Enforcement of Support Orders by Contempt of Court

By Joel R. Brandes

In Gompers v. Buck's Stove and Range Company, 221 U.S. 418, 450, 31 S.Ct. 492, 501, 55 L.Ed. 797 (1911) the U.S. Supreme Court observed that for civil contempt the punishment is remedial, and for the benefit of the complainant. A person imprisoned for civil contempt is committed to prison unless and until he performs the act required by the court's order. "[He] carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do. "

Procedures for adjudication of civil contempt must comport with the due process standards mandated for all civil proceedings. In civil contempt proceedings, due process is met by the clear and convincing standard. Addington v. Texas, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979)

On the other hand, in criminal contempt proceedings, where the punishment is a definite term of imprisonment, the purpose is to vindicate the authority of the court. The unconditional nature of the punishment renders the relief criminal in nature because the relief "cannot undo or remedy what has been done nor afford any compensation" and the contemnor "cannot shorten the term by promising not to repeat the offense." Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, 637–38, 108 S.Ct. 1423, 1432–33, (1988)

Criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires for criminal proceedings, including the requirement that the offense be proved beyond a reasonable doubt. Hicks on Behalf of Feiock v. Feiock, supra.

Sometimes it is difficult to distinguish civil contempt from criminal contempt. The Supreme Court has held that the character of the relief imposed is ascertainable "by applying a few straightforward rules. If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." … If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order." Hicks on Behalf of Feiock v. Feiock, supra.

Domestic Relations Law § 245 and Family Court Act § 454 both authorize the remedy of civil contempt and imprisonment to compel spouses and parents to comply with support orders. However, the procedural law for attaining that laudable goal appears to be different in Family Court contempt proceedings than in Supreme Court contempt proceedings.

Domestic Relations Law § 245 provides that where a spouse, in an action for divorce, separation, annulment or declaration of nullity of a void marriage, or for the enforcement in this state of such a judgment rendered in another state, makes default in paying any sum of money as required by the judgment or order, the aggrieved spouse may make application pursuant to the provisions of Judiciary Law § 756 to punish the defaulting spouse for contempt.

In McCormick v. Axelrod, 59 N.Y.2d 574, 466 N.Y.S.2d 279 (1983), the Court of Appeals described the elements necessary to support a finding of civil contempt under the Judiciary Law. “In order to find that contempt has occurred in a given case, it must be determined that a lawful order of the court, clearly expressing an unequivocal mandate, was in effect. It must appear, with reasonable certainty, that the order has been disobeyed. Moreover, the party to be held in contempt must have had knowledge of the court's order, although it is not necessary that the order actually have been served upon the party. Finally, prejudice to the right of a party to the litigation must be demonstrated (see Judiciary Law, § 753, subd A).” (citations omitted)

The Court of Appeals has explained in El-Dehdan v El-Dehdan, 26 N.Y.3d 19, 19 N.Y.S.3d 475, 485 (2015) that wilfulness is not an element of civil contempt. Nowhere in Judiciary Law § 753 (A) (3) is wilfulness explicitly set forth as an element of civil contempt. It explained that “[t]he contemnor's action must connote an intentionality not otherwise indicative of wrongfulness. In other words, the contemnor must have a consciousness that reflects an awareness of the act that is other than “unwitting conduct”. Civil contempt is established, regardless of the contemnor's motive, when disobedience of the court's order “defeats, impairs, impedes, or prejudices the rights or remedies of a party.”

Inability to pay the amount ordered to be paid is a defense under Domestic Relations Law § 246. A support obligor cannot be found in contempt by the Supreme Court for failure to comply with maintenance and child support provisions of a judgment of divorce, absent proof he has the ability to pay the maintenance and child support. Bisnoff v. Bisnoff, 27 A.D.3d 606, 811 N.Y.S.2d 442 (2 Dept. 2006).

On the other hand, Family Court Act § 156 provides that the provisions of the judiciary law relating to civil and criminal contempt apply to the family court, unless a specific punishment or other remedy is provided in the act or any other law. In contrast to Domestic Relations Law § 245, which only applies to matrimonial actions, the Family Court Act § 454(3)(a) provides that upon a finding by the court that a respondent has “willfully failed to obey any lawful order of support”, the court shall commit the respondent to jail for a term not to exceed six months.

At a hearing under Family Court Act § 454 to determine whether a respondent has “willfully failed to obey any lawful order of support,” the burden is on the petitioner to

establish that the respondent willfully violated the terms of the order or judgment by failing to pay the required support. A respondent is prima facie presumed in a hearing under Family Court Act § 454 to have sufficient means to support his or her spouse and children under the age of 21. (Family Court Act § 437). Moreover, for purposes of Family Court Act § 454, "failure to pay support, as ordered, shall constitute prima facie evidence of a willful violation." Family Court Act § 454[3](a).

In Matter of Powers v Powers, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995) the Court of Appeals pointed out that Respondents argument made " much of the Hearing Examiner's reference to a "presumption" of willfulness arising out of nonpayment, …" It explained that Family Court Act § 454(3)(a) "speaks of *prima facie evidence* of a willful violation, not a *presumption."* The word "presumption" should not have been used, and the inappropriate reference was immaterial in the context of his decision.

Financial inability to comply with the directions contained in a support order issued under article 4 of the Family Court Act or an order or judgment entered in a matrimonial action or an action for the enforcement of a judgment in a matrimonial action rendered in another state, is a defense in a proceeding under Family Court Act § 454 (1) or under the judiciary law to punish a party for failure to comply with such directions. Family Court Act § 455.

In Matter of Powers v Powers, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995) the Court of Appeals found that Petitioner presented prima facie evidence of the willful violation of a lawful support order by the testimony of the Support Collection Unit Supervisor that respondent had made only 11 of the nearly 32 payments due. This satisfied the requirement for competent proof of nonpayment. At that point, the burden of going forward shifted to the respondent to rebut the petitioner's prima facie evidence of a willful violation. Once this showing is made, the burden shifts to the respondent to present competent, credible evidence of "his or her financial inability to comply."

Financial Inability to comply may be shown by evidence of financial hardship or loss of employment. However, loss of employment as a result of a parent's incarceration for his wrongful conduct is insufficient to demonstrate an inability to make child support payments. St. Lawrence County Support Collection Unit v. Cook, 57 A.D.3d 1258, 870 N.Y.S.2d 531 (3d Dep't 2008). The respondent must demonstrate his good faith attempts to obtain employment commensurate with his abilities. Dorner v. Mc Carroll, 271 A.D.2d 530, 705 N.Y.S.2d 408 (2d Dept. 2000). He must make reasonably diligent efforts to find employment commensurate with his or her earning capacity. Nassau County Dept. of Social Services v. Walker (2 Dept. 1983) 95 A.D.2d 855, 464 N.Y.S.2d 218. See, for example, Matter of Morgan v Spence, 139 A.D.3d 859, 31 N.Y.S.3d 556 (2 Dept., 2016) and cases cited in the decision, where the respondent established he lacked the ability to pay child support due to lack of employment.

Where the failure to pay is due to a mental or physical condition a support obligor must offer competent medical evidence to establish that he was unable to meet his support obligation. See Greene v. Holmes, 31 A.D.3d 760, 820 N.Y.S.2d 597 (2d Dep't 2006).

The payment of legitimate debts instead of child support is not a defense to contempt where there is no proof as to the necessity for placing those debts ahead of a support obligation. Commissioner of Social Services ex rel Daeda v. Monica, 10 A.D.3d 260, 781 N.Y.S.2d 70 (1st Dept. 2004); Modica v. Thompson, 258 A.D.2d 653, 685 N.Y.S.2d 783 (2 Dept. 1999). A showing that respondent simply exhausted his funds, with no credible evidence indicating the necessity for placing his alleged expenses ahead of support payments, does nothing to satisfy his burden of going forward on the issue of financial inability. Matter of Powers v Powers, 86 N.Y.2d 63, 629 N.Y.S.2d 984 (1995)

Conclusion

In contempt proceedings for nonpayment of support under the Family Court Act, the failure to pay support as ordered constitutes “prima facie evidence of a willful violation.” Family Court Act § 454(3)(a). If the court is satisfied by “competent proof” that the respondent failed to obey the order, the court may “commit the respondent to jail for a term not to exceed six months,” if the failure was willful. Willfulness requires proof of both the ability to pay support and the failure to do so. Family Ct Act § 455 (5). Matter of Powers v Powers, supra. However, the respondent is prima facie presumed to have sufficient means to support his or her spouse and children. Family Court Act § 437. Proof of nonpayment alone establishes a prima facie case, which can be defeated by evidence of inability to pay.

This presumption of “sufficient means” does not arise in contempt proceedings under the Domestic Relations Law. There, it must be established by “clear and convincing evidence” that disobedience of the court's order “defeats, impairs, impedes, or prejudices the rights or remedies of a party” and inability to pay is a defense.

A presumption is not evidence. It merely serves in place of evidence until the opposing party comes forward with his or her proof and then it disappears. It obviates any necessity, of going forward with proof. People ex rel. Wallington Apartments v. Miller, 288 N.Y. 31, 41 N.E.2d 445 (1942). A rebuttable presumption involving the imposition of civil penalties is valid if there is a rational connection between the facts proven and the fact presumed, and there is a fair opportunity for the opposing party to make his or her defense. Casse v. New York State Racing and Wagering Bd., 70 N.Y.2d 589, 523 N.Y.S.2d 423 (1987).

Does the presumption of “sufficient means” contained in Family Court Act § 437 meet this test? Is there a rational connection between the fact proven: (1) the respondents' failure to pay support as ordered, and the fact presumed: (2) a willful violation of the support order? Is due process satisfied by “competent proof” in family

court contempt proceedings? These unanswered questions must wait resolution by our appellate courts.

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of a new twelve-volume treatise, Law and the Family New York, 2021- 2022 edition and Law and the Family New York Forms, 2021 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.