

No Contempt for the Nonpayment of Money Without Actual Evidence of Ability to Pay

In 2015, I wrote two blog posts summarizing the law relating to the use of contempt to enforce orders to pay support. [No Default Judgment in Contempt \(May 1, 2015\)](#) and [Contempt: Establishing Ability to Pay \(May 8, 2015\)](#). Recent appellate opinions justify revisiting this topic.

No Default Judgment for Contempt

Because case law holds that the entry of a show cause order for civil contempt shifts the burden in the contempt hearing to the alleged contemnor to establish why he or she is not in civil contempt, see *e.g. Shumaker v. Shumaker*, 137 NC App 72 (2000), it is not uncommon for petitioners to argue that if no evidence of ability to pay is offered or if the court does not find the evidence of the respondent to be credible, the respondent should be held in contempt by default. The court of appeals repeatedly has rejected this argument. In the recent case of [Tigani v. Tigani, __ N.C. App. __, 805 SE2d 546 \(October 17, 2017\)](#), the court of appeals reiterated that a party cannot be held in civil contempt for the nonpayment of money unless evidence is introduced sufficient to establish the parent has the actual present ability to pay.

In [Tigani](#), the trial court ordered Defendant to pay attorney fees but he did not pay. Plaintiff filed a motion requesting defendant be held in civil contempt. Defendant did not appear for the contempt hearing and the trial court concluded he had the ability to pay and held him in civil contempt. On appeal, defendant argued there was insufficient evidence in the record to establish that he had the present ability to pay the attorney fee at the time of the contempt hearing and the court of appeals agreed. The court noted that while the trial court reviewed bank account records of the defendant during the contempt hearing, the records were not introduced into evidence during the hearing and no witness testified. Therefore, there was no evidence in the record at all. The court of appeals also rejected plaintiff's argument that defendant waived any objection to the lack of evidence by not attending the contempt hearing and producing evidence of his inability to pay. The court of appeals held that a defendant's failure to participate in the hearing does not relieve the court of the need to make findings of fact regarding defendant's present ability to comply with the court order and the purge being imposed before holding a party in contempt. Those findings of fact must be supported by evidence in the record.

For cases involving a child support enforcement agency, recently revised federal regulations require that the IV-D agency provide the trial court with evidence regarding a parent's ability to pay in contempt proceedings. See blog post [New Regulations Regarding Contempt in IV-D Cases \(June 30, 2017\)](#).

Evidence Sufficient to Establish Ability to Pay

The court of appeals also recently reaffirmed the NC Supreme Court opinion in *Mauney v. Mauney*, 268 N.C. 254 (1966), holding that conclusory findings by a trial court that a respondent has the ability to pay are not sufficient. Rather, a trial court must take an “inventory” of a party’s “financial condition” in order to support a finding that the party has the ability to pay.

In [County of Durham ex rel. Wilson and King v. Burnette, __ N.C. App. __, S.E.2d \(October 16, 2018\)](#), the trial court held father in civil contempt for failure to pay child support. Plaintiff presented no evidence in the contempt hearing other than the amount of arrears owed by father. Father presented evidence that he had no income and no ability to pay. The trial court order concluded that father acted willfully and had the ability to pay support based on findings that he:

“owns a boat, owns a car, spends money on gas, spends money on food, has medical issues that do not keep him from working, prepares and delivers food, repairs cars for money, pays for car insurance, and receives in-kind income from his sister.”

The court of appeals held that while the evidence in the record supported these specific findings, the evidence and the trial court findings did not support the conclusion father had the ability to pay support or to pay the purge amount set by the trial court. According to the court of appeals, a trial court must “take an inventory” of a parent’s “financial condition” in order to support the conclusion that the parent willfully failed to pay and has the present ability to comply with the purge condition. A trial court “must consider both sides of the equation: income or assets available to pay and reasonable subsistence needs of the [parent]”.

The findings of fact in this case did not establish, for example, how much the boat or the car was worth, whether father needed the car to care for himself, how much money he makes from repairing cars or delivering food, or how much income he receives from his sister. In addition, there was no evidence in the record to establish father’s subsistence needs. According to the court of appeals, “the central deficiency of the trial court’s order is the complete failure to consider defendant’s living expenses.” Without such findings, the trial court cannot hold a parent in contempt for failure to pay support. The court of appeals further explained that the court must allow a parent “legitimate reasonable needs and expenses” and held that a “defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses.”

Ability to work. The court of appeals also held that the trial court had no evidence to support the finding that father had the ability to work. Plaintiff presented no evidence of his ability to work and father presented evidence from a doctor that father had suffered a work related injury and had recurring pain that significantly restricted his movement. Plaintiff argued on appeal that the trial court simply did not find father’s evidence credible. The court of appeals held that while the trial court is the sole judge of credibility, “the lack of evidence is not evidence.” In other words, even if the trial court did not believe father’s evidence of his inability to work, the trial court erred in finding that he could work without evidence to support that finding.

In addition, the court of appeals held that “the ability to work means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job.”

