



Enforcement: The Civil Contempt Conundrum

By Brian Karpf, Miami, FL

The Court's contempt power is a potent tool. It is typically an enforcement mechanism of last resort, but one used to both maintain family law principals and coerce compliance with rulings. When an individual attempts to avoid an obligation of support – whether it be alimony or child support, or even an award of attorney's fees – its contempt power is often times the Court's only means to compel deficient obligors to fulfill their obligations. Notably absent from this power, though, is the Court's ability to coerce compliance with its equitable distribution awards. This discrepancy serves as an arguable "flaw in the system," one which creates a double standard and all but promotes a party unsatisfied with their obligations pursuant to an equitable distribution award to simply ignore it, while essentially forcing the recipient of that award to incur further legal fees and endure more litigation at a time when the litigation was intended to cease. It kicks a critical element of family law cases out of the realm of Family Law Court, relegating the obligee to be the "cat" and the obligor "mouse" in a chase for equity.

What Is Contempt?

In general, criminal contempt is used to punish an individual for an intentional violation of a court order and to vindicate the court's authority. *Bowen v. Bowen*, 471 So. 2d 1274 (Fla. 1985). As such, one's ability to comply with the underlying order is irrelevant. Criminal contempt proceedings are appropriate when it can be established that the party in default has continually and willfully neglected his support obligations, or has affirmatively acted to divest

himself of assets and property. Direct criminal contempt occurs where the underlying conduct was actually seen or heard by the Court, in the presence of the Court - versus indirect criminal contempt – where the underlying conduct occurred outside of the Court. Even in family law cases, criminal contempt proceedings are governed by Florida Rules of Criminal Procedure (Rule 3.830 for Direct Criminal Contempt and Rule 3.840 for Indirect Criminal Contempt). Since the proceeding is punitive in nature, potential criminal contemnors are entitled to the same constitutional due process safeguards as defendants in typical criminal proceedings. 471 So. 2d at 1277.

Conversely, the purpose of civil contempt proceedings is to obtain compliance by, rather than punish, the contemnor. The sanction of incarceration is still available in civil contempt proceedings, but may be used only when the contemnor has the ability to comply with the underlying order to be purged of contempt (this ability to comply being the contemnor's "key to his cell"). *Id.* Civil Contempt in Support Matters is actually codified in Rule 12.615, Florida Family Law Rules of Procedure, and is the focus of this article.

How Contempt for Enforcement Purposes Works

Family law support matters are often enforced through contempt. The underlying order requiring a party to pay support is premised on a finding that they have an ability to pay it. In subsequent cases, this creates a presumption that the party still has an ability to pay the ordered amount. Accordingly, the party moving for

civil contempt initially need only establish that (A) a prior order directs the opposing party to pay the support amount, and (B) that the obligor has failed to make the required payment. The burden of proof then shifts to the obligor who must dispense with the presumption of ability to pay by showing that, since the previous order or judgment, they no longer have the ability to meet their support obligations, due to circumstances beyond their control. If the obligor is found to be in civil contempt, the Court must determine which tool(s) it will utilize to coerce compliance. If incarceration is contemplated, when determining the contemnor's ability to purge themselves of contempt, the court can look at all assets from which the purge amount could be satisfied. Get creative. Look for less obvious sources than just income or bank accounts: Sick leave or vacation time that has a value which can be tapped, IRA accounts, Federal Income Tax refunds, security deposits, storage units, tools, automobiles, jewelry, and electronics. Is the obligor a business owner? If so, consider their inventory, equipment, and furnishings. If incarceration is impossible, other coercive alternatives are available. Typically, the end result is the contemnor's satisfaction of their support obligations, due to the overt pressure which the Court can employ to ensure that its support orders are enforced. This is why the Court's contempt power is so crucial in family law cases.

Where Contempt Falls Far Short

In the majority of circumstances, property settlement awards are not enforceable by civil contempt. This is most troubling in the case of an



equitable distribution award requiring the payment of money, e.g., an equalizing payment, the payment of a marital debt, or the payment of funds from a bank account. The basis for this stems from the Florida Constitution's prohibition against imprisonment for non-payment of a debt. Equitable distribution awards are typically deemed just that – payment of a debt – rather than in the nature of support.

Of course, awards of child support and alimony are enforceable by civil contempt. Even an award of attorney's fees from one former spouse to another is considered in the nature of support and thus is enforceable by civil contempt. *See, e.g., Fishman v. Fishman*, 656 So. 2d 1250 (Fla. 1995) This holds true even where the fees incurred have nothing to do with a support award, such as those incurred while enforcing of a timesharing order. In fact, the court may use contempt to enforce orders awarding attorney's fees even in cases with no children or alimony awards. *Wertkin v. Wertkin*, 763 So. 2d 465 (Fla. 4th DCA 2000) Conversely, most equitable distribution awards are considered judgments solely for the payment of money and thus are left to be enforced by obtaining and enforcing a money judgment, removing the former spouses from the family law arena on this one discrete issue – despite it arising from the Family Court - and instead placing them in the precarious positions of debtor and creditor.

While the basis for this dichotomy is good in theory, its application to family law cases is defunct. Generally speaking (and quite ironic to the Court's inability to coerce compliance therewith), equitable distribution awards are not dischargeable in bankruptcy. They are the crux of divorce proceedings. No doubt, one spouse's receipt of capital assets from the other is often times the primary (if not sole) award to that spouse. It is axiomatic that a monetary equitable distribution award is inextricably intertwined with support. The recipient

of the award relies on such monies as a “nest egg” – whether it be for extraordinary expenditures, a down payment on a home, etc. Moreover, the Court necessarily took that award into consideration in determining an alimony or child support obligation (e.g., the interest income which would be earned on each spouse's respective share of the monies). Yet, the party who fails to deliver such funds to the other, in defiance of the Court's equitable distribution award, is essentially given a windfall, and the other, short changed. Take, for instance, the situation where an alimony recipient is in sole possession of the parties' marital funds, and is ordered- but refuses - to pay the alimony payor their share thereof. The Family Court cannot coerce the payee's compliance with civil contempt. Yet, the payor remains obligated to fulfill their alimony payment, and is stuck incurring even more legal fees as a “creditor” to obtain the funds to which he or she is entitled (which may not even exist anymore). What's more, the calculation of that alimony obligation took into consideration each party's anticipated share of such monies.

Moreover, the Family Court judge – familiar with the case, parties, and the circumstances leading to its order - is stripped of the ability to effectuate compliance with its ruling. After issuing a money judgment, the Court's role is essentially complete in the process. Then the chase begins. Of course, pursuing a former spouse as such (from the position of debtor/creditor) is difficult, costly, time consuming, and often fruitless. A “paper judgment” can be obtained, which is just the start of the chase. While the enforcing party can seek fees against the other for their efforts, actually collecting is likely just as difficult as obtaining the underlying awards itself. The debtor is also left with ample time to spend or conceal the other's share of the award. While the intentional divestiture of assets – and hence the ability to satisfy the Court's award – is punishable by incarceration through

an indirect criminal contempt proceeding, this is not much conciliation to the party left short changed.

There is an exception to this flaw: where the equitable distribution award is akin to an act – rather than simply the payment of money – civil contempt is available. In *Roth v. Roth*, 973 So2d 580 (Fla 2d DCA 2008), the Court distinguished the general proposition that property division awards may not be enforced by contempt from those acts which do not necessarily involve the payment of money (in which case a trial court may enforce property division award through contempt). Such examples include failure to execute and deliver various documents necessary to release a former spouse's interest in a note and mortgage, failure to name a former spouse as beneficiary of a certain life insurance policy as required by the Court, and a former spouse's refusal to sign a sales contract when the sale of certain marital real estate at a specific price was ordered in the Final Judgment. *Id.* Each of these examples are, in part, based upon Rule 1.570(c)(2), Florida Rules of Civil Procedure, which permits the Court to enforce an order requiring the performance of an act through contempt. With regard to an equitable distribution award calling for the payment of money, an analogy can be made – and an Order can be worded – to require the physical act of a transfer or, even better, that a party execute certain paperwork effectuate a transfer. This at least provides an *argument* that the obligor's failure to comply is a failure to perform an act, and thus can be enforced through civil contempt. *See, e.g., Burke v. Burke*, 336 So.2d 1237 (Fla. 4th DCA 1976) (although general rule is that contempt cannot be used to enforce payments under property settlement agreement, it may be employed where a party fails to execute documents as part of divorce) and *Firestone v. Ferguson*, 372 So.2d 490 (Fla. 3d DCA 1979) (same). Compare *Fisher v. Fisher*, 787 So.2d 926, 930 (Fla. 2d DCA 2001) (Civil contempt not available).

continued, next page

**Enforcement***from preceding page*

able where the husband failed to pay the wife for share professional football tickets) and *Filan v. Filan*, 549 So.2d 1105 (Fla. 4th DCA 1989)(Former Husband could not be held in contempt for his failure to pay off mortgage on marital home)

A number of other states avoid this issue by logically utilizing contempt to effectuate *all* orders contained in a dissolution decree. See, e.g., **Ohio:** *Harris v. Harris*, 390 N.E. 2d 789 (Ohio 1979)(“For purposes of enforcing a decree entered in a domestic relations proceeding, provisions relating to the division of property as contained within a separation agreement do not constitute a “debt” within the meaning of that term as used in constitutional inhibition against imprisonment for a debt.” This is because “the requirements of a property division are not in the nature of ordinary money judgments or business debt.”); **Missouri:** *Ellington v. Pinkston*, 859

S.W. 2d 798 (Mo. Ct. App.)(“An order to pay money as a part of the division of marital property, like an order to pay maintenance or child support, creates an obligation arising from the existence of marital status and is not a debt in the sense used in the constitution.”); and **South Dakota:** *Hanks v. Hanks*, 334 N.W. 2d 856 (Dakota 1983)(The Court may enforce its equitable division of property awards through contempt, including those requiring the payment of money from one party to the other.)

A complete fix to Florida’s problem is simple and necessary: Keep family law issues in Family Law Courts, and allow family law judges to enforce *all* of their orders. An equitable distribution award is far different – and has far greater implications – than a typical creditor seeking repayment of a debt. These are families, not businessmen.

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