



THE ENFORCER

BY DAVID FINDLING

THE FINDLING LAW FIRM

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May I Proceed with a Contempt Hearing Against a Party who has Filed for Bankruptcy?

Contempt proceedings, with the threat of incarceration and fines, can be a powerful remedy to enforce a judgment of divorce. But what happens when the day before your contempt hearing, the offending party files for bankruptcy? Can you still proceed with your contempt proceedings? It depends on the type of contempt.

Civil and Criminal Contempt

There are two types of contempt, civil and criminal. Civil contempt ends when the contemnor complies with the court's order and pays any fines or costs for the contempt proceedings.¹ Criminal contempt serves a very different purpose from civil contempt in that it punishes the contemnor for past conduct that affronts the court's dignity.² A court exercising its criminal contempt power is not attempting to force the contemnor to comply with an order. Therefore, it is impossible to purge this sort of contempt by acting in any particular manner.³

It can be difficult in day to day situations to distinguish between the two forms of contempt. This because the different remedies for civil and criminal contempt may both involve fines and imprisonment. Often, the form of the proceedings will distinguish the type of contempt. Proceedings for civil contempt are between the original parties and are instituted and tried as part of the main case; whereas a criminal contempt proceeding is a separate and independent proceeding apart from the underlying case.⁴

The Automatic Stay in Bankruptcy and Contempt

11 U.S.C. § 362(a)(1) states that a filing of a bankruptcy petition operates as a stay of the commencement or continuation of a judicial proceeding against the debtor. However, there are exceptions to this rule, including the commencement or continuation of: (1) a criminal action or

proceeding; or (2) the establishment or modification of an order for domestic support obligations.⁵

While pursuing an order of contempt, including seeking incarceration, may appear to fall within the exception for criminal proceedings under 11 U.S.C. § 362(b)(1), the contempt proceedings may still be civil or criminal. If the bankruptcy court is led "to the inescapable conclusion that the debtor was being threatened with a fine and imprisonment unless he paid his pre-petition marital obligations," the contempt will be deemed to be civil, not criminal, and thereby stayed by the bankruptcy filing.⁶

Furthermore, while actions to *establish* or *modify* domestic support obligations are excepted from the automatic stay, actions to *enforce* or *collect* existing domestic support obligations are only excepted from the automatic stay if the collection is from property that is not property of the debtor's estate.⁷ In a Chapter 7 bankruptcy filing, all of the debtor's assets prior to the filing of the petition are part of the debtor's estate, while post-petition income is not part of the estate. In a Chapter 13 both pre-petition and post-petition income is part of the estate.

Accordingly, courts have repeatedly held that a creditor's use of civil contempt proceedings to collect unpaid pre-petition domestic support obligations constitute a violation of the automatic stay.⁸ Given the significant penalties imposed on a creditor for violating the automatic stay, it is best to ensure the contempt proceeding does not seek to attach assets that are part of the bankruptcy estate. Accordingly, unless a family law practitioner is well versed in bankruptcy law, it may be prudent to dismiss a contempt hearing and first seek relief from the stay before proceeding.⁹

Endnotes

1. *Algarawi v. Auto Club Ins. Ass'n (In re Auto Club Ins. Ass'n)*, 243 Mich. App. 697, 712 (Mich. Ct. App. 2000).



2. *State Bar v. Cramer*, 399 Mich. 116, 127 (Mich. 1976).
3. *Algarawi* at 713.
4. Administrative Office of the U.S. Courts, Case Management Manual for United States Bankruptcy Judges, at 63 (1995)
5. 11 U.S.C. § 362(b)(1) and (2)(A)(ii).
6. *In re Tipton*, 257 B.R. 865, 874 (Bankr. E.D. Tenn. 2000)(citing *In re Kearns*, 168 B.R. 423 (D. Kan. 1994).
7. 11 U.S.C. § 362(b)(2)(B).
8. See *Caffey v. Russell (In re Caffey)*, 384 B.R. 297, 30607 (Bankr.S.D.Ala.2008) (holding a former spouse violated automatic stay by pursuing contempt proceedings to compel debtor's payment of domestic support obligations without first seeking relief from automatic stay); see also *Tipton v. Adkins (In re Tipton)*, 257 B.R. 865, 87475 (Bankr. E.D. Tenn.2000); *In re Haas*, No. 0411534, 2004 Bankr. LEXIS 2216 (Bankr. E.D. Va. Dec. 22, 2004).
9. See 11 U.S.C § 362(k) which provides that an individual injured through willful violations of the stay shall recover actual damages including costs and attorney fees and, in appropriate circumstances, punitive damages.

