Contempt: The Basics
Presented by Judge Steve Stafford

The Basics

Authority

- In Tennessee, court's authority to punish certain acts as contempt derives from statute, and is limited to forms of conduct set forth in contempt statute.
    - ***State v. Turner***, 914 S.W.2d 951 (Tenn. Crim. App. 1995).
- Tennessee Code Annotated section 29-9-102.
    - 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 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.

Findings

- Finding of willful conduct must precede judgment for contempt.
    - ***Haynes v. Haynes***, 904 S.W.2d 118 (Tenn. Ct. App. 1995).
- **PRACTICE TIP:** If the court determines that the defendant is guilty of contempt, the court must clearly state what type of contempt the defendant has been found guilty of. Furthermore, if a sentence is imposed, it should be a sentence that is consistent with that type of contempt finding. For example, if a defendant is found guilty of a criminal contempt, he should not be sentenced to an indefinite term of imprisonment.
    - The threshold issue in every appeal from a finding of contempt is whether the contempt is civil or criminal. ***Jones v. Jones***, [No. 01A01-9607-CV-00346, 1997 WL 80029, at *1 (Tenn. Ct. App. Feb. 26, 1997)]. The answer turns on the conduct involved and the sanctions imposed, not on the labels of "civil" or "criminal" affixed by the parties or the trial court. ***Sherrod v. Wix***, Tenn. Ct. App. 1992, 849 S.W.2d 780, 787. Making the distinction is essential because doing so determines the procedure to be followed and the constitutional protections to be afforded the alleged contemnor. ***Storey v. Storey***, Tenn. Ct. App.1992, 835 S.W.2d 593, 599.
        - ***Cooner v. Cooner***, No. 01A01-9701-CV-00021, 1997 WL 625277, at *6–7 (Tenn.Ct.App. Nov.14, 1997) (No Tenn. R.App. P. 11 application filed).

Civil Contempt

Definition

- Civil contempt occurs when a person refuses or fails to comply with a court order and a contempt action is brought to enforce private rights.
    - ***Bryan v. Leach***, 85 S.W.3d 136 (Tenn. 2001).

Burden of Proof

- "The quantum of proof needed to find that a person has actually violated a court order is a preponderance of the evidence. . . . Thus, decisions regarding whether a person actually violated a court order should be reviewed in accordance with the standards in Tenn. R.App. P. 13(d)."
    - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 356 (Tenn. 2008).
- One the movant has shown an obligation that has not been met, the contemnor bears the burden of proving that he is unable to comply with the court's order at the time of the hearing.
    - ***Boren v. Hill Boren, P.C.***, No. W2017-02383-COA-R3-CV, 2018 WL 5044669, at *8 (Tenn. Ct. App. Oct. 17, 2018) (citing ***Cisneros v. Cisneros***, No. M2013-00213-COA-R3-CV, 2015 WL 7720274, at *11 (Tenn. Ct. App. Nov. 25, 2015); *see also* ***State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Grp. Tr.***, 209 S.W.3d 602, 612 (Tenn. Ct. App. 2006) ("Although the party to be held in civil contempt must have the ability to perform the act it is ordered to perform, the burden of proof is on the contemnor to show the inability to pay.") (citation omitted).

Immediate Appeal

- Contempt proceedings are collateral to and independent of the cases or proceedings from which they arise. Contempt proceedings commenced after the entry of an otherwise final order in the underlying case should be viewed as independent proceedings. Accordingly, they are not part of the subject matter of the underlying case and are not among the issues that must be resolved before an otherwise final order in the underlying case will be considered final for the purposes of Tenn.R.App.P. 3(a).
    - ***Poff v. Poff***, No. 01-A-01-9301-CV00024, 1993 WL 73897, at *2 (Tenn. Ct. App. March 17, 1993).

Appellate Review

- Issues of law reviewed *de novo*. Findings of fact reviewed *de novo* accompanied with a presumption of correctness.
    - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 356 (Tenn. 2008).
- Decision to impose sanctions is reviewed under an abuse of discretion standard
    - ***Hawk v. Hawk***, 855 S.W.2d 573, 583 (Tenn. 1993).

Willful Action

- Willful conduct "consists of acts or failures to act that are intentional or voluntary rather than accidental or inadvertent. Conduct is 'willful' if it is the product of free will rather than coercion. Thus, a person acts 'willfully' if he or she is a free agent, knows what he or she is doing, and intends to do what he or she is doing."
    - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 356 (Tenn. 2008).

Remedy

- Imprisonment; defendant has keys to the jail
    - As any imprisonment ordered in civil contempt case is remedial, coercive, and designed to compel contemnor to comply with court's order, compliance will result in immediate release from incarceration.
        - ***Black v. Blount***, 938 S.W.2d 394 (Tenn. 1996).
    - After a finding of civil contempt, an individual may be sentenced indefinitely to jail, but only if the individual has the present ability to comply with the court's order. In addition, the order sentencing the individual to jail must specifically state how the individual may purge herself of the contempt.
        - ***Poole v. City of Chattanooga***, No. E1999-01965-COA-R3-CV, 2000 WL 310564 (Tenn. Ct. App. March 27, 2000).
    - If the petition alleged civil contempt and the alleged contemnor meets his obligations, the contempt petition may be deemed moot. In that situation: "As the purpose of civil contempt is to coerce compliance with the court's order, a finding of contempt would serve no purpose."
        - ***Luplow v. Luplow***, 450 S.W.3d 105, 119 (Tenn. Ct. App. 2014).
    - A trial court is not authorized to suspend a sentence for civil contempt.
        - ***McClain v. McClain***, No. E2016-01843-COA-R3-CV, 2017 WL 4217166, at *38 (Tenn. Ct. App. Sept. 21, 2017) (quoting ***Mayer v. Mayer***, 532 S.W.2d 54, 60 (Tenn. Ct. App. 1975), *perm. app. denied* (Tenn. Dec. 1, 1975) ("There is no such thing as a suspended sentence for civil contempt.")).
- Compensatory damages
    - Compensatory damages may be awarded for civil contempt either when the contemptuous conduct involves:
        - Performance of a forbidden act.
            - Tenn. Code Ann. § 29-9-105 ("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."); ***Overnite Transp. Co. v. Teamsters Local Union No. 480***, 172 S.W.3d 507 (Tenn. 2008) (holding that an injured party may recover compensatory damages for civil contempt from the party who performed an act in violation of court order);
        - Failure to perform an act ordered by the court.
            - Tenn. Code Ann. § 29-9-104 (when "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" or the person "can be "separately fined, as authorized by law, for each

day it is in contempt until it performs the act or pays the damages ordered by the court.").

- Change in a parenting plan/ change in custody is not a proper remedy for a contempt action relating to failure to follow a parenting plan in the absence of a proper pleading seeking modification.
    - ***In re Ky'Auri M.***, No. E2017-00501-COA-R3-JV, 2018 WL 3471181, at *1 (Tenn. Ct. App. July 18, 2018).

Criminal Contempt

Definition

- Criminal contempt is intended to preserve power and vindicate dignity and authority of the law, and court as an organ of society, and therefore, sanctions for criminal contempt are generally both punitive and unconditional in nature.
    - ***Bryan v. Leach***, 85 S.W.3d 136 (Tenn. 2001).

Burden of Proof

- Beyond a reasonable doubt
    - ***Black v. Blount***, 938 S.W.2d 394, 398 (Tenn. 1996).

Immediate Appeal

- If the trial court determines that the defendant is guilty of criminal contempt, the defendant has the right to immediately appeal.
    - Tennessee Rule of Appellate Procedure 3(b).
- ***Coffey v. Coffey***, E2012-00143-COA-R3-CV, 2013 WL 1279410 (Tenn. Ct. App. March 28, 2013).
    - In a divorce case, Husband was found in criminal contempt four times for violations of temporary orders. On appeal Husband argued that he could not be held in contempt for violations of these orders because the final order specifically stated that all temporary orders were "vacated, set aside, and held for naught."
    - The Court of Appeals upheld the finding of contempt, however, concluding:
        - The case law on the subject is to the effect that any order that imposes punishment upon a petition for contempt is a final appealable order in its own right, even though the proceedings in which the contempt arose are ongoing. . . . The nature and effect of orders finding contemptuous behavior and assessing punishment for same is such as falls outside of the characterization of "temporary" or "interim."

Appellate Review

- Only overturn criminal contempt convictions "when the evidence is insufficient to support the trier-of-fact's finding of contempt beyond a reasonable doubt."
    - ***Hawk v. Hawk***, 855 S.W.2d 573, 583 (Tenn. 1993).
- Individuals convicted of criminal contempt lose their presumption of innocence and bear the burden of overcoming their presumption of guilt on appeal.
    - ***Thigpen v. Thigpen***, 874 S.W.2d 51, 53 (Tenn. Ct. App. 1993).
- Decision to impose sanctions is reviewed under an abuse of discretion standard.

- ***Hawk v. Hawk***, 855 S.W.2d 573, 583 (Tenn. 1993).
- There is no appeal from the trial court's finding that the evidence was insufficient to hold a party in criminal contempt. Rather, "[b]ecause the trial court's dismissal functioned as an acquittal for the purposes of double jeopardy, we cannot review the trial court's decision without violating the Constitution." ***Covarrubias v. Baker***, No. E2016-02316-COA-R3-CV, 2017 WL 6276230, at *2 (Tenn. Ct. App. Dec. 11, 2017); *see also* ***Adkisson v. Adkisson*****,** No. E2012-00174-COA-R3-CV, 2013 WL 936369 (Tenn. Ct. App. Mar. 11, 2013) ("[A]n appeal from an acquittal of criminal contempt is barred.").

Willful Action

- "[I]n criminal law, 'willfully' connotes a culpable state of mind. . . . [A] willful act is one undertaken for a bad purpose."
  - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 357 (Tenn. 2008).

Punishment

- Circuit, Chancery and Appellate Courts
  - (a) The punishment for contempt may be by fine or by imprisonment, or both.
  - (b) Where not otherwise specially provided, the circuit, chancery, and appellate courts are limited to a fine of fifty dollars ($50.00), and imprisonment not exceeding ten (10) days, and, except as provided in § 29-9-108, all other courts are limited to a fine of ten dollars ($10.00).
    - Tenn. Code Ann. § 29-9-103.
- General Sessions Courts
  - (a) Notwithstanding any provision of the law or private act to the contrary, courts of general sessions have the power to issue attachments and inflict punishments for contempts of court. The punishments for contempts shall be limited to:
  - (1) A fine not exceeding fifty dollars ($50.00) and imprisonment not exceeding ten (10) days if the judge of the general sessions court is licensed to practice law; and
  - (2) A fine not exceeding fifty dollars ($50.00) if the judge of the general sessions court is not licensed to practice law.
  - (b) Courts of general sessions have the power to punish for contempt persons who fail to appear for traffic violations.
    - Tenn. Code Ann. § 16-15-713.
- Juvenile Courts
    - The [juvenile] court may punish a person for contempt of court for disobeying an order of the court or for obstructing or interfering with the proceedings of the court or the enforcement of its orders by imposing a fine or imprisonment as prescribed for circuit, chancery or appellate courts pursuant to title 29, chapter 9.
      - Tenn. Code Ann. § 37-1-158.
- Municipal Courts
  - (a)(1)The judges of courts exercising municipal jurisdiction in counties having a metropolitan form of government are empowered to punish any person for contempt who, having been cited to appear in such court for the violation of a city, municipal or metropolitan government law or ordinance, willfully fails to appear

without just cause on the designated day and at the designated time. The punishment for contempt in each such case is limited to a fine of ten dollars ($10.00) and imprisonment not exceeding five (5) days for each violation.
    - (2) The provisions of this section shall also apply to judges of courts of general sessions when such judges are exercising municipal jurisdiction by hearing violations of city, municipal or metropolitan government laws or ordinances.
    - (3) The power to punish for contempt conferred by this section may not be used to punish persons who fail to appear for parking violations.
    - (b)(1) The judges of courts exercising municipal jurisdiction over environmental violations relating to health, housing, fire, building and zoning codes of the municipal code, in any county having a population of not less than seven hundred thousand (700,000) according to the 1980 federal census or any subsequent federal census, shall punish any person for contempt who, having been cited for failure to appear in such court for the violation of a municipal government law or ordinance involving any violation relating to health, housing, fire, building and zoning codes or municipal law:
    - (A) Willfully fails to appear without just cause on the designated day and at the designated time; or
    - (B) Willfully fails to obey the court's order to correct a violation of the municipal code relating to health, housing, fire, building and zoning codes, within the designated day and at the designated time as given by court order.
    - (2) The punishment for contempt in each such case is limited to a fine of ten dollars ($10.00) and imprisonment not exceeding five (5) days for each violation.
    - (3) The power to punish for contempt conferred by this section may not be used to punish persons who fail to appear for parking violations.
        - Tenn. Code Ann. § 29-9-108.
- Attorney's fees may not be awarded in criminal contempt cases but a litigant may recover attorney's fees in actions seeking to enforce child support or custody orders under Tenn. Code Ann. § 36-5-103(c).
    - ***Watts v. Watts***, No. M2015-01216-COA-R3-CV, 2016 WL 3346547, at *11 (Tenn. Ct. App. June 8, 2016) (holding that criminal contempt does not serve the purpose of enforcing a support order or adjudicating custody; instead, it vindicates the power and authority of the court by punishing the contemnor); *see also* ***Nichols v. Crockett***, No. E2016-00885-COA-R3-CV, 2017 WL 4051083, at *7 (Tenn. Ct. App. Sept. 13, 2017) (holding that attorney's fees were not allowed as damages in the criminal contempt involving violations of a parenting plan).
    - *See also* ***Frontz v. Hall***, No. E2021-00154-COA-R3-CV, 2022 WL 2161095, at *8 (Tenn. Ct. App. June 15, 2022) (noting that the order or protection statute "did not authorize an award of attorney's fees incurred in successfully prosecuting a petition for criminal contempt alleging a willful violation of an order of protection").
- Notice of a charge of indirect criminal contempt may specify multiple violations so long as they are sufficiently distinct to support separate convictions.
    - ***State v. Wood***, 91 S.W.3d 769 (Tenn. Ct. App. 2002).
- Generally, it is within the discretion of the trial court to impose consecutive sentences if it finds by a preponderance of the evidence that "[t]he defendant is sentenced for criminal contempt."

- Tenn. Code Ann. § 40-35-115(b); *see also* discussion below regarding sentencing in criminal contempt matters

Constitutional Protections in Civil and Criminal Contempt

	Civil Contempt	Criminal Contempt
Right to counsel	Yes, if facing incarceration Tn. Sup. Ct. R. 13; ***Sevier v. Turner,*** 742 F.2d 262 (6th Cir. 1984).	Yes. Tn. Sup. Ct. R. 13.
Right to be given notice of the charges and an opportunity to be heard	Civil contempt only requires that the contemnor be notified of the allegation and be given the opportunity to respond. ***State ex rel. Flowers v. Tennessee Trucking Ass'n Self Ins. Group Trust***, 209 S.W.3d 602 (Tenn. 2006).	Parties facing a criminal contempt charge must be given explicit notice that they are charged with criminal contempt and must also be informed of the facts giving rise to the charge. Tenn. Rules Crim. Proc. Rule 42(b); ***Long v. McAllister-Long***, 221 S.W.3d 1 (Tenn. 2006)
Freedom from double jeopardy	No. Can be retried for the same offense unless *res judicata*.	Yes; cannot be retried for the same criminal contempt offense after a witness has been sworn in and jeopardy has attached. *See* ***Bailey v. Crum***, 183 S.W.3d 383, 389-91 (Tenn. Ct. App. 2005).
Trial by Jury	No. ***Weinstein v. Heimberg***, 490 S.W.2d 692 (Tenn. Ct. App. 1972).	Typically no. ***Baker v. State***, 417 S.W.3d 428 (Tenn. 2013) (not unless the contempt is "serious enough"). *But see* Child Support Section, *infra*
State Funded Court Reporter Present	No.	No. ***State, ex rel. Creighton v. Creighton***, No. M2010-01171-COA-R3-CV, 2011 WL 1344638 (Tenn. Ct. App. April 7, 2011).
Right against Self-incrimination	Maybe. *Cf.* ***Duke v. Duke***, No. M2009-02401-COA-R3-CV, 2012 WL 1971144 (Tenn. Ct. App. June 1, 2012) (holding that Father waived argument that his right against self-incrimination was violated by joining criminal & civil contempt proceedings together).	Yes. ***Gompers v. Bucks Stove***, 221 U.S. 418, 444 (1911); ***Kornick v. Kornick***, 3 Tenn. Civ. App. 41, 44 (1931).
Indictment	No.	No. ***State v. Wood***, 91 S.W.3d 769 (Tenn. Ct. App. 2002). *But see* Child Support Section, *infra*

Contempt for Disobeying Court Order; Indirect Contempt

Indirect Contempt

- If the contempt is committed outside of court or is not witnessed by the judge, it is an "indirect contempt."
  - ***Dargi v. Terminix Intern. Co., L.P.***, 23 S.W.3d 342 (Tenn. Ct. App. 2000).

Elements

- The order alleged to have been violated must be "lawful."
  - A lawful order is one issued by a court with jurisdiction over both the subject matter of the case and the parties. ***Vanvabry v. Staton***, 88 Tenn. 334, 351-52, 12 S.W. 786, 791 (1890); ***Churchwell v. Callens***, 36 Tenn.App. 119, 131, 252 S.W.2d 131, 136-37 (1952). An order is not rendered void or unlawful simply because it is erroneous or subject to reversal on appeal. ***Vanvabry v. Staton***, 88 Tenn. at 351, 12 S.W. at 791; ***Churchwell v. Callens***, 36 Tenn.App. at 131, 252 S.W.2d at 137. Erroneous orders must be followed until they are reversed. ***Blair v. Nelson***, 67 Tenn. (8 Baxt.) 1, 5 (1874). However, an order entered without either subject matter jurisdiction or jurisdiction over the parties is void and cannot provide the basis for a finding of contempt. ***Brown v. Brown***, 198 Tenn. 600, 610, 281 S.W.2d 492, 497 (1955); ***Howell v. Thompson***, 130 Tenn. 311, 323-24, 170 S.W. 253, 256 (1914). Naturally, the determination of whether a particular order is lawful is a question of law.
    - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 355 (Tenn. 2008) (footnotes omitted).
- The order alleged to have been violated must be clear, specific, and unambiguous.
  - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 355 (Tenn. 2008).
  - ***Landis v. Landis***, No. M2015-02520-COA-R3-CV, 2016 WL 6311800, at *4 (Tenn. Ct. App. Oct. 27, 2016) (holding that wife's refusal to give husband the trailer that went with a boat awarded to him in the divorce was not contemptuous because the parties' MDA did not list the boat trailer as an item awarded to husband); *see also* ***Scobey v. Scobey***, No. M2016-00963-COA-R3-CV, 2017 WL 4051085 (Tenn. Ct. App. Sept. 13, 2017) (holding that husband could not be held in civil contempt for failing to divide certain retirement accounts because the four corners of the MDA was ambiguous, regardless of whether both parties understood its meaning); *Cf.* ***Sykes v. Sykes***, No. M2020-00261-COA-R3-CV, 2021 WL 4948061, at *7 (Tenn. Ct. App. Oct. 25, 2021) (holding that: (1) husband could not be found in civil contempt of a court order that was not properly served on him (it was served by email even though he was pro se); and (2) husband could not be found in civil contempt for violation of the automatic statutory restraining order that prevents relocation of the child because the restraining order served on husband did not contain language that was more restrictive than the statutory language and the statutory restraining order was therefore not in effect against husband).
- The person alleged to have disobeyed the order must have actually disobeyed or otherwise resisted the order
  - ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 355 (Tenn. 2008).

- The person's violation of the order must be "willful."
    - "Willful" has different meanings depending on whether the contempt is civil or criminal. *See* ***Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.***, 249 S.W.3d 346, 357 (Tenn. 2008), and the discussion of each type of contempt *supra*, for the proper definition in each context.
- Although the above elements originated in a civil contempt case, they apply equally in criminal contempt actions.
    - ***Furlong v. Furlong***, 370 S.W.3d 329, 336 (Tenn. Ct. App. 2011) ("***Konvalinka*** is a case involving civil contempt, but, with the noted exception of the standard for reviewing the sufficiency of the evidence, it is clear to us that the following analysis set out in ***Konvalinka*** applies to all contempt proceedings.").
- No requirement that the order violated be final or reduced to writing.
    - ***Huggins v. Follin***, 500 S.W.2d 435 (Tenn. 1973).
- Error or irregularity does not excuse violation of an order.
    - ***Blair v. Nelson***, 67 Tenn. (8 Baxt.) 1, 5 (1874).
- If an order is void *ab initio* (not merely voidable), then the order cannot provide the basis for a finding of contempt.
    - ***Moorcroft v. Stuart***, No. M2014-00691-COA-R3-CV, 2015 WL 4086334 (Tenn. Ct. App. July 6, 2015).

Konvalinka v. Chattanooga-Hamilton County Hosp. Auth., 249 S.W.3d 346, 357 (Tenn. 2008).

- Plaintiff physician's attorney brought action against hospital, in his own name, seeking access to records regarding the plaintiff physician as well as another physician. However, the records involved were the subject of a discovery dispute in another case. In that case, the trial court ruled that the records were not subject to discovery but had granted the plaintiff physician an interlocutory appeal. The Court of Appeals likewise granted an interlocutory appeal on the discovery issue, and entered an order staying "all proceeding below" pending resolution of the interlocutory appeal.
- The hospital defended the suit by arguing that the attorney's action was in direct violation of the Court of Appeals' stay. The trial court declined to require the hospital to produce any records that were the subject of the pending interlocutory appeal.
- The hospital subsequently filed a motion with the Court of Appeals to find the attorney and plaintiff physician in civil contempt for violation of the Court of Appeals' order. The Court of Appeals heard the underlying interlocutory appeal and the contempt issue contemporaneously. The Court of Appeals found that the plaintiff physician and attorney were in civil contempt for disobeying the Court of Appeals' order, awarded the hospital its attorney's fees in prosecuting the contempt, and remanded to the trial court for a hearing on the reasonable amount of fees.
- The Supreme Court reversed, holding that the order of the Court of Appeal was ambiguous in that it appeared to only stay proceedings in the trial court case from which the interlocutory appeal was granted:

> The stay order did not clearly and unambiguously apply to separate proceedings under Tenn. Code Ann. § 10-7-505(a) to obtain public records being held by the Hospital Authority. Thus, [plaintiff physician and his attorney] could reasonably have believed that the stay order did not prevent

them from filing their own petition under Tenn. Code Ann. § 10-7-505(a) for access to public records.

> Because the May 17, 2005 order did not clearly and unambiguously prohibit petitions pursuant to Tenn. Code Ann. § 10-7-505(a), it cannot provide the basis for holding [plaintiff physician and his attorney] in civil contempt for filing their petition seeking access to public records. The language of the order prevents a finding of willful disobedience on the part of either [plaintiff physician or his attorney] because they could have believed reasonably that the order did not extend to separate actions under Tenn. Code Ann. § 10-7-505(a). Accordingly, the Court of Appeals' decision to hold [plaintiff physician and his attorney] in civil contempt must be reversed because it is inconsistent with the applicable legal standards and because it lacks evidentiary support.

- Bottom line: For an individual to be held in contempt, the order allegedly violated must be unambiguous, not susceptible to more than one reasonable interpretation, and leave no basis for doubt. In addition, any ambiguity will be construed in favor of the person facing the contempt charge.

Direct and Summary Contempt

Direct Contempt

- Direct contempt is based upon acts committed in presence of court and may be punished summarily.
    - ***State v. Maddux***, 571 S.W.2d 819 (Tenn. 1978).

Summary Contempt

- "A judge may summarily punish a person who commits criminal contempt in the judge's presence if the judge certifies that he or she saw or heard the conduct constituting the contempt. The contempt order shall recite the facts, be signed by the judge, and entered in the record."
    - Tennessee Rule of Criminal Procedure 42(a).
- A trial judge has the authority to punish direct contempt summarily when necessary to protect the authority and integrity of the court and to prevent obstruction of the administration of justice. Direct contempt may be punished summarily if the judge certifies that he or she saw or heard the conduct constituting contempt.
    - ***Daniels v. Grimac***, 342 S.W.3d 511 (Tenn. Ct. App. 2010).
- ***In re: Brown***, No. W2014-00825-COA-R3-JV, 2015 WL 1332669 (Tenn. Ct. App. Mar. 23, 2015), *perm. app. denied* (Tenn. Aug. 14, 2015).
    - An attorney appealed the juvenile court's finding of criminal contempt. The juvenile court found the attorney in criminal contempt after the attorney made a series of disrespectful remarks to the juvenile court judge. When the juvenile court threatened to hold the attorney in contempt, the attorney repeatedly challenged the court's authority to institute contempt charges against him. At one point, the attorney stated he had researched the juvenile court's contempt powers and believed

the court could only fine the attorney ten dollars for each contempt finding. As such, the attorney began waving ten dollar bills at the judge. Eventually, the attorney was physically removed from the courtroom and sentenced to five days in jail.

- In its finding, the juvenile court found the attorney in direct criminal contempt for his "willful, deliberate, orchestrated event designed to show his disrespect for the judicial system."
- The attorney appealed. The Court of Appeals affirmed finding that the juvenile court properly applied Tennessee Rule of Criminal Procedure 42(a), which provides for summary disposition of contemptuous conduct committed in the presence of the judge. Accordingly, the attorney was not entitled to a hearing on the summary finding of his direct criminal contempt. The Court of Appeals also held that the attorney's conduct was indeed contemptuous and that the attorney was not simply "respectfully and zealously" advocating for his client. Regarding Rule 42(a)'s requirement of a written order, the Court of Appeals held that the juvenile court's delay of one day in entering the written order was not in error and did not prejudice the attorney.
- Bottom line: Contemptuous behavior in the presence of the court constitutes direct criminal contempt, which may be punished summarily pursuant to Tennessee Rule of Criminal Procedure 42(a). Additionally, Tennessee courts do not require strict compliance with Rule 42(a)'s requirements for a written order.

Recusal

- When the charged acts of contempt involve disrespect to the trial court or criticism of the judge, that judge is disqualified from presiding over the contempt hearing unless the defendant consents; recusal is preferred except where it would cause prejudicial or injurious delay.
  - ***Daniels v. Grimac***, 342 S.W.3d 511 (Tenn. Ct. App. 2010).
- ***How does this square with the summary contempt procedure?***

Watkins, ex rel. Duncan v. Methodist Healthcare System, No. W2008-01349-COA-R3-CV, 2009 WL 1328898 (Tenn. Ct. App. May 13, 2009).

- Attorney and trial court entered into heated argument, ending when the trial court stated that she considered the attorney to be in contempt. Instead of summarily sentencing the attorney at the time, trial court scheduled a contempt hearing, stating that the case would be heard by a special judge and prosecuted by a special prosecutor. At the hearing, however, the trial judge presided and no special prosecutor was appointed. The trial judge denied the attorney's request to be heard and instead read her prepared findings of fact and conclusions of law, finding the attorney in contempt and sentencing him to jail. The trial court later entered an order finding the attorney in direct criminal contempt:

  > The [c]ourt initially indicated that this matter would be dealt with by appointing a special prosecutor and having a special judge assigned to hear the case. Upon further reflection, the [c]ourt decided that this was a direct

> criminal contempt that should be dealt with summarily but through a written finding of facts and law.

- The Court of Appeals vacated the order, holding that the trial court had not properly invoked her summary contempt power:

> [W]e must agree that the imposition of summary contempt was not appropriate in this case where a hearing was scheduled and held some six days after the alleged acts of contempt occurred. The trial court did not exercise its permissive, discretionary authority on [the day the acts occurred]. The [later] hearing at which the trial court found Mr. Bailey to be in contempt simply was not a summary proceeding as anticipated by the statutes or Rule 42(a). The need for the imposition of summary punishment had greatly diminished by [the date of the later hearing], and a hearing as originally anticipated by the trial court, including an opportunity to be heard, was appropriate at this juncture. We accordingly vacate the trial court's order on contempt and remand for further proceedings.

- Bottom Line: Summary contempt proceedings are only appropriate at the time the contempt occurs. If a hearing is scheduled for a later date, the alleged contemnor must be given basic due process, including the opportunity to be heard.

State v. Anderson, No. W2014-02219-CCA-R3-CD, 2015 WL 5278378, at *1 (Tenn. Crim. App. Sept. 9, 2015).

- The trial court found an attorney in summary direct criminal contempt for his failure to appear at a scheduled court appearance. The trial court reasoned that summary direct contempt was appropriate because the attorney's failure to appear was in the court's presence and the trial court was privy to text messages received from the attorney explaining his whereabouts at the time of the scheduled court appearance.
- The Court of Appeals reversed, holding that the direct summary contempt procedure was not applicable because the attorney's willful misconduct did not occur in the presence of the judge. *See* ***Bailey v. Crum***, 183 S.W.3d 383 (Tenn. Ct. App. 2005) (noting that while the trial court witnessed the respondent's absence from court, the trial court was not a witness to her willfulness). The Court further held that the availability of text message or other electronic communication was no substitute for the required hearing. The Court therefore remanded the matter for a hearing in accordance with Rule 42.
- Bottom line: Failure to appear at court cannot be punished by direct summary criminal contempt.

Sentencing Criminal Contempt

State v. Wood, 91 S.W.3d 769 (Tenn. Ct. App. 2002).

- In a civil case, the trial court found the defendant guilty of 36 violations of a protective order and sentenced the defendant to 10-day sentences for each violation, to be served day-

for-day. The Court of Appeals reversed, finding that because there were no allegations that the defendant committed violence or even threatened violence, the sentence was not the least severe measure necessary to affect the purpose behind the criminal contempt statute, stating:

> "[P]ortions of the criminal code that require the court to set a percentage of the sentence that must be served (Tenn. Code Ann. § 40-35-302(d)) and that allows a misdemeanant to earn good conduct credits while serving time in a local jail (Tenn. Code Ann. § 41-2-111(b)) do not apply to a defendant convicted of criminal contempt arising out of a civil matter. The possible punishment is already so limited (a $50 fine and/or ten days in jail, Tenn. Code Ann. § 29-9–103(b)) that the legislature could hardly have intended to mandate a further reduction.
>
> There is, however, a principle embodied in the criminal statutes that we think applies wherever punitive incarceration is considered. Tenn. Code Ann. § 40-35-103(4) requires that the sentence be the least severe measure necessary to achieve the purpose for which the sentence is imposed. In this country, where freedom is highly valued and the fundamental laws (both state and federal) restrict the power of the government to infringe on that freedom, that principle should guide courts in the imposition of any prison sentence imposed for punishment . . . . Because the right to a trial by jury historically did not attach to a charge of contempt, see ***Ahern v. Ahern***, 15 S.W.3d 73 (Tenn.2000) and Green v. United States, 356 U.S. 165, 78 S.Ct. 632, 2 L.Ed.2d 672 (1958), appellate courts are charged with a special responsibility to see that the contempt power is not abused."

- Bottom line: While the law allows multiple convictions for criminal contempt to be served consecutively, the court still must consider the severity of the violations and determine the least severe measure necessary to properly punish the contempt.

Simpkins v. Simpkins, 374 S.W.3d 413 (Tenn. Ct. App. 2012).

- The trial court found Husband guilty of fourteen counts of criminal contempt and sentenced him to the maximum sentence of 140 days in jail.
- The Court of Appeals affirmed the trial court's finding that Husband was guilty of contempt, but exercised its authority under to modify the trial court's sentence which it deemed excessive.
- The Court of Appeals first noted that it had authority to modify the sentence imposed by the trial court under the holding in ***Thigpen v. Thigpen***, 874 S.W.2d 51, 54 (Tenn. Ct. App. 1993), which recognized that appellate courts "may modify sentences for contempt on appeal when they appear to be excessive[.]"
- The Court of Appeals next considered whether the consecutive sentence was excessive in light of "the presumption in favor of concurrent sentencing as distinguished from consecutive sentencing."
- The Court noted that the trial court erroneously failed to consider the factors outlined in Tennessee Code Annotated section 40-35-115(b) regarding the

imposition of consecutive sentences. Section 40-35-115(b) states that consecutive sentencing may be imposed if:

- The defendant is a professional criminal who has knowingly devoted the defendant's life to criminal acts as a major source of livelihood;
- The defendant is an offender whose record of criminal activity is extensive;
- The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- The defendant is a dangerous offender whose behavior indicates little or no regard for human life and no hesitation about committing a crime in which the risk to human life is high;
- The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- The defendant is sentenced for an offense committed while on probation; or
- The defendant is sentenced for criminal contempt.

- In addition, the Court considered the following additional factors as outlined in ***In re Sneed***, 302 S.W.3d 825, 828–29 (Tenn. 2010):
  - Whether the overall length of the sentence must be justly deserved in relation to the seriousness of the offenses,
    - Tenn. Code Ann. § 40-35-102(1)
  - Whether the sentence is no greater than that deserved under the circumstances
    - Tenn. Code Ann. § 40-35-103(2)
- Ultimately, the Court of Appeals reduced the sentence to an effective 49 day sentence.
- Bottom line: The trial court may order consecutive sentencing if the factors outlined in section 40-35-115(b) and ***In re Sneed*** support consecutive sentencing. The Court of Appeals, however, retains the power and discretion to modify an excessive sentence.

How does this square with the abuse of discretion standard of review adopted by the Tennessee Supreme Court in *State v. Bise*, 380 S.W.3d 682, 708 (Tenn. 2012), for sentencing in criminal cases?

- "[S]entences imposed by the trial court within the appropriate statutory range are to be reviewed under an abuse of discretion standard with a 'presumption of reasonableness.'"
- *See* ***Reynolds v. Reynolds***, No. M2013-01912-COA-R3-CV, 2014 WL 7151596, at *9 (Tenn. Ct. App. Dec. 12, 2014) (applying both ***Bise*** and ***Simpkins*** to hold that the trial court did not abuse its discretion in ordering a twenty-eight day consecutive sentence on six contempt convictions).

Coffey v. Coffey, E2012-00143-COA-R3-CV, 2013 WL 1279410 (Tenn. Ct. App. March 28, 2013).

- Husband also argued that the trial court erred in waiting too long to "unsuspend" certain contempt proceedings. Husband was previously held in criminal contempt, but with the consent of Wife, that sentence was suspended. Eventually, the suspended time amounted

to a total of 50 days in jail. More than 50 days later, Husband was again found in criminal contempt. The trial court ordered Husband to serve the suspended sentences, in addition to the new sentence. Husband argued that Tenn. Code Ann. § 40-35-310(a) deprived the court of jurisdiction to revoke the suspension beyond the maximum term to which he could have been sentenced.

- The Court of Appeals disagreed, noting that a finding of criminal contempt is not a finding that the defendant committed a crime. Thus the Court concluded that Tenn. Code Ann. § 40-35-310(a) "does not come into play when criminal contempt is at issue, and, therefore, it does not affect the court's ability to suspend its ten-day sentence."
- Bottom line: A court may "unsuspend" criminal contempt convictions outside the time in which the defendant was to have served the maximum sentence for his contemptuous acts.

Simultaneous Trial of Civil and Criminal Contempt

Duke v. Duke, No. M2009-02401-COA-R3-CV, 2012 WL 1971144 (Tenn. Ct. App. June 1, 2012).

- Mother filed a petition for criminal and civil contempt in conjunction with a divorce proceeding. The trial court, in effect, conducted a civil contempt proceeding and a criminal contempt proceeding simultaneously and found Father guilty of two counts of criminal contempt. Father argued on appeal that the trial court erred in simultaneously trying the civil and criminal contempt petitions.
- The Court of Appeals affirmed Father's criminal contempt convictions, noting:

> We have pointed out that such proceedings are fundamentally flawed and should be avoided because of the significant differences in the respective burdens of proof and the procedural rights accorded to the persons accused of contempt. ***Cooner v. Cooner***, No. 01A01–9701–CV–00021, 1997 WL 625277, at *6–7 (Tenn.Ct.App. Nov.14, 1997) (No Tenn. R. App. P. 11 application filed). Criminal and civil contempt proceedings should be tried separately.

- However, the Court concluded that because Father had been afforded all the constitutional protections required in a criminal contempt proceeding, the trial judge's decision to try both types of contempt simultaneously was not enough to require reversal:

> [T]he record before us shows that Father was fully advised of his rights attendant to being charged with criminal contempt, of the factual basis of the charges and that he suffered no prejudice from the joinder. . . . Father does not assert on appeal that the notice was inadequate or that the evidence does not support the finding of contempt, only that the court erred in considering criminal and civil contempt in the same proceeding. Under the facts presented in this case, we find no error in the manner in which the court considered the civil and criminal contempt allegations.

- Bottom line: If the Defendant/Appellant can point to no specific ways in which his or her rights have been violated by trying the civil and criminal contempt petitions simultaneously, the Court of Appeals will not reverse the trial court's decision to do so.
- Contempt issues can also be tried contemporaneously with other matters. *See* ***Norfleet v. Norfleet***, No. M2013-00652-COA-R3-CV, 2014 WL 1408146, at *5 (Tenn. Ct. App. Apr. 9, 2014) ("Thus, even though it may be better in some ways to try contempt separately from other claims, it is not unusual for a contempt charge to be tried together with the case from which it arose, for reasons of judicial economy and for the convenience of the parties. In such cases, it is important for the trial court to keep the distinctions between the various claims in mind.").

PRACTICE TIP: Be clear in your orders. In some cases, no court reporter will be present nor will any statement of the evidence be filed. Consequently, it is a necessity to be clear in your orders since that is the only record of what occurred. If the order does not specify whether civil or criminal contempt was tried or it says one type of contempt was tried but the punishment for another type was imposed, you may get the opportunity to try the case again.

- *But see* ***State ex rel. Groesse v. Sumner***, No. W2016-01953-COA-R3-JV, 2019 WL 259740, at *6 (Tenn. Ct. App. Jan. 18, 2019) (holding that the trial court's failure to specify which type of contempt was at issue was not reversible error where it was clear from the type of punishment imposed that civil contempt was at issue).

Failure to Pay Child Support

Tennessee Code Annotated section 36-5-104

- (a) Any person, ordered to provide support and maintenance for a minor child or children, who fails to comply with the order or decree, may, in the discretion of the court, be punished by imprisonment in the county workhouse or county jail for a period not to exceed six (6) months.
- (b) No arrest warrant shall issue for the violation of any court order of support if such violation occurred during a period of time in which the obligor was incarcerated in any penal institution and was otherwise unable to comply with the order.
- (c) In addition to the sanction provided in subsection (a), the court shall have the discretion to require an individual who fails to comply with the order or decree of support and maintenance to remove litter from the state highway system, public playgrounds, public parks, or other appropriate locations for any prescribed period or to work in a recycling center or other appropriate location for any prescribed period of time in lieu of or in addition to any of the penalties otherwise provided; provided, however, that any person sentenced to remove litter from the state highway system, public playgrounds, public parks, or other appropriate locations or to work in a recycling center shall be allowed to do so at a time other than such person's regular hours of employment.
- (d) In any proceeding to enforce child support, the court may apply an inference that the obligor had the ability to pay the ordered child support as set forth in § 36-5-101(a)(8).
    - *See* discussion of United States Supreme Court case, ***Hicks on Behalf of Feiock v. Feiock***, *infra.*

Important Points

- Failure to pay must be willful.
    - ***Haynes v. Haynes***, 904 S.W.2d 118, 120 (Tenn. 1995).
- Must specifically cite Tenn. Code Ann. § 36-5-104 in order to invoke child support statute and obtain sentence of up to six months.
    - ***Ahern v. Ahern***, 15 S.W.3d 73 (Tenn. 2000).
- Individuals charged with violations of the child support statute are entitled to jury trials.
    - ***Brown v. Latham***, 914 S.W.2d 887, 888-89 (Tenn. 1996).

State v. Hill, No. M2011-02233-CCA-R3-CD, 2012 WL 3834066 (Tenn. Crim. App. Sept. 5, 2012).

- Appeals from convictions under the child support statute are properly heard by the Court of Criminal Appeals.
- Defendant charged under Tennessee Code Annotated section 36-5-104 is not only entitled to a jury trial, but also the right to have case presented to the grand jury as a requirement to invoke the jurisdiction of the trial court, unless that right is waived:

> Section 36-5-104(a) is not a contempt provision. It is a general statute denoting the equivalent of a misdemeanor offense. *See* ***Brown*** [***v. Latham***], 914 S.W.2d [887,] 888-89. Because this statute is a general criminal statute, we are compelled to conclude that person accused of its violation is entitled to grand jury action.

State ex rel. Murray v. Neiswinter, No. M2005-01983-COA-R3-CV, 2007 WL 565823 (Tenn. Ct. App. Feb. 23, 2007).

- State filed criminal contempt charges against Mother for failure to pay child support. After a hearing, in which the evidence showed that nothing prevented Mother from obtaining a job, the trial court found Mother in contempt for failing to make more than token child support payments and sentenced her to jail. The trial court's order, however, did not make a specific affirmative finding that Mother had the ability to pay the child support.
- On appeal Mother argued that her conviction should be reversed due to the trial court's failure to make a specific finding that she had the ability to pay. In order to find that a party's failure to pay child support was contemptuous under section 29-9-102, "the court first must determine that [the party] had the ability to pay at the time the support was due and then determine that the failure to pay was willful." ***Ahern v. Ahern***, 15 S.W.3d 73, 79 (Tenn. 2000).
- The Court of Appeals affirmed, however, finding that the trial court had made an earlier ruling that Mother had the ability to pay child support and that:

> Based on the evidence and its assessment of the witnesses' credibility, the trial court found that Mother was employed during at least a great portion of the pertinent time period, that she was flying between Tennessee and Ohio during this time, that she gave only "vague excuses" for not paying, and that the State had proven the contempt for nonpayment of child support beyond a reasonable doubt. Viewing the proceedings as a whole and the findings in the prior appeal, we must conclude that, regardless of Mother's actual earnings during April through August 2004, the trial court's oral

> ruling reflects a finding that Mother had retained the same ability to earn as was found [previously], and that she had also maintained the same "lackadaisical attitude to secure employment which would allow her to meet her child support obligation." ***Neiswinter v. Murray***, 2003 WL 23103967, at *5. Thus, we conclude that the trial court made a sufficient finding that Mother had the ability to pay the required child support during the contempt period.

- Bottom line: Trial court must make a sufficient finding that parent has ability to pay, but order finding parent in contempt will not be overturned merely because trial court fails to specifically state that parent has the ability to pay in the order. However, the record must show that the trial court considered the issue and that evidence supports that conclusion.

Gulley v. Fletcher, No. M2012-00718-COA-R3-CV, 2013 WL 492960 (Tenn. Ct. App. Feb. 7, 2013).

- Mother filed a petition for criminal contempt based on Father's failure to pay child support. Father counterclaimed for a downward modification in support based on his decreased income. The trial court declined to award a downward modification and found Father guilty of 18 counts of criminal contempt. Father was sentenced to 180 days in jail unless he provided Mother with a $3,000.00 cash bond.
- The Court of Appeals reversed. Based on the undisputed evidence at trial, Father's income had decreased from $3,284.69 per month to $1,059.13 per month, including a monthly disability benefit. No allegation of underemployment was mentioned in the opinion. Because the difference in income constituted a significant variance, the trial court erred in failing to reduce Father's child support as of the date he filed his petition.
- The Court of Appeals also reversed the trial court's finding of contempt. The Court of Appeals noted that even using the income amount utilized by the trial court, of $910.00 per month, Father did not have the ability to pay child support of $835.00 per month.
- Bottom line: Must have present ability to pay to be found in criminal contempt for failure to make support payments.

Inference of Ability to Pay in Child Support Enforcement Statute

- ***Hicks on Behalf of Feiock v. Feiock***, 485 U.S. 624, 108 S.Ct. 1423 (U.S. 1988).
    - Holding that a statute that required the defendant to prove a present inability to pay child support as an affirmative defense is unconstitutional as applied in criminal contempt cases. Such a statute essentially placed the burden on the defendant to prove one element of the charge, willful failure to pay despite the present ability to pay.
    - The Court held that making such a showing an affirmative defense is appropriate in a civil contempt case. Tennessee follows this rule in civil cases. *See* ***Pirrie v. Pirrie***, 831 S.W.2d 296, 298 (Tenn. Ct. App. 1992) ("It is true that a spouse attempting to recover a judgment for unpaid child support or alimony has the burden of proving the amount due. But, the burden may be met by showing the order to pay and the fact of nonpayment.") (citation omitted).

- Bottom line: When charged with criminal contempt for failure to pay support, the State or petitioner has the burden to prove that the parent/obligor has the present ability to pay.
    - **Does our Child Support Enforcement Statute conflict with this holding?**

State ex rel. Waldo v. Waldo, No. E2011-027677-COA-R3-CV, 2013 WL 1319591 (Tenn. Ct. App. March 5, 2013).

- Mother's children were in the custody of maternal grandmother. The State filed a petition for civil contempt for Mother's failure to pay child support. The magistrate over the case did not appoint counsel to represent Mother.
- At the hearing, Mother testified that she was unemployed and homeless. The State failed to ask pertinent questions about what assets Mother had that she could use to pay her child support when it came due. The magistrate found Mother in willful contempt for failure to pay support.
- The Court of Appeals reversed, concluding that "the record contains no proof regarding Mother's ability to pay at the time of the contempt hearing."
- Bottom line: Places the burden to prove ability/inability to pay on the State/petitioner, even in a civil contempt context.

Does the Child Support Statute Limit the Punishment for Criminal Contempt?

Burris v. Burris, No. M2015-01969-COA-R3-CV, 2016 WL 5266550, at *1 (Tenn. Ct. App. Sept. 20, 2016).

- The trial court found mother guilty of 37 counts of criminal contempt for failure to pay previously ordered child support, sentencing Mother to 403 days incarceration, which included a previously suspended sentence.
- On appeal, Mother argued that the trial court was not authorized to sentence her to more than six months incarceration for her failure to pay child support, as allowed by section 36-5-104 (allowing a sentence "not to exceed six (6) months).
- The Court of Appeals disagreed, holding that the criminal contempt proceedings and punishments authorized by Tennessee Code Annotated section 29-9-103 (the general criminal contempt statute) are separate and distinct from the proceedings and punishment authorized by section 36-5-104 (the failure to pay child support statute). In support, the Court noted that section 36-5-104 had previously been described as "a general criminal statute," entitling the alleged contemnor to grand jury indictments and appeals to the Court of Criminal Appeals. *See* ***State v. Hill***, No. M2011-02233-CCA-R3-CD, 2012 WL 3834066 (Tenn. Crim. App. Sept. 5, 2012) (no perm. app. filed).
- The Court of Appeals therefore affirmed the trial court's ability to punish Mother's contempt by more than six months in prison, but vacated the sentence and remanded for resentencing in light of ***Simpkins v. Simpkins***, 374 S.W.3d 413 (Tenn. Ct. App. 2012).
- Bottom line: Even where the alleged contemptuous action involves the non-payment of child support, the trial court is authorized by the criminal contempt statute to impose a

punishment of 10 days per count of contempt, even if the resulting sentence is more than six months. The trial court must also consider whether the sentence is excessive in light of the circumstances.

Are Criminal Contempt Convictions Subject to Collateral Attack?

Baker v. State, 417 S.W.3d 428 (Tenn. 2013).

- The Mother pleaded guilty to criminal contempt for violating a court order to discontinue contact with her ex-husband. After her direct appeal was denied, the Mother filed a petition for post-conviction relief in chancery court, arguing that the trial court's failure to conduct an in-court guilty plea acceptance hearing at the time of her guilty plea voided her plea. The chancery court summarily denied the petition. The Court of Appeals affirmed, holding that the post-conviction relief procedure is not applicable to a case of criminal contempt. The Supreme Court granted Mother's application for permission to appeal stating:

> The language of Tennessee Code Annotated section 29-9-102 does not define contempt as a criminal offense or prescribe a conviction for contempt. Though criminal contempt has been regarded as a "crime" for some purposes, *see* ***Black*** [***v. Blount***], 938 S.W.2d at 402, criminal contempt proceedings are not intended to punish conduct proscribed as harmful by the general criminal laws. Rather, they are designed to serve the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings. *Id.* (quoting ***Young v. United States ex rel. Vuitton et Fils S.A.,*** 481 U.S. 787, 800, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987)). Despite imprecise language in prior Tennessee appellate decisions, a person found in contempt pursuant to Tennessee Code Annotated section 29-9-102 has not been "convicted" of a criminal offense for purposes of the Post–Conviction Procedure Act. Rather, section 29-9-102 defines the circumstances that authorize courts to "inflict punishments" for contempt. Courts properly "find" or "hold" persons in contempt and impose "sanctions" or "punishment" for contempt but do not "convict" persons of contempt.
>
> [*P]ost*-conviction relief, by its very nature, presupposes the existence of a conviction for a criminal offense. . .Thus, a "conviction" cannot be based on conduct that does not violate one of the general criminal laws of this State. Criminal offenses are defined by the General Assembly, ***State v. Burdin,*** 924 S.W.2d 82, 87 (Tenn. 1996), which has declared that "[c]onduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, or rule authorized by and lawfully adopted under a statute," Tenn. Code Ann. § 39-11-102(a) (2010).

- Bottom line: Criminal contempt convictions are not subject to collateral attack under the Post-Conviction Procedure Act.

Do Attorney's Commit Contempt When They Violate Ethical Rules?

State v. Beeler, 387 S.W.3d 511 (Tenn. 2012).

- Case involved a communication between a lawyer and the opposing party, during trial, while the opposing party's lawyer was questioning a witness. The communication was in violation of the Rule of Professional Responsibility 4.2 prohibiting attorneys from talking to the opposing party without the consent of the opposing party's attorney.
- The trial court, observing the behavior of the attorney, charged the attorney with contempt, citing "willful misbehavior in the presence of the court so as to obstruct the administration of justice. After a hearing, the trial court found the attorney in contempt and ordered him to pay a $50.00 fine and spend 10 days in jail, later ordered to be served on probation.
- The Court of Appeals affirmed. The Supreme Court reversed, concluding that the attorney's behavior did not constitute "willful misbehavior." According to the Court, not every ethical violation is criminal contempt of court. "[V]iolation of an ethical duty will support a criminal contempt conviction . . . only if the ethical impropriety also impinges upon the integrity of the court." Thus, unethical conduct may amount to criminal contempt, but only if the conduct also 'embarrasses, hinders, or obstructs a court in its administration of justice or derogated the court's authority or dignity, thereby bringing the administration of law into disrepute.'"
    - Because the evidence suggested that the opposing party's attorney would have permitted the attorney to ask the question had permission been requested and the opposing parties had worked closely together in the case prior to trial, the attorney's action did not constitute willful misbehavior. In addition, the action of the attorney did not "embarrass[], hinder[], or obstruct[]" the court in any way.
- Bottom line: Violation of an ethical rule will not be the basis for a finding of contempt unless the attorney's action embarrasses, hinders, or obstructs court in some way.

Knowledge of the Order that was Alleged to be Violated

Mawn v. Tarquinio, No. M2019-00933-COA-R3-CV, 2020 WL 1491368 (Tenn. Ct. App. Mar. 27, 2020)

- Husband was charged with six counts of criminal contempt for removing funds from the children's college funds in violation of the automatic divorce injunction. At trial, Husband claimed that he was never given notice of the injunction by his attorney. The trial court, however, found that the knowledge of Husband's counsel was imputed to Husband and found him guilty of criminal contempt.
- The Court of Appeals vacated the judgment of the trial court. First, the court looked to previous cases in the criminal contempt context to define willfulness in that context as: "(1) intentional conduct; and (2) a culpable state of mind." The court further held that this standard required knowledge that the defendant's actions were unlawful. The court further held that while a conclusive presumption of imputed knowledge is appropriate in the civil

contempt context, because of the quasi-criminal nature of criminal contempt, a conclusive presumption that Husband obtained knowledge of the injunction through his counsel's knowledge was improper. Because a permissive non-mandatory inference would be permissible, however, we remanded to the trial court for it to consider all of the evidence presented as to whether Husband had notice of the injunction.

- Bottom line: In order to show the essential element of willfulness to sustain a criminal contempt conviction, the defendant must have knowledge that his or her actions were unlawful. And in order to show knowledge, the court cannot conclusively presume that knowledge to counsel was imputed to the client.

Other Interesting Contempt Cases

In re Gracelyn H., No. W2021-00141-COA-R3-JV, 2022 WL 1008312 (Tenn. Ct. App. Apr. 4, 2022), *perm. app. denied* (Tenn. Aug. 4, 2022).

- Grandfather appealed the trial court's decision not to hold Mother in contempt for violating a temporary order relating to grandparent visitation.
- The Court of Appeals held that the issue was moot because the trial court found, following a final hearing, that the grandfather had no right to grandparent visitation. As such, there was "no private right to enforce" for purposes of civil contempt.

Gibbs v. Gibbs, No. E2015-01362-COA-R3-CV, 2016 WL 4697433 (Tenn. Ct. App. Sept. 7, 2016).

- Following a divorce, the former wife filed a civil contempt petition against husband alleging that he failed to pay certain debts and other obligations outlined in the parties' property settlement agreement. The trial court found the husband in civil contempt and he appealed, arguing that a trial court could not enforce the parties' contractual property settlement agreement through the contempt power.
- The Court of Appeals affirmed the trial court, holding that contempt is a proper remedy for the breach of a marital dissolution agreement even though the contract did not merge with the court's order and was not modifiable by the court.
- Bottom line: Contempt is a proper remedy for breach of an MDA even where the contract did not merge with the court's order.

Dodd v. Dodd, No. M2011-02147-COA-R3-CV, 2012 WL 3193339 (Tenn. Ct. App. Aug. 6, 2012).

- Mother filed a petition to find Father in contempt for failing to timely make child support payments and reimburse Mother for mortgage and other expenses. The trial court declined to find Father in contempt, finding that he had purged the contempt prior to trial. Regardless the trial court ordered Father to pay amounts he had failed to reimburse to Mother regarding the parties' tax return.
- On appeal, Father argued that it was error for the trial court to order payments without finding him in contempt. The Court of Appeals affirmed the trial court, however, noting:

> Father also takes issue with the money judgments the trial court awarded to Mother, which, he asserts, flow from the trial court's

> erroneous findings of civil contempt. As explained in the preceding section, we have concluded Father was not found to be in civil contempt. However, that conclusion does not undermine the propriety of the money judgments awarded to Mother.

- *See also* ***Wilkinson v. Wilkinson***, W2012-00509-COA-R3-CV (Tenn. Ct. App. 2013) (involving a similar issue).
- Bottom line: The Court may enforce its prior orders by reducing an arrearage to judgment without first finding a party in contempt.

In re Carolina M., No. M2014-02133-COA-R3-JV, 2016 WL 6427853 (Tenn. Ct. App. Oct. 28, 2016).

- The parents of a child subject to a dependency and neglect proceeding sought to have the child's guardian ad litem found in contempt for sharing information with the child's teacher that was confidential under Tennessee Code Annotated section 37-1-153.
- The alleged contemptuous acts involved two emails to the child's teacher: (1) listing questions the GAL hoped to ask the parents and asking for the teacher's input; and (2) containing a copy of a motion filed in the dependency and neglect case, which motion had been precipitated by information provided to the GAL from the teacher.
- The Court of Appeals concluded that the first email did not violate the confidentiality statute, which "precluded a finding of criminal contempt based thereon."
- As to the second email, the Court of Appeals concluded that the attachment of the court filing clearly violated section 37-1-153 regardless of the fact that the teacher had independent knowledge of the facts underlying the motion, but that GAL's action was not willful because parents failed to show that the GAL's actions were "undertaken for a bad purpose or "with the specific intent to do something the law forbids."
- Bottom line: Violation of a statute may support a finding of criminal contempt, but the violation must be willful, that is including both: "(1) intentional conduct, and (2) a culpable state of mind."

Miller v. Miller, No. M2014-00281-COA-R3-CV, 2015 WL 113338 (Tenn. Ct. App. Jan. 7, 2015).

- The trial court found Mother in contempt for her failure to allow Father previously ordered parenting time with the children.
- The Court of Appeals reversed, noting that Mother had received a letter from the department of human services in Wisconsin "alleging concerns that Father had sexually abused and neglected the minor children." No action was ultimately taken against Father, but Mother refused to allow Father visitation for a period shortly after receiving the DHS letter. The Court noted that Mother's refusal to send the children to Father was because "she had feared for the safety of the children" and that her testimony indicated that she did not intend to flaunt the trial court's orders. The Court of Appeals therefore concluded that her failure to allow Father visitation was not willful because Mother did not act with a bad purpose. The Court noted, however, "in the future we would certainly direct Mother to secure relief from the courts before unilaterally deviating from the mandated parenting schedule[.]"
- Bottom line: Refusal to allow parenting time may not be contemptuous when done with a good faith and/or reasonable belief that allowing visitation would harm the children.

- *See also* ***Colley v. McBee***, No. M2014-02296-COA-R3-CV, 2017 WL 445516, at *9 (Tenn. Ct. App. Feb. 2, 2017) (affirming trial court's refusal to find contempt when mother's refusal to allow visitation was based upon medical necessity).

In re Khrystchan D., No. M2018-01107-COA-R3-JV, 2020 WL 3494467 (Tenn. Ct. App. June 26, 2020).

- The parties' parenting plan required that Mother produce the child in Cincinnati on specified dates for visitation with Father. Father filed a petition for contempt based on Mother's failure to produce the child for Thanksgiving visitation. The proof showed that Mother informed Father that she was under pregnancy-related travel restrictions that made her unable to meet in Cincinnati in October but that she eventually was able to find someone to drop the child off. When, On October 31, Father informed Mother that he intended to have his Thanksgiving visitation as scheduled, she responded 10 days later that she could not bring the child due to her pregnancy and that she had no one else who could perform the task for her. Father did not hear again from Mother until he received a voicemail on November 22 from Mother's mother informing him that Mother was in the hospital giving birth. Father then went to Cincinnati on November 23 to pick up the child as the order required, but the child was not present.
- The trial court found that Mother was in contempt for her violation of the parenting plan.
- The Court of Appeals affirmed, explaining,

> Viewed in its entirety and in context, the evidence shows that Mother knew beginning on October 10 that she had restrictions on her ability to travel and would need to find a designee or reach an agreement with Father regarding his ability to exercise parenting time until her restrictions were lifted, and that the parties communicated often through the months of October and November. In the absence of agreement with Father or relief from the order, Mother had the responsibility to make arrangements to get Khrystchan to Cincinnati. Her failure in the time since learning of her travel restrictions to make arrangements to satisfy her obligations under the order relative to the Thanksgiving visitation, the difficulties as to which had been made evident with reference to the October visitation, demonstrates a conscious and deliberate decision to disregard the order.

- Bottom line: Plan ahead!

St. John-Parker v. Parker, No. E2018-01536-COA-R3-CV, 2020 WL 1491371 (Tenn. Ct. App. Mar. 27, 2020), perm. *app. denied* (Tenn. Sept. 16, 2020).

- This contempt case involved Husband's efforts to avoid paying alimony. The Court of Appeals affirmed the trial court's decision to award Wife attorney's fees in the resulting contempt action for both the fees she incurred in prosecuting the contempt, and the fees she incurred in participating in Husband's bankruptcy proceeding that was filed in an effort to avoid his obligations.

Luttrell v. Wassenberg, No. W2017-02443-COA-R3-CV, 2020 WL 3867131 (Tenn. Ct. App. July 9, 2020).

- Holding that a finding of civil contempt for violating a modified parenting plan must be vacated when the modified parenting plan was vacated on appeal for lack of sufficient findings of fact and conclusions of law. The modified plan was, however, to remain in place pending the entry of a new plan.
- *See also* ***New Phase Invs. LLC v. Elite RE Invs. LLC***, No. W2019-00980-COA-R10-CV, 2020 WL 6537400, at *3 (Tenn. Ct. App. Nov. 5, 2020) (vacating a trial court's order finding a party in contempt for refusing to participate in ordered mediation when the trial court had no authority to order mediation, but was instead required to determine the threshold issue of whether arbitration should be compelled). *But see* ***Total Garage Store, LLC v. Moody***, No. M2019-01342-COA-R3-CV, 2020 WL 6892012, at *11 (Tenn. Ct. App. Nov. 24, 2020) (holding that even though the trial court wrongly granted a permanent rather than temporary injunction due to a lack of notice, the party could still be held in contempt for violating the temporary injunction).

Varney v. Stooksbury, No. E2018-01812-COA-R3-JV, 2020 WL 2950555 (Tenn. Ct. App. June 3, 2020).

- Holding that an order finding a party in contempt is not final and appealable until an order setting the punishment for the contempt is entered.

Proctor v. Proctor, No. M2018-01757-COA-R3-CV, 2020 WL 2764410 (Tenn. Ct. App. May 27, 2020).

- Holding that the statute of limitations applicable to a contempt action related to provisions of an MDA was the ten-year statute of limitations for "[a]ctions on judgments and decrees of courts of record of this or any other state or government" under Tenn. Code Ann. § 28-3-110, and that the statute of limitations accrued on the date of the judgment, rather than the date of the payments. But the court noted that the wife could have sought to extend the judgment pursuant to Tenn. R. Civ. P. 69.04.

Bachelor v. Bachelor, No. W2020-00516-COA-R3-CV, 2021 WL 217703 (Tenn. Ct. App. Jan. 21, 2021).

- The trial court found that the husband had violated the parties' MDA but declined to find him in contempt because it found the actions not willful. The trial court therefore declined to award attorney's fees to Wife.
- The Court of Appeals reversed, holding that the parties' MDA provided for attorney's fees related to enforcement of the MDA and/or contempt and the trial court clearly found that Husband violated the MDA. As such, Wife was entitled to attorney's fees, despite the trial court's finding that Husband's noncompliance was not willful.

Keller v. Est. of McRedmond, No. M2013-02582-COA-R3-CV, 2018 WL 2447041, at *6 (Tenn. Ct. App. May 31, 2018).

- Vacating the trial court's award of damages for contempt because the trial court's order did not delineate between the damages attributed to the contempt and to the other causes of action involved in the case.