Enforcement Issues in Child Custody Cases

1. An attorney requests that you enter an ex parte custody order. The attorney has filed a complaint for custody on behalf of the mother of a 3-year-old child against the father of the child. The complaint includes a request for temporary custody and for an ex parte temporary custody order. Plaintiff alleges in the complaint that the father of the child has threatened to leave the country with the child to return to his native country of Ireland. The attorney also asks that you order law enforcement to enforce the ex parte order by accompanying mom to pick up the child from the father.

   You decide to enter the ex parte custody order giving mother immediate physical custody of the child. Do you include the order directing law enforcement assistance?

2. It is late on Friday afternoon when a clerk approaches you with a question. A person is in the clerk's office with a California custody order directing that law enforcement in any state take immediate custody of the child identified in the custody order. The person is the father of the child, and the order grants him custody of the child. He told the clerk that your sheriff refuses to pick up the child without an order from a North Carolina judge.

   Can you enter such an order? What is the appropriate procedure?

3. A custody order provides:
   " Each party shall generally have *unrestricted but reasonable* telephone or FaceTime contact with the minor children when the children are in the custody of the other parent."

   Mother requests that father be held in contempt for violating this provision of the order. Mother testifies that she has repeatedly attempted to contact the children through father's phone and through the children's iPad, but she has not been able to reach them on most occasions. Father has blocked her number on his cell phone.

   Father alleges that he has complied with the provision in the custody order by turning on the children's iPad every evening from 6:00 pm until 6:30 pm when the children are with him. The children can use FaceTime through the iPad. Father admits that he did not inform mother of the time that the iPad would be on, and he also admits that he blocked her number from his cell phone.

   Is father in contempt? If so, what do you order?

4. A custody order grants mother primary physical custody of a 10-year-old boy and provides that father will have visitation with the child every other weekend and every Wednesday evening. Father requests that mother be held in contempt because she has refused to allow his visitation with the child until he attends an anger management class.

   At the contempt hearing, mother testifies that she stopped visitation after the child returned from time with his father with bruises on his arm and his back, resulting from the father's "inappropriate discipline" of the child. She tells you that the father has a history of domestic violence against her, and she fears for the safety of the child in the father's care. She believes father's behavior will improve if he attends the anger management class.

   Father admits he disciplined the child, but he argues that the custody order does not address discipline of the child and it does require that he attend an anger management class. He also argues that the mother is not entitled to withhold visitation in violation of the custody order.

   Is mother in contempt?

5. There is a custody order granting joint physical and legal custody to the parents of a 14-year-old girl and a 12-year-old boy. Father filed a motion to modify alleging mom has engaged in behavior that has resulted in the severe deterioration of the relationship between the father and both children, resulting in emotional harm to the children.

   Following a trial on the modification request in which you heard evidence from a psychologist who conducted a child custody evaluation as well as extensive testimony from both parents, you find that mother has engaged in acts intentionally designed to alienate the children from their father, that the father and the children had a close and loving relationship before mother engaged in these acts but that the relationship is now significantly strained, and that the deterioration of the relationship with their father has been harmful to the welfare of the children. Based on these findings, you conclude there has been a substantial change in circumstances and that the custody order needs to be modified to support the best interests of the children.

   Father requests that he be granted primary physical custody, that the parties be ordered to attend "reunification therapy", and that mother be denied visitation until they have successfully completed the reunification program.

   What can you do? What would you do?

6. The custody order grants primary physical custody of a 14-year-old boy to mother and provides for visitation with father. Mother lives in Durham while father lives in Wilmington. The child prefers spending time at his father's house, and he has traveled to Wilmington with friends and family members on several occasions without the permission or knowledge of his mother. Once at his father's house, the boy refuses to return to Durham when his father's visitation time is over. On two occasions, the father drove the boy to Durham only to have the boy return to Wilmington the next day after convincing an older friend to drive him back to Wilmington without his mother's permission.

   Mother requests that father be held in contempt. She argues that he is violating the custody order by not using appropriate parental disciplinary measures to encourage and force the child to comply with order. Father argues that he is not violating any provision in the custody order. He testifies that he has told the child that the child should comply with the order but admits that he has not disciplined the boy in any way.

   What can you do?

Enforcement Issues in Custody Cases

April 2024

1

Law Enforcement Involvement

2

Probably no inherent authority…….

In re Bhatti,
98 NC App 493 (1990)

Chick v. Chick,
164 NC App 444 (2004)

3

GS 50-13.5(d)(3)

"A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of a minor child as set forth in G.S. 50A-311."

4

GS 50A-311

(b) If the court, **upon the testimony of the petitioner or other witness**, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child. …. The application for the warrant must include the statements required by G.S. 50A-308(b).

(c) A warrant to take physical custody of a child must:

- (1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;
- (2) Direct law enforcement officers to take physical custody of the child immediately; and
- (3) Provide for the placement of the child pending final relief.

5

GS 50A-311

(e) A warrant to take physical custody of a child is enforceable throughout this State. If the court finds **on the basis of the testimony of the petitioner or other witness** that a less intrusive remedy is not available, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour. …..

(f) The court may impose conditions upon placement of a child to ensure the appearance of the child and the child's custodian.

6

CV-667

STATE OF NORTH CAROLINA

File No.

_____ County

In The General Court Of Justice
District Court Division

Name And Address Of Plaintiff

VERSUS

Name And Address Of Defendant

WARRANT DIRECTING LAW ENFORCEMENT TO TAKE IMMEDIATE PHYSICAL CUSTODY OF CHILD(REN) SUBJECT TO A CHILD CUSTODY ORDER

G.S. 50-13.3, -13.5; 50A-308(c)

County And State, Or Country In Which Child Custody Order Entered

Date Child Custody Order Entered

Name And Address Of Person(s) With Physical Custody Of Child, If Different Than Defendant

FINDINGS OF FACT

This matter coming on before the undersigned judge, the Court finds as follows:

1. A child custody order was entered on (date) _____ in the county and state, or country of _____ in an action captioned _____.
2. The child custody order gives plaintiff the right to immediate physical custody of the following child(ren): *(list each child by name and date of birth)*

☐ 3. Plaintiff filed a verified petition for expedited enforcement of a child custody order pursuant to G.S. 50A-308(a). A copy of that petition is attached and incorporated herein by reference.

☐ 4. Plaintiff's verified petition requests that law enforcement officers immediately take physical custody of the child(ren) listed in paragraph 2 above.

5. Based upon the sworn testimony of ☐ plaintiff ☐ *(name of person(s) other than plaintiff offering sworn testimony)*

_____

the court finds that the child(ren) is/are imminently likely to ☐ suffer serious physical harm. ☐ be removed from North Carolina.

7

Foreign Custody Orders

8

§ 50A-303
Duty to enforce

(a) A court of this State shall recognize and enforce a child-custody determination of a court of another state if the latter court exercised jurisdiction in substantial conformity with this Article or the determination was made under factual circumstances meeting the jurisdictional standards of this Article, and the determination has not been modified in accordance with this Article.

(b) A court of this State may utilize any remedy available under other law of this State to enforce a child-custody determination made by a court of another state. The remedies provided in this Part are cumulative and do not affect the availability of other remedies to enforce a child-custody determination.

9

Expedited Enforcement Procedure

Statutes	GS 50A-308 (Petition) GS 50A-310 (Hearing) GS 50A-317 (Order) GS 50A-311 (Warrant)
Forms	CV-665 (Petition) CV-666 (Order for Hearing) CV-668 (Order Allowing or Denying Petition)

10

11

"Implicit in every order is the understanding that its terms will be honored in good faith—that the parties bound by it will act under the dictates of common sense and reasonableness." ***Blanchard v. Blanchard***, 279 NC App 280 (2021)

Cf. Grissom v. Cohen, 261 NC App 576 (2018)(refusing to recognize "implied" provisions in a custody order to justify holding father in contempt)

"Our Supreme Court, in determining whether a party was in contempt for violating a temporary restraining order, stated that " '[t]he order of the court must be obeyed implicitly, *according to its spirit and in good faith.*' " A party " 'must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially so.' " ***Middleton v. Middleton***, 150 NC App 224 (2003)

12

Justified Violation?

- *Davis v. Davis*, 229 NC App 494 (2013)
- *But cf. Baines v. Baines*, 225 N.C. App. 840 (2013) (unpublished)

13

Alienating Behavior

14

NC Cases

- *Sneed v. Sneed*, 261 NC App 448 (2018)
  - Okay to suspend mom's visitation until she completed treatment program
- *Tankala v. Pithavadian*, 248 NC App 429 (2016)
  - Okay to order attendance at family treatment camp

15

Additional resource:

"Parental Alienation in Cases Involving Visitation and Parenting Plan Issues, and General Evidentiary Considerations, Constitutional and Procedural Issues, and Related Matters—21st Century Cases"

- **85 A.L.R.7th Art. 2 (Originally published in 2023)**

16

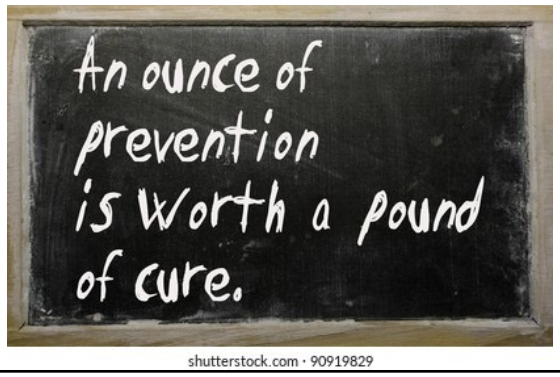
Teenagers

17

NC Cases

- *Hancock v. Hancock*, 122 NC App 518 (1996)
- *McKinney v. McKinney*, 253 NC App 473 (2017)
- *Grissom v. Cohen*, 261 NC App 576 (2018)

18



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How can you be proactive in preventing unnecessary contempt motions?

- Remember your audience for your orders is the parties.
- Use clear, concise, plain language.
- When necessary to address a particular problem issue, use detailed specificity to insure you are clear which party is responsible for doing what.
- Draft orders carefully curtailed to the needs of the specific case.
- Avoid provisions in orders that will present continuing difficulties.

20

How many of you have seen or used terms like this:

Father and Mother shall share the physical custody of the child during the holidays, as set forth below The below schedule shall supersede the school year parenting time schedule:

Spring Break: the child shall spend Spring Break with Mother in all even numbered years and with Father in all odd numbered years. Spring Break shall begin when school releases prior to the break and ends when school resumes following the break.

Mother's Day: Each year, Mother shall have the child for Mother's Day weekend beginning on Friday at 6:00 p.m. to the following Monday at 8:00 a.m.

Father's Day: Each year, Father shall have the child for Father's Day weekend beginning on Friday at 6:00 p.m. to Monday at 8:00 a.m.

Thanksgiving: the child shall spend the Thanksgiving holiday with Father in even-numbered years and with Mother in odd-numbered years. The Thanksgiving holiday shall begin when school recesses for Thanksgiving until school resumes following Thanksgiving.

Christmas/Winter Break: In even-numbered years, Father shall have the child from the time school recesses for the break until December 25 at 1:00 p.m. and Mother shall have the child from December 25 at 1:00 p.m. until school resumes following the break. In odd numbered years, this schedule shall reverse such that Mother has the child from the time school recesses for the break until December 25 at 1:00 p.m. and Plaintiff/Father has the child from December 25 at 1:00 p.m. until school resumes following the break.

21

Compare this:

Father and Mother shall share the physical custody of the child during the holidays, as set forth below. The below schedule shall supersede the school year parenting time schedule:

	Spring Break	Thanksgiving Break	Winter Break (First Part)	Winter Break (Second Part)
Odd Years	■ Mother □ Father	□ Mother ■ Father	■ Mother □ Father	□ Mother ■ Father
Even Years	□ Mother ■ Father	■ Mother □ Father	□ Mother ■ Father	■ Mother □ Father

Each holiday visitation shall begin at 6:00 p.m. on the last day school is in session and shall end at 6:00 p.m. the evening before the first day school is back in session. The first part of Christmas holidays/Winter break shall end, and the second part shall begin at 6:00 p.m. on December 26th.

Mother's Day weekend shall always be with Mother and Father's Day weekend shall always be with Father from 6:00 p.m. Friday to 6:00 p.m. Sunday.

22

Be specific in designating times

For example:

In the summer, Father shall have the first week of July.

vs.

In the summer, Father shall have the week that begins the first Friday in July from Friday at 6:00 p.m. to the following Friday at 6:00 p.m.

23

Be specific about how exchanges are to take place.

For example:

The parties shall exchange the children at 6:00 p.m. on Fridays for Father to begin his visitation through Sunday at 6:00 p.m.

vs.

Father shall have visitation from Friday at 6:00 p.m. to Sunday at 6:00 p.m. Father shall pick up the children from Mother's residence at the beginning of his visitation time and Mother shall pick up the children from Father's residence at the end of Father's visitation time.

24

Be specific about telephone visitation when it is a problem issue in your case.

For example:

Mother shall have reasonable telephone access and shall be allowed time at 7:00 p.m. on Tuesday and Thursday.

vs.

Mother shall have reasonable telephone/video chat access to the child. In addition to general reasonable access, Mother shall specifically have time at 7:00 p.m. on Tuesdays and Thursdays for at least 10 minutes. Father shall provide Mother with the method for her to contact the child on those days and times. Mother shall initiate contact and Father shall ensure the device is answered.

25

Specifically spell out how the regular visitation schedule works alongside the holiday and summer visitation schedules and how the transition between the two work.

For example:

The care, custody, and control of the minor children during the HOLIDAYS and SUMMER shall be shared between the parties as follows. The holiday and summer schedule listed herein shall supersede the regular visitation schedule. For further clarification, the parties shall enter the regular visitation schedule on their calendar, and then enter the holiday and summer visitation schedule. The holiday and summer visitation schedule control when it is different from the regular schedule.

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Rights of First Refusal

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"Your honor we are item number #200 on your contempt docket."

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Ordering Law Enforcement Officers to Enforce a Child Custody Order

It is not uncommon to see custody orders – both orders entered by North Carolina courts and orders from other states – containing language such as “Law enforcement officers shall assist in the enforcement of this custody order,” or “Law enforcement shall pick up the minor child and deliver the child to the custodial parent.” While most judges intentionally enter such orders only when there is reason to be concerned for the safety of the children, these provisions often are included as standard provisions in custody order templates throughout North Carolina and are extremely common in form orders used in other states.

Must a law enforcement officer comply with such a provision in an order from another state? Does a North Carolina judge have the authority to order law enforcement involvement? Case law and statutes indicate that authority for law enforcement involvement is limited.

Enforcement of Custody Orders

Custody orders are civil orders enforceable by contempt. GS 50-13.3(a). GS Chapter 5A sets out the remedies authorized when a court holds a person in civil or criminal contempt. While law enforcement officers can be ordered to take a person into custody pursuant to an order that the person be imprisoned, the contempt statutes do not include the authority to order law enforcement to assist in effectuating the terms of the underlying civil order.

No one would assume law enforcement could be ordered to enforce any other type of civil order, such as a child support order, a property division order, or a small claims judgment. Is there something different about a child custody order?

Appellate Opinions

There are only two court opinions in North Carolina addressing this issue and both indicate that the court of appeals does not believe there is any sort of general authority for these orders in custody cases. *In re Bhatti*, 98 N.C. App. 493 (1990), held that the trial court erred in ordering law enforcement to pick up children to enforce a custody order entered in the state of Georgia. After pointing out that the Uniform Child Custody Jurisdiction Act (UCCJA) in effect at the time specifically provided that orders from other states be enforced by ordering a party to produce the child at the enforcement hearing, the court stated that there is no statutory authority in North Carolina for a court to order law enforcement involvement in a custody case. Instead, according to the court in *Bhatti*, the trial court is limited to the remedy of contempt.

The court made the same statement again in *Chick v. Chick*, 164 N.C. App. 444 (2004). In that case, the court held that the trial court erred by ordering law enforcement to pick up children to enforce an order entered in Vermont. By the time *Chick* was decided, North Carolina had adopted the new Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) containing the enforcement provisions discussed below. After concluding that the trial court did not comply with the provisions of that act that would have allowed the court to issue a pick-up warrant, the *Chick* court cited *Bhatti* and stated that because there is no general statutory authority authorizing the use of law enforcement in a custody case, the trial court was limited to the remedies authorized in the contempt statutes.

The UCCJEA Enforcement Provisions: Not Just for Out-of-State Orders??

One of the significant differences between the UCCJA and the UCCJEA that replaced it in 1999 is that the UCCJEA contains enforcement provisions that were not included in the first act. Part 3 of the UCCJEA contains provisions regarding enforcement of a "custody determination" and those provisions include GS 50A-311 which authorizes a court to issue a pick-up warrant in specific circumstances. While the provisions in Part 3 relating to registration of custody determinations specify that they apply only to orders entered in other states, the provisions authorizing a process for expedited enforcement and the issuance of a pick-up warrant specify that they apply to any "custody determination." GS 50A-102(3) defines "custody determination" to include any judgment or order addressing the custody of a child. Apparently therefore these provisions apply to both orders from other states and orders entered by North Carolina judges.

The Enforcement Process

GS 50A-308 authorizes a procedure for expedited enforcement of an order. The AOC has adopted forms for use in this process. AOC-CV-665, *et seq.* However, the AOC forms indicate that the process is to be used for the enforcement of "foreign" custody orders.

Because law enforcement authority in the civil custody area is so unclear, when a North Carolina law enforcement officer is presented with a custody order from another state, it is best for the officer to direct the person seeking enforcement of the order to the clerk of court to initiate the enforcement process through the use of these AOC forms.

Like the UCCJA, the UCCJEA provides that the normal course for enforcement of a custody order should be for the court to order the party to produce the child at the enforcement hearing. However, GS 50A-311 authorizes the court to order law enforcement involvement in limited circumstances. That statute provides that if a petitioner files a verified request for a pick-up warrant and:

[i]f the court, *upon the testimony of the petitioner or other witness*, finds that the child is imminently likely to suffer serious physical harm or be removed from this State, it may issue a warrant to take physical custody of the child. (emphasis added).

In addition to requiring actual testimony rather than allowing the court to rely on a verified motion, the statute requires that the warrant actually “recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based.”

Any warrant issued also must “provide for the placement of the child pending final relief” and the court is required to schedule a hearing for the day following service of the warrant, unless that date is impossible. If not the next judicial day, the hearing must be held on “the first judicial day possible.”

To be Avoided if Possible

The UCCJEA clearly intends that law enforcement officers should be involved in custody cases only under the most extreme circumstances. This statute, along with the appellate court reluctance to recognize general authority on the part of the trial court, indicates that orders for law enforcement involvement in civil custody cases should be avoided except when necessary to protect a child.

More on Law Enforcement Involvement in Custody Cases

More on Law Enforcement Involvement in Custody Cases

In my earlier blog post, Ordering Law Enforcement Officers to Enforce a Child Custody Order, Jan. 15, 2016, I discussed North Carolina case law indicating that a trial court's authority to order law enforcement to assist in the enforcement of a child custody order is very limited. The General Assembly recently enacted legislation to clarify that the warrant provision in GS 50A-311 is a tool available to trial court judges seeking to enforce North Carolina custody orders as well as orders issued in other states and countries.

NC Case Law

In re Bhatti, 98 NC App 493 (1990) and *Chick v Chick*, 164 NC App 444 (2004), both reversed trial court orders requiring that law enforcement officers "assist" in the enforcement of a custody order. In both of those situations, the custody orders being enforced were issued by courts in other states. The court of appeals held in both cases that the trial court had no authority to order law enforcement to assist, noting that GS 50-13.3 provides that custody orders are enforceable through "traditional contempt proceedings." The court in *Chick* acknowledged GS 50A-311, a provision in the Uniform Child Custody Jurisdiction and Enforcement Act (the UCCJEA) which allows a court to issue a warrant directing law enforcement to take physical custody of a child when a child is in imminent danger or likely to be removed from the state, but held that the trial court in that case had not made the findings of fact required to invoke the authority in that statute. In both *Bhatti* and *Chick* the court of appeals stated "we [are] unaware of any statutory basis for invoking the participation of law enforcement officers in producing the children."

GS 50A-311 Warrant for Physical Custody

In that earlier blog post, I suggested that the warrant provision in GS 50A-311 could be interpreted to apply to cases involving North Carolina custody orders rather than limited to the enforcement of out of state orders. However, many attorneys, judges, and law enforcement officers remained uncertain that this provision in Part 3 of the UCCJEA, the part of the UCCJEA clearly addressing primarily the enforcement of custody orders from other states and countries, could be read broadly to apply to North Carolina orders. This lack of clarity was especially troubling to law enforcement officers, who need to know their authority to act in these cases is unambiguous and firmly grounded in the law. The recent legislative amendment appears to resolve the issue.

The Legislative Amendment

S.L. 2017-22 (S53) applies to orders entered on or after Oct. 1, 2017 and amends GS 50-13.5(d)(3) to state that:

"A temporary custody order that requires a law enforcement officer to take physical custody of a minor child shall be accompanied by a warrant to take physical custody of the child as set forth in GS 50A-311."

In addition, the legislation also amends GS 50A-311 to clarify that:

"An officer executing a warrant to take physical custody of the child, that is complete and regular on its face, is not required to inquire into the regularity and continued validity of the order. An officer executing the warrant pursuant to this section shall not incur criminal or civil liability for its due service."

The process for issuing a GS 50A-311 warrant

The amendment appears to provide that a trial court can order law enforcement to take physical custody of a child to enforce a temporary custody order if the court issues a warrant pursuant to the provisions in GS 50A-311. That statute provides that a petitioner seeking enforcement of a child custody determination "may file a verified application for the issuance of a warrant to take physical custody of the child if the child is immediately likely to suffer serious physical harm or be removed from this State." The warrant may be issued "[i]f the court, ***upon the testimony*** of the petitioner or other witness, finds that ***the child is imminently likely to suffer serious physical harm or be removed from this State***".

So the statute does not allow the warrant to be issued upon affidavits or verified pleadings alone. Instead, the court must receive actual testimony about the need for the warrant and the warrant may issue only if the court concludes the child is in imminent danger of serious physical harm or removal from the state.

If the warrant is issued, GS 50A-311 appears to require an expedited hearing. The statute states that upon issuance of the warrant, the petition seeking enforcement of the custody order "must be heard on the next judicial day after the warrant is executed unless that date is impossible. In that event, the court shall hold the hearing on the first judicial day possible."

The warrant itself must:

"(1) Recite the facts upon which a conclusion of imminent serious physical harm or removal from the jurisdiction is based;

(2) Direct law enforcement officers to take physical custody of the child immediately; and

(3) Provide for the placement of the child pending final relief."

In addition, the warrant can order "conditions upon placement of a child to ensure the appearance

of the child and the child's custodian."

The statute provides that a warrant to take physical custody of a child is enforceable throughout this State and specifies that "[i]f the court finds on the basis of the testimony of the petitioner or other witness that a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child. If required by exigent circumstances of the case, the court may authorize law enforcement officers to make a forcible entry at any hour."

Right to Counsel in Civil Contempt Proceeding for Violation of Custody Order

When a court is considering whether to hold a party in civil contempt for the failure to comply with provisions in a child custody order, must the court inform that parent that he has the right to a court-appointed attorney if he wants an attorney and is unable to afford one?

The court of appeals recently held that the answer to that question must be determined on a "case-by-case basis" with appointed counsel being required only "where assistance of counsel is necessary for the adequate presentation of the merits, or to otherwise insure fundamental fairness."

***Wilson v. Guinyard* (NC App June 20, 2017)**

Mother Ms. Wilson initiated civil contempt proceedings against father Mr. Guinyard for alleged violations of visitation provisions in custody order. Father lived in Charleston, South Carolina and mother lived in Durham, North Carolina. The custody order called for exchanges for visitation to be made at South of the Border on specified times on certain Fridays and Sundays. Mother alleged father was habitually late for these exchanges.

Two months before the contempt hearing, father signed a consent to the withdrawal of his counsel and one week before the hearing, he requested a continuance to retain new counsel. The trial court denied his request and proceeded with the contempt hearing. The trial court held father in civil contempt and provided he could purge the contempt by picking up and dropping the child off at the mother's home for the next three weekend visitations. The order specified that if father was more than 30 minutes late for any of these three exchanges, his next visitation would be forfeited and he would be jailed for 72 hours.**

On appeal, father argued the trial court erred in failing to inquire into his desire and eligibility for court appointed counsel, stating:

"The rule of this State is that "[w]here a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues." *D'Alessandro v. D'Alessandro*, 235 NC App 458 (2014); *King v. King*, 144 NC App 391 (2001). He can waive his right to representation but the record must reflect that he was advised of his right and he must voluntarily waive it." *Id.*

The court of appeals rejected father's argument and held he had no right to counsel under the circumstances of this case. The court acknowledged that Due Process requires that "a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and 'where the litigant may lose his physical liberty if he loses the litigation'

[citations omitted].” However, the court held that it is up to the litigant facing contempt to show “(1) he is indigent, and (2) his liberty interest is at stake,” and explained that the determination of whether a liberty interest is at stake “is a determination made on a case-by-case basis.” Citing *Hodges v. Hodges*, 64 NC App 550 (1983), the court of appeals further explained that when a civil proceeding may result in imprisonment, “appointment of counsel for indigents is required only where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness.” In this case, the court of appeals held appointment of counsel was not necessary because defendant had the ability to comply with the purge conditions as imposed and the case presented no “unusually complex issues of law or fact.” The court offers no additional guidance on what type of issues would be sufficiently complex to require the appointment of counsel.

What about *McBride v. McBride*?

The North Carolina Supreme Court held in *Jolly v. Jolly*, 300 NC 83 (1980), that Due Process does not require the appointment of counsel in civil contempt proceedings arising out of the nonpayment of child support as the impact on a respondent’s liberty interest is slight. Because a court is required to determine the respondent has the actual present ability to comply with any purge condition imposed in a civil contempt order, the respondent “holds the keys to the jail” in that he simply needs to comply with the court order to avoid imprisonment.

However, when the court revisited the issue in the case of *McBride v. McBride*, 334 NC 124 (1993), the North Carolina Supreme Court determined that the focus in *Jolly* was “misplaced,” at least in the context of civil contempt proceedings arising out of the nonpayment of child support. According to the court, “experience” showed that respondents in these civil contempt proceedings often are incarcerated without the trial court first determining they have the ability to pay the amount ordered as a purge. The court reasoned that because respondents do not “hold the keys to the jail” if they do not have the actual ability to pay the purge, assistance of counsel is necessary to insure that they do not go to jail unless they actually have the ability to pay.

The *McBride* court therefore held that “absent appointment of counsel, indigent contemnors may not be incarcerated for failure to pay child support.” The court instructed trial courts to “assess the likelihood of incarceration” at the outset of the contempt hearing and, if incarceration is likely, “inquire into the [respondent’s] desire for counsel and the ability to pay.”

Does *McBride* apply in custody cases?

While *McBride* spoke directly to concerns arising in child support enforcement cases, the court of appeals has applied the holding in *McBride* to vacate a civil contempt order arising out of the violation of a custody order. In *D’Alessandro v. D’Alessandro*, 235 NC App 458 (2014), the court of appeals broadly held that “when a defendant faces the potential of incarceration if held in contempt, the court must inquire into defendant’s desire for and ability to pay for counsel to

represent him as to the contempt issues." Because the trial court failed to conduct this inquiry in this case, the court of appeals "reversed both the contempt of the custody order and the contempt of the child support order." The court did not explicitly address the issue of whether *McBride* was limited to the child support enforcement proceedings.

However, in the recent *Wilson v. Guinyard* opinion, the court of appeals held that *McBride* applies "specifically to civil contempt proceedings for nonsupport" and adopted the standard in *Jolly* for determining whether appointed counsel is required in other types of civil contempt proceedings. Even though the court in *Wilson* cited the *D'Alessandro* case, the court nevertheless states that the holding in *McBride* has not been applied outside of the context of contempt for failure to pay child support.

So until the supreme court tells us otherwise, it appears that respondents facing civil contempt arising out of the failure to comply with the terms of a custody order are not entitled to court-appointed counsel, at least absent the existence of "unusually complex issues of law or fact." Be sure to read the comments posted below, especially the one from my colleague John Rubin. I agree with John that the court of appeals clearly was influenced in this case by the belief that father was not indigent, and I also have wondered why GS 7A-451 has not been applied to civil contempt cases by our appellate courts.

**According to *Reynolds v. Reynolds*, 356 NC 287 (2002), adopting dissent in court of appeals, 147 NC App 566 (2001), this contempt order appears to be criminal contempt rather than civil contempt. In *Reynolds*, the dissent from the court of appeals adopted by the supreme court explained that when the court imposes a specific period of incarceration that is "suspended" upon the contemnor's compliance with conditions, the order is more in the nature of criminal rather than civil contempt. In this case, the father was at risk for a 72-hour confinement until he completed the three visitation exchanges as ordered; it was in essence a 72-hour sentence suspended on the condition that he comply with the conditions of the next three visitations. Appointment of counsel always is required for indigent respondents in criminal contempt cases. GS 7A-451(a)(1); *State v. Wall*, 49 NC App 678 (1980). The issue of whether the contempt order in *Wilson* actually was an order for civil contempt was not addressed by the court.

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. S*ee 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 to 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.