

Deadbeat Lockup

FAMILY LAW: There is no constitutional impediment to using the contempt power to punish a parent who willfully refuses to seek and accept employment in order to pay a child-support obligation.

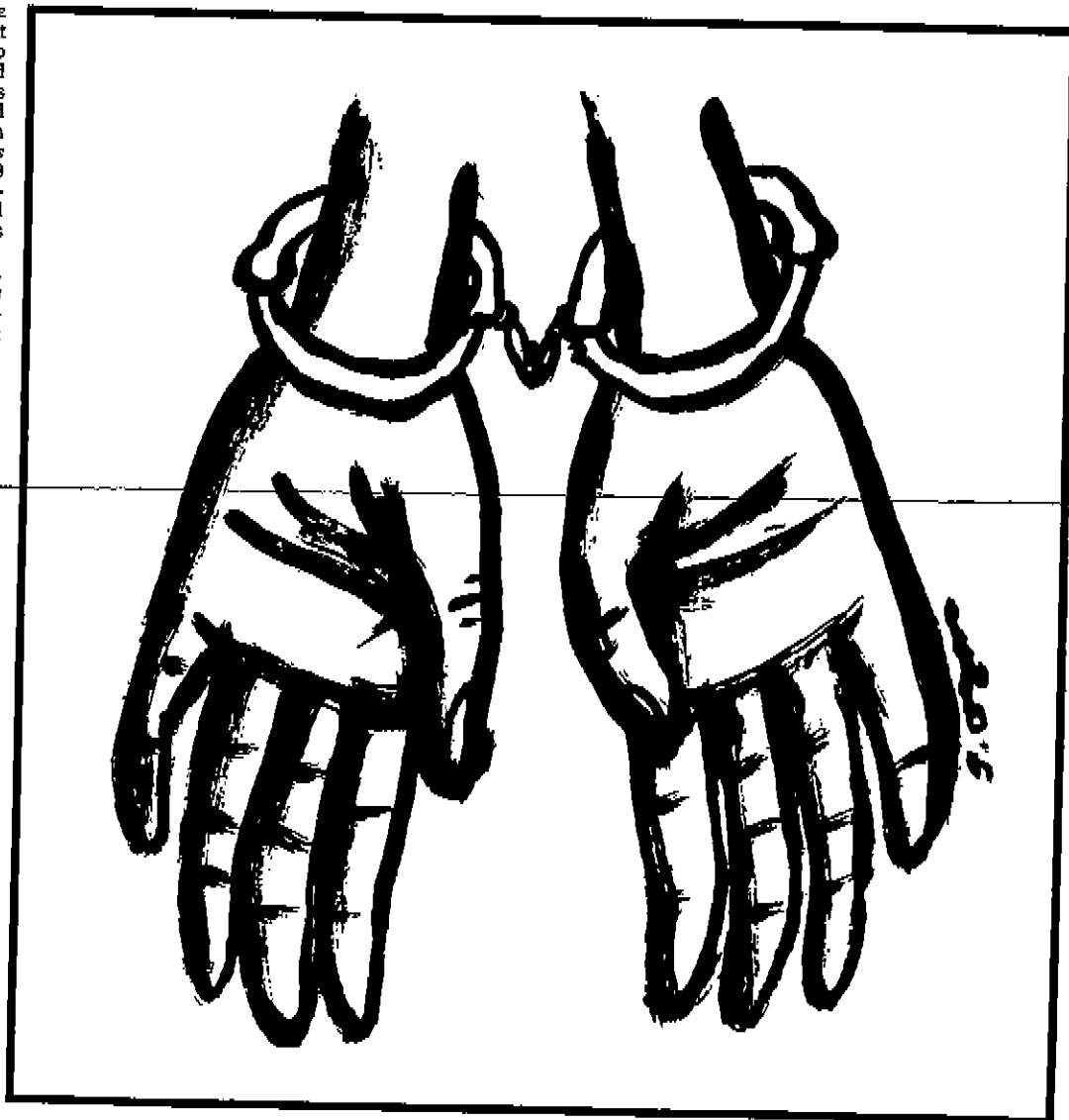
By Mitchell A. Jacobs and Soo J. Kim

A recent California Supreme Court decision holds that a parent who is unable to pay court-ordered child support because of his willful failure to seek and obtain employment can be adjudged in contempt and punished. *Moss v. Superior Court of Riverside County*, 99 Daily Journal D.A.R. 1141 (Feb. 2, 1998), significantly expands the law of contempt and changes the evidentiary burden as it applies to child support.

Until *Moss*, the general consensus, based on the century-old case of *Ex parte Todd*, 119 Cal. 57 (1897), was that to impose a contempt sanction against a parent because he was unable to comply with a child-support order would violate the constitutional ban on involuntary servitude and imprisonment for debt, even if the parent's inability to pay support was the result of the parent's willful failure to obtain a job. However, the *Moss* court held that there was no constitutional impediment to the imposition of contempt sanctions in such circumstances.

In addition, the *Moss* court held that the burden of proof in child-support contempt proceedings lies with the alleged contemnor and that his inability to comply with a child-support order has to be proven by a preponderance of the evidence. Although the decision will have a dramatic effect on future contempt proceedings, the *Moss* court held that the change in the law could not be applied retroactively.

Over a century ago, the *Todd* court, in its one-page opinion, held that a court does not have the power to "compel a man to seek employment in order to earn money to pay alimony and punish him for his failure to do so." Although not expressly stated, the general understanding from *Todd* was that to force an individual to work under a threat of imprisonment



Mitchell A. Jacobs, a certified family law specialist in Los Angeles, limits his practice to marital dissolution and other family law matters. Soo J. Kim, an associate with the Law Office of Mitchell A. Jacobs, also practices exclusively in the area of family law.

constituted involuntary servitude or imprisonment for debts.

Other cases following in the footsteps of *Todd* affirmed the rule set forth in that case. In *In re Brown*, 136 Cal.App.2d 40 (1955), a writ of habeas corpus was issued on the petition of Stuart F. Brown, who was serving a five-day jail sentence for failing to comply with a spousal-support order.

The affidavit of Brown's former wife, upon which the citation was issued, stated that Brown was delinquent in the sum of \$800. The former Mrs. Brown alleged that her ex-husband was a very well-educated, healthy man, 45 years of age. He was earning in excess of \$18,000 per year but, shortly after the judgment of divorce was entered, he became unemployed and did not find another job. Rather, Brown remarried and claimed that his new wife with "substantial property and income" was supporting him. The affidavit was silent as to whether Brown gave up his employment or refused to accept employment that was available.

The *Brown* court, relying on *Todd*, held that the mere ability to work was not the same as the ability to pay and concluded that a showing of the obligor spouse's ability to work was inadequate to charge him with willfully-refusing to work for the express purpose of evading his obligation of support.

In *In re Jennings*, 133 Cal.App.3d 373 (1982), a defendant was found in contempt of court and sentenced to 60 days in jail for failure to pay spousal support and attorney fees. The trial court found that the defendant had willfully quit working to avoid paying court-ordered spousal support. Although at the time of the contempt hearing the defendant was unemployed and without assets, the contempt order was issued based on a finding that defendant had the ability to earn \$80,000 per year.

On appeal, the *Jennings* court, relying on *Todd* and *Brown*, held that, to the extent the contempt order was based on defendant's failure to work, it could not be sustained. The *Jennings* court went on to state that the language of *Todd* clearly implied that under both federal and state constitutional prohibitions against involuntary servitude (except as a punishment for crime), a contempt order could not be applied to incarcerate a person for failure to work to support a former spouse.

In *Moss*, a judgment of dissolution was filed on March 17, 1992. It ordered Brent Moss to pay a total of \$483 a month to support two children. Although Moss was unemployed when the support order was made, the amount of child support was based on his ability to earn \$1,671 gross income per month. The order was modified on Nov. 1, 1994, to \$385 per month.

On June 22, 1995, a declaration for contempt was filed by Moss's ex-wife, Tamara Ortiz. The declaration alleged 24 contempt counts based on 24 dates on which a payment had not been made. Moss failed to make child-support payments from July 1, 1994, through June 15, 1995, and he owed \$5,012 in support.

The Superior Court issued an order to show cause (OSC) directing Moss to appear and show why he should not be found guilty of contempt. At the OSC hearing, Ortiz testified that Moss was present when the support order was made and that he had not paid any support since July 1, 1994. Moss's counsel argued that Ortiz bore the burden of proof of his ability to pay support.

O

rtiz testified that Moss did not have a car and at times had no food in his house. She further testified that she was not aware of his having a job in the past four years and did not know if he had any money or any ability to pay child support. Moss's mother testified that she provided Moss with a home and utility expenses most, but not all, of the time, and that he often ate at her home. She also testified that he did odd jobs but she did not know how much he earned from the odd jobs. His mother went on to testify that Moss brought the children over to her house to eat when the children were with him.

Moss's counsel argued that Ortiz failed to present any evidence to show that Moss had the ability to comply with the support order. He went on to state that, in a contempt proceeding to enforce a child-support order, the citee need only raise the question of ability to comply, at which point the party seeking the contempt sanction had the burden of proving the ability to comply beyond a reasonable doubt. The counsel went on to state that Moss's inability to comply had been adequately raised by the evidence and compelling Moss to work would constitute involuntary servitude.

Ortiz's counsel argued that Moss had the burden of proving his inability to comply with the order as an affirmative defense and that the ability to comply did not require ability to pay the full amount of support order.

The trial court agreed with Ortiz that the burden of proving inability to comply lay with Moss and observed that there had been no evidence that Moss was unable to work. The court concluded that Moss did have the ability to pay child support, as the evidence permitted an inference that he was receiving money from some source other than his mother. The court stated that Moss was "well dressed and had to be doing something to buy his own clothes and feed himself when he did not eat at his mother's home." The court further stated that Moss could get a job at MacDonald's.

Because the court found that Moss's unemployment was based on his choice not to get a job, Moss was found guilty of contempt and sentenced to a five-day jail sentence for each of six contempt charges (the number of contempt charges were reduced to meet the current statutory limit), required to do community service and placed on a three-year informal probation. The execution of the jail sentence was stayed, however, to permit Moss to purge himself of contempt by making specified payments.

Moss filed a petition for writ of mandate to set aside the contempt judgment. He raised the issue of his inability to make the child-support payments and stated that Ortiz did not present any evidence in court to show that he had the resources to pay child support. In his defense, Moss argued that under *Todd*, *Jennings* and *Brown*, the court lacked the power to impose contempt sanctions.

The appellate court reluctantly set aside the contempt judgment, holding that the evidence was not sufficient to prove that Moss had the ability to pay and that *Todd* was controlling. The court concluded that Moss could not be adjudged in contempt based only on his ability to earn. The court, however, invited the Supreme Court to reconsider *Todd*, at least in the context of child support.

The Supreme Court, in reviewing the facts, focused on the duty of a parent to support a child or children and stated that to support a child was among the most fundamental of obligations recognized by modern society and was legally enforceable. The court held that, to the extent *Todd* might apply to child-support orders, it was disapproved.

The court went on to state that there was no constitutional impediment to use the contempt power to punish a parent who, otherwise lacking monetary ability to pay child support, willfully fails and refuses to seek and accept available employment commensurate with the parent's skills and abilities.

The *Moss* court distinguished the parent's obligation to comply with a child-support order from involuntary servitude, stating that seeking and keeping employment to comply with a child-support order does not bind the parent to any particular employer or form of employment or otherwise affect the freedom of the parent.

Reasoning that the 13th Amendment did not prevent state and federal governmental entities from compelling the performance of civic duties such as jury service, military service and road work, the court stated that a parent's obligation to support a minor child is a social obligation that is no less important.

The *Moss* court distinguished the prohibition of imprisonment for debt found in Article I, Section 10 of the California Constitution by stating that it does not apply to imprisonment for a "crime" and that the provision was not intended to "shield a dishonest man who takes unconscionable advantage of others."

The *Moss* court also addressed the issue of the burden of proof for the alleged contemnor in a contempt proceeding. The court held that an obligor parent could use his inability to comply with a child-support order as an affirmative defense; however, said defense had to be proven by a preponderance of the evidence, citing *Martin v. Ohio*, 480 U.S. 228 (1987), which considered the validity of an Ohio law allowing self defense as an affirmative defense in a prosecution for murder. There, the high court held that since the state did not preclude the jury from considering self-defense evidence in determining whether there was a reasonable doubt that any element of the offense had been proven, it was permissible to impose on the defendant the burden of proving self defense by a preponderance of the evidence.

The *Moss* court also disapproved part of the holding in *In re Feiock*, 215 Cal.App.3d 141 (1989). The *Feiock* court had ruled that the alleged contemnor need to only raise the issue of ability to pay and that the petitioner must then prove the contempt beyond a reasonable doubt, including ability to pay. The *Moss* court stated that the ability to pay was not an element of the child-support contempt offense and disapproved *Feiock* in that respect.