40 Years

Working Together for Children

1976 - 2016

June 14 – 17, 2016
Merrillville, Indiana

Indiana Child Support Conference

Tips & Tools for Contempt

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CIVIL CONTEMPT

"[C]ontempt is always available to assist in the enforcement of child support, at least in respect of unemancipated children, including orders to pay accrued arrearages and money judgments against delinquent parents for past due amounts.

Pettit v. Pettit, 626 N.E.2d 444, 447 (Ind. 1993)

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OBJECTIVE = TO GET THEM TO PAY

[It]is not to punish… but rather to coerce action for the benefit of the aggrieved party. . . .

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In a civil contempt action the fine is to be paid to the aggrieved party, and imprisonment is for the purpose of coercing compliance with the order.

Duemling v. Fort Wayne Cmty. Concerts, Inc., 243 Ind. 521, 524–25, 188 N.E.2d 274, 276 (1963).

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KNOW THE STATUTE

31-16-12-6 Contempt

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31-16-12-6 CONTEMPT

Sec. 6. (a) If the court finds that a party is delinquent as a result of an intentional violation of an order for support, the court may find the party in contempt of court.

If an action or request to enforce payment of a child support arrearage is commenced not later than ten (10) years after:

(1) the child becomes eighteen (18) years of age; or

(2) the emancipation of the child;

whichever occurs first, the court may, upon a request by the person or agency entitled to receive child support arrearages, find a party in contempt of court.

31-16-12-6 CONTEMPT

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SIDE NOTE ON THE LIMITATIONS LANGUAGE

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The Indiana Supreme Court has "recognized the inherent powers of a trial court to use contempt as a remedy in the context of child support." *Pettit,* 626 N.E.2d at 446.

"Only upon a finding by the court that the delinquency was the result of a **willful failure** by the parent to comply with the support order and that the delinquent parent has the financial ability to comply is contempt available." *Id.* at 447.

J.M. v. D.A., 935 N.E.2d 1235, 1243 (Ind. Ct. App. 2010)

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31-16-12-6 CONTEMPT

(b) The court may order a party who is found in contempt of court under this section to:
(1) perform community restitution or service without compensation in a manner specified by the court; or
(2) seek employment.

(c) The court may order a party who is alleged to be in contempt of court under this section to show cause as to why the party should not be held in contempt for violating an order for support. The order to show cause must set forth:

(1) the contempt allegations;
(2) the failure to pay child support allegations;
(3) when the court issued the order for support;
(4) the party's history of child support payments;
(5) the specific:
    (A) date and time when; and
    (B) place where;
    the party is required to show cause in the court; and
(6) the party's arrearage.

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WHEN TO FILE

Who decides? Attorney? Caseworker?

Aside from meeting the statutory requirements, here are some practical questions to ask when deciding to file:

- Has it been at least 30 days since there has been payment made?
- Does the Custodial Parent (CP) still want enforcement?
- Has the driver's license been suspended?
- What is the total amount of arrears owed?
  - You want to consider the amount of the weekly order vs the amount of total arrears owed
- Have all administrative remedies been exhausted?

WHAT MUST BE FILED

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SERVICE

The person charged with contempt is entitled to be served with a rule of the court against which the contempt was alleged to have been committed.

Be prepared to provide the Court with proof of service

BURDEN OF PROOF

The party seeking a finding of contempt must demonstrate by clear and convincing evidence that:

Actual knowledge of the injunction, order or decree;

The order met the specificity requirements of the rules of procedure; and

Thereafter violated the order during the time period while the order was in effect, even if the order is erroneous.

REMEMBER:
...delinquent as a result of an intentional violation...

The failure to pay **must have been willful**, and the delinquent payor must possess the present financial ability to comply.

Branum v. State, 829 N.E.2d 622 (Ind. Ct. App. 2005).

The trial court has authority to use its contempt power only when the parent has the **ability to pay** the support due and his **failure to do so was willful.**

Pettit, 626 N.E.2d at 448. Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005)

DEFENSES

"preponderance of the evidence."

Excuse and/or Justification for Contemnor's actions

The parent who has failed to comply with a child support order has the burden of proving, but **a preponderance of the evidence**, that the failure to comply was not otherwise excused.

Failure to obey was not willful

The parent who has failed to comply with child support order has the burden of proving, by **a preponderance of the evidence**, that the failure to comply was not willful.

DEFENSES

…Other defenses might include…

Existence of a void court order – i.e. an order issued either (a) without subject matter jurisdiction, or (b) without jurisdiction over the person of the contemnor.

Acting in good faith in response to an ambiguous order.

Impossibility of compliance/performance with order.

DEFENSES cont.

HOWEVER:

Failure to obey an erroneous order is not a defense.

Civil contempt is the proper action for the failure to obey an erroneous order, disobedience is not.

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DUE PROCESS CONSIDERATIONS

Right to Counsel

Procedural due process requires that a contemnor facing potential incarceration in a civil contempt proceeding be notified of the right to counsel, and if indigent, of the right to court-appointed counsel.

Branum v. State, 822 N.E.2d 1102 (Ind. Ct. App. 2005); *In re Marriage of Stariha,* 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987; I.C. 34-10-1-2(2).

DUE PROCESS CONSIDERATIONS

Appointment of Public Defenders

Does the appointment of a PD become a necessity to protect liberty interests of the contemnor?

"…[I]f the individual in jeopardy of incarceration is indigent, he or she may not be incarcerated without having counsel appointed to represent him or her.

Accordingly, if Father is indigent, he is eligible for court-appointed counsel prior to the conduct of any contempt hearing…"

Marks v. Tolliver, 839 N.E.2d 703, 706 (Ind. Ct. App. 2005)

REMEDIES

No Punitive Remedy -Imprisonment

Imprisonment is an appropriate sanction for civil contempt only when it is clearly coercive in attempting to compel compliance with an order; it is not automatically appropriate, particularly where a jail sentence is used to punish acts already committed.

"Unlike criminal indirect contempt, the primary objective of a civil contempt proceeding is not to punish the contemnor but to coerce action for the benefit of the aggrieved party. "

Thompson v. Thompson, 811 N.E.2d 888, 905 (Ind.Ct.App.2004), trans. denied.

REMEDIES

An imprisonment order in a civil case must provide that the jail term ceases when the contemnor complies with the order. The contemnor must be offered the ability to purge himself.

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"[O]ne who is held in civil contempt for failing to pay support should be ordered to pay the total arrearage and given an opportunity to purge himself or herself of contempt by paying the amount owed. Mitchell, 785 N.E.2d at 1199. However, incarceration for contempt is legally allowable only where the support order upon which release is conditioned is attainable by the obligor."

B*ranum v. State,* 829 N.E.2d 622, 623 (Ind.Ct.App.2005). Marks v. Tolliver, 839 N.E.2d 703, 707-08 (Ind. Ct. App. 2005)

REMEDIES

Cannot anticipate future contempt

A court order cannot order the immediate incarceration of the contemnor in the event that subsequent non-compliance with the court's orders occurs.

In Marks v. Tolliver, 839 N.E.2d 703, 708 (Ind. Ct. App. 2005), the trial court fashioned an order that provides for prospective incarceration upon omission of any future child support installment without inquiry into the obligor's ability to pay.

In essence, the order presumes willful non-compliance.

-This order was reversed by the Indiana Court of Appeals

FOCUS ON ABILITY TO PAY

GET THE BACKGROUND

- Where does NCP live with?
- Who does NCP live with?
- What assets does NCP have?
- How does NCP support himself
- What is NCP's educational background?
- Does NCP have a High school diploma?
- Did NCP seek a High school equivalency certificate?
- Does NCP have any specialized vocational training?

FOCUS ON ABILITY TO PAY

ASK ABOUT ALL JOBS AND THE LAST JOB

- Where was NCP last employed?
- What date did the last job start/end?
- What was the reason for the separation for the last employment?
- Did NCP apply for unemployment benefits?
- What was the outcome of the unemployment benefits?
- Did NCP appeal the denial of unemployment?
- What happened at the unemployment appeal hearing? Or was there a hearing?

FOCUS ON ABILITY TO PAY

WHEN INABILITY TO WORK IS ALLEGED

- Are you currently under the care of a doctor for any mental disabilities?
- Are you currently under the care of a doctor for any physical disabilities?
- Do you have any medical documentation to support this diagnosis?
- Who is the treating doctor?
- Where is the doctor located?
- What as your diagnoses?
- What is your treatment plan with this doctor?
- Is there physical therapy?
- When and How often were/are you in physical therapy
- When was the last appointment with this doctor?
  - OFTEN YOU WILL FIND THAT THIS PERSON WORKED AT SOME POINT WITH THE DIAGNOSIS
- What if anything has the doctor told you about continuing to work?

EMPLOYER CONTEMPT

…When NCP alleges that support is being withheld from his paycheck…

Ask for NCP's paystubs to support the statement that support is being withheld

Is there more than one child support obligation that is being withheld

Have you talked to your employer about child support being withheld

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EMPLOYER CONTEMPT

Has the caseworker has contacted the employer for NCP and discussed the IWO

Employer acknowledges they have withheld the money but they only send it in once a month

Your records show the above statement is not the case

At this point if you proceed with contempt against the employer you will need the cooperation of NCP

EMPLOYER CONTEMPT

31-16-15-7.5(a) WITHHOLDING OF INCOME BY INCOME PAYOR

(a) An income payor that is required to withhold income under this chapter shall:

(1) forward income withheld for the payment of current or past due child support as directed by an income withholding order to the state central collection unit at the time that an obligor is paid;
(2) include a statement that identifies the: . . . .
(3) begin withholding income not later than the first pay date after fourteen (14) days following the date the order for income withholding is received by the income payor.

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EMPLOYER CONTEMPT

31-16-15-23(c) LIABILITY OF INCOME PAYORS

(c) An income payor that:

(1) receives an income withholding order from a court or Title IV-D agency; and

(2) fails to comply with the income withholding order;

may be liable for contempt of court.

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EMPLOYER CONTEMPT

31-16-15-23(a) LIABILITY OF INCOME PAYORS

If an income payor fails to forward the money required by an income withholding order, the Title IV-D agency shall send the income payor, by certified mail, a **notice of failure to comply.**

If the income payor fails to forward the money required by an income withholding order <u>within thirty (30) days</u> after receipt of the notice of failure to comply, the income payor is liable for the amount the income payor fails to forward.

EMPLOYER CONTEMPT

31-16-15-23(b) LIABILITY OF INCOME PAYORS

(b) An income payor described in subsection (a) is liable to the:

(1) obligee for the amount of income not paid in compliance with the income withholding order, including an amount the obligor is required to pay for health insurance coverage; and

(2) obligor for:

(A) the amount of income withheld and not paid as required under the income withholding order;

(B) an amount equal to the interest that accrues according to the interest percentage that accrues on judgments; and

(C) reasonable attorney's fees and court costs.

EMPLOYER CONTEMPT

Procedural Steps to Take

1. Title the letter: NOTICE OF FAILURE TO COMPLY
   -Enclose last copy of IWO sent
2. Send the letter certified mail
   -Must wait 30 days from the date the letter was received by the employer
3. File a Motion to Join 3rd party with the Court
4. File Information For Rule to Show Cause with the Court
5. File Rule to Show Cause- This Document is for the Judge's signature
6. File Entry with the Court that alleges the Information for Rule to Show Cause was filed with the Court and request Summons be returnable to your office
7. Prepare the Summons for the Clerk's office indicating designated service