

MEMORANDUM

TO: Julia Dunlap, Esq

FROM: Kaelyn Contardi

RE: Carmen Leake- Contempt for Non-Payment of Child Support

DATE: December 8, 2025

ISSUES

1. Does Carmen have an affirmative defense to contempt for failure to pay child support based on her status as a UCSD Graduate student, her limited financial capacity, and inability to work full-time?
2. If Carmen is held in contempt for nonpayment, would a punishment which includes possible jail time violate her rights protected under the XIII Amendment?

SHORT ANSWERS

1. Yes, it can be described as willful noncompliance and while she could bring forth an affirmative defense based upon her status as a UCSD graduate student, a limited financial capacity, and claimed inability to work full-time, she is unlikely to succeed in avoiding the contempt order based upon her failure to adjust the order or make any partial attempts to comply.
2. No, punishment for nonpayment of child support does not violate the XIII Amendment as child support debt is classified separately from other forms of debt as a parent has a moral obligation to their child that they cannot divest themselves from and which must take precedence.

FACTS

The firm's client, Camen Leake, was ordered by the court to pay child support for her two children who live with her previous husband in San Diego. However, Carmen has not paid child support since the finalization of the divorce on January 4, 2024. She is a current graduate student at UCSD, and her only income is student loans and income from tutoring undergraduate students for final exams. She claims an inability to work full-time due to travel requirements for her dissertation. She has not traveled in the past year but claims working full-time will impede on her ability to finish her degree on time (at the end of the year). Carmen's ex-husband has filed a Request for Order for Contempt to enforce the original support order. Criminal Law states that courts may impose criminal sanctions for nonpayment of child support where a parent's inability to pay is due to unwillingness to work.

DISCUSSION

CONTEMPT AND WILLFULLNESS

By definition, the willful refusal to obey a valid court order is an act of contempt. Cal Code Civ Proc § 1209.5. The California Code of Civil Procedure defines the various acts or omissions that constitute contempt punishment and defines criminal contempt as a "willful disobedience of the terms written of any process or court order...lawfully issued by any court, including orders pending trial." Cal. Code Civ. Proc. § § 1209-1211. Under California law, the elements necessary to constitute prima facie evidence of contempt include the existence of a valid court order, knowledge of the aforementioned order, the ability to comply, followed by willful noncompliance. Cal. Code Civ. Proc. § 1218. These key elements must be established by the plaintiff before one is found in contempt. Within a child-support nonpayment proceeding, each month of child support nonpayment is considered its own distinct violation, and a parent can face

multiple counts of contempt for different months they have not paid support. Cal. Code Civ. Proc. § 1218.5. In this instance, the noncompliance is considered willful where there is knowledge and nonpayment, at which the burden of proof befalls the accused parent to then bring an affirmative defense showcasing a lack of true willingness, often an inability to pay due to limited financial capacity. These statutes inform the firm that the burden of proof will fall upon Carmen to prove that willfulness element did not go beyond a simple disregard for the order, as she will need to showcase a true inability to pay, whether that be due to her status as a student or inability to get a job.

In California, courts have long established that a refusal to work in order to comply with a support order cannot be punished by contempt where there exists a true inability to pay, as opposed to a willful disobedience, as that it is far beyond the rights of the courts to enforce or punish for such. *Moss v. Superior Court*, 17 Cal. 4th 396 (1998); *In re Marriage of Smith*, 225 Cal. App. 3d 469 (1990). Key holdings from such case law include that inability to pay protects from contempt and the punishments. *Id.* at 477. For Carmen, it is imperative to prove that she did not just have reason, but an inability to pay the court ordered child support payments due to varying life factors outside of her control.

That then begs the question of how to differentiate between a true inability and a willful disobedience. The ruling from case law in *Moss*, 17 Cal. 4th 396 (1998) makes a note that good faith is important and that one cannot create the inability that then protects them. Reasonable efforts must be made to secure methods of paying the ordered support otherwise willful disobedience, punishable with contempt, may be assumed. This ruling held that a court may impose contempt sanctions for violation of a court support order when inability to pay is the “result of the parent’s willful failure to seek and accept available employment that is

commensurate with his or her skills and ability” *Id.* at 403. Within Carmen’s case, her failure to seek employment that fits within her abilities as a largely able, graduate student with above-average intelligence might lead a court to find willfulness in that she had the ability to seek better employment but that she failed to do so at the expense of her child’s wellbeing.

Furthermore, as stated in *United States v. Ballek*, within the 9th circuit Court of Appeals, it was further dictated how to determine the interpretation of “willfully” within the context of nonpayment of a debt, and was determined that “willfully” goes beyond merely failing to pay when one has the funds available, but rather extends to the situation where the defendant has acted willfully in not having funds available. *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999). Carmen may be seen as having this critical element of contempt given she is putting herself in a position to not have the funds available, whereas she otherwise might be able to pay.

With this information, Carmen looks to satisfy the elements of contempt and showcase a willful defiance of the court order. However, these considerations may carry less weight when her financial circumstances and student status are considered as that raises a question of whether she truly had the present ability to comply. Noting that Carmen falls under the elements necessary for contempt, the next steps would be to utilize an affirmative defense for inability to pay, as noted in the next section.

AFFIRMATIVE DEFENSE

In the consideration of whether Carmen may have an affirmative defense regarding her failure to comply with child support orders given her status as a UCSD graduate student, lack of liquid funds, and supposed inability to work full time, the firm will look at each of these assertions

within the inability to pay defense parameters to see if any of them may hold weight in a court of law.

To begin, it must be noted for Carmen's defense that the burden of proof falls upon her to prove her inability exists. It should be noted that "in proceedings pursuant to a failure to pay support, the inability to comply is an affirmative defense that must be proven by a preponderance of the evidence by the alleged contemner." 33A Cal. Jur. 3d, Family Law § 1409 (2025). It is further discussed that a failure to comply must also be proven to be without just cause and willful inability. 53 A.L.R.2d 59, § 4 (1957). Case law further dictates ability to pay is an affirmative defense for contempt within child support actions. *Moss*, 17 Cal. 4th 396 at 78 (1998).

However, when discussing whether this rule within the parameters of Carmen's case, it should be noted that this assertion goes beyond simply having the liquid funds available at the time of the child support payments or seeking employment to meet the support obligations.

Under statute, child support obligor may plead as affirmative defense to allegation of contempt that obligor lacked ability to provide support in amount ordered, lacked property that could be sold, mortgaged, or otherwise pledged to raise funds needed, attempted unsuccessfully to borrow funds needed, and knew of no source from which money could have been borrowed or legally obtained." 53 A.L.R.2d 591, 4.

To be successful within this defense, borrowing funds, selling assets, and all other avenues of potential financial gain should be exhausted, or at the very least reasonably attempted, within a situation where ability to comply is claimed as an affirmative defense. California Family Code 4058 defines income for child support purposes as "income from whatever source derived" which includes wages, pensions, commissions, or other forms of compensation. Knowing of a source to obtain money and failing to showcase valiant efforts to utilize this source could be a potential hole within this affirmative defense that should not be ignored. As was mentioned in

the earlier discussion regarding the elements of contempt, ability to comply determines willfulness, which is a valid consideration in contempt proceedings. As one cannot willfully disobey an order that they do not have the ability to comply with, this is the only firm affirmative defense that Carmen could stand to benefit from, and it is tethered to showcasing beyond reasonable doubt that all other methods of obtaining funds were impossible or unknown to her.

When courts consider whether a parent has failed to provide for their child, in general, the court “in determining the ability of the parent to support his or her child, shall consider all income, including social insurance, benefits, and gifts.” Cal. Penal Code § 270 (2025). The courts take a similar stance with orders that are in place to support a child. Cal. Fam. Code § 4058. However, it should be noted that income with an expectation of repayment is distinguishable from other forms of income. In a similar case regarding a student receiving student loans, the student loans, including the amounts used for living expenses do not fall under the definitions of income under Cal. Fam. Code § 4058. *In re Marriage of Rocha*, 68 Cal. App. 4th 514 (1998). In *In Re Marriage of Rocha*, it was affirmed that again, contempt requires willful failure to pay and that educational loans can support an affirmative defense for inability to pay, although it does not outright excuse the nonpayment.

Further considering what constitutes inability to pay, and whether Carmen’s assertion that she has been unable to work could strengthen her inability to pay defense, it should be noted that there is an earning capacity standard to be considered as well. “With regard to child support the court may, in its discretion consider the earning capacity of a parent in lieu of that parent’s income, consistent with the best interests of the child,” *In re Marriage of Ilas*, 12 Cal. App. 4th 1630, 1638 (1993). Within California, it has been held that for purposes of support, earning capacity represents the income the spouse is reasonably, outside of extreme circumstances,

capable of earning based upon age, health, education, and marketable skills. *In re Marriage of Simpson*, 4 Cal. 4th 225 (1992). Earning capacity is a key consideration when determining income within Cal. Fam. Code § 4058. In Carmen’s case she is a well-educated individual who is likely to have a higher earning capacity than what her payments, or lack thereof, would assume. As she has contributed nothing to her child support since the orders began, the court is likely to find that she, at the very least, had some ability to pay beyond what she chose to. Furthermore, case precedent from *In re Marriage of Ilas*, found that quitting a job where you are making income to pursue education does not void that parent of responsibility, and that this behavior showcases “deliberate conduct designed to avoid financial responsibilities.” *Ilas*, 12 Cal. App. 4th at 1630 (1993). Carmen’s case may be seen as voluntary underemployment as her priority should have been her child. “Child and spousal support constitute a priority overhead expense which must be taken into account whenever an obligor wishes to pursue a different lifestyle or endeavor. The court equates child and spousal support as an overhead which must be paid first before any other expenses.” *Id.* at 1635 (1993). Essentially, Carmen cannot state that her lifestyle choice of being a student absolves her of her duty to her support payments.

This brings forth the discussion on another key disruptor to Carmen’s affirmative defense. It has been discussed whether willfulness and the inability to pay defense can succeed when a contemnor is shown to have had the ability to comply *partially* with a support order. The Supreme Court of California has previously asserted that a contemnor’s affirmative defense of inability to comply with an order may be considered moot if it is shown that the parent had an ability to comply partially but did not take action to do so. As stated, “a person may not be able to comply with an order in full yet may have the ability to comply in part.” and “unless a defendant shows he has complied with the court’s order to the fullest extent of his ability his defense of inability fails.” *Lyon v. Superior Court of L.A. Cty.*, 68 Cal. 2d 446 (1968). In *United*

States v. Craig, 181 F.3d 1124 (9th Cir. 1999) willfulness was determined as a crucial determination within a contempt conviction, and prior precedent from *United States v. Ballek*, 170 F.3d 871 (9th Cir. 1999) was reaffirmed which stated a parent must seek to modify a court order within the state courts and failing to do so showcases a willful nonpayment.

Within the case of Carmen Leake, it would be noted that while she may raise the affirmative defense of inability to pay it is likely to fall short based upon how her driving factor within her inability to pay defense would be her student status, which has been held in prior case law including *In re Marriage of Ilas* to not be sound. A court would likely find her able yet unwilling to pursue employment showcasing a willful disobedience of a court order, thus shirking her parental duty to her child, punishable by contempt, and possible jail time.

CONTEMPT AND THE THIRTEENTH AMENDMENT

If the court found Carmen to be unwilling to pursue employment, then can she and the firm assert that forced labor under the threat of imprisonment violates her protections under the thirteenth amendment? That shall be discussed as pursuant to state statutory law, parents have the duty to support their children, and if a parent willfully fails to provide the other parent may bring an action against them. Cal. Fam. Code § 4000. Appropriate action, both civil and criminal may be taken to enforce the child support obligation. 67 Ops. Cal. Att’y. Gen. 431 (1984). As contempt is a quasi-criminal proceeding, detainment is a possibility for Carmen. A defense then for this client, would be that it could be unconstitutional to force labor in return for payment of debt under the threat of imprisonment. As outlined in Cal. Civ. Proc. Code §1218 (2025):

“the court or judge shall determine whether the person proceeded against is guilty of the contempt charged, and if it be adjudged that the person is guilty of the contempt, a fine may be imposed on the person not exceeding one thousand dollars (\$1,000), payable to the

court, or the person may be imprisoned not exceeding five days, or both.”

While imprisonment is a determined punishment for contempt, it is well established that provisions within the United States Constitution state that “neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States.” U.S. Const. amend. XIII, § 1. The assertion is that a person cannot be forced to work, however, they can be punished and sanctioned for willfully refusing to comply with a court order where they are able. As stated in the opinion within *United States v. Ballek*, 170 F.3d 871, 874 (1999) not all forced employment is prohibited by the Constitution. Federal opinion states “where the obligation is one that has traditionally been enforced by means of imprisonment, the Constitutional prohibition does not apply.” Imprisonment has been a historical, long understood enforcement for child support contempt, and is noted as an exception to the particular constitutional provision. If the contempt exists due to failure to perform an act which the parent is still in the power to perform, the contemnor may be imprisoned until the act is performed. 4 Cal. Fam. L. Prac. & Proc 2d § 140.89 (2025).

While the U.S. Constitution prohibits jailing for debt or invoking involuntary servitude, it is integral to mention that the key determination in whether Carmen can be forced to pursue employment lies with the fact that debt on behalf of a parent to their child is not adjudged in the same way debt to a collector is on either a federal or a state level. It is considered a high priority debt. Cal. Fam. Code § 4011. 11 USCS § 523 and further California Supreme Court Cases such as *In re Marriage of Ilas*, establish that spousal support and failure to provide for a child is a unique circumstance separate from a normal debt and that the obligation of a parent to their child, is in its nature, non-dischargeable. *In re Marriage of Ilas*, 12 Cal. App. 4th 1630 (1993). In this case, it was found that the contemnor, “did not have the right to divest himself of his earning

ability at the expense of [the former Mrs. Ilas] and his two minor children. [Mr. Ilas] may wish to undertake and pursue and continue to pursue his acquisition of a medical doctorate degree, but he must also continue to pay his child and spousal support." *Id.* at 1639. Child support is more than a debt or contractual agreement. Parents must provide necessary care for their children, and without lawful excuse, a parent is criminally liable for their failing to do so. *Id.* Furthermore, it is a statutory duty of a parent to support their child and they cannot divest themselves from this duty. Cal. Fam. Code § 4500.

This concept is furthered within the confines of bankruptcy as well, as Federal statutes naming exceptions to debt discharge describe domestic support obligations as a unique exception, separate from that of other forms of debt. Child support is viewed as a court-imposed obligation to the child, not the other parent. Otherwise, it is unconstitutional to incarcerate people for debts they are unable to pay or force them to work to pay such debts. *Turner v. Rogers*, 564 U.S. 431, 435 (2011). A parent cannot be sent to jail without determining whether they had the true ability to pay the support orders. Vicki Turetsky and Maureen R. Waller, 4 *Ucla Crim. Just. L. Rev.* 117 (2020). *Moss v. Superior Court* also clarified that the Thirteenth amendment does not disallow imprisonment for contempt sanctions.

The overall takeaway for Carmen, then, would be that if the prior mentioned facts showing willfulness are presented, Carmen cannot be prevented from being forced to work under the threat of imprisonment, as these protections exist separate from her situation and the obligation, she owes to her child which she is under no right to divest herself from. The thirteenth amendment does indeed protect from involuntary servitude and jailing for debt, but Carmen's situation would not fall under these parameters.

CONCLUSION

To conclude, based upon the assertions noted herein and the facts provided within Carmen's case, it is unlikely that an affirmative defense based upon Carmen's status as a UCSD graduate student and part-time tutor with lack of funds would succeed in a court of law. Under statutory law pursuant to Cal Code Civ Proc § 1218.5 and case law including *In re Marriage of Ilas*, 12 Cal. App. 4th 1630 (1993) and *Moss v. Superior Court*, 17 Cal. 4th 396 (1998), Carmen is not able to divest herself from her obligations to her child, and she had chosen a lifestyle path that allowed her to be in a situation where she could not pay for her child.

Furthermore, as outlined in case law and Cal. Fam. Code § 4500, Carmen can indeed be told to find employment as the debt to her children is not seen within the scope of normal a normal creditor debtor relationship. Thus, the thirteenth amendment would not apply to this situation.

TABLE OF AUTHORITIES

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