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ENFORCEMENT OF FAMILY LAW ORDERS BY CONTEMPT IN CALIFORNIA

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Contempt - General Concepts

A party subject to a valid court order who, with knowledge of the order and the ability to comply, fails to comply with the terms of the order is subject to a contempt adjudication and statutory contempt penalties (Ca Civ Pro §§ 1218 & 1219). As an enforcement remedy, exercise of the contempt power enables the court to compel compliance with its valid orders.

In a "civil contempt," the punishment is "remedial, and for the benefit of the complainant." In a "criminal contempt," the sentence is "punitive, to vindicate the authority of the court."

The face of the Judicial Council Affidavit for Contempt form expressly states "A contempt proceeding is criminal in nature" and advises the citee that "the possible penalties include jail sentence . . ." Consequently, at least one court concludes any contempt proceeding brought on the standard Judicial Council contempt form is per se a criminal (not a civil or "remedial") contempt matter.

Family law orders and **judgments** are enforceable by contempt unless punishment by contempt would violate the constitutional guaranty against imprisonment for nonpayment of "debt" (U.S. Const., Amend. XIII; Ca Const. Art. I, § 10). However, an order or judgment is not a "debt" within the meaning of the constitutional guaranty against imprisonment for "debt" simply because it requires the payment of money. As developed below, most (but not all) family law orders and judgments are deemed based on a law-imposed obligation (not "money judgments in civil actions for debts") and thus are enforceable by the court's contempt power.

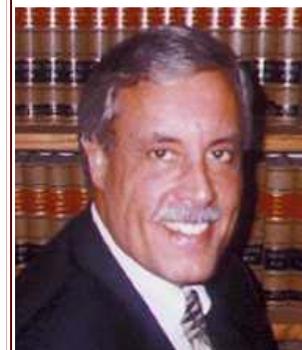
Orders Enforceable By Contempt

Support Orders: Child, spousal and family support orders are based on an obligation arising out of marriage and parentage and are imposed by law. They are not money judgments in civil actions for the payment of a "debt" within the meaning of the constitutional guaranty against imprisonment for debt and thus clearly are enforceable by contempt.

Child Custody & Visitation Orders: Child custody and visitation orders do not impose a "debt" obligation. Thus, e.g., the court may invoke its contempt power against a parent who unjustifiably interferes with the other parent's court-ordered visitation rights or violates an injunction restraining relocation with the children.

Attorney Fees/Costs Orders: Need-based attorney fees and costs are awardable by statute in marital proceedings (Ca Fam §§ 2030/2032). The award is based on a law-imposed obligation (not arising out of a money judgment for a "debt") and thus is enforceable by contempt.

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Property Division Orders: A spouse who refuses to relinquish a specific item of property or to pay over a portion of a specific fund of money pursuant to a community property division order is subject to enforcement by contempt. The obligation is "law-imposed" (not a "debt") because based on the parties' statutory right to an equal division of community property upon termination of marital status (Ca Fam § 2550 et seq.).

Restraining Orders & Family Court Protective Orders: The court may properly invoke its contempt power to compel compliance with valid protective orders and restraining orders issued in a domestic relations proceeding. [Ca Penal § 273.6 (misdemeanor penalty for intentional and knowing violation of Ca Fam § 6218 protective orders)]

Failure To Comply With "Declaration Of Disclosure" Requirements: A spouse who has complied with the statutory "declaration of disclosure" requirements in marriage dissolution proceedings (Ca Fam § 2100 et seq.) has various statutory remedies against the other spouse who has failed to comply. One such remedy is a motion to compel a further response (Ca Fam § 2107(b)(1)). If the noncomplying spouse fails to file a sufficient response, the complying spouse may seek monetary sanctions "in addition to any other remedy provided by law" (Ca Fam § 2107(c))--including an OSC re Contempt]

Orders Enforceable By Contempt

Marital Settlement Agreement Obligations Not Merged Into Judgment: Obligations arising out of a marital settlement agreement are not enforceable as court orders unless "merged" or incorporated in the judgment. Consequently, breach of a marital settlement agreement (or any other contract) is not remediable by contempt where the defaulted obligation was never made a part of the judgment.

Marital Debt Liability Orders: An order pursuant to a division of the community estate requiring a spouse to make specified payments in satisfaction of a community liability is a "debt" not enforceable by contempt . . . unless the obligation is an integral part of a support order.

Statute Of Limitations

The contempt remedy for noncompliance with a court order made under the Family Code is subject to a statute of limitations (Ca Civ Pro § 1218.5)

Support Orders: For an alleged failure to pay child, family or spousal support, the contempt action must be commenced no later than three years from the date the payment was due. [Ca Civ Pro § 1218.5(b)]

A contempt cause of action for nonpayment of support may be broken down into separate "counts" for each month payment was not made in full. Thus, the fact the obligor stopped (or fell short in) payments over three years ago is not fatal to a contempt remedy: Each month within the three-year period for which payments were in default is separately punishable as separate counts of contempt. [See Ca Civ Pro § 1218.5(a)]

Other Family Court Orders: A contempt action to enforce any other order made under the Family Code must be brought within two years "from the time that the alleged contempt occurred." [Ca Civ Pro § 1218.5(b)]

Due Process Protections

If the contempt proceedings are criminal in nature, the U.S. Constitution guarantees the citee the full panoply of due process safeguards afforded criminal defendants.

Notice Of The Charge: The citee must be formally notified of the charge and of the time and place for the court hearing on the charge. Service of the notice must be effected in a manner authorized for service of summons; an OSC re Contempt is not properly served by the more liberal Ca Civ Pro § 1010 et seq. methods for service of motions or OSCs generally.[Ca Civ Pro § 1016; Ca Fam § 215]

Opportunity To Be Heard: Unlike ordinary motion and OSC proceedings, contempt cannot be decided on the moving and responding papers alone. The citee is entitled to a formal hearing as a matter of right and must be allowed to testify, to call and cross-examine witnesses, and to introduce evidence in defense of the charge. [Ca Civ Pro § 1217]

Right To Counsel: Contempt citees clearly have a due process right to be represented by an attorney they have retained for that purpose. Additionally, where the potential penalty includes a jail sentence, an indigent citee has the due process right to court-appointed counsel at county expense.

Application Of The 5th Amendment: The citee must be afforded the testimonial privileges of a criminally accused: He or she is entitled to exercise the privilege not to be called as a witness, and can decline to answer specific questions, claiming the privilege against self-incrimination. These privileges are not waived by filing an answer to the charging declaration.

Criminal Burden Of Proof: As a general rule, the citee also has the same rights as a criminally accused to proof of a prima facie contempt case by competent evidence beyond a reasonable doubt. The contempt must be discharged if the charging party fails to carry this burden on each element of the prima facie case.

Right To Jury Trial: The Sixth Amendment to the U.S. Constitution guarantees the right to a jury trial for all "serious" criminal contempts--i.e., when the contempt is punishable by more than six months' imprisonment.

The right to a jury trial under the California constitution is broader: It extends to all criminal prosecutions above an "infraction." Thus, there is a right to jury trial in criminal contempt proceedings that carry a maximum penalty comparable to a felony or misdemeanor (six months' imprisonment plus \$1,000 fine) regardless of what the Legislature has labeled the offense.

However, there is no right to jury trial where the court invokes its general summary contempt power under Ca Civ Pro § 1209 and imposes only a maximum five-day sentence and/or \$1,000 fine (Ca Civ Pro § 1218(a)). That punishment is not akin to a misdemeanor penalty and thus does not trigger the state constitutional jury trial provision.

If the court proceeds to trial on contempt charges without a jury, and the citee has not expressly waived the right to a jury, the maximum sentence that may be imposed is 180 days (six months). A longer sentence in violation of the jury trial right will not invalidate the contempt conviction or require retrial by jury; but the court must reduce the sentence to six months or less.

Double Jeopardy: Constitutional "double jeopardy" protection guarantees that a person will not be subject to duplicate punishment or duplicate prosecution for the same criminal offense (U.S. Const., 5th Amend; see also Ca Penal § 1387). Double jeopardy protection fully attaches in a nonsummary criminal contempt prosecution to the same extent as it does in other prosecutions for a criminal offense.

Initiating Contempt Proceedings

Contempt proceedings to **enforce a civil judgment** or order are commenced by presenting a prescribed "charging affidavit" to the court. [Ca Civ Pro § 1211(a)] Based on the affidavit (which recites the facts constituting the prima facie contempt), the court must then **issue and sign an order to show cause** directing the alleged contemnor to appear and be heard on the charge at a specified date and time. [Ca Civ Pro § 1212]

In **family law cases**, the contempt proceedings must be initiated by filing and serving an **FL-410** Order to Show Cause and Affidavit for Contempt, along with an applicable Affidavit of Facts Constituting Contempt (**FL-411** or **FL-412**). These forms have been adopted for mandatory use.

The facts constituting the contempt must be alleged by an "affidavit of facts," setting forth the type of order violated, the date the order was issued, how the order was violated, and when the violation occurred. Jurisdiction to adjudicate a contempt ordinarily exists only if the charging affidavit alleges evidentiary facts showing a prima facie case of contempt (as developed below). [Ca Civ Pro § 1211(a)] However, a deficient charging affidavit may be amended at any stage of the proceeding (Ca Civ Pro § 1211.5(b)). And, if there is no objection to the sufficiency of the charging affidavit, jurisdiction to adjudicate contempt may be established by facts proved at the contempt hearing (in which case, the court "shall cause the affidavit or statement to be amended to conform to proof"). [Ca Civ Pro § 1211.5(a)]

Elements Of A Cause Of Action For Contempt:

The facts generally necessary to establish a prima facie contempt of a family law order are: (i) rendition of a

valid order; (ii) the citee's knowledge of the order; and (iii) the citee's willful disobedience of the order.

Valid Order: A contempt adjudication cannot stand if the underlying order is invalid. The charging affidavit must identify the underlying order by date of entry and type. For purposes of sustaining a prima facie case, the court can presume validity unless the order is void on its face; the citee thus normally bears the burden of showing invalidity, either as an affirmative defense in the answer or by motion to discharge the contempt citation.

Knowledge Of The Order: The charging affidavit must set forth facts showing the citee's notice or knowledge of the underlying order (a jurisdictional prerequisite to a valid contempt adjudication).

Knowledge can be shown by personal service of a copy of the order, the citee's presence in court when the order was made, the citee's signature on a stipulation upon which the order was based, or proof that the citee previously sought relief related to the order (e.g., modification).

Order Willfully Disobeyed: To complete a prima facie case of contempt, the charging party must allege facts showing the citee's willful disobedience of the underlying order.

Support Cases: In making a family law support or attorney fees/costs order, the family court necessarily must determine the obligor's ability to pay (Ca Fam §§ 4320(c) (spousal support), 4053(c),(d) (child support), 270, 271(a), 2030(a) (attorney fees and costs)). Since the court has already determined the obligor/citee's ability to pay the underlying order, present ability to pay is not an element of a prima facie contempt case predicated on nonpayment. Rather, inability to pay is an affirmative defense that must be proved by the citee.

Custody/Visitation Cases: A custodial parent can be held in contempt of a visitation order only when he or she has sufficient control over the child so as to have the ability to make the child available for visitation. This is a fact question in each case. A parent probably has sufficient control over minor children of "tender years" to compel them to visit with the other parent; failure to make such children available for visitation probably would be punishable as contempt. But the result may be otherwise when the children get older and it becomes more difficult to exert parental "control." If a teenage child refuses to visit with the noncustodial parent, through no fault of the custodial parent, the custodial parent lacks the ability to comply with the order and cannot be held in contempt; in these cases, the noncustodial parent is probably left without a remedy.

Filing And Service

Filing With Court Clerk: The completed OSC and affidavit form(s) are taken to the court clerk, who will obtain the judge's signature on the OSC and then file the papers.

Personal Service Required: Conformed copies of the charging affidavit and OSC must be served on the citee at least 21 calendar days before the hearing (Ca Civ Pro § 1005(b)). The citee must be served personally, in a manner authorized for service of summons. Service on the citee's attorney will not suffice in a contempt proceeding. [Ca Civ Pro §§ 1015, 1016; see also Ca Fam § 215 (postjudgment proceedings)]

Exception Were Citee Conceals Him/Herself: "Substitute service" on the citee's attorney of record might suffice where the citee has concealed himself or herself to avoid service of the contempt papers. [Shibley v. Super.Ct. (1927) 202 Cal. 738, 742-743, 262 P 332, 334; see also Cedars-Sinai Imaging Med. Group v. Super.Ct. (Moore), supra, 83 Cal.App.4th at 1286, 100 Cal.Rptr.2d at 324--personal service on citee required "(u)nless the citee has concealed himself from the court"] However, a charging party seeking to invoke this exception to personal service must provide the court with evidentiary facts showing reasonable efforts to ascertain the citee's whereabouts and the efforts taken to attempt service on the citee.

Responding To The Charge

The citee may answer the charge, admitting or denying it, or may move for a discharge without answering.

In response to the contempt charge, and before the hearing, the citee can file an opposing affidavit (declaration under penalty of perjury; Ca Civ Pro § 2015.5), questioning the adequacy of the moving party's

charging affidavit or raising a sufficient "excuse or justification" in defense. The opposing affidavit together with the charging affidavit frame the issues to be tried in the proceeding.

Common Defenses: Contempt charges are commonly defended on the ground that any failure to comply with the underlying order was not "wilful" because the citee lacked the ability to comply. The citee does not meet this burden, however, with conclusory declarations. He or she must set forth evidentiary facts showing why complete performance was impossible. Moreover, default under the order will not be excused if the responding allegations disclose that the inability to comply was self-imposed for the purpose of avoiding compliance.

Note also that disobedience of a lawful court order is not excused by the fact the citee was acting on advice of counsel. Moreover, attorneys who encourage such defiance can be held in contempt themselves for their own recalcitrant conduct.

Motion For Discharge: In lieu of an answer, the citee can move for a discharge of the contempt citation on the following grounds:

- o The charging affidavit does not make out a prima facie case of contempt.
- o The order expired before the alleged violation. (But if the order was in effect at the time of the violation, discharge will not be granted simply because it has expired or been superseded at the time of the contempt proceedings)
- o The same charge was previously made on the same facts and the citee was discharged on the merits.

The Hearing

Appearance At The Hearing: Normally, either the citee or his or her attorney must appear at the hearing; and, if neither appears, a bench warrant can issue to secure their presence. But it is error for the court to proceed in the absence of the alleged contemnor or his or her attorney, unless it finds the OSC and Affidavit for Contempt forms were validly served and the failure to appear was voluntary. [Ca Civ Pro § 1217]

Admissible Evidence: The charging and opposing affidavits are hearsay and thus inadmissible over objection. [Ca Evid §§ 1200(a),(b)]

Contempt Penalties

The penalties upon a contempt adjudication are prescribed by Ca Civ Pro §§ 1218 and 1219.

Mandatory Community Service Or Imprisonment: Upon a contempt adjudication for failure to comply with a court order made under the Family Code, the court "shall order" community service and/or imprisonment as prescribed by Ca Civ Pro § 1218(c).

First Contempt: Upon a first finding of contempt, the contemnor must be ordered to perform community service of up to 120 hours, or to be imprisoned up to 120 hours (five days), for each count of contempt. [Ca Civ Pro § 1218(c)(1)]

Second Contempt: Upon a second finding of contempt, the contemnor must be ordered to perform up to 120 hours of community service, in addition to imprisonment of up to 120 hours (five days), for each count of contempt. [Ca Civ Pro § 1218(c)(2)]

Third Contempt: Upon the third or any subsequent finding of contempt, the contemnor must be imprisoned for up to 240 hours (10 days) and be ordered to perform up to 240 hours of community service, for each count of contempt. [Ca Civ Pro § 1218(c)(3)(A)]

The contemnor must also be ordered to pay an "administrative fee," not exceeding the "actual cost" of the contemnor's administration and supervision, while assigned to a community service program. [Ca Civ Pro § 1218(c)(3)(B)]

Calculating "Counts" Of Contempt In Support Nonpayment Cases: With regard to child, family or spousal support contempts, each month in which there was a default may be alleged as a separate count of contempt and punishment imposed for each count proved. [Ca Civ Pro § 1218.5(a)]

Read together with § 1218(c), above, this provision means that each count alleged in one charging affidavit may result in one "finding of contempt"; but that the specified community service and imprisonment penalties may be aggregated for each of the counts proved.

Example: One charging affidavit alleges five months' default in support payments, each as a separate count. If the citee has not yet been adjudicated in contempt of a Family Code order, proof of each count in a single proceeding will amount to a "first finding of contempt" under § 1218(c)(1); but the citee may be ordered to perform up to 600 hours of community service or be imprisoned for up to 600 hours (25 days).

Attorney Fees And Costs: In addition to the fine, community service and imprisonment penalties discussed above, a party (or party's agent) found in contempt for violating a court order "may" be ordered to pay the charging party's reasonable attorney fees and costs incurred in connection with the contempt proceeding. [Ca Civ Pro § 1218(a)]



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