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Frustrated by a Deadbeat Parent? Try Invoking the Dog Law by Judge O.H. Eaton, Jr.

Family practitioners occasionally run into the deadbeat parent who simply refuses to obey the order directing payment of support. These cases are frustrating for several reasons.

True deadbeats have no money or assets. They live off of the income of others, usually day by day, or they rely upon the generosity of friends for assistance through the hard times.

Deadbeats believe they have nothing to lose. They have no job. They have no status. They have no property. They perceive themselves to be creatures deserving of sympathy due to their pathetic state which was caused by the custodial parent who now is to blame for the whole thing.

The usual civil remedies such as income deduction orders and writs of execution or sequestration do not produce needed monetary support. To add to the frustration, the custodial parent is usually destitute, or nearly so, and cannot afford counsel.

Sometimes the court files in these cases are voluminous because the deadbeat is pro se and is making a career out of dragging the custodial parent to court over trivial matters, thus jeopardizing employment and putting the custodial parent even more at the mercy of the deadbeat. How should the family law practitioner and the courts approach these cases?

One approach is to apply "dog law." Now, I do not claim this concept to be original with me. I learned the concept during a lecture by Professor Calvin Woodard of the University of Virginia College of Law several years ago.

According to Professor Woodard, there are two kinds of law: "human law" and "dog law."

"Human law" is the law of reason. It assumes that human beings are rational and are able to obey the law or weigh the advantages and disadvantages of violating the law by assessing the risk of being caught, evaluating the possible penalties, and deciding whether violating the law is worth the risk. By way of example, "human law" principles are assumed in criminal statutes, zoning ordinances, and the law of contract.

"Dog law," on the other hand, does not include any rational reasoning. When a dog jumps up on a couch, the couch gets dirty. The dog does not realize that this is a problem. If the dog's owner slaps the dog, he will get off of the couch. After being slapped a few times, the dog will not jump on the couch. This is not because the dog understands that he is getting the couch dirty, but because the dog knows he will get slapped if he jumps up on it.

"Dog law" is particularly applicable to deadbeat parents. It is not rational to refuse to pay child support. It is not rational for an able-bodied person to refuse to earn a living in order

to avoid paying child support. Deadbeat parents justify their irrational behavior as a way to get back at the custodial parent or to get the custodial parent back.

Most family practitioners fail to recognize the realities of the situation with deadbeat parents and attempt to use civil contempt as a remedy to enforce payment of support. Civil contempt is the application of “human law,” and it will not work. Let me explain.

Civil Contempt

Deadbeat parents are confident that they will not suffer loss of liberty through civil contempt. This confidence is justified. Although it is easy to initiate, civil contempt is impossible to prove in the case of a deadbeat parent. Civil contempt requires proof that the defaulting party has the ability to pay all or part of the support obligation. Since the deadbeat parent has no ability to pay, civil contempt will not be available.¹ This is true even if assets have been squandered and income has been lost through R.A.I.D.S.² The deadbeat parent knows that the court cannot force him or her to obtain gainful employment through the use of civil contempt.³ The only effective remedy in these situations is the invocation of “dog law” through indirect criminal contempt.

Indirect Criminal Contempt and Dog Law

Indirect criminal contempt differs significantly from civil contempt. First, it is punitive, not coercive.⁴ This means the deadbeat finally has something to lose that matters—liberty. Second, the awful engines of the criminal process take over the case. This includes such eye-opening events as arrest, being booked and fingerprinted, posting bond, attending arraignment, being prosecuted by an assistant state attorney, and, most significantly, having to explain lack of payment of support to a six-person jury. A jury trial is essential because it is publicly embarrassing and a jury verdict authorizes the trial judge to sentence the deadbeat to the county jail for up to a year.⁵ A nonjury trial reduces the maximum penalty to six months.⁶

Of course, the deadbeat is entitled to all of the constitutional rights of a criminal defendant including the right to counsel (the public defender must be appointed since the deadbeat is indigent) and be given a reasonable time to prepare for trial.⁷ Upon conviction, the public defender is required to seek a lien for services rendered.⁸

Invoking the criminal process is without cost to the custodial parent. The taxpayers pick up the whole tab. This is a great benefit, because the custodial parent is usually destitute due to lack of payment of support.

Initiating an indirect criminal contempt proceeding is nearly as simple as initiating a civil contempt proceeding. The process is started by the filing of a motion for order to show cause.⁹ The motion must be verified or be accompanied by an affidavit of a person who has knowledge of the facts.¹⁰ It is presented *ex parte* along with an order to show cause. The order to show cause must state the essential facts constituting contemptuous conduct.¹¹ The order can be issued like a summons or a *capias*.¹² If it is issued as a *capias*, a bond can be required.¹³ The sheriff is the officer who serves the order without costs. Once the order is served, an arraignment and trial are scheduled.

I have presided over criminal contempt proceedings, so my observations may be of benefit to those who have not had the experience.

Jurors have little sympathy for deadbeat parents, and I am amazed at the number of people in jury pools who not only pay child support, but also have never missed a payment and are proud of it. The deadbeat will realize things are going badly during the first few moments of the trial.

After the jury has been selected, it is a simple matter for the state attorney to have the support order admitted into evidence and establish the amount of arrearage. The state can then rest because of the presumption that the deadbeat had the ability to comply with the requirements of the support order when it was entered.¹⁴

At that point the deadbeat has no choice but to take the stand and try to explain away the failure to pay support. No matter what excuse is presented, the deadbeat cannot survive cross examination. Remember, the true deadbeat makes no payments, not reduced payments. It is not possible for the deadbeat to answer the following questions satisfactorily:

“Q: Mr. Doe, you have made no child support payments in the past two years. Are you telling this jury that you could not have paid even one dollar during all that time?”

“Q: Are you telling this jury that you could not have obtained a minimum wage job in this economy?”

“Q: Did you ever seek employment from an employment agency or labor pool?”

“Q: Did you try to convince a judge that you deserve relief from the support order?”

After the deadbeat rests and final argument is presented, the court will give the following instruction to the jury:

“If you find it has been proven beyond a reasonable doubt that there was a court order requiring (defendant) to pay child support and (defendant) was aware of the order, it is presumed that (defendant) had the ability to comply with the order and has willfully disobeyed the order. (Defendant) has the burden to come forward with evidence to dispel this presumption.”

Conviction is inevitable.

It is important for the trial judge to sentence the defendant on the spot while the jury is present. The judge should explain the concept of dog law to the defendant so that it is clearly understood. The deadbeat should be told that the court understands the defendant does not think rationally, otherwise support would have been paid. Accordingly, the sentence imposed should be accompanied with the promise that another order to show cause will be issued 60 days after the defendant is released from custody unless there is regular payment of support. The deadbeat should be informed that upon a second conviction, the sentence may be greater than the first sentence. A third conviction may result in a sentence of a year in jail. The deadbeat should be assured that this procedure will continue until support is regularly paid.

Trial judges have a lot of sentencing options in indirect criminal contempt cases besides a straight jail sentence. For instance, the judge can place the deadbeat on probation

under the supervision of the Department of Corrections. This is particularly therapeutic in certain cases because the deadbeat gets the opportunity to be supervised by a probation officer like other criminals. Special conditions of probation can be imposed, such as serving a jail sentence, completing a program at a probation and restitution center, or requiring participation in a work release program while incarcerated. Community service can be required in addition to other sanctions. The deadbeat can also be required to pay court costs and the public defender lien.

The judge has up to 60 days from the date of the contempt judgment to amend it.¹⁵ This is useful in many cases.

For example, in one of the cases I tried, a private attorney suddenly appeared after the sentence had been imposed and filed a motion for bond pending appeal. The attorney did not seriously think he would prevail on the bond motion because he had no fairly debatable issue on appeal, but he used the hearing to discover what I might be willing to do to change the sentence.

Surprisingly, a prospective employer appeared at the hearing who said he simply had to have the deadbeat on his payroll. He agreed to co-sign a note with the bank across the street from the courthouse for the full amount of past due child support, which came to over \$15,000. I agreed to vacate the sentence upon deposit of the money with the clerk and to place the deadbeat on probation for a year with the single condition that he pay child support as each payment became due. I also required the deadbeat to deposit enough money to pay the public defender lien.

Criminal contempt is not the answer to every deadbeat parent case. It may only be appropriate to a very few. However, it is available in the court's arsenal and, if used sparingly, it can be most effective. As an added bonus, it allows the overworked family practitioner to rely upon the criminal justice system for collection of past due child support payments in cases where there is little possibility of success through the use of the usual civil remedies.

1 Bowen v. Bowen, 471 So. 2d 1274 (Fla. 1985); Fishman v. Fishman, 656 So. 2d 1250 (Fla. 1995); Coogan v. Coogan, 662 So. 2d 1380 (Fla. 1st D.C.A. 1995); Miller v. Miller, 587 So. 2d 601 (Fla. 5th D.C.A. 1991); De Molina v. De Molina, 463 So. 2d 405 (Fla. 3d D.C.A. 1985).

2 Recently Acquired Income Deficiency Syndrome.

3 Some judges have tried to use civil contempt to force nonpaying parents to obtain employment. This only works in cases where the nonpaying parent is not a true deadbeat. If the deadbeat refuses to obtain employment and goes to jail, he still has no ability to pay and is entitled to release.

4 Featherstone v. Montana, 684 So. 2d 233 (Fla. 3d D.C.A. 1996).

5 Wells v. State, 654 So. 2d 146 (Fla. 3d D.C.A. 1995).

6 Id.

7 Bowen, 471 So. 2d 1274; Gidden v. State, 613 So. 2d 457 (Fla. 1993).

8 Fla. Stat. §938.29(1)(a).

9 Fla. R. Crim P. 3.840.

10 Hunt v. State, 659 So. 2d 363 (Fla. 1st D.C.A. 1995); Lindman v. Ellis, 658 So. 2d 632 (Fla. 2d D.C.A. 1995); Hill v. State, 643 So. 2d 1178 (Fla. 2d D.C.A. 1995); Aiello v. State, 338 So. 2d 1101 (Fla. 4th D.C.A. 1976).

11 Wood v. State, 700 So. 2d 401 (Fla. 1st D.C.A. 1997).

12 Ex parte Biggers, 95 So. 763 (Fla. 1923); State v. Golden, 571 So. 2d 49 (Fla. 3d D.C.A. 1990).

13 Gidden, 613 So. 2d 457.

14 Bowen, 471 So. 2d 1274.

15 Fla. R. Crim. P. 3.800(c).

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This article is submitted on behalf of the Family Law Section, Ky M. Koch, chair, and Mark A. Sessums, editor.