IN THE COURT OF APPEALS

JAMES NEAL BROWN, JR.,	)	HAMILTON CIRCUIT
	)	C.A. NO. 03A01-9508-CV-00287
Plaintiff-Appellant	)	
vs.	)	HON. WILLIAM L. BROWN
	)	JUDGE
ANNABELLE SHROUT BROWN,	)	VACATED IN PART, AFFIRMED IN
	)	PART AND REMANDED
Defendant-Appellee	)	

BARBARA S. ARTHUR, Rossville, Georgia, for Appellant.

CHARLES W. BURSON, ATTORNEY GENERAL AND REPORTER and JAMES H. TUCKER, JR., ASSISTANT ATTORNEY GENERAL, Nashville, for Appellee.

OPINION

McMurray, J.

This case originated as a divorce action between the parties. This appeal results from a judgment of the trial court finding the appellant to be contempt of court for failing to pay child support as ordered by the court and sentencing him to serve ninety (90) days in the Hamilton County Jail.[1] Child support payments were suspended during the period of incarceration. We vacate the judgment in part and affirm the judgment in part.

This action was instituted by the State of Kentucky as assignee of Annabelle Brown. The action was filed in the original divorce case and no objection was taken thereto. The State of Kentucky sought a finding that the appellant was in willful contempt of court and asked that he be required to pay all child support arrearage.

During the pendency of the action for contempt and for the collection of child support, the appellant filed for bankruptcy under the provisions of Chapter 13 of the U.S. Bankruptcy Code. The appellant filed a motion in the Circuit Court to stay or dismiss the proceedings because of the bankruptcy action. The trial court denied the motion. Thereafter a motion was made in the Bankruptcy Court for a temporary restraining order prohibiting the state court from proceeding further pending the outcome of the bankruptcy action.

[1]The jail sentence was suspended pending the outcome of this appeal.

The Bankruptcy Court for the Eastern District of Tennessee denied a temporary restraining order. In its memorandum opinion, the Bankruptcy Court stated:

> ... [B]ecause the Sixth Circuit Court of Appeals has recognized that the court in which the litigation claimed to be stayed is pending may determine whether the automatic stay applies to that litigation, and because the state court ruled against the plaintiff on her claim that the automatic stay prevented a continuation of the state court action, the court believes that the plaintiff's remedy is not to obtain injunctive relief in the bankruptcy court, but to appeal the state court ruling.

The Bankruptcy Court abstained from any opinion as to whether the automatic stay applied under the circumstances of this case and left that determination to the state court.

The appellant presents two issues for our consideration:

A. Whether or not the trial court should have stayed the proceedings upon being notified that Respondent [appellant] had filed a petition for relief in Bankruptcy.

B. Whether or not the respondent's [appellant's] conduct in failing to pay all the child support he owed amounted to willful contempt of court.

Insofar as we have been able to determine, the issue of the application of an automatic stay as it relates to the collection of child support has not been decided by the courts of this juris-

diction. There is a multitude of bankruptcy cases, however, which have dealt with the issue.

11 U.S.C. 362(a) provides in pertinent part as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS §78eee(a)(3)], operates as a stay, applicable to all entities, of))
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title [11 USCS §§101 et seq.], or to recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§101 et seq.];
>
> * * * *
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title [11 USCS §§101 et seq.];
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> * * * *
>
> (b) The filing of a petition under section 301, 302, or 303 of this title [11 USCS §§301, 302, 303], or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 [15 USCS §78eee(a)(3)], does not operate as a stay))
>
> (1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;
>
> (2) under subsection (a) of this section))
>
> (A) of the commencement or continuation of an action or proceeding for))

(i) the establishment of paternity; or

(ii) the establishment or modification of an order for alimony, maintenance, or support; or

(B) of the collection of alimony, maintenance, or support from property that is not property of the estate;

Paragraph (2) set out above was substituted by an amendment to the act, effective October 22. 1994, for a paragraph that read:

(2) Under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate.

We note that the action which gave rise to this appeal was instituted on December 1, 1994, after the effective date of the amendment set out above. We are of the opinion that the statute, either before or after the amendment, does not operate to exempt the collection of child support arrearage from the automatic stay. As applied to this case, we believe that the statute limits the court to the trial of a criminal contempt action, the establishment or modification of a support order with prospective application only and the determination of the amount of arrearage.

In our construction of the statute we are guided by the principles set out in U. S. Nat. Bank of Ore. v Ins. Agents, 508 US ____, 124 L Ed 2d 402, (1993). The U. S. Supreme Court addressing the concept of statutory construction stated:

> Over and over we have stressed that "[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." United States v Heirs of Boisdoré, 8 How 113, 122, 12 L Ed 1009 (1849) (quoted in more than a dozen cases, most recently Dole v Steelworkers, 494 US 26, 35, 108 L Ed 2d 23, 110 S Ct 929 (1990)); see also King v St. Vincent's Hospital, 502 US ____, ____, 116 L Ed 2d 578, 112 S Ct 570 (1991). No more than isolated words or sentences is punctuation alone a reliable guide for discovery of a statute's meaning. Statutory construction "is a holistic endeavor," United Savings Assn. of Texas v Timbers of Unwed Forest Associates, Ltd., 484 US 365, 371, 98 L Ed 2d 740, 108 S Ct 626 (1988), and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter.

U.S. Not. Bank of Ore. v Ins. Agents, supra, pp 417 -418.

The accepted rules of statutory construction in this state are not at variance with the rules of statutory construction set out above. The cardinal rule of Tennessee statutory interpretation is to ascertain and give effect to the intent and purpose of the Legislature in relation to the subject matter of the legislation, all rules of construction being but aids to that end. Rippeth v. Connelly, 60 Tenn. App. 430, 447 S.W.2d 380, 381 (1969). A statute must be construed so as to ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning. Marion County Board of Commissioners v. Marion County Election Commission, 594 S.W.2d 681 (Tenn. 1980). The Court should assume that the Legislature used each word in the statute purposely and that the use of these words conveyed some intent and had a meaning and

purpose. Anderson Fish & Oyster Company v. Olds, 197 Tenn. 604, 277 S.W.2d 344 (1955). See also Crowe v. Ferguson, 814 S.W.2d 721 (Tenn. 1991).

The appellant argues that since this is basically a collection action, only property which is not a part of the debtor's estate may be subjected to the satisfaction of the appellant's child support arrearage. Under our construction of the statutes we generally agree with the argument advanced by the appellant. However, there is an express exemption from the automatic stay for proceedings of a criminal nature. Therefore, we must determine whether the contempt action in this case is civil or criminal. If civil, the action must be stayed absent relief from the automatic stay. If criminal, the action may go forward. The scope of the trial court action, however, is limited to punishment for the criminal contempt, modifying its support order prospectively and to ascertaining of the amount of arrearage owed by the debtor. See In Re: Campbell, 185 B.R. 628; In Re Allison, 182 B.R. 881 and In Re: Ward, 188 B.R. 1002. The payment of the arrearage is subject to the Chapter 13 plan as confirmed. See In Re: Walter, 153 B.R. 38.

In ascertaining whether the contempt action and punishment therefor is civil or criminal, we look to State ex rel. Anderson v. Daugherty, 137 Tenn. 125, 191 S.W. 974 [1916], in which the following language appears:

> "Contempts are of two kinds, civil and criminal. A 'civil contempt' is one where a person refuses or fails to comply with an order of court in a civil case; and punishment is meted at the instance and for the benefit of a party litigant. The proceeding is in furtherance of the right of a private person which the court has determined that he, as a litigant, is entitled to. To this class of Contempts belong such an act as the refusal to pay alimony, as ordered. Unless special elements of contumacy appear, such refusal is looked upon as a resistance of the opposite party, and not the court itself. If imprisonment be ordered it is remedial and coercive in character, having relation to the compelling of the doing of something by the contemnor which when done will work his discharge. As has been said, in such case the one imprisoned 'carries the keys to his prison in his own pocket.' In re Naevoid, [8 Car.] 117 F. [448] 451, 54 C.P.A., 622.
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> "'Criminal Contempts,' on the other hand, are punitive in character, and the proceeding is to vindicate the authority of the law, and the court as an organ of society. Such Contempts, while they may arise in private litigation, in a very true sense 'raise an issue between the public and the accused.'"

Hugging v. Fallen, 500 S.W.2d 4435 (Tenn. 1973).

In this case there is no question but that special elements of contumacy appear. The appellant has demonstrated that he has no regard for the orders of the court. He has failed and refused to comply with the orders of the court over a long period of time without sufficient cause.

Since the order of support in this case was entered, the appellant has remarried, sired three additional children, took on the responsibility of a step-child and the support of his wife. He

asks the court to excuse him from punishment for his failure to pay because of his inability to adequately support his present family and wife. He further asserts that his present wife is ill and that as a result he is unable to be employed to the extent he would be otherwise. It is well-settled that voluntary obligations assumed after an order of support is entered are not sufficient to constitute a change in circumstances and give rise to a reduction in support obligations. See Elliot v. Elliot, 825 S.W.2d 87 (Tenn. App. 1991) and Dillow v. Dillow, 575 S.W.2d 289, 291 (Tenn. App. 1978).

It is clear from the record that the appellant's disregard of the court's order has been willful and is of such long standing that this proceeding is necessary to vindicate the authority of the law and the court. Additionally, the defendant, under the court's judgment, does not "carry the keys to his prison in his own pocket." He has been sentenced to a definite sentence in the county jail or workhouse. He has been represented by counsel through the entire proceedings. In addition, all the requirements of Rule 42(b), T.R.Cr.P. have been met. We, therefore, find that the contempt is criminal, not civil, and the automatic stay provided in the Bankruptcy Code is inapplicable to the contempt proceeding. Further, we are of the opinion that contempt has been established beyond a reasonable doubt.

The trial court found the arrearage at the time of trial to be $11,400.90. He further established current support at $52.00 per week plus the clerk's commission of 5% and ordered an additional $10.00 per week to be paid on the arrearage.

The automatic stay provided by the Bankruptcy Code applies to that part of the court's judgment requiring weekly payments on the arrearage. Actions taken in violation of an automatic stay are void, Kalb v. Feuerstein, 308 U.S. 433, 438, 60 S.Ct. 343, 345-46, 84 L.Ed. 370 (1940); Walter P. Richard v. City of Chicago, 80 B.R. 451 (1987). Arrearage payments will abide the orders of the Bankruptcy Court.

Further, we believe that the appellant's child should not be penalized for the willful acts of the appellant. Accordingly, we vacate that part of the order of the trial court requiring weekly payment on child support arrearage and suspending payment of child support while the appellant is incarcerated. The trial court's judgment is affirmed in all other respects.

Costs are taxed to the appellant and this cause is remanded to the trial court for the collection thereof and for such other and further action as necessary to execute the judgment of the trial court in conformity with this opinion.

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Don T. McMurray, J.

CONCUR:

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Herschel P. Franks, J.

_____
William H. Inman, Senior Judge.

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Plaintiff-Appellant	)	
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vs.	)	HON. WILLIAM L. BROWN
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	)	
	)	
	)	
ANNABELLE SHROUT BROWN,	)	VACATED IN PART, AFFIRMED IN
	)	PART AND REMANDED
	)	
Defendant-Appellee	)	

ORDER

This appeal came on to be heard upon the record from the Circuit Court of Hamilton County, briefs and argument of counsel. Upon consideration thereof, we vacate that part of the order of the trial court requiring weekly payment on child support arrearage. and suspending payment of child support while the appellant is incarcerated. The trial court's judgment is affirmed in all other respects.

Costs are taxed to the appellant and this cause is remanded to the trial court for the collection thereof and for such other and

further action as necessary to execute the judgment of the trial in conformity with this opinion.

PER CURIAM