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No Default Judgment in Contempt



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Even when contempt is based upon the failure to pay child support, the contempt order must contain the conclusion of law that respondent willfully violated the court order. That conclusion must be supported by findings of fact showing respondent actually has/had the ability to comply or to take reasonable steps to comply and deliberately failed to do so. Those findings of fact must be based on evidence.

In other words, a contempt order cannot be entered by default – a court cannot assume a respondent has the ability to comply simply because the respondent fails to prove he/she does not have the ability to comply.

Civil Contempt

A civil contempt proceeding can be initiated in one of three ways:

- Pursuant to GS 5A-23(a1), by filing a verified motion, or a motion along with an affidavit, and a notice of hearing on the contempt motion; or
- Pursuant to GS 5A-23(a), by filing a verified motion, or a motion along with an affidavit, that includes a request for a show cause order;
- And for child support contempt only, pursuant to GS 50-13.9(d), by filing an affidavit and asking a judge or a clerk to issue a show cause order.

In all three situations, the court can hold the respondent in civil contempt only if the court concludes:

- The order being violated remains in force;
- The purpose of the order may still be served with the respondent's compliance with the order;
- The respondent's failure to comply with order is **willful**; and

- The respondent **has the present ability to comply** with the order in whole or in part or take reasonable steps that would enable him/her to comply in whole or in part.

GS 5A- 21(a).

Since the purpose of civil contempt is to force compliance, the only remedy is imprisonment until the respondent complies with the order. GS 5A-21. The court must ensure the respondent “holds the keys to the jail” by ordering a purge that respondent has the actual present ability to perform. *Jolly v. Wright*, 300 NC 83 (1980)(respondent must have the actual present ability to purge himself of contempt at the time he is jailed).

Who Issues the Show Cause in Civil Contempt?

For civil contempt actions pursuant to GS 5A-23(a), only a judge can issue the show cause order. *Moss v. Moss*, 222 NC App 75 (2012). In child support cases, GS 50-13.9(d) allows the show cause to be issued either by a judge or by a clerk of court.

When Can a Show Cause Order be Issued?

No show cause should be issued unless there are facts in the verified motion or affidavit that will support the conclusions required for contempt. This is because the show cause is issued only upon a finding of **probable cause** to believe obligor is in contempt. GS 5A-23(a). This means that in addition to alleging respondent has failed to comply with an order, the motion/affidavit also must contain credible allegations that provide a reasonable ground for believing the respondent is willfully failing to comply with the order. *Young v. Mastrom, Inc.*, 149 NC App 483 (2002).

‘Burden of Proof’

When contempt is initiated pursuant to GS 5A-23(a1) by motion and notice of hearing, the moving party has the burden of going forward with evidence at the contempt hearing to establish the factual basis for contempt. GS 5A-23(a1).

When contempt is initiated by a verified motion or affidavit and the issuance of a show cause order, either pursuant to GS 5A-23(a) or GS 50-13.9(d), the burden of going forward with evidence at the hearing is upon respondent. *Shumaker v. Shumaker*, 137 NC App 72 (2000). However, this is only because a judge or clerk previously determined – based on specific factual allegations in the verified motion or affidavit – there is probable cause to believe respondent is in contempt.

Despite this shifting of the burden of proof, no contempt order can be entered without sufficient evidence to support the conclusion that respondent acted willfully and has the present ability to comply with the purge ordered by the court. *Henderson v. Henderson*, 307 NC 401 (1983); *Lamm v.*

Lamm, 229 NC 248 (1948). While appellate courts have stated that a respondent who fails to make an effort to show a lack of ability to comply “does so at his own peril”, *Hartsell v. Hartsell*, 90 NC App 380 (199), it is clear there can be no default contempt order.

Criminal Contempt

There is only one way to initiate an indirect criminal contempt proceeding. GS 5A-15(a) provides that a judicial official – either a clerk or a judge – initiates the proceeding by issuing a show cause order. The statute does not require a verified motion or affidavit, but the show cause order must contain adequate information to put respondent on notice of the allegations forming the basis for the charge. *O'Briant v. O'Briant*, 313 NC 432 (1985).

The purpose of criminal contempt is to punish, so the focus is on the past behavior of respondent. So for example, if contempt is based on the failure to pay child support, criminal contempt must be based on the conclusion – adequately supported by factual findings that are adequately supported by evidence – respondent willfully failed to pay at some point in the past. In criminal proceedings, despite the fact that the action is initiated by a show cause order, the burden of presenting evidence at trial always remains with the moving party and the court must find willful disobedience beyond a reasonable doubt. GS 5A-15(f).

As the goal of criminal contempt is to punish rather than force compliance, the court has the option of ordering imprisonment, a fine, or censure. GS 5A-12. None of these require the court to conclude respondent has the present ability to comply **at the time the contempt order is entered**, as is required with a purge in civil contempt.

Ability to Pay

So what evidence is sufficient to show actual ability to comply? That's the topic of my next blog. Stay tuned.

This entry was tagged with the following terms: Contempt; child support.

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