Rules to Show Cause: The Sometimes-Friend of the Family Practitioner

by David R. Clarke

Could there be any order that has more components, more moving parts, than a typical divorce order? Matters of continuing spousal and child support, logistics of custody and visitation, obligation of the parties to interact with civility, and the duty to divide assets that range from household furnishings to pensions are but a few of the provisions that may typically be found in a domestic relations order. Parties who are suffering through a separation and divorce may continue to harbor ill feelings and be less than compliant when it comes to following the directives of the court.

What then can the family law practitioner do for a client when the recalcitrant spouse or former spouse runs afoul of the dictates of an order and refuses to pay support, abide by the visitation schedule, market the former residence, follow any other rulings? The only remedy may be to seek a rule to show cause.[1]

Before initiating such an action or defending a client against a rule, the careful practitioner should first understand some not-so-apparent distinctions, subtleties, and concepts inherent in such contempt proceedings. These considerations include service of process, burdens of proof, limitations of relief, and defenses. But perhaps the most important concept to understand is whether the proceeding is civil or criminal in nature.[2]

Although the distinction between criminal and civil contempt is critical, it is not always apparent and marked by a bright line.

This threshold issue is critical. It will determine how the charges of contempt are prosecuted and defended, and what rights may attach to those who find themselves in the uncomfortable position of being the subject of contempt proceedings.

In 1911 in the case *Gompers v. Bucks Stove & Range Company*, the U. S. Supreme Court explained the distinction in this way:

> Contempts are neither wholly civil nor altogether criminal. And "it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both." But in either event, and whether the proceedings be civil or criminal, there must be an allegation that in contempt of court the defendant has disobeyed the order, and a prayer that he be attached and punished therefor. It is not the fact of punishment but rather its character and purpose that often serve to distinguish between the two classes of cases. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court. It is true that punishment by imprisonment may be remedial, as well as punitive, and many civil contempt proceedings have resulted not only in the imposition of a fine, payable to the complainant, but also in committing the defendant to prison. But imprisonment for civil contempt is ordered where the defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance, was mandatory in its character. Imprisonment in such cases is not inflicted as a punishment, but is intended to be remedial by coercing the defendant to do what he had refused to do. The decree in such cases is that the defendant stand committed unless and until he performs the affirmative act required by the court's order.[3]

Although the distinction between criminal and civil contempt is critical, it is not always apparent and marked by a bright line. As seen in *International Union v. Bagwell,* a trial court may consider the proceeding to be civil and then be

reversed on appeal when the appellate court deems the proceedings criminal in nature. This reversal results in a dismissal of the findings of contempt.[4]

In *International Union*, unions had repeatedly violated the Virginia trial court's orders that regulated the conduct of a labor dispute. Following a contempt hearing at which the unions were denied a trial by jury, significant fines were imposed. These fines were characterized by the trial court as being civil in nature; that is, imposed for the purpose of coercion, not punishment.[5]

The Virginia Court of Appeals reversed the trial court and vacated the fines. But the Supreme Court of Virginia sustained the trial court's finding that the fines were imposed in a civil proceeding, not a criminal one, and accordingly the unions were not entitled to a jury as a criminal defendant would be.[6] This ruling was then appealed by the unions to the U.S. Supreme Court.

Justice Harry A. Blackmun, writing for the majority, stated:

> Although the procedural contours of the two forms of contempt are well established, the distinguishing characteristics of civil versus criminal contempt are somewhat less clear. In the leading early case addressing this issue in the context of imprisonment, *Gompers v. Bucks Stove & Range Co.,* the Court emphasized that whether a contempt is civil or criminal turns on the "character and purpose" of the sanction involved. Thus, a contempt sanction is considered civil if it "is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive to vindicate the authority of the court."[7]

The Court found the fines more closely analogous to criminal fines than to civil fines and reversed the Supreme Court of Virginia. The U.S. Supreme Court reasoned that because the underlying proceedings were criminal in nature, the unions were denied due process when not afforded a trial by jury.[8]

The following checklist, drawn from *Gompers* and other cases, assists the practitioner in distinguishing between criminal and civil contempt.

- In order to qualify as a civil proceeding, the contemnor must be afforded an opportunity to purge the contempt; "he carries the keys of his prison in his own pocket."[9]
- A contempt fine is considered civil and remedial if the fine is designed either to coerce a party into compliance or compensate the aggrieved party for losses sustained.
- Civil contempt proceedings are between the parties to the original cause, while criminal proceedings are between the public and the defendant.
- If civil, there must be a valid court order over which the court has continuing jurisdiction.[10]

Thus, distinguishing between criminal and civil contempt proceedings is essential. Because civil contempt sanctions are viewed as nonpunitive and avoidable, fewer procedural protections for such sanctions have been required. But if criminal, the party charged is entitled to a host of procedural protections by the Constitution. These include: a presumption of innocence;[11] proof of guilt beyond a reasonable doubt;[12] notice of the charges;[13] the right against self-incrimination;[14] right to counsel; and the right to a jury trial if the contemnor may be sentenced to a period of incarceration of more than six months.[14]

Additionally, there are limitations on the punishments that may be imposed in cases of summary convictions for criminal contempt. These limitations extend not only to potential periods of incarceration, but also to the amount and scope of the fine.

Pursuant to *Code of Virginia,* 1950 Annotated, § 18.2-457: "no court shall, without a jury, for any such contempt [under Code § 18.2-456(1)], impose a fine exceeding $250.00 or imprison more than ten days.…"[16]

In *Nusbaum v. Berlin*, after finding a practitioner guilty of criminal contempt, the court imposed not only a fine of $250, but also a monetary sanction consisting of a significant award of attorneys' fees and costs.[17] On appeal, the Supreme Court of Virginia affirmed the conviction and the imposition of the fine but reversed the judgment imposing the monetary sanction. The Court agreed with the appellant that the monetary sanction exceeded the maximum fine allowable under Code § 18.2-457 and was beyond the trial court's inherent power to discipline.[18]

With any case which an aggrieved party intends to appeal, the objections to the court's holdings must be noted with specificity in order to preserve grounds for appeal. For example, in *Scialdone v. Commonwealth*, the defendants claimed they were denied due process rights associated with plenary contempt. Although the

Court of Appeals initially agreed with the appellants, the decision of the trial court was nevertheless affirmed because the appellants failed to timely object during proceedings at trial.[19]

More often than not, however, the family practitioner will be litigating civil contempt charges. In these instances, it may prove helpful to understand procedural elements of rules to show cause: how they may (or should) be entered initially, the service requirements, the burdens of proof, and the remedies available. Each is discussed separately below.

Initiating the Rule

How the rule is initially presented to the court may depend on your local practice. Rule 1:12 of the Rules of the Supreme Court of Virginia provides in part that, after the initial process, all copies of all pleadings, motions, or papers shall be provided to each counsel of record on or before the day of filing.[20] It would appear, therefore, that not even the petition for issuance of a rule would be filed with the court without notice to opposing counsel. However that is not the case, at least in all jurisdictions.

It has become common practice in domestic relations cases in the Fairfax County Circuit Court (and perhaps other jurisdictions as well) to file for the issuance of a rule upon affidavit or ex parte evidence without notice. Rhetorical query: How does this practice not violate Rule 1:12? Is not a petition for issuance of a rule to show cause a pleading or "paper" encompassed in the seemingly catchall language of Rule 1:12? Should it not follow that notice to all counsel is required? No doubt defenders of the practice would cite the Fairfax County Circuit Court case of *Fairfax County v. Alward*.[21] However, *Alward* was an unusual case. It appears from the scant record that after a hearing on the merits the defendant had been found in contempt of the court's order. The defendant then asked the court to reconsider the finding. Evidently, one of the grounds cited by Mr. Alward was that the rule served on him had been issued ex parte. In summarily denying the motion for reconsideration, the court reasoned in its one-paragraph ruling that:

> [The issuance of the Rule to Show Cause] simply puts the matter at issue, as does the filing of a Motion for Judgment. Notice to the opposing party always is given thereafter by service of process and opportunity to be heard. The petition for a rule brings to the Court's attention that there may have been a violation of an Order of the Court but does not result in any finding by the Court until a further hearing. Such an initiation of process does not require advance notice, anymore than one must advise an opponent before filing a Motion for Judgment.[22]

But no matter what the rationale, it still remains a challenge to reconcile any ex parte filing with the clear mandates of Rule 1:12. As the Supreme Court of Virginia stated in *Lee v. Mulford*, whatever the local practice may be, it may not alter substantive rights of the parties provided by statute, rules of court, and Virginia case law.[23] Moreover, is initiating a rule to show cause on an ex parte basis really without prejudice to the respondent? Not only does the moving party gain leverage by having a rule in hand, but the putative contemnor has the burden of proof at the outset.

Service of Rule

Virginia Code Ann. § 8.01-314 provides in pertinent part:

> When an attorney…has entered a general appearance for any party, any process order or other legal papers to be used in the proceedings may be served on such attorney of record. … [P]rovided, however, that in any proceeding in which a *final* decree or order has been entered, service on an attorney as provided herein shall not be sufficient to constitute personal jurisdiction over a party in any proceeding citing that party for contempt, either civil or criminal, unless personal service is also made on the party.[24]

The requirements of service are clear enough for a rule to show cause issued after entry of a final order. Query: What if the contempt proceeding were initiated based upon an alleged violation of a *pendente lite* order, and not a final order? Arguably, in such a circumstance, merely sending the rule to counsel of record would suffice without need for personal service on the party.

Burden of Proof

The burden rests upon the moving party to show that the respondent failed in some regard to comply with a valid court order. Although there do not appear to be any Virginia appellate cases that definitively establish the requisite burden of proof, the U.S. Court of Appeals for the Fourth Circuit has held that the moving party must prove noncompliance by clear and convincing evidence, and that willfulness is not an element.[25]

Whatever the burden of proof may be, it is clear that once the disobedience — for example, failure to pay support — is proved, the burden then shifts to the obligor to provide justification for his noncompliance with the order of the court.[26]

In meeting that burden, respondents charged with civil contempt are guaranteed an opportunity to present evidence in their defense. In *Street v. Street,* the Court of Appeals ruled:

> [A] defendant charged with out-of-court contempt must be given the opportunity to present evidence in his defense, including the right to call witnesses. The due process clause of the Fourteenth Amendment requires that alleged contemnors "have a reasonable opportunity to meet [the charge of contempt] by way of defense of explanation." This due process right includes the right to testify, to examine the opposing party, and to call witnesses in defense of the alleged contempt.[27]

Defenses

That which is ordered by the court must be subject to being purged; otherwise no order should be entered for a finding of civil contempt.[28] Additionally, the inability to pay is a valid defense to a charge of contempt. As seen in *Street*, a husband who was without sufficient funds to meet his court-ordered support obligations was not held in contempt because his sad pecuniary state was not of his own doing.[29]

In *Laing v. Commonwealth*, the court set forth the grounds on which a respondent can and cannot successfully assert a defense of inability to pay.

> It is true the inability of an alleged contemnor, without fault on his part, is a good defense to a charge of contempt. But where an alleged contemnor has *voluntarily and contumaciously* brought on himself disability to obey an order, he cannot avail himself of a plea of inability as a defense to the charge of contempt.[30]

Just as self-inflicted poverty is no defense, neither can a respondent rely on the defense that his violation of the court order was unintentional. The absence of the specific intent to violate a court order does not relieve the respondent of the consequences of civil contempt.[31] As declared in *Leisge v. Leisge*, "[t]he sanctity and enforceability of a [finding of civil contempt] should not hinge upon the mental state of an unsuccessful litigant."[32] The court elaborated citing the United States Supreme Court in *McComb v. Jacksonville Paper Co.,* quoting:

> The absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. … An act does cease to be a violation of law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions.[33]

Definite Terms

There can be no ambiguity in the language of the order either prohibiting or commanding certain conduct. As noted in *Winn v. Winn:*

> As a general rule "before a person may be held in contempt for violating a court order, the order must be in definite terms as to the duties thereby imposed upon him and the command must be expressed rather than implied." This is … the rule followed in Virginia. In *Taliaferro v. Horde's Adm'r.,* we said that "[t]he process for contempt lies for disobedience of what *is* decreed, not for what *may be* decreed."[34]

Stated differently, there must be an explicit command or prohibition which has been violated in order for a proceeding in contempt to lie.[35]

Scope of Relief

Aside from compelling compliance, the court in civil contempt proceedings may impose sanctions to compensate the aggrieved party for losses sustained because of a respondent's noncompliance with a court's order. "The punishment in a civil contempt proceeding 'is adapted to what is necessary to afford the injured party remedial relief for the injury or damage done by the violation of the injunction to his property or rights which were under protection of the injunction.'"[36] Depending upon the circumstances, the relief may include

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the appointment of a fiduciary or conservator to facilitate discovery or preserve the marital estate,[37] and certainly there is the issue of attorneys' fees and related costs.

In nearly every show cause hearing, as the night follows the day, a litigant will inevitably ask for attorney's fees in having to either prosecute the rule or successfully defend against the rule. Very often the basis for such an award may be found in a provision of the incorporated property settlement agreement. Absent a ratified agreement, however, there is still ample authority for such an award.

> [C]ourts have the power to award counsel fees incurred in divorce cases where contempt proceedings have to be initiated and conducted to enforce an order of the court. This is particularly true where the custody of a child, or child support, is involved because of the court's continuing concern for the welfare of the children, and because a parent's common law duty to support his or her children is not affected by the entry of a final decree in a divorce case terminating the parent's marital relationship.
>
> An aggrieved party to a divorce has the right to petition for relief, and the court has the authority to hold the offending party in contempt for acting in bad faith or for willful disobedience of its order. Consistent with our prior decisions, we hold that in such cases a court has the discretionary power to award counsel fees incurred by an aggrieved party incident to contempt proceedings instituted and conducted to obtain enforcement of an order of the court.[38]

Note, too, that a finding of contempt is not a prerequisite to an award of attorneys' fees. In the case of *Sullivan v. Sullivan,* the former wife filed a motion for a rule to show cause claiming that her former husband had breached their property settlement agreement for failure to maintain a life insurance policy. Following a hearing on the merits, the trial court agreed with the wife that the husband was in breach and awarded her attorneys' fees, but did not specifically find the husband in contempt of court.[39]

Conclusion

Contempt proceedings can be a powerful weapon. A contempt finding may result in a crippling pecuniary sanction, a fine, incarceration, or all of the above. While litigants should be mindful of the potential consequences of noncompliance with valid and explicit court orders, so too should counsel give serious consideration to the advisability of initiating contempt proceedings. Just because a rule can be issued does not necessarily mean that it should be issued. First, there may be less Draconian measures available to the aggrieved party. Second, a thoughtful practitioner ought to weigh the impact contempt proceedings may have on potentially volatile situations, such as when divorced parents continue to co-parent. But, the proceeding information offers instruction should the decision be made to ask a judge to hold a person in contempt. ■

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Endnotes:

1 For statutory authority to enforce orders relating to custody and visitation, as well as other relief under Code § 20-103, see Va. Code Ann. § 20-124.2(E).
2 While this article presents some details about criminal contempt, its focus is upon civil contempt. Details about criminal contempt are included in part to distinguish criminal contempt from civil contempt. When matters of criminal contempt arise, the practitioner should be aware, among other things, of distinctions between "in court" versus "out of court" contempt, "petty contempt" and charges of contempt that warrant plenary proceedings.
3 *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 441-42 (1911) (citation omitted).
4 *International Union v. Bagwell,* 512 U.S. 821, 839 (1994).
5 *Id.* at 823-25.
6 *Id.* at 825-26.
7 *Id.* at 827-28.
8 *Id.* at 835-39.
9 *See In re Nevitt,* 117 F. 448, 461 (8th Cir. 1902).
10 *See Hackler v. Hackler*, 44 Va. App. 51, 602 S.E.2d 426 (2004) (A husband who had repeatedly violated the terms of a *pendente lite* order died before divorce. At his death, the action was abated and the court lost jurisdiction, leaving the wife without redress.)
11 A person charged with criminal contempt is entitled to the benefit of the presumption of innocence, and the burden is on the prosecution to prove the guilt of the accused. *Bryant v. Commonwealth*, 198 Va. 148, 152, 93 S.E.2d 130, 133 (1956); *Calamos v. Commonwealth*, 184 Va. 397, 404-05, 35 S.E.2d 397, 400 (1945).
12 "Mere preponderance of evidence is not sufficient to convict, but the offense charged must be proved beyond a reasonable doubt." *Nicholas v. Commonwealth*, 186 Va. 315, 321-22, 42 S.E.2d 306, 310 (1947) (citation omitted).
13 "Due process of law, therefore, in the prosecution of contempt, except of that committed in open court, requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation. We think this includes the assistance of counsel, if requested, and the right to call witnesses to give testimony, relevant either to the issue of complete exculpation or in extenuation of the offense and in mitigation of the penalty to be imposed." *Cooke v. United States*, 267 U.S. 517, 537 (1925).
14 "In proceedings for criminal contempt the defendant is presumed to be innocent, he must be proved to be guilty beyond a reasonable doubt, and cannot be compelled to testify against himself." *Gompers*, 221 U.S. at 444.
15 The right to assistance of counsel and to a jury attach in nonsummary contempt proceedings under the same circumstances as for any other crime. *See Bagwell*, 512 U.S. at 826 (holding that "[f]or 'serious' criminal contempts involving imprisonment of more than six months, . . . the right to jury trial" applies); *Argersinger v.*

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Hamlin, 407 U.S. 25, 37 (1972) (holding that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial"); *Bloom v. Illinois*, 391 U.S. 194, 198 (1968) (holding "serious contempts are so nearly like other serious crimes that they are subject to the jury trial provisions of the Constitution").

16 Va. Code Ann. § 18.2-457; *Scialdone v. Commonwealth*, 53 Va. App. 226, 235 n.7, 670 S.E.2d 752, 757 n.7 (2009) ("A party cannot appeal the trial court's failure to take specific action in response to an irregularity in jury deliberations unless the party asked the trial court to do something about it.") (en banc).

17 *Nusbaum v. Berlin*, 273 Va. 385, 390, 641 S.E.2d 494, 496 (2007).

18 *Id.* at 398-401, 641 S.E.2d at 500-02.

19 *Scialdone,* 53 Va. App. at 238-39, 670 S.E.2d at 758-59.

20 Supreme Court of Virginia Rule 1:12.

21 *Fairfax County v. Alward*, 33 Va. Cir. 28 (1993).

22 *Id.* at 28.

23 *Lee v. Mulford,* 269 Va. 562, 566 (2005).

24 Va Code Ann. § 8.01-314 (emphasis added).

25 *In re: General Motors Corp*., 61 F.3d 256, 258 (4th Cir. 1995).

26 "In a show cause hearing, the moving party need only prove that the offending party failed to comply with an order of the trial court. The offending party then has the burden of proving justification for his or her failure to comply." *See Alexander v. Alexander,* 12 Va. App. 691, 696, 406 S.E.2d 666 (1991) (citing *Fraizer v. Commonwealth*, 3 Va. App. 84, 87, 348 S.e.2d 405, 407 (1986)).

27 *Street v. Street,* 24 Va. App. 14, 20, 480 S.E.2d 118, 121 (1997) (citations omitted).

28 *See Hackler,* 44 Va. App. at 72, 602 S.E.2d at 436.

29 *Street* at 22, 480 S.E.2d at 122.

30 *Laing v. Commonwealth,* 205 Va. 511, 514-15, 137 S.E.2d 896, 899 (1964) (citations omitted).

31 *Leisge v. Leisge*, 224 Va. 303, 309, 296 S.E.2d 538, 541 (1982).

32 *Id.* at 308, 296 S.E.2d at 541.

33 *Id.* at 308-09, 296 S.E.2d at 541 (citing *McComb v. Jacksonville Paper Co.,* 336 U.S. 187, 191 (1949)).

34 *Winn v. Winn*, 218 Va. 8, 10, 235 S.E.2d 307, 309 (citations omitted) (emphasis in original).

35 *See French v. Pobst*, 203 Va. 704, 710, 127 S.E.2d 137, 141 (1962); *see also Petrosinelli v. Peta,* 273 Va. 700, 706-07, 643 S.E.2d 151, 154-55 (2007).

36 *Rainey v. City of Norfolk,* 14 Va. App. 968, 974, 421 S.E.2d 210, 214 (1992) (citing *Deeds v. Gilmer,* 162 Va. 157, 262, 174 S.E. 37, 78-79 (1934)).

37 *See Hackler*, 44 Va. App. at 65-67, 602 S.E.2d at 433-34.

38 *Carswell v. Masterson*, 224 Va. 329, 332, 295 S.E.2d 899, 901 (1982).

39 *Sullivan v. Sullivan*, 33 Va. App. 743, 751-53, 536 S.E.2d 925, 929-30 (2000).