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Proving Contempt in Child Support and Alimony Cases in Massachusetts

By James M. Lynch | October 31, 2016

Child Support Family Law Alimony Contempt

Massachusetts divorce lawyer James M. Lynch reviews proof of non-payment in alimony and child support cases in Massachusetts.



In an [earlier post](#), we discussed the application of the [Massachusetts Child Support Guidelines](#) in the recent case of *Fehrm-Cappuccino vs. Cappuccino* as it related to how “income” is defined in those Guidelines. In that same opinion, the Massachusetts Appeals Court also overturned the finding of Norfolk Probate & Family Court judge, Hon. George F. Phelan, that a father’s non-payment of a lump sum [child support arrearage](#) did not constitute [civil contempt](#). This blog deals with the contempt aspect of that [opinion](#).

On March 6, 2013, a judge of the Norfolk Probate & Family Court issued a judgment ordering the father in *Fehrm-Cappuccino* to pay the mother a lump sum of \$10,000 within 90 days. The \$10,000 would be applied towards the father’s past due child support arrearage of nearly \$23,000. After the 90 days expired, the mother filed a [complaint for civil contempt alleging that the father failed to pay](#) the \$10,000 lump sum, as he was ordered by the court.

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The Difference Between Criminal Contempt and Civil Contempt: Punishment vs. Correction

The [purpose of civil contempt is remedial](#)—to coerce the disobedient party into complying with an outstanding order or judgment for the benefit of the complainant. The vast majority of complaints for contempt in Massachusetts probate and family courts are for civil contempt. Criminal contempt cases, on the other hand, are far less frequent and are punitive in nature – they are meant to punish the offender for his/her disobedience. Both civil and criminal contempt proceedings can result in the incarceration of the contemnor; however, if “the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, it is a civil contempt whereas the criminal contemnor receives a fixed sentence of imprisonment, which he cannot avoid or abbreviate through compliance with the court’s order.

In short, an individual convicted a criminal contempt can be sentenced to jail as punishment, as with any criminal conviction. The period of time served will simply be a function of the sentence. A party found in civil contempt, however, generally has an opportunity to leave jail immediately – if they comply with the order. Thus, a civil contempt defendant who owes \$10,000 in child support may be sentenced to jail for a period of 60 days, with the caveat that he or she will be released immediately if the \$10,000 is paid in the interim. (To read more about financial contempts in Massachusetts probate and family courts, [read here](#). For an overview of the law of contempt in Massachusetts, [read here](#). For contempts involving the violation of visitation and parenting orders, [read here](#).)

Burden of Proof in Criminal Contempt and Civil Contempt Proceedings

In a criminal contempt proceeding, the plaintiff or prosecution must overcome the defendant’s presumption of innocence and proof must be beyond a reasonable doubt. The burden of proof in civil contempt cases – like the one in [Fehrm-Cappuccino](#) – is less than the criminal burden but is higher than the normal civil burden of proof by a preponderance of the evidence. Since 2009, all contempt findings must be supported by [clear and convincing evidence that there was disobedience of a clear and unequivocal command](#).

The probate court judge in *Fehrm-Cappuccino* found that the March 6, 2013 judgment order was ‘clear and unequivocal’ but he also found that the mother’s testimony that the father did not pay the \$10,000 failed to suffice as clear and convincing evidence of father’s failure to comply. In other words, the judge wanted the mother to prove that she hadn’t received the \$10,000. Philosophy majors may be aware that “proving a negative” can be exceedingly difficult, [where](#) “absence of evidence is not evidence of absence”. In *Fehrm-Cappuccino*, the Appeals Court seized upon the fact that the mother alleged non-payment in her complaint and testified that the payment did not happen under oath. In contrast, the father did not file an answer to the complaint, nor did he testify – or offer any other evidence – to refute the mother’s allegation of non-payment. In reversing the trial judge’s finding, the Appeals Court held:

While the judge is not required to accept uncontroverted evidence, ... it is difficult to perceive how the mother could have provided ‘direct evidence,’ apart from her own testimony, of something she claims did not occur.

Notably, the Appeals Court added that there was no indication that the trial judge found fault with the mother’s credibility. This was a central issue, given that the only evidence entered at trial regarding payment was mother’s testimony that she did not receive the \$10,000 payment from the father. More broadly, the Appeals Court seemed to be asking: how was mother supposed to “prove” that she never received \$10,000 from the father?

How to Prove Non-Payment: Force Testimony from the Defendant through Cross-Examination

It is clear that the Appeals Court was skeptical in *Fehrm-Cappuccino* about whether the mother needed to “prove” that she did not receive \$10,000 from the father, beyond the pleadings and testimony she offered to that effect. If the mother could do her trial over again, however, she would have been well served by forcing the father to testify under oath, through cross-examination, about whether he made the \$10,000 payment or not.

As the plaintiff, the mother had the right to call the father as a witness and demand an answer from him: did he pay the \$10,000 or not? If he claimed to have made the payment under cross-examination, mother’s lawyer could follow up with additional questions attacking the father’s credibility, such as:

- When was the payment made?
- Was it paid by cash, check or some other means?

- What account did the funds come from?
- Did you keep a copy of the payment?
- What paper or electronic records exist that could prove the payment was made?

While the Appeals Court suggests in *Fehrm-Cappuccino* that the mother was probably not *required* to cross-examine the father on this issue, doing so at trial could have erased all doubt of the disobedience, and avoided the delay, anxiety and expense of preparing an appeal on this issue.

Order on Reversal

The Appeals Court did not directly say that the mother had met her burden by testifying that the father did not pay but they seemed to imply that the burden had shifted to the father to prove that he had paid and that he had failed to do so. In setting the adjudication aside, the case was remanded “so that the judge may further explain his rationale, *or make alternate disposition, if necessary*” [italics added by this author]. This phrasing may seem innocuous to the untrained eye but appellate courts sometimes send pointed messages to lower court judges couched in language like this about what they think should happen when a case is remanded back to the lower court for proceedings consistent with the appellate court’s opinion.

About the Author: James M. Lynch is a Massachusetts personal injury attorney and divorce lawyer for Lynch & Owens, located in Hingham, Massachusetts.

Schedule a consultation with James M. Lynch today at (781) 253-2049 or send him an email

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