

## UNDERSTANDING CONTEMPT

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### I. Introduction

Churchill said that “Russia is a riddle wrapped in a mystery inside an enigma.” He could have been describing contempt proceedings.

This paper addresses the methods for distinguishing between civil and criminal contempt and the procedures applicable to both.<sup>1</sup>

### II. Contempt in a nutshell<sup>2</sup>

There are only two forms of contempt: Direct and indirect. Direct contempts occur in the presence of the court, or so near thereto as to interfere with the court’s process. Direct contempts are punished in a summary proceeding, i.e. then and there. Indirect contempts require proof of the defendant’s willful and intentional violation of a court’s order. An indirect contempt may be either civil, criminal, or both. Facts that would justify a civil proceeding would normally support a criminal contempt action as well. But the opposite is not true because some forms of criminal contempt are so complete that purge is not available as required by a civil action.<sup>3</sup>

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<sup>1</sup> This paper is revised as of September 6, 2013. I thank Chief Justice Clark for advising me of the Order in *In Re Sneed*, 302 S.W.3d 825 (Tenn. 2010) which applies the Tennessee Sentencing Act to the contempt sentences imposed on Sneed.

<sup>2</sup> The Supreme Court released its decision in *Baker v. State* on September 6, 2013 holding that the Post-Conviction Procedure Act does not apply to criminal contempt convictions. The opinion is a concise statement of the law of civil and criminal contempt. It should be the starting point of any inquiry.

<sup>3</sup> For example, a party is enjoined from contacting his spouse at work. He calls the spouse several times in a single day. There is no way the husband can bring himself into compliance by “performing” some act required by the order. His conduct is complete. He should be charged with criminal contempt.

The relief being sought by the petitioner determines whether the proceeding for an indirect contempt is civil or criminal. If compliance with the order at issue is impossible, then the act is complete and normally, a criminal contempt action is the proper one to pursue. But even if compliance is still possible, one might also bring a *separate* action as well for criminal contempt.

As usual, the devil is in the details. These details will be examined in depth, *infra*.

### **III. Direct and Indirect Contempts**

#### **A. Direct Contempts - Summary Proceedings**

Direct contempt is based upon acts occurring in the immediate presence of the court. This is commonly referred to as a ‘summary proceeding.’

Because the court has the inherent power to control its proceedings, summary contempt matters enjoy the fewest procedural safeguards, except in circumstances involving a personal attack on the court as discussed *infra*. *Black* at 398, *Bagwell, supra*, 826 -27.

##### **1. Notice Requirements for Summary Proceedings**

Summary means exactly that: no notice, no hearing, no kidding. Contempt may be punished *summarily* under T.R.Crim.P. Rule 42 *if the court certifies in writing* that it saw or heard the conduct

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Consider a father who fails to pay child support because he had to pay for his girl friend’s new breast implants. He is charged with criminal and civil contempt. During the criminal contempt hearing, the wife testifies that the defendant told her he had the money to pay support, but used it for his new girl friend. This would support a guilty verdict because it establishes that the defendant had the means of complying with the order when he failed to make the payment.

Under the civil proceeding, the court finds that the defendant is presently capable of paying the arrearage. Thus, the defendant can bring himself into compliance with the order. The punishment for civil contempt is confinement until the defendant complies with the order. The defendant immediately pays the arrearage. Thus, no confinement. The defendant, however, can be ordered to pay attorney fees and costs associated with the prosecution of the civil action, not the criminal action.

constituting the contempt, and it was actually committed in the presence of the court. Courts have held that misbehavior ‘so near to the court’ as to obstruct the judicial process is the same as “in the presence” of the court. Contempt may be imposed immediately without further hearings or other notices.

This is the purest form of criminal contempt. However, unless the court acts immediately, notice under Rule 42 must be used and a hearing conducted.

This was the issue presented in *Daniels v. Grimac*, 2010 Tenn. App. LEXIS 695. The court found that the trial court erred in exercising its summary contempt authority more than three weeks after citing the attorney for contempt.

The attorney was charged with an act of contempt on April 20, 2009. The trial court entered an order charging the attorney with contempt on April 23, 2009.

The actual hearing was set on June 12, 2009. Rather than provide a hearing for the attorney, the court summarily found the attorney guilty of a direct criminal contempt on April 20, 2009 for the attorney’s violation of the court’s pre-trial order.

On appeal, the trial court was reversed. When the imposition of punishment is deferred pending the conclusion of a trial, the need for summary proceedings decreases “and the need for a hearing increases.” The trial court tried to invoke its summary authority when it should have conducted a hearing under Rule 42.

The court cannot wait several weeks to conduct a hearing under summary procedures, and thereby, avoid the requirements imposed by Rule 42 for “indirect” contempts. *Daniel’s v. Grimac; supra; Watkins, ex rel Duncan vs. Methodist Healthcare System*, 2009 Tenn.App. Lexis 210

The court should strike while the iron is hot, otherwise Rule 42 must be followed. Imposition of the sentence can be delayed after a finding of contempt. *State v. Turner*, 914 S.W.2d 951 (Tenn. Crim. App. 1995).

If the behavior constitutes a personal attack on the court, then under T.R.Crim.P. Rule 42 another judge must hear the matter, and notice must be given to the defendant. *Daniels v. Grimac*.

### **B. Indirect Contempts - Notice Required**

For matters not occurring in the presence of the court, then proper notice must be given to the accused. *Daniels v. Grimac; supra; In re: Chandler*, 906 F.2d 248, 250 (6<sup>th</sup> Cir. 1990) [affording attorney opportunity to explain his reason for tardiness did not comply with the mandate of Rule 42]; *Bagwell, supra*.

Indirect contempt may be either a civil or criminal matter depending on the facts, e.g., failure to pay support may be indirect civil or criminal contempt because the “willfulness” element did not occur before the court. For indirect criminal contempts, the notice requirements are set out in Tenn. R. Crim. P. Rule 42(b) and F.R.Crim.P. 42.

Notice is also required for indirect civil contempts, e.g., failure to make timely support payments. *See*, Lawrence A. Pivnick *Tennessee Circuit Court Practice* § 3:19 at 290 (2005) [hereinafter *Pivnick*]; *Dargi v. Terminex International*, 23 S.W.3d 342, 345 (Tenn. App. 2000).

## **IV. Civil and Criminal Contempt - General Principles**<sup>4</sup>

### **A. Civil and criminal distinguished**

Criminal contempt is intended to preserve the power and vindicate the authority of the court. *Black v. Blount*, 938 S.W. 2d 394, 398 (Tenn. 1996). Civil contempt is typically brought to enforce private rights. *Black v. Blount*, 938 S.W. 2d 394, 398 (Tenn. 1996).

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<sup>4</sup> The decisions in *Black v. Blount*, 938 S.W.2d 394 (Tenn. 1996), *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000), and *Overnite Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005) should be read by anyone bringing a contempt action. *International Union v. Bagwell*, 512 U.S. 821 (1994) has been cited by Tennessee courts and presents a thorough discussion of the differences between civil and criminal contempt proceedings.

The decision in *McPherson v. McPherson*, 2005 Tenn. App. Lexis 795, 2005 WL 3479630 (opinion by Justice Koch when a member of the court of appeals) provides an excellent discussion of the difference between the two and the procedure for trying a civil and criminal contempt action.

### 1. Nature of Relief Determines Nature of Proceeding

The nature of the relief sought is determinative of the nature of the action. *Robinson v. Fulliton*, 140 S.W.3d 304, 309 (Tenn. App. 2003) *no pta.*; *International Union, v. Bagwell*, 512 U.S.821 (1994); *Overnite Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005).

The inquiry is whether the plaintiff is seeking compliance<sup>5</sup> with the order by confining the defendant until he purges himself of contempt, or seeks to punish the defendant for a specific willful violation of the order.

Where one seeks confinement to force compliance, this is civil because it is brought for the benefit of the plaintiff. *Ahern v. Ahern*, 15 S.W.3d 73, at 78-79 (Tenn. 2000). Where the offensive act is completed, and cannot be undone, then it should be prosecuted as criminal contempt because it is purely punitive and serves to vindicate the court's authority.

One must be aware that the same body of facts may support both a criminal and civil contempt action. *Bailey v. Crum*, 183 S.W.3d 383, 389 (Tenn. App. 2005) *pta den.* Where relief is sought in a

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<sup>5</sup> Too often, courts proceed with a hearing on the merits and then determine what punishment is appropriate and thus, declare the nature of the proceeding after the fact. It is the plaintiff's obligation to select the proceeding desired so that the proper notice is given to the defendant. Civil and criminal contempt are not mutually exclusive. But, the proceedings must be conducted separately.

*Storey v. Storey*, 835 S.W.2d 593, 600 (Tenn. App. 1992) *no pta* illustrates the point. A contempt proceeding was instituted without specifying whether it was criminal or civil. Not until the hearing concluded did the court decide to treat it as criminal contempt. No notice under Rule 42 was given. The conviction was reversed.

single pleading for both civil and criminal contempt, the pleading must be separated into two different actions. *McPherson v. McPherson*, 2005 Tenn. App. Lexis 795; 2005 WL 3479630 [trying civil and criminal contempt matters at the same time is fundamentally flawed.]<sup>6</sup>

Each must carry the relevant Notice to the defendant, and specify the punishment that might be imposed. For criminal contempt, the provisions of T.R.Crim.P. Rule 42 apply, and the defendant should be advised of the full panoply of rights. The civil notice should reference either § 29-9-104 or § 29-9-105 as the particular provision involved, and the possible penalty that can be imposed.

Consider the following example of the interplay between civil and criminal contempt matters. The defendant is ordered to pay \$1000.00 per month on the 1<sup>st</sup> of each month. The defendant has not made six payments and is \$6000.00 in arrears.

The plaintiff believes she has sufficient evidence to prove a willful noncompliance, and that the defendant has the current ability to comply with the order, and had the ability to comply at the time of

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No answer is filed to a charge of criminal contempt, just as no answer is filed to an indictment. Thus, when the two actions are improperly combined in a single pleading, the petitioner cobbles together a civil proceeding, where an answer is filed, with a criminal one, where no answer is required. This leaves the defendant with a Hobson's choice implicating his due process rights as the accused. Accordingly, one should move to require two separate petitions, with appropriate notices for each, and require that the criminal matter be tried first and concluded before proceeding with the civil action.

One should also insist that the court make a determination of guilt or innocence in the criminal matter. Thus, a decision is cast if the defendant chooses not to testify because his testimony might produce the necessary evidence to convict him. Once acquitted, then the defendant can testify and be required to testify. But, there are no "do-overs." And the inquiry is whether the defendant has the *current ability to comply with the order*, the essence of civil contempt.

each violation of the order. The remedies available to her are not mutually exclusive.

First, she can bring criminal contempt action, designating it as such and seeking punishment of a fine and confinement for violation of the order.

Second, she can bring an additional, but separate, action for civil contempt seeking to confine the defendant until he satisfies the arrearage. Accordingly, she files two petitions to cite the defendant, and gives the appropriate Notice for each.

The criminal contempt proceeding is tried first. Thereafter, the civil petition is tried.

If the court finds that the failure to make the six payments was willful beyond a reasonable doubt and the defendant had the ability to comply *at the time when compliance was due*, but did not, then the court can sentence the defendant to a fine of \$50.00 and 10 days for each violation and require that the sentences be served consecutively.<sup>7</sup> Both elements, willful violation of the order, and ability to pay at the time of the violation, must be proven beyond a reasonable doubt.

As for the civil contempt action, if the court finds *on the day of trial that the defendant has the ability to comply*, and the failure to pay when due was willful, then he can be confined, and fined \$50.00 per day until he purges himself of contempt.

Attorney fees cannot be imposed for bringing the criminal contempt if done by a private prosecutor. *Butler v. Butler, infra*. Attorney fees can be awarded as additional support for the spouse in the civil contempt proceeding, and may also be imposed if the MDA permits assessment of fees incurred to enforce the MDA for the benefit of the charging party. But fees cannot be imposed for bringing the criminal petition because criminal contempt is punishable by a fine and confinement only.<sup>8</sup>

In a matter involving an act that is complete, and purging is not an option, then the matter must be

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<sup>7</sup> The Sentencing Act applies in determining whether the sentences should run consecutively or not.

<sup>8</sup> The imposition of attorney fees will be discussed *infra*, including the decision in *Black v. Blount*.

brought as criminal contempt. Suppose the court has ordered that the defendant have no contact with the other spouse, and the defendant calls the spouse six times at work. These are completed acts and cannot be punished in any matter except in criminal contempt action.

The statutes and cases cited herein will provide the authoritative sources supporting the foregoing propositions.

## **V. THE SOURCES OF THE COURT'S CONTEMPT AUTHORITY**

### **A. Tenn. Code Ann. § 29-9-102 - Grounds For Contempt**

In Tennessee, the court's authority to punish for contempt is defined by statute.<sup>9</sup> Any proceeding, an award of damages, or imposition of a fine and confinement must be authorized by the statutory provisions. A court cannot go beyond the dictates of the statute.

Tenn. Code Ann. § 29-9-102 provides:

The power of the several courts to issue attachments, and inflict punishments for contempts of court, shall not be construed to extend to any except the following cases:

- (1) The willful misbehavior of any person in the presence of the court, or so near thereto as to obstruct the administration of justice;
- (2) The willful misbehavior of any of the officers of such courts, in their official transactions;
- (3) The willful disobedience or resistance of any officer of the such courts, party, juror, witness, or any other person, to any lawful writ, process, order, rule, decree, or command of such courts;
- (4) Abuse of, or unlawful interference with, the process or proceedings of

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Public Chapter 187 of 2013 creating Tenn. Code Ann. § 26-2-225, notice to judgment creditors, is discussed *infra*.



the court;

- (5) Willfully conversing with jurors in relation to the merits of the cause in the trial of which they are engaged, or otherwise tampering with them; or
- (6) Any other act or omission declared a contempt by law.

The statute defines six categories of contempt. The common nexus in all categories is *willfulness*. *State ex rel Paula Flowers v. Tennessee Trucking Association Self Insurance Group Trust*, 209 S.W.3d 602 (Tenn. App. 2006) *pta den.* [“*willfulness*” in the context of criminal contempt is different from “*willfulness*” in the context of civil contempt ]; *State v. Smith*, 2010 Tenn. Crim. App. Lexis 1061 [the term “*willfulness*” in criminal contempt means an act voluntarily and intentionally done and with the specific intent to do something the law forbids.]

In *In Re Sneed*, 302 S.W.3d 825 (Tenn. 2010), the court does equate “willfulness” with “intentional” as defined in Tenn. Code Ann. § 39-11-302(a) (2006).<sup>10</sup>

In the absence of proof that behavior is *willful*, then there can be no conviction for either civil or criminal contempt. *Black v. Blount*, 938 S.W.2d 394 (Tenn. 1996)

#### **B. Tenn. Code Ann. § 29-9-103 - Criminal Contempt**

Tenn. Code Ann. §§ 29-9-103 (a) and (b) provide that the punishment for criminal contempt may be confinement, fine, or both. The maximum period of confinement is 10 days and the maximum fine is \$50.00.<sup>11</sup>

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<sup>10</sup> Again, thanks to Chief Justice Clark for reference to the Sneed case, and accompanying Order which discusses the concept of “willfulness.”

<sup>11</sup> The court cannot require someone to undergo counseling as part of the punishment for criminal contempt for violating an order of protection. *Cable v. Clemons*, 36 S.W.3d 39, 45 (Tenn. 2001). Though the case was dismissed on appeal, consider the court’s action in imposing a sentence of 30 days for criminal contempt in *Minor Miracle Productions, LLC v. Starkey*, 2013 Tenn. Lexis 334, 2013 WL 2149878 (Memorandum Opinion, not for

Community service may not be imposed as part of the punishment. *Cansler v. Cansler*, 2010 Tenn. App. Lexis 76; *no pta.*

General Sessions courts have the same sentencing authority if the judge is licensed to practice law, otherwise, the limit is \$50.00. Tenn. Code Ann. § 16-15 -713 (2005).

Environmental and Metro Municipal courts have authority to impose a fine of \$10.00 and confinement for five days for contempt for failure to appear, except in cases involving parking tickets. Tenn. Code Ann. § 29-9-108.

### **1. Consecutive Sentencing**

Consecutive sentencing for multiple convictions of criminal contempt is allowed under our decisional authority. *Sliger v. Sliger*, 181 S.W.3d 684 (Tenn. App. 2005); *State v. Wood*, 91 S.W.3d 769, 776 (Tenn. App. 2002) . The Tennessee Criminal Sentencing Act does apply to sentences imposed for contempt. *In Re Sneed*, 302 S.W.3d 825 (Tenn. 2010). While *State v. Wood*, 91 S.W.3d 769 (Tenn. App. 2002) holds to the contrary, it is clear that the Act does apply, especially in deciding whether consecutive sentencing is appropriate. The Supreme Court addressed this issue in an Order issued in *Sneed*.<sup>12</sup>

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publication.) The trial court found the defendant guilty of wilful contempt and sentenced him to 30 days confinement. The court, however, provided that if the defendant complied with its orders, then the sentence would terminate upon compliance.

This opinion represents how the courts cobble together the civil and criminal contempt statutes to create hybrids. If guilty of civil contempt, the defendant is sentenced to jail until he complies. There is no specific period of incarceration. The keys are in his pocket; comply and be released. Criminal contempt is punishable by 10 days confinement, not 30. The petitioners filed a blanket petition alleging violation of all of the contempt statutes. Since the defendant was *pro se*, it is impossible to determine what the Court of Appeals would have done with a proper record before it.

<sup>12</sup> The order was never published by West and cannot be found in either WestLaw or Lexis. Nonetheless,

## 2. Right to Jury Trial

Under U.S. Supreme Court jurisprudence there is a right to trial by jury where the aggregate sentence imposed exceeds six months, but this exception does not apply to Tennessee contempt proceedings because the maximum for one offense is just 10 days regardless of how many offenses are committed. *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968); *Taylor v. Hayes*, 418 U.S. 488 (1974) [sentence of 4 and ½ years imposed upon attorney was reduced on appeal to no more than six months, thereby, avoiding the necessity of a jury trial; and while no personal attack was involved on the court, given the circumstances, another judge must hear the matter upon remand.]

In *Sliger v. Sliger*, *supra*, the court held that the defendant was not entitled to a jury trial even though his total sentence for violating an order of protection was 310 days. The *Sliger* court noted that while under *Codiposti v. Pennsylvania*, 418 U.S. 506 (1974), the defendants there were found to be entitled to a jury trial because their sentences were run consecutively, *Codispoti* did not apply.

In *Codispoti*, the contempts were found to be ‘serious’ because Pennsylvania, like many states, does not limit the punishment that can be imposed for contempt. In this respect, it is identical to federal law which sets no limits either.

In rejecting *Sliger*’s argument that *Codispoti* controlled, the court relied upon *Lewis v. United States*, 518 U.S. 322 (1996). In *Lewis*, the court held that a postal worker charged with two counts of mail obstruction, each carrying a maximum confinement of six months, was not entitled to a jury trial even if the sentences were run consecutively.

In reaching this conclusion, the Court determined that the offenses were ‘petty.’ The fact that the aggregate sentence could exceed six months did not make them ‘serious’ offenses. Applying *Lewis*, the court in *Sliger* found no problem with consecutive sentences.

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the Order holds that the Sentencing Act applies in deciding whether to impose consecutive sentencing in criminal contempt convictions.

The issue of a right to trial by jury where consecutive sentencing is imposed has not been addressed by the Tennessee Supreme Court. Because the right to trial by jury in Tennessee does not depend upon the classification of an offense as ‘petty’ or ‘serious,’ just how this would be resolved is uncertain where the aggregate sentences add up to serious jail time.

More probably than not, the Tennessee Supreme Court would adopt the analysis employed in *Lewis* because Tennessee’s denial of a right to trial by jury in contempt matters has been upheld in *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968) under a Sixth amendment analysis because the maximum sentence for a single offense is only a fine of \$50.00 and confinement for 10 days.

### **3. The Tennessee Post-Conviction Act**

The decision in *Baker v. State*, 2013 Tenn. Lexis 715, 2013 WL 4768309, holds that the Post-Conviction Procedure Act does not apply to convictions for criminal contempt. The court notes that a person “found guilty of criminal contempt” has not actually been convicted of a crime as required by the Act, only that the person has been “held in contempt.” Holding someone in contempt does not amount to a violation of the general criminal laws of the state.

While the Tennessee Post-Conviction Procedure Act does not apply to raise the issue of ineffective assistance of counsel, consider the decision in *Goldberg v. Maloney*, 692 F.3d 534 (6<sup>th</sup> Cir. 2012) where a lawyer was sentenced 18 months confinement for concealing assets and refusing to return unearned fees after being ordered to do so by an Ohio Probate Court.

Goldberg filed a 28 USC § 2241 petition for habeas relief. He argued that he had not been given the proper notice of what actual charge he was facing, and that he had ineffective assistance of counsel at the trial and appellate level. The court affirmed the denial of relief on the basis that Goldberg had procedurally defaulted on his claims. The merits of his claim were never addressed. Nonetheless, the door is not closed to the federal courthouse on ineffective assistance of counsel is an issue, provided the issue is not defaulted. A cursory reading of contempt appeals demonstrates just how serious sentencing

can be.

### **C. Tenn Code Ann. § 29-9-104 - Keys in the Pocket - Civil Contempt**

This statute is the one most frequently invoked in enforcing a court's order for the benefit of the petitioner.

Tenn. Code Ann. § 29-9-104. Omission to perform act.

(a) If the contempt consists in an omission to perform an act which it is yet in the power of the person to perform, the person may be imprisoned until such person performs it.

(b) The person or if same be a corporation, then such person or corporation can be separately fined, as authorized by law, for each day it is in contempt until it performs the act ordered by the court.

If it is a matter where the defendant can perform the act ordered, then he 'has the keys to the jail in his pocket' and can be confined until he performs the act. *International Union v. Bagwell*, 512 U.S. 821 (1994). This is designed to force the defendant to act.

This provision enables the court to punish for *civil contempt*, but only if the court makes an *express finding that at the time of the trial that the defendant has the present ability to comply with the order, e.g., pay the support due. Beard v. Beard*, 206 S.W.3d 463 (Tenn. App. 2006), *McPherson, supra* (court must make a specific finding at trial that the defendant willfully violated the order, and presently has the ability to comply with the order); *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000)

If the defendant does not have the *present ability to comply with the order, or purge himself of contempt*, then the court cannot sentence the defendant to jail for *civil contempt. Beard, supra* at 467; *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000)

What if the defendant has created the circumstances so that he cannot comply? It is axiomatic that a defendant cannot intentionally disable himself from complying with a court order. *Gossett v.*

*Gossett*, 241 S.W.2d 934 (Tenn. App. 1951). In such a case, the defendant can be charged with *criminal contempt*.

Not being able to comply because of past intentional behavior that makes current compliance impossible is criminal contempt, not civil contempt.

But what happens when at the conclusion of the civil contempt proceeding, the court determines that noncompliance was caused by the defendant willfully disabling himself from compliance, and the Rule 42(a) Notice was not given? If the case proceeded on the basis that it was civil contempt, then the petitioner will have to start over, file criminal contempt action, and serve the Rule 42 notice. What if the defendant has already testified?

Unless the defendant invokes the privilege against self-incrimination in the civil proceeding, which he ought to do if he knows that he willfully disabled himself from being able to comply, then the privilege is waived.

What if he invokes it immediately upon the filing of a civil contempt charge, and does so at trial? While the privilege can be invoked in a civil matter, the court may draw an adverse inference which will support a finding of willful failure to obey an order. *See, Akers v. Prime Succession of Tenn. Inc.*, 387 S.W.3d 495 (Tenn. 2012) [requirements before the court can draw an adverse inference where party invokes the privilege against self-incrimination.]

The invocation of the privilege suggests that the defendant has intentionally disabled himself from compliance. The petitioner may have to ferret out other evidence to prove criminal contempt. In criminal matters, one may not draw any adverse inference when the defendant remains silent.

Consider the decision in *Foster v. Foster*, 2007 Tenn. App. LEXIS 796 (Tenn. Ct. App. 2007).

The defendant willfully failed to pay support and had the means of doing so when the support was due. At the time of the hearing, however, the defendant could not comply with the order because he was unemployed.

Even though the petition alleged civil/and/or criminal contempt (the dreaded Siamese-Twins), the court determined that the matter should proceed on the basis of criminal contempt, and the appropriate Rule 42 notice was given by the court, and the defendant fully informed of his right to remain silent.

The petitioner proved that Mr. Foster willfully violated the support order. Mr. Foster testified that he had spent the money due the children for a new paint job for his motorcycle rather than pay support. Foster should have kept his mouth shut. He was found guilty on 18 counts, and sentenced to 180 days in jail.

The appellate court found that even though the petition was styled as one to find the defendant in civil contempt, criminal contempt, or both, the actual proceeding was for criminal contempt. It rejected the argument that the defendant was being tried for both at the time of the hearing. The appellate court found that the appropriate notice under Rule 42 was given.

This case demonstrates what happens by allowing the petitioner to assert both criminal and civil contempt allegations in a single pleading.

A civil and criminal contempt matter may not be heard simultaneously. *McPherson, supra*. They should be filed separately.

The real problem is that too many lawyers do not know the difference between the two and thus, present the court with the Siamese-Twins of civil and criminal contempt in a single pleading, e.g., Petition to Cite The Defendant With Civil/And/Or Criminal Contempt, as noted in *Foster*.

When presented with Siamese - Twins, the defendant should move the court to require the petitioner to separate the pleading into two petitions each citing the relevant facts that support an allegation of civil or criminal contempt. The criminal contempt must be tried first.

**D. Tenn Code Ann § 29-9-105 - Performance of Forbidden Act - Civil Contempt**

This civil contempt statute provides for the award of damages in order to make the plaintiff whole. This distinguishes this statute from § 29-9-104 which does not allow the imposition of damages.

Tenn. Code Ann. § 29-9-105 provides that: If the contempt consists in the performance of a forbidden act, the person *may be imprisoned until the act is rectified by placing matters and person in status quo, or by the payment of damages.*

This provision permits the imprisonment of the defendant until the “act is rectified by placing matters and person in status quo, or by the payment of damages.” This allows the court to assess damages for the defendant’s misbehavior constituting civil contempt. *Overnite Transportation Co. v. Teamsters Local Union No. 480*, 172 S.W.3d 507 (Tenn. 2005).

One must be careful not to confuse the remedy under § 29-9-105 with the “keys in your pocket” remedy under § 29-9-104. They seem similar but they are not because § 29-9-105 contemplates a finding that the injured party can be restored to the status quo. A proceeding under § 29 -9 -105 can result in the awarding of damages and attorney fees. *Overnite Transportation, supra; Reed v. Hamilton*, 39 S.W.3d 115 (Tenn. App. 2000)

If the act is complete, and cannot be undone, i.e., restore one to the status quo, then it is criminal contempt subject to a fine and confinement, but not damages, or attorney fees. If compliance is still possible then the proceeding is under § 29-9-104. *Law vs. Law*, 2007 Tenn. App. LEXIS 655. [wife could not be charged under Tenn. Code Ann. § 29 - 9 -105 and ordered to pay damages for violation of order requiring counseling of child.]

#### **E. Tenn. Code Ann. § 26-2-225 - Debtor’s Obligation to Advise Creditor**

This is a newly created provision for the benefit of creditors. The statute, Public Acts of 2013 Chapter 187, imposes an affirmative duty on a debtor whose wages are subject to garnishment to notify the judgment creditor within 10 days of obtaining any new employment. A debtor who fails to comply is



“in contempt of court.” Upon the “court making a determination of contempt, may be punished the same as contempt of court in a judicial proceeding.” Notification is considered timely “if mailed less than ten (10) days from the date of obtaining new judgment.”

This is a drastic departure from the usual rules regulating contempt proceedings. First, the statute does not indicate when the court’s order requiring this notification is actually entered and served on the defendant. Normally, contempt involves disobedience to an order.<sup>13</sup> Saying that a debtor’s failure to advise the creditor about the debtor’s current employment is not the same as finding a violation of an order.

The creditor does not become a judgment creditor until a judgment is entered, not just by filing suit. As written, it appears that the statute operates in the future and a garnishment has been issued. Second, the statute makes no provision for the court to enter an order or how to serve that order if a default judgment is entered.

Third, the statute says that the debtor can be punished in the same way as in a judicial proceeding. Really? Is that by summary proceedings, indirect civil proceedings, or indirect criminal proceedings?

Does the creditor file a petition to cite the defendant for contempt, and if so, should that be for criminal or civil contempt, or both. If the action is brought by a civil contempt proceeding, then the court cannot punish the defendant if the defendant complies by advising the creditor of his new job. Both civil and criminal contempt proceedings are problematic because of the failure to provide for entry of an order and service of the order on the defendant.

Other objections to this statute include imprisonment for debt in violation of Article I § 18 of the

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*See, Sloan v. Poff*, 2011 Tenn. App. Lexis 153, 2011 WL 1166845, contempt presupposes a violation of a pre-existing court order.

Tennessee Constitution; and violation of the separation of powers doctrine under Article II §1 and 2 of the Tennessee Constitution.

## **VI. THE CONDUCT OF THE HEARING - PROCEDURAL ISSUES**

### **A. Notice Requirements - Contents**

#### **1. Summary Proceedings**

Do not pass Go, do not collect \$200.00, go directly to jail if the matter involves summary contempt. There is no need to provide a hearing, trial, or an attorney. The court is empowered to protect the integrity of its proceedings in a summary fashion. *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000).

However, unless the finding of contempt and the punishment are decided immediately, then the procedural safeguards of T.R.Crim.P. Rule 42 and F.R.Crim.P. Rule 42 apply. *Ahern v. Ahern*, *Black v. Blount*, *In Re Dellinger*, 461 F.2d 389 (7<sup>th</sup> Cir. 1972); *Bagwell*, *supra*.

#### **2. Proceedings Requiring Notice**

##### **a. Criminal Proceedings**

Unless it is a summary proceeding, both state and federal law require by Rule as well as decisional authority that notice be given to the accused. T.R.Crim.P. Rule 42; F.R.Crim.P. Rule 42. *McLean v. McLean*, 2010 Tenn. App. Lexis 365 [notice to defendant insufficient, conviction vacated.]; *Sprague v. Sprague*, 2013 Tenn. App. Lexis 398; 2013 WL 3148278 [notice insufficient, conviction reversed.]

Under T.R.Crim.P. Rule 42, notice must be given *in open court by the court to the accused*, T.R.Crim.P. 42 (b), or by *the district attorney general or an attorney appointed by the court for that*

*purpose by an order to show cause or an order of arrest.*

The written notice must always be as specific as possible regarding the factual allegations alleged to constitute contempt.

#### **b. Civil Proceedings**

In civil contempt, notice is given by filing a petition citing the defendant for contempt, and alleging the specific facts constituting contempt. If the case is still pending before the court, then the action can be commenced by motion and notice served on opposing counsel or the party, if unrepresented. T.R.Civ.P. Rule 5.02. ; *Newman v. Newman*, 2005 Tenn. App. LEXIS 398 [Rule 5 provides for notice of civil contempt matters by service by mail in pending cases]; *Pivnick, supra*.

If the case is closed, as in a domestic matter concluded with a final decree entered, then a new petition is filed and personal service must be made on the respondent pursuant to T.R.Civ.P. Rule 4. *Battleson v. Battleson*, 2010 Tenn. App. Lexis 407 [service on prior attorney is invalid after case is closed.]

Providing the incorrect notice is one of the more common areas where reversal is likely to occur. The court must ensure that the proper notice is given. The court should not be swayed by any title given the petition because more probably than not the attorney may not be sure whether he is pursuing civil contempt, criminal contempt, or both.

#### **B. Answering the Petition**

If the matter is criminal, then no answer is filed, the defendant enters a plea of not guilty.

If the petition consists of criminal and civil allegations, then the petition must be redrafted into two separate petitions alleging the matters constituting criminal contempt, and those amounting to civil contempt. *McPherson v. McPherson, supra*.

The appropriate notice must be given for each and the criminal matter must be tried first.<sup>14</sup> Discovery in the criminal matter is controlled by T.R.Crim.P. Rule 16.

In civil contempt, the defendant should file an answer setting forth any defenses that show that failure to comply was not willful.

### **C. Who Prosecutes?**

In summary matters, the judge is the prosecutor.

However, if the conduct involves a personal attack on the court, then another judge must hear the matter. Both state and federal versions of T. R. Crim. P. Rule 42 apply. Personal attacks on the court cannot be adjudicated as summary contempts.

The petitioner's attorney prosecutes civil contempt proceedings. But Tennessee law and federal law differ on who prosecutes criminal contempt. Under federal law, the prevailing view is that the U.S. Attorney must prosecute all criminal contempts.

*Young v. United States*, 481 U.S. 787 (1987) holds that appointment of party's attorney to prosecute a criminal contempt is improper. Thus, appointment of a party's attorney to prosecute purely criminal matters in federal proceedings is prohibited.

But in Tennessee, *Wilson v. Wilson*, 984 S.W. 2d 898 (Tenn. 1998) allows appointment of a private party's attorney to prosecute criminal contempt. The *Young* decision should not be read as controlling.<sup>15</sup> *Black, supra*, notes that the better practice is to ask the district attorney general to prosecute

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<sup>14</sup> *Sprague v. Sprague*, 2013 Tenn. App. Lexis 398, 2013 WL 3148278 provides a survey of cases

reversed due to the failure to provide the notice required by Rule 42. The case also provides an excellent summary of the differences between civil and criminal contempt.

<sup>15</sup> Remember that in federal court, the punishment for contempt can be severe and measured in years.

before appointing private counsel.

#### **D. Payment of Attorney Fees**

##### **1. Civil Contempt - Element of Damages**

###### **a. Tennessee**

In Tennessee, the petitioner is entitled to recover attorney fees associated with the bringing of a successful civil contempt proceeding under Tenn. Code Ann. § 29-9-105, but not under an action brought pursuant to § 29-9-104.<sup>16</sup> *Overnite Transportation Company, supra, Reed v. Hamilton*, 39 S.W.3d 115 (Tenn. App. 2000) *pta denied*; *XL Sports, Ltd. v. Lawler*, 2007 Tenn. App. Lexis 623 [agreement to pay attorney fees survives the underlying action even if the underlying action is dismissed; civil contempt is a separate action which does not depend upon principal action for enforcement.]

The opinion in *XL Sports, Ltd.* contains an excellent discussion of the differences between coercive civil contempt and civil contempt actions brought for damages.

Where the matter involves the recovery of support for the spouse or child, then fees are recoverable on their behalf. *Tenn. Code Ann.* § 36-5-103(c). But remember, a criminal contempt action is

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Where the punishment exceeds six months, a federal defendant is entitled to a jury trial. Even so, once convicted, there is no limit on the punishment that can be imposed. Accordingly, the prosecution of such matters are more properly left to the judgment of the U.S. Attorney.

The U.S. Supreme Court has not yet addressed whether state provisions allowing for the appointment of a private prosecutor implicates due process considerations.

<sup>16</sup> Note that § 29-9-104 is the “keys in your pocket” provision where compliance is still possible.

Whereas, § 29-9-105 allows the defendant to restore the plaintiff to the status quo by payment of damages.

not for the benefit of the petitioner, but for the benefit of the court.

Fees may be awarded through either the MDA typically providing for the recovery of fees to a party bringing an action to enforce the decree or MDA, or pursuant to generally recognized principles followed by the courts. *Dalton v. Dalton*, 858 S.W.2d 324, 327 (Tenn. App. 1993) [court has discretion to award attorney fees to the custodial parent in bringing successful claim for child support]; *Huntley v. Huntley*, 61 S.W.3d 329,341 (Tenn. App. 2001) [attorney fees on appeal can also be assessed; if assessed on appeal, matter should be remanded to trial court for determination of the amount.]

#### **b. Federal Court**

In federal court there is no statutory counterpart to § 29-9-105. However, federal courts have held that a petitioner is entitled to recover attorney fees as part of its damages in prosecuting civil contempt. *Thompson v. Johnson*, 410 F.2d 633 (E.D. Pa. 1976).

### **2. Criminal Contempt**

No attorney fees can be awarded to the private attorney representing a party for the prosecution of criminal contempt. *Butler v. Butler*, 1995 Tenn. App. Lexis 749 [ the penalty for criminal contempt is established by statute, and it does not permit the award of attorney fees.] Some courts, however, have relied upon Tenn. Code Ann. § 36-5-103(c) as authority to award fees in criminal contempt matters where support of a spouse or child is involved.

This approach is problematic because the statute refers to enforcement of support obligations, not punishment of the defendant. Thus, it would seem to apply only to civil contempt proceedings. *Wilkinson v. Wilkinson*, 2011 Tenn. App. LEXIS 642 [ Tenn Code Ann. § 36-5-103(c) provides basis for award of attorney fee in prosecuting a criminal contempt.]

Similarly, a provision in the MDA providing for fees when an action is brought to enforce the

MDA typically refers to obtaining a benefit for one of the parties. Criminal contempt involves the defendant and the court; there is no benefit for the other party, other than the vicarious satisfaction of seeing a former spouse jailed. This is an issue that the Tennessee Supreme Court should address in order to resolve the apparent conflict in the statutes. As it stands now, courts has cobbled the criminal statute with a civil statute to create a new remedy not specifically authorized by the criminal contempt statute. The issue will gain the attention of the Tennessee Supreme Court only if defense counsel raise the issue before the trial court and make the appropriate argument on appeal.

The decision in *Black v. Blount, supra* is not to the contrary because Black was appointed by the court to represent the court's interests, and not those of a private litigant. The *Black* court reserved decision on the precise question. In *Black*, the better practice would have been for the trial court to have requested that the contempt matter be prosecuted by the district attorney general.

## **E. The Right To Counsel - Applies to Civil and Criminal Proceedings**

### **1. Current Status of The Right to Counsel in Contempt Matters**

If indigent, the defendant is entitled to the appointment of counsel. Whatever disagreement may have existed in the past concerning the right to counsel in a civil contempt action, the matter has been put to rest by the Tennessee Supreme Court by adoption of Rule 13 of the Tennessee Supreme Court Rules. Supreme Court Rule 13 Section 1 (d)(1)(B) provides that counsel shall be appointed for all indigent defendants charged with contempt where the defendant is in jeopardy of incarceration. Appointed counsel is entitled to a maximum fee of \$500.00. Rule 13 Section 2 (c)(1) and (d)(2)(A). *See, State ex rel. Creighton v. Creighton*, 2011 Tenn. App. 173 [criminal contempt defendant entitled to appointed counsel pursuant to Supreme Court Rule 13 Section 1(d)(1)(B).]

Just a few states do not require counsel in civil contempt matters: Maine, New Hampshire, New Mexico, Florida, and South Carolina. The United States Supreme Court has held in *Turner v. Rodgers*,

564 U.S. \_\_\_\_; 131 S.Ct. 2507 (2011) that an indigent defendant may be entitled to the appointment of counsel in civil contempt proceedings as a matter of due process. Where the petitioner is represented by counsel, under *Turner*, the defendant should be appointed counsel. *Turner* discusses the framework for determining under what circumstances counsel should be appointed. But for the purposes of Tennessee law, indigent defendants are always entitled to appointed counsel.

## **F. The Burden of Proof**

### **1. Criminal Proceedings**

In any criminal contempt proceeding, the burden of proof is beyond a reasonable doubt, the same as in any criminal matter. This means that in proving criminal contempt the petitioner must show that the respondent's failure to comply with the order was willful and that the respondent had the ability to comply but chose not to comply. *Ahern, supra*; *State ex rel. Dotson v. Howard*, 2013 Tenn. App. 350, 2013 WL 2326508 [conviction reversed, evidence insufficient to establish that violation of order was wilful.]

It is not sufficient to show only that there was an order, and the respondent did not comply with the order. *Huffnagle v. Huffnagle*, 2005 Tenn. App. LEXIS 700 [a 180-day sentence vacated, the wife failed to prove beyond a reasonable doubt that former husband willfully failed to pay support; there was no evidence that the defendant could have met his obligations under the order at the time he failed to make the payments, and that the failure was willful.]<sup>17</sup>

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<sup>17</sup> The *Huffnagle* opinion should be read in its entirety. During the hearing, the defendant testified in a limited fashion, but then asserted his 5<sup>th</sup> Amendment right against self-incrimination. Query: what was he doing testifying at all? He could have asserted his privilege.

The wife's proof consisted of proving the order of support and the fact she had not been paid. There was no proof that the defendant had the ability to make the payments. Moreover, the defendant was remarried, and his lifestyle



## 2. Civil Proceedings

In civil contempt, the burden is on the petitioner to show by the preponderance of the evidence that the respondent has failed to comply with the order; this makes out a *prima facie* case for civil contempt.<sup>18</sup>

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could have been maintained by his new wife's earnings.

If this matter had been prosecuted as a civil contempt action, and it should have been, the wife might have been able to make a recovery because in a civil contempt proceeding the burden of proving inability to comply rests with the defendant. If the husband asserts the privilege in the civil contempt proceeding, then the court is free to draw the adverse inference.

There is no indication whether discovery had occurred prior to the trial. More problematic is that fact that the original petition was brought as a civil contempt, then later amended it to make it criminal contempt.

Once a witness testifies about the details of the subject matter at issue, the witness may not later refuse to testify about the details by invoking the right against self-incrimination. *Mitchell v. United States*, 526 U.S. 314 (1999) [the right is waived for the scope of the matters to which the witness testifies]; *Haas v. Haas*, 2002 Tenn. App. Lexis 510.

The claim must be invoked at the outset. Otherwise, once the defendant starts answering questions, he cannot decide to stop later. Further, the defendant cannot assert a blanket objection. He must object to each question so that the court can determine whether there is a basis for the privilege-objection.

<sup>18</sup> *Pivnick* suggests that *Givler v. Givler*, 964 S.W.2d 902 (Tenn. App. 1997) requires clear and convincing evidence. *Pivnick* § 3:19 at 290. *Givler* does not require that the proof be clear and convincing to convict one of civil contempt.

Once the *prima facie* showing has been made, however, then the defendant has the burden of proving an inability to comply with the order, or that noncompliance was not willful. *Mayer v. Mayer, supra; Leonard v. Leonard*, 341 S.W.2d 740, 743 (Tenn. 1971). Inability to comply with the order is a complete defense to a charge of civil contempt. *Gossett v. Gossett*, 241 S.W.2d 934 (Tenn. App. 1951); *Young v. Young*, 1997 Tenn. App. Lexis 170. The court must affirmatively find that on the day of the hearing the defendant could bring himself into compliance and purge the contempt finding. So, if prior to the hearing, the defendant pays the arrears, then there is nothing the court can do in a civil contempt proceeding. The purpose of the proceeding is to force compliance. Attorney fees can be awarded for being required to prosecute in order to force compliance. *See*, Tenn. Code Ann. § 29 - 9 -105.<sup>19</sup>

### **G. The Privilege Against Self-Incrimination**

The privilege against self-incrimination applies in criminal contempt proceedings, *Ahern v. Ahern, supra, Bagwell*. It can be asserted in civil proceedings as well, but an adverse inference can be drawn by the court.<sup>20</sup> The defendant also has a right to testify. Before advising the court that the defendant does

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The court in *Givler* found that the evidence was *clear and convincing* that the husband was in willful contempt and could pay the alimony. This was only a comment about the strength of the evidence, not a statement that this was the threshold requirement to prove contempt. My apology to Professor Pivnick whose work is otherwise an exemplary effort that has benefitted the bench and bar for so long.

<sup>19</sup> Even if the court declines to find the defendant guilty of civil contempt, the court can award the petitioner a judgment against the defendant for any arrears. *Wilkinson v. Wilkinson*, 2013 Tenn. App. Lexis 107, 2013 WL 614708 [it was not necessary to find the defendant in contempt in order to award wife judgment for arrears and attorney fees.]

<sup>20</sup> See footnote 8 for the procedure to be used in objecting to questions, and the manner in which the privilege is claimed. It must be asserted to each question deemed privileged so that the court can determine at a later hearing whether there is a basis for making the claim of privilege.

not wish to testify, the court should follow the procedure set forth in *Momon v. State*, 18 S.W.3d 152 (Tenn. 1999)<sup>21</sup> [the defendant's right to testify or not is personal and can only be waived by the defendant]. The procedure requires that counsel put the defendant on, out of the presence of the jury, where a jury is involved, and after the prosecution's proof -in- chief, and examine the defendant to ensure that:

1. the defendant knows that he has the right to testify if he wishes, and no one can prevent him from testifying if he wants to testify;

2. he can refuse to testify and that no adverse inference can be drawn from his silence, and

3. he has conferred with counsel and considered the advantages and disadvantages of testifying, and that his choice whether to testify or not testify has been made voluntarily and that the waiver of the right to testify has been personally made.

*Momon* permits the waiver to be in writing, but the better practice from the defense lawyer's view

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<sup>21</sup> I wish to express my appreciation to Circuit Judge James Martin for raising this aspect of testifying

and its application to criminal contempt proceedings. Trial judges would do well, and defense attorneys would do even better by remembering criminal contempt proceedings are subject to the provisions and protections afforded all criminal proceedings even if only a class C misdemeanor. While there is no case where the issue has been raised, no doubt someone will raise it as a claim of ineffective assistance of counsel, especially if the sentence is serious enough.

Whether the Post-Conviction Procedure Act applies to criminal contempt proceedings is an issue currently pending before the Tennessee Supreme Court in *Baker v. State*, 2012 Tenn. Crim. App. Lexis 535, 2012 WL 3017727; permission to appeal granted November 28, 2012. Argument in this matter was heard on May 30, 2013. The Court held that The Post-Conviction Procedure Act does not apply to criminal contempt matters. Opinion of September 6, 2013

would be to put it on the record, and have it reflected in any order finding the defendant guilty of contempt.

## **H. Right to Trial By Jury**

### **1. Criminal Contempt - ‘Petty Offenses’ versus ‘Serious Offenses’**

In deciding if a jury trial is warranted in the context of criminal contempt prosecutions, summary or otherwise, the U.S. Supreme Court employs an analysis involving ‘petty’ versus ‘serious’ crimes. *Compare, Bloom v. Illinois*, 391 U.S. 194 (1968) [sentence of 24 months for criminal contempt is a ‘serious’ offense entitling defendant to jury trial which is not otherwise available for ‘petty’ offenses with a maximum punishment of six months]; *with Cheff v. Schnackenberg*, 384 U.S. 373 (1966) [defendant not entitled to jury trial when punishment imposed was six months for contempt and was therefore, a ‘petty’ offense to which the right to trial by jury did not apply]; and *Bagwell*, fine of 52 million dollars required a jury trial, with *Muniz, supra*, no right to jury trial involving a \$10,000.00 fine.

However, Tennessee does not employ the ‘petty’ versus ‘serious’ offense analysis in providing for jury trials in traditional criminal matters. In all criminal proceedings in Tennessee, if the punishment can include imprisonment or a fine more than \$50.00, then the defendant is entitled to a jury trial. *State v. Dusina*, 764 S.W.2d 766 (Tenn. 1989). But there is no right to trial by jury in criminal contempt proceedings. *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000).

Tennessee law on this point was affirmed in *Dyke v. Taylor Implement Co.*, 391 U.S. 216 (1968). In *Dyke*, the court found that because the maximum punishment for criminal contempt consisted of a \$50.00 fine and 10 days of imprisonment, this was a ‘petty’ offense not subject to jury trial.

In a summary contempt action under 18 U.S.C. § 401, it must be clearly shown that the conduct

“actually obstructed the district judge in the performance of judicial duty.” Besides showing wrongful intent, the proof must be that the misbehavior was an actual and material obstruction. *Ibid.*

## 2. Civil Contempt

There is no right to trial by jury in civil contempt proceedings. *Ahern v Ahern*. However, if the matter is criminal, and involves more than a ‘petty’ offense either as to the period of confinement or the size of the fine that might be imposed, then a jury trial is required. *Bagwell, In Re Dellinger; Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), *but see, Taylor v. Hayes*, 418 U.S. 488 (1974) [no right to jury trial where 4 ½ year sentence for contempt was reduced to six months.]

In a case of civil contempt where the defendant ‘has the keys in his pocket,’ there is no right to a jury trial. *Shillitani v. U.S.* 384 U.S. 364 (1966).

There is no right to a jury trial in Tennessee for matters involving criminal contempt as explained in *Ahern, supra*.

### I. Double Jeopardy

The protection against double jeopardy applies to criminal contempt proceedings. *Ahern v. Ahern, supra. State v. Smith*, 2010 Tenn. Crim. App. Lexis 1061 (E.S. 2010)<sup>22</sup>

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<sup>22</sup> This case presents an excellent summary of the law of double jeopardy in criminal contempt proceedings, including a survey of applicable federal and Tennessee law. *But, see, State ex rel Creighton v. Creighton*, 2011 Tenn. App. 173 holding that a criminal contempt proceeding is not really a “criminal proceeding” providing all the substantive protections normally afforded a criminal defendant such as a free transcript of the trial proceedings if indigent in interpreting a Tennessee statute defining criminal proceedings for the purpose of affording free transcripts. Statute applies to felony proceedings only, not those involving misdemeanors.

In the absence of a transcript, the trial court’s ruling is presumed to be valid on appeal. *Coakley v. Daniels*, 840 S.W.2d

### **J. Trials in Absentia - The Disappearing Defendant**

In criminal contempt proceedings, if the defendant fails to appear after being served, he cannot be tried *in absentia* if he leaves before the trial begins. *Denton v Phelps*, 2005 Tenn. App. LEXIS 647; *State v. Far*, 51 S.W.3d 222 (Tenn. Crim. App. 2001) and *Crosby v. United States*, 506 U.S. 255 (1993) [ if the defendant leaves *before the trial starts*, as opposed to leaving while the trial is in progress, he cannot be tried in absentia because of F.R.Crim.P. Rule 42; trial can proceed if the defendant is voluntarily absent *after the trial has commenced*.] T.R.Crim.P. Rule 42 is identical to the federal rule.

Rule 42 applies to criminal contempt *not civil contempt*.

### **K. Recusal - Mayberry v. Pennsylvania, 400 U.S. 455 (1971)**

If the charge involves personal criticism of the judge, then another judge must hear the matter. Both the state and federal rules codify the holding in *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971). *See, Herrera v Herrera*, 944 S.W.2d 379, 392 (Tenn. App. 1996); *Daniels v. Grimac*, *supra*

*Mayberry* involved finding a criminal defendant in contempt for 11 specific acts of misconduct during a 21-day trial. *After the trial*, the court imposed a sentence of one to two years for each of the 11 incidents resulting in an effective sentence of 11 - 22 years.

The Supreme Court held that even if immediate action had been taken to find the defendant in contempt, and punishment imposed then and there, due process required that where the conduct consisted of a personal attack on the judge, another judge should hear the contempt matter.

Thus, it is quite possible that even an immediate finding of contempt by a court for a single outburst consisting of a personal attack on the court might be viewed as a violation of the *Mayberry* holding, as well as the express language of T.R.Crim.P. Rule 42 (b) which forbids the court from hearing

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367, 370 (Tenn. App. 1992).

the matter.

#### **L. Statute of Limitations As A Defense To Criminal Contempt**

Criminal contempt is a class C misdemeanor. Tenn. Code Ann. § 40-35-110 (c)(3) and § 40-35-111 (c)(3) [a class C misdemeanor is punishable by a fine not to exceed \$50.00, confinement for not more than 30 days, or both fine and confinement.]<sup>23</sup> The statute of limitations for prosecuting a misdemeanor is 12 months from the date of the commission of the offense. Tenn. Code Ann. § 40-2-102(a).

The misdemeanor statute of limitations applies to bar criminal contempt proceedings instituted more than one year after the commission of the alleged contemptuous act. *Church of God v. Tomlinson Church of God*, 247 S.W.2d 63 (Tenn. 1952).

The decision in *Cottingham, supra*, is not to the contrary even though the defendant raised an issue regarding the prosecution of the contempt action after the lapse of the time during which he was to pay alimony.

In *Cottingham*, the defendant was ordered to pay alimony from August 26, 1996 through August 26, 2001. The defendant was cited for contempt on *May 22, 2002* for failure to make the scheduled payments. *Cottingham*, who proceeded *pro se*, did not specifically assert the statute of limitations as a defense.

He argued that because the 5-year period during which he was ordered to pay alimony had expired by the time the contempt citation was filed, the court no longer had jurisdiction over the matter.

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There has been a suggestion that because the contempt statute does not classify the offense, it is automatically a class A misdemeanor. Given that the penalty is within that proscribed by class C misdemeanors, the better argument is that it is a class C misdemeanor. This affects the length of any probationary period, and when the suspension of a sentence is concluded.

Apparently, Cottingham believed that a contempt action should have been instituted during the 5-year period he was ordered to pay alimony. The Court summarily rejected the argument.

Rather curiously, even though the Court found the notice deficient, and the evidence insufficient to establish guilt, the statute of limitations as a bar was never mentioned. One can hope that if Cottingham had been represented by competent counsel, the statute would have been asserted as a complete bar to the prosecution of any failures to pay arising on or before May 22, 2001.

## **VII. Damages**

### **A. Tennessee**

The *Overnite* decision is the seminal opinion on the issues of damages and the right to appeal a lower court's refusal to award damages. Even if the misbehavior has ceased, the defendant can be tried for prior acts of contempt. Damages, including attorney fees, can be imposed to the extent they are proven.

### **B. Federal Court**

Damages have been routinely awarded in civil contempt proceedings. *Manhattan Industries Inc. v. Sweater Bee by Banff*, 885 F.2d 1, 5 (2<sup>nd</sup> Cir. 1989).

## **VIII. Appeals**

### **A. Tennessee**

#### **1. Proceedings in General Sessions**

If the matter arises in the civil general sessions court, then the appeal lies in the circuit court. Tenn. Code Ann. § 16-10-112. If it arises in the criminal general sessions court, then the appeal is to criminal court. T.R.Crim.P. Rule 5.

#### **2. Proceedings in Circuit Court**



All appeals from final orders in circuit or chancery court go to the Court of Appeals. Tenn. Code Ann. § 16- 4-108. Whether found guilty or not, civil contempt orders are final orders appealable as a matter of right by either side. An acquittal of criminal contempt is not appealable by the prosecution. *Overnite Transportation, supra*.

When the contempt occurs during another proceeding, e.g. divorce action, one cannot wait until the end of the underlying case to appeal. *Overnite, supra, Bailey v. Crum*, 183 S.W.3d 383, 387 (Tenn. App. 2005). The time to appeal runs with the entry of the order. That is final and appealable under T.R.A.P. Rule 3 as of right. *Bailey v. Crum, supra*.

### **3. Proceedings in Criminal Court**

All appeals from final orders go to the Court of Criminal Appeals. Tenn. Code Ann. § 16- 5 -108 (a). A finding of guilty is appealable as a matter of right under T.R.A.P. Rule 3.

### **4. Appeals In Orders of Protections**

All appeals from orders involving orders of protection go to either circuit or chancery court pursuant to Tenn. Code Ann. § 36-3- 601(2)(F). *State v. Wood*, 91 S.W.3d 769 (Tenn. App. 2001).

### **5. Juvenile Court**

Appeals go to the Court of Appeals. *State v. Reem*, 2008 Tenn. App. Lexis 539, 2013 WL 4367457.

## **B. Federal**

### **1. Appeal from Magistrate's Ruling**

For matters arising under the trial of cases pursuant to 28 U.S.C. § 636 (c), an appeal of a contempt conviction goes to the court of appeals. 28 U.S.C. § 636(e)(7). Otherwise, all contempt appeals

go to the district court. § 636(e)(7).

## **2. Appeal from District Court Ruling**

Appeals go to the court of appeals.

### **C. Plaintiff's Right to Appeal**

#### **1. Civil Proceedings**

The plaintiff can appeal from a finding of no contempt in civil contempt proceedings. *Overnite, supra.*

#### **2. Criminal Proceedings**

If acquitted, no appeal. *Overnite, supra.*

### **D. Expunction of Records**

*Robinson v. Fulliton*, 140 S.W.3d 304 (Tenn. App. 2003) *no pta* holds that expunction is available where criminal contempt matter is dismissed. *Robinson* is a perfect example of how not to prosecute contempt.

The court held that the petition citing the defendant-attorney for contempt consisted of both criminal and civil allegations. Thus, all of the allegations charging criminal contempt could be redacted from the petition. This finding was unusual because, in the trial court, the defendant argued that the petition was really one for civil contempt. No review was sought in the Supreme Court but *Robinson* is controlling because it is reported.

## **IX. Miscellaneous Matters**

### **A. Verification of Petition Not Required**

Whatever the rule may have been prior to the adoption of the current rules of civil procedure, there

is no requirement that a petition for contempt be verified. *Thomasson v. Thomasson*, 1989 Tenn. Crim. App. LEXIS 916.

The court rejected the contention that the proceeding was flawed because the petition was not verified. “Only the initial petition for divorce [has to be] be verified.” No authority was offered to the contrary.

### **B. Necessity of A Hearing**

The court must conduct a hearing in all matters, affording the respondent an opportunity to offer proof, and adhering to the procedures normally associated with trials. The court has no authority to engage in a summary disposition of civil contempt matters. *Mayers v. Mayers*, 532 S.W.2d 54 (Tenn. App. 1975) [trial court erred in convicting the husband of contempt without affording the defendant an opportunity to be heard and present defenses.]

### **C. Contempt Cannot Be Used To Enforce Contractual Matters**

#### **1. Matters Retaining Their Contractual Nature Upon Entry of**

##### **A Final Decree**

This area causes great confusion because even though a provision of the MDA is breached, the breach may not support contempt. Only those portions of the MDA over which the court has continuing jurisdiction to modify lose their contractual nature when merged into the final decree. *Penland v. Penland*, 521 S.W.2d 222 (Tenn. 1975); *Kesser v. Kesser*, 201 S.W.3d 636 (Tenn. 2006); *Bryan v. Leach*, 85 S.W.3d 136 (Tenn. App. 2001) [father could be held in contempt for nonpayment of child support arising during child’s minority even though agreement to provide support beyond age 18 was contractual in nature.] *Vick v. Vick*, 1999 Tenn. App. Lexis 373 [mother brought contempt action to enforce agreement to

pay for daughter's college education; court awarded judgment to mother for college expenses.]<sup>24</sup>

Items losing their contractual nature are provisions relating to child support and alimony in futuro, transitional alimony, or rehabilitative alimony all of which might be modified after the entry of the final decree.

Alimony in futuro is subject to modification by the court. Tenn. Code Ann. § 36-5-121(f)(2). Rehabilitative alimony may be subject to modification, including extension, if modification is sought during the initial term of the obligation. Tenn. Code Ann. § 36-5-121(e)(2). Transitional alimony may be modified. Tenn. Code Ann. § 36-5-121 (g)(2). And, if the parties agree, even alimony in solido can be modified, but not by the court. Tenn. Code Ann. § 36-5-121(h)(1).

Thus, if there is a failure to pay any form of support covered by the above provisions, then enforcement by contempt is appropriate. The key is that these forms of support are, by statute, subject to the continuing jurisdiction of the court and may be modified.

An obligation to pay alimony in solido, however, is a contractual matter because the agreement cannot be modified by the court after the decree is entered. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). Therefore, a breach of a provision like this is typically enforced by suing for a breach of the agreement. Otherwise, modification of a contractual matter might be viewed as impairment of a contract in violation of Article I Section 20 of the Tennessee Constitution prohibiting enactment of retrospective laws, or laws impairing contractual obligations.

However, *Long v. Mattingly -Long*, 221 S.W.3d 1 (Tenn. App. 2006) *pta denied*, holds that

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<sup>24</sup>

Apparently, the court did not making a finding of contempt and enforced the MDA provision as a

breach of contract. There is no discussion on appeal regarding the propriety of using contempt to enforce a contractual obligation.

contempt can be used to enforce *a hold harmless and indemnity agreement*. This decision represents a drastic departure from *Penland* and its progeny holding that suing for breach is the only available remedy.

Whether *Long* can be argued as support for using contempt to enforce contractual obligations is doubtful. If the hold harmless agreement is by agreement of the parties, it is subject to enforcement by a breach of contract in accordance with *Penland*.

If the matter had been tried with the trial court including the hold harmless provision and indemnity provision part of the final decree, then a violation of either could be enforced by a contempt proceeding as discussed below.

**D. Tenn. Code Ann. 36-5-104 - Criminal Proceedings For Failure To  
Pay Child Support<sup>25</sup>**

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<sup>25</sup>For additional methods of prosecuting non-support see Tenn. Code Ann. § 39-15-101:

(a) A person commits the crime of non-support who fails to provide support which that person is able to provide and knows the person has a duty to provide to a minor child or to a child or spouse who, because of physical or mental disability, is unable to be self-supporting.

.....

(d) A person commits the offense of flagrant non-support who:

(1) Leaves or remains without the state to avoid a legal duty of support; or

(2) Having been convicted one (1) or more times of non-support or flagrant non-support, is

This statute is not a contempt statute. It is a criminal statute. Its purpose is to punish for non-compliance with an order of support. *Brown v. Latham*, 914 S.W. 2d 887 (Tenn. 1996).

Because it is a criminal statute, the defendant is entitled to a jury trial and all of the protections afforded the accused in a criminal proceeding. *Ahern v. Ahern*, 15 S.W.3d 73 (Tenn. 2000); *Brown, supra*. Other issues arise.

The defendant cannot be compelled to testify. The burden of proof is beyond a reasonable doubt. The right to counsel is mandatory. *Cottingham v. Cottingham*, 193 S.W.3d 531 (Tenn. 2006). Arguably, because it is a pure criminal statute, only the district attorney general is authorized to prosecute under it even though private counsel can prosecute criminal contempt proceeding. *Wilson v. Wilson*, 984 S.W. 2d 898 (Tenn. 1998).

Note, Tenn. Code Ann. §36-5-104 (d) provides that the court can infer that the defendant had the ability to pay as order pursuant to §39- 5 -101(a)(8) which provides:

When a court having jurisdiction determines child support pursuant to the Tennessee child support guidelines, based on either the actual income or the court's findings of an

\_\_\_\_\_ convicted of a subsequent offense under this section.

(e) Non-support under subsection (a) is a Class A misdemeanor. Flagrant non-support under subsection (d) is a Class E felony.

obligor's ability to earn income, the final child support order shall create an inference in any subsequent proceeding that the obligor has the ability to pay the ordered amount until such time as the obligor files an application with the court to modify the ordered amount.

Given that the prosecution has the burden of proving every essential element of the offense beyond a reasonable doubt, and the defendant is presumed innocent, it would appear that this "inference" is legally dubious, and on shaky constitutional grounds. See, Sandstrom v. Montana, 442 U.S. 510 (U.S. 1979) [prosecution has burden of proving every essential element of the offense and may not rely upon burden shifting presumptions.] While cast as an "inference," the inference here relieves the prosecution from proving anything other than the court's prior order. Therefore, in the absence of further proof that the defendant willfully violated the prior order, and had the ability to comply at the time of the alleged violation, the statute allows the defendant to be convicted without further ado. Such cannot stand in the face of due process.

## **X. CASES OF NOTE**

- A. Kesser v. Kesser, 201 S.W.3d 636 (Tenn. 2006)
- B. Cottingham v. Cottingham, 193 S.W.3d 531 (Tenn. 2006)
- C. Nahon v. Nahon, 2005 Tenn.App. Lexis 780
- D. Long v. Mattingly - Long, 221 S.W.3d 1 (Tenn. App. 2006) *pta denied*
- E. Sinor v. Barr, 2006 Tenn. App. Lexis 87
- F. McPherson v. McPherson, 2005 Tenn. App. Lexis 795
- G. Rose v. Rose, 2006 Tenn. App. Lexis 271

- H. State v. Swanson, 2006 Tenn. Crim. App. Lexis 199
- I. Memphis Health Ctr, Inc. v. Grant, 2006 Tenn. App. Lexis 498
- J. Bueno v. Todd, 2006 Tenn. App. Lexis 510
- K. Beard v. Beard, 2006 Tenn. App. Lexis 293
- L. Flowers v. Hasenmueller, 2006 Tenn. App. Lexis 380
- M. United Color Lab and Digital v. United Studios, 2006 Tenn. App. Lexis 185
- N. Sims v. Williams, 2006 Tenn. App. Lexis 58
- O. Mills v. Mills, 2006 Tenn. App. Lexis 352
- P. In Re: Victoria Bowling, 2007 Tenn. App. 602
- Q. XL Sports, Ltd. v Lawler, 2007 Tenn. Ann. Lexis 623
- R. Tacker v. Davidson, 2008 Tenn. App. Lexis 460 (this is a Memorandum Opinion, not for publication, it has been replaced by citations to published opinions with similar holdings.)
- S. Daniels v. Grimac, 2010 Tenn. App. LEXIS 695.
- T. Watkins, ex rel Duncan vs. Methodist Healthcare System, 2009 Tenn. App. Lexis 210