

## TECHNICALITIES IN CONTEMPT ENFORCEMENT ORDERS ALLOW OBLIGATED, NON-CUSTODIAL PARENTS TO ESCAPE CHILD SUPPORT

The inability to collect child support payments from non-custodial parents<sup>1</sup> has become a national crisis, and no one should doubt the seriousness of this problem.<sup>2</sup> “In 1983, only half of custodial parents received the full amount of child support ordered; approximately 26% received some lesser amount, and 24% received nothing at all.”<sup>3</sup> To respond to this problem, Congress enacted the Child Support Enforcement Amendments of 1984.<sup>4</sup>

The Texas Legislature followed suit in 1985 with its own package of amendments to the Texas Family Code aimed at strengthening enforcement of court orders for child support.<sup>5</sup> The provision relating to contempt enforcement orders, section 14.33(a), was part and parcel of this comprehensive legislation.<sup>6</sup> Experience has shown, however, that although the legislature passed section 14.33(a) in an attempt to strengthen child support collection efforts, the provision has in actual practice weakened the enforcement remedy of contempt.<sup>7</sup> Courts are being forced to discharge contempt sentences placed on obligated fathers due to technicalities arising from the difficulty in meeting the drafting requirements of section 14.33(a).<sup>8</sup> Consequently, enforcement orders are being turned into “worthless piece[s] of scrap” because of obstacles erected by the legislature in the path of child support enforcement.<sup>9</sup>

The intent of this Comment is not only to show how section 14.33(a) has weakened child support enforcement efforts, but also to present a proposal for revision of this family code section. Part I provides an explanation of the contempt process as it exists under the current state of the law. Part II details the frustration of Texas courts in dealing with

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1. Because most contemnors are fathers, masculine nouns and pronouns will be used throughout this Comment in reference to hypotheticals and general situations. However, the statute would apply equally to either gender. See TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993).

2. See *Hicks v. Feiock*, 485 U.S. 624, 644 (1988) (O'Connor, J., dissenting).

3. *Id.* at 644 (O'Connor, J., dissenting) (quoting amicus curiae brief filed by the Women's Legal Defense Fund *et al.*).

4. *Id.*

5. See *Ex parte Boykins*, 764 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1989, no writ).

6. See TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993); 764 S.W.2d at 592.

7. See 764 S.W.2d at 592.

8. See *id.*

9. See 485 U.S. at 644 (O'Connor, J., dissenting).

enforcement orders. Finally, Part III proposes amending section 14.33(a) based on an analysis of past enforcement order provisions and pre-1985 case law.

## I. OVERVIEW OF THE PROCESS OF CONTEMPT

### A. Two Types of Contempt Proceedings

Contempt sentences may be either civil or criminal.<sup>10</sup> Although the areas of civil and criminal contempt law have become increasingly blurred,<sup>11</sup> it is nevertheless important to recognize the distinction. For example, if a criminal contempt penalty is imposed, the procedural safeguards required must be the same as those afforded in criminal proceedings, such as proof of the offense beyond a reasonable doubt.<sup>12</sup> On the other hand, civil contempt may be imposed without proof beyond a reasonable doubt and many of the other more protective safeguards required in criminal proceedings.<sup>13</sup> The critical features in determining the nature of a contempt sentence are "the substance of the proceeding and the character of the relief that the proceeding will afford."<sup>14</sup>

#### 1. Criminal Contempt

The purpose of a criminal contempt sentence is to punish and deter, thus vindicating the court's authority.<sup>15</sup> "The unconditional nature of the punishment renders the relief criminal in nature because the relief cannot undo or remedy what has been done nor afford any compensation and the contemnor 'cannot shorten the term by promising not to repeat the offense.'"<sup>16</sup> The key elements thus become the unconditional and determinate character of the relief. If these elements are present, the contempt proceeding is criminal.<sup>17</sup>

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10. *Id.* at 631.

11. *Id.* One court thinks it is absurd to distinguish between criminal and civil incarceration because "from the perspective of the person incarcerated, the jail is just as bleak no matter which label is used." *Ex parte Strickland*, 724 S.W.2d 132, 134 (Tex. App.—Eastland 1987, no writ) (quoting *Walker v. McLain*, 768 F.2d 1181, 1183 (10th Cir. 1985)); *see also* CAL. CIV. PROC. CODE ANN. §§ 1209-1222 (West 1982 & Supp. 1993) (merging the two kinds of proceedings under the same procedural rules).

12. 485 U.S. at 632.

13. *See id.* at 645-46 (O'Connor, J., dissenting).

14. *Id.* at 631.

15. *Id.* at 631, 634-35.

16. *Id.* at 633 (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 442 (1911)).

17. The consideration of an example will be helpful in illuminating the definable characteristics of a criminal contempt sentence. In case A, a father is found to be in contempt for failing to pay child support. As a result, the court orders him to pay his arrearages along with serving one week in jail. The

## 2. Civil Contempt

Civil contempt, on the other hand, is remedial and coercive in nature, given for the benefit of the movant.<sup>18</sup> The purpose of civil contempt, then, is not so much to punish the contemnor, but rather to compel him to do some particular act,<sup>19</sup> usually to pay arrearages in child support cases. "If the relief provided is a sentence of imprisonment, it is remedial if 'the defendant stands committed unless and until he performs the affirmative act required by the court's order.'"<sup>20</sup> The conditional aspect of the relief renders the penalty civil in nature because the defendant can discharge himself from jail and terminate the sentence at any time by performing the requisite act.<sup>21</sup> In fact, a determinate sentence, otherwise criminal, can be considered remedial if it contains a purge clause, whereby the contemnor will not have to remain incarcerated for the specified duration if he performs the required affirmative act.<sup>22</sup>

### B. Three Stages of a Contempt Proceeding

For the purpose of deciding what process is due in a contempt proceeding, the analysis in this section separates the proceeding into three stages: the support decree, the motion to enforce, and the enforcement order. These three stages represent the steps a custodial parent must go through in obtaining a contempt order. This section will discuss and relate each element separately to the purpose it serves in a contempt proceeding.

#### 1. Support Decrees

To encourage the amicable resolution of disputes between parties to a lawsuit under chapter fourteen of the Texas Family Code, parties may agree

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incarceration in case A, being unconditional and determinate — the father must spend a week in jail — is thus characterized as criminal contempt. The relief not only serves to punish this father, but also to deter other fathers from not paying child support. *See id.* at 634-35.

18. *Id.* at 631.

19. *See id.* at 633.

20. *Id.* at 632 (quoting 221 U.S. at 442).

21. *Id.*

22. *Id.* at 634. It is therefore said that a person incarcerated for civil contempt carries the keys to the jail in his own pocket. *Id.* at 633. Consider another example. In case B, a father is found to be in contempt for failing to pay child support. However, the father in case B is sentenced to jail unless and until he pays his arrearages. Because the sentence in case B is conditional — the father can avoid incarceration by promptly paying his child support arrearages — the penalty is considered civil in nature. The court imposes such a sentence because it is more concerned with getting the delinquent child support payments than it is with punishing the contemnor. The relief given by the court is thus imposed for the benefit of the movant, usually the custodial parent, and not to vindicate the authority of the court.

in writing on conservatorship and support of a child.<sup>23</sup> However, if the parties cannot reach such an amicable settlement, the court may order either parent or both parents to provide child support.<sup>24</sup> Once a court has determined that a support agreement is in the best interest of a child, or on its own determined what support is in the best interest of a child, the terms are set forth in the support decree, and the parties are ordered to comply with such provisions.<sup>25</sup> If a party fails to comply with the support decree, the contempt process may commence.<sup>26</sup> Thus, a child support decree serves as the underlying court order upon which a finding of contempt may be sought.<sup>27</sup>

A support decree "must spell out the details of compliance in clear, specific and unambiguous terms so that [the father] will readily know exactly what duties or obligations are imposed upon him."<sup>28</sup> The language must be specific and unequivocal because, where the penalty of incarceration is a possibility, the burdens imposed upon the father cannot be left to implication or conjecture.<sup>29</sup> If concise language is present in the support decree, a father can have no misunderstanding of what he is required to do.<sup>30</sup> If a support decree fails to clearly and specifically delineate the obligations imposed upon a father, the decree becomes too indefinite and, thus, is void.<sup>31</sup>

In *Ex parte Slavin*,<sup>32</sup> a support decree ordered the father to pay \$150 per month in child support until his three children reached the age of 18 years.<sup>33</sup> Shortly after the oldest child attained the age of 18, the father reduced his monthly child support payment by \$50.<sup>34</sup> The custodial mother subsequently brought a contempt action against the father for failing to abide by the support decree, and the trial court held the father in contempt.<sup>35</sup> The father appealed the contempt sentence by filing a writ of habeas corpus, urging that the obligations imposed upon him in the support decree were ambiguous and, therefore, unenforceable.<sup>36</sup> The Supreme Court of Texas agreed with the father, finding that the support decree was

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23. TEX. FAM. CODE ANN. § 14.06(a) (Vernon Supp. 1993).

24. TEX. FAM. CODE ANN. §§ 14.05, 14.051(b) (Vernon Supp. 1993).

25. TEX. FAM. CODE ANN. § 14.06 (b), (c) (Vernon 1986).

26. See *Ex parte Slavin*, 412 S.W.2d 43, 43-44 (Tex. 1967).

27. See *id.*

28. *Id.* at 44.

29. *Id.*

30. See *id.* at 44-45.

31. *Id.* at 45.

32. 412 S.W.2d 43 (Tex. 1967).

33. *Id.* at 44.

34. *Id.*

35. *Id.* at 43.

36. *Id.* at 43-44.

susceptible to either of two constructions: (1) the father could reduce the support payments proportionately (\$50) after each child reached eighteen; or (2) the father would have to pay the fixed sum of \$150 per month until the youngest child reached the age of eighteen.<sup>37</sup> The Texas Supreme Court held that, because the details of compliance were ambiguous, the support decree was unenforceable.<sup>38</sup> As a result, the father was discharged from custody.<sup>39</sup>

## 2. Motions for Contempt

The second step in a contempt proceeding is moving the court to impose the sanction of contempt.<sup>40</sup> The motion must not only ask for a finding of contempt, but must also provide proper notice to the father of each violation of the support decree.<sup>41</sup> As a result, a motion to sanction a father for failing to pay child support "must allege the portion of the [support] order allegedly violated and must specify as to each date of alleged contempt the amount due and the amount paid, if any."<sup>42</sup> The Texas Family Code mandates such specificity because due process requires that the father be given notice of each charge against him so that he may have the ability to prepare his defense to the allegations.<sup>43</sup>

Specificity in a motion for contempt also serves another purpose.<sup>44</sup> Each time a father fails to pay a child support payment that is due, the father commits a separate and distinct act of contempt.<sup>45</sup> As a result, a contemnor may be assessed a separate punishment for each act of contempt even though there is only one hearing for numerous alleged violations.<sup>46</sup> Multiple punishments can be imposed, however, only if the motion for contempt alleges each failure or refusal to pay as a separate and distinct violation of the support decree.<sup>47</sup> "A general complaint that a person has violated the [support] order by failing or refusing to make the payments ordered does not suffice to charge separate, distinct and independent acts of

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37. *Id.* at 44.

38. *Id.* at 45.

39. *Id.*

40. *See Ex parte Almendarez*, 621 S.W.2d 664, 666-67 (Tex. App.—Fort Worth 1981, no writ).

41. *See* TEX. FAM. CODE ANN. § 14.312(a) (Vernon Supp. 1993).

42. *Id.*

43. *See* 621 S.W.2d at 667. Thus, a motion for contempt is similar to a criminal indictment. *Ex parte Papageorgiou*, 685 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1985, no writ).

44. *See, e.g., Ex parte Loreant*, 464 S.W.2d 223, 224 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

45. *Id.* at 224.

46. *See, e.g., id.*

47. *Id.*

contempt."<sup>48</sup> If a motion fails to allege separate and distinct violations, but the court proceeds to order multiple punishments anyway, an enforcement order based on such a motion is void.<sup>49</sup>

For example, in *Ex parte Loreant*,<sup>50</sup> a support decree ordered the father to pay \$75.00 per week in child support.<sup>51</sup> The motion for contempt charged that the father failed and refused to comply with the support decree.<sup>52</sup> At the hearing, the trial court held the father in contempt, finding that he was in arrears for eight payments.<sup>53</sup> Although the motion for contempt alleged only a general violation, the trial court nevertheless assessed separate punishments for each violation of the support decree.<sup>54</sup> The trial court ordered the father to be incarcerated for three days per contemptuous act, a total of twenty-four days.<sup>55</sup> Upon habeas corpus review, the appellate court ordered the father discharged because the motion for contempt was not sufficient to give the father the requisite notice due him to defend against the separate allegations.<sup>56</sup> A generally pleaded motion, such as in *Lorent*, is sufficient to authorize punishment for one single act of contempt only.<sup>57</sup>

### 3. Enforcement Orders

Upon a finding of contempt, a court must specifically outline the relief given, or in other words, detail what a father must do to discharge the contempt sentence.<sup>58</sup> Such an enforcement order must be entered pursuant to section 14.33(a) of the Texas Family Code.<sup>59</sup>

An enforcement order shall contain findings setting out in ordinary and concise language the provision of the final order, decree, or judgment for which enforcement was sought, the acts or omissions that are the subject of the order, the manner of noncompliance, and the relief awarded by the court. If the order imposes incarceration or a fine, an enforcement order

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48. *Id.*

49. *See id.*

50. 464 S.W.2d 223 (Tex. Civ. App.—Houston [1st Dist.] 1971, no writ).

51. *Id.* at 224.

52. *Id.*

53. *Id.* at 223.

54. *Id.* at 224.

55. *Id.*

56. *See id.*

57. *Id.* The father, having already served five days, had been incarcerated beyond the maximum sentence that was available. *See id.*

58. *See* TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993). Relief may include the imposition of a fine and/or a jail sentence. *See, e.g., Ex parte Boykins*, 764 S.W.2d 590, 591 (Tex. App.—Houston [14th Dist.] 1989, no writ). For the purposes of this Comment, the penalty referred to and discussed will be that of incarceration.

59. TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993).

must contain findings setting out specifically and with particularity or incorporating by reference the provisions of the final order, decree, or judgment for which enforcement was sought and *the time, date, and place of each occasion on which the respondent failed to comply with the [support] provision and setting out the relief awarded by the court.*<sup>60</sup>

If an enforcement order fails to comply with these specificity requirements, a contemnor does not receive the required notice of each violation for which he was found in contempt.<sup>61</sup> Courts have thus held that such an enforcement order does not comport with due process as mandated by section 14.33(a).<sup>62</sup> As a result, the enforcement order is void, and the contemnor must be discharged from custody.<sup>63</sup>

An example of the strictness of the requirement is found in *Ex parte Boykins*,<sup>64</sup> wherein a support decree ordered the father to pay \$400 each month in child support.<sup>65</sup> The custodial parent filed a motion for contempt, specifically alleging each occasion on which the father failed to pay.<sup>66</sup> At the contempt hearing, undisputed evidence existed that the father had missed some child support payments.<sup>67</sup> As a result, the trial court entered an enforcement order holding the father in contempt "by reason of his failure and refusal to make payments of child support heretofore ordered . . . in defiance of the terms of the [support] decree."<sup>68</sup> The trial court ordered the father to serve 90 days in jail, continuing thereafter until he purged himself of contempt by paying some of the child support arrearages.<sup>69</sup> Upon habeas corpus review, the appellate court agreed that the father had failed to make some child support payments, but held that the enforcement order failed to comply with the required specificity of section 14.33(a).<sup>70</sup> The order did not list the time, date, and place of each violation of the support decree.<sup>71</sup> Thus, the court of appeals found itself forced to release the father from custody.<sup>72</sup>

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60. *Id.* (emphasis added).

61. *See Ex parte Greene*, 788 S.W.2d 724, 726 (Tex. App.—Houston [14th Dist.] 1990, no writ).

62. *Id.*

63. *Id.*

64. 764 S.W.2d 590 (Tex. App.—Houston [14th Dist.] 1989, no writ).

65. *Id.* at 591.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* This is an example of a combination civil and criminal contempt sentence.

70. *Id.* at 592.

71. *See id.* at 591-92.

72. *Id.* at 592. It should be noted that the release of a contemnor from custody due to a void enforcement order does not discharge him from his duty to pay child support arrearages. *Ex parte Johnson*, 778 S.W.2d 168, 169 (Tex. App.—Houston [1st Dist.] 1989, no writ).

As *Boykins* demonstrates, section 14.33(a) "reflects the seriousness of incarcerating a defaulting child support obligor by reiterating that court orders need to be specific and detailed and that findings must be particularized."<sup>73</sup> But has the legislature gone too far in its attempt to safeguard the rights of contemnors and thus weakened one of the enforcement tools by which defaulting fathers are forced to bear their burden of child support? Do the requirements of section 14.33(a) provide too difficult a challenge for lawyers to draft enforcement orders in "ordinary and concise language?"<sup>74</sup>

## II. THE CURRENT STATE OF § 14.33(A) UNDERMINES JUDICIAL ENFORCEMENT POWERS OF CONTEMPT

Section 14.33(a) was part of the comprehensive legislation passed by the Texas Legislature in 1985 to amend and supplement chapter fourteen of the Texas Family Code in order to strengthen enforcement of court-ordered child support.<sup>75</sup> These legislative reforms have served their purpose to a great extent. However, experience since 1985 has convinced some appellate courts that section 14.33(a) needs to be amended because the provision has weakened the court's power to enforce orders for child support.<sup>76</sup>

Many courts are frustrated by the fact that, although a father is found to be in arrears in child support payments, courts are often forced to release him because the order lacks the requisite specificity.<sup>77</sup> In fact, in an effort to help attorneys, the court of appeals in *Ex parte Haynie*<sup>78</sup> took it upon itself to delineate the minimum requirements for a valid enforcement order:

1. findings setting out specifically and with particularity or incorporating by reference the provisions of the final [support] order, decree, or judgment for which enforcement is being sought,
2. the acts or omissions that are the subject of the [enforcement] order, or in other words, the manner of noncompliance,
3. the time, date, and place of each occasion on which the respondent failed to comply with the provision, and
4. the relief awarded by the court.<sup>79</sup>

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73. John J. Sampson, *Chapter 14. Conservatorship, Possession, & Support of Children*, 21 TEX. TECH L. REV. 1323, 1447 (1990).

74. *See id.* at 1448.

75. 764 S.W.2d at 592.

76. *See id.*; *Ex parte Haynie*, 793 S.W.2d 317, 320 (Tex. App.—Houston [14th Dist.] 1990, no writ).

77. *See* 764 S.W.2d at 592; *Ex parte Duncan*, 795 S.W.2d 10, 10 (Tex. App.—El Paso 1990, no writ).

78. 93 S.W.2d 317 (Tex. App.—Houston [14th Dist.] 1990, no writ).

79. *Id.* at 320.

In some cases, the enforcement order's lack of specificity forces an appeals court to grant a contemnor habeas corpus relief even though he has stipulated or testified to the fact that he has not paid court-ordered support payments in the same amounts as listed in the enforcement order.<sup>80</sup> As a result, fathers who admit their "guilt" may nevertheless go free on a technicality, and consequently, the relief afforded by a contempt proceeding is no longer available.<sup>81</sup>

An extreme example is *Ex parte Sinclair*,<sup>82</sup> wherein the father entered a stipulation that he owed \$1,667 in delinquent child support payments under the support decree, and another \$1,610 in arrearages under a subsequent court order.<sup>83</sup> The father later testified under oath at the hearing that he owed these amounts.<sup>84</sup> Nevertheless, because the enforcement order recited only total arrears and not the specific time, date, and place of the father's violations,<sup>85</sup> the appellate court granted his habeas corpus request and discharged him from custody.<sup>86</sup>

The support decree in *Ex parte Bahmani*<sup>87</sup> ordered the non-custodial mother to pay \$250 each month in child support.<sup>88</sup> Testimony at the contempt hearing showed the mother owed \$1,000 in child support arrears and also "did not return her daughter to the father," the child's managing conservator, after her visitation periods.<sup>89</sup> Again, the enforcement order listed only total arrears and not the individual payments the mother had missed.<sup>90</sup> As a result, the court of appeals held the enforcement order void and released the mother from jail.<sup>91</sup>

Cases such as *Bahmani* and *Sinclair*, where enforcement orders are invalidated on mere technicalities, are indicative of the "frustrating and often futile efforts the trial judges of this state are daily going through in an attempt to see that fathers of children do what any honorable, sane, morale [sic] and decent parent should do after bringing innocent children into this society."<sup>92</sup> Rather than ensuring that the best interests of the children of

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80. See, e.g., *Ex parte Sinclair*, 746 S.W.2d 956, 958 (Tex. App.—Houston [14th Dist.] 1988, no writ).

81. See *id.* at 958-59.

82. 746 S.W.2d 956 (Tex. App.—Houston [14th Dist.] 1988, no writ).

83. *Id.* at 958.

84. *Id.*

85. *Id.*

86. See *id.* at 959.

87. 760 S.W.2d 769 (Tex. App.—Houston [14th Dist.] 1988, no writ).

88. *Id.* at 769.

89. *Id.* at 769-70.

90. *Id.* at 770.

91. *Id.*

92. See *Ex parte Duncan*, 795 S.W.2d 10, 11 (Tex. App.—El Paso 1990, no writ).

Texas are protected, courts are reduced to "flyspecking" enforcement orders to release obligated parents on technicalities.

### III. RECOMMENDATIONS FOR LEGISLATIVE REVISION

#### A. *Motion for Contempt Provides Necessary Notice*

A motion for contempt must state the portion of the order violated and the date and amount of each alleged failure of the father to pay child support.<sup>93</sup> This specificity does not allow general or vague pleadings when multiple punishments are sought for the various alleged violations of a support decree.<sup>94</sup> It could be said that such specificity is excessive and serves only to enable defaulting fathers the opportunity to escape their just due because of a technicality.<sup>95</sup> Arguably, a motion should simply bring a concise, informative complaint before the court, giving the defendant notice and an opportunity to be heard. Under the old statute governing pleadings in child support contempt cases, a verified written statement describing the alleged disobedience was the only requirement.<sup>96</sup> "Simplicity in pleading . . . is so characteristic of the rule that a construction requiring a written complaint to use particular or artful words or allegations would run counter to the [old] rule's spirit and purpose."<sup>97</sup> As it is now, however, appellate courts are afforded "the fun of flyspecking the [motion for contempt] in order to free an obligated parent who has not paid his . . . child support. It is unclear whether the legislature shares this same idea of what is fun."<sup>98</sup>

Nevertheless, where the penalties of both civil and criminal contempt are available, due process is best served by maintaining the specificity and detail of the law as it stands today. The motion for contempt, being similar to a criminal indictment, should give notice of each specific allegation to the non-custodial father so that he may prepare his defense.<sup>99</sup> This provides due process before the hearing and ensures that the pleadings are sufficient to enable the matter to proceed to hearing.

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93. TEX. FAM. CODE ANN. § 14.312(a) (Vernon Supp. 1993).

94. Sampson, *supra* note 73, at 1429.

95. *Id.*

96. TEX. R. CIV. P. 308-A (Vernon 1977) (now TEX. FAM. CODE ANN. § 14.312(a) (Vernon Supp. 1993)).

97. *Ex parte* Woodruff, 483 S.W.2d 951, 953 (Tex. Civ. App.—Texarkana 1972, writ *dism'd w.o.j.*).

98. Sampson, *supra* note 73, at 1430.

99. See *Ex parte* Papageorgiou, 685 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1985, no writ).

*B. Repeating Notice of Support Decree Violations Not  
Necessary*

Under current Texas law, however, an enforcement order must also specifically state the time, date, and place of each occasion on which a contemnor violated the provisions of the final support decree.<sup>100</sup> If an enforcement order does not contain this requisite specificity, the contemnor is not afforded due process.<sup>101</sup> But why should the order of contempt and confinement have to specify exactly which child support installments the father failed to pay? The reason for requiring the specific recitation of each alleged instance of failure to pay child support in a motion for contempt is to provide the father sufficient notice of the noncompliance so as to enable him to defend against the motion.<sup>102</sup> Why does an enforcement order, as it is being used now, need to give a contemnor a second notice of his violations of the support decree? Once the matter has proceeded to the hearing stage, a contemnor has been accorded all the notice about the violations to which due process entitles him.<sup>103</sup>

Without exception, the motions for contempt in *Bahmani* and *Sinclair* contained the date and amount of each alleged failure to pay, thus complying with the requisite specificity of section 14.312(a).<sup>104</sup> As such, the contemnors in each of those cases were afforded the opportunity to adequately prepare a defense to the allegations of nonpayment against them. The courts of appeals were nevertheless forced to grant habeas corpus relief because of a mandated statutory concern for due process after the hearing.<sup>105</sup> What purpose does notice of the violations serve after a relator has already been held in contempt? There is nothing left for the contemnor to defend against; he has already been found in contempt.

The legislature has misplaced its focus on notice and due process. This additional requirement of notice is unnecessary because it essentially gives notice "after the fact." A relator can do nothing, once found in contempt, to comply with what the support decree had required. The purpose of an enforcement order is to spell out the terms necessary to discharge the contempt sentence, not to repeat notice previously given in the motion.<sup>106</sup>

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100. TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993).

101. See *Ex parte* Greene, 788 S.W.2d 724, 726 (Tex. App.—Houston [14th Dist.] 1990, no writ).

102. See *Ex parte* Almendarez, 621 S.W.2d 664, 667 (Tex. App.—Fort Worth 1981, no writ).

103. See *Ex parte* Boykins, 764 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1989, no writ).

104. See *Ex parte* Bahmani, 760 S.W.2d 769, 769-70 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Ex parte* Sinclair, 746 S.W.2d 956, 957 (Tex. App.—Houston [14th Dist.] 1988, no writ).

105. See 764 S.W.2d at 592 (commenting on the decisions in *Bahmani* and *Sinclair*).

106. See *id.*

In *Boykins*, the Houston Court of Appeals for the Fourteenth District spelled out what it thinks a valid enforcement order should contain:

If the motion for contempt alleges the required specifics and particularities and the evidence supports the trial court's [enforcement] order that [relator] is in arrears in a specified *total* amount of money, in [this court's] opinion that should be all the law requires in that respect for a valid contempt and commitment order.<sup>107</sup>

Under this approach, the emphasis on providing a relator due process is properly shifted to giving notice before the hearing. The motion for contempt serves as the primary vehicle by which the contemnor receives notice of his alleged violations. However, this is not to say that an enforcement order should not give notice. The order must still properly give the requisite notice to a contemnor of what he must do to in order to discharge the contempt sentence.<sup>108</sup>

Texas case law prior to the enactment of section 14.33(a) supports the proposition that an enforcement order should not have to repeat notice of each violation of the support decree.<sup>109</sup> In *Ex parte Papageorgiou*,<sup>110</sup> a father sought habeas corpus relief after the trial court entered an enforcement order and confined him to jail.<sup>111</sup> The trial court, however, did not make individual findings as to each contemptuous act, but rather held the father in contempt for failing to comply with the support decree and refusing to pay child support in the total amount of \$6,175.<sup>112</sup> The court of appeals denied the habeas corpus request,<sup>113</sup> holding that an enforcement order consisting of an aggregate contempt based on the separate acts listed in the motion for contempt was sufficient, provided that the *motion* had given the father adequate notice of the alleged violations.<sup>114</sup> The court determined that as long as an enforcement order indicated the support decree at issue, stated how the decree was violated, and detailed the terms of compliance, the order need not recite individual findings as to each act of contempt.<sup>115</sup> This is in line with the concept that a motion to enforce

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107. *Id.* (emphasis added).

108. See TEX. FAM. CODE ANN. § 14.33(a) (Vernon Supp. 1993).

109. See *Ex parte Papageorgiou*, 685 S.W.2d 776, 779 (Tex. App.—Houston [1st Dist.] 1985, no writ).

110. 685 S.W.2d 776 (Tex. App.—Houston [1st Dist.] 1985, no writ).

111. *Id.* at 777.

112. *Id.* at 779.

113. *Id.* at 780.

114. *Id.* at 779 (emphasis added).

115. *Id.*

should give notice of the alleged violations of the support decree while an enforcement order should spell out the terms of compliance.<sup>116</sup>

A revision of section 14.33(a) based on the principles of *Papageorgiou* would greatly simplify the contempt process by amending the provision that allows obligated parents to be released on technicalities. A model enforcement order might read:

(Name) was charged with contempt in failing and refusing to comply with the order of this court entered on (date) wherein the court ordered him to pay the sum of (\$\$\$) each month on the 1st day of each month to (name) for the support of (name). . . . The court finds (name) guilty of contempt of this court for failing and refusing to pay child support as ordered in the amount of (total arrears). (Details of compliance would follow).<sup>117</sup>

*C. Enforcement Orders Need Not Repeat the Violations Alleged in the Motion for Contempt to Provide Bases to Appellate Courts of Lower Court Decisions*

Another reason asserted for requiring the specific recitation of each violation of the support decree in the enforcement order is to provide an adequate record whereby a defaulting father is protected from being prosecuted twice for the same individual delinquent child support payment.<sup>118</sup> However, this rationale is without support. The record of the proceedings, consisting of the motion to enforce, the evidence, and the enforcement order, provides sufficient detail for review.

In *Ex parte Rogers*,<sup>119</sup> a support decree required the father to pay \$498 per month in support payments for three children.<sup>120</sup> The mother brought suit to hold the father in contempt for allegedly failing to make support payments on four separate occasions.<sup>121</sup> The motion to enforce

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116. See *Ex parte Boykins*, 764 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1989, no writ).

117. See 685 S.W.2d at 779. Although it may seem somewhat less stringent to incorporate by reference the dates of a father's violations from the motion, this incorporation must still be specifically stated in the enforcement order. See *Ex parte Sinclair*, 746 S.W.2d 956, 958-59 (Tex. App.—Houston [14th Dist.] 1988, no writ). Furthermore, the reality is that incorporation by reference is not often used in enforcement orders, most likely because fathers may not be found in contempt for all of the alleged violations in the motion. An enforcement order that makes a blanket incorporation of the motion for contempt is voidable if it includes unfounded allegations. See *Ex parte Rogers*, 820 S.W.2d 35, 38 (Tex. App.—Corpus Christi 1991, no writ).

118. See *Ex parte Haynie*, 793 S.W.2d 317, 320 (Tex. App.—Houston [14th Dist.] 1990, no writ). The focus of this Comment is on situations in which the court has imposed a single penalty in the enforcement order. The author acknowledges that where punishments are stacked, specificity in the enforcement order is necessary to provide appellate courts bases to review lower courts' decisions.

119. 820 S.W.2d 35, 38 (Tex. App.—Corpus Christi 1991, no writ).

120. *Id.* at 36.

121. See *id.*

listed -support accrued less support paid- to show aggregate arrears.<sup>122</sup> After the hearing, the trial court found the father in contempt.<sup>123</sup> The father subsequently brought a petition seeking habeas corpus relief.<sup>124</sup> The appellate court found a problem with the enforcement order because two of the children had been eighteen years old for more than six months when the mother filed the motion for contempt.<sup>125</sup> A child support obligation ends six months after the support decree says it is to terminate.<sup>126</sup> In *Rogers*, support payments for each of the two oldest children ended after they turned eighteen.<sup>127</sup> Although the contempt motion listed only the youngest child, the court found the aggregate amount sought included arrears for all three children.<sup>128</sup> Consequently, the court of appeals found the enforcement order void.<sup>129</sup>

The importance of *Rogers* lies not in the fact that the appellate court voided the enforcement order, but rather in the manner in which the court held the order void. In an action for habeas corpus relief, the guilt or innocence of a contemnor is not in question; a court's only concern is with the legality of the contemnor's incarceration.<sup>130</sup> To determine legality, the *Rogers* court looked at the "face of the record."<sup>131</sup> Since the record did not show the dates of payments made, the court held that it could not determine whether the alleged arrears were all due on behalf of the youngest child or were due on behalf of all three children.<sup>132</sup>

Neither the motion for contempt nor the enforcement order in *Rogers* listed the dates on which payments were made,<sup>133</sup> yet the court looked beyond the face of these documents to see if it could determine the dates of payments made and whether the arrearages sought in the motion were all on behalf of the youngest child.<sup>134</sup> How the court made its determination is important because the dates missing from the motion would necessarily be the same dates that would have to be listed in the enforcement order. It follows that a court could look to the record of a contempt proceeding to determine the basis of a lower court's decision with respect to an enforce-

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122. *Id.* at 37.

123. *Id.* at 36.

124. *Id.*

125. *Id.* at 37.

126. TEX. FAM. CODE ANN. § 14.40(b)(2) (Vernon 1986).

127. *See* 820 S.W.2d at 37.

128. *Id.* at 38.

129. *Id.* "By lumping together enforceable and unenforceable obligations and assessing one penalty, the whole judgment was . . . void." *Id.*

130. *Id.* at 37-38.

131. *Id.* at 38.

132. *See id.*

133. *See id.* at 37.

134. *See id.* at 38.

ment order. The motion to enforce, the evidence, and the enforcement order, when read together, would indicate the payments for which a father was held in contempt. Such a determination will more than adequately protect a father from being found in contempt twice for the same past-due child support payment. Moreover, under a "Rogers review," the due process interests of obligated fathers would be protected along with, instead of contrary to, the interests of children in Texas.

#### IV. CONCLUSION

The Texas Legislature passed section 14.33(a) of the Texas Family Code to strengthen the child support enforcement remedy of contempt.<sup>135</sup> Experience has shown, however, that this provision has actually weakened the ability of Texas courts to enforce court orders for child support.<sup>136</sup> Courts are being forced to release obligated fathers because of technicalities in enforcement orders caused by the exacting drafting requirements of section 14.33(a).<sup>137</sup> A revision of this provision based on the principles set forth above would go a long way in once again ensuring that the best interests of the children of this state are being looked after by the legislature.

*by Matthew J. Schroeder*

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135. *Ex parte Boykins*, 764 S.W.2d 590, 592 (Tex. App.—Houston [14th Dist.] 1989, no writ).

136. *Id.* at 592.

137. See *Ex parte Duncan*, 795 S.W.2d 10, 11 (Tex. App.—El Paso 1990, no writ); 764 S.W.2d at 592; *Ex parte Bahmani*, 760 S.W.2d 769, 770 (Tex. App.—Houston [14th Dist.] 1988, no writ); *Ex parte Sinclair*, 746 S.W.2d 956, 957-59 (Tex. App.—Houston [14th Dist.] 1988, no writ).

