

What Criminal Defense Lawyers Need to Know about Family Law

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Additional materials available at www.corallolawoffice.com

ABA Model Rules of Professional Conduct- It is unethical to use or threaten to use criminal charges to gain advantage in a civil proceeding.

I. Domestic Abuse Injunctions, Wis. Stat. Sect. 813.12

- DAI – require dating relationship
- Domestic Abuse defined as:
 1. intentional infliction of physical pain, physical injury or illness
 2. Intentional impairment of a physical condition
 3. A violation of s.940.225 (1) (2) (3)
 4. A violation of s.943.01, involving property that belongs to the individual
 5. A threat to engage in the conduct under subd. 1, 2, 3, or 5.

Two parts- First request a TRO, Second appear at hearing. Ct shall determine after a hearing if reasonable grounds to believe that the respondent engaged in, or based upon prior conduct may engage in domestic abuse of the petitioner.

REASONABLE GROUNDS- such a low standard – consequences so significant- CCAP, criminal penalties for violation, impacts child custody and placement decisions.

- An injunction is not voided if the petitioner allows or initiates contact with the respondent or admits the respondent into a dwelling that the injunction directs him or her to avoid.
- Lasts for 4 years
- Automatic Firearms Prohibition – Maybe not for a peace officer see 813.12 (4m) (ag).
- Important that respondents be represented- Advise- Statements can be used against you! Refusing to answer a question –this is a civil proceeding the court can draw a negative inference.
- Testifying - DA's have been known to request the hearing transcript for use at trial in criminal cases.
- Testimony of Petitioner and Written Statement in the TRO may prove useful for impeachment. What was left out? Is the statement consistent with statements

made to police?

- Injunctions can be modified- Petitioner can file with court a written statement or stipulation. Contact can be modified any way the petitioner wants- I visit, contact only via text message, curbside pick-up etc.
- Contact through third parties- Pitfalls. It is a thankless job, may want to consider Our Family Wizard (www.OurFamilyWizard.com) Note if criminal case is pending at the same time see if court will modify conditions of bail to include contact via OFW. Propose to agent at review hearing. Cost is \$99.00 per year per party. Great way for parents to stay involved in what is happening with their children. When people know the communication can be retrieved or observed they are a bit more careful about hitting the send button. May want to warn client communication is saved, cannot be altered, and could be used later against them.
- No contact orders in criminal cases- Sometimes appropriate but also can be very detrimental to families. Cutting off contact with children may not be in their best interest. Fact specific but consider it can also be a goal of representation that should not be ignored.

767.41- Custody and Placement

1. Presumption is that it is in child's best interest that parties share joint custody. Except if the Court finds by a preponderance of the evidence that a party has engaged in a pattern or serious incident of interspousal battery, domestic abuse. The presumption can be rebutted. See 767.41 (2) d

- **Child Support- Here are the basics for anyone who doesn't know.**

Establishment of Paternity

- Child support is set often as a result of a finding of paternity. The State of Wisconsin has a policy interest in establishing paternity for every child born in the state. The State believes that every child has a right to know his or her father. The State also has an interest in having both parents support their families, so that the State does not have to provide as much in public benefits to support families.
- Keep in mind that the Child Support Attorneys do not represent either parent or the child; they represent the State's interest in collecting support payments.
- Paternity established in one of three ways:
 - **Voluntary Paternity Agreement** - the blue form that parents may sign in the hospital when the baby is born. A Voluntary Paternity Agreement may get the father's name on the birth certificate, if the father paid the fee to get his name on the State Vital Record.
 - **Court** - through a genetic test or default judgment
 - When a child is born, either parent or the Child Support Agency may request a hearing to establish paternity. Notice is given, but if the alleged father does not appear at the hearing, and there is no other alleged father, the court will establish that person as the

father through a default judgment.

- To review a father's paternity at a later date, a mother or father may petition the family court commissioner. There must be a good reason to revisit the case; for example, some new information came out after the hearing that makes one parent question the paternity judgment. GAL required to ensure it is in the child's best interest.

- **Marriage**

- A child born to a married woman is assumed to be the child of her husband. Usually can't get a divorce if mom is pregnant and the child is alleged by one or both parties as non-marital.

Establishment of Child Support

- Either parent may request their local Child Support Agency to establish child support. In Milwaukee County, parties are eligible for CSA services when they are involved in a family court action.
- Setting child support payments are **mandatory when one party receives state assistance**. This includes any W-2 payment or service, including childcare assistance; SSI Caretaker Supplement; Kinship Care.
 - **Cooperation required.** Parents who are required to cooperate with the CSA, even if they do not want child support:
 - Anyone who receives w-2 in a household.
 - Applicants for Kinship Care or SSI Caretaker Supplement.
 - **Cooperation** means: both parents must notify the Agency of changes in address, employment, health insurance coverage, or income. A child support order is not automatically reduced when a person's income changes; they must notify the Agency and file a Motion to Modify with the Family Court Commissioner. Notification may be online; see the State website childsupport.wisconsin.gov.
- A parent may request privacy protection from the CSA. This means the Agency will not tell the other parent of the requesting parent's address or other personal information. Yes, a parent may receive child support and still refuse the other parent visitation rights.
 - **Definitions - see Administrative Rule DCF 150.**
- Family Support - combined order covering both child support and spousal support in a divorce case
- Good Cause claim - See Milwaukee's FAQ. A mother may argue that there is "good cause" to not establish paternity with a father, because she fears for the child's wellbeing and safety. A parent may argue there is "good cause" for failure to cooperate with the CSA.
- Gross Income - DCF 150.02(13). Child support is calculated based on the Gross

Income.

- KIDS - the statewide child support computer database. A person may have a court case number AND an IV-D number, which is also the KIDS case number.
- Motions to modify can be done relatively easily but require a substantial change in circumstances.
 - **Enforcement Process**
- Past-due support may be recovered through these means:
 - increased income withholding for back pay
 - Automatic: interception of tax refund or lottery winning, liens against titled property, report to credit bureau. A lien may prevent a person from getting state loans or grants, and intercept state pension benefits.
 - On a case-by-case-basis: Recreational, occupational, or drivers' license loss; interception of judgments or settlements; ordered work search; hearing for contempt of court; criminal non-support charges.
 - **Seizures:**
 - A license may be revoked after 3+ months of nonpayment.
 - A bank account or IRA or money market fund may be seized after 3 months of nonpayment, or debts of over \$1000 have accrued, whichever comes first.
 - Land or cars may be seized after 6 months of nonpayment.
- **Contempt hearing**
 - "If the court finds that the parent could have paid but did not," the Court can find the payor in contempt of court.
 - The court will order jail sentence and purge conditions. Purge conditions are money or actions to avoid the jail sentence being imposed.
 - **Notice:** notice is mailed to the payor's last-known address.
- **Myths Debunked**
- **"Half time" does not mean there is no obligation to support a child monetarily.** The calculation is based on income levels as well as time with the child.
- A "shared placement schedule" does not mean that each parent has the child 50% of the time--just that one parent has the child 25% or more.
- Unemployment does not mean that a parent has no obligation to pay child support. Child support may be taken out of Unemployment Insurance compensation, and additionally, if a parent is receiving no UI or wages, the Child Support Agency may look at **earning capacity**. In some cases, as in Waukesha County, the Agency will "impute minimum wage" for unemployed parents. The

CSA may also order a court-observed work search through the Children First Program.

▪ **Process to Modify Existing Order**

- A parent may file a Motion to Modify Support with the Family Court Commissioner.
- If Child Support is an interested party they need to be served with a copy of the motion.
- Substantial change can be change in income, change in employment, or change in the placement conditions of the child. See Wis. Stat. Sect. 767.32.
- Is incarceration a substantial change in circumstances? What if client is incarcerated at the time the initial order is set, should the Court base the order on actual income, or imputed income.
- *In re the Marriage of: Toni L Rottschiets vs. Terry L. Dumler, 262 Wis. 2d 292 (2003),*
- Ct held - Parents with support obligations should not automatically be rewarded with a payment reduction as a result of incarceration. Incarceration is an appropriate factor for a court to consider, however, by itself, incarceration is not a basis to modify or refuse to modify a support order. "To find that incarceration automatically entitles a payer to a reduction in child support promotes the wrong incentives...." However, allowing arrearages to accumulate endlessly would discourage a parent from even attempting to pay down the debt."
- Factors – Length of incarceration. Nature of the offense, relevant course of conduct leading to incarceration, the payer's assets, the payer's employability, and likelihood of future income upon release, likelihood of work release during incarceration, and the needs of the children. ... all other relevant factors.

Note: Milwaukee County does assist inmates in filing stipulations or motions to suspend or "hold open" child support during their incarceration. Retroactive modification is not allowed so the suspension would start as of the date of filing of the motion and then the CSA requests that it be reinstated automatically two months after the Mandatory Release date.

If the mother or child in the case were the victim in the case for which father is incarcerated, the CSA will not file such motions. If the child will be emancipated on a date before the payer is released, they don't bother filing the motion.

Parents may also stipulate to waive arrears owed. Parents **may not** stipulate to forgive any arrears owed to the State (birth expenses,

payments to Kinship Care program, payments for W-2 benefits, etc.)

▪ **Resources for parents (and criminal defendants or incarcerated individuals)**

- **Milwaukee Justice Center- Staff assists parties with completing forms and securing fee waivers. Also have a brief legal advice clinic. See materials.**
- **See Fatherhood Initiative's website, www.milwaukeefatherhood.com**
- **childsupport.wisconsin.gov** - the State Department of Children and Families' site. Includes links to each county's local Child Support Agency website and contact information. Also includes helpful FAQs about child support for parents.

See job search program called "Children First." A payer with an order can stipulate into it. More often they are referred by court order during the enforcement process. The program also has resources to get people in GED programs or get drivers' licenses reinstated.

There is additional Federal funding for jobs programs. A person with an order only need call the number to inquire. You don't need a court order to be referred into this. (See attached file: Transitional Jobs Revised Flyer.doc)

There is an annual Fatherhood Initiative Summit. Here is the web site: <http://www.milwaukeefatherhood.com/>
The Milwaukee County CSA office staffs a table or booth for assisting fathers with arrears to make settlements on arrears owed to the State.

The Milwaukee County CSA refers people to the SPD all the time when they are facing incarceration for failure to pay child support, even in civil matters. In Family Court, it's a civil matter.

If a person is found in contempt of court for willfully and intentionally disobeying a court order, they are sentenced to a period of incarceration, up to six months. Unlike in a criminal case, they are given the "keys to the jailhouse door" when the court sets "a reasonable purge" amount. They can pay a sum set by the court and get out. That purge amount is applied to arrears. The order continues.

Once the CSA has gone this far in Family Court, the office can refer the case to the DA's office for criminal prosecution for Felony Non Support.

If someone with an obligation moves from State to State to avoid paying support and the arrears top \$10,000, the CSA can seek Federal Criminal Prosecution.

UW-Madison Law School has a program with students called Legal Assistance to Incarcerated Persons ("LAIP") at the Remington Center. See, <http://www.law.wisc.edu/fjr/laip/>

Contempt

Definition - § 785.01(1)

- Contempt is "disobedience, resistance, or obstruction of the authority, process or order of a court." 785.01(1)(b)
- For a primer on contempt law, see *Christensen v. Sullivan*, 2009 WI 87; 320 Wis. 2d 76 (2009), beginning at paragraph 48. This was the class action brought by inmates of the Milwaukee County jail for violations of the court order to improve living conditions at the jail.

Situations in which a court may find contempt of court

- Violation of divorce proceeding prohibitions under 767.117(1)
- Nonpayment of child support AND a finding that the payor was able to pay and nonpayment was willful.
 - **Power of the Court to Impose Sanctions - 785.02**
- The Court (A Judge, not a court commissioner) has the inherent power, as well as the statutory power, to impose sanctions for contempt of court.
 - **Remedial and Punitive Sanctions - 785.03(2) Nonsummary contempt**
- Nonsummary contempt is contempt of court covering any actions **not done** in front of a judge in court. Violation of court order is an action of nonsummary contempt.
- After a finding of contempt, the judge may impose one or both of two types of sanctions: remedial and punitive.
- **Remedial sanctions:** intended to cause compliance with the order (terminate contempt) and to compensate a private party for damages suffered. *Christensen*, ¶ 55; *Frisch*, ¶ 35. Requested by a party. *Frisch*, ¶ 36.
 - Remedial sanctions may only be made while the contempt is ongoing. After the contempt had ceased, the Court had no discretion to impose a remedial sanction. *Christensen v. Sullivan*, ¶ 4.
- The contempt must be "**purgeable**"--that is, the individual who is found in contempt must have some way of removing the status of being in contempt. *Frisch v. Henrichs*, 2007 WI 102; 304 Wis. 2d 1 (2007). (*Frisch v. Henrichs* is a contempt case arising from a divorce judgment, in which the husband was required to supply his tax returns and income information yearly to his former wife, but failed to do so.)
 - This is usually done through payment of a fine, payment of some percent of child support arrears, or compliance with the order that the person violated.

- A "**purge condition**" may be the same as the sanction imposed on the individual. *Frisch*, ¶ 63.
 - Remedial contempt must be purgeable through compliance. *State ex. rel. VJH v. CAB*, 163 Wis. 2d 833 (1991). It may also be outside of compliance with the court order which led to contempt, when compliance is impossible due to timing. *Frisch v. Henrichs*, 2007 WI 102; 304 Wis. 2d 1 (2007), ¶ 54. For example, if a parent withholds a child from visiting the other parent, those exact times cannot be made up after the fact.
 - A sufficient purge condition may also be simply that a person may be imprisoned for civil contempt for six months or until compliance with the order, whichever is shorter. *Larsen v. Larsen*, 165 Wis. 2d 679 (1991), at 685.
 - The purge condition must be within the power of the contemnor, and must be reasonably related to the cause or nature of the contempt. *Larsen*.
- A **punitive sanction** is intended as a punishment against the person violating the court order. *Frisch*. A punitive sanction is not concerned with protecting private rights. *Christensen*, ¶ 52.
 - **Possible Sanctions - listed at 785.04(1)**
 - One example: a parent is required to pay child support even after the child has turned 18, if there is a balance due.
 - **Contempt Procedure and Rights of the Defendant**
 - **Procedure - 785.03(1)**
 - For a remedial sanction, a private person/party to the original action or a court commissioner may file a motion with the judge in the case. After notice and a hearing, the court (a judge only) may impose a remedial sanction.
 - Only a judge may order confinement. § 785.07. **No imprisonment** for interference with visitation rights, failure to respond to a citation, or failure to appear in court for a nonmoving traffic violation.
 - For a punitive sanction, the district attorney, attorney general, or special prosecutor issues a complaint. A party to the action, a court commissioner, the child support agency, or a municipal judge may petition the court for a sanction. § 785.06.
 - Contempt may be found and a sanction issued at the same hearing.
 - The alleged contemnor has a right to a **hearing** to establish contempt. *Reed v. Luebke*, 2003 WI App 207.
 - The respondent is entitled to a hearing before he or she may be incarcerated as a result of failure to comply with purge conditions.

- A contemnor whose liberty interests are at stake must be given the opportunity to show that failure to comply with the purge condition was not willful and intentional. *State ex. rel. VJH v. CAB*, 163 Wis. 2d 833 (1991) (Failure to pay child support.)
 - A hearing is required before the respondent could be recommitted to jail. *State ex. rel. VJH*, at p. 843. In this case, the purge conditions had been set through a Settlement Agreement. **At the hearing, the contemnor has the burden of convincing the court that the purge condition is unreasonable or that noncompliance was unintentional or the result of unforeseen events.**
 - A contemnor's ability to avoid the sanction obviates the need for **due process**. *Frisch*, at ¶ 60, citing *Diane K.J.*, 196 Wis. 2d at 970. This concept is referenced as the individual having "the keys to the jail" because he or she has the ability to release him- or herself.
- **Right to Counsel**
 - **In a state-initiated hearing for contempt, the defendant has a right to counsel.** When a defendant's liberty is threatened in a remedial contempt action, the court must advise the defendant of the right to appointed counsel if he or she is indigent. *State v. Pultz*, 206 Wis. 2d 112 (1996).
 - **In a civil contempt case, the defendant may not have a right to counsel.** d
 - **Appeals** - If the contempt proceeding was prosecuted by the State, the defendant may appeal under § 809.30.
 - A prosecution by the State includes prosecution by the Family Court Commissioner. *Biel v. Biel*, 130 Wis. 2d 335 (1986 Ct. App.)
 - Punitive sanction may include imprisonment regardless of compliance. *State ex. rel. N.A. v. G.S.*, 156 Wis. 2d 338 (Ct. App. 1990).
 - The time limit for judicial substitution begins with the commencement of the underlying action. *James L.J. v. Walworth County Circuit Court*, 200 Wis. 2d 496 (1996).

Conclusion: Collaboration between Criminal Defense Lawyers and Family Law Lawyers.

Issues crossover- Domestic Violence, Child Physical and Sexual Abuse Allegations

Important to understand the collateral consequences that criminal consequences have on child custody placement determinations. Presumptions can shift based upon whether there is evidence of domestic violence or child abuse.

Negotiation strategy- Understand the dynamics of the household- Should an isolated incident of inter-spousal battery be treated the same as any other incident of battery.

Civil practice has more tools for discovery- Depositions, Requests for Documents, Interrogatories. Working collaboratively can benefit the criminal/family law client.