

CONTEMPT

The Honorable Carolyn K. Fulmer
District Court of Appeal
Second District
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Revised and Updated by
Judge John C. Lenderman
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CONTEMPT

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CONTEMPT

A. CONTEMPT GENERALLY

Any act which is calculated to embarrass, hinder or obstruct the court in the administration of justice, or which is calculated to lessen its authority or dignity. This includes but is not limited to a wilful refusal to obey any legal order, mandate or decree made or given by any judge. See Ex Parte Earman, 85 Fla. 297, 95 So. 755 (1923); section 38.23, Florida Statutes.

Courts have the authority to enforce a judgment by the exercise of their contempt powers. They are granted this contempt authority because orderly government demands that respect and compliance be given to court orders. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000).

The definition of criminal contempt is not restricted to a violation of an order per se. The test in determining whether conduct constitutes criminal contempt is whether the conduct interferes with or impugns the judicial function, not whether it causes a particular judge to feel aggrieved or vexed. Thomas v. State, 752 So.2d 679 (Fla. 1st DCA 2000).

Ambiguous Orders: Ambiguous, implied or inherent provisions of a final judgment or order cannot serve as a basis for an order of contempt. Keitel v. Keitel, 716 So.2d 842 (Fla. 4th DCA 1998); Reynolds v. Reynolds, 711 So.2d 45 (Fla. 2d DCA 1998).

Erroneous Orders: Party may be held in contempt for failing to comply with erroneous order. Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA) rev. denied, 501 So.2d 1283 (Fla. 1986); Robbie v. Robbie, 726 So.2d 817 (Fla. 4th DCA 1999).

Intent: Intent to disobey court order is one of the necessary elements of contempt. Power Line Components, Inc. v. Mil-Spec Components, Inc., 720 So.2d 546 (Fla. 4th DCA 1998). For example, late court appearance because of car breakdown is not indirect criminal contempt. Werner v. State, 740 So.2d 591 (Fla. 5th DCA 1999).

B. TYPES DEFINED

A contempt is either civil or criminal and either direct or indirect. The cause in which the contempt arises is not determinative. For example, a criminal contempt may occur in a civil proceeding. The distinctions are important because the type of contempt governs the procedures that must be used to institute and conduct the hearing, and the sanctions that may be used. Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977).

1. Criminal Contempt

If the purpose of the contempt proceeding is to punish for offensive conduct against the court, its judgments, orders or processes, it is criminal.

2. Civil Contempt

If the purpose of the contempt proceeding is remedial or coercive, it is civil. Civil contempt is

usually used to preserve and enforce rights of private parties to a suit or to compel obedience to orders made for the benefit of a party. Civil contempt may not be used to compel payment of debt not considered support. Montanez v. Montanez, 697 So.2d 184 (Fla. 2d DCA 1997); Lee v. Lee, 710 So.2d 186 (Fla. 1st DCA 1998).

3. Direct Contempt

If an act deemed contemptuous is committed in the presence of the court (i.e., detected through the judge's sense of hearing, seeing, or smelling), it is direct.

4. Indirect (Constructive) Contempt

If an act deemed contemptuous is committed outside of the presence of the judge, it is indirect. (E.g., if the judge does not see, hear or smell the contemptuous act, it is indirect contempt even if it is committed in the courtroom where the judge is presiding.) Everyone must read Kelley v. Rice, 800 So.2d 247 (Fla. 2nd DCA 2001) attached!

C. STANDARDS OF PROOF

1. Criminal

Although criminal contempt is not a statutory offense, it is a common law crime in Florida. Persons accused of criminal contempt are entitled to the same basic constitutional rights as are those accused of violating criminal statutes. Aaron v. State, 284 So.2d 673 (Fla. 1973). Thus, the presumption of innocence applies and the charge must be proved beyond every reasonable doubt.

CASES: Burden of proof required in criminal contempt proceedings is beyond a reasonable doubt. Kramer v. State, 800 So.2d 319 (Fla. 2d DCA 2001). To prove indirect criminal contempt, there must be proof beyond a reasonable doubt that the individual intended to disobey the court. Tide v. State, 804 So.2d 412 (Fla. 4th DCA 2001).

2. Civil

The contempt must be proved by a preponderance of the evidence. There is no presumption of innocence. In Interest of S.L.T., 180 So.2d 374 (Fla. 2d DCA 1965).

D. PROCEDURE - DIRECT CRIMINAL CONTEMPT

1. **Should be used sparingly!** Use of direct criminal contempt summary procedures should be reserved for exceptional circumstances where the disruption or obstruction frustrates an ongoing proceeding and must be immediately addressed in order for proceedings to continue. If used improvidently, the court may, for example, be found to have wrongfully denied the person charged of the right to counsel or to have presided over a contempt proceeding where recusal was appropriate. Tschapek v. Frailing, 699 So.2d 851 (Fla. 4th DCA 1997).

2. Florida Rule of Criminal Procedure 3.830 controls.

a. May be commenced on court's own initiative or on motion directed to the court.

b. Proceedings are summary in nature and may be invoked forthwith if the court saw or heard the contemptuous conduct in the actual presence of the court. Written charges or affidavits are not necessary. Fla. R. Crim. P. 3.830.

c. Judge must inform defendant of accusation and inquire if defendant has any cause to show why he or she should not be adjudged guilty of contempt and sentenced therefor. Fla. R. Crim. P. 3.830.

d. The defendant shall be given an opportunity to present evidence of excusing or mitigating circumstances. Fla. R. Crim. P. 3.830; Patz v. State, 691 So.2d 66 (Fla. 3d DCA 1997).

e. Sentence must be pronounced in open court. Fla. R. Crim. P. 3.830.

f. Judgment must be in writing and signed by the judge and contain a recital of those facts on which the adjudication of guilt is based and be entered of record. Fla. R. Crim. P. 3.830.

g. All criminal proceedings are to be reported. Fla. R. Jud. Admin 2.070(g). Trial court required to ensure that a court reporter is at criminal contempt proceedings. Blalock v. Rice, 707 So.2d 738 (Fla. 2d DCA 1997); Chamberlain v. Chamberlain, 588 So.2d 20 (Fla. 1st DCA 1991). But see, Martin v. State, 743 So.2d 591 (Fla. 4th DCA 1999) (For direct criminal contempt proceeding, absence of court reporter did not require reversal.)

h. May not award attorney fees in criminal contempt. Lamb v. Fowler, 574 So.2d 262 (Fla. 1st DCA 1991). But, for family law matters, the court has authority to assess attorney's fees and costs against the criminal contemnor after making a determination of ability to pay. The order may state that the amount be paid directly to the attorney, who may then enforce the order in his or her name. See FS 61.16(2).

CASES:

Kress v. State, 790 So.2d 1207 (Fla. 2d DCA 2001) - Court could not hold defendant in direct criminal contempt for outburst of profanity in judge's presence since the incident occurred in elevator on way out of the courthouse and the defendant did not know he was a judge. Conduct was not directed at judge in his official capacity.

Aron v. Huttoe, 265 So.2d 699 (Fla. 1972); Bouie v. State 784 So.2d 521 (Fla. 4th DCA 2001); Speer v. State, 742 So.2d 373 (Fla. 1st DCA 1999) - Failure to appear in court pursuant to court order can constitute direct criminal contempt

But see, Kelley v. Rice, 800 So.2d 247 (Fla. 2d DCA 2001) - Failure of witness in criminal case to appear in response to subpoena may be punished as indirect criminal contempt; FS 901.11 Effect of not answering summons.--Failure to appear as commanded by a summons without good cause is an indirect criminal contempt of court and may be punished by a fine of not more than \$100.

Cook v. State, 636 So.2d 895 (Fla. 3d DCA 1994) - Trial court must make clear and specific findings of fact and must give Cook the opportunity to present evidence of excuse or mitigating circumstances before it imposed sentence.

Pendley v. State, 392 So.2d 321 (Fla. 1st DCA 1980) - Where witness refused to testify *before a grand jury* after receiving immunity for all except perjury, his action was indirect, not direct, criminal contempt.

Fisher v. State, 248 So.2d 479 (Fla. 1971) - In case that had not been scheduled for trial, attorney had right to withdraw from case, and his refusal to obey court's order reinstating him and his law firm as attorney of record was not direct criminal contempt.

Montoya v. State, 695 So.2d 873 (Fla. 3d DCA 1997) and Schenck v. State, 645 So.2d 71 (Fla. 4th DCA 1994) - Contempt judgment must recite facts constituting the contempt.

Williams v. State, 698 So.2d 1350 (Fla. 1st DCA 1997) - Defendant was not entitled to counsel or formal hearing in direct contempt proceeding, but contempt judgment remanded because facts constituting the contempt were not recited in judgment and because court did not explicitly offer him the opportunity to show cause why he should not be held in contempt (offer opportunity to exculpate himself)

Martin v. State, 711 So.2d 1173 (Fla. 4th DCA 1998) - Scrupulous compliance with rule 3.830 is required because its provisions are the essence of due process. Kahn v. State, 447 So.2d 1048 (Fla. 4th DCA 1984). Court must give contemnor chance to show why he should not be held in contempt and to argue for a different sentence.

Michaels v. State, 773 So.2d 1230 (Fla. 3d DCA 2000) - Appellate court reviewed trial court's ruling of direct criminal contempt under abuse of discretion standard.

Marshall v. State, 764 So.2d 908 (Fla. 1st DCA 2000) - Failure to ask defendant to show cause why he should not be held in direct criminal contempt and to give opportunity to present mitigating evidence required remand.

E. DISQUALIFICATION OF JUDGE - DIRECT CRIMINAL CONTEMPT

The law governing disqualification in indirect criminal contempt proceedings (set forth below) is also applied in direct criminal contempt proceedings. A direct criminal contempt occurring in the presence of a trial judge may be punished immediately and summarily. See Rule of Criminal Procedure 3.830. Under such circumstances, the trial judge need not disqualify himself unless he has become directly and personally embroiled. Sandstrom v. State, 402 So.2d 461 (Fla. 4th DCA 1981). See Oates v. State, 619 So.2d 23 (Fla. 4th DCA), rev. denied, 629 So.2d 134 (Fla. 1993).

F. PROCEDURE - INDIRECT CRIMINAL CONTEMPT

Florida Rule of Criminal Procedure 3.840 controls.

1. Order to show cause required:

a. Must initiate by service of order to show cause on the defendant.

b. Order to show cause must

--be based on affidavit of any person having knowledge of facts or on judge's own motion. Reins v. Johnson, 604 So.2d 911 (Fla. 2d DCA 1992).

--state the essential facts constituting the contempt charged. Giles v. Renew, 639 So.2d 701 (Fla. 2d DCA 1994).

--Require the defendant to personally appear and show cause why the defendant should not be held in contempt. Haynes v. State, 695 So.2d 371 (Fla. 4th DCA 1997).

--specify the time and place of the hearing, with a reasonable time allowed for preparation of defense after service of order to show cause.

CASE: Contempt hearing held less than two days after service of the order to show cause was insufficient. Due process requires more time to prepare. Russ v. State, 622 So.2d 501 (Fla. 5th DCA 1993), rev. denied, 634 So.2d 626 (Fla. 1994).

CASE: Where defendant received only two actual working days' notice of the contempt hearing, he was not afforded a reasonable time for preparation of his defense. Goral v. State, 553 So.2d 1282 (Fla. 3d DCA 1989).

2. Motions/answer:

After being served with order to show cause, defendant may:

- move to dismiss order to show cause
- move for statement of particulars
- answer by denial, explanation or defense
- do nothing. Failure to plead is not an admission of guilt

3. Order of arrest:

May be issued if judge has reason to believe the defendant will not appear in response to the order to show cause. If arrested, defendant shall be admitted to bail as in criminal cases.

4. Arraignment and hearing:

a. Arraignment may be held at time of hearing or prior thereto if requested by defendant.

b. Rule says all issues of law and fact shall be heard and determined by judge. But, Aaron v. State, 284 So.2d 673 (Fla. 1973), says if judge contemplates imprisonment of greater than six months (as authorized by section 775.02, F.S.) a jury must be empanelled. Otherwise, rule would not pass constitutional muster. See Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994).

c. Judge may conduct hearing or may be assisted by prosecuting attorney or by an attorney appointed for that purpose.

d. Defendant's due process rights include: -

--to be represented by counsel (Florida Rule of Criminal Procedure 3.111(d) waiver of counsel requirements and Faretta apply). Norman v. State, 699 So.2d 854 (Fla. 4th DCA 1997).

--to have compulsory process for the attendance of witnesses

--to testify in own behalf

(The following are not expressly stated in Rule 3.840, but are in case law):

--to be present (De Mauro v. State, 632 So.2d 727 (Fla. 3d DCA 1994); Haynes v. State, 695 So.2d 371 (Fla. 4th DCA 1997); Bradley v. State, 420 So.2d 417 (Fla. 1st DCA 1982)).

--to not incriminate oneself. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994).

--to have offense proved beyond a reasonable doubt. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994). It is error for a judge to suggest that the directive of an order to

show cause is to place the responsibility of going forward on the shoulders of the respondent, since contemnor is afforded same due process considerations as any other criminal defendant. Tide v. State, 804 So.2d 412 (Fla. 4th DCA 2001).

--to a jury trial if imprisonment will be for more than six months. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994).

--speedy trial rule does not apply to criminal contempt proceedings initiated by the court. Burk v. Washington, 713 So.2d 988 (Fla. 1998).

5. The Judgment:

a. must be entered of record *at the conclusion of the hearing* finding the defendant guilty or not guilty

b. must be in writing

c. must be signed by the judge

d. should contain a recital of the facts constituting the contempt (however, in Gidden v. State, 613 So.2d 457 (Fla. 1993), the supreme court held that written findings of fact are not required if sufficient oral findings of fact are made on the record). (Cf., procedure for direct criminal contempt - judgment "must" contain recital of facts.)

6. Sentencing Requirements:

a. Prior to pronouncement, judge shall inform defendant of accusation and judgment against defendant and inquire whether defendant has any cause to show why sentence should not be pronounced.

b. Defendant shall be afforded opportunity to present mitigating circumstances.

c. Sentence shall be pronounced in open court in presence of defendant.

d. Maximum penalty that may be imposed is one year in county jail and \$500 fine. Contempt is a common law crime in Florida. Florida Statutes 38.22 and 38.23 authorize the courts to punish contempts but contain no penalty provisions. Section 775.02 provides that where there is no statutory penalty for an offense, "the court shall proceed to punish such offense by fine or imprisonment, but the fine shall not exceed \$500, nor the imprisonment 12 months."

Even though criminal fine cannot exceed \$500, court must consider financial resources of contemnor before setting amount of criminal or coercive civil fine. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994).

e. Period of incarceration may not exceed six months if nonjury trial or one year if jury trial provided. Aaron v. State, 284 So.2d 673 (Fla. 1973). See Parisi v. Broward County, 769 So.2d 359 (Fla. 2000), citing International Union, United Mine Workers v. Bagwell, 512 US 821, 826 (1994).

f. For family law matters, the court has authority to assess attorney's fees and costs against the criminal contemnor (whether direct or indirect contempt) after making a determination of ability to pay. The order may state that the amount be paid directly to the attorney, who may then enforce the order in his or her name. See FS 61.16(2).

g. NOTE: Look for statutory exceptions. For example, section 901.11, Florida Statutes, provides that failure to appear as commanded by a summons without good cause is an indirect criminal contempt and may be punished by a fine of not more than \$100.

CASE: \$2000 fine for indirect criminal contempt was excessive. Kramer v. State, 800 So.2d 319 (Fla. 2d DCA 2001).

CASE: It would offend the Double Jeopardy Clause to appeal a not guilty finding of indirect criminal contempt. Lascaibar v. Lascaibar, 773 So.2d 1236 (Fla. 3d DCA 2000).

CASES: Failure to appear. Kelley v. Rice, 800 So.2d 247 (Fla. 2d DCA 2001) - Failure of witness in criminal case to appear in response to subpoena may be punished as indirect criminal contempt; "The failure to obey a subpoena does not necessarily result in criminal contempt." Johnson v. State, 697 So.2d 995 (Fla. 5th DCA 1997). Proof of failure to appear without additional proof of willfulness does not constitute contempt. B.S. v. State, 646 So.2d 287 (Fla. 2d DCA 1994); Prior v. State, 562 So.2d 864 (Fla. 5th DCA 1990). See cases under Direct Criminal Contempt, above. FS 901.11 Effect of not answering summons. Failure to appear as commanded by a summons without good cause is an indirect criminal contempt of court and may be punished by a fine of not more than \$100.

G. DISQUALIFICATION OF JUDGE-INDIRECT CRIMINAL CONTEMPT

1. Rule 3.840(e) provides that if the contempt involves disrespect to or criticism of a judge, the judge shall disqualify himself or herself from presiding at the hearing. If you are in doubt about whether you should disqualify yourself, opt for disqualification.

CASE: If the prosecution seeks to establish the fact of the trial court's presumed oral instruction to defendant through the judge's recollection and testimony, it might be appropriate for a different judge to preside at the indirect criminal contempt hearing to avoid a situation where the initial trial judge is an adverse fact witness, the trier of fact, and the potential sentencer. Freeman v. State, 804 So.2d 484 (Fla. 2d DCA 2001).

CASE: Judge was not required to disqualify himself from hearing indirect criminal contempt proceeding against attorney who had failed to appear for trial before him, where record did not indicate that obstruction of the court in the administration of justice constituted personal disrespect for judge as contemplated by rule on disqualification. Lowe v. State, 468 So.2d 258 (Fla. 2d DCA 1985).

2. Rule 3.840(e) also provides that if a judge disqualifies himself or herself, the chief justice of the supreme court shall designate another judge to hear the matter. In practice, the chief judge of the circuit usually appoints a substitute judge. However, if there is an objection to this procedure, failure to

follow the rule will result in reversal. Castro v. Luce, 650 So.2d 1067 (Fla. 2d DCA 1995).

H. PROCEDURE-DIRECT CIVIL CONTEMPT

Direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily, and, except for serious criminal contempts in which a jury trial is required, the traditional distinction between civil and criminal contempt proceedings does not pertain. International Union, United Mine Workers v. Bagwell, 512 US 821, 827, fn 2 (1994) (dicta).

No general rule of procedure available to follow.

1. May be commenced on court's own motion or motion of person with standing.
2. Proceedings are summary in nature and may be invoked forthwith upon the happening of the contemptuous conduct. Thus, motion and notice of hearing are not necessary.
3. Remaining procedures and requirements are same as for indirect civil contempt.

I. PROCEDURE-INDIRECT CIVIL CONTEMPT

No general rule of procedure available to follow, but see Florida Family Law Rules of Procedure 12.615 governing civil contempt proceedings in support matters related to family law cases, below.

1. Motion and notice required: See Fla.R.Civ.P. Form 1.982; Fla. Fam. L.R. .P. 12.615(b).
 - a. Initiated by person having standing by serving motion and notice on respondent or his/her counsel
 - b. Service by mail is sufficient. Spencer v. Spencer, 311 So.2d 822 (Fla. 3d DCA 1975), cert. denied, 328 So.2d 845 (Fla. 1975); Dep't. of Health & Rehab. Servs. v. Pierre, 625 So.2d 987 (Fla. 3d DCA 1993).
 - c. Service by publication is not permitted. Chapman v. Lamm, 388 So.2d 1048 (Fla. 3d DCA 1980), disapproved in part on other grounds, 413 So.2d 749 (Fla. 1982).
 - d. Notice must be reasonable. Hayman v. Hayman, 522 So.2d 531 (Fla. 2d DCA 1988) (notice received morning of contempt hearing was not sufficient notice)
 - e. Motion and notice must specify acts claimed to be contemptuous
 - f. Must specify time and place of hearing
2. Hearing:
 - a. Court must inform respondent of allegations.

- b. Moving party has burden of proof as in any civil proceeding (preponderance of the evidence).
- c. Once noncompliance is established or admitted, burden shifts to respondent to show inability to perform or excuse.
- d. Respondent is not entitled to counsel because proceedings are remedial and not criminal. Andrews v. Walton, 428 So.2d 663 (Fla. 1983).
- e. Appellant's failure to provide transcript of civil contempt proceeding barred review. Calicchio v. Calicchio, 693 So.2d 1124 (Fla. 4th DCA 1997); Ganceres v. Ganceres, 703 So.2d 1220 (Fla. 5th DCA 1998).

3. Fines

- a. A compensatory fine may be imposed to compensate an injured party for losses. Fine must be based on evidence of the injured party's actual loss. Johnson v. Bednar, 573 So.2d 822 (Fla. 1991) as modified by International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1994). Only if the fine is compensatory is it appropriate to dispense with a purge provision. Gregory v. Rice, 727 So.2d 251 (Fla. 1999), citing Bagwell.
- b. A coercive fine may be ordered to coerce compliance. However, the court must consider (a) the character and magnitude of the harm threatened by continued contumacy, and (b) the probable effectiveness of a particular sanction in achieving the result desired. The court must also consider the offending party's financial resources and the seriousness of the burden on that party. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000); Johnson v. Bednar (as modified, see above); Spade Engineering Co. v. Dep't. of Env'tl. Protection, 670 So.2d 1062 (Fla. 2d DCA 1996).
- c. Coercive fines must have purge provision. Gregory v. Rice, 727 So.2d 251 (Fla. 1999), citing Bagwell. See "Purge" below under Rule 12.615.
- d. "Bonded" fines are not permitted as civil contempt sanctions. Post a bond or place fines in escrow pending compliance. Parisi v. Broward County, 769 So.2d 359 (Fla. 2000).
- e. Attorney's fees may be awarded as sanctions. Lamb v. Fowler, 574 So.2d 262 (Fla. 1st DCA 1991).

4. Incarceration

- a. Incarceration may be ordered but ONLY if purge provision is provided AND court finds that contemnor has present ability to perform the purge. Siegel v. Felcher, 636 So.2d 872 (Fla. 3d DCA 1994); Ponder v. Ponder, 438 So.2d 541 (Fla. 1st DCA 1983), review denied, 477 So.2d 887 (Fla. 1984); Mallardi v. Jenne, 721 So.2d 380 (Fla. 4th DCA 1998); Clark v. Manning, 721 So.2d 793 (Fla. 3d DCA 1998).
- b. Period of incarceration should be indefinite. Contemnor carries keys to cell in his own pocket. Pasin v. Pasin, 480 So.2d 699 (Fla. 4th DCA 1985); Pugliese v. Pugliese, 347 So.2d 422

(Fla. 1977).

5. Other Enforcement Sanctions

Lascaibar v. Lascaibar, 715 So.2d 1042 (Fla. 3d DCA 1998) (discusses enforcement alternatives. "In the enforcement of a judgment entered in equity, a trial judge is limited only by due process, in scope of its process, and because liberty is the core value of the republic, in civil contemnor's ability to purge himself of contempt by compliance. Other than those restraints, the ability of the trial court to enforce its decree is fettered only by a lack of imagination."); Mallardi v. Jenne, 721 So.2d 380 (Fla. 4th DCA 1998) (good discussion of ability to pay and burdens of proof).

6. Judgment:

a. must be in writing

b. must be signed by judge

c. must recite facts upon which contempt is based

d. must contain purge provision and must contain a finding that respondent has the present ability to meet the purge. Andrews v. Walton, 428 So.2d 663 (Fla. 1983); Haymon v. Haymon, 640 So.2d 1204 (Fla. 2d DCA 1994); Bowen v. Bowen, 454 So.2d 565 (Fla. 2d DCA 1984), approved, 471 So.2d 1274 (Fla. 1985); Barben v. Barben, 681 So.2d 742 (Fla. 2d DCA 1996); rev. denied, 686 So.2d 575 (Fla. 1996); Spade Engineering Co. v. Dep't of Env'tl. Protection, 697 So.2d 974 (Fla. 2d DCA 1997); Krystoff v. Krystoff, 705 So.2d 146 (Fla. 4th DCA 1998); Mallardi v. Jenne, 721 So.2d 380 (Fla. 4th DCA 1998); Clark v. Manning, 721 So.2d 793 (Fla. 3d DCA 1998).

e. may not order incarceration for future noncompliance. Koeppel v. Holyszko, 643 So.2d 72 (Fla. 2d DCA 1994); Samuels v. Grossman, 720 So.2d 297 (Fla. 1st DCA 1998).

J. RULE 12.615. CIVIL CONTEMPT IN SUPPORT MATTERS - Effective February 1, 1999

1. Purpose - To compel compliance with court order, or to compensate for losses sustained as a result of willful failure to comply with order. See Giallanza v. DOR, 799 So.2d 256 (Fla. 2d DCA 2001).

2. Initiated by motion and notice. No civil contempt may be imposed without notice and an opportunity to be heard.

a. May be served by mail "provided notice by mail is reasonably calculated to apprise alleged contemnor of pendency of the proceedings." Notice must specify time and place of hearing.

b. Motion must contain facts/acts amounting to contempt

c. Motion must contain "FAILURE TO APPEAR AT THE HEARING MAY RESULT IN THE COURT ISSUING A WRIT OF BODILY ATTACHMENT FOR YOUR ARREST. IF YOU ARE ARRESTED, YOU MAY BE HELD IN JAIL UP TO 48 HOURS BEFORE A HEARING

IS HELD.

3. Hearing – STEPS

- a. Court must first make express finding on proper notice of motion and hearing.
- b. Movant then establishes prior order, failure to pay and arrearage amount.
- c. If Δ not present, set reasonable purge. The court may issue writ of bodily attachment directing Δ be brought before court within 48 hours on issue of present ability and wilful failure to pay.
- d. If Δ present, determine present ability to pay and wilful failure to pay arrearage amount.

4. Order and Sanctions – Finding of contempt requires written order granting or denying motion with factual findings:

- a. contemnor had notice of motion and hearing
- b. prior order was entered
- c. failure to pay
- d. had present ability to pay (remember statutory presumption)
- e. willfully failed to ~~pay~~ comply with prior order
- f. recital of facts on which findings are based.

If court grants motion, court may impose appropriate sanction, including:

- a. incarceration
- b. attorney's fees, suit \$ and costs
- c. compensatory or coercive fines
- d. any other coercive sanction permitted by law

MUST HAVE PURGE PROVISION

5. Purge

- a. If court orders jail, coercive fine or any other coercive sanction – must set conditions for purge of contempt based upon present ability to comply.

CASE: Purge provision requiring, inter alia, that ex-husband "not expose the children to his hostility toward the Former Wife" was too broad and indefinite. Lanza v. Lanza, 804 So.2d 408 (Fla. 4th DCA 2001).

b. Must make separate affirmative finding of present ability to comply with purge and the factual basis for that finding .

c. Court may grant Δ reasonable time to purge.

d. If court defers jail for more than 48 hours in order for contemnor to comply, court may rely on affidavit of non-compliance from movant and certificate from Depository, when issuing writ of bodily attachment.

e. Court may jail upon proof of non-compliance, but must re-determine present ability to purge within 48 hours of arrest.

6. Continuing authority to review present ability to comply with purge, to review duration of incarceration, and to modify any prior orders upon motion of any party or court.

7. Where there is a failure to pay support but no showing that it was wilful, court may grant such relief as may be appropriate under the circumstances.

CASES: Limitations on sanctions.--In contempt action court could not order H to pay one-half day-care expenses in addition to previously ordered child support. There was no petition for modification of child support before the court. *Bator v. Osborne*, 799 So.2d 263 (Fla. 2d DCA 2001).

Attorney fees.--Civil contempt may be used to enforce award of attorney fees in dissolution where there was no support awarded and no visitation issue. *Wertkin v. Wertkin*, 763 So.2d 465 (Fla. 4th DCA 2000), citing *Fishman v. Fishman*, 656 So.2d 1250 (Fla. 1995) (Civil contempt may be used to enforce payment of attorney's fees owed by one former spouse to the other which were awarded as contempt sanction in visitation enforcement proceeding.); *Robbie v. Robbie*, 683 So.2d 1131 (Fla. 4th DCA 1996). (Payment of attorney fees reduces wife's ability to support herself; therefore attorney fees could be seen as an element of support.)

Change of custody was not a proper sanction for indirect civil contempt of visitation order. *LaLoggia-VonHegel v. VonHegel*, 732 So.2d 1131 (Fla. 2d DCA 1999).

Following erroneous order.--Order authorizing H to abate court-ordered child support until further order of the court was clearly wrong, but H may not be held in contempt for following it. (He may be ordered to pay the resulting arrearage, however.) *Stanley v. Stanley*, 756 So.2d 210 (Fla.4th DCA 2000).

Abatement of child support.--"Fine" imposed in the form of abatement of child support was punitive sanction rather than purge and converted civil contempt proceeding to one for indirect criminal contempt. Lack of constitutional due process protections required by Fla. R. Crim P. 3.840 required reversal of proceeding. *Kimball v. Yaratch*, 787 So.2d 97 (Fla. 2d DCA 2001).

K. CONVERTING CIVIL CONTEMPT TO CRIMINAL CONTEMPT

While you may not mix civil and criminal contempt in the same proceeding, it is possible to convert civil contempt to criminal contempt after a hearing is commenced. However, "[s]uch a

conversion would mandate the continuation of the hearing to provide for issuance of an order to show cause that complies with the rule with fair opportunity to the respondent to prepare and be heard. However, such practice flirts with procedural due process flaws. Accordingly, better practice suggests that such situations be anticipated in advance whenever possible so that full due process safeguards required by Fla. R. Crim. P. 3.840 will be afforded.” Pugliese, 347 So.2d 422, 426-427 (Fla. 1977).

A person may be held in civil contempt and criminal contempt. in separate proceedings, for the same conduct. Featherstone v. Montana, 684 So.2d 233 (Fla. 3rd DCA 1996).

L. RELEVANT CASES

THE BIG SIX:

Kelley v. Rice, 800 So.2d 247 (Fla. 2nd DCA 2001)

Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977)

Excellent overview of the four types of contempt and the basic rules.

Bowen v. Bowen, 471 So.2d 1274 (Fla. 1985)

Excellent explanation of proper procedure to use civil contempt in child support enforcement.

Johnson v. Bednar, 573 So.2d 822 (Fla. 1991)

Excellent overview of civil contempt including explanation of different types of civil contempt fines but must also read International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 114 S. Ct. 2552, 129 L.Ed.2d 642 (1994), which effectively overruled the purge provision holding in Johnson v. Bednar and which the supreme court acknowledges in Gregory v. Rice, 727 So.2d 251 (Fla. 1999).

Gregory v. Rice, 727 So.2d 251 (Fla. 1999)

Procedure for civil contempt proceeding involving Department of Revenue and Child Support Enforcement Hearing Officer. (Recommended orders must contain detailed findings of fact to support the hearing officer's recommendation.)

Parisi v. Broward County, 769 So.2d 359 (Fla. 2000)

Civil contempt sanctions; review of contempt power.

M. MISCELLANEOUS CASES:

Supreme Court Reprimand of Judge

In re Inquiry Concerning Perry, 641 So.2d 366 (Fla. 1994). Public reprimand of judge based primarily on the manner in which he exercised his contempt powers.

JQC Referrals for Failure to Follow Contempt Law

“It is the ethical responsibility of all judges in the State of Florida to know the law and to faithfully follow it. The continued failure to apply the law correctly in these hearings in the future will require us to refer the offending judge, or judges, to the Judicial Qualifications Commission for

consideration of appropriate disciplinary measures. Garcia v. Manning, 717 So.2d 59 (Fla. 3d DCA 1998); Conley v. Cannon, 708 So.2d 306 (Fla. 2d DCA 1998); Blalock v. Rice, 707 So.2d 738 (Fla. 2d DCA 1997).

OTSC Requirement

Error to fail to issue Order to Show Cause even though no objection made. However, the necessity for issuance of an OTSC can be expressly waived. Persoff v. Persoff, 589 So.2d 1007 (Fla. 4th DCA 1991).

Attorney's Fees

Trial court has inherent authority to order an attorney, who is an officer of the court, to pay opposing counsel's fees without a finding of contempt. Lathe v. Florida Select Citrus, Inc. 721 So.2d 1247 (Fla. 5th DCA 1998).

What Is Contempt?

Criminal defense attorney's failure to disclose his client's whereabouts to law enforcement did not constitute contempt of court; attorney did not violate any court order or engage in any offensive behavior in presence of court. Eubanks v. Agner, 636 So.2d 596 (Fla. 1st DCA 1994).

Burden of proof-- criminal contempt

Evidence did not sustain finding that former husband was guilty of indirect criminal contempt of court for violating domestic violence injunction with respect to appearance in newspaper of personal notice addressing husband's former wife and her companion; there was no testimony as to who caused personal notice to appear in the newspaper other than state's contention that husband's name was printed at end of notice. Shields v. Shields, 636 So.2d 169 (Fla. 2d DCA 1994).