

# Incarceration in Family Law

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There are many reasons a person may be sent to jail, but did you know that failure to pay child support is one? In many cases involving a parent's willful refusal to pay, a court will order jail time as a sanction. A sanction is the legal term for a penalty stemming from a party's violation of a court order. In addition, it is common for the bail amount to be set at an amount equal to the unpaid child support obligation.

In a recent Florida case, a lower court sent a father to jail for his willful failure to pay child support. However, the father sought appellate review of his case and order of incarceration alleging his inability to pay child support. The appellate court reversed and remanded the case back to trial court for a hearing on whether the father had the ability to pay.

In other words, if a parent fails to pay child support, the person may be forced to go to jail until the child support is fully repaid. But if a parent properly claims they cannot pay child support, a court will grant a hearing to determine their ability to pay before they are sent to jail. However, if a court is not convinced that the parent is unable to pay, then the parent may still be incarcerated.

In the court's order of incarceration, the court must affirmatively find that the party has a present ability to pay child support. This means that the coercive sanction of incarceration is only ordered when a party is found to be able to pay child support AND does not pay child support. If a court finds that a party is unable to pay child support or if it is unknown whether the party can

pay child support, the court usually won't order incarceration.

It is important to note that jail time or incarceration may only be ordered based on past wrongdoing; this sanction may not be ordered based on future, anticipated noncompliance. This means that even though you know your ex-husband is not going to comply with a court order, you cannot take him to court until after his compliance is due. A party must wait until the time to perform has come and passed before bringing another party to court.

Moreover, failure to pay child support is not the only way that a person can be incarcerated in a family law matter. It is possible to be incarcerated for failure to return children or exercise timesharing as required by the court's order. In the *De Mauro v. State* case, a trial court changed custody of the minor children from the ex-wife to the ex-husband. The mother refused to return the children as required by the court's order. The court found the mother in civil and criminal contempt and ordered her incarceration until

the children were returned to the ex-husband. Upon the successful return of the children, the ex-wife was released from jail.

Another way to be sent to jail in a family law matter is by willfully not paying court-ordered alimony. However, to order incarceration for this type of civil contempt the court must still make a finding that the contemner has the present ability to purge the contempt and refuses to do so. The order in the *Pattison v. Pattison* case involves alimony and it states that if the former husband fails to make any alimony payment, the former wife and her counsel are permitted to file an affidavit of non-payment that could result in immediate issuance of a writ of bodily attachment and incarceration.

The moral of the story from these cases is that court-ordered child support, alimony, and timesharing with children must be complied with and if a parent willfully disobeys a court order relating to these issues, then they may be forced to serve jail time. ❖

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