

# Seeking Civil Relief for Violations of Orders of Protections

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## I. Introduction

Family law practitioners sometimes must obtain protection for clients who are victims of domestic abuse. That process entails proceeding under the Illinois Domestic Violence Act of 1986 and securing the entry of an order of protection. After the order of protection is obtained, however, the domestic abuse can continue even though the domestic violence statute criminalizes violations. Abuse may continue because in select instances police officers and sometimes prosecutors can be dismissive of such violations, especially when the violations superficially appear to be innocuous or difficult to establish in court. While the vast majority of law enforcement professionals take the alleged violations seriously, tragic examples still occur of women protected by such an order being slain by their abusers. If alleged violations are not treated seriously, a lawyer must decide what, if anything, can be done to protect the client from further abuse despite the entry of the order of protection.

The usual and necessary advice given clients who claim their spouse has violated an order of protection is to contact local authorities and file criminal charges. Illinois in 2009 attempted to further protect domestic violence victims by enacting a number of new laws. One such law, referred to as the Cindy Bishof Law, was named after an Arlington Heights woman who was shot to death by her ex-boyfriend. The new law allows a court to require a person who violates an order of protection to wear a global tracking device that would notify the victim when the offender approaches a forbidden zone.

The long term effects of these new laws are unknown and unclear. Even the constitutionality of the Cindy Bishof Law is in question and has drawn some criticism because it allows judges to require the wearing of a global positioning device even though the defendant has not been convicted of violating the order of protection. Therefore, it is still necessary to consider alternative means to try to protect clients who may be victims of ongoing abuse despite the entry of an order of protection. If the criminal justice system does not provide clients with the necessary safeguards, the Illinois Domestic Violence Act of 1986 does offer an abused person the ability to pursue protection and deterrence through alternative means, specifically Section 60/223(b) of the Illinois Domestic Violence Act of 1986, which allows a Court to enforce violations of orders of protection through both criminal prosecution and contempt proceedings.

## II. Civil v. Criminal Contempt

In pursuing contempt as a remedy, one must decide whether to seek criminal or civil contempt sanctions. Contempt can be either civil or criminal, and the distinction is often difficult to make. *People ex rel. Chicago Bar Association v. Barasch*, 21 Ill.2d 407, 409, 173 N.E.2d 417 (1961). In fact, a single act may give rise to both civil and criminal sanctions. *Yates v. U.S.*, 355 U.S. 66, 78 S.Ct. 128 (1957). A proceeding for civil contempt usually arises when a party has refused to do what the court ordered, while criminal contempt arises when he does what the court has prohibited. *Shillitani v. United States*, 384 U.S. 364, 368, 86 S.Ct. 1531 (1966). A sanction for civil contempt is prospective in nature and seeks to compel a contemnor to comply with the court's order for the benefit of another party, while a sanction for criminal contempt is retrospective in nature and is intended to punish the party violating a court order and thereby preserve the authority of the court. *Id.*

Two conclusive characteristics distinguish the two forms of contempt. First, the sanction for civil contempt, including imprisonment, allows the contemnor to purge himself of the contempt and avoid the penalty by obeying the court order, while the contemnor sanctioned for criminal contempt, if sentenced to a definite term of imprisonment, is unable to avoid the punishment by complying with the court order. *People v. Gray*, 36 Ill.App.3d 720, 721, 344 N.E.2d 683 (1<sup>st</sup> Dist. 1976). Second, the pleading requirements for each are significantly different. A party seeking a sanction for criminal contempt cannot ask the court for an order directing the offending party "to show cause" why he should not be held in contempt of court because the party accused of criminal contempt cannot be made to testify against himself; instead, a petition for criminal contempt must be titled as such so as to give the alleged contemnor proper notice of the nature of the charges against him. *In re Marriage of Betts*, 200 Ill.App.3d 26, 58-59, 558 N.E.2d 404 (2<sup>nd</sup> Dist. 1990).

## III. Pursuing Indirect Civil Contempt

A petition for indirect civil contempt can be used effectively to try and protect a client whose spouse or partner has allegedly violated an order of protection. First, it can be used to deter the alleged violator from future acts of domestic abuse. An action for civil contempt should ask the court to fashion a sanction that will stop someone from violating the restrictions in the order of protection and to impose imprisonment as the sanction for any future violations. Such a remedy is supported by the 19<sup>th</sup> Judicial Circuit Court Rule 13.01(D)(2)(e) and Illinois case law. In *People v. Doherty*, 165 Ill.App.3d 630, 518 N.E.2d 1303 (2<sup>nd</sup> Dist. 1988), the court imposed a fixed term of imprisonment on a divorced father who had failed to return his children to their custodial mother following a weekend visit. However, the sentence was stayed conditioned on the husband's future compliance with the visitation order; as such, the husband remained free as long as he complied with the court's order. Thus, even a sentence of future imprisonment can be coercive and therefore civil in character.

The other reason a petition for indirect civil contempt makes sense is that it avoids any potential double jeopardy problem if there is a criminal case pending for the same violations, or if there is a likelihood that a criminal charge is imminent. Although Section 60/223 of the Illinois Domestic Violence Act of 1986 authorizes Illinois courts to enforce orders of protection through both criminal prosecution and contempt proceedings, it prohibits a criminal contempt action that is second in time to a criminal charge on grounds of collateral estoppel or the constitutional prohibition against double jeopardy. However, the fact that a single act may give rise to different sanctions, one civil and coercive, the other criminal and punitive, presents no double jeopardy problem. *Yates v. U.S.*, 355 U.S. 66, 75 (fn. 9), 78 S.Ct. 128 (1957). The double jeopardy prohibition applies only to criminal proceedings, including criminal contempt, *In re Marriage of D'Attomo*, 211 Ill.App.3d 914, 570 N.E.2d 796 (1<sup>st</sup> Dist. 1991), so a criminal prosecution is not barred by a prior civil action. *People v. Gray*, 36 Ill.App.3d 720, 722, 344 N.E.2d 683 (1<sup>st</sup> Dist. 1976). Neither does a prior criminal conviction bar subsequent proceedings, including coercive incarceration, for indirect civil contempt. *Sanders v. Shephard*, 185 Ill.App.3d 719, 731, 541 N.E.2d 1150 (1<sup>st</sup> Dist. 1989).

In *People v. Doherty*, 165 Ill.App.3d 630, 518 N.E.2d 1303 (2<sup>nd</sup> Dist. 1988), a divorced father violated a visitation order by retaining children for ten months following a weekend visit. A grand jury returned an indictment charging the father with child abduction. Three weeks later, the mother filed a civil contempt proceeding in the divorce court. The contempt proceeding in the civil matter went to hearing while the State was still preparing its child abduction case and resulted in a finding of civil contempt and the imposition of a coercive penalty in the form of future incarceration for any further violation of the visitation order. When the father argued that the State prosecutor was aware of the civil contempt proceeding and should have acted to postpone that action, the appellate court stated,

“[W]e cannot equate that knowledge with authority to postpone the contempt action or to consolidate the cases. We know of no statutory or decisional law in this State which authorized the State’s Attorney to intervene in a contempt proceeding arising from private litigation.”

165 Ill.App.3d at 638.

Thus, even if civil contempt proceedings are filed first in time, as noted above, the State has no authority to postpone the contempt action or to prevent the dissolution court from exercising its inherent contempt power at the request of a civil litigant. *Doherty*, 165 Ill.App.3d at 638. As set forth in *Yates*, a criminal action, even if second in time, is not barred by any constitutional or estoppel principle. Further, a petition for rule to show cause for violation of an order of protection is required to be treated by the court as an expedited proceeding. Therefore, a litigant can quickly obtain relief in civil court on a rule to show cause petition as opposed to waiting for the long and sometimes drawn out criminal process to resolve itself.

Last, obtaining relief in civil court will usually be easier than in criminal court since it requires a lesser burden of proof. Establishing a violation through indirect civil contempt requires proof only by a preponderance of the evidence, whereas criminal contempt still requires establishing the violation beyond a reasonable doubt. Moreover, in those situations where no criminal proceedings are pending, the relief that can be sought by the petitioning party includes incarceration, fines, community service, and attorneys' fees. For first time offenders and to the extent permitted by law, the court is encouraged to impose a minimum penalty of 24 hours imprisonment and 48 hours imprisonment for second and subsequent violations.

#### IV. Conclusion

No order of protection can ensure the safety of a domestic violence victim. As demonstrated over time, while ultimately designed to act as a deterrent, orders of protection cannot stop a bullet or other life-threatening actions of a mentally deranged or unstable person. And while Illinois's new laws in 2009 may further ensure a victim's safety, creative and zealous lawyering may be an additional way to serve and protect clients who are subject to ongoing domestic abuse.