

## **Punishment for Civil Contempt**

### **By Joel R. Brandes**

In an action for divorce, a court of record has the power to punish a spouse for contempt where he or she defaults in paying any sum of money required by the judgment or order. It may also punish a spouse for contempt where he or she disobeys any lawful mandate of the court. A spouse who is held in contempt of court may be fined or imprisoned, or both. (Jud. Law § 753(3)).

#### **Imprisonment for non-payment**

In an action to punish a defaulting spouse by contempt proceedings for failure to make ordered payments of maintenance, child support, counsel fees, or other payments required by a judgment of divorce or support order, the punishment is a restraint of freedom until he or she pays. (Jud. Law § 772). The defaulting spouse may pay and escape at once.

On the return date of an application to punish a spouse for contempt, the questions that are raised must be determined as with any other motion. (Jud. Law § 772).

If it is determined that the defaulting spouse has committed the offense he or she is charged with and that it was calculated to or actually did defeat, impair, impede, or prejudice the rights or remedies of the other spouse, the court must make a final order directing that he or she be punished by fine, imprisonment, or both, as the nature of the case requires. A warrant of commitment must be issued, and the spouse in default may be committed to prison without further process upon a certified copy of the order of commitment. (Jud. Law § 770). Wilfulness is not an element of civil contempt. ( *El-Dehdan v. El-Dehdan*, 26 N.Y.3d 19, 19 N.Y.S.3d 475 (2015)).

A spouse cannot be committed for nonpayment of future maintenance or nonpayment of any maintenance past due unless adjudged guilty of contempt after it becomes due. (*Loebel v Loebel*, 237 A.D. 591, 262 N.Y.S. 116 (1 Dept., 1933)).

#### **Length of imprisonment for non-payment**

There is a limit to the length of imprisonment in contempt proceedings to which a defaulting spouse in a divorce action may be subjected. The length of imprisonment for nonpayment of alimony, maintenance, distributive awards, or special relief in matrimonial actions, or counsel fees awarded by a final judgment in a divorce action, is limited to 3 months for a default of less than \$500 and to 6 months for default of \$500 or over. (Civ. Rights Law §72).

Under the express provisions of the Domestic Relations Law, where the

judgment or order directs the payment to be made in installments, or at stated intervals, a spouse's failure to make a single payment or installment may be punished as contempt. That punishment, whether it is either by fine or commitment, does not bar a subsequent proceeding to punish the defaulting spouse for contempt for failure to pay subsequent installments. (Domestic Relations Law §245). The defaulting spouse may be punished as often as he or she defaults in paying the different installments. For this purpose, he or she may be proceeded against under the order in the same manner and with the same effect as though the installment payment was directed to be paid by a separate and distinct order. The provisions of the civil rights law are superseded so far as they conflict with this provision. (Domestic Relations Law §245).

The imprisonment of the defaulting spouse for non-payment does not preclude the other spouse from exercising any mode of enforcement for the collection of the alimony, maintenance, distributive awards, or special relief in matrimonial actions or counsel fees that he or she may have had before the imprisonment. (Civ. Rights Law §72).

The judiciary law provides that where the misconduct proved consists of an omission to perform an act or duty that is yet in the offender's power to perform, he shall be imprisoned only until he has performed it, and paid the fine imposed. (Jud. Law §774).

If he performs the act or duty required, he may not be imprisoned for the fine that is imposed for more than three months if the fine is less than \$500, or more than six months if the fine is \$500 or more. If one is issued, the order and the warrant of commitment must specify the act or duty to be performed and the sum to be paid. (Jud. Law §774).

In every other case, where special provision is not made by law, the offender may be imprisoned for a reasonable time, not exceeding six months, and until the fine, if any, is paid; and the order, and the warrant of commitment, if any, must specify the amount of the fine, and the duration of the imprisonment. (Jud. Law §774).

If the term of imprisonment is not specified in the order, the offender must be imprisoned for the fine that is imposed for three months if the fine is less than \$500, and six months if the fine imposed is \$500 or more. (Jud. Law **§774**).

If the offender is required to serve a specified term of imprisonment, and in addition to pay a fine, he may not be imprisoned for the nonpayment of the fine for more than three months if the fine is less than \$500 or more than six months if the fine is \$500 or more, in addition to the specified time of imprisonment. (Jud. Law §774).

## **Opportunity to purge the contempt**

Every order adjudging a party guilty of civil contempt must contain three items: (1) a description of the acts which were committed or omitted by a party constituting contempt, (2) a determination of what that party should do, or how much he should pay if anything, in order to purge himself from contempt, and (3) an adjudication that the acts done or omitted impaired the rights of a party to the action. (*Loeber v. Teresi* 256 A.D.2d 747, 681 N.Y.S.2d 416 (3 Dept. 1998)). An opportunity to purge the contempt must be afforded even where the contempt order is made upon default (See Jud. Law §§751, 772, 773)

Any condition imposed to permit a defendant to purge himself of contempt must be limited to the amount for which he is found to be in arrears. A requirement that the defendant pay all future support payments to purge himself of contempt is improper. (*Blauner v. Blauner*, (51 A.D.2d 938, 381 N.Y.S.2d 481 (1 Dept. 1976))

A spouse held in contempt must be given an opportunity to perform that act (the payment of arrears) that was still within his power to perform. (*Kaminski v. Kaminski*, (212 A.D.2d 1045, 623 N.Y.S.2d 671 (4 Dept. 1995)); *Dankner v. Steefel*, (41 A.D.3d 526, 838 N.Y.S.2d 601 (2 Dept. 2007)).

In *Stempler v. Stempler*, (200 A.D.2d 733, 607 N.Y.S.2d 111 (2d Dep't 1994)), the Supreme Court ordered that the defendant be imprisoned, apparently because of his consistent failure to comply with its orders regarding payment of maintenance and child support. The Appellate Division reversed holding that he must be given an opportunity to perform that act (*i.e.*, the payment of arrears) which is still within his power to perform. Any term of imprisonment must be conditioned upon the defendant's failure to pay all arrears within a specified time.

In *Cooper v. Cooper* (21 A.D.3d 869, 800 N.Y.S.2d 618 (2d Dept. 2005)), a pendente lite order directed the plaintiff to return \$274,000 she unilaterally withdrew from the parties' joint account and to account for any sums spent. The plaintiff refused to abide by the court's directive, and, after issuance of the directive, secretly removed the funds and hid them in her father's safe, and continued to deplete the funds. The Supreme Court held the plaintiff in contempt and directed that she be incarcerated for four days with no opportunity to purge herself of the contempt. The plaintiff served half a day in the Suffolk County Correctional Facility and was released by the sheriff, who mistakenly calculated her release date according to the rules on criminal contempt. Learning of the plaintiff's release, the Supreme Court directed that the plaintiff be re-incarcerated. The Appellate Division stayed enforcement of those portions of the Supreme Court's orders directing incarceration, including the directive requiring re-incarceration. It observed that even if the plaintiff had been properly adjudicated in contempt, the Supreme Court erred in failing to give her an opportunity to purge herself of her civil contempt since she still had the ability to return the funds and render an accounting.

## **Imprisonment for violation of custody or visitation order**

A spouse who interferes with or refuses to allow court ordered visitation may be found in contempt. (See *Fuerst v Fuerst*, 131 A.D.2d 426, 427, 515 N.Y.S.2d 862, 864 (2 Dept., 1987) where mother willfully and repeatedly impeded the father's right to visit with his daughters).

In *Kasal v. Kasal*, 297 A.D.2d 624, 747 N.Y.S.2d 38 (2d Dep't 2002) the parties' so-ordered stipulation, which was incorporated but not merged into the judgment of divorce indicated that "[n]either party shall relocate his or her residence outside of the counties of Nassau and/or Queens, without prior permission of the Court or written consent of the other party." The mother subsequently remarried and relocated with the children from Nassau County approximately 80 miles away to her new marital residence in Chester, without court permission or the father's written consent. The Appellate Divison held that the Supreme Court's denial of that branch of the father's motion which was to hold the mother in contempt was in error.

The remedy against a spouse who violates a custody or visitation order by removing the child from the state is by way of contempt. (*McGrady v. Rosenbaum*, 62 Misc. 2d 182, 308 N.Y.S.2d 181 (Sup 1970), judgment aff'd, 37 A.D.2d 917, 324 N.Y.S.2d 876 (1st Dep't 1971).

In *Young v Young*, (129 A.D.2d 794, 514 N.Y.S.2d 785 (2 Dept., 1987) the Appellate Divison found that the plaintiff was properly adjudged to be in civil contempt. The testimony adduced at the hearing established that the plaintiff's disobedience of the prior order awarding the defendant visitation frustrated and impeded the defendant's right to visit with her son. However, it could not sanction the six-month term of imprisonment. It found that a more appropriate punishment was a definite term of imprisonment of 15 days and the imposition of a \$250 fine. While the plaintiff claimed that he should be allowed to purge himself of his contempt, he could not purge himself as to the days of visitation already lost to the defendant.

In *Matter of Marallo v Marallo*, 128 A.D.2d 710, 513 N.Y.S.2d 204 (2 Dept., 1987) a contempt proceeding to enforce a prior order which awarded the petitioners temporary visitation with their grandchildren, the court found the mother in contempt of court and directed that she be incarcerated on the first and third weekends of each month for a period of six months. The Appellate Divison reduced the sentence to the first and third weekends of each month for three months. It found no error in the Court's finding that she committed civil contempt in repeatedly and intentionally violating its temporary orders of visitation in favor of the petitioners. The record revealed that the mother deliberately and knowingly prevented the paternal grandparents from visiting with the children, even though she initially consented to interim visitation. However, under the

circumstances of this case, it concluded that the punishment imposed was excessive to the extent indicated.

The court is not obligated to give a Respondent an opportunity to purge herself of contempt based upon the omission to perform an act or duty, where the act or omission is no longer within the Respondent's power to perform. (see, Judiciary Law § 774[1]). *Kruszczyński v Charlap*, 124 A.D.2d 1073, 1073, 508 N.Y.S.2d 861, 862 (4 Dept., 1986)

The primary purpose of civil contempt is remedial. Any penalty imposed “is designed not to punish but, rather, to compensate the injured private party or to coerce compliance with the court's mandate or both” (*Matter of Department of Environmental Protection of City of N.Y. v. Department of Environmental Conservation of State of N.Y.*, 70 N.Y.2d 233, 239, 519 N.Y.S.2d 539). Punishment is the purpose of criminal contempt, not civil contempt. (*Palmitesta v Palmitesta*, 166 A.D.3d 782, 89 N.Y.S.3d 94 (2 Dept., 2018)).

In custody cases appellate courts have held that despite the finding of contempt, the hearing court properly exercised its discretion in refusing to impose a fine or term of imprisonment against the mother because of its possible further detrimental impact upon the children where a sentence directing the mother's immediate incarceration “would serve no purpose” (See *Rubin v. Rubin*, 78 A.D.3d 812, 911 N.Y.S.2d 384, quoting *Berkman v. Berkman*, 57 A.D.2d 542, 542, 393 N.Y.S.2d 60; *Thimm v Thimm*, 137 A.D.3d 775, 28 N.Y.S.3d 693, (2 Dept., 2016))

### **Amount of Fine**

Where an actual loss has been caused by a contempt, the aggrieved spouse is entitled to recover the amount of the loss and the reasonable costs and expenses in proving the amount and the attendant contempt. (Jud. Law §773)

In *Jamie v. Jamie*, (19 A.D.3d 330, 798 N.Y.S.2d 36 (1st Dep't 2005)) the Appellate Division construed Judiciary Law §773 to mean that where an actual loss has been caused by a contempt, the aggrieved party is entitled to recover not only the amount of such loss but also the reasonable costs and expenses in proving such amount and the attendant contempt. To hold that reasonable costs and expenses are recoverable only when an actual loss or injury is not shown would be to make the recovery of an actual loss or injury anomalously disadvantageous where, as here, the claimed costs and expenses incurred in prosecuting the contempt are much larger than the claimed actual loss caused by the contempt. The Court overruled its prior holdings that attorneys' fees are not recoverable where actual damages are shown.

If an actual loss or injury has been caused to a party to the action or special proceeding, because of the contempt that is proved against a spouse offender, and the case is not one where it is specially prescribed by law that an action may be maintained

to recover damages for the loss or injury, a fine, must be imposed upon the offender. It must be sufficient to indemnify the aggrieved spouse and collected and paid over to the aggrieved spouse under the direction of the court. The payment and acceptance of the fine constitute a bar to an action by the aggrieved spouse to recover damages for the loss or injury. (Jud. Law §772).

Where it is not shown that such an actual loss or injury has been caused, a fine may be imposed, not exceeding the amount of the complainant's costs and expenses, plus two hundred and fifty dollars which must be collected and paid, in the same manner. (Jud. Law §773)

The Supreme Court exceeds its authority when it fashions a remedy for contempt not contemplated by the statute. (*Parker v Top Homes, Inc.*, 58 AD3d 817, 819 (2d Dept., (2009); *Vider v Vider*, 85 AD3d at 906, 925 N.Y.S.2d 189 (2 Dept., 2011)).

### **Counsel Fees**

Judiciary Law §773 permits recovery of counsel fees from the offending party by a party aggrieved by the contemptuous conduct. (Jud. Law §773). Since October 12, 2010, Domestic Relations Law §238 authorizes a court to award counsel fees in a contempt proceeding under Domestic Relations Law §§ 245, or 246. (Laws of .2010, Ch. 329, § 2, effective October 12, 2010.)

### **Suspension of payments during imprisonment**

A provision of any judgment or order rendered or made in an action for divorce, separation, annulment, or declaration of nullity of a void marriage, requiring the payment of moneys by one spouse for the support of the other, is suspended and inoperative so far as punishment for contempt is concerned during the period in which the defaulting spouse is imprisoned under any order adjudging him or her in contempt for failure to comply with any provision in the order. (DRL §247).

Although the Domestic Relations Law refers only to “moneys for the support of the other spouse,” it has been held that there also is a suspension of payments during imprisonment where the order or judgment was for the support of the “wife and children”. (*Weiss v. Weiss*, 85 N.Y.S.2d 344 (Sup 1948)). Thus, the suspension of maintenance payments until the defaulting spouse becomes able to make the payments is authorized by the statute. (*Birdsall v. Birdsall*, 246 A.D. 879, 284 N.Y.S. 856 (3d Dep't 1936); *Singer v. Singer*, 246 A.D. 850, 285 N.Y.S. 16 (2d Dep't 1936); *Weiss v. Weiss*, supra.)).

### **Immunity from further proceedings**

After serving the maximum term in prison, a defaulting spouse becomes immune against any further attempt to compel payment of that installment of support by

contempt proceedings. (People ex rel. Levine v. Shea, 201 N.Y. 471, 94 N.E. 1060 (1911); Thayer v. Thayer, 145 A.D. 268, 129 N.Y.S. 1035 (1st Dep't 1911)). The cited cases were decided before 1919, at which time the immunity extended to contempt proceedings for failure to pay subsequent installments. Since the amendment of IRC §1773 (CPA §1172) in 1919, such immunity extends only to contempt proceedings for failure to pay the same installment of alimony.)

Moreover, the defaulting spouse may move to be relieved from imprisonment under Judiciary Law §775, upon the ground that he or she is unable to endure the imprisonment or to pay the sum required to entitle him to be released. (Politano v. Politano, 146 Misc. 792, 262 N.Y.S. 802 (Sup 1933); Ryckman v. Ryckman, 34 Hun 235 (N.Y. Gen. Term 1884), aff'd, 98 N.Y. 639, 1885 WL 11796 (1885)).

In Staples v. Staples, (206 A.D. 196, 200 N.Y.S. 583 (1st Dep't 1923)) the defendant's motion to be discharged from imprisonment for failure to pay alimony was granted where it appeared that he had been in prison for seven months when the motion was heard, there were no children of the marriage, that the decree awarding alimony was granted on default, and that the defendant has never earned enough money since the final decree was entered to pay the alimony awarded thereby and had no means or property with which to pay the same. There was no claim made by the plaintiff in opposition to this motion that the defendant has any means or property with which to pay the alimony that has been awarded or the fines that have been imposed.

### **Relief from payment for Inability to pay**

The Domestic Relations Law provides that if financially unable to comply with the order or judgment to make the payment, a person who is held in contempt of court under Domestic Relations Law §245 or the Judiciary Law, may, make an application to the court for an order relieving him from the payment and the contempt order, upon such notice to such parties as the court may direct. (DRL §246(1); See also. Jud. Law §775). If the court is satisfied that the applicant is financially unable to make the payment it may, until further order of the court, modify the order or judgment to make the payment and relieve him or her from the contempt order. (DRL §246(1); Jud. Law §775).

An order to show cause is required to institute an application under this section, and a notice of motion is insufficient. (Schenker v. Schenker, 58 N.Y.S.2d 167 (Sup 1945)). Upon the hearing of the application, if the court, is that the applicant is financially unable to make any payment, it may, upon a showing of good cause, modify the order or judgment to make the payment and relieve him or her from the contempt order. (DRL §246).

To obtain a reduction in support the applicant must establish changed circumstances resulting in a worsened financial condition. (Zeitz v. Zeitz, 262 A.D. 750, 27 N.Y.S.2d 283 (2d Dep't 1941); Calabrese v. Calabrese, 2 A.D.2d 761, 153 N.Y.S.2d 723 (2d Dep't 1956); Witkowski v. Witkowski, 271 A.D. 901, 67 N.Y.S.2d 88 (2d Dep't

1946), order aff'd, 297 N.Y. 626, 75 N.E.2d 635 (1947); Kolmer v. Kolmer, 19 Misc. 2d 298, 191 N.Y.S.2d 324 (Sup 1959)).

It has been held to be an improvident exercise of discretion to relieve a husband from contempt where he failed to explain his failure to make any support payments or to show that he had made a reasonable attempt to comply with the support order, his conduct being willful and contumacious. (*Didero v. Didero*, 10 A.D.2d 875, 200 N.Y.S.2d 705 (2d Dep't 1960); *Zeitlan v. Zeitlan*, 44 A.D.2d 608, 353 N.Y.S.2d 532 (2d Dep't 1974); *Bruno v. Bruno*, 50 A.D.2d 701, 375 N.Y.S.2d 442 (3d Dep't 1975)).

If the court modifies the order or judgment the modification may not reduce or annul unpaid sums or installments accrued before the making of the application unless the defaulting party shows good cause for failure to make an application for relief from the judgment or order directing the payment before the accrual of the arrears. (DRL §246(1)). The modification may increase the support nunc pro tunc based on newly discovered evidence. (DRL §246(1)). Any retroactive amount of support due must be paid in one sum or periodic sums, as the court directs, taking into account any amount of temporary support that has been paid. (DRL §246(3)).

### **Conclusion**

Even if the defaulting spouse establishes financial hardship to excuse his noncompliance with the contempt order his relief may be only temporary. Where it appears to the satisfaction of the court that any person who has been totally or partially relieved under the provisions of Domestic Relations Law §246 from making any payment is no longer financially unable to comply with the order or judgment, the court may, upon application made by any interested party, modify or revoke its order on a showing of good cause. (DRL §246(2)).

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