

# Contempt versus Enforcement – same but different

Michelle May O'Neil 11/22/2021

## Enforcement Generally

### Rights versus Remedies

Enforcement is the act of compelling observance or compliance with a law, rule or obligation. An enforcement case in family law compels compliance with a court order.

So if enforcement of a judgment is the right – what are the remedies for that right? Remember that at law a right goes with a remedy (or more than one remedy). A legal remedy is the MEANS by which a court of law enforces a right. “For every right there is a remedy. Where there is no remedy, there is no right.” (William Blackstone)

Generally, remedies are in two broad categories – judicial remedies or those that a judge can award -- versus extrajudicial remedies or self-help that keeps people out of the court system.

Judicial remedies generally fall in 3 categories – monetary damages, declaratory relief, and equitable remedies like injunctions or specific performance or even contempt of court.

1. Damage remedies:
  - a. Damages/Money judgment
  - b. Judgment lien against property
  - c. Breach of contract damages
  - d. Fines/Sanctions – attorneys fees
2. Declaratory remedies
  - a. Declaration of rights/duties in a set of facts
3. Equitable remedies:
  - a. Seizure of property/levy against assets
    - i. Use of QDROS to take retirement – Dalton and new law (now enforce maintenance via QDRO)
    - ii. Taking tax refund
  - b. Garnishment of wages
    - i. EWO
  - c. Specific performance
    - i. Signing a deed
    - ii. Habeas corpus turnover of child for possession
  - d. Non-monetary judgment
    - i. make up time

- e. Injunction
  - i. To prohibit action
- f. Posting a bond or security
- g. Other sanctions
  - i. Suspended licenses
- h. Contempt of court is one type of legal remedy for enforcing a judgment – it is a limited remedy only available in certain circumstances.

### Which court do you file in?

The court that renders the order always maintains the power to enforce. Court of continuing jurisdiction over the child.

Statute of limitations:  
property award, 2 years

Breach of contract, 4 years

no statute of limitations for clarification

possession contempt: 6 months after the child becomes an adult or the right of possession terminates

child support contempt: 2 years after the child becomes adult or the obligation terminates (note special needs)

judgment collection – complex rules for statute of limitations, especially with child support

Personal jurisdiction:

If court had personal jurisdiction over the party when order is rendered then jurisdiction over the enforcement. But if no jurisdiction over the party in prior order then no jurisdiction to enforce.

## Contempt Remedy

Power to enforce by contempt

1. Have to have an order!
  - a. Only an order is enforceable – not a memo ruling, not a MSA or ISA or Rule 11, not an oral ruling. Only a written signed order. And the order must be an ORDER so use ORDER language.
    - i. The order must be based on pleadings so make sure the underlying pleadings support the order especially if the order is not agreed.
    - ii. Cant add terms to agreement in converting to an order so make sure that your MSA/ISA/Rule 11 are specific enough to support judgment.
    - iii. Be careful with agreements to do things in the future

- b. Slavin – if an order does not clearly and specifically set forth what the person must do to comply, how, and when, then he cannot be sent to jail for contempt for not doing it. Other enforcement remedies might be available, but not contempt.
  - i. Possession awards
    - 1. Passive contempt – where the parent shows up and purports to comply with the order but another factor prevents compliance (like uncompliant child). No such thing as passive contempt – involuntary inability to comply
  - ii. Medical support awards (hard to enforce because the unknowns of the future medical needs and amounts)
    - 1. School, extracurricular expenses
    - 2. Agreements to agree

In re Janson 2020 WL 7413707 SCOTX – agreed order providing for children’s participation in extracurricular activities too vague to be enforced by contempt. Mandamus case. TCT held mother in contempt for failing to take daughter to extracurricular activities in future. No evidence that the parties agreed on the future activities.

In re Kluge 2020 WL 1173702 Beaumont – an order that imposes geo restriction pertains to child’s primary residence. Does not apply to a child’s temporary residence while attending school in another location – example boarding school. BUT watch the possession schedule for turnover of child details.

- c. Performance of conditions precedent to relief – send the EOB, show up at the time and place and demand the child be turned over
- 2. Must have a valid order
  - a. Right of the court to order under the law – did the court have the legal authority to order the person to do the action (example, pay child support under 18 versus over 18)
    - i. Service/notice of prior proceedings (hard to contempt if prior order was a default)
    - ii. A contempt order based on an unenforceable decree if VOID.
    - iii. Respondent must have knowledge of the order. – no notice of underlying suit, no contempt for noncompliance.
  - b. Cant put someone in jail for nonpayment of a debt – example property awards
    - i. In re Kinney case – judgment for \$40k from W to H secured by owelty lien and ordered to pay by date specific. She didn’t. Tct held in civil contempt and put her in jail until she paid. COA – nope, that’s a debt, dear.) In the context of a divorce case, a payment of money to be made in the future is not debt if it represents the former spouse’s share of a specific funds, including matured rights to future payments, that are community property and in existence at the time the divorce decree was rendered. See In re Henry, 154 S.W.3d 594, 596 (Tex. 2005) (“A person may be held in coercive contempt for failure to satisfy an obligation to deliver specific property pursuant to a division of the community estate. To be enforceable by contempt, the divorce decree must indicate the

funds existed at the time the decree was rendered or specify particular community funds from which the amount is to be paid. In re Henry, 154 S.W.3d at 597. The fact that relator had “access to” the sum of \$40,000.00 from money she inherited from her mother’s estate is not dispositive. A court cannot divest an owner of separate property. Pearson v. Fillingim, 332 S.W.3d 361, 364 (Tex. 2011). A trial court may invoke its contempt power only to enforce “delivery of specific property or an award of a right to future property” or the delivery of “a sum of money in existence at the time the decree was rendered or a matured right to future payments.” TEX. FAM. CODE ANN. §9.012 (West 2006).

- c. Attorneys fees are ALWAYS a debt. Only one exception when awarded for a contempt proceeding for child support collection
- d. Maintenance versus contractual alimony (In re Dupree)
- e. Can’t put someone in jail for a void order – against public policy.

### Type of contempt – direct contempt versus constructive contempt

1. Direct – actions committed in the presence of the judge which offends the dignity of the court – immediate contempt, no further service/notice/hearings.
2. Constructive contempt – actions committed outside the presence of the court – requires more due process.

Punishment for constructive contempt – criminal/punitive versus civil contempt. Difference is nature/purpose of the penalty.

1. Civil contempt: persuade the contemnor to obey the previous order. It’s conditioned on compliance. Forwards looking. Hold keys to the jail cell in your hand. No right to jury trial regardless of the length of punishment. Must state specifically what the person has to do to be released.
2. Criminal contempt: punish for noncompliance as affront to dignity of the court. No conditional compliance. Backwards looking. Period of incarceration for a past violation as punishment. Must make specific findings.

\*\*\*\* A finding of contempt is NOT Required for using other enforcement remedies. \*\*\*\*

See 157.162: contempt not required for other enforcement remedies; not in contempt can still award court costs, atty fees, other remedies.

### Pleadings seeking contempt

1. Plead the jurisdiction of the court
  - a. Prior order of the court
  - b. If foreign order, register and serve the registration.
2. Personal service upon the respondent. Cant get a default on contempt (but you can on other enforcement remedies) Service on attorney, 106 service, or other methods of NOT personal service are not sufficient to get *cajas* for appearance.

3. Recite the language of the underlying order which was violated (don't just dump it all in – must be specific), can also attach order and incorporate by reference, BUT still have to say what part of the order was violated.
4. Date and specifics of violations. Who what when where how.
5. Respondent was capable of performing the acts ordered.
6. Future violations based on repeated past violations between filing and hearing.
7. Ask for other remedies: clarification, specific performance, etc etc etc.
8. Plead for attorneys fees – be sure to segregate if you have multiple proceedings like a modification. Mandatory award if violation of child support or possession/access.
9. Entitled to 10-days notice of hearing. Cant get a capias for nonappearance if less than 10-days notice of hearing. If served, must appear
10. Best practice – don't join enforcement with other claims (like modification) Keep them separate.
11. Pleading for jail time – if you ask for more than 180 days criminal contempt OR if you ask the court to make the punishment CONSECUTIVE (stacked) then entitled to jury trial. Be specific – ask for concurrent punishment to avoid right to jury. The form book is insufficient. Also invokes right to indigency counsel.
12. Pleading fines – if you ask for more than \$500 fine total, then entitled to jury. The pleadings control – in court oral limitation on request for relief is insufficient to preclude right to jury trial.

**Hearing procedure** – record must be made. If no record, no contempt. The moving party has absolute burden to prove all violations. Respondent has right to remain silent during the prosecution of the case in chief. Be sure to have movant identify the respondent during the testimony. Must prove willfulness of the violations by the respondent and ability to comply. (Back to the passive violation of possession orders).

#### Standard of proof:

- a. Civil contempt – preponderance of the evidence.
- b. Criminal contempt – beyond a reasonable doubt.

#### The enforcement order provisions:

- c. Provision of the order being enforced
- d. Acts/omissions subject of the order
- e. Manner of noncompliance
- f. Relief granted.
- g. If criminal contempt, include specific findings
- h. If civil contempt, findings for how to purge the contempt
- i. If probation, terms of probation.
- j. CANNOT modify the underlying order in enforcement order.

#### To commit a person to jail:

- k. Order Must be entered before confinement to jail.

- l. Must have contempt order AND a commitment order. Can be one document but BEST PRACTICE is that they be separated out into two documents because the commitment order is directed at the sheriff to take custody of the person.
- m. Orders must be entered within a SHORT time of taking the person into custody – 3 days is too long. Friday to Monday is too long. BEST PRACTICE – have your orders ready to go. But don't do a fill in the blank order

## Defenses to contempt

### Criminal Contempt moving for judgment

1. Criminal contempt: Double jeopardy attaches once the movant calls the first witness and asks one question. You can move for judgment on the pleadings at this point if there's a pleading deficiency for criminal contempt. In this case, don't file special exceptions. Like a criminal case where the indictment has to pass constitutional muster.
2. Criminal contempt: After the prosecution case in chief, if they fail to meet the BORD burden, Use a motion for judgment on the pleadings at the end of the prosecution's case in chief to avoid putting on a case.

**Defenses and Affirmative defenses** – must be plead but NO entitlement to advance notice of pleadings. (NO 3 day notice requirement) – I think under pandemic requiring advance filing of exhibits for respondent is unconstitutional in criminal contempt case.

1. TRCP 94 affirmative defenses: payment, inability to comply, relinquishment, failure of movant to perform conditions precedent, agreement, ambiguity, ratification, rescission, mistake
2. Actual compliance is a defensive matter, NOT an affirmative defense. Ochsner case 517 SW3d 717 SCOTX held that direct payments (to school) even made contrary to terms of the order may be considered as actual compliance.
3. Inability to comply – criminal contempt is a backwards examination. Civil contempt is a PRESENT examination of ability. Can still be put in jail for criminal contempt if he had ability at the time of the violation to comply and didn't. EVEN if complied later. Civil contempt is a current ability to comply.
4. Attack willfulness element with evidence like unemployment, hospitalization, attempt to comply even if not full compliance or not the exact method required by the order.

## Appellate remedies

No appeal if you lose a contempt case.

If contempt is found no direct appeal. Remedy is by habeas corpus (if liberty is attached – jail time OR in some cases probation). Remedy is by mandamus for some parts of a contempt order. Order granting OTHER enforcement remedies attack by mandamus. If judgment, then appellate remedy may be by direct appeal.

For a writ of habeas to prevail in the appellate court, the contempt order must be VOID – high standard