

Enforcing custody orders: civil contempt is not always the appropriate remedy

[GS 50-13.3](#) provides that an order for custody is enforced by civil contempt and its disobedience is punished by criminal contempt. This statute mirrors case law regarding contempt; civil contempt is to force present compliance with an order and criminal contempt is to punish a past failure to comply and to discourage future noncompliance.

This distinction between civil and criminal contempt has been described by appellate courts as “murky at best,” and recent cases from the North Carolina Court of Appeals illustrate that contempt can be particularly difficult to apply correctly in custody cases. Most importantly however, these cases indicate that civil contempt probably is not an appropriate remedy for the most common enforcement issues that arise in custody cases.

Civil vs. Criminal Contempt: [Kolczak v. Johnson](#)

In theory, civil contempt is straightforward. The court orders a party to act but the party willfully fails to act. The court holds the party in civil contempt, ordering the party incarcerated until civil contempt is lifted by the party’s compliance with the court order. The only remedy authorized by [GS 5A-21](#) for civil contempt is incarceration until compliance. Civil contempt is appropriate only when the party has the actual present ability to comply with the terms of the court order at the time the court holds the party in civil contempt. In other words, the party held in civil contempt must “hold the keys to the jail” so he can free himself at any point in time simply by complying with the court order.

In [Kolczak v. Johnson, 817 SE2d 861 \(NC App July 3, 2018\)](#), the trial court held mother in civil contempt for violating terms of a custody order. The court of appeals held that the findings of fact and evidence supported the trial court’s conclusion that mother had willfully violated the terms of the order by:

- failing to inform father of certain events as required by the custody order,
- failing to give father the right of first refusal when she needed child care for the child as specified in the custody order,
- allowing her husband to be present when the children were at her home when order provided that children were to have no contact with the husband, and
- scheduling the children for camps during times that interfered with father’s custodial time with the children.

Despite agreeing with the trial court that mother willfully violated the custody order, the court of appeals reversed the civil contempt order because it did not contain a purge condition indicating

how mother could take herself out of civil contempt. Significantly, the court of appeals refused to remand the case to the trial court for the imposition of a purge condition because the court concluded that it was not “apparent how an appropriate civil purge condition could coerce the defendant to comply with the court order as opposed to punishing her for a past violation.” In other words, the trial court could not order mother incarcerated until she complies with these provisions in the custody order because they were not things she could do immediately to take herself out of contempt. In a footnote, the court of appeals stated that this situation was more appropriate for criminal contempt than civil.

When children refuse to visit

Appellate opinions also illustrate that it can be extremely difficult to find a parent in civil contempt when it is the child rather than the parent who refuses to comply with the terms of the custody order. In such cases, a parent generally cannot be shown to be willfully refusing to comply with an explicit provision or directive to that parent in the custody order. See e.g. *McKinney v. McKinney*, 799 SE2d 280 (NC App 2017); *Hancock v. Hancock*, 122 NC App 518 (1996). Even if a parent has failed to comply with a specific directive in the past, those situations more often resemble the situation in *Kolczak* where criminal contempt is the more appropriate remedy.

In the most recent case involving a child’s refusal to comply with the custody order, [Grissom v. Cohen, __ N.C. App. __, S.E.2d \(October 2, 2018\)](#), mother alleged that her 17 year-old daughter refused to return to her custody due to father’s failure to impose consequences on the child for refusing to return to mother and due to his alienating behavior. Along with other remedies, mother requested that the court hold father in civil contempt.

The trial court concluded father was not in civil contempt and the court of appeals affirmed. Both courts rejected mother’s argument that the custody order contained an “implied” directive that father take action to force the child to visit mother. Without a showing of a violation of an explicit provision in the custody order, the court of appeals cited *Hancock* as requiring “a showing that the custodial parent deliberately interfered with or frustrated the noncustodial parent’s visitation before the custodial parent’s actions can be considered willful.” There was no evidence in this case that father acted deliberately to keep the child away from the mother.

Even if there had been evidence of father’s past violation of a specific provision in the order, [Kolczak](#) indicates the remedy for a noncustodial parent would be criminal contempt rather than civil contempt.

Parent’s obligation to ‘encourage’ child to comply with order

The court of appeals in [Grissom](#) does not reject the argument that a parent has an obligation to do everything the parent reasonably can do to encourage the child to comply with the custody order even if the custody order does not explicitly require action. In this case, the trial court found that the

teenage daughter suffered from depression, engaged in self-cutting and refused to return to her mother's home. The trial court further found that father encouraged the daughter to return to her mother or at least to visit with mother, but the child refused. He drove the child to the mother's home "almost daily" but the child refused to stay, and he also encouraged mother to visit the daughter at his home. The trial court concluded father did everything he reasonably could do to encourage the child to comply with the custody order.

Mother argued on appeal that the trial court erred in finding father did all he could do to force the child to comply with the custody order, pointing out that father allowed the girl to have her cell phone, to spend time with her friends, to travel out of town and to shop and socialize regularly. The court of appeals rejected mother's argument, holding that the trial court's findings established that the father did all he could do to encourage the child to visit her mother without resorting to actions that would likely be harmful to the daughter. According to the court of appeals, "father was dealing with a depressed teenage girl who was self-harming" and "isolating her from friends or locking her in the house would likely exacerbate her condition." The court held that the trial court appropriately considered the welfare of the child when determining whether father complied with the terms of the custody order.

Again, however, even if the father had not acted in the past to do all he reasonably could do, [Kolczak](#) indicates the remedy should be criminal rather than civil contempt.

Compliance orders rather than civil contempt

The court of appeals in [Grissom](#) engages in a lengthy discussion about orders to "force visitation" and indicates that such orders are the more appropriate way to address these difficult situations when children refuse to visit. Rather than immediately considering civil contempt, *Grissom* holds that a trial court has the authority to enter orders directing a parent to take specific actions to encourage a child to comply with a custody order. If a parent refuses to comply with the specific directives, then contempt is available to enforce compliance with the specific directives.

The court of appeals held that mother in [Grissom](#) properly requested such an order by filing motions along with her request for contempt:

"She asked for a mandatory preliminary injunction requiring father to return [the child] to her home and to "exert his parental influence" to make her stay there. She also asked for "judicial assistance" in the form of mandated reunification therapy. If these motions are not requests for "forced visitation" orders, it is hard to imagine what a forced visitation request would include."

The court of appeals stressed that an order to encourage visitation must include findings of fact regarding the needs of the child. Based on those findings, the trial court should direct "what action a parent should reasonably take to force visitation, consistent with the best interest of the child." The appellate court affirmed the trial court's refusal to force visitation in this case because the trial

court concluded based on the findings of fact regarding the emotional state of the teenage child that forced visitation would not be in her best interest.