# Inability to Pay or Inability to Care? Holding the Deadbeat in Contempt

**By Vesselin Mitev**

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Since 2013, in the Second Department, "willfulness" has not been an element of civil contempt, yet countless applications both for and against such a finding still spill much ink arguing the now-moot issue. Nor is there required to be a hearing, despite oft-cited ancient case law to the contrary, if the facts are not in dispute, *Kudla v. Kudla,* 173 AD3d 1149, nor are you required to exercise less drastic remedies, see DRL 245 (as amended), see *El Dehdan v. El Dehdan,* 26 NY3d 19, 29; *Rhodes v. Rhodes,* 169 AD3d 841, 843.

And, if failure to pay support is at issue (as it often is), this constitutes *prima facie* evidence of a willful violation (despite the seemingly contradictory deletion of the willfulness requirement by case law fiat).

Inability to comply/pay, therefore, is considered the last "defense" that can be proffered on a contempt application as to the merits, procedural arguments notwithstanding. So, a typical scenario unfolds something like this: the court orders child support amount in a certain sum, the payor spouse defaults on the child support obligation and a contempt proceeding is brought by order to show cause.

On the thrice-adjourned court date, the defaulting spouse shows up with "just-retained" counsel, having inevitably delayed the matter for months including two postponements to secure an attorney. At the bench conference, your adversary trots out golden oldies like "you can't get blood from a stone," "recession," "unemployment," "cash-poor," "housing market crash," "doing his best" and "getting his broker's license" in order to keep the proverbial judicial sword of Damocles sheathed.

Doing your best not to have your eyes roll permanently in the back of your head (as your mother always warned you would happen as a child) and feeling your client's increasing agita at her (mis?)perception of yet another court-occasioned free pass of her deadbeat

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