

STATE OF TENNESSEE

OFFICE OF THE
ATTORNEY GENERAL
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March 12, 2004

Opinion No. 04-043

Powers of Child Support Expedited Process Referees

QUESTIONS

1. Has Attorney General Opinion No. 92-43 been superceded by subsequent legislation?
2. Respondent appears in Court and is ordered by the Court to pay \$500 per month as on-going child support. Respondent appears on review date and states that he did not pay any support despite earning \$3,000 per month because he believed that Petitioner would “just blow the money.” A finding of willful civil contempt is made for Respondent’s failure to comply with the Court’s order. Can the expedited process referee, upon a finding of willful civil contempt by the Respondent (a) incarcerate the Respondent instanter, until he shows a disposition to conform his conduct to the court orders? (b) order Respondent to pay a certain sum by a certain date or report to court to be taken into custody on that certain date to be held indefinitely until he shows a disposition to conform his conduct to court orders?
3. Under 2(b) must the referee’s order be confirmed by the trial judge, absent an appeal, prior to the actual imposition of incarceration for failure to pay? Is such a confirmation necessary before an incarceration?
4. If the Respondent does not pay the ordered amount and then fails to appear on the date given in 2(b), can the Referee sign an attachment for the arrest of the Respondent? And upon arrest of the Respondent, can he be held until he shows a disposition to follow court orders, or is he required to be admitted to bond once attached?

OPINIONS

1. Yes.
2. Yes. (a) An expedited process referee can order the Respondent incarcerated for willful contempt of court provided a finding is made that Respondent has the present ability to pay the court ordered sum. (b) The expedited process referee can order the Respondent to pay a certain sum by a certain date or report to court to be taken into custody on that certain date to be held until

he shows a disposition to conform his conduct to court orders if willful civil contempt is found on that certain date.

3. No. Tennessee Code Annotated 36-5-403, requiring that “all final orders of a referee must be reviewed by a judge as provided in § 36-5-405,” is not limited by 36-5-405 to require that the referee’s order be confirmed by the trial judge, absent an appeal, prior to the actual imposition of incarceration for failure to pay.

4. Yes. If the Respondent does not pay the ordered amount and then fails to reappear on the certain date given in 2(b), the Referee can sign an attachment for the arrest of the Respondent, and upon arrest of the Respondent, Respondent can he be held until he shows a disposition to follow court orders if a finding of willful civil contempt is made prior to incarceration.

ANALYSIS

I.

Regarding Question 1, this Opinion supercedes Attorney General Opinion No. 92-43.

The Child Support Enforcement Act of 1985, 1985 Tenn. Pub. Acts § 477 (now codified at Tenn. Code Ann. § 36-5-401 through 36-5-406) established an expedited process for support. It provides for the appointment of referees to set and enforce child support and to administer expedited process.

The powers of expedited process referees are set out in Tenn. Code Ann. §36-5-403 as follows:

The referee shall have the same authority and power as a circuit court judge to issue any and all process and in conducting hearings and other proceedings in accordance with this part; provided that all final orders of a referee must be reviewed by a judge as provided in § 36-5-405.

This statutory language has not been changed since it was enacted in 1985. 1985 Tenn. Pub. Acts 477, § 13.

This office previously issued its Opinion No. 92-43, which concluded that referees appointed pursuant to Tenn. Code Ann. § 36-5-401 through 36-5-406 lacked authority to incarcerate a respondent for civil contempt or to issue and sign an attachment for the arrest of the respondent with a bond for failure to appear. The same opinion determined that such referees had authority to punish those who were in direct contempt of the court due to contemptuous behavior in the courtroom.

Such an order of contempt in the latter case was subject to review under Tenn. Code Ann. § 36-5-405 and remains so.

Although Tenn. Code Ann. § 36-5-403 gives expedited process referees the same authority and power as a circuit court judge, that power is limited by the language of Tenn. Code Ann. § 36-5-405. That statute formerly provided in subsections (c) and (d) that “[i]f the petition is for contempt, *the court* may issue an attachment for the arrest of the respondent with a bond.” Tenn. Code Ann. § 36-5-405(c) and (d); 1985 Tenn. Pub. Acts 477, § 13 (emphasis added).

It is clear that Opinion No. 92-43 placed great emphasis on the use of the word “court” and determined it showed legislative intent that the power to issue an attachment for the arrest of a respondent was limited to the trial judge and was not extended to the expedited process referee. However, since the issuance of Opinion No. 92-43, both Tenn. Code Ann. § 36-5-405(c) and (d) have been amended.

Tennessee Code Annotated §§ 36-5-405(c) and (d) were amended to read as follows:

If the petition is for contempt, *either the referee or the judge* may issue an attachment for the arrest of the respondent with a bond.

Tenn. Code Ann. §§ 36-5-405(c) and (d); 2000 Tenn. Pub. Acts 922, § 11 (emphasis added).

Therefore, the previous limitations on the powers of expedited process referees have been removed, and expedited process referees have been expressly granted authority to issue an attachment for the arrest of respondents with a bond. Tenn. Code Ann. § 36-5-405 (2000).¹

II.

Hence, if Respondent in Question 2 appears and a finding of willful civil contempt is made for failure to comply with the Court’s previous order, either the expedited process referee or the trial judge may order the Respondent incarcerated “instantly” until he shows a disposition to conform his conduct to the Court’s orders. There must be a showing of a current ability to comply with the Court’s orders before one can be incarcerated for civil contempt. *Garrett v. Forest Lawn Memorial Gardens*, 588 S.W.2d 309, 315 (Tenn. Ct. App. 1979); *Gossett v. Gossett*, 241 S.W.2d 934, 936 (Tenn. Ct. App. 1952).

Similarly, should Respondent in Question 2 appear, either the expedited process referee or the trial judge may order Respondent to pay a certain sum by a certain date or report to court to be taken into custody on that certain date to be held indefinitely until he shows a disposition to conform

¹As the statutory limitations on the powers of expedited process referees remain uncircumscribed by Tenn. Code Ann. § 36-5-405 with respect to *direct* contempt, those powers continue for expedited process referees with the recent amendment to the statute.

his conduct to court orders. However, there must be a finding of willful misbehavior in the actions of Respondent in failure to pay the court-ordered sum. Tenn. Code Ann. § 29-9-102(3). Again, there must be a showing of a current ability to pay that court-ordered sum for civil contempt to lie.

III.

Under Question 2(b), the referee's order need not be confirmed by the trial judge, absent an appeal, prior to the actual imposition of incarceration for failure to pay. Tennessee Code Annotated § 36-5-403 requires that all final orders of a referee must be reviewed by a judge as provided in Tenn. Code Ann. § 36-5-405. However, Tenn. Code Ann. § 36-5-405 does not require that the referee's order be confirmed by the trial judge prior to the actual imposition of incarceration for failure to pay. Therefore, a Respondent may be incarcerated prior to the judge's confirmation of the referee's order.

IV.

If the Respondent fails to pay the court-ordered amount and then fails to appear on the date given in 2(b), the referee can sign an attachment for the arrest of the Respondent if he or she properly finds the Respondent's actions to be willful disobedience of or resistance to the Court's orders. Tenn. Code Ann. § 29-9-102(3). Furthermore, upon the arrest, Respondent can be held for civil contempt until he shows a disposition to follow the Court's order, assuming the expedited process referee finds Respondent has the present ability to pay the court-ordered amount pursuant to the law of civil contempt.

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