

## ENFORCEMENT OF ORDERS

- Contempt
- Child and Spousal Support
- Parent time
- Restraining Orders
- Failure to pay debts

**Rule 101. Motion practice before court commissioners.**

(a) Written motion required. An application to a court commissioner for an order shall be by motion which, unless made during a hearing, shall be made in accordance with this rule. A motion shall be in writing and state succinctly and with particularity the relief sought and the grounds for the relief sought.

(b) Time to file and serve. The moving party shall file the motion and attachments with the clerk of the court and obtain a hearing date and time. The moving party shall serve the responding party with the motion and attachments and notice of the hearing at least 14 calendar days before the hearing. A party may file and serve with the motion a memorandum supporting the motion. If service is more than 90 days after the date of entry of the most recent appealable order, service may not be made through counsel.

(c) Response; reply. The responding party shall file and serve the moving party with a response and attachments at least 5 business days before the hearing. A party may file and serve with the response a memorandum opposing the motion. The moving party may file and serve the responding party with a reply and attachments at least 3 business days before the hearing. The reply is limited to responding to matters raised in the response.

(d) Attachments; objection to failure to attach.

(d)(1) As used in this rule "attachments" includes all records, forms, information and affidavits necessary to support the party's position. Attachments for motions and responses regarding alimony shall include income verification and a financial declaration. Attachments for motions and responses regarding child support and child custody shall include income verification, a financial declaration and a child support worksheet. A financial declaration shall be verified.

(d)(2) If attachments necessary to support the moving party's position are not served with the motion, the responding party may file and serve an objection to the defect with the response. If attachments necessary to support the responding party's position are not served with the response, the moving party may file and serve an objection to the defect with the reply. The defect shall be cured within 2 business days after notice of the defect or at least 2 business days before the hearing whichever is earlier.

(e) Courtesy copy. Parties shall deliver to the court commissioner a courtesy copy of all papers filed with the clerk of the court within the time required for filing with the clerk. The courtesy copy shall state the name of the court commissioner and the date and time of the hearing.

(f) Late filings; sanctions. If a party files or serves papers beyond the time required in subsections (b) or (c), the court commissioner may hold or continue the hearing, reject the papers, impose costs and attorney fees caused by the failure and by the continuance, and impose other sanctions as appropriate.

(g) Counter motion. Opposing a motion is not sufficient to grant relief to the responding party. An application for an order may be raised by counter motion. This rule applies to counter motions except that a counter motion shall be filed and served with the response. The response to the counter motion shall be filed and served no later than the response. The reply to the response to the counter motion shall be filed and served at least 2 business days before the hearing.

(h) Limit on hearing. The court commissioner shall not hold a hearing on a motion before the deadline for an appearance by the respondent under Rule 12.

(i) Limit on order to show cause. The court shall issue an order to show cause only upon motion supported by affidavit or other evidence sufficient to show probable cause to believe a party has violated a court order. The court commissioner shall proceed in accordance with Utah Code Title 78, Chapter 32, Contempt.

(j) Motions to judge. The following motions shall be to the judge to whom the case is assigned: motion for alternative service; motion to waive 90-day waiting period; motion to waive divorce education class; motion for entry of default judgment; motion for leave to withdraw after a case has been certified as ready for trial; and motions in limine. A court may provide that other motions be to the judge.

## Utah Case Law

COLEMAN v. COLEMAN, 664 P.2d 1155 (Utah 1983)

664 P.2d 1155

BILLIE J. COLEMAN (SCARCELLA), PLAINTIFF AND RESPONDENT, v. HAROLD S.

COLEMAN, DEFENDANT AND APPELLANT.

No. 18730.

Supreme Court of Utah.

March 22, 1983.

### Page 1156

Appeal from the Third District Court, Salt Lake County, Robert V. Phillips, Circuit Judge.

Richard L. Bird, Salt Lake City, for defendant and appellant.

M. Richard Walker, Salt Lake City, for plaintiff and respondent.

PER CURIAM:

Defendant appeals from an order and judgment of the district court finding him in contempt of court for failure to pay alimony, and granting judgment in favor of plaintiff for delinquent alimony of \$3,000, and attorney's fees of \$200. We affirm.

A judgment was entered December 3, 1981, by which defendant was ordered to pay \$1,500 each month to plaintiff as alimony. On July 2, 1982, plaintiff caused an order to show cause to issue, requiring defendant to appear and show cause why he should not be held in contempt of court for failure to pay the alimony. Plaintiff filed a regular form affidavit in support of this order to show cause, in which she stated that defendant had paid no alimony for the months of May and June, 1982; that the total past due was \$3,000 and that defendant had the ability to pay, but willfully failed and refused to do so. She did not fill in blanks provided in the form for the amount of defendant's income, or any other assets or sources of income available to him.

At the hearing on the matter, plaintiff offered as evidence, copies of the records kept by the district court clerk showing that alimony for the two months of May and June had not been paid.<sup>[fn1]</sup> Defendant stipulated that the photocopy was a record kept by the alimony clerk, but did not stipulate as to the amount which was in fact unpaid. He then refused to present any evidence to show the amounts paid, as he said he had filed bankruptcy, and the court had no authority to enter a money judgment against him in view of the automatic stay in bankruptcy proceedings provided for in [11 U.S.C. § 362](#)(a). He further stated that if a money judgment were requested, he was not prepared to proceed on the contempt matter. Accordingly, the court found on the basis of evidence presented by plaintiff, that defendant was delinquent in payment of alimony for the months of May and June, 1982, and entered judgment in favor of plaintiff in the amount of \$3,000. The court further found defendant in contempt of court for having failed to pay, and having failed to produce evidence of any valid reason for his failure to pay. Defendant was sentenced to serve 30 days in the Salt Lake County jail, which has since been stayed pending this appeal.

Defendant contends that the contempt judgment should be vacated by this Court because (1) the court placed the burden of proving his inability to pay on defendant, (2) the evidence does not support the judgment, and (3) the written findings do not support the judgment. Defendant further argues that the money judgment

should be vacated because he had no opportunity to prepare to defend against a money judgment, and because the judgment violates the bankruptcy stay.

For his first point, defendant relies on *Thomas v. Thomas*, Utah, [569 P.2d 1119](#) (1977), in which this Court held that a finding of contempt and the imposition of a jail sentence must be supported by clear and convincing proof that (1) defendant knew what was required, (2) that he had the ability to comply, and (3) that he willfully and knowingly failed and refused to do so. We reaffirm that rule. Defendant is mistaken, however, that it is plaintiff's burden to prove these three elements. An order to show cause is an order from the court, directed to the defendant to appear and show cause why he should not be held in contempt for willfully disobeying the previous order of the court. While it is true that an order to show cause will not issue except upon an affidavit that a party has

**Page 1157**

violated or disobeyed the court's orders, once issued, the burden is on the defendant to present evidence with respect to the three elements stated in *Thomas, supra*. In *DeYonge v. DeYonge*, [103 Utah 410](#), [135 P.2d 905](#) (1943), this Court stated:

The "affidavit is sufficient if it states the acts done or omitted in violation of the order of the court." [Citations omitted.] Ability to pay is a matter of defense and the burden of proof is upon the defendant in the contempt proceeding.

135 P.2d at 905, 906.

Defendant's argument that the court was in error in placing the burden of proof on him is thus without merit.

Defendant's second point is likewise without merit. He contends that though plaintiff, in her affidavit, alleged that defendant had the ability to pay alimony as ordered by the court, there was no basis in the affidavit to show that plaintiff had personal knowledge of this fact, as required by Rule 56(e), Utah R.Civ.P. As stated by this Court in *DeYonge, supra*, the affidavit serves only to show that a party by his acts or omissions, has violated an order of the court.

In *Thomas v. Thomas, supra*, on which defendant relies, we clearly stated the burdens of the parties to a contempt proceeding:

It is true as plaintiff contends, that where there is a judgment that a party do an act, such as deliver stock or a deed, which judgment stands unattached, it is presumed that the party has the ability to perform and that a complainant makes a prima facie case of contempt by showing failure to comply with the judgment. But where there is evidence concerning justification for the failure, the ultimate burden of proving that the party charged is in contempt is on the complainant.

569 P.2d at 1121.

It is only after defendant presents evidence of justification for his failure to perform that the burden shifts back to the plaintiff.

The same reasoning applies to defendant's third point. Defendant cites cases in which this Court has reversed judgments of contempt for failure of the trial court to make explicit findings that a defendant had the ability to comply with the court's previous order. See *Thomas* and *DeYonge*, both *supra*. But in each of those cases, defendant had presented evidence of inability to perform. Where there is conflicting evidence presented, but no finding is entered by the trial court resolving that conflict, it is difficult for a reviewing court to measure

the sufficiency of the evidence which might have determined the issue. In this case, however, defendant refused to present any evidence in justification of his failure to perform. He has thus failed to rebut the presumption that he had the ability to pay alimony as ordered by the court, and the court was not in error in finding defendant in contempt on that basis.

Defendant further contends that the judgment for \$3,000 in favor of plaintiff should be vacated because he had no notice that a money judgment would be demanded, and had no opportunity to prepare to defend against such a judgment. Installments of support payments ordered in a divorce decree become vested in the recipient when they become due. *Bates v. Bates*, Utah, [560 P.2d 706](#) (1977); *Larsen v. Larsen*, Utah, [561 P.2d 1077](#) (1977). The entry of judgment for delinquent alimony or support payments is entered as a means of enforcing the original order, and collecting amounts due. The district court has authority to enter judgments for delinquent support payments under U.C.A., 1953, § [30-3-5](#)(1). Plaintiff's affidavit specifically stated that the alimony payments for May and June were unpaid. Defendant had adequate notice that these payments were at issue, but failed and refused to show anything to the contrary of plaintiff's evidence.

The burden being upon defendant to establish the amount paid, he must assume the risk of any failure by reason of indefiniteness.

*Openshaw v. Openshaw*, [86 Utah 229](#), [235](#), [42 P.2d 191](#), [193](#) (1935).  
**Page 1158**

Finally, defendant's argument that the federal bankruptcy statutes deprive the state district court from entering this money judgment for delinquent support payments is without merit. Under [11 U.S.C. § 523](#)(a), alimony debts are not discharged in bankruptcy and under [11 U.S.C. § 362](#)(b) the filing of a petition in bankruptcy does not stay the collection of alimony from property that is not a part of the bankruptcy estate. The record is devoid of any indication that plaintiff has attached property belonging to the bankruptcy estate in execution of this judgment.

The judgment of the district court is affirmed, and the stay of execution of the contempt order previously issued by this Court is hereby vacated.

[fn1] Defendant had made payments of alimony through the clerk of the court, who keeps records of such deposits and forwards the same to the recipient.

## Utah Case Law

BOGGS v. BOGGS, 824 P.2d 478 (Utah App. 1991)

824 P.2d 478

JOHN R. BOGGS, PLAINTIFF AND APPELLANT, v. JANICE B. BOGGS, DEFENDANT AND  
APPELLEE.

No. 910007-CA.

Utah Court of Appeals.

December 31, 1991.

**Page 479**

Appeal from the Third District Court, Summit County, Pat B. Brian, J.

David S. Dolowitz and M. Joy Douglas, Salt Lake City, for plaintiff and appellant.

John B. Anderson, Salt Lake City, for defendant and appellee.

Before BILLINGS, JACKSON and ORME, JJ.

### OPINION

JACKSON, Judge:

John R. Boggs appeals a judgment of contempt issued against him under Utah Code Ann. § [78-32-1](#) (1987).[\[fn1\]](#)

### BACKGROUND

John R. Boggs (Husband), and Janice B. Boggs (Wife), were divorced several years ago in California. They were the parents of one child at that time. Both parties were residing in Summit County, Utah, when Husband filed a petition seeking to have his child support obligation reduced. Wife filed a verified counterpetition seeking to have child support increased and judgment entered for arrearages in support. Wife's petition included conclusory allegations that Husband's failure to pay support was willful and contemptuous. The parties sparred with various hearings,

**Page 480**

stipulations and continuances for several months. The court held a pre-hearing settlement conference which resulted in the issuance of a discovery order and a notice of hearing. The order set a deadline for "all outstanding discovery." At that time, the discovery outstanding consisted of certain interrogatories served by Wife. The notice set a date for "evidentiary hearing on divorce modification." The time frame for both was within thirty days.

After the conference, Husband's attorney withdrew and Husband secured a replacement. Wife's attorney mailed a notice of deposition duces tecum to Husband's attorney for Husband to appear for a deposition before the hearing. Husband's new attorney applied for a protective order due to the shortness of time and Husband's relocation to Colorado. Wife's attorney had previously filed a motion to permit the filing of an amended counterpetition. A few days before the hearing, Wife's attorney mailed to Husband's attorney a notice to submit for decision the motion for protective order and the motion to amend the counterpetition. Two days before trial Husband provided some of the information Wife was seeking to discover and stated the remainder was not available to him. The hearing date arrived and the court proceeded without ruling on either of the above motions.

The court requested that counsel proceed on the basis of proffers rather than submission of evidence. The parties stipulated that judgment be entered against Husband for an agreed amount of arrearages in child support. Thereafter, the court reserved all remaining divorce issues for a later hearing and proceeded to determine whether Husband should be held in contempt of the court for (1) failure to respond to discovery and (2) willful failure to pay child support. After hearing the proffers of both parties concerning contempt, the court concluded that Husband had committed willful contempt of court and ordered him imprisoned as follows:

[f]or forty-eight (48) hours in the Summit County jail for willfully failing to comply with the discovery orders of the Court, and ten (10) days in the Summit County Jail for failure to pay child support. These contempt confinements may be served in twenty-four (24) hour increments, and may be served in a comparable facility in either Colorado or Mississippi and not in the Summit County Jail, provided that verification of time served be provide [sic] to the Court on or before January 1, 1991. In the event that the Plaintiff fails to serve said confinement as ordered by the Court before January 1, 1991, then the Defendant shall be held in further contempt of the Court and shall be confined for thirty (30) consecutive straight days in the Summit County Jail without further notice or hearing.

#### ISSUES

Husband argues that entry of the contempt orders (i) violated constitutional and statutory due process requirements because of inadequate notice of the charges, (ii) violated judicially imposed requirements regarding the substantive elements of contempt findings, and (iii) was an abuse of the trial court's discretion because the sanctions imposed exceeded statutory limits. Wife argues on motion that Husband's appeal be dismissed as being untimely.

#### TIMELINESS OF APPEAL

Wife claims that the judgment of contempt is not final because it did not adjudicate all pending claims. Further, she claims the thirty-day appeal period began when the court issued an order of commitment, not upon entry of the judgment. We conclude that the contempt judgment is properly before us. If the contempt judgment is merely one of fine and/or imprisonment, it is criminal in nature and appealable. *Von Hake v. Thomas*, [759 P.2d 1162](#), [1167](#) (Utah 1988); *Salzetti v. Backman*, [638 P.2d 543](#), [544](#) (Utah 1981) (per curiam); *Foreman v. Foreman*, [111 Utah 113](#), [176 P.2d 165](#), [169](#) (1947). A judgment of criminal contempt is generally considered to be a final order separate from ongoing proceedings and appealable as a matter of right. *Von Hake*, 759 P.2d at 1167. Husband's imprisonment was unconditional, he **Page 481** was not permitted any opportunity to remedy or purge himself of the alleged contempt. Thus, the principal purpose of the judgment was to punish rather than obtain compliance with prior orders. Accordingly, the judgment was criminal in nature and appealable. *Id.* at 1168; *Thomas v. Thomas*, [569 P.2d 1119](#), [1121](#) (Utah 1977).

The notice of appeal was timely because it was filed within thirty days of the entry of findings, conclusions and judgment, although a commitment order directed to the sheriff was issued earlier. See Utah R.App.P. 3(a) (filing appeal from final orders and judgments).

#### ANALYSIS RE CONTEMPT

As the trial court stated, the contempt judgment was based on both Husband's failure to pay child support and failure to

respond to discovery. We will examine the procedures followed with respect to each ground separately to determine their lawfulness.

First, we examine the procedure followed regarding Husband's failure to pay child support. Wife's counterpetition for modification included a section labeled "Order to Show Cause" which contained her allegations of contempt. Her only factual statement was that Husband had failed to pay support. A copy of this pleading was served by mail to Husband's attorney. At most, this document provided notice that Wife might request the trial judge to authorize and issue an order to show cause. The record does not reveal any copy of an order to show cause regarding contempt, court approval or authorization of an order, or service of an order on Husband requiring him to appear at any time or place to show cause why he should not be held in contempt for failure to pay child support. "An order to show cause is an order from the court, directed to the *defendant* to appear and show cause why he should not be held in contempt for willfully disobeying the previous order of the court." *Coleman v. Coleman*, [664 P.2d 1155](#), [1156](#) (Utah 1983) (per curiam) (emphasis in original). Further, the notice of hearing issued by the court simply notified counsel that the hearing was to be an "evidentiary hearing on divorce modification."

When Husband appeared for this modification hearing, the proceedings were converted into a contempt trial based on proffers. See *State v. Halverson*, [754 P.2d 1228](#), [1230](#) (Utah App. 1988) (conviction of indirect contempt reversed where evidentiary procedures not followed), *overruled on other grounds by Von Hake*, 759 P.2d at 1171. Summary contempt proceedings are permitted when the court has personally witnessed the acts constituting contempt and the person charged has full knowledge of the nature of the charge and an opportunity to defend. See Utah Code Ann. § [78-32-3](#) (1987); *Von Hake*, 759 P.2d at 1170. But indirect contempt, as here, can be properly adjudged only in a proceeding more tightly hedged with procedural protections:

The due process provision of the federal constitution requires that in a prosecution for a contempt not committed in the presence of the court, "the person charged be advised of the nature of the action against him [or her], have assistance of counsel, if requested, have the right to confront witnesses, and have the right to offer testimony on his [or her] behalf." *Burgers v. Maiben*, 652 P.2d [1320] at 1322 [Utah 1982], see U.S. Const. amend. XIV; cf. *Robinson v. City Court ex rel. City of Ogden*, 112 Utah [36] at 42, 185 P.2d [256] at 259 [(1947)] (applying Utah Const. art. 1 § 12 to criminal contempt proceedings). These protections are amplified upon in the Code, which requires, *inter alia*, that in a case of indirect contempt, an affidavit must be presented to the court reciting the facts constituting the contempt in order to ensure that the court and the person charged are informed of the conduct alleged to be contemptuous.

*Von Hake*, 759 P.2d at 1170 (citing Utah Code Ann. § [78-32-3](#) (1987); *Robinson*, 112 Utah at 41, 185 P.2d at 258).

In this case, a verified petition was filed with the court, but the record does not show that it was presented to the trial judge for consideration and issuance of an

**Page 482**

order to show cause at any time prior to the modification hearing. Further, section [78-32-4](#) states: "without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted[.]" In the present case, no notice or order to show cause was issued by the trial judge or personally served on Husband. Husband appeared for a modification hearing and was ushered into a contempt proceeding. On the foregoing facts, it was not appropriate for the court to use the summary procedures provided in section

[78-32-3](#). Thus, we reverse the contempt judgment based on Husband's conduct regarding child support.

Next, we examine the procedure followed regarding Husband's failure to respond to Wife's discovery. Husband's conduct in failing to provide all of the information Wife was seeking would be properly classified as an indirect contempt, if any, because it occurred outside the court's presence. The court had ordered all outstanding discovery, i.e., responses to Wife's interrogatories to be completed a few days before the hearing. He complied in part two days before the hearing stating that the remainder was not available to him. The record does not reveal that any of the more elaborate procedures required for indirect contempt were followed regarding this conduct. The section [78-32-3](#) requirement of an affidavit was not satisfied. Moreover, no notice of the proceeding or order to show cause was issued for Husband's personal appearance as required by section [78-32-4](#). Husband had no way of knowing that he would be required to show cause why he should not be held in contempt for his conduct regarding discovery. He did not receive ample notice of these contempt charges or the pendency of a show-cause hearing regarding them. Further, the court limited the hearing to proffers rather than conducting an evidentiary hearing. On these facts, it was not proper for the court to utilize summary procedures. Accordingly, we reverse the contempt judgment based on Husband's conduct regarding discovery.

#### CONCLUSION

Because we reverse both of the contempt judgments on due process and statutory procedural grounds, we need not reach Husband's remaining arguments. Costs to Husband as prevailing party.

BILLINGS and ORME, JJ., concur.

[fn1] Section [78-32-1](#) enumerates the acts and omissions constituting contempt. Subsection (5) provides: "Disobedience of any lawful judgment, order or process of the court." Additional relevant sections that address contempt are as follows:

[78-32-3](#). In immediate presence of court; summary action - Without immediate presence; procedure.

When a contempt is committed in the immediate view and presence of the court, or judge at chambers, it may be punished summarily, for which an order must be made, reciting the facts as occurring in such immediate view and presence, adjudging that the person proceeded against is thereby guilty of a contempt, and that he be punished as prescribed in § [78-32-10](#) hereof. When the contempt is not committed in the immediate view and presence of the court or judge at chambers, an affidavit shall be presented to the court or judge of the facts constituting the contempt, or a statement of the facts by the referees or arbitrators or other judicial officers.

[78-32-4](#). Warrant of attachment or commitment order to show cause.

When the contempt is not committed in the immediate view and presence of the court or judge a warrant of attachment may be issued to bring the person charged to answer, or, without a previous arrest, a warrant of commitment may, upon notice, or upon an order to show cause, be granted; and no warrant of commitment can be issued without such previous attachment to answer, or such notice or order to show cause.

[78-32-10](#) (Supp. 1991). Contempt - Action by court.

Upon the answer and evidence taken, the court shall

determine whether the person proceeded against is guilty of the contempt charged. If the court finds the person is guilty of the contempt, the court may impose a fine not exceeding \$200, order the person imprisoned in the county jail not exceeding 30 days, or order both fine and imprisonment. However, a justice court judge or court commissioner may punish for contempt by a fine not to exceed \$100 or by imprisonment for one day, or by both the fine and imprisonment.

Page 1193

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