

## **An ACLU-PA Guide to Contempt Proceedings Following Nonpayment of Fines, Costs, or Restitution**

When defendants have failed to pay fines, costs, or restitution (collectively “legal financial obligations,” or “LFOs”), they may be brought before the court for a hearing pursuant to Pa.R.Crim.P. 456 (for summary cases) or 706 (for non-summary criminal cases). If the defendant is found to have “willfully” failed to pay, then the defendant may be held in contempt. We intend this Guide to help attorneys and judges comply with the procedural requirements for contempt hearings, whether under Rule 456 or Rule 706.<sup>1</sup>

### **Civil v. Criminal Contempt**

In any given case, the court’s contempt proceedings can be “civil” or “criminal.” If the court will issue an order designed to compel payment, and the court sets certain conditions by which the defendant can “purge” the contempt and escape punishment, it is a civil contempt proceeding.<sup>2</sup> But if the court will issue an order punishing the defendant for failing to comply with the court’s past order, and the defendant is not given any way to escape punishment, it is a criminal contempt proceeding.<sup>3</sup>

Usually, Pennsylvania courts use the threat of civil contempt to compel payments, telling defendants that they will go to jail unless they pay a certain amount of money (and that they can get out of jail at any time if they make the payment). The easiest way to distinguish civil from criminal contempt is to ask whether there is something that the defendant can do to escape punishment. If the defendant is not given an opportunity *after the finding of contempt* to escape punishment, then it is criminal contempt.<sup>4</sup>

It is important to determine whether the contempt proceeding is civil or criminal at the outset because there are different procedural safeguards required for each (these are discussed below).

### **Did the defendant willfully refuse to pay?**

In both civil and criminal contempt proceedings, the fundamental question the court must answer is whether the defendant “willfully” failed to comply with the court order.

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<sup>1</sup> How to determine whether the defendant is “able to pay” is the subject of a separate ACLU-PA Guide.

<sup>2</sup> *Bruzzi v. Bruzzi*, 481 A.2d 648, 652 (Pa. Super. Ct. 1984).

<sup>3</sup> *Commonwealth v. Pruitt*, 764 A.2d 569, 574 (Pa. Super. Ct. 2000); *Crozer-Chester Medical Center v. Moran*, 560 A.2d 133, 136 (Pa. 1989) (“In criminal contempt one has committed an act that in itself calls for specific sanction and when imposed cannot be obviated because it is a completed offense.”). A defendant who is “powerless to escape by compliance” after a finding of contempt has been sentenced to criminal contempt. *Id.* at 137 (quoting *In re Martorano*, 346 A.2d at 27-29). See *Ingebretsen v. Ingebretsen*, 661 A.2d 403, 405 (Pa. Super. Ct. 1995) (“Here, appellant was subject to criminal contempt as she did not have the opportunity to purge herself of the contempt finding.”).

<sup>4</sup> Courts that impose a purge condition with which the defendant cannot comply unlawfully impose a sentence of criminal contempt. See *Barrett v. Barrett*, 368 A.2d 616, 620-21 (Pa. 1977).

- Willfulness is both a substantive element of a finding of contempt and a constitutional prerequisite to punishing a defendant for failure to pay.<sup>5</sup>
- It is therefore required before any finding of contempt, regardless of the penalty imposed.<sup>6</sup>

When it comes to nonpayment of LFOs, willfulness is defined as whether the defendant has **present** ability to pay rather than **future** ability to pay.<sup>7</sup>

- At an individualized hearing, the court must determine whether the defendant’s nonpayment was a “deliberate disregard of the court’s order” or instead stems from “circumstances beyond the defendant’s control” due to the person’s financial situation.<sup>8</sup>
- Courts cannot treat contempt as a strict liability offense merely because the person did not pay.<sup>9</sup>
- Consult our “ACLU-PA Guide to Determining Whether a Defendant is ‘Able to Pay’ Fines, Costs, or Restitution” for more information on when a defendant is able to pay as a matter of law.

A defendant who is **indigent** cannot be held in contempt for nonpayment, as a finding of indigence “preclude[s] any determination” that the defendant’s nonpayment “was willful.”<sup>10</sup> Thus, when a defendant is “penniless and unable, through no fault of his own, to pay any sum on the delinquencies,” the defendant is not in “willful noncompliance.”<sup>11</sup> Moreover, Pennsylvania law flatly prohibits jailing the indigent for non-payment.<sup>12</sup>

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<sup>5</sup> Substantive requirement: *Commonwealth v. Rosser*, 407 A.2d 857, 859, 860 n.8 (Pa. Super. Ct. 1979) (noting that finding civil contempt for nonpayment of fines and costs requires evidence of willfulness of nonpayment, as only a “non-indigent person who willfully fails to pay fines or costs” may be imprisoned). Constitutional requirement: *Bearden v. Georgia*, 461 U.S. 660, 672 (1983) (under the Fourteenth Amendment, a defendant may be punished for nonpayment only if he “willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay.”); *Commonwealth v. Eggers*, 742 A.2d 174, 176 (Pa. Super. Ct. 1999) (*Bearden* requires that the court make a “determination of whether the [defendant] made a willful choice not to pay”).

<sup>6</sup> See *Barrett*, 368 A.2d at 620 (civil contempt requires finding that contemptnor “willfully and contemptuously violated the original orders”); *Commonwealth v. Washington*, 353 A.2d 806, 807 (Pa. 1976) (criminal contempt requires willful, wrongful intent).

<sup>7</sup> *Thompson v. Thompson*, 2018 PA Super 122 (Pa. Super. Ct. 2018).

<sup>8</sup> *Commonwealth v. Mauk*, 185 A.3d 406, 411 (Pa. Super. 2018). See also *Commonwealth v. Diaz*, 2018 PA Super 175 (Pa. Super. Ct. 2018) (trial court failed to make required finding that the defendant “had the present financial ability to pay the outstanding fines and costs such that imprisonment was warranted”); *Commonwealth v. Smetana*, 2018 PA Super 176 (Pa. Super. Ct. 2018) (court improperly imputed family member’s financial resources on defendant).

<sup>9</sup> *Id.*

<sup>10</sup> *Diaz*, 2018 PA Super 175 at n.24.

<sup>11</sup> *Commonwealth ex rel. Wright v. Hendrick*, 312 A.2d 402, 404 (Pa. 1973).

<sup>12</sup> See Pa.R.Crim.P. 706 (fines and costs); Pa.R.Crim.P. 456 (addressing summary cases); 42 Pa. Cons. Stat. § 9730(b)(2) (same); 18 Pa. Cons. Stat. § 1106(c)(2)(iii) (restitution). As the Commonwealth Court has explained, the Rules “preclude[] the possibility of imprisonment ever being imposed upon one whose indigency is established.” *Bacik v. Commonwealth*, 434 A.2d 860, 863 (Pa. Commw. Ct. 1981) (describing then-Pa.R.Crim.P. 65, which contained identical language to current Rule 706 and applied only to summary offenses).

Before imposing any punishment, the court has an obligation to make an *affirmative inquiry* into the defendant’s ability to pay LFOs to determine whether the defendant has willfully refused to pay.<sup>13</sup>

- This obligation arises from the Constitution’s Equal Protection and Due Process protections, which require the court to ensure that a defendant who cannot afford to pay is not jailed for being poor.<sup>14</sup>
- As part of this inquiry, the court must look at the defendant’s entire financial situation.<sup>15</sup>
- This inquiry must happen each and every time a defendant appears for a contempt hearing “because the person’s financial situations may have changed since the last time she or he was before the court.”<sup>16</sup>
- Each defendant is entitled to an individualized hearing.<sup>17</sup>

These requirements are incorporated into Rules 456 and 706, as well as in Pennsylvania’s statutes.<sup>18</sup> A court violates these provisions when it holds a defendant in contempt and imprisons that defendant without inquiring into and making “findings of fact” regarding the defendant’s ability to pay.<sup>19</sup> A person does not need to be indigent to be unable to pay LFOs, although as noted above, the bar on jailing indigent defendants is an added protection.

## **Civil Contempt**

### **Elements of Civil Contempt**

To find a defendant in contempt, a court must find by a preponderance of the evidence that:

- (1) the defendant had notice of the court order;
- (2) the defendant’s failure to pay was volitional; and
- (3) the defendant acted with wrongful intent.<sup>20</sup>

### **Notice of a “clear, definite, and specific” order**

A defendant can be held in contempt for violating a court order only if the order is “definite, clear, and specific—leaving no doubt or uncertainty” in the defendant’s mind as to what the

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<sup>13</sup> *Bearden*, 461 U.S. at 672 (“a sentencing court must inquire into the reasons for the failure to pay”); *Commonwealth v. Dorsey*, 476 A.2d 1308, 1312 (Pa. Super. Ct. 1984).

<sup>14</sup> As the Supreme Court has explained, otherwise the court risks jailing an indigent defendant “simply because, through no fault of his own, he cannot pay the fine.” *Bearden*, 461 U.S. at 673. Such action would be “contrary to the fundamental fairness required by the Fourteenth Amendment.” *Id.*

<sup>15</sup> See *Commonwealth v. Ruiz*, 470 A.2d 1010, 1012 (Pa. Super. Ct. 1984) (mere knowledge that defendant is employed is insufficient to determine ability to pay); *Commonwealth ex rel. Bashore v. Leininger*, 2 Pa. D. & C. 3d 523, 528-29 (1977) (courts must ask about the defendant’s salary and “day to day expenses”). For more details, look at the separate ACLU-PA Guide that addresses ability to pay.

<sup>16</sup> *Mauk*, 185 A.3d at 411.

<sup>17</sup> *Id.*

<sup>18</sup> Rule 706 forbids jailing a defendant for failure to pay “unless it appears *after [a] hearing* that the defendant is financially able to pay the fine or costs.” Pa.R.Crim.P. 706(A) (emphasis added). See also 42 Pa Cons. Stat. § 9730(b) (substantially the same provision, which also governs summary proceedings); 42 Pa. Cons. Stat. § 9772 (court may hold a defendant in contempt for nonpayment of a fine and imprison the defendant if the failure to pay is not “excusable”).

<sup>19</sup> *Diaz*, 2018 PA Super 175.

<sup>20</sup> See *In re Cullen*, 849 A.2d 1207, 1211 (Pa. Super. Ct. 2004).

obligation is.<sup>21</sup> Accordingly, courts must be specific about how much money is due and on which date(s).

- Any ambiguities or omissions in the order must be construed in favor of the defendant.<sup>22</sup>
- A defendant who only “plausibl[y]” violated only one interpretation of the order cannot be held in contempt.<sup>23</sup>

### **Willful violation**

As described above, in both forms of contempt the fundamental question after LFO default is whether the defendant has willfully failed to pay; the “volitional” and “intent” prongs merge into one.

### **An additional condition of civil contempt: the defendant must have the present ability to comply with the purge condition**

A court holding a defendant in civil contempt must impose a “purge condition”—a way to escape the punishment for contempt (otherwise, the court has unlawfully used its criminal contempt authority without appropriate procedural safeguards).<sup>24</sup>

- When it imposes a proper purge condition, a court must find *beyond a reasonable doubt* that the defendant can immediately comply with that condition.<sup>25</sup>
- If the defendant cannot comply with the condition and escape punishment, then the coercive civil contempt sentence has been transformed into a punitive criminal contempt sentence—but without the heightened criminal contempt procedural protections. For this reason, the “beyond a reasonable doubt” standard applies when the court determines whether the defendant can comply with the purge condition.<sup>26</sup>
- For example, if a court holds a defendant in contempt, imposes a sentence of 5 days in jail and imposes a purge condition of \$500, that purge condition is legal only if the court finds beyond a reasonable doubt that the defendant has the present ability to pay that \$500. Under such circumstances, defendants should consider filing an appeal and seek a stay of that order and/or, if necessary, file a petition for a writ of habeas corpus.
- The defendant’s past, or potential future, ability to comply with the purge condition is irrelevant.<sup>27</sup>

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<sup>21</sup> *Lachat v. Hinchliffe*, 769 A.2d 481, 488-89 (Pa. Super. Ct. 2001) (citation and emphasis omitted).

<sup>22</sup> *Id.* at 489.

<sup>23</sup> *Id.* at 490.

<sup>24</sup> *Barrett v. Barrett*, 368 A.2d 616, 621 (Pa. 1977).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Applying *Barrett*, courts have ruled purge conditions illegal when it is impossible for the defendant to immediately pay the amount of money required or meet other conditions set by the court. For example, the Superior Court has invalidated a purge condition that a use his IRS refund to make payments because he was not entitled to an IRS refund. *Godfrey v. Godfrey*, 894 A.2d 776, 783 (Pa. Super. Ct. 2006). The court also invalidated a requirement that he obtain employment, as that was a “condition [that] will only be met sometime in the future.” *Id.* See also *Hyle v. Hyle*, 868 A.2d 601, 606 (Pa. Super. Ct. 2005) (purge condition that defendant pay \$2,500 through work release invalid because the defendant lacked the present ability to pay the money and could only make the money sometime in the future). By the same token, if the defendant has already done whatever the court wanted, even if he or she is late in doing so, any punishment of that action is accomplished through criminal, not civil,

## Procedural Requirements

A finding of civil contempt ordinarily requires five procedural steps.<sup>28</sup> However, if the court order requiring payment of LFOs was issued at the conclusion of a prior hearing, such as a hearing under Rule 456 or 706 imposing a payment plan, then all five formal steps need not be followed.<sup>29</sup> Instead, in such cases, “the essential due process requisites for a finding of civil contempt are notice and an opportunity to be heard.”<sup>30</sup> The notice must give the defendant an opportunity to prepare a defense, which in these circumstances means explaining that the defendant’s “ability to pay is a critical issue in the contempt proceeding.”<sup>31</sup>

## Right to Counsel

Defendants facing imprisonment for nonpayment of LFOs have a right to counsel at their contempt hearings, and they must have a “timely opportunity to consult with counsel,” meaning before they appear before the judge.<sup>32</sup> The Superior Court has made clear that such a right exists under Rule 122 of the Rules of Criminal Procedure for nonpayment in summary cases,<sup>33</sup> and there is also a Due Process right under the Fourteenth Amendment in all cases.<sup>34</sup>

## Appeals

If the judge holds the defendant in contempt and imposes a punishment that does not require any additional court hearing or order before it takes effect, the defendant can immediately appeal.<sup>35</sup> A defendant can take an appeal even if there is a purge condition that would allow the defendant to escape punishment.<sup>36</sup>

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contempt. See *Bruzzi v. Bruzzi*, 481 A.2d 648, 654 (Pa. Super. 1984) (parent who absconded with children and had already returned them by the time of contempt hearing was subject to criminal, not civil, contempt). That is because the defendant would not have the present ability to do something to escape the punishment.

<sup>28</sup> *Crislip v. Harshman*, 365 A.2d 1260, 1261 (Pa. Super. Ct. 1976) (en banc) ((1) a rule to show cause why attachment should issue; (2) an answer and hearing; (3) a rule absolute; (4) a hearing on the contempt citation; and (5) an adjudication.)

<sup>29</sup> *Diamond v. Diamond*, 792 A.2d 597, 601 (Pa. Super. Ct. 2002); *Harcar v. Harcar*, 982 A.2d 1230, 1235 (Pa. Super. Ct. 2009).

<sup>30</sup> *Schnabel Assoc., Inc. v. Bldg. and Const. Trades Council*, 487 A.2d 1327, 1334 (Pa. Super. Ct. 1985).

<sup>31</sup> *Harrington v. Dep’t of Transportation*, 763 A.2d 386, 392 (Pa. 2000) (explaining that “due process requires sufficient notice of the conduct that forms the basis for a deprivation so that the respondent may adequately prepare a defense”); *Turner v. Rogers*, 564 U.S. 431, 447 (2011) (procedural safeguards to prevent “erroneous deprivation of liberty” in civil contempt proceedings for nonpayment include, *inter alia*, “notice to the defendant that his ‘ability to pay’ is a critical issue in the contempt proceeding”).

<sup>32</sup> *Mauk*, 185 A.3d at 412.

<sup>33</sup> *Commonwealth v. Farmer*, 466 A.2d 677, 678 (Pa. Super. Ct. 1983) (Rule 122 (then numbered Rule 316) addressing summary offenses requires appointment of counsel prior to imprisonment for nonpayment of LFOs).

<sup>34</sup> *Diaz*, 2018 PA Super 175.

<sup>35</sup> *Foulk v. Foulk*, 789 A.2d 254, 258 (Pa. Super. 2001) (en banc); *Stahl v. Redcay*, 897 A.2d 478, 487 (Pa. Super. Ct. 2006) (“civil contempt orders imposing sanctions generally constitute final, appealable orders”).

<sup>36</sup> *Foulk*, 789 A.2d at 258 (it would be “inappropriate and unnecessarily harsh for a contemnor in a civil contempt action to undergo incarceration or fulfill another sanction before this Court will accept an appeal of a contempt order.”).

An appeal of contempt for failure to pay is not moot, even if the defendant has already served the sentence.<sup>37</sup> There is also a separate exception to the mootness doctrine if the trial court fails to provide necessary due process rights.<sup>38</sup>

In non-summary criminal cases, filing an appeal does not automatically stay the sentence.<sup>39</sup> Instead, the defendant needs to seek a stay either from the trial court or from the Superior Court pursuant to the Rules of Appellate Procedure.<sup>40</sup> In summary cases where a magisterial district judge imposes a sentence of imprisonment for nonpayment, any period of incarceration is automatically stayed for 30 days so that the defendant has time to file an appeal, and filing the appeal continues the stay until resolution by the court of common pleas.<sup>41</sup>

Finally, there are two separate standards of review governing contempt cases:

- If the appeal challenges the finding of contempt and/or the purge condition, the standard of review is abuse of discretion.<sup>42</sup>
- To the extent that the appeal also, or exclusively, challenges procedural violations, the standard of review is de novo and the scope plenary.<sup>43</sup>
- As a result, an individual case could raise some claims (such as factual claims about whether the defendant is willfully in contempt) under an abuse of discretion standard, and others (procedural violations) under a de novo standard of review.

## **Criminal Contempt**

Criminal contempt is a charge used to punish a party for failing to comply with a court order.<sup>44</sup> The type at issue for nonpayment of LFOs is “indirect” criminal contempt.<sup>45</sup> The exercise of criminal contempt powers by magisterial district courts is limited by Pa.R.Crim.P. 140(B).<sup>46</sup>

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<sup>37</sup> *Barrett*, 368 A.2d at 619 n.1 (Pa. 1977) (“Although Barrett’s terms of imprisonment, as limited by the Superior Court, have expired, we do not regard these appeals as moot, since he remains subject to the orders of support and a failure to comply with them might again subject him to contempt proceedings.”); *Commonwealth v. Cromwell Twp.*, 32 A.3d 639, 652 (Pa. 2011) (explaining that, “where a contemnor’s terms of imprisonment have expired, an appeal is not moot, since the contemnor remains subject to the underlying order, and a failure to comply may result in additional contempt sanctions”).

<sup>38</sup> *Mauk*, 185 A.3d at 410.

<sup>39</sup> *Woodruff v. Lower Southampton Twp.*, 516 A.2d 834, 835 (Pa. Commw. Ct. 1986).

<sup>40</sup> Pa.R.A.P. 1764 explains that in criminal cases where no other rule applies, the rules governing civil appeals apply. Accordingly, a defendant can seek a stay pursuant to Pa.R.A.P. 1732.

<sup>41</sup> Pa.R.Crim.P. 461(A).

<sup>42</sup> *Commonwealth v. Baker*, 766 A.2d 328, 331 (Pa. 2001).

<sup>43</sup> *Commonwealth v. Moody*, 125 A.3d 1, 6 (Pa. 2015); *Mauk*, 185 A.3d at 409.

<sup>44</sup> *Commonwealth v. Ashton*, 824 A.2d 1198, 1203 (Pa. Super. Ct. 2003).

<sup>45</sup> Direct (or “summary”) criminal contempt occurs in the presence of the court, such as using inappropriate language in the court room. Indirect criminal contempt occurs outside the presence of the court. See *Diamond*, 715 A.2d at 1194 (holding defendant in contempt for failing to answer interrogatories). It is the court’s indirect criminal contempt power that it uses to punish nonpayment of LFOs.

<sup>46</sup> Under Rule 140, a district judge may imprison a defendant for up to 90 days for failure to pay fines and costs, and it may send a defendant who has failed to pay restitution to jail for 30 days and impose a \$100 fine. The court may also choose to modify a payment plan at the hearing. Any punishment is automatically stayed for 30 days. To be clear, Rule 140 only governs the use of a district court’s *criminal* contempt powers—Rule 456 governs the use of its inherent civil contempt powers.

## **Elements of Indirect Criminal Contempt**

To find a defendant guilty of indirect criminal contempt, the court must find four elements beyond a reasonable doubt:

- (1) the order was definite, clear, specific and left no doubt or uncertainty in the mind of the defendant that the defendant must take a certain action, *e.g.* pay LFOs in a certain amount and by a certain date;
- (2) the defendant had notice of the specific order,
- (3) the defendant's failure to pay was volitional; and
- (4) the defendant acted with wrongful intent.<sup>47</sup>

As with civil contempt, the essential element of a conviction for failure to pay LFOs is willfulness.

## **Procedural Protections**

A defendant charged with criminal contempt has the right to “the essential procedural safeguards that attend criminal proceedings generally,” which include:

- (1) bail, both pre- and post-trial;<sup>48</sup>
- (2) notice of the specific accusations;
- (3) a reasonable time to prepare a defense; and
- (4) the assistance of counsel.<sup>49</sup>

## **Appeals**

An order holding a defendant in criminal contempt is immediately appealable.<sup>50</sup> Otherwise, the law governing appeals in criminal contempt cases is the same as in civil contempt cases (described above).

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<sup>47</sup> *Commonwealth v. Baker*, 722 A.2d 718, 721 (Pa. Super. Ct. 1998) (en banc).

<sup>48</sup> The defendant has a right to bail even after conviction for criminal contempt. *See* Pa.R.Crim.P. 521.

<sup>49</sup> *Ashton*, 824 A.2d at 1203. *See also* *Turner*, 564 U.S. at 431 (recognizing that the Sixth Amendment provides a right to counsel in criminal contempt proceedings other than summary proceedings); *Mauk*, 185 A.3d at 412.

<sup>50</sup> *Stahl*, 897 A.2d at 486 (citing *Ashton*, 924 A.2d at 1201 (“However, the imposition of a criminal sanction is collateral to the underlying proceeding in which it occurs because, by its nature, it is directed to an individual's independent conduct and not to the ultimate issues which are at stake in the action. A person's right to appeal from a criminal contempt citation is immediate.”) (citations omitted)).