NORTH CAROLINA TRIAL JUDGES'

Bench Book

District Court Volume 2

Powers, Duties, and Conduct
Criminal Law and Procedure
Civil Trial Law and Procedure

Chapter 4. Contempt of Court (2014)*

* Date denotes when chapter last updated.

Section I
Chapter 4
Contempt of Court

For an ONLINE MODULE on the law of contempt, *see* https://unc.ncgovconnect.com/p30019876/.

CHECKLIST

CONTEMPT ORDER

1. **Civil contempt**
    a. **Act alleged to constitute contempt**
    b. **Party advised of possibility of incarceration, of right to counsel, and of right to court appointed counsel if indigent**
    c. **Unless party waived right to counsel, counsel appointed if defendant indigent**
    d. **Finding on each element in G.S. § 5A-21:**
        i. **Order remains in force**
        ii. **Purpose of the order may still be served**
        iii. **Noncompliance was willful**
            1. **Party had actual ability to comply with the court order at the time of the party's noncompliance or had ability to take reasonable measures that would enable the party to comply**
            2. **Deliberate and intentional failure to comply**
    e. **Party is being held in civil contempt**
    f. **Order finds the facts that constitute contempt**
    g. **Party is to be confined immediately for an indefinite and open-ended period until purge conditions are met**
    h. **Purge conditions:**
        i. **Specific action party must take to purge contempt and be released from imprisonment**
        ii. **Party has the present means to comply with the purge conditions**

2. **Criminal contempt**
    a. **Generally**
        i. **Standard of proof applied was beyond a reasonable doubt**
        ii. **Finding of guilty or not guilty**
        iii. **That defendant is being held in criminal contempt**

iv. **Punishment ordered, either censure, fine not to exceed $500, or imprisonment for a definite and fixed term not to exceed 30 days, or any combination thereof**
v. **Imprisonment for up to 120 days authorized for failure to pay child support, provided sentence suspended upon conditions reasonably related to payment of child support**
vi. **Purge conditions are improper (only imposed for civil contempt)**
vii. **Contempt matter heard before another judge if alleged contemptuous acts so involve the judge that his or her objectivity may reasonably be questioned**
viii. **If imprisonment is suspended, clear statement of all conditions of the suspension**

b. Direct criminal contempt/summary proceeding
i. **Act alleged to constitute contempt**
ii. **Facts established beyond a reasonable doubt**
iii. **Defendant acted willfully**
iv. **Defendant given summary notice of the charges and summary opportunity to respond**

c. Indirect criminal contempt or direct criminal contempt/plenary proceeding
i. **Act alleged to constitute contempt**
ii. **Facts established beyond a reasonable doubt**
iii. **Defendant advised of possibility of incarceration, of right to counsel, and of right to court appointed counsel if indigent**
iv. **Unless party waived right to counsel, counsel appointed if defendant indigent**
v. **If direct criminal contempt heard at a plenary proceeding, party was informed of judge's intent to institute a plenary proceeding**
vi. **Finding that party's conduct was willful**

1. **Party had actual ability to comply with the court order at time of the party's noncompliance or had the ability to take reasonable measures that would enable party to comply**
2. **Deliberate and intentional failure to comply or conduct that was done deliberately and without authority, justification or excuse**

Chapter 4
Contempt of Court

I. Distinction Between Criminal and Civil Contempt

A. Purpose of the action determines whether contempt is civil or criminal.

1. Contempt of court may be civil or criminal in nature, but the line of demarcation is "hazy at best." [*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (citation omitted); *File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting O'Briant*.] It can be difficult to distinguish between civil and criminal contempt, in part, because willful disobedience of a court order constitutes criminal contempt under G.S. § 5A-11(a)(3) and willful failure to comply with a court order is grounds for civil contempt under G.S. § 5A-21(a).

2. A major factor in determining whether contempt is civil or criminal is the purpose for which the power is exercised. [*Bishop v. Bishop,* 90 N.C.App. 499, 369 S.E.2d 106 (1988), *quoting O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985).]

3. If a contempt action is brought to:

a) Force compliance in the future with a court order, the action is for civil contempt and G.S. §§ 5A-21 through 25 apply.

(1) Civil contempt is a civil remedy used exclusively to enforce compliance with court orders. [Official Commentary to G.S. § 5A-21; *Jolly v. Wright,* 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *Shippen v. Shippen,* 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Scott v. Scott,* 157 N.C.App. 382, 579 S.E.2d 431 (2003) (purpose of civil contempt is not to punish, but rather to coerce the defendant to comply with an order of the court); *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969) (citation omitted) (civil contempt proceedings look only to the future).]

b) Punish conduct that has already occurred that violated a court order or showed disrespect to the court or otherwise challenged its authority, the action is for criminal contempt and G.S. §§ 5A-11 through 17 apply.

(1) Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. [*Brower v. Brower,* 70 N.C.App. 131, 318 S.E.2d 542 (1984).] Criminal contempt is generally applied in punishment of an act already accomplished, tending to interfere with the administration of justice. [*File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting O'Briant*.]

(2) Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt.

[*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985), *citing Blue Jeans Corp. v. Amalgamated Clothing Workers,* 275 N.C. 503, 169 S.E.2d 867 (1969).]

4. Distinguishing civil contempt orders from criminal contempt orders.

a) Civil contempt.

(1) If the relief is imprisonment for an indefinite period of time, which the contemnor may avoid or terminate by performing some act required by the court, such as complying with a previous court order, the contempt is civil in nature.

b) Criminal contempt.

(1) If the relief is imprisonment for a definite period of time, which the contemnor has no possibility of avoiding or terminating by performing some act required by the court, the contempt is criminal in nature.

(2) If relief is imprisonment for a definite period of time and imprisonment is suspended, and one of the conditions of the suspended sentence is compliance with a prior court order during the suspended sentence, the contempt is criminal in nature.

(3) An order sentencing defendant to 30 days in jail, suspended on the condition that he make future child support payments in compliance with an earlier court order, post a cash bond in the amount of $75,000, and pay $10,000 attorney fees to plaintiff was an order for criminal contempt. [*Reynolds v. Reynolds,* 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (reversing court of appeals decision that order was civil contempt); *Hancock v. Hancock* 122 N.C.App. 518, 471 S.E.2d 415 (1996).]

B. Importance of the distinction between civil and criminal contempt.

1. Distinguishing between civil and criminal contempt is important because whether the proceeding is for civil or criminal contempt determines in large part:

a) The procedures that must be followed by the court;

b) The legal rights accorded to the alleged contemnor;

c) The elements that must be proved to establish contempt;

d) The burden of proof;

e) The available sanctions and remedies; and

f) The procedure applicable to an appeal. [John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004; *Reynolds v. Reynolds,* 356 N.C.

287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

2. Examples of the different procedures and rights include:

a) Criminal contempt is a crime, and constitutional safeguards are triggered accordingly. A civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (citations omitted) (discussing the difference in protections).]

b) Under G.S. § 5A-15(e), a person charged with criminal contempt may not be called to be a witness against himself at the show cause hearing. [*See* section III.H.7 at page 76.] In civil contempt proceedings, an alleged contemnor may assert the right against self-incrimination and refuse to testify but the court may draw an adverse inference of fact from the failure to testify. [*McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000); *see* section II.F.9 at page 31.]

c) A person found in criminal contempt in district court may appeal to superior court for a trial de novo. [G.S. § 5A-17; G.S. § 15A-1431; *see* section III.L at page 84.] A person found in civil contempt may appeal the district court's order to the court of appeals. [*See* G.S. § 5A-24; *see* section II.K at page 45.]

d) The burden of proof in a criminal contempt proceeding is beyond a reasonable doubt and this burden does not shift to the defendant after the entry of a show cause order. [*See* section III.H.11 at page 78.] In a civil contempt proceeding initiated under G.S. § 5A-23(a), a judicial official's finding of probable cause shifts the burden of proof to the defendant. [*See* section II.F.6 at page 30.]

3. Practical reasons that may help decide which type of contempt to use.

a) Criminal contempt should be used when:

(1) An order for arrest is necessary to ensure a defendant's appearance. [*See* G.S. § 5A-16(b) (OFA authorized in criminal contempt statute when there is probable cause to believe that the defendant will not appear at a show cause hearing).]

(2) A person cannot be held in civil contempt because that person does not have the ability, at the time of the contempt hearing, to comply with the order violated.

(3) The court wants to suspend a contemnor's incarceration and impose conditions of probation. [*See* III.I.1 at page 80.]

(4) There are no acts that the court wants the contemnor to take, i.e., there are no purge conditions to include in the order.

(5) The person subject to contempt is not a party to a court order, i.e., is a witness, a spectator, a lawyer, etc. Note, however, in *Marshall v. Marshall*, __ N.C.App. __, 757 S.E.2d 319 (2014), defendant was found in civil contempt of a marital dissolution agreement for his harassment of two individuals not parties to the agreement or to related court orders, based on the trial court's finding that the individuals were third party beneficiaries of the agreement.

(6) The alleged contemnor has not violated a court order or the order that is the subject of the contempt proceeding does not address the specific conduct of the contemnor.

b) Civil contempt should be used when:

(1) There are acts that the court wants to encourage the contemnor to take, i.e., purge conditions, such as the payment of money.

(2) The alleged contemnor testifies and asserts the right against self-incrimination. [*See* section II.F.9 at page 31 allowing inference of guilty from assertion in a civil contempt proceeding.]

4. For a table distinguishing criminal and civil contempt, *see* page 89.

C. Simultaneous action for civil and criminal contempt.

1. Although a person may be cited for both civil and criminal contempt for the same conduct, a person may not be held in both civil and criminal contempt for the same conduct. [*See* G.S. §§ 5A-12(d), 5A-21(c), 5A-23(g)]

a) A person may be held in both civil and criminal contempt when each contempt is based on different acts. [*Adams Creek Associates v. Davis,* 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900, 901 (2008) (act supporting civil contempt was defendants' violation of a court order requiring defendants to stay off certain real property; act supporting criminal contempt was defendants' testimony that they would continue to violate court orders requiring them to stay off the land).]

2. G.S. § 5A-23(g) permits, in essence, a consolidated hearing for civil and criminal contempt. Thus, a judge who has begun a civil contempt hearing is permitted to find a person in criminal contempt even though the person is beyond the reach of civil contempt because of inability at that time to comply with the order. [Official Commentary to G.S. § 5A-23]

3. The statutes do not indicate whether the procedural requirements for criminal contempt are to be applied in a consolidated hearing when the defendant could be found in criminal contempt. Case law has established only that when a defendant was found in civil, not criminal, contempt, the defendant was not entitled to the constitutional protections and notice required in a criminal contempt proceeding. [*See Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310

(2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (where the notice of hearing did not clearly state whether the proceedings were criminal or civil but defendant admits she was found in civil contempt, she was not entitled to all the protections and safeguards of a criminal contempt proceeding); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam,* 328 N.C. 729, 403 S.E.2d 307 (1991) (since relief granted was wholly civil in nature and defendant was not, in fact, subject to criminal penalties, the trial court was not required to afford defendant all procedural and evidentiary safeguards required for criminal contempt proceedings, nor was court of appeals required to examine whether, in this case, defendant's fifth amendment rights were adequately protected during the contempt proceeding).]

4. To protect a defendant's rights, the extra due process requirements of a plenary hearing for indirect criminal contempt should be applied in contempt proceedings that might result in a finding of criminal contempt. [*See* section III.H on plenary hearings starting at page 72, setting out right against self-incrimination, the reasonable doubt standard of proof, that the burden of proof remains with the State, and the parameters for the right to appointed counsel).] [*But cf. Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (stating that "[s]ince the contempt proceeding in this case can rest on either the criminal or civil foundations, we conclude that compliance with either the procedural requirements of civil contempt or criminal contempt will validate the proceedings") (prior version of contempt statute that allowed both civil and criminal contempt for the same conduct).]

5. The procedural protections required in criminal contempt proceedings recognized by the U.S. Supreme Court include the requirement of proof beyond a reasonable doubt, protection from double jeopardy, and a jury trial where the result is more than six months imprisonment. [*Turner v. Rogers,* __ U.S. __, 131 S.Ct. 2507 (2011) (citations omitted).] As to double jeopardy:

a) The double jeopardy clause constitutes a bar to a subsequent criminal prosecution if the elements of the offense at issue in a previous contempt proceeding match the elements of the subsequently charged criminal offense. [*See State v. Freeland,* 316 N.C. 13, 340 S.E.2d 35 (1986) (defendant could not be punished for both first-degree kidnapping and the underlying sexual assault, which is an element of first-degree kidnapping).]

b) When wife in criminal contempt for violating provision in civil consent order that prevented her from "coming to" the residence of her ex-husband, double jeopardy precluded subsequent prosecution for domestic criminal trespass as elements of the offenses in both proceedings the same. [*State v. Dye,* 139 N.C.App. 148, 532 S.E.2d 574 (2000).]

c) Double jeopardy precluded conviction for assault on a female in light of defendant's prior adjudication of criminal contempt based upon violation of a DVPO that prohibited defendant from assaulting his wife.

[*State v. Gilley*, 135 N.C.App. 519, 522 S.E.2d 111 (1999), *cert. denied*, 549 S.E.2d 860 (2001).]

D. Consent judgments.

1. Generally.

a) Except in domestic relations matters discussed below, a consent judgment or order that merely recites the parties' settlement agreement and does not adjudicate the parties' respective rights is treated as a contract between the parties. As such, it is enforceable by an action for breach of contract and not through the contempt powers of the court. [*Ibele v. Tate*, 163 N.C.App. 779, 594 S.E.2d 793 (2004); *Crane v. Green*, 114 N.C.App. 105, 441 S.E.2d 144 (1994) (viewed from its four corners, clear that the consent agreement and order was merely a recital of the parties' agreement and not an adjudication of rights and thus was not enforceable by contempt).]

b) This is so even if the consent order provides that it is enforceable by contempt. [*Ibele v. Tate*, 163 N.C.App. 779, 594 S.E.2d 793 (2004) (attempt by parties to overcome the general law on consent orders by providing consent order enforceable by contempt not successful; contempt is an inherent power of the court that the parties cannot grant or accept).]

c) If, however, the trial court makes findings of fact and conclusions of law, thereby adjudicating the parties' rights, the contempt power may be used to enforce a consent judgment. [*Ibele v. Tate*, 163 N.C.App. 779, 781 n.2, 594 S.E.2d 793 (2004).]

d) The contempt power has been used to enforce a consent judgment that did not contain findings and conclusions when either:

(1) The parties waived those provisions [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (in light of the parties' express waiver of findings and conclusions in the consent order and in the absence of any evidence rebutting the presumption of adoption, the consent judgment was adopted by the court and was enforceable through contempt proceedings)]; or

(2) The trial court actually determined and adjudicated the parties' rights. [*See PCI Energy Serv., Inc. v. Wachs Technical Serv., Inc.*, 122 N.C.App. 436, 470 S.E.2d 565 (1996) (it was clear from the procedural history and language of the consent judgment, which adopted and incorporated the parties' agreement, even without findings, that the trial court had not merely "rubber-stamped" the parties' private agreement but had transformed the parties' agreement into the court's own determination of the parties' respective rights and obligations).]

2. Consent judgments in domestic relations matters.

a) In a domestic relations action, any consent judgment entered by the court is enforceable by civil contempt. [*Walters v. Walters*, 307 N.C. 381, 298 S.E.2d 338 (1983) (under rule announced in the case, every court approved separation agreement is to be considered a court ordered consent judgment enforceable by civil contempt in same manner as any other judgment in a domestic relations case); *Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (enforcing a consent judgment by civil contempt); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (finding defendant in contempt for violating a consent judgment providing for property distribution); *Barker v. Barker*, __ N.C.App. __, 745 S.E.2d 910 (2013) and *Ross v. Voiers*, 127 N.C.App. 415, 490 S.E.2d 244, *review denied*, 347 N.C. 402, 496 S.E.2d 387 (1997) (in both cases, father in contempt for violating consent order requiring payment of child's college expenses); *Fucito v. Francis*, 175 N.C.App. 144, 622 S.E.2d 660 (2005) (for practical purposes, in *Walters*, the court fashioned a "one-size fits all" rule applicable to incorporated settlement agreements in the area of domestic law, holding that when parties present their separation agreement to the court for approval, the agreement will no longer be considered a contract between the parties, but rather a court-ordered judgment); *GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (consent judgment that required wife to specifically perform her obligation under an unincorporated separation agreement to satisfy certain indebtedness, which was akin to an ED provision, enforceable by contempt).]

II. Civil Contempt

A. When used.

1. The purpose of civil contempt is not to punish, but rather to coerce a defendant to comply with an order of the court. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).] Unlike criminal contempt, civil contempt is not a form of punishment. [Official Commentary to G.S. § 5A-21]

a) Where the trial court itself described the civil contempt action it took as "punishment," order for civil contempt reversed. Civil contempt is not proper as a means of punishment. [*Atassi v. Atassi*, 122 N.C.App. 356, 470 S.E.2d 59 (1996) (noting that criminal contempt would have been appropriate on the facts presented).]

2. Civil contempt may be used in civil or criminal proceedings.

3. The nature of the proceeding does not determine whether contempt is civil or criminal. Both civil and criminal contempt are available in both civil and criminal proceedings.

a) A defendant may be charged criminally but be in civil contempt. [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (defendant

charged with criminal nonsupport found in civil contempt for failing to comply with an order for blood testing).]

b) A person may be held in criminal contempt for willfully failing to comply with an order entered in a civil proceeding. [*See* G.S. § 50-13.4(f)(9) (child support); G.S. § 50-13.3(a) (custody); G.S. § 50-16.7(j) (alimony).]

B. Grounds for civil contempt.

1. A person may be found in civil contempt for failure to comply with a court order if the following elements are met:

a) The order remains in force;

b) The purpose of the order may still be served by compliance with the order;

c) The noncompliance by the person to whom the order is directed is willful; and

d) The person to whom the order is directed is able to comply, or able to take reasonable measures that would enable the person to comply, with the order. [G.S. § 5A-21(a)]

2. Willfullness.

a) Effective December 1, 1999, willfullness was added as a necessary element of contempt. [G.S. § 5A-21(a)(2a), *amended by* 1999 N.C. Sess. Laws 361, § 1, effective December 1, 1999, and applicable to all proceedings for civil contempt held on or after that date.]

b) Prior to that, case law had interpreted the statutes to require an element of willfulness. [*See McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000).]

c) Willfulness is, in the context of civil contempt:

(1) An ability to comply with the court order; and

(2) A deliberate and intentional failure to do so. [*Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005); *see also Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered); *Teachey v. Teachey*, 46 N.C.App. 332, 264 S.E.2d 786 (1980), *citing Lamm* (to find willfulness, must establish as an affirmative fact that defendant possessed the means to comply with the order at some time after its entry).]

d) Thus, in a civil contempt proceeding, a person's ability to comply with an order often is subsumed within the issue of willfulness. [*See* John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series

No. 17, School of Government, February 2004 (noting this in the context of child support).]

e) In the child support context, a finding of willful failure to pay court-ordered child support must be based on evidence that the obligor is purposefully, deliberately, stubbornly, or in bad faith disobeying a child support order or disregarding a court-ordered obligation to pay child support despite the present ability to do so. [*See* G.S. § 5A-21(a)(3); *Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *citing Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983) (willfulness involves more than deliberation or conscious choice; it imports a bad faith disregard for authority and the law); *Barker v. Barker*, __ N.C.App. __, 745 S.E.2d 910 (2013), *Meehan v. Lawrance*, 166 N.C.App. 369, 602 S.E.2d 21 (2004) and *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (citations omitted) (all noting that willfulness imports knowledge and a stubborn resistance).] *See Enforcement of Child Support Orders*, Bench Book, Vol. 1, Chapter 3, Part 4.

f) Willfulness based on refusal to work when capable of doing so.

(1) Father who admitted that he was physically and mentally able to be employed, and in fact was employed full-time when the child support order was entered, but who voluntarily quit his job after entry of the support order to become a member of a religious community that prohibited its members from earning outside income, and who testified that he would not take outside employment under any circumstances, willfully failed to pay support and was properly held in civil contempt. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010) (that father's religious beliefs were sincerely held was irrelevant).]

(2) However, evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite his or her present ability to do so. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (findings that defendant had ability to earn good wages, had been continuously employed as of a certain date, and had not made a motion to modify court order requiring him to pay support, were not sufficient to support conclusion that defendant's failure to pay was willful); *Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32 year old with tenth grade education, with work experience in the furniture industry, insufficient); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (finding that defendant able-bodied at least part of the time and "was capable of and had the means or should have had the means" to make support payments not sufficient); *Self v. Self*, 55 N.C.App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was

physically able to work, it did not establish that work was available to him so conduct not willful).]

g) Willfulness based on a party's voluntarily taking on additional financial obligations or divesting him or herself of assets or income after entry of an order requiring support or other payments.

(1) A party who has the ability to pay court-ordered support a when support order is entered but later becomes unable to pay after voluntarily taking on additional financial obligations, or divesting assets or reducing income, engages in willfull conduct and may be held in civil contempt. [*See Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting Faught v. Faught*, 67 N.C.App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (*Faught* reviewed well-established line of cases so providing).]

(2) Contempt order affirmed when defendant's income situation at time of contempt hearing was "of his own making" since he had voluntarily changed jobs twice since entry of the support order, the first change resulting in a lower salary and the second change resulting in "undisclosed compensation." Moreover, defendant had remarried and had a child by the second marriage and applied his income to matters other than the support called for in the parties' agreement, including payment on a home titled to his second wife. [*Williford v. Williford*, 56 N.C.App. 610, 289 S.E.2d 907 (1982).]

h) A party's noncompliance may not be willful when the party shows valid reasons for his or her noncompliance. [*See Spencer v. Spencer*, 133 N.C.App. 38, 514 S.E.2d 283 (1999) (obligor's unilateral reduction in court-ordered child support payments when obligor obtained physical custody of one of the parties' two children did not constitute willful failure to comply with child support order); *see also Meehan v. Lawrance*, 166 N.C.App. 369, 602 S.E.2d 21 (2004) (where parties orally agreed to modify defendant's child support obligation, trial court's finding that defendant did not act willfully affirmed).]

3. Present ability to comply.

a) The present ability to comply includes not only the present means to comply, but also the ability to take reasonable measures to comply. [G.S. § 5A-21(a)(3); *Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008); *Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

b) The court must determine a party's ability to comply during two periods of time. The trial court must find that the party:

(1) Possessed the means to comply with the court's order during the period the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (requiring a finding that defendant possessed the means to comply with alimony and child support orders during the period when he was in default); *Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (to address the requirement of willfulness, the trial court must make findings as to the ability of the party to comply with the order at issue during period of default); *Sowers v. Toliver*, 150 N.C.App. 114, 562 S.E.2d 593 (2002) (contempt order vacated when it lacked findings as to plaintiff's ability to comply with order during period when in default)]; and

(2) Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting McMiller v. McMiller*, 77 N.C.App. 808, 336 S.E.2d 134 (1985) ("[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages"); *Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009) (citation omitted) (G.S. §§ 5A-21 and 5A-22, construed together, require that a person have the present ability to comply with purge conditions before he or she may be imprisoned for civil contempt); *Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Bennett v. Bennett*, 21 N.C.App. 390, 204 S.E.2d 554 (1974) (findings taken as a whole showed that court considered husband's ability to comply at the time of the hearing with an order requiring him to pay $20,000 of unpaid alimony within 60 days of entry of the order); *Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988) (contempt reversed when no findings as to defendant's ability to pay at date of hearing); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (contempt order vacated when court did not determine ability to pay as of date of hearing).]

(3) Because a trial court must find that an alleged contemnor has the present ability to comply, a party cannot bring a civil contempt action to enforce an order against a person who is deceased when the contempt action is initiated. [*MacMillan v. Thompson*, __ N.C.App. __, 753 S.E.2d 741 (2013) (**unpublished**) (motion in the cause interpreted to initiate a civil contempt action to enforce an incorporated separation agreement).]

c) General finding of present ability to comply sufficient in certain circumstances.

(1) A general finding of present ability to comply with a support order is sufficient when there is evidence in the record regarding defendant's assets. [*Watson v. Watson*, 187 N.C.App. 55,

652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008), *citing Adkins v. Adkins*, 82 N.C.App. 289, 346 S.E.2d 220 (1986); *see also Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010) (finding that "[d]efendant has the ability to comply or take reasonable efforts to do so" while making no finding that defendant had the present ability to pay the arrearage and purge himself of contempt, was not as specific or detailed as might be preferred but was minimally sufficient); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (although specific findings as to the contemnor's present means are preferable, findings that that "[d]efendant ha[d] at all times been fully capable and able of complying with all provisions of the Court's decree" and that "[d]efendant ha[d] the present ability and continuing capability to comply with all remaining provisions of the Court's decree with which he ha[d] not heretofore complied" sufficient when supported by competent evidence of assets that could be sold); *Lee v. Lee*, 37 N.C.App. 371, 246 S.E.2d 49 (1978), *citing Moore v. Moore*, 35 N.C.App. 748, 242 S.E.2d 642 (1978) (failure to include a finding as to contemnor's present ability to perform the order not fatal when evidence introduced that would justify such a finding).]

d) Use of findings from an earlier hearing of present ability to comply.

(1) Prior findings of a present ability to pay may be res judicata as to future proceedings on that issue, at least when the proceedings are close in time. [*Abernethy v. Abernethy*, 64 N.C.App. 386, 307 S.E.2d 396 (1983) (finding of a present ability to pay at March hearing was res judicata on that issue at a June hearing, defendant not having appealed the March judgment).]

e) A finding that a party "has had" the ability to comply, without more, not sufficient support for a finding of present ability to comply at the time of the hearing.

(1) The sole finding, that the defendant "has had" the ability to comply with the support order, did not, standing alone, support the conclusion that defendant had the present ability to purge himself of contempt by paying arrearages owed. [*McMiller v. McMiller*, 77 N.C.App. 808, 336 S.E.2d 134 (1985) (since no finding was made as to defendant's present ability to pay the arrearages necessary to purge himself from contempt, judgment vacated); *Thompson v. Thompson*, __N.C.App. __, 735 S.E.2d 214 (2012), *citing McMiller* (finding that "Defendant has had the ability and means to pay the Post Separation Support previously ordered, or at least a substantial portion of that amount" was insufficient because it speaks to past ability to pay and was not a finding about

defendant's present ability to pay); *cf. Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (findings taken as a whole showed that court considered husband's present ability to comply with an order requiring him to pay alimony arrearages even though contempt order stated that defendant "*had* the present ability to comply" with the order, rejecting plaintiff's argument that trial court's use of "had" was fatal to its judgment; findings addressed plaintiff's various sources of income, that his expenses and debts were paid by his closely held corporation and that he voluntary made mortgage and rent payments for his adult children and mother instead of paying alimony arrearages as ordered).]

f) A failure to seek modification of a support order cannot, without more, be the basis for finding a present ability to comply.

(1) A present ability to pay may not be presumed based solely on the existence of a prior support order and the absence of a motion to modify that order. [*See Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940) (right to move for modification does not sustain conclusion that failure to comply was willful and contemptuous); *Graham v. Graham*, 77 N.C.App. 422, 335 S.E.2d 210 (1985) (noting that while a defendant who lacks means to make required payments should move for modification, failure to do so is not evidence of willful contempt).]

g) Ability to work, standing alone, generally not sufficient to show willfulness or present ability to comply.

(1) Evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite his or her present ability to do so. [*See Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32 year old with tenth grade education, with work experience in the furniture industry, insufficient); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (finding that defendant able-bodied at least part of the time and "was capable of and had the means or should have had the means" to make support payments not sufficient); *Self v. Self*, 55 N.C.App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was physically able to work, it did not establish that work was available to him so conduct not willful).]

h) Inability to comply must be genuine.

(1) A person's inability to comply at the time of the contempt hearing must be genuine and not deliberately effected. [*See Bennett v. Bennett*, 21 N.C.App. 390, 204 S.E.2d 554 (1974) (affirming

contempt in child support context, noting that a defendant may not deliberately divest himself of property and in effect pauperize himself for appearance at a contempt hearing).]

i) Ability to part of arrearage.

(1) Ability to pay part of arrearage is insufficient to support incarceration until entire amount is paid. [*See Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902) (where court found that husband could pay at least a portion of alimony owed, it was error to imprison him until he should pay the whole amount); *see also Brower v. Brower*, 70 N.C.App. 131, 318 S.E.2d 542 (1984) (order that required defendant's imprisonment until he paid entire arrearage vacated when supported only by finding that defendant has present ability to pay a portion of that amount).] Note, however, that ability to pay part of arrearage is sufficient to support incarceration until that part is paid. [*But see Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (emphasis in original) (court's finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court" insufficient to support a finding of willfulness; case remanded for specific findings addressing plaintiff's willful noncompliance, including findings regarding his ability to pay during the period that he was in default).]

j) Party had the present ability to comply with an order or purge condition requiring the payment of money when he or she had:

(1) Sixty days from entry of contempt order to pay $20,000 of unpaid alimony, he had $15,000 in monthly income, a portion of which could be used to pay the amount ordered, he had personal debts and expenses paid by his business, a closely held corporation, and he could take reasonable measures to comply by accessing cash from lines of credit associated with credit cards and by ceasing to voluntarily make monthly mortgage and rent payments for his adult children and mother. [*Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014).]

(2) The ability to pay some of the costs associated with the numerous lawsuits he filed, there was no evidence showing that he could not have been gainfully employed, and further that he actually satisfied the judgment by payment of $2,000 after serving only one day in jail. [*Ward v. Jett Properties, LLC*, 698 S.E.2d 768 (2010) (**unpublished**).]

(3) At the time of the hearing, a $2,000 cashier's check, a boat and a car that could readily be converted to cash, and at least $6,200 from his 401(k) plan. [*Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009) (payment of $10,000 in alimony arrears required for defendant to purge himself of contempt).]

(4) Equity in real property that exceeded $500,000. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant given 90 days to sell real property to pay plaintiff's attorney fees and to pay credit card debt she was ordered to pay in ED).]

(5) $60,000 in equity and several items of personal property of value. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam,* 328 N.C. 729, 403 S.E.2d 307 (1991) (payment of approximately $36,000, representing sums owed under a consent decree for taxes and attorney fees, required for defendant to purge himself of contempt).]

(6) Several assets (automobiles and real estate) at the time of the hearing that could have been sold or liquidated, as well as consistent and recurring deposits and monies from a "friend," and present income from service on a city council. [*Onslow County obo Eggleston v. Willingham,* 199 N.C.App. 755, 687 S.E.2d 541 (2009) (**unpublished**).]

(7) Stock valued in excess of $30,000, which had defendant sold it, could have been used to pay a required installment payment of $7,000 for wife's attorney fees, as well as the entire amount owed on that debt. [*Hudson v. Hudson,* 193 N.C.App. 454, 667 S.E.2d 340 (2008) (**unpublished**).]

4. Ability to take reasonable measures that would enable a person to comply.

a) "Reasonable measures" that would enable a person to comply with an order for support or to pay arrearages may include:

(1) Liquidating equity in encumbered assets. [*Adkins v. Adkins,* 82 N.C.App. 289, 346 S.E.2d 220 (1986) (rejecting father's argument that he could not be imprisoned for civil contempt unless court found that father had unencumbered property that could be used to purge himself of contempt).]

(2) Borrowing money, selling property or liquidating other assets. [*Gordon v. Gordon,* __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Teachey v. Teachey,* 46 N.C.App. 332, 264 S.E.2d 786 (1980).]

b) Party had the ability to take reasonable measures to enable the party to comply:

(1) With a discovery order when the documents were readily available from third-party sources, such as banks, brokerage houses, and accountants. [*Milks v. Mills,* 681 S.E.2d 865 (2009) (**unpublished**) (requiring defendant to obtain the discovery materials from third-party sources was not unreasonable).]

(2) With an order requiring defendant to purchase certain residential properties when defendant could have sold or encumbered other real property he owned, could have enlisted the financial support of his partner, and could have been more diligent in efforts to procure financing through an institutional lender. [*Banana Wind Properties, LLC v. K&T Real Estate Investments*, 191 N.C.App. 399, 663 S.E.2d 12 (2008) (**unpublished**).]

C. When civil contempt is not available.

1. Civil contempt is not available when:

a) *The required action has been performed, in other words, the alleged contemnor is in compliance on the date of the hearing.*

(1) A court may not find a party in civil contempt after the required action has been performed. [*Ruth v. Ruth*, 158 N.C.App. 123, 579 S.E.2d 909 (2003) (error for trial court to find mother in contempt for failing to return children after visitation when she had returned children to father before the contempt hearing); *Vaughn v. Vaughn*, 176 N.C.App. 409, 626 S.E.2d 876 (2006) (**unpublished**) (husband's marriage before the contempt hearing meant that he was in compliance with custody order that prohibited opposite sex overnight guests).] But criminal contempt may be available, *see* section III.E at page 62 and immediately below.

(2) An obligor ordered to show cause for failing to pay court-ordered child support may not be held in civil contempt if he or she pays the full amount of the arrearage before the contempt hearing is held. [*See Reynolds v. Reynolds*, 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd on other grounds per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002) (father's payment of arrearages after contempt motion filed eliminated option of civil, but not criminal, contempt); *Hudson v. Hudson*, 31 N.C.App. 547, 230 S.E.2d 188 (1976) (no contempt where between filing of contempt motion and hearing thereon the defendant brought the support payments up to date).]

(3) The "compliance by date of hearing" argument was not successful when the alleged contemnor was ordered to refrain from certain behavior, in this case, unsupervised visitation, as opposed to an order requiring an affirmative act, for example, bringing support up to date. [*See Helms v. Landry*, 681 S.E.2d 566, *review denied*, 363 N.C. 744, 688 S.E.2d 454 (2009) (**unpublished**) (rejecting mother's argument that since she had not attempted to visit the minor child after the motion in the cause was filed, she was in compliance at the time of the hearing with the court's prior orders requiring supervised visitation).]

b) *No underlying order has been entered pursuant to G.S. § 1A-1, Rule 58, in other words, no order was "in force" when contempt order entered.*

(1) Contempt reversed when trial court gave an oral judgment for plaintiffs but never reduced the judgment to writing or entered it. Since an order is not enforceable by contempt until entered pursuant to G.S. § 1A-1, Rule 58, defendants could not be in contempt of it. [*Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007); *see also Carland v. Branch*, 164 N.C.App. 403, 595 S.E.2d 742 (2004) (citations omitted) (custody arrangement announced in open court on 11/19/01 not an enforceable order until it was entered on 5/13/02); *Hassell v. Hassell*, 149 N.C.App. 972, 563 S.E.2d 100 (2002) (**unpublished**) (defendant could not be found in contempt in October 2000 of an August 2000 decision that was not entered as an order until January 2001).]

(2) Contempt reversed when it was based on conduct by defendant occurring prior to entry of the underlying order. [*Onslow County v. Moore,* 129 N.C.App. 376, 499 S.E.2d 780, *review denied,* 349 N.C. 361, 525 S.E.2d 543 (1998) (order was not "in force" until it was entered in March; conduct occurring in January and February could not be basis for contempt).]

(3) A party cannot be held in civil contempt of a temporary order following termination of the action by a Rule 41 voluntary dismissal. [*See Collins v. Collins*, 18 N.C.App. 45, 196 S.E.2d 282 (1973) (father could not be held in contempt of a temporary custody order after mother voluntarily dismissed the action under Rule 41(a)(1); mother's voluntary dismissal, after being awarded temporary custody but before claim for permanent custody was decided, was a final termination of that action and no valid orders, including adjudications of contempt for violation of the temporary order, could be made thereafter in that cause).]

c) *The alleged contemnor is not the person "to whom the order is directed" as required by G.S. § 5A-21(a)(2a) and (3).*

(1) When the order that was the subject of the contempt proceeding allowed mother to travel out of the country with the child, arose upon mother's motion, and was solely directed at the conduct of mother, error to find father in civil contempt of the order for filing for, and obtaining custody, in a foreign country during a visit there by the mother and child. [*Atassi v. Atassi,* 122 N.C.App. 356, 470 S.E.2d 59 (1996) (while defendant father could not be in civil contempt of an order that was not directed at him, the court noted that father's conduct could be the basis for criminal contempt).]

d) *Conduct alleged to be contemptuous is not specifically prohibited by the order or provision in order is impermissibly vague*.

(1) Provision that allowed defendant to purge his contempt by "fully complying" with prior orders did not clearly specify what defendant could or could not do to purge himself of contempt and did not establish a date after which contempt purged. Order for civil contempt reversed. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748 S.E.2d 709 (2013), *citing Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).]

(2) Father could not be in contempt of order that was so vague that court had to "strain" to identify the provisions pursuant to which defendant was held in contempt. Language that directed father not to "interfere" with mother's custody was impermissibly vague for it did not specify what father could or could not do to purge himself of contempt. [*Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003).] *Cf. Middleton v. Middleton*, 159 N.C.App. 224, 583 S.E.2d 48 (2003) (upholding contempt even though the conduct complained of was not specifically addressed in the agreement or order when it was clear that the party violated the intent and spirit of the agreement or order).

e) *The conduct allegedly contemptuous violated a contract, not a court order.*

(1) Provisions included in an unincorporated separation agreement may not be enforced through civil contempt. [*See Jones v. Jones*, 144 N.C.App. 595, 548 S.E.2d 565 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").]

(2) However, an order requiring a party to specifically perform his or her obligations under an unincorporated separation agreement is enforceable by contempt. [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002), *citing McDowell v. McDowell*, 55 N.C.App. 261, 284 S.E.2d 695 (1981) (if a party to an unincorporated separation agreement does not perform his or her obligations under the agreement, the other party may obtain a decree of specific performance of the separation agreement, which is enforceable through contempt proceedings).]

(3) *See Spousal Agreements*, Bench Book, Vol. 1, Chapter 1, discussing specific performance as a remedy for breach of an unincorporated separation agreement.

f) *The person aggrieved agreed to the allegedly contemptuous conduct.*

(1) Father not in contempt for failing to make court-ordered child support payments for nearly ten years when father reasonably relied upon mother's oral agreement to waive the payments in exchange for father foregoing his visitation rights. The court noted the "just rule" that disobedience to a court order that results from the advice or agreement of the complainant should not be punished at the complainant's behest. [*Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983).]

g) *Alleged contemnor is immune from suit*.

(1) Clerk of superior court, acting in a judicial capacity in a partition suit, had judicial immunity from contempt charges. [*Bare v. Atwood,* 204 N.C.App. 310, 693 S.E.2d 746 (2010).]

(2) State of North Carolina and its administrative agencies, such as the DOT, enjoy sovereign immunity and cannot be held in contempt. [*North Carolina Dep't of Transportation v. Davenport,* 334 N.C. 428, 432 S.E.2d 303 (1993) (further noting that contempt statutes refer to persons, which does not include a sovereign).]

h) *Order to be enforced by contempt was made without, or in excess of, the court's jurisdiction.*

(1) Consent judgment requiring that a municipal election be held at a different time than that fixed by statute was void as court lacked jurisdiction to require that an invalid primary election be held. Defendants could not be in contempt for refusal to surrender their offices. [*Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952); *Wilson v. Wilson*, 124 N.C.App. 371, 477 S.E.2d 254 (1996) (when the trial court lacked jurisdiction to issue a subpoena to a nonparty to appear for a deposition out of county, nonparty could not be held in civil contempt for his failure to appear).]

D. Matters that have not precluded a finding of civil contempt.

1. That the party erroneously interpreted a court order. [*McVicker v. McVicker,* __ N.C.App. __, 762 S.E.2d 533 (2014) (**unpublished**) (defendant mistakenly believed that language in an ED consent judgment, that authorized upon default a charging order on distributions to defendant from defendant's business, was sole remedy and precluded the remedy of contempt); *Rain Tree v. Bradford*, 206 N.C.App. 330, 698 S.E.2d 557 (2010) (**unpublished**) (plaintiff erroneously believed that a 2007 order prohibiting cohabitation but not overnight guests superseded a provision in a 2005 order that prohibited her from having overnight guests of the opposite sex).]

2. That the conduct complained of was not specifically addressed in the agreement or order when it was clear that the party violated the intent and spirit of

the agreement or order. [*Middleton v. Middleton,* 159 N.C.App. 224, 583 S.E.2d 48 (2003) (citation omitted) (husband violated the spirit and intent of a consent judgment providing for the sale of the marital home when he took willful and deliberate action to thwart the sale by making the house unattractive and undesirable to prospective purchasers; civil contempt finding upheld because a party "must do nothing, directly or indirectly, that will render the order ineffectual, either wholly or partially").] *But cf. Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003) (defendant could not be held in contempt of order that was so vague that court had to "strain" to identify the provisions pursuant to which defendant was held in contempt; language that directed father not to "interfere" with mother's custody was impermissibly vague for it did not specify what father could or could not do to purge himself of contempt).

E. Procedure in a civil contempt proceeding.

1. Ways to initiate a civil contempt proceeding.

a) A person interested in enforcing a court order, including a judge, may file a motion accompanied by a sworn statement or affidavit. If a judicial official [*see* 2(a) below for definition] finds probable cause to believe there is civil contempt, the judicial official may issue either:

(1) A notice to show cause stating that the alleged contemnor will be held in contempt unless he or she appears and shows cause for not being held in contempt; or

(2) An order to show cause directing the alleged contemnor to appear and show cause why he or she should not be held in contempt. [G.S. § 5A-23(a)] This requires the defendant to personally appear at the hearing or risk being found in contempt for failure to appear. [*See Cox v. Cox,* 92 N.C.App. 702, 376 S.E.2d 13 (1989) (defendant found in indirect criminal contempt for failure to appear; appearance of defendant's counsel not sufficient to satisfy a show cause order that specifically ordered defendant to appear).]

b) An aggrieved party may serve a motion accompanied by a sworn statement or affidavit and notice of hearing on the alleged contemnor. [G.S. § 5A-23(a1)] There is no show cause order issued and no finding of probable cause. [*See Trivette v. Trivette,* 162 N.C.App. 55, 590 S.E.2d 298 (2004) (when contempt proceeding initiated by motion and notice of aggrieved party, there is no judicial finding of probable cause).] If initiated pursuant to G.S. § 5A-23(a1), the motion is limited to civil contempt and the court cannot consider criminal contempt. Due process requires that a proceeding for criminal contempt be initiated by the court, not by a private litigant. [*Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011).] For more on *Brandt, see* Michael Crowell, Contempt, School of Government, February 2013, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/015-Drennan%20-%20Crowell-Contempt,%202013.pdf.

2. Contempt proceedings initiated pursuant to G.S. § 5A-23(a).

a) The verified motion or motion accompanied by a sworn statement or affidavit requests a judicial official to issue an order or notice requiring an alleged contemnor to show cause why he or she should not be held in civil contempt. A judicial official is defined in G.S. § 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. § 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012).] *See* G.S. § 50-13.9(a) specifically authorizing clerk to issue show cause orders in proceedings for income withholding or for contempt for failure to pay child support.

b) A judicial official must determine, based on the motion and sworn statement or affidavit, whether there is probable cause to believe there is civil contempt. [*See* G.S. § 5A-23(a)]

(1) Probable cause in G.S. § 5A-23(a) refers to those facts and circumstances, within a judicial official's knowledge and about which he has reasonably trustworthy information, that are sufficient to warrant a prudent person in believing that the alleged contemnor is in civil contempt. [*Young v. Mastrom, Inc*., 149 N.C.App. 483, 560 S.E.2d 596 (2002) (contempt action brought for failure to comply with order directing payment of money).]

(2) A trial court used the incorrect standard in denying a motion for a show cause order when it decided the motion under G.S. § 5A-21, which sets out the elements of civil contempt, instead of making a probable cause determination under G.S. § 5A-23(a). [*Young v. Mastrom, Inc*., 149 N.C.App. 483, 560 S.E.2d 596 (2002).]

(3) A judicial official's determination of probable cause under G.S. § 5A-23(a) is generally ex parte. The alleged contemnor is not entitled to prior notice or an opportunity to be heard before the judicial official issues an order or notice to show cause pursuant to G.S. § 5A-23(a).

c) If there is probable cause to believe that a person is in civil contempt, the judicial official must issue a notice or order to show cause directed to that person. [G.S. § 5A-23(a); *see Watkins v. Watkins,* 136 N.C.App. 844, 526 S.E.2d 485 (2000) (vacating an order finding a defendant in civil contempt of a consent order for custody based, in part, on the fact that no notice or order to show cause was ever issued to the defendant).]

(1) An **order** to show cause requires an alleged contemnor to appear before a district court judge at a specified reasonable time to show cause why he or she should not be held in civil contempt.

(2) A **notice** to show cause does not require the alleged contemnor's appearance but provides notice that he or she will be found in civil contempt unless he or she appears before a district court judge at a specified reasonable time and shows cause why he or she should not be held in civil contempt.

(3) Notice is not optional under G.S. § 5A-23 and contempt will be vacated when notice not provided unless objection waived. [*Carter v. Hill,* 186 N.C.App. 464, 650 S.E.2d 843 (2007) (when defendants were notified at the end of the trial that they would be held in contempt until the debt was paid, and they were taken immediately to jail, the hearing was clearly in violation of G.S. § 5A-23(a)); *Garrett v. Garrett,* 121 N.C.App. 192, 464 S.E.2d 716 (1995), *disapproved of on other grounds by Pulliam v. Smith,* 348 N.C. 616, 501 S.E.2d 898 (1998) (finding of civil contempt vacated when court's instantaneous determination of contempt made it obvious that the required statutory notice was not provided to plaintiff).]

(4) When defendant is served with a copy of the motion for an order to show cause, which states the grounds for the alleged civil contempt, as well as the show cause order referencing the motion, defendant had adequate notice of the nature of the contempt proceedings. [*Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant had adequate notice that her failure to pay credit card debt as ordered was the basis of the proceeding).]

d) Service of the order or notice.

(1) Absent good cause, a show cause order or notice issued pursuant to G.S. § 5A-23(a) must be served on the alleged contemnor at least five days before the scheduled hearing. [G.S. § 5A-23(a)]

(2) G.S. § 5A-23(a) does not specify the manner in which a show cause order or notice must be served. Rule 5 of the Rules of Civil Procedure allows all orders to be served either pursuant to Rule 4 or pursuant to Rule 5. However, for income withholding or contempt for failure to pay child support, G.S. § 50-13.9(d) provides that an order to appear and show cause issued pursuant to that statute should be served in accordance with G.S. § 1A-1, Rule 4.

(3) The court is authorized to shorten the period of notice for good cause shown. [G.S. § 5A-23(a); *M.G. Newell Co. v. Wyrick,* 91 N.C.App. 98, 370 S.E.2d 431 (1988) (court authorized to shorten notice period when alleged contemnor had known of charges against him for several months and had had ample time to prepare, witnesses and parties were present, and defendant's

attorney acknowledged ample time to discuss charges with defendant).]

(4) There is no requirement that notice be served on other parties of interest in the underlying case. [*Anderson v. Lackey,* 166 N.C.App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (child did not have to be served with notice of contempt against his mother for her violation of an order providing for visitation by the father).]

e) Procedural requirements may be waived.

(1) When an alleged contemnor comes into court to answer the charges of the show cause order, he or she waives procedural requirements. [*Lowder v. All Star Mills, Inc.,* 301 N.C. 561, 273 S.E.2d 247 (1981) (contemnor waived defect of no sworn statement or affidavit); *see also Watson v. Watson,* 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008) (defendant's active participation in a contempt hearing, without objection and which included presenting evidence and exhibits relating to credit card debt that a court had ordered her to pay, defeated her contention that she did not have notice that her nonpayment of the credit card debt would be at issue); *Glesner v. Dembrosky,* 73 N.C.App. 594, 327 S.E.2d 60 (1985) (contemnor waived her objection to the lack of notice by appearing at hearing and presenting substantial evidence on the issues of which she claimed no notice); *Whitaker v. Whitaker,* 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied,* 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied,* 361 N.C. 370, 662 S.E.2d 552 (2008), *citing Lowder* (procedural objection to contempt hearing held only one day after defendant filed show cause motion was waived by plaintiff's attendance and participation at the hearing without objection).]

3. Contempt proceedings initiated by motion, affidavit and notice of an aggrieved party pursuant to G.S. § 5A-23(a1).

a) When contempt proceedings are initiated by motion pursuant to G.S. § 5A-23(a1), the aggrieved party must serve a copy of the motion, sworn statement or affidavit, and notice of hearing on the alleged contemnor pursuant to G.S. § 1A-1, Rule 5, at least five days before the scheduled hearing, absent good cause. [G.S. § 5A-23(a1)] Failure to provide a notice of hearing warrants reversal of a contempt order entered in a proceeding initiated pursuant to G.S. § 5A-23(a1). [*Ross v. Ross,* 215 N.C.App. 546, 715 S.E.2d 859 (2011).]

b) G.S. § 5A-23(a1) allows a contempt proceeding to be initiated upon motion and notice by an aggrieved party without a judicial finding of probable cause. [*Trivette v. Trivette,* 162 N.C.App. 55, 590 S.E.2d 298 (2004).]

4. Dismissal of a motion for contempt or order to show cause.

a) A person ordered to show cause may move to dismiss the order. [G.S. § 5A-23(c)]

b) Because when considering a motion to dismiss, the trial court must take the complaint's allegations as true, dismissal generally is appropriate only where the face of the complaint discloses some insurmountable bar to recovery. [*Westlake v. Westlake,* __ N.C.App. __, 753 S.E.2d 197 (2014), *citing Lea v. Grier,* 156 N.C.App. 503, 577 S.E.2d 411 (2003); *Brown v. Brown,* 188 N.C.App. 164, 654 S.E.2d 832 (2008) (**unpublished**) (since holding a party in contempt requires a determination by the trial court of willfulness, it is rarely appropriate for such a matter to be disposed of by a motion to dismiss pursuant to G.S. § 1A-1, Rule 12(b)(6), or a motion for summary judgment under G.S. § 1A-1, Rule 56; only where it is absolutely clear that a party has not violated a provision of a court order should the trial court consider such a disposition).]

c) Dismissal of contempt motion in error.

(1) Trial court erred in dismissing father's motion for contempt for failure to state a claim when motion stated that custody order was still in effect and that mother had repeatedly obstructed father's visitation with his children. [*Westlake v. Westlake,* __ N.C.App. __, 753 S.E.2d 197 (2014) (construing father's motion liberally and treating the allegations as true).]

d) Dismissal of contempt motion upheld.

(1) Six of seven grounds for finding defendant in civil or criminal contempt properly dismissed because either i) defendant could not be in contempt of provisions not in the order; ii) conduct complained of did not violate order; iii) plaintiff did not allege that defendant's conduct was willfull; or iv) defendant had complied with order before motion filed or by hearing. [*Brown v. Brown,* 188 N.C.App. 164, 654 S.E.2d 832 (2008) (**unpublished**).]

5. A person with an interest in enforcing an order may present the case for a finding of civil contempt for failure to comply with an order. [G.S. § 5A-23(f)] A "person with an interest" includes the State, as represented by the district attorney, in a criminal case. [Official Commentary to G.S. § 5A-23(a)]

6. Mediation requirement for contempt issues in child custody and visitation matters.

a) In districts with a mediation program, any case with a contested issue of custody or visitation must be referred to mediation unless excused by order of a judge. Issues that arise in motions for contempt with respect to orders for custody and visitation shall be set for mediation unless waived by the court. [G.S. § 50-13.1(b); Rule 7.01 of the Uniform Rules Regulating Mediation of Child Custody and Visitation Disputes Under the North Carolina Custody and Visitation Mediation Program (providing for

mediation of, among other things, actions to enforce custody and visitation orders).]

7. Contempt in context of a mediated settlement conference.

a) A person required to attend a mediated settlement conference or other settlement procedure under G.S. § 7A-38.4 who, without good cause, fails to attend or fails to pay any or all of a mediator or other neutral's fee, is subject to the contempt powers of the court. [G.S. § 7A-38.4A(c)]

F. Hearing.

1. Proceedings for civil contempt are always plenary proceedings. [*See* G.S. § 5A-23(a) and (a1) requiring notice and a hearing.] There is no summary procedure for civil contempt proceedings.

2. Because all proceedings are plenary, the distinction between direct and indirect contempt has little meaning in the civil contempt context. Notwithstanding, some cases refer to "indirect civil contempt." [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (trial court found defendant in "indirect civil contempt" when he failed to have blood drawn for court-ordered paternity testing); *Piedmont Equipment Co. v. Weant*, 30 N.C.App. 191, 226 S.E.2d 688 (1976) (reviewing on appeal an order dismissing a charge of "indirect civil contempt").]

3. Venue is in the county where the order was issued. [G.S. § 5A-23(b)]

4. Recusal of judge if judge's objectivity may reasonably be questioned.

a) G.S. § 5A-15(a) provides that if a criminal contempt is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order must be returned before a different judge.

b) No statute addresses recusal in the context of civil contempt. However, recusal may be appropriate under Canon 3C(1) of the Code of Judicial Conduct, which provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned." For more on recusal, *see North Carolina Code of Judicial Conduct,* Bench Book, Vol. 2, Chapter 1.

c) That respondent father, in an unrelated criminal proceeding before the same judge had been held in contempt of court and jailed for calling the judge a bad name, did not require judge's recusal from a later TPR proceeding. [*In re A.R.S.*, 195 N.C.App. 459, 673 S.E.2d 168 (2009) (**unpublished**).]

5. Standard of proof.

a) G.S. Ch. 5A does not clearly specify the standard of proof in civil contempt proceedings.

b) In contempt proceedings pursuant to G.S. § 5A-23(a) (order or notice issued by a judicial official), and contempt proceedings pursuant to G.S. § 5A-23(a1) (motion and affidavit of an aggrieved party), a court should not find a person in civil contempt unless there is sufficient proof of contempt. Standard of proof is probably preponderance of the evidence.

6. Burden of proof.

a) Proceeding initiated by an order or notice issued by a judicial official pursuant to G.S. § 5A-23(a). A judicial official is defined in G.S. § 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. § 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012).] *See* G.S. § 50-13.9(d) specifically authorizing clerk to issue show cause orders in proceedings for income withholding or for contempt for failure to pay child support.

(1) A show cause order in a civil contempt proceeding that is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show cause why he should not be held in contempt. [G.S. § 5A-23(a); *Gordon v. Gordon*, __ N.C.App. __, 757 S.E.2d 351 (2014), *citing Tucker*; *Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009), *citing State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (in a civil contempt proceeding initiated by a show cause order, the defendant has the burden of presenting evidence to show that he was not in contempt and the defendant refuses to present such evidence at his own peril).]

(2) To meet a defendant's burden in the case of failure to pay money, such as child support, a party must establish a lack of means to pay support or an absence of willfulness in failing to pay. [*Belcher v. Averette*, 136 N.C.App. 803, 526 S.E.2d 663 (2000).]

(3) Despite fact that burden shifts to defendant, case law makes it clear that a defendant may not be held in contempt unless the trial court has sufficient evidence upon which to base findings of fact sufficient to support finding that defendant had the ability to pay as well as all other required findings to support contempt. [*See Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007) (where findings of fact were "conspicuously absent" from contempt order, and worse, instead of finding that defendant had the ability to pay, the court found to the contrary, that he was not able to pay the amount ordered, entry of contempt reversed); *Frank v. Glanville*, 45 N.C.App. 313, 262 S.E.2d 677 (1980) (when it was not clear that defendant had the ability to comply with the contempt order,

ever had the ability, or would ever be able to take reasonable measures that would enable him to comply, and because no finding detailing defendant's ability to comply with the contempt order was made, contempt order reversed); *State ex rel. Dunkle v. Utley*, 208 N.C.App. 568, 706 S.E.2d 841 (2010) (**unpublished**) (reversing contempt order when trial court "wholly failed" to make any findings of fact regarding defendant's willfulness or present ability to comply).]

b) Proceeding initiated by motion, affidavit and notice of an aggrieved party pursuant to G.S. § 5A-23(a1) (no prior review by a judicial official).

(1) In a proceeding initiated pursuant to G.S. § 5A-23(a1), the burden of proof is on the aggrieved party. [G.S. § 5A-23(a1); *Trivette v. Trivette*, 162 N.C.App. 55, 590 S.E.2d 298 (2004).]

(2) The burden does not shift to the alleged contemnor as it does in proceedings initiated by a notice or show cause order under G.S. § 5A-23(a). [*See Trivette v. Trivette*, 162 N.C.App. 55, 590 S.E.2d 298 (2004) (since contempt proceeding was initiated by motion and notice of hearing filed by former wife rather than order or notice issued by judicial officer, former wife, as movant, had burden of proof on motion seeking to find former husband in civil contempt; trial court erroneously placed burden on former husband to prove a lack of willful contempt).]

(3) Misapplication of the burden of proof is a procedural defect that is waived if not raised at trial. [*Moss v. Moss*, __ N.C.App. __, 730 S.E.2d 203 (2012) (defendant waived objection to misapplication of burden of proof in contempt proceeding by not objecting and acquiescing in the procedure employed by the trial court).]

7. Consideration of contempt orders in related proceedings.

a) A trial court did not err when it considered prior contempt orders entered in the same case in determining child custody. [*Raynor v. Odom*, 124 N.C.App. 724, 478 S.E.2d 655 (1996).]

8. No right to a jury trial in civil contempt proceedings. [*See* § G.S. 5A-23(d) (judicial official is the trier of facts at the show cause hearing).]

9. Right against self-incrimination.

a) The civil contempt statutes do not address a contemnor's right not be compelled to be a witness against himself at a contempt hearing. [*See* G.S. § 5A-15(e) so providing in criminal contempt proceedings.]

b) The North Carolina Supreme Court has noted that the Fifth Amendment privilege against compulsory testimonial self-incrimination extends to civil proceedings where a party may be subjected to

imprisonment. [*Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (considering whether a defendant's refusal to comply with an order to produce tax returns was protected, court determined that, under the facts of the case, the contents of the tax returns did not invoke protection of the Fifth Amendment, nor did the testimonial aspect involved in their production invoke its protection); *see also In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994) (stating that the privilege against self-incrimination, guaranteed by the Fifth and Fourteenth Amendments, applies to both civil and criminal proceedings "wherever the answer might tend to subject to criminal responsibility him who gives it") (citations omitted).]

c) An alleged civil contemnor may assert the right against self-incrimination and refuse to testify but the court may draw an adverse inference of fact from the failure to testify. [*McKillop v. Onslow County*, 139 N.C.App. 53, 532 S.E.2d 594 (2000) (stating rule that the finder of fact in a civil contempt case may use a witness' invocation of his Fifth Amendment privilege against self-incrimination to infer that his truthful testimony would have been unfavorable to him; holding that plaintiff, by her refusal to present testimony, chose to abandon her claim that she was not in contempt of the trial court's order).]

d) With respect to the scope of review on appeal, an appellate court has found that where the relief granted is wholly civil in nature and defendant was not subject to criminal penalties, an appellate court is not required to examine whether a contemnor's right not to be a witness against himself was adequately protected during the contempt proceeding. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

10. Right to confront witnesses.

a) In a civil contempt proceeding, the court is not obligated to provide the alleged contemnor with confrontation rights. [*Smith v. Barbour*, 170 N.C.App. 436, 613 S.E.2d 753 (**unpublished**), *review denied*, 359 N.C. 853, 619 S.E.2d 512 (2005) (mother's rights not violated when father not present at proceeding where she was held in civil contempt for violation of a custody and visitation order).]

11. Right to and appointment of counsel.

a) An alleged contemnor has the right to be represented by legal counsel in civil contempt proceedings.

(1) The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt hearing begins, that he or she may be incarcerated if found in civil contempt, that he or she has the right to be represented by retained counsel, and that he or she may be entitled to court-appointed counsel if unable to afford an attorney. [*See McBride v. McBride*,

334 N.C. 124, 431 S.E.2d 14 (1993) (at outset of a contempt proceeding for nonsupport, a trial court should (1) assess how likely it is that the defendant will be incarcerated; (2) if it is likely, the court should inquire into the defendant's desire for counsel, and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent, the court is to appoint counsel to represent him).] In *D'Alessandro v. D'Alessandro*, __ N.C.App. __, 762 S.E.2d 329 (2014), the court of appeals specifically held that *McBride* applies in contempt proceedings for violation of a custody order.

(2) An alleged contemnor may waive his or her right to legal representation. [G.S. § 7A-457(a)]

(a) Any waiver must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must make a written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and the consequences of the waiver." [G.S. § 7A-457]

(b) Even though G.S. § 7A-457 speaks to waiver by an indigent, any waiver must be in accordance with G.S. § 7A-457, notwithstanding its limiting language. [*State v. Williams*, 65 N.C.App. 498, 309 S.E.2d 721 (1983).]

(3) If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the civil contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b) The North Carolina Supreme Court has held that an alleged contemnor is entitled to **court-appointed** counsel in a civil contempt proceeding arising out of the nonpayment of child support if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (right based on Fourteenth Amendment due process clause); *King v. King*, 144 N.C.App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that he is indigent and that his liberty interest is at stake); *Young v. Young*, __ N.C.App. __, 736 S.E.2d 538 (2012), *citing Turner* and *King* (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support); *cf. Turner v. Rogers*, __ U.S. __, 131 S.Ct. 2507 (2011) (the Fourteenth Amendment due process clause does not automatically require the State to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order if the State provides "alternative or substitute procedural safeguards").] Prior to August 2014, it was not clear whether the holding in *McBride* was broad enough to require the

appointment of counsel for civil contempt proceedings arising in contexts other than child support enforcement. In *D'Alessandro v. D'Alessandro*, __ N.C.App. __, 762 S.E.2d 329 (2014), the court of appeals extended the right to court-appointed counsel to an indigent defendant subject to civil contempt for failure to comply with a child custody order. In separate proceedings, consolidated on appeal, a trial court found a pro se father in civil contempt of custody and child support orders. After finding an "obvious likelihood" that father might be incarcerated if found in contempt, that father had not been advised of his right to counsel and had not waived that right, and that it appeared from the record that father was indigent, both orders reversed "to the extent that they held defendant in contempt of the custody order and the child support order."

(1) Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. § 7A-452(c)]

(2) An alleged contemnor is indigent if he or she has insufficient income and resources, based on guidelines approved by the Office of Indigent Defense Services, to retain an attorney to represent him or her in the contempt hearing. [*See* G.S. § 7A-452; *see* G.S. § 7A-450(a) for definition of an indigent person.]

(3) In a proceeding for failure to pay a court-ordered sum of money, such as child support, a finding that a person is entitled to court-appointed counsel based on indigency may indicate that the person lacks the present financial ability to pay the sum ordered and therefore may preclude a finding of civil contempt for willfully failing to pay the amount ordered.

(4) Counsel for indigent persons in civil contempt proceedings are appointed pursuant to procedures approved by the Office of Indigent Defense Services. [*See* G.S. § 7A-452(a)]

c) An indigent obligor may not be incarcerated for civil contempt unless he or she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (due process requires that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages).]

12. Failure to appear at initial hearing for civil contempt. There is no statute or case law authorizing the court to order the alleged contemnor's arrest if he or she fails to appear at the initial hearing for civil contempt. [*But see* G.S. § 15A-305(b)(8) (allowing arrest when defendant fails to appear as required by a show cause order issued in a criminal proceeding) and G.S. § 5A-16(b) (allowing arrest pursuant to G.S. § 15A-305 based on finding of probable cause that person ordered to appear for hearing to determine criminal contempt will not appear).] For more on this point, *see* Michael Crowell, Contempt, School of Government, February 2013, available at

http://www.sog.unc.edu/sites/www.sog.unc.edu/files/015-Drennan%20-%20Crowell-Contempt,%202013.pdf.

G. Orders for civil contempt.

1. Fundamentals of an order finding a person in civil contempt. The order should:

a) Indicate whether a person is being held in civil contempt or criminal contempt. [*See Watkins v. Watkins*, 136 N.C.App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

b) State how a party may purge the contempt. [G.S. §§ 5A-23(e) and 5A-22(a); *Bethea v. McDonald*, 70 N.C.App. 566, 320 S.E.2d 690 (1984) (purge provision is essential to the order).] *See* section 3 below.

c) Make findings as follows:

(1) On each of the elements in G.S. § 5A-21(a) [G.S. § 5A-23(e)];

(2) As to the facts constituting contempt [G.S. § 5A-23(e)];

(3) That the party had the ability to comply during the period when the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966)]; and

(4) That the party has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010).] *See* section II.G.3. below.

2. The following AOC forms are available.

a) SHOW CAUSE ORDER, FINDINGS AND JUDGMENT – CONTEMPT OR FAILURE TO APPEAR FOR JURY DUTY (AOC-CR-219) (criminal or civil contempt).

b) CONTEMPT ORDER DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-309) (criminal or civil contempt).

c) CONTEMPT ORDER NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT (AOC-CV-529) (criminal or civil contempt).

d) COMMITMENT ORDER FOR CIVIL CONTEMPT (AOC-CV-603).

e) ORDER OF CONTEMPT FOR NON-PAYMENT OF MEDIATOR'S FEES (AOC-CV-816).

3. Purge conditions.

a) The court's order must clearly specify the action that the contemnor must take to purge the contempt. [G.S. §§ 5A-23(e) and 5A-22(a)]

(1) If an order for civil contempt does not contain a purge provision, the contempt is criminal, not civil, and the order will be reversed. [*See In re S.J.R.*, 184 N.C.App. 188, 645 S.E.2d 900 (2007) (**unpublished**) (where the judge failed to state a purge condition that would allow the defendant to avoid incarceration, finding of civil contempt set aside).]

(2) If the order does not clearly specify what a person can do to purge the contempt, the order will be reversed. [*See Scott v. Scott*, 157 N.C.App. 382, 579 S.E.2d 431 (2003) (purge conditions that prevented father from "interfering" with mother's custody impermissibly vague; what father could or could not do to purge himself of contempt not specified); *Cox v. Cox*, 133 N.C.App. 221, 515 S.E.2d 61 (1999) (vague condition that mother shall not place children in a stressful situation or a situation detrimental to their welfare and not punish children in manner that is stressful, abusive, or detrimental, did not set out what mother could do to purge herself of contempt; contempt order reversed); *Nohejl v. First Homes*, 120 N.C.App. 188, 461 S.E.2d 10 (1995) (contempt order that failed to specify purge conditions remanded for entry of same).]

b) The conditions under which an obligor may purge himself or herself of contempt must be conditions that he or she has the present ability to meet, so that a defendant holds the keys to his own jail by virtue of his ability to comply with the court order. [*See Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see also* Official Comment to G.S. § 5A-21.]

c) Upon a contemnor's "purging" himself of contempt, the contempt judgment is "lifted" or terminated. [*Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

4. Findings.

a) At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. § 5A-21(a). [G.S. § 5A-23(e)]

b) If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the actions that the contemnor must take to purge himself or herself of the contempt. [G.S. § 5A-23(e)]

c) Failure to make the required findings is sufficient by itself to reverse an order for contempt. [*Carter v. Hill*, 186 N.C.App. 464, 650 S.E.2d 843 (2007) (where findings of fact were "conspicuously absent" from the trial court's contempt order, and worse, instead of finding that

defendant had the ability to pay, the court found to the contrary, that he was not able to pay the amount ordered, entry of contempt reversed); *Frank v. Glanville*, 45 N.C.App. 313, 262 S.E.2d 677 (1980) (when it was not clear that defendant had the ability to comply with the contempt order, ever had the ability, or would ever be able to take reasonable measures that would enable him to comply, and because no finding detailing defendant's ability to comply with the contempt order was made, contempt order reversed); *Vaughn v. Vaughn*, 176 N.C.App. 409, 626 S.E.2d 876 (2006) (**unpublished**) (contempt order vacated when preprinted "fill-in-the-blank" form used by the trial court did not state how the purpose of its custody order could be served by compliance, did not contain a finding as to the alleged act of noncompliance by husband or that his action was willful, and made no finding as to his ability to comply with the custody order or what action he could take to purge himself of the contempt).]

d) The court must make findings as to a party's ability to comply (and willful conduct) during two periods of time: during the period when the party was in default and at the time of the hearing. *See* section II.B.3 at page 14.

H. Sanctions for civil contempt.

1. Incarceration.

a) Imprisonment is the only authorized sanction for civil contempt. [G.S. § 5A-21] [*Cf. Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __N.C. _, _762 S.E.2d 207 (2014) (fine payable to the moving party for defendant's violation of a Chapter 50C order upheld; a fine is a "statutorily permitted" sanction for civil contempt proceedings).]

b) A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations in G.S. § 5A-21(b1) and (b2). [G.S. § 5A-21(b)]

c) Limitation on term of imprisonment.

(1) There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing to comply with a court order that does not involve the payment of money.

(2) A person found in civil contempt for failure to pay money other than child support may not be imprisoned for more than 90 days for the same act of disobedience or refusal to comply with a court order but may be recommitted for successive 90 day periods, with the total period of imprisonment not to exceed 12 months. [G.S. § 5A-21(b2)]

(3) When contempt is not purged within 90 days by a person imprisoned for civil contempt for the failure to pay money other than child support, the court must conduct a de novo hearing

before recommitting the person for a successive 90 day term. [G.S. § 5A-21(b2)]

(a) To qualify for a hearing de novo, defendant must show that he was being recommitted to an additional term of imprisonment and not merely serving the time remaining on an original sentence that had been suspended. [*Liberatore v. Liberatore*, __ N.C.App. __, 753 S.E.2d 397 (2013) (**unpublished**) (defendant's indefinite sentence for civil contempt temporarily suspended after defendant served 30 days; court did not strike the civil contempt charge and conditioned temporary suspension on defendant's compliance with original court order by a date certain, which defendant did not do; defendant sentenced to 60 days; defendant not entitled to a de novo hearing as there was only one sentence or in other words, defendant was sentenced to serve the time remaining from the first sentence and was not recommitted to a new sentence).]

(4) The 12 month maximum period of imprisonment includes the initial period of imprisonment and any additional period of imprisonment. [G.S. § 5A-21(b2)]

(5) Before a person can be recommitted, the court must:

(a) Conduct a hearing de novo; and

(b) Enter a finding for or against the alleged contemnor on each of the elements of G.S. § 5A-21(a); and

(c) Must find that all the elements of G.S. § 5A-21(a) continue to exist. [G.S. § 5A-21(b2)]

(6) A person's failure or refusal to purge himself of contempt shall not be deemed a separate or additional act of disobedience, failure, or refusal to comply with an order of the court. [G.S. § 5A-21(b2)]

2. Release from incarceration.

a) A person imprisoned for civil contempt must be released when the civil contempt no longer continues, in other words, when the contemnor has satisfied all purge conditions. [G.S. § 5A-22(a)]

b) Release by the judge upon motion of the contemnor.

(1) Upon contemnor's motion to the judge who found civil contempt, unless that judge is not available, the judge must order release if the judge affirmatively determines that the contemnor is subject to release. [G.S. § 5A-22(b)]

(2) If judge that found civil contempt is not available, the motion is made to a judge of the same division in the same judicial district. [G.S. § 5A-22(b)]

c) Release by the sheriff or other officer having custody without further order of the court.

(1) Upon finding that the contemnor has complied with the purge conditions specified in the contempt order, the sheriff or other officer having custody may release the person without further order of the court. [G.S. § 5A-22(a)]

(2) This is intended to apply mainly to situations in which compliance with the order calls for payment of money to the court. [Official Commentary to G.S. § 5A-22]

d) A contemnor may seek release under other procedure available under state law. [G.S. § 5A-22(b)]

I. Damages and costs.

1. Compensatory damages are not available in a contempt proceeding. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010), *citing Glesner v. Dembrosky*, 73 N.C.App. 594, 327 S.E.2d 60 (1985) (recognizing general rule in North Carolina, that a court has no authority to award damages to a private party in a contempt proceeding because "[c]ontempt is a wrong against the state, and moneys collected ... go to the state alone"); *Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (error to award sums for repairs and cleanup of home and moving costs; recognizing that North Carolina's general rule is contrary to majority of states and to the federal position, but strong precedent supports rule); *Glesner v. Dembrosky*, 73 N.C.App. 594, 327 S.E.2d 60 (1985) (court erred in requiring contemnor to pay defendants' out-of-state travel expenses incurred in attending hearing on their motion to compel contemnor's compliance with an order allowing them visitation).]

2. Husband, in contempt of an ED order that required him to transfer certain property to wife, including stock certificates, ordered incarcerated until he came forward with a proposal to deliver the property, which husband did after nearly a year of incarceration. Release order required husband to transfer the then present value of the stock. Transfer of present value provision upheld, not as compensatory damages, but as recognition that wife would have been compensated for stock splits and dividends had husband made the stock transfer in a timely fashion. [*Conrad v. Conrad*, 82 N.C.App. 758, 348 S.E.2d 349 (1986).]

3. A court has no authority to award costs to a private party. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (order for wife to pay cost of husband's CPA expert witness reversed); *Green v. Crane*, 96 N.C.App. 654, 386 S.E.2d 757 (1990) (trial

court did not err in refusing to tax defendants with costs).] *See* below regarding award of attorney fees.

J. Attorney fees in civil contempt proceedings.

1. General rule.

a) Subject to exceptions in the area of family law, a court may award attorney fees in contempt matters only when specifically authorized by statute or pursuant to an express provision in an agreement between the parties.

(1) Outside of the family law field, statutory authority is required to award attorney fees in a contempt action. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010); *see also Sea Ranch II Owner's Assoc. v. Sea Ranch II, Inc.*, 180 N.C.App. 230, 636 S.E.2d 307 (2006), *review denied*, 361 N.C. 357, 644 S.E.2d 233 (2007) (neither G.S §§ 6-18 or 6-20, allowing costs as a matter of course or as a matter of discretion, applies to a contempt proceeding as a basis for awarding attorney fees); *Baxley v. Jackson*, 179 N.C.App. 635, 634 S.E.2d 905, *review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006) (rejecting plaintiff's argument that court's inherent authority to sanction a party for willful failure to obey its orders includes an order for attorney fees); *United Artists Records, Inc. v. Eastern Tape Corp.*, 18 N.C.App. 183, 196 S.E.2d 598, *cert. denied*, 283 N.C. 666, 197 S.E.2d 880 (1973) (without express statutory authorization, trial court lacked authority to award attorney fees to plaintiff after finding defendant in civil contempt of a TRO).]

(2) Award of attorney fees in a contempt action has been upheld when based on an express provision in a consent judgment. [*PCI Energy Serv., Inc. v. Wachs Technical Serv*., 122 N.C.App. 436, 470 S.E.2d 565 (1996) (court properly awarded attorney fees in a contempt proceeding to enforce a consent judgment when the judgment contained an express provision allowing for the recovery of "all costs and expenses" associated with enforcing the consent judgment).] [*But cf. Stillwell Enterprises, Inc. v. Interstate Equipment Co.*, 300 N.C. 286, 266 S.E.2d 812 (1980) (requiring statutory authority for an award of fees in addition to an express provision; stating in the context of a lease for personal property that "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees as may be necessitated by a successful action on the contract itself, our courts have consistently refused to sustain such an award absent statutory authority therefor").]

(3) When there is no express contractual provision or statutory authority permitting a party to recover fees, they have not been

allowed. [*Moss Creek Homeowners Ass'n v. Bissette*, 202 N.C.App. 222, 689 S.E.2d 180, *review denied and dismissed*, 364 N.C. 242, 698 S.E.2d 402 (2010) (reversing an award of attorney fees in a contempt proceeding for failure to pay fees and costs in prior orders when there was no statutory authorization for fees); *Baxley v. Jackson*, 179 N.C.App. 635, 634 S.E.2d 905, *review denied*, 360 N.C. 644, 638 S.E.2d 462 (2006) (when there was no statutory authority allowing attorney fees as a sanction for defendants' failure to comply with the order of specific performance, the trial court was without authority to award attorney fees); *Nohejl v. First Homes*, 120 N.C.App. 188, 461 S.E.2d 10 (1995) (refusing to award attorney fees to the party seeking to enforce a consent judgment because there was no express contractual provision or statutory authority permitting plaintiffs to recover such fees).]

2. Family law exceptions.

a) Generally.

(1) Case law allows the award of attorney fees incurred in contempt actions enforcing some family law obligations when the underlying family law statutes authorize attorney fees in the underlying action. *See* discussions below regarding child support, child custody and alimony.

(2) However, case law also allows attorney fees to a party seeking to enforce an equitable distribution order by contempt even though the equitable distribution statute does not authorize the award of attorney fees. *See* discussion below.

b) Child support.

(1) The court may award attorney fees to an obligee pursuant to G.S. § 50-13.6 in connection with civil contempt proceedings to enforce a child support order. [*See Ugochukwu v. Ugochukwu*, 176 N.C.App. 741, 627 S.E.2d 625 (2006), *citing Blair v. Blair*, 8 N.C.App. 61, 173 S.E.2d 513 (1970) (award of fees to wife based on husband's willful contempt for failure to pay child support upheld; payment of fees does not appear to be a purge condition); *Belcher v. Averette*, 152 N.C.App. 452, 568 S.E.2d 630 (2002) (defendant in contempt of child support provisions in a consent decree ordered to pay plaintiff's attorney fees pursuant to G.S. § 50-13.6); *Smith v. Smith*, 121 N.C.App. 334, 465 S.E.2d 52 (1996) (agreement to pay college expenses is in nature of child support so that court authorized to award attorney fees when father failed to do so); *but cf. Powers v. Powers*, 103 N.C.App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring

husband to pay for child's college expenses, holding that order was not for "child support").]

(2) Contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order. [*See Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting Eakes v. Eakes*, 194 N.C.App. 303, 669 S.E.2d 891 (2008) (order required payment of attorney fees as a condition of being purged of contempt for failure to comply with an order for child support and postseparation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes v. Eakes*, 194 N.C.App. 303, 669 S.E.2d 891 (2008), *citing Blair* (contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order).]

(3) For more on attorney fees in child support actions, both generally and in the context of contempt, *see Child Support*, Bench Book, Vol. 1, Chapter 3, Parts 1 and 4.

c) Equitable distribution.

(1) The court may award reasonable attorney fees to a party seeking to enforce an ED order by contempt proceedings, even though generally there can be no award for fees incurred in obtaining the ED order in the first instance. [*Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

(2) A contemnor can be required to pay an award of attorney fees as a condition of purging contempt arising from enforcement of an ED consent order. [*Watson v. Watson*, 187 N.C.App. 55, 652 S.E.2d 310 (2007), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008) (wife ordered to pay portion of husband's counsel fees as a condition of purging herself of contempt); *Middleton v. Middleton*, 159 N.C.App. 224, 583 S.E.2d 48 (2003) (district court authorized to award attorney fees as a condition of purging contempt for failure to comply with an ED order); *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (upholding award of attorney fees as a condition of purging husband's contempt for failure to comply with an ED order).]

(3) A contemnor has been required to pay an award of attorney fees as a condition of purging contempt arising from enforcement of a provision in a separation agreement that was analogous to an ED award. [*GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (award of fees arising from an assignment in an

unincorporated separation agreement of car and related debt to wife, adopted in a consent judgment that ordered wife to specifically perform payment obligation to GMAC, was akin to a court awarding attorney fees through contempt proceedings for a spouse's failure to pay a marital debt arising out of an equitable distribution award, for which an award of attorney fees through the court's contempt power would be permitted); *see also Cox v. Cox*, 185 N.C.App. 158 (2007) (**unpublished**) (defendant ordered to pay attorney fees to wife who successfully brought contempt action for violation of a provision in a consent judgment that was "akin to one of equitable distribution").]

(4) For more on attorney fees in equitable distribution actions, both generally and in the context of contempt, *see Equitable Distribution Overview and Procedure*, Bench Book, Vol. 1, Chapter 6, Part 1.

d) Custody.

(1) Plaintiff properly ordered to pay attorney fees incurred by mother in defending frivolous proceeding for contempt of a custody order; award based on G.S. § 50-13.6 authorizing fees upon a finding that the supporting party had initiated a frivolous action or proceeding. [*Wiggins v. Bright*, 198 N.C.App. 692, 679 S.E.2d 874 (2009) (court noted fees also authorized under G.S. § 50–13.6 based on findings that defendant responded in good faith to the motion for contempt and did not have sufficient means to defray the costs and expenses of the matter).]

(2) Attorney fees allowed to father in a contempt proceeding for mother's violation of visitation provisions, even though mother not found in civil contempt because she had performed the required action, return of the children, by the time of the hearing. [*Ruth v. Ruth*, 158 N.C.App. 123, 579 S.E.2d 909 (2003) (fees recovered were those incurred by father in filing the motion to show cause and in the hearings related thereto); *Lafell v. Lafell*, 177 N.C.App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (attorney fees allowed to father in part for mother's criminal contempt for failure to comply with order allowing visitation and telephone contact).]

(3) For more on attorney fees in custody actions, both generally and in the context of contempt, *see Child Custody*, Bench Book, Chapter 4.

e) Alimony.

(1) The following cases have awarded attorney fees in a contempt proceeding involving alimony. [*Shumaker v. Shumaker*, 137 N.C.App. 72, 527 S.E.2d 55 (2000) (upholding an award of

fees when a defendant in contempt for failing to comply with a temporary alimony order); *see also Martin v. Martin*, 202 N.C.App. 372, 690 S.E.2d 767 (2010) (**unpublished**) (upholding order finding defendant in civil contempt for failure to pay alimony as ordered and requiring defendant to pay plaintiff's attorney fees incident to the contempt proceeding); *Hudson v. Hudson*, 193 N.C.App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (defendant properly found in civil contempt for his failure to comply with an alimony order that required payment of attorney fees).] *But see Blackburn v. Bugg*, __ N.C.App. __, 723 S.E.2d 585 (2012) (**unpublished**) (reversing an award of attorney fees against a defendant found in civil contempt for failure to pay alimony as ordered in a prior proceeding enforcing the parties' premarital agreement; appellate court finding there was no express statutory authority to support the trial court's award, nor did the case arise from a recognized exception to the general rule, namely, orders for child support or ED).]

(2) For more on attorney fees in alimony actions, both generally and in the context of contempt, *see Postseparation Support and Alimony*, Bench Book, Vol. 1, Chapter 2.

f) Separation agreements.

(1) An unincorporated separation agreement is enforceable and modifiable only under traditional contract principles [*Long v. Long*, 160 N.C.App. 664, 588 S.E.2d 1 (2003)], so an unincorporated separation agreement is not properly the subject of a contempt proceeding. [*But see GMAC v. Wright*, 154 N.C.App. 672, 573 S.E.2d 226 (2002) (if a party to an unincorporated separation agreement does not perform his or her obligations under the agreement, the other party may obtain a decree of specific performance of the separation agreement which is enforceable through contempt proceedings).]

(2) Attorney fees have been allowed in a contempt proceeding involving an incorporated separation agreement.

(a) Trial court correctly awarded plaintiff $2,200 in attorney fees after finding defendant in contempt for failure to comply with property settlement provisions in the parties' incorporated separation agreement. [*Michael v. Michael*, 198 N.C.App. 703, 681 S.E.2d 866 (2009) (**unpublished**) (separation agreement did not contain provision on attorney fees).]

(3) For more on attorney fees in spousal agreements, including unincorporated separation agreements that address attorney fees if enforcement of the agreement is required, *see Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

K. Appeal of a civil contempt order.

1. Appeal of a civil contempt order generally.

a) A person found in civil contempt may appeal the district court's order to the court of appeals by filing a notice of appeal within 30 days after the order is entered. [*See* G.S. § 5A-24 and G.S. § 7A-27(c); N.C. R. APP. P. 3(c)]

b) G.S. § 5A-24 allows an appeal only by a person found in civil contempt. It makes no provision for appeal when contempt is not found. However, at least one case has found an appeal by a plaintiff/appellant proper in a case finding defendant not in contempt. [*See Piedmont Equipment Co. v. Weant*, 30 N.C.App. 191, 226 S.E.2d 688 (1976) (prior contempt statute) (plaintiff/appellant entitled pursuant to G.S. § 1-277 to appeal the trial court's denial of civil contempt when the decision affected a substantial right of plaintiff/appellant and there was no other proceeding by which plaintiff could enforce its rights under the consent judgment other than the contempt proceeding for which review sought).]

c) Other cases have allowed the appeal of a person who unsuccessfully sought a civil contempt order without discussing the propriety of the appeal. [*See Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied, appeal dismissed*, 356 N.C. 297, 570 S.E.2d 504 (2002) (father appealed order that denied his motion to find mother in contempt of a custody order); *Forte v. Forte*, 65 N.C.App. 615, 309 S.E.2d 729 (1983) (ex-wife appealed an order declining to hold ex-husband in contempt for failure to make court-ordered child support payments).]

2. Standard of review.

a) In reviewing contempt proceedings, the appellate court is limited to determining whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law or judgment. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748_S.E.2d 709_(2013), *citing Shumaker v. Shumaker*, 137 N.C.App. 72, 527 S.E.2d 55 (2000) (civil contempt); *Ugochukwu v. Ugochukwu*, 176 N.C.App. 741, 627 S.E.2d 625 (2006) (citation omitted); *Campen (Featherstone) v. Featherstone*, 150 N.C.App. 692, 564 S.E.2d 616, *review denied, appeal dismissed*, 356 N.C. 297, 570 S.E.2d 504 (2002).]

b) Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. [*File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *citing State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853 (2007) (in reviewing a nonjury proceeding such as contempt, findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary); *Eakes v. Eakes,* 194 N.C.App. 303, 669

S.E.2d 891 (2008), *citing Hartsell v. Hartsell*, 99 N.C.App. 380, 393 S.E.2d 570 (1990).]

c) On appeal from order of civil contempt, conclusions of law are reviewed de novo. [*Wellons v. White v. Wellons*, __ N.C.App. __, 748 S.E.2d 709 (2013), *citing Tucker v. Tucker*, 197 N.C.App. 592, 679 S.E.2d 141 (2009).]

3. Motion or application to stay a contempt order during appeal of contempt order.

a) The general rule of appellate procedure is that a motion to stay any civil order is directed initially to the district court. [*See* N.C. R. App. P. 8(a)]

b) If the stay is denied by the trial court, a party may apply to the appellate court for a writ of supersedeas staying enforcement of the order.

4. Contempt order affects a substantial right.

a) Ordinarily an appeal lies only from a final judgment. [*See* G.S. § 7A-27(c) allowing appeal of a final judgment in district court to the court of appeals.] Appeal of a nonfinal, or interlocutory order, that affects a substantial right is allowed. [G.S. § 7A-27(d)(1)]

b) Even though the order may be interlocutory, appeal of a civil contempt affects a substantial right and is immediately appealable. [*Guerrier v. Guerrier*, 155 N.C.App. 154, 574 S.E.2d 69 (2002) (citations omitted) (appeal of any contempt order affects a substantial right and is immediately appealable); *Thompson v. Thompson*, __ N.C.App. __, 735 S.E.2d 214 (2012), *citing Guerrier* (appeal allowed of order finding defendant in civil contempt for failing to pay postseparation support even though PSS order itself was interlocutory and not appealable, even after defendant found in contempt of it); *Hamilton v. Johnson*, __ N.C.App. __, 747 S.E.2d 158 (2013), *citing Willis v. Duke Power*, 291 N.C. 19, 229 S.E.2d 191 (1976) (appeal of contempt order for failure to comply with a temporary child support order affected a substantial right); *Ross v. Ross*, 215 N.C.App. 546, 715 S.E.2d 859 (2011), *citing Guerrier*; *see also Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (finding that court of appeals could consider plaintiff's appeal of a contempt order, regardless of the fact that it provided for further proceedings, based on *Guerrier* statement that "any contempt order" is immediately appealable); *but see Anderson v. Lackey*, 166 N.C.App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (a contempt order does not affect a substantial right when the party is not at imminent risk of punishment, distinguishing *Guerrier* on the basis that the court in *Anderson* took under advisement the sanctions to be imposed for the mother's contempt).]

c) In *State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992), the court addressed whether an interlocutory appeal of a contempt order affected a substantial right. It found that defendant's appeal from a civil contempt order entered in a criminal nonsupport action, based on his refusal to undergo a court-ordered blood test in a paternity action, was immediately appealable because, if defendant refused to comply, he risked a fine or imprisonment, and if he complied, his challenge to the blood test would have been moot.

d) For a case addressing whether an order dismissing a motion for contempt affects a substantial right, *see Moore v. Moore*, __ N.C.App. __, 741 S.E.2d 513 (2013) (**unpublished) (**citations omitted) (appeal of an order dismissing a motion for criminal contempt does not affect a substantial right; appeal of an order dismissing defendant's motion for civil contempt did not affect a substantial right when defendant failed to show the possibility of inconsistent verdicts absent the appellate court's consideration of the appeal).]

e) G.S. § 50-19.1, *added by* 2013 N.C. Sess. Laws 411, § 2, effective August 23, 2013, providing for immediate appeal of certain actions when other claims are pending in the same action, does not appear to apply to contempt orders. Thus, the appealability of a contempt order is not affected by G.S. § 50-19.1.

5. An appeal of a contempt order generally precludes further action by the trial court in the contempt matter.

a) Generally an appeal of a contempt order precludes further action in the contempt matter. [G.S. § 1-294; *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (when defendant gave notice of appeal in open court of an order finding him in contempt for failing to produce income tax returns and a list of assets, the court lost jurisdiction to take further action on the contempt matter; order entered for defendant's imprisonment for failure to satisfy purge condition and imposing sanctions on defendant was void); *Guerrier v. Guerrier*, 155 N.C.App. 154, 159, n.4, 574 S.E.2d 69 (2002) (appeal of an order finding father in contempt of an ED judgment for removing funds from childrens' investment accounts precluded the trial court from entering further orders on the matter, such as entering judgment for the amount of the funds removed or removing the father from acting as custodian of the accounts; enforcement order vacated on other grounds but court noted that unlike child support, child custody, and alimony, no statute provided that an equitable distribution order remains enforceable pending appeal).]

b) A trial court lacks jurisdiction to consider contempt of a contempt order from which an appeal has been taken. [*See Marshall v. Marshall*, __ N.C.App. __, 757 S.E.2d 319 (2014), *citing Webb v. Webb*, 50 N.C.App. 677, 274 S.E.2d 888 (1981) and G.S. § 1-294 (trial court lacked jurisdiction to enter contempt order #2 in October 2012, finding defendant

in contempt of contempt order #1 entered in August 2012, when defendant had taken an appeal of contempt order #1 in September 2012).]

L. Enforcement of an order by contempt after appeal of the order is filed.

1. Generally a perfected appeal stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein. [G.S. § 1-294; *see Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981) (noting as "well settled" that an appeal, even of an appealable interlocutory order, operates as a stay of all proceedings relating to issues included therein until the matters are determined on appeal; further noting jurisdiction of the trial court is divested from the date that notice of appeal was given).]

2. Thus, a party generally may not be found in civil contempt of an order while an appeal of the order is pending, subject to exceptions set out below in section L.3.

a) A party generally may not be held in contempt for "violating the very order then being questioned on appeal." [*Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (citation omitted); *see also Wilson v. Wilson*, 124 N.C.App. 371, 477 S.E.2d 254 (1996) (appeal of an order ordering nonparty to appear at a deposition divested the trial court of jurisdiction, pending the appeal, to find the nonparty in contempt of that order); *McKyer v. McKyer*, 184 N.C.App. 188, 645 S.E.2d 902 (2007) (**unpublished**) (husband's notice of appeal, from an order denying his motion to vacate an award of attorney fees to former wife, divested the trial court of jurisdiction to hold a contempt hearing and to find husband in contempt for failing to pay wife's attorney fees).]

b) Even though a party generally cannot be held in contempt of an order pending appeal of the order, the Supreme Court has cautioned parties that there may be consequences for violation of an order pending appeal. In *Joyner v. Joyner*, 256 N.C. 588, 124 S.E.2d 724 (1962), the court noted that while an appeal stays contempt proceedings until the validity of the judgment is determined, taking an appeal "does not authorize a violation of the order" and further, that a party "who wilfully violates an order does so at his peril" because, if the order is upheld, a violation "may be inquired into" upon remand.

3. However, by statute, certain orders are enforceable by contempt pending appeal.

a) Order for child support.

(1) Notwithstanding G.S. § 1-294, a child support order is enforceable in the trial court by civil contempt pending an appeal of the child support order. [G.S. § 50-13.4(f)(9)] The original order, and the finding of contempt based on a violation of that

order, may be enforced pending appeal. [*See Guerrier v. Guerrier*, 155 N.C.App. 154, 574 S.E.2d 69 (2002) (G.S. § 50-13.4(f)(9) is an exception to G.S. § 1-294 and allows enforcement of orders for the payment of child support pending appeal including any sanctions entered pursuant to an order of civil contempt; appeal of an order finding defendant in contempt for failure to pay child support did not divest the court of jurisdiction to enter an enforcement order sanctioning defendant $100 for failure to comply with purge condition that required payment of past child support and medical expenses).]

(2) When the trial court enters an order of contempt while the child support order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for child support until the appeal is decided, if justice requires. [G.S. § 50-13.4(f)(9); N.C. R. App. P. 23]

b) Order for alimony.

(1) Notwithstanding G.S. § 1-294 and G.S. § 1-289, an order for the periodic payment of alimony is enforceable in the trial court by civil contempt pending an appeal of the order. [G.S. § 50-16.7(j); *see Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (reading G.S. § 1-294 and G.S. § 50-16.7(j) together, the trial court had jurisdiction to issue a show cause order and subsequent criminal contempt order for defendant's failure to appear at the hearing on the show cause order).]

(2) G.S. § 50-16.7(j) does not appear to apply to an award of postseparation support, at least not after entry of an award for alimony. [*See Harris v. Harris*, 173 N.C.App. 232, 617 S.E.2d 723 (2005) (**unpublished**) (without considering application of G.S. § 50-16.7(j), appeal from an order awarding wife alimony divested the trial court of jurisdiction to consider wife's motion for civil contempt for failure to pay postseparation support while the alimony order was on appeal because alimony award affected postseparation support; also holding that the PSS order did not continue in force during appeal of alimony award).]

(3) When the trial court enters an order of contempt while the alimony order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for alimony until the appeal is decided, if justice requires. [G.S. § 50-16.7(j); N.C. R. App. P. 23]

c) Custody order.

(1) Notwithstanding G.S. § 1-294, an order for custody or visitation is enforceable by civil contempt pending an appeal of the order. [G.S. § 50-13.3(a)]

(2) When the trial court enters an order of contempt while the custody order is on appeal, the appellate court in which the appeal is pending may stay any order for civil contempt entered for child custody until the appeal is decided, if justice requires. [G.S. § 50-13.3(a); N.C. R. App. P. 23]

d) ED order. There is no statutory provision allowing enforcement of an order for equitable distribution by civil contempt pending an appeal of the ED order. [*See Guerrier v. Guerrier*, 155 N.C.App. 154, 159 n.4, 574 S.E.2d 69 (2002) (trial court would have been without jurisdiction to enforce an ED judgment by civil contempt pending appeal because, unlike child support, child custody, and alimony, no statute provides that an equitable distribution order remains enforceable pending appeal).]

4. Also, matters not affected by the judgment appealed from are not stayed by an appeal.

a) The general rule is that appeal of any matter only divests the court of jurisdiction in matters "affected by the judgment appealed." [G.S. § 1-294]

b) Therefore a trial court may consider contempt, or enforce an order for contempt, if the matter appealed is unrelated to the contempt. [*See Johns v. Johns*, 195 N.C.App. 325, 672 S.E.2d 782 (2009) (**unpublished**) (appeal of order dismissing husband's various motions in a domestic case, did not divest the trial court of jurisdiction to issue order for arrest after the appeal to enforce contempt order for husband's failure to pay wife's attorney fees, because contempt order/purge condition not affected by appeal of the order dismissing husband's motions).]

5. Appeal of a nonappealable interlocutory order does not deprive the trial court of jurisdiction over the proceeding.

a) When the order being appealed from is interlocutory but does not affect a substantial right or is otherwise not appealable, the trial court has jurisdiction to, and can properly, hold a party in contempt for violating the order. [*Onslow County v. Moore*, 129 N.C.App. 376, 499 S.E.2d 780, *review denied*, 349 N.C. 361, 525 S.E.2d 543 (1998) (when order issuing a preliminary injunction was interlocutory and did not affect a substantial right, trial court could find defendant in contempt for violating the injunction after appeal of the order issuing the injunction); *see also Whitaker v. Whitaker*, 181 N.C.App. 609, 640 S.E.2d 446 (2007) (**unpublished**), *review denied*, 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied*, 361 N.C. 370, 662 S.E.2d 552 (2008) (when plaintiff's appeal of an order was interlocutory and the order was neither certified as a final judgment for appeal nor affected a substantial right, the trial court could properly hold plaintiff in contempt for violations of that order).]

III. Criminal Contempt

A. When used.

1. The nature of the proceeding does not determine whether contempt is civil or criminal. Both civil and criminal contempt are available in both civil and criminal proceedings.

a) A defendant may be charged criminally but be in civil contempt. [*See State v. Mauney*, 106 N.C.App. 26, 415 S.E.2d 208 (1992) (defendant charged with criminal nonsupport found in civil contempt for failing to comply with an order for blood testing).]

b) A person may be held in criminal contempt for willfully failing to comply with an order entered in a civil proceeding. [*See* G.S. § 50-13.4(f)(9) (child support); G.S. § 50-13.3(a) (custody); G.S. § 50-16.7(j) (alimony).]

B. Not a criminal conviction.

1. For a case holding that a 1994 criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury, *see State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (decided before 2009 amendment to G.S. § 5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).

C. Grounds for criminal contempt. [G.S. § 5A-11]

1. G.S. § 5A-11 sets out the following exclusive grounds for criminal contempt:

a) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings. [G.S. § 5A-11(a)(1)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Lawyer's conduct in failing to turn off cell phone upon entering courtroom, which phone later audibly rang and interrupted proceedings, was irresponsible but not willful. [*State v. Phair,* 193 N.C.App. 591, 668 S.E.2d 110 (2008) (contempt order reversed; lawyer's conduct was "certainly irresponsible" but not willful; G.S. § 5A-11(a)(2) also cited as basis for contempt).]

(3) Lawyer's conduct in soliciting a third person to disrupt the criminal trial of his client, by standing up and protesting the judge's rulings, was willful and interrupted court proceedings. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C.

673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988) (contempt order affirmed).]

b) Willful behavior committed during the sitting of a court in its immediate view and presence and tending to impair the respect due its authority. [G.S. § 5A-11(a)(2)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) A spectator's refusal to rise while court was adjourning, after being asked to rise and when capable of doing so, is sufficient grounds for contempt under this section or G.S. § 5A-11(a)(1). [*State v. Randell,* 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing order of contempt when defendant was not accorded a summary hearing before being found guilty of contempt).]

(3) Attorney, who was not attorney of record but rather was an interloper, correctly found in direct criminal contempt for refusing to sit down after direct order to do so, refusing to be quiet after direct order to do so, repeatedly interrupting the judge by speaking over his voice, disputing court proceedings and encouraging the criminal defendant to do the same, and pandering to the audience. [*In re Nakell*, 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied,* 330 N.C. 851, 413 S.E.2d 556 (1992) (attorney's conduct precipitated a violent outburst from the criminal defendant, applause from his supporters in the courtroom, and resulted in removal of the criminal defendant from the courtroom).]

(4) Attorney's refusal to sit down and be quiet when repeatedly told to do so by the trial court, attorney's repeated attempts to address the trial court concerning his client although a different matter had been called for hearing, and attorney's "basically shouting" at the court after being warned, constituted direct contempt. Attorney held in contempt a second time for continuing to address the trial court even after being taken into custody. [*In re Brown,* 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**) (noting that attorney's refusal to sit down when ordered to do so, standing alone, constituted contempt of court).]

(5) Pro se defendant, who disobeyed a direct order not to make statements about the prosecutor's veracity, properly found in contempt under G.S. § 5A-11(a)(2) and (3). [*State v. Williams,* 188 N.C.App. 848, 656 S.E.2d 736 (2008) (**unpublished**).]

(6) Lawyer's response, after being advised that the court could not hear lawyer's motion and ordering lawyer to appear the following morning, "[i]f you wanted to hear my case, you should have heard my case today," was, along with other conduct, disrespectful and contemptuous. [*State v. Lambert,* 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (contempt reversed when court did not give lawyer a summary opportunity to respond).]

(7) Defendant found in contempt for violating the spirit of a court order when defendant nonlawyer attempted to represent a corporation's owner in court proceedings after being ordered not to act in a representative capacity for the corporation. [*State v. Gell,* 151 N.C.App. 599 (2002) (**unpublished**).]

c) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution. [G.S. § 5A-11(a)(3)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Plaintiff's failure to appear at two court hearings, if contempt at all, constituted criminal contempt. [*O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (without deciding whether failure to appear constituted direct or indirect contempt, the court noted that it was clear that the purpose of the contempt judgments was to punish plaintiff's disobedience of the court's orders rather than to provide a remedy for defendant).]

(3) A person can be in contempt pursuant to G.S. § 5A-11(a)(3) even though a formal written order was never entered and filed with the clerk of court. [*See State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853, *review denied,* 361 N.C. 702, 653 S.E.2d 158 (2007) (defendant in indirect criminal contempt of court for visiting the office of the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area; the relevant "process, order, directive, or instruction" does not have to be a formal written order; noting, however, that the better practice is to put an instruction or directive in writing, especially if the order is to remain effective after the completion of the proceeding or matter then before the court).]

(4) An exchange between a judge and an attorney, occurring at the conclusion of a voir dire hearing, constituted a directive or instruction of the court, which the attorney disobeyed at a later criminal trial, by asking a question that was clearly impermissible

under the Rape Shield Statute. [*State v. Okwara* __ N.C.App. __, 733 S.E.2d 576 (2012) (criminal contempt and censure affirmed).]

(5) Mother in criminal contempt under this section for interfering with a court order allowing father temporary visitation with their child. [*File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009).]

(6) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox,* 92 N.C.App. 702, 376 S.E.2d 13 (1989) (appearance of defendant's counsel was not sufficient to satisfy the order as defendant was personally ordered to appear; contempt order reversed because due process required that defendant be given a hearing and required that facts be established by a reasonable doubt).] Failure to appear pursuant to a show cause order may also constitute contempt under G.S. § 5A-11(a)(7).

(7) Defendant in indirect criminal contempt for calling a witness and encouraging her not to obey a subpoena issued by the court. [*State v. Wall,* 49 N.C.App. 678, 272 S.E.2d 152 (1980).]

(8) Defendant in indirect criminal contempt when he filed suit in South Carolina to accomplish an action, payment to him of a commission, that a North Carolina court had by order denied. [*Osmar v. Crosland-Osmar, Inc.,* 43 N.C.App. 721, 259 S.E.2d 771 (1979), *cert denied,* 299 N.C. 331, 265 S.E.2d 397 (1980).]

d) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified. [G.S. § 5A-11(a)(4)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Testimony that is obviously false or evasive is equivalent to a refusal to testify within the intent and meaning of criminal and civil contempt statutes. [*Galyon v. Stutts,* 241 N.C. 120, 84 S.E.2d 822 (1954) (earlier version of G.S. § 5A-11(a)(4)).]

(3) Reporter's refusal to answer a prosecutor's questions, when she had notice that the trial court had rejected another reporter's claim of privilege and after being warned that her failure to answer would subject her to contempt sanctions, was a willful and deliberate act constituting direct contempt. [*In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999).] NOTE: case decided before G.S. § 8-

53.11 was passed, codifying a qualified privilege of journalists against disclosure of confidential or nonconfidential information obtained while acting as a journalist. [*See* 1999 N.C. Sess. Laws 267, § 1, effective October 1, 1999.]

(4) A minister duly subpoenaed and called to the stand, who willfully and unlawfully refused to be sworn and to testify on religious grounds, was properly found in direct contempt and punished summarily, even though he sincerely believed it was his moral duty as a Christian minister to refuse to testify. [*In re Williams*, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967) (statute then in effect on communications between clergymen and communicants, G.S. § 8-53.1, did not justify minister's refusal to testify because the communicant did not object to the testimony, which was required at the time to evoke the privilege).] NOTE: case decided before G.S. § 8-53.1 (now G.S. § 8-53.2) was amended, removing the requirement that the communicant object to the testimony of the clergyman to evoke the privilege. [*See* 1967 N.C. Sess. Laws 794, effective June 15, 1967.]

e) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court. [G.S. § 5A-11(a)(5)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may be imposed without finding that the act or omission was willfully contemptuous and without clearly warning the individual that the conduct is improper. [G.S. § 5A-12(b)]

(2) No person may be held in contempt under G.S. § 5A-11 on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice. [G.S. § 5A-11(b)]

(3) A court shall not issue any rule or order prohibiting or restricting the publication or broadcast of matters occurring in open court in any hearing, trial, or other proceeding, civil or criminal. [G.S. § 5A-11(c); G.S. § 7A-276.1]

(4) A court may not seal or restrict the publication or broadcast of the contents of any public record required to be open to public inspection. [G.S. § 5A-11(c); G.S. § 7A-276.1]

f) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction. [G.S. § 5A-11(a)(6)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) Gross negligence implies "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576 (2012), *quoting State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (determination that defense attorney's violation of the Rape Shield Statute was willful and grossly negligent affirmed; gross negligence was based on attorney's "failure to perform her duties as an officer of the court in an official transaction" arising from impermissible questioning of the alleged victim).]

g) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court. [G.S. § 5A-11(a)(7)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) "Grossly negligent," for purposes of criminal culpability, implies recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others. [*State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987).]

(3) "Substantial interference" means that degree of interference with the court's business that is real, and not momentary or illusory. It also has been described as "wilful disobedience, resistance to, or interference with the court's lawful process, order, direction or instructions or its execution." [*State v. Key,* 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (citation omitted) (rejecting argument that there was no interference because the court was able to transact other business).]

(4) Both willfulness or gross negligence and evidence of substantial interference with court business must be established. [*See State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (reversing contempt for lack of evidence on both elements; no

evidence that wife's arrival one hour after criminal proceedings against her husband began was willful or negligent but rather was related to transportation failure; nor was there any evidence that wife's tardiness resulted in substantial interference with the business of the court when trial had just started and wife was expected to testify for the defense).]

(5) Attorney properly held in contempt for failure to appear at his client's hearing on an absconder violation and for abandonment of his client by leaving the courthouse. Attorney's actions unnecessarily resulted in the court, its staff and its officers expending significant time and effort in an attempt to resolve the case over a two day period. These actions substantially interfered with the court's business. [*State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).]

(6) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (appearance of defendant's counsel was not sufficient to satisfy the order as defendant was personally ordered to appear; contempt order reversed because due process required that defendant be given a hearing and required that facts be established by a reasonable doubt); *State v. Nwanguma*, __ N.C.App. __, 754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (a party's failure to appear for trial as ordered was indirect criminal contempt); *cf. State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (expressly declining to rule on the question but assuming that attorney was in direct criminal contempt after returning to the courtroom eighteen minutes late from a lunch break).] Failure to appear pursuant to a show cause order may also constitute contempt under G.S. § 5A-11(a)(3).

(7) A trial court was authorized to find contempt under G.S. § 5A-11(a)(7), but instead struck defendant's answer as a sanction, when parties advised the court of a settlement but defendants failed to execute settlement documents. Defendants' failure to complete settlement violated court-wide rule regarding calendaring and settlement of cases. [*Lomax v. Shaw*, 101 N.C.App. 560, 400 S.E.2d 97 (1991).]

h) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses. [G.S. § 5A-11(a)(8)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission

was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

i) Willful communication with a juror in an improper attempt to influence his deliberations. [G.S. § 5A-11(a)(9)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may be imposed **without** finding that the act or omission was willfully contemptuous and **without** clearly warning the individual that the conduct is improper. [G.S. § 5A-12(b)]

(2) A person held in criminal contempt under this section may, for the same conduct, be found guilty of a violation of G.S. § 14.225.1 [picketing or parading with intent to influence, among others, a juror], but the person must be given credit for any imprisonment resulting from the contempt. [G.S. § 5A-12(e)]

j) Willful refusal by a defendant to comply with a condition of probation. [G.S. § 5A-11(a)(9a); *see also* G.S. § 15A-534 (a willful violation of a condition of probation is punishable by criminal contempt).]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

k) Any other act or omission specified elsewhere in the General Statutes as grounds for criminal contempt. [G.S. § 5A-11(a)(10)]

(1) Punishable by censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)] Punishment may not be imposed unless the act or omission was willfully contemptuous or was preceded by a clear warning by the court that the conduct is improper. [G.S. § 5A-12(b)]

(2) A partial listing of general statutes or rules providing for criminal contempt includes the following:

(a) A person served with criminal summons who willfully fails to appear may be punished for criminal contempt. [G.S. § 15A-303(e)(3)]

(b) Contempt authorized for violation of a TRO issued by a district court judge to prevent or enjoin criminal activity on or in the immediate vicinity of leased premises. [G.S. § 42-74]

(c) Civil or criminal contempt is authorized for violation of a civil no-contact order issued by a district court judge under the Workplace Violence Prevention Act. [G.S. § 95-269]

(d) An order for child custody or visitation is enforceable by civil contempt, and its disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-13.3(a)] This language has been interpreted as giving the trial court a choice as to whether it would treat the party's alleged disobedience as civil or criminal contempt. [*Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984).] For a case finding a parent in criminal contempt for willful violation of a custody order, *see Sloan v. Sloan*, 164 N.C.App. 190, 595 S.E.2d 228 (2004) (mother in criminal contempt for refusing to comply, on six occasions, with orders providing for telephonic visitation with child's grandparents).]

(e) An order for the periodic payment of child support or a child support judgment that provides for periodic payments is enforceable by proceedings for civil contempt, and disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-13.4(f)(9)]

(f) Any order for the payment of alimony or postseparation support is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt. [G.S. § 50-16.7(j)]

(g) UIFSA orders may be enforced by civil or criminal contempt. [G.S. § 52C-3-305(b)(5)]

(h) A violation of a 50B order is punishable by contempt. [G.S. § 50B-4(a)]

(i) A knowing violation of a civil no-contact order is punishable as contempt of court. [G.S. § 50C-10; *see Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __ N.C. __, 762 S.E.2d 207 (2014) (interpreting G.S. § 50C-10 as authorizing civil contempt for violation of a 50C order).]

(j) A presiding judge may maintain courtroom order through use of his civil or criminal contempt powers. [G.S. § 15A-1035]

(k) General Rule of Practice 6 for Superior and District Courts provides that conduct of counsel during arguments on motions heard by telephone conference may be subject to punishment as direct criminal contempt of court.

2. Willfulness required by G.S. § 5A-11.

a) "Willfulness" in G.S. § 5A-11 means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." The term has also been defined as "more than deliberation or

conscious choice; it also imports a bad faith disregard for authority and the law." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576, 582 n.4 (2012), *citing Phair* (standard of review is not abuse of discretion or plain error); *State v. Phair*, 193 N.C.App. 591, 668 S.E.2d 110 (2008) (citations omitted).]

b) The word willful when used in a criminal statute means that the act was "done purposely and deliberately in violation of law and without authority, justification, or excuse." [*State v. Chriscoe*, 85 N.C.App. 155, 354 S.E.2d 289 (1987); *State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**), *citing Chriscoe*).]

c) A failure to pay may be willful under G.S. § 5A-11 if a spouse voluntarily takes on additional financial obligations or divests self of assets or income after entry of a support order. [*Faught v. Faught*, 67 N.C.App. 37, 312 S.E.2d 504, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (citations to "well-established line of authority" omitted) (defendant's failure to pay alimony was willfull within the meaning of G.S. § 5A-11(a)(3) when, after the original alimony award, defendant obligated himself to pay for automobiles for himself, his adult daughter and his new wife, as well as other obligations for his new family).]

3. Gross negligence required by G.S. § 5A-11(a) (6) and (7).

a) Gross negligence implies "recklessness or carelessness that shows a thoughtless disregard of consequences or a heedless indifference to the rights of others." [*State v. Okwara*, __ N.C.App. __, 733 S.E.2d 576 (2012), *quoting State v. Chriscoe*, 85 N.C.App. 155, 354 S.E.2d 289 (1987) (determination that defense attorney's violation of the Rape Shield Statute was willful and grossly negligent affirmed; gross negligence was based on attorney's "failure to perform her duties as an officer of the court in an official transaction" as set out in G.S. § 5A-11(a) (6), arising from attorney's impermissible questioning of the alleged victim).]

D. When criminal contempt is not available.

1. Acts that, by statute, may not be the basis for criminal contempt.

a) No person may be held in contempt under G.S. § 5A-11 on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice. [G.S. § 5A-11(b)]

(1) Trial judge did not find attorney in contempt based on attorney's statements at a public rally that attorney believed that the prosecution of his client was racially motivated. Where the trial court considered the attorney's rally statements as relevant only to the issue of the attorney's motive or intent to solicit the third party, the trial court did not base its finding of contempt on evidence in violation of G.S. § 5A-11(b) or the attorney's constitutional rights. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319

N.C. 673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988) (record showed attorney found in contempt for soliciting a third person to disrupt his client's trial).]

b) Inability, failure, or refusal to pay the appointment fee for appointed counsel shall not be grounds for contempt. [G.S. § 7A-455.1(d)]

c) Citation issued by a law enforcement officer may not be enforced by contempt. [Official Commentary to G.S. § 15A-302]

2. Circumstances that, pursuant to case law, may not be the basis for criminal contempt.

a) *When the order to be enforced by contempt was made without, or in excess of, the court's jurisdiction.*

(1) Disobedience of an order made without, or in excess of, jurisdiction is not punishable as contempt. [*In re Smith,* 301 N.C. 621, 272 S.E.2d 834 (1981) (order requiring out-of-state attorney, who was never admitted to limited practice in North Carolina and was never attorney in the case, to appear was a nullity; attorney could not be held in criminal contempt for failure to appear); *cf. State v. Jordan,* __ N.C.App. __, 748 S.E.2d 775 (**unpublished**), *review denied,* __ N.C. __, 748 S.E.2d 325 (2013), *citing* 17 Am.Jur.2d Contempt § 127 (even though order requiring defendant to submit to competency examination may have been voidable for failing to comply with applicable statute, when order was issued by court having subject matter and personal jurisdiction, defendant required to obey order, regardless of the order's "ultimate validity"; defendant properly found in criminal contempt for failing to appear).]

b) *When the order to be enforced by contempt does not compel or prohibit the act complained of.*

(1) When defendant witness was not under any legal process, order or personal instruction by the judge to appear in court, defendant could not be held in criminal contempt for failure to appear. [*State v. Chriscoe,* 85 N.C.App. 155, 354 S.E.2d 289 (1987) (in the absence of an order to be present, defendant may not be held in contempt for violation of same).]

c) *When the order to be enforced lacks clarity as to what is intended.*

(1) Language in a temporary injunction prohibiting any person who was "not fully licensed" from, among other things, taking off or landing from an airport, was not sufficiently clear to provide the trial court with a basis for holding defendants in criminal contempt. [*Broadbent v. Allison,* 193 N.C.App. 454, 667 S.E.2d 342 (2008) (**unpublished**) (phrase "fully licensed" was ambiguous because pilots are issued "certificates" and not "licenses" and FAA

regs provided no fewer than six different levels of pilot certification).]

d) *When conduct complained of occurred solely after issuance of the show cause order.*

(1) Criminal contempt reversed when the findings supporting contempt were based solely on acts that occurred after issuance of the show cause orders. Reversal warranted even though the record contained evidence that defendant violated the order at issue, a TRO, before the show cause order was issued because the trial court failed to make the necessary findings beyond a reasonable doubt as to those facts. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008).]

E. Matters that have not precluded a finding of criminal contempt.

1. That the defendant sincerely believed that his contemptuous statements were truthful. [*State v. Williams*, 188 N.C.App. 848, 656 S.E.2d 736 (2008) (**unpublished**) (that defendant sincerely believed that his statements about the prosecutor being a liar were true was beside the point; regardless of their truth, the trial court repeatedly directed defendant not to make the statements, and defendant disobeyed that order).]

2. That the statements may be protected under the First Amendment. [*State v. Lambert*, 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (freedom of speech under the First Amendment is not absolute and yields to the compelling state interest of maintaining order, decorum and respect in the operations of its courts; lawyer's conduct and statements that court should have heard his matter that day was disrespectful and contemptuous and not protected speech).]

3. That a reporter believed that, in a criminal matter, she had a qualified privilege to refuse to testify under the First and Fourteenth Amendments. [*In re Owens*, 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999) (reporter's belief that refusal to testify was privileged was irrelevant).]

4. That court proceedings may not have actually begun for the day. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**) (irrelevant when the court was still in session for the week and moreover, the court was in the process of beginning the day's business when prospective jurors were waiting in two rooms for the start of voir dire).]

5. That defendant was not" technically" in violation of a court order. [*State v. Gell*, 151 N.C.App. 599 (2002) (**unpublished**) (defendant nonlawyer, who had been ordered not to act as the legal representative of a corporation, violated the spirit of the order when he filed documents and appeared in a representative capacity on behalf of the corporation's owners in other court proceedings).]

6. That the court's directive was oral and not written. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007) (defendant in indirect criminal contempt of court for visiting the office of

the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area).]

7. That the position espoused by the attorney was correct when the attorney was not the defendant's attorney of record. [*Nakell v. Attorney General of North Carolina,* 15 F.3d 319 (4th Cir.), *cert. denied,* 513 U.S. 866 (1994) (it was inappropriate for attorney to present arguments to the court, regardless of correctness, when attorney clearly understood that the court did not recognize him as defendant's counsel).]

8. That the alleged contemnor is in compliance on the date of the hearing. [*See Ruth v. Ruth,* 158 N.C.App. 123, 579 S.E.2d 909 (2003) (error for trial court to find mother in civil contempt for failing to return children after visitation when she had returned children to father before the contempt hearing); *Reynolds v. Reynolds,* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam on other grounds for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002) (father's payment of arrearages after contempt motion filed eliminated option of civil, but not criminal, contempt).]

F. Distinction between direct and indirect criminal contempt.

1. The distinction between direct and indirect criminal contempt is important because summary proceedings are available only for direct criminal contempt.

a) Because G.S. §5A-13(b) requires plenary proceedings for indirect criminal contempt, it would be reversible error to proceed summarily in the case of indirect criminal contempt.

b) Because proceedings for direct criminal contempt may be plenary or summary, direct contempt mislabeled as indirect has been found not to warrant reversal. [*See Adams Creek Associates v. Davis,* 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900, 901 (2008) (incorrectly identifying contempt as indirect when it was direct not reversible error).]

2. Direct criminal contempt.

a) Criminal contempt is direct when the act:

(1) Is committed within the sight or hearing of the presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court. [G.S. § 5A-13(a)]

b) G.S. § 5A-13(a) does not require that the presiding judicial official actually see or hear a defendant's act, only that it be committed "within the sight or hearing" of the official. [*State v. Jackson,* __ N.C.App. __, 752 S.E.2d 257 (2013) (**unpublished**) (even though the judge did not hear defendant use a racial epithet when she spoke to a deputy/bailiff,

defendant uttered the racial slur in the presence of the judge when defendant made the statement in open court during court proceedings).]

c) A judge may punish direct criminal contempt immediately in a summary proceeding, discussed in section III.G at page 67, or may defer punishment for a plenary proceeding, discussed in section III.H at page 72.

3. Indirect criminal contempt.

a) Indirect criminal contempt is any other criminal contempt. [G.S. §5A-13(b)] *See* section III.C at page 51 for list of conduct that is criminal contempt.

b) Indirect criminal contempt is punishable only after plenary proceedings. [G.S. §5A-13(b)] *See* section III.H at page 72.

4. Examples of direct criminal contempt.

a) Refusal to obey order of the court.

(1) A spectator's refusal to rise while court was adjourning, after being asked to rise and when capable of doing so, is sufficient grounds for direct criminal contempt. [*State v. Randell,* 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing order of contempt when defendant was not accorded a summary hearing before being found guilty of contempt).]

b) Disrespectful attitude or demeanor toward the court.

(1) Testimony by defendants that they would not comply with existing court orders requiring them to stay off certain real property, and that they would not follow future court orders directing them to vacate the property, constituted direct criminal contempt pursuant to G.S. § 5A-13(a)(1). Testimony was within sight and hearing of the presiding judge and was "disrespectful and disparaged the respect due to the court and its orders." [*Adams Creek Associates v. Davis*, 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved*, 362 N.C. 354, 662 S.E.2d 900, 901 (2008).]

(2) Attorney's response, after being advised that the court could not hear his motion and ordering attorney to appear the following morning, that "[i]f you wanted to hear my case, you should have heard my case today," along with other conduct, was disrespectful and constituted direct contempt. [*State v. Lambert,* 152 N.C.App. 719, 568 S.E.2d 337 (2002) (**unpublished**) (contempt reversed when court did not give attorney a summary opportunity to respond).]

(3) Attorney's refusal to sit down and be quiet when repeatedly told to do so by the trial court, attorney's repeated attempts to address the trial court concerning his client although a different matter had been called for hearing, and attorney's "basically

shouting" at the court after being warned, constituted direct contempt. Attorney in direct contempt a second time for continuing to address the trial court even after being taken into custody. [*In re Brown*, 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**) (noting that attorney's refusal to sit down when ordered to do so, standing alone, constituted contempt of court).]

c) Untruthful testimony before the court.

(1) Defendant's untruthful testimony after taking an oath at a probation revocation hearing, that a mandatory Saturday class prevented her from reporting for weekend detention, constituted direct criminal contempt. [*State v. Terry*, 149 N.C.App. 434, 562 S.E.2d 537 (2002).]

d) Interruption or interference with court proceedings.

(1) Defendant's use of a racial epithet when she spoke to a deputy/bailiff was disruptive when the judge, upon becoming aware of the statement, "immediately stopped the proceedings to address defendant's behavior." Judge also stated that basis for contempt was "disruption to the operation of court." [*State v. Jackson*, __ N.C.App. __, 752 S.E.2d 257 (2013) (**unpublished**).]

(2) Defendant's conduct, while engaged in a verbal dispute with his former probation officer, created a commotion in front of the courthouse during jury selection for a controversial trial. His conduct, which included the use of profanity, and yelling loudly immediately outside a window in the judge's chambers, constituted direct criminal contempt, even though court proceedings had not begun for the day. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**).]

(3) Defendant did not willfully interrupt or interfere with court proceedings when defendant had no knowledge that court proceedings were taking place. [*In re Hennis*, 276 N.C. 571, 173 S.E.2d 785 (1970) (per curiam) (defendant was silently picketing sixty-one feet from the windows of the courtroom and had no knowledge that court was in session or that his conduct was interfering with the court's regular conduct of business, nor had he been told to discontinue walking along sidewalks adjacent to courthouse wearing a placard; error to find him in direct contempt when his conduct could not be considered willful).]

(4) A defendant's willful intent to interfere with court proceedings can be inferred. [*State v. Evans*, 193 N.C.App. 455, 667 S.E.2d 340 (2008) (**unpublished**), *citing State v. Warren*, 313 N.C. 254, 328 S.E.2d 256 (1985).]

5. Examples of indirect criminal contempt.

a) Defendant was in indirect criminal contempt for visiting the office of the trial court administrator in violation of the trial court's oral directives to stay out of the judges' office area. [*State v. Simon,* 185 N.C.App. 247, 648 S.E.2d 853, *review denied,* 361 N.C. 702, 653 S.E.2d 158 (2007).]

b) Defendant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (contempt order reversed because due process required that defendant be given a hearing and that facts be established by a reasonable doubt); *State v. Nwanguma,* __ N.C.App. __,754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (failure to appear for trial as ordered was indirect criminal contempt).]

c) Defendant in indirect criminal contempt for calling a witness and encouraging her not to obey a subpoena issued by the court. [*State v. Wall,* 49 N.C.App. 678, 272 S.E.2d 152 (1980).]

d) Defendant in indirect criminal contempt under G.S. § 5A-11(a)(3) when he filed suit in South Carolina to accomplish an action, payment to him of a commission, that a North Carolina court had by order denied. [*Osmar v. Crosland-Osmar, Inc.,* 43 N.C.App. 721, 259 S.E.2d 771 (1979), *cert denied,* 299 N.C. 331, 265 S.E.2d 397 (1980).]

e) Defendant in indirect criminal contempt for willfully violating the court's order to comply with all inmate rules and regulations while in jail for direct criminal contempt. [*State v. Williams*, 200 N.C.App. 322, 683 S.E.2d 467 (2009) (**unpublished**) (defendant called the officer in charge of the jail an obscene name and used other profanity when referring to her after being denied certain personal items he had requested).]

6. The classification of tardiness or failure to appear in court as direct or indirect is not entirely clear. In light of the lack of clarity on the issue, it is the better practice to conduct a plenary hearing if faced with a tardy or absent contemnor.

a) The court of appeals has noted that the "willful absence of an attorney from a scheduled trial constitutes contempt of court, although disputes arise over whether it is direct or indirect contempt." [*In re Smith*, 45 N.C.App. 123, 263 S.E.2d 23 (1980), *rev'd on other grounds*, 301 N.C. 621, 272 S.E.2d 834 (1981) (citations omitted).]

b) One case has found that a litigant's failure to appear personally at a show cause hearing as ordered by the court in a show cause order was indirect criminal contempt. [*Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (classification of contempt as indirect was based on judge's lack of direct knowledge of facts that would establish that defendant's failure to appear was willful); *State v. Nwanguma*, __ N.C.App. __, 754 S.E.2d 257 (2014) (**unpublished**), *citing Cox* (failure to appear for trial as ordered was not an overt act that occurred in the trial court's presence).]

c) Other cases have decided the contempt issue in tardy or failure to appear cases on other grounds, such as notice or opportunity to respond, without classifying the conduct as direct or indirect contempt. [*See O'Briant v. O'Briant,* 313 N.C. 432, 329 S.E.2d 370 (1985) (court elected not to decide whether plaintiff's repeated failure to appear at custody hearings constituted direct or indirect contempt); *State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (attorney's failure to appear as counsel at his client's hearing constituted criminal contempt but court did not classify the failure to appear as direct or indirect); *Pierce v. Pierce*, 58 N.C.App. 815, 295 S.E.2d 247 (1982) (defendant punished summarily for being 25 minutes late for court; contempt order reversed for lack of notice/opportunity to respond; neither court addressed whether tardiness constituted direct or indirect criminal contempt).]

G. Summary proceedings for criminal contempt.

1. Generally.

a) Summary proceedings are available only for direct criminal contempt. [G.S. § 5A-13(a)] Summary proceedings may not be used for civil or indirect criminal contempt.

b) The Rules of Evidence, other than those with respect to privileges, do not apply to contempt proceedings in which the court is authorized by law to act summarily. [G.S. § 8C-1, Rule 1101(b)(4)]

c) A judicial official may chose not to proceed summarily against a person charged with direct criminal contempt but may instead proceed under G.S. § 5A-15 for plenary proceedings. [G.S. § 5A-13(a)]

d) If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of the official's intention to institute contempt proceedings. [G.S. § 5A-13(a)] The Official Commentary states that this sentence establishes the rule that a person be cited for contempt at the time the contempt occurs even if the proceedings are to be held later.

2. If conduct qualifies as direct criminal contempt under G.S. §§ 5A-11 and 5A-13(a), the trial judge may punish summarily when:

a) Necessary to restore order or maintain the dignity and authority of the court; **and**

b) Measures are imposed substantially contemporaneously with the contempt; **and**

c) The person charged with contempt is given summary notice of the charges **and** a summary opportunity to respond. [G.S. § 5A-14(a) and (b)]

3. Whether measures imposed are substantially contemporaneously with the contempt.

a) The term “substantially contemporaneously with the contempt” clearly does not require that the contempt proceeding immediately follow the misconduct. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

b) Factors bearing on whether the punishment imposed is substantially contemporaneous with the contempt include:

(1) Defendant's notice or knowledge of the misconduct;

(2) The nature of the misconduct; and

(3) Other circumstances that may have some bearing on the right of the defendant to a fair and timely hearing. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

c) A hearing on 16 November was a continuation and was "substantially contemporaneous" with events in court on 14 November that gave rise to the contempt charge. On the 14th, the judge gave the defendant attorney "specification of the contempt" and set a hearing on the 16th to further consider the matter and to afford attorney/contemnor adequate opportunity to respond to the direct criminal contempt charge. [*In re Nakell*, 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied*, 330 N.C. 851, 413 S.E.2d 556 (1992); *see also Nakell v. Attorney General of North Carolina*, 15 F.3d 319 (4th Cir.), *cert. denied*, 513 U.S. 866 (1994) (addressing the same hearing in the context of attorney/contemnor’s habeas petition, the 4th Circuit found no violation of due process arising from the delay of two days).]

d) Under the “particular circumstances” of the case, punishment imposed at a hearing held a day after the direct contempt occurred was substantially contemporaneous. The circumstances included that defendant was in court for a brief period for a bond hearing, not a trial; defendant was put on notice that his conduct was so disruptive that he lost his right to be present and was removed; defendant’s removal “infuriated” defendant, giving rise to a conclusion that further punishment that day could have further antagonized defendant and further delayed proceedings. [*State v. Johnson*, 52 N.C.App. 592, 279 S.E.2d 77, *review denied*, 303 N.C. 549, 281 S.E.2d 390 (1981).]

4. Summary notice of charge.

a) Before summarily imposing measures in response to direct criminal contempt, the judicial official must give the person charged with contempt summary notice of the charges. [G.S. § 5A-14(b); *see* Official Commentary to G.S. § 50-14 (following ABA recommendation that a person charged with contempt be given notice of what the contemptuous action was).]

b) Formal notice and a hearing are not required in summary proceedings. [*In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999).]

c) Written notice is not required when the trial court imposes measures substantially contemporaneously with the contempt as provided by G.S. § 5A-14(a). [*State v. Johnson,* 52 N.C.App. 592, 279 S.E.2d 77, *review denied,* 303 N.C. 549, 281 S.E.2d 390 (1981).]

d) Attorney given adequate notice of impending contempt charge, even though judge never specifically used the word "contempt," when the trial court repeatedly told attorney that he was "out of order" and asked him whether he wished to join his client in custody, directly warned contemnor that he was out of order and would be detained if he said one more word, and told contemnor to sit down and be quiet three times. [*In re Brown,* 181 N.C.App. 148, 639 S.E.2d 454 (2007) (**unpublished**).]

5. Summary opportunity to respond.

a) G.S. § 5A-14(b) requires the judicial official to provide a person summary notice of the charges and a summary opportunity to respond before imposing measures.

(1) A summary verbal notice that a person is charged with criminal contempt, and a description of the acts considered contemptuous, meet the requirements of the statute.

(2) A written order to appear and show cause is not required in a summary proceeding for direct contempt when the trial court imposes measures substantially contemporaneously with the contempt as provided by G.S. § 5A-14(a). [*State v. Johnson,* 52 N.C.App. 592, 279 S.E.2d 77, *review denied,* 303 N.C. 549, 281 S.E.2d 390 (1981).]

b) Since the statute guarantees a potential contemnor a chance to respond to the charge, a contempt order entered in a summary proceeding will be reversed if a contemnor was not given notice and an opportunity to respond. [*Peaches v. Payne,* 139 N.C.App. 580, 533 S.E.2d 851 (2000) (when court was immediately recessed after the judge advised an attorney that he was in the bailiff's custody for contempt, contempt finding reversed; attorney not given summary opportunity to respond); *Pierce v. Pierce,* 58 N.C.App. 815, 295 S.E.2d 247 (1982) (order for contempt reversed when defendant father, who had been punished summarily for being 25 minutes late for court without offering any excuse, was not given notice or an opportunity to respond as required in a summary proceeding); *In re Discipline of Sutton,* 205 N.C.App. 321, 697 S.E.2d 525 (2010) (**unpublished**) (error to find attorney in criminal contempt when attorney not afforded a real "opportunity to present reasons not to impose a sanction"; attorney had already been held in contempt before being taken into custody); *State v. Scott,* 178 N.C.App. 563, 631 S.E.2d 892 (2006)

(**unpublished**) (criminal contempt reversed when defendant not given summary notice and an opportunity to respond before being found in contempt for filing a frivolous motion for appropriate relief and/or for making false statements under oath at the evidentiary hearing on the motion).]

c) G.S. § 5A-14 does not require a hearing, or anything approaching a hearing, in summary contempt proceedings. Instead, the requirements of the statute are meant to ensure that the individual has an opportunity to point out instances of gross mistake. [*See* Official Comment to G.S. § 5A-14; *In re Owens*, 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam*, 350 N.C. 656, 517 S.E.2d 605 (1999) (statutory requirements met if individual has an opportunity to present reasons not to impose a sanction).]

d) While trial judges must have the ability to control their courts, judges must also be punctilious about following the statutory requirements because a finding of contempt against a practitioner may have significant repercussions for that lawyer. [*Peaches v. Payne*, 139 N.C.App. 580, 533 S.E.2d 851 (2000).]

e) The summary hearing must be held before the defendant is found guilty of contempt. An opportunity to explain, given after finding contempt, does not correct a failure to provide a summary opportunity to be heard. [*State v. Randell*, 152 N.C.App. 469, 567 S.E.2d 814 (2002) (per curiam) (reversing the contempt order even though defendant given "ample" opportunity afterwards to explain his actions); *In re Foster*, __ N.C.App. __, 744 S.E.2d 496 (2013) (**unpublished**) (criminal contempt, based on defendant attorney's repeated cursing in magistrate court reversed when defendant not given summary notice and a summary opportunity to respond; while magistrate twice warned defendant not to curse, magistrate did not warn defendant that she would be held in contempt if she continued to curse, did not specifically inform defendant about a possible contempt charge before holding defendant in direct criminal contempt, and did not give defendant an opportunity to provide reasons why contempt should not be imposed prior to being held in contempt).]

f) For sample summary notice language, *see* Appendix on page 90.

6. Custody of person charged with direct criminal contempt to be heard at a summary proceeding.

a) A judicial official may orally order that a person being charged with direct criminal contempt be taken into custody and restrained to the extent necessary to assure the person's presence for summary proceedings. [G.S. § 5A-16(a)]

7. No right to a jury trial. [*See* G.S. § 5A-14(a) authorizing judicial official to summarily impose measures in response to direct criminal contempt); *Int'l Union,*

United Mine Workers v. Bagwell, 512 U.S. 821, 827 n.2, 114 S.Ct. 2552 (1994) (direct contempts that occur in the court's presence may be immediately adjudged and sanctioned summarily).]

8. Standard of proof.

a) The facts in a summary proceeding for contempt must be established beyond a reasonable doubt. [G.S. § 5A-14(b)] *See* section 9.c below for case law regarding standard of proof.

9. Findings.

a) Before imposing punishment under G.S. § 5A-14, the judicial official must find facts supporting the summary imposition of punishment in response to contempt. [G.S. § 5A-14(b)]

b) The findings in a summary contempt proceeding should clearly reflect or include:

(1) That the contemnor was given an opportunity to be heard;

(2) A summary of whatever response was made;

(3) A finding that the excuse or explanation proffered was inadequate or disbelieved; and

(4) That the judicial official applied the reasonable doubt standard to the findings of fact. [*State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979).]

c) Case law on requirement of a finding as to the court's application of the reasonable doubt standard.

(1) Without a finding as to application of the reasonable doubt standard, the order will be reversed. [*In re Contempt Proceedings against Cogdell,* 183 N.C.App. 286, 644 S.E.2d 261 (2007) (order that failed to indicate that judge applied the "beyond a reasonable doubt" standard to judge's findings was fatally deficient); *State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979) (implicit in G.S. § 5A-14(b) is the requirement in a summary proceeding that the judicial official's findings should indicate that the reasonable doubt standard was applied to the findings of fact).]

(2) However, an order without a reasonable doubt finding has been upheld when there was no factual determination for the court to make. [*See In re Owens,* 128 N.C.App. 577, 496 S.E.2d 592 (1998), *aff'd per curiam,* 350 N.C. 656, 517 S.E.2d 605 (1999) (when it was clear that the court had considered the contemnor's excuse, the privilege of a reporter to refuse to testify, and had found it inadequate, an order lacking a reasonable doubt finding was upheld).]

(3) The implicit requirement in G.S. § 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable

doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004) (the import and consequences of the two hearings is substantially equivalent; holding an order of superior court, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied); *see also State v. Phillips*, __ N.C.App. __, 750 S.E.2d 43, *temporary stay allowed*, __ N.C. __, 751 S.E.2d 212 (2013), *review allowed, writ allowed*, __ N.C __, 755 S.E.2d 629 (2014), *citing Ford* and *State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (order for indirect criminal contempt reversed for failure to indicate application of "beyond a reasonable doubt" standard).] *See* section III.H.10 at page 78.

10. There is no right to counsel in a summary proceeding for direct contempt. [*In re Williams*, 269 N.C. 68, 152 S.E.2d 317, *cert. denied*, 388 U.S. 918 (1967) (summary punishment for direct contempt committed in the presence of the court does not contemplate a trial at which the person charged with contempt is represented by counsel).]

H. Plenary proceedings for criminal contempt.

1. Plenary criminal proceedings are used for all indirect contempts and can be used for direct contempt. [*See* G.S. § 5A-15(a) (when a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when a judicial official may not proceed summarily, the judicial official proceeds with a plenary proceeding).]

2. Procedure.

a) A judicial official initiates a plenary proceeding by issuing a show cause order directing a person to appear and show cause why he or she should not be held in criminal contempt. [G.S. § 5A-15(a); *Brandt v. Gooding*, 636 F.3d 124 (4th Cir. 2011) (criminal contempt proceedings are initiated at the sole discretion of the court; only the court can provide "real notice of the true nature of the charge" against the alleged contemnor).]

(1) Issuance of a show cause order requires the defendant to personally appear at the hearing or risk being found in contempt for failure to appear. [*See Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989) (defendant found in indirect criminal contempt for failure to appear; appearance of defendant's counsel not sufficient to satisfy a show cause order that specifically ordered defendant to appear).]

b) There is no requirement in Chapter 5A for application or motion by a party or other person nor is a finding of probable cause required.

(1) Although a party is not required to file a verified petition or affidavit as a prerequisite to the issuance of a show cause order for

criminal contempt, a verified motion or affidavit filed pursuant to a civil contempt proceeding under G.S. § 5A-23 may provide a proper basis for the issuance of a show cause order by a judicial official for criminal contempt under G.S. § 5A-15(a). [*See Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984) (husband's motion alleged sufficient facts to show wife's willful disobedience of order setting out husband's visitation rights).]

c) Venue lies throughout the judicial district where the show cause order was issued. [G.S. § 5A-15(b)]

d) A person ordered to show cause may move to dismiss the order. [G.S. § 5A-15(c)]

3. Right to notice and a hearing.

a) A copy of the show cause order must be furnished to the person charged and must direct the person to appear before a judge at a reasonable time specified in the order and show cause why the person should not be held in contempt. [G.S. § 5A-15(a)]

(1) Service under G.S. § 1A-1, Rule 4, is sufficient.

(2) When the show cause order is issued in a pending civil case, where Rule 4 service of process has been accomplished on the defendant, Rule 5 of the Rules of Civil Procedure appears to allow the show cause order to be served on a party pursuant to Rule 5. Rule 5 allows service by regular mail.

b) For notice to be constitutionally sufficient, it must afford a defendant the opportunity to prepare an adequate defense. [*O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985) (noting that under U.S. Supreme Court precedent, even in instances of direct contempt where the trial court postpones announcing punishment for contemptuous behavior that occurred during a trial, the contemnor "should have reasonable notice of the *specific charges* and opportunity to be heard in his own behalf"); *State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing O'Briant* (for indirect criminal contempt proceedings in which a trial court is not allowed to proceed summarily, a show cause order is akin to a criminal indictment and is the process by which a defendant is afforded notice).]

c) The show cause order must provide adequate notice of the grounds for the alleged contempt. In *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985), the court vacated a 1983 adjudication of criminal contempt when plaintiff not given sufficient notice that she should be prepared to defend herself on contempt charges arising from failure to attend custody hearings in early to mid-1982.

(1) Evidence did not establish that plaintiff received an order to appear and show cause at a hearing in 1983 why she should not be held in contempt for failing to appear at hearings in 1982. Even if

received, order did not provide adequate notice of contempt charges arising from failure to appear at the 1982 hearings when notice stated only that the hearing would be "a trial on the merits upon all outstanding issues" and "all outstanding motions pending."

(2) The 1982 show cause orders were not specific about which of plaintiff's acts were alleged to be contemptuous, i.e., her failure to appear or her failure to comply with an order allowing visitation and telephone contact. Even if 1982 show cause orders gave notice of contempt charges based on failure to appear, they did not provide adequate notice of the contempt charges to be heard in 1983. [*O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985).]

d) Reasonable time requirement in G.S. § 5A-15(a).

(1) Eighteen hours was sufficient notice for defendant to appear and answer a charge of indirect criminal contempt when defendant had an opportunity to seek counsel but voluntarily waived his right to do so, the charges against defendant were neither complex nor lengthy, and the show cause order described defendant's contemptuous acts. [*State v. Williams,* 200 N.C.App. 322, 683 S.E.2d 467 (2009) (**unpublished**).]

e) A defendant, given notice of the charges and the assistance of appointed counsel, who elected not to present evidence on his own behalf, did not take advantage of his opportunity to be heard and cannot complain of improper notice and inadequate opportunity to be heard. [*State v. Gell,* 151 N.C.App. 599 (2002) (**unpublished**).]

4. Special provisions involving direct contempt to be heard at a plenary proceeding.

a) If a judicial official defers a proceeding for direct contempt, he or she must, immediately following the alleged contemptuous act, inform the person of the judicial official's intent to institute a plenary proceeding for direct contempt. [G.S. § 5A-13(a)]

b) A judicial official may orally order that a person being charged with direct criminal contempt be taken into custody and restrained to the extent necessary to assure the person's presence for notice of plenary proceedings. [G.S. § 5A-16(a)]

5. Order for arrest of a person charged with criminal contempt to be heard at a plenary proceeding.

a) In a proceeding for criminal contempt, the court may order a person's arrest if the court finds, based on a sworn statement or affidavit, probable cause to believe that the person will not appear in response to the show cause order. [G.S. § 5A-16(b); G.S. § 15A-305(b)(9); *see also Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984) (court had

power to have plaintiff wife arrested and held until she posted bail to assure her appearance).] An order for arrest has been reversed when the court failed to make a probable cause finding that plaintiff would not appear. [*See Mather v. Mather*, 70 N.C.App. 106, 318 S.E.2d 548 (1984).]

b) If a court issues an order for arrest and the person is not brought before a judge for hearing in the contempt proceeding immediately following arrest, he or she must be released from jail pending the contempt hearing upon posting an appearance bond or satisfying other pre-trial release requirements pursuant to G.S. § 15A-534. [*See* G.S. § 5A-16(b)]

c) An order for arrest may be issued when a defendant fails to appear as required by a show cause order issued in a criminal proceeding. [G.S. § 15A-305(b)(9)]

d) If a person fails to appear at a contempt hearing after being released from custody following arrest, the person's appearance bond may be forfeited for the benefit of the public schools but may not be applied to satisfy amounts the person owes. [*See Mussallam v. Mussallam,* 321 N.C. 504, 364 S.E.2d 364 (1988) (discussing distinction between appearance bond and compliance bond in contempt proceeding relating to civil action for child custody); N.C. CONST. art. IX, § 7; G.S. § 115C-452 (codification of constitutional provision); G.S. § 15A-544.7(c)(1) (providing for clear proceeds to go to county finance officer for benefit of the public schools).]

6. No right to a jury trial.

a) There is no constitutional right to a jury trial of criminal contempt. [*Blue Jeans Corp. v. Amalgamated Clothing Workers,* 275 N.C. 503, 169 S.E.2d 867 (1969) (no constitutional right to a jury trial when the prescribed punishment is imprisonment for less than six months or a fine of less than $500; punishment for criminal contempt at the time was a fine of $250 or imprisonment for thirty days, or both); *see also Bloom v. Illinois,* 391 U.S. 194, 20 L.Ed.2d 522 (1968) (criminal contempt conviction in a nonjury trial could not be sustained when a twenty-four month prison sentence imposed).] [*But cf. Int'l Union, United Mine Workers v. Bagwell,* 512 U.S. 821, 114 S.Ct. 2552 (1994) (serious noncompensatory contempt fines were criminal and constitutionally could not be imposed absent a jury trial).]

b) The judge is the trier of facts at the criminal contempt hearing. [G.S. § 5A-15(d)]

c) When a trial judge sits as "both judge and juror" in a non-jury proceeding, the judge has the duty to weigh and consider all competent evidence, and pass upon the credibility of witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom.

[*In re Paul,* 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied,* 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied,* 484 U.S. 1004 (1988).]

d) For a paper raising questions about a right to a jury trial based on amendments to G.S. § 5A-12 allowing imprisonment for up to six months, *see* Michael Crowell, Civil Contempt, presented at the Superior Court Judges Summer 2008 Conference and available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/CivilContempt.pdf.

e) For a case holding that a 1994 criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury, *see State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (decided before 2009 amendment to G.S. §5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).

7. Right against self-incrimination.

a) The person charged with contempt may not be compelled to be a witness against himself at the hearing. [G.S. § 5A-15(e)] Thus, a person who asserts the privilege upon a reasonable belief that his answer could be used against him in a criminal prosecution cannot be held in criminal contempt for the refusal to answer. [*See In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994).]

b) An order holding a defense witness in a murder case in criminal contempt for refusal to answer two questions on cross examination, when the witness had a charge of first degree murder pending against him in a related case, infringed on the witness' privilege against self-incrimination. Criminal contempt order reversed. [*In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994) (applying a liberal interpretation to the privilege and concluding that it was reasonable for witness to believe that his answers to both questions could be used against him in a criminal prosecution).]

c) Although a witness is entitled to assert the privilege, the trial court may, in its discretion, strike the witness' direct testimony "in whole or in part" when the witness invokes the privilege on cross-examination in response to questions relating to the details of the witness' direct examination. [*In re Jones*, 116 N.C.App. 695, 449 S.E.2d 221 (1994).]

8. Appointment of a prosecutor or member of the bar to represent the court.

a) The judge conducting the plenary proceeding may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar, to represent the court in hearings for criminal contempt. [G.S. § 5A-15(g)]

9. Recusal of judge if judge's objectivity may reasonably be questioned.

a) If the criminal contempt is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order must be returned before a different judge. [G.S. § 5A-15(a); *In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008) (citation omitted) (in connection with a criminal contempt hearing, stating that since one purpose behind the statute is to maintain public confidence in the courts, even the appearance of a lack of objectivity must be avoided); *see also Caperton v. A.T. Massey Coal Co., Inc,* 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009) (identifying criminal contempt proceedings as one of the situations that may require recusal under the Due Process Clause).]

b) It can be error not to have criminal contempt heard before a different judge even when the respondent fails to make such a motion. [*See In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008) (vacating a judgment holding attorney in contempt because show cause order was not returned before a different judge, even though attorney had not made such a request).]

c) G.S. § 5A-15 neither expressly nor impliedly places any responsibility on a respondent to file a motion for recusal. Rather G.S. § 5A-15(a) imposes a duty on the judge to acknowledge that the judge's involvement in the acts allegedly constituting the contempt could reasonably cause others to question the judge's objectivity and, in such circumstance, to return the show cause order before a different judge *ex mero motu*. [*In re Marshall,* 191 N.C.App. 53, 662 S.E.2d 5 (2008).]

d) Fact that judge presiding at a summary proceeding requested affidavits from court personnel who witnessed conduct of the attorney charged with direct criminal contempt, and that judge gave an interview to a newspaper reporter regarding the contempt charges, did not constitute personal bias that would require the judge's recusal nor did it render the contempt proceeding unfair. [*Nakell v. Attorney General of North Carolina,* 15 F.3d 319 (4th Cir.), *cert. denied,* 513 U.S. 866 (1994) (agreeing, however, with the district court that the trial judge's actions were "not a wise judicial activity"); *accord In re Nakell,* 104 N.C.App. 638, 411 S.E.2d 159 (1991), *appeal dismissed, disc. review denied, stay dissolved,* 330 N.C. 851, 413 S.E.2d 556 (1992) (record showed no bias, prejudice, or proof that would require judge before whom the contempt was committed to recuse himself from conducting the hearing).]

e) The recusal language speaks to direct criminal contempt. No statute addresses recusal in the context of an indirect criminal contempt or civil contempt. While G.S. § 5A-15(a) does not address the return of the show cause order before a different judge in those contexts, other authority may make it appropriate to do so. [*See* Code of Judicial Conduct Canon 3C(1), which provides that "[o]n motion of any party, a judge should disqualify himself/herself in a proceeding in which the judge's impartiality may reasonably be questioned."

f) For more on disqualification, *see North Carolina Code of Judicial Conduct*, Bench Book, Vol. 2, Chapter 1.

10. Standard of proof.

a) Facts supporting a finding that a person is guilty of criminal contempt must be established beyond a reasonable doubt. [G.S. § 5A-15(f)]

b) The implicit requirement in G.S. § 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004), *citing State v. Verbal*, 41 N.C.App. 306, 254 S.E.2d 794 (1979) (the import and consequences of the two hearings is substantially equivalent; holding an order of superior court, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied).]

c) An appellate court is not at liberty to make findings for the trial court. There is no precedent or legal authority permitting the appellate court to remand for additional findings of fact by the trial court in an indirect criminal contempt matter. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing In re Estate of Lunsford*, 160 N.C.App. 125, 585 S.E.2d 245 (2003) (criminal contempt vacated even though the record contained evidence that defendant violated the order at issue, a TRO, before the show cause order was issued because the trial court failed to make the necessary findings beyond a reasonable doubt as to those facts).]

11. Burden of proof.

a) A show cause order in a criminal contempt proceeding is akin to an indictment and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008) (plenary proceeding) (noting that burden does not shift to the defendant as in a proceeding for civil contempt under G.S. § 5A-23(a)).]

b) In a criminal contempt proceeding, as in any other criminal proceeding, the State has the ultimate burden of proof beyond a reasonable doubt on all elements of the offense. The State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007), *citing State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007).]

c) While the State must prove the facts that form the basis of the contempt charge, when defendant admits to the underlying facts, leaving no issue of fact to be decided, there was no improper burden on defendant. [*State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361

N.C. 702, 653 S.E.2d 158 (2007) (defendant admitted entering judges' office area after judge had told him not to).]

12. Right to and appointment of counsel.

a) An alleged contemnor has the right to be represented by legal counsel in criminal contempt proceedings.

(1) The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt proceeding is heard, that he or she may be incarcerated if found in criminal contempt, that he or she has the right to be represented by retained counsel, and that he or she may be entitled to court-appointed counsel if he or she is unable to afford to retain an attorney.

(2) An alleged contemnor may waive his or her right to legal representation. An alleged contemnor's waiver of legal representation must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must a make written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and the consequences of the waiver." [G.S. § 7A-457]

(3) If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the criminal contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.

b) An alleged contemnor is entitled to court-appointed counsel in a criminal contempt proceeding if (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [G.S. § 7A-451(a) (an indigent person is entitled to court-appointed counsel in any case in which imprisonment, or a fine of $500, or more, is likely to be adjudged); *State v. Wall*, 49 N.C.App. 678, 272 S.E.2d 152 (1980) (failure to advise defendant charged with criminal contempt of his right to counsel if he was indigent not prejudicial error when no evidence that defendant was indigent and he voluntarily waived right to counsel); *Hammock v. Bencini*, 98 N.C.App. 510, 391 S.E.2d 210 (1990) (noting that G.S. § 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders); *Tyll v. Berry*, __ N.C.App. __, 758 S.E.2d 411, *review denied, appeal dismissed*, __ N.C. __, 762 S.E.2d 207 (2014), *citing Turner v. Rogers*, __ U.S. __, 131 S.Ct. 2507 (2011) and *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158 (1979) (in criminal contempt proceedings, the Sixth and Fourteenth Amendments to the U.S. Constitution generally "require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense").]

(1) Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. 7A-452(c)]

(2) An alleged contemnor is indigent if he or she has insufficient income and resources, based on guidelines approved by the Office of Indigent Defense Services, to retain an attorney to represent him or her in the contempt hearing. [*See* G.S. 7A-452; *see also* G.S. § 7A-450(a) for definition of an indigent person.]

c) Child support proceedings.

(1) Counsel for indigent obligors in criminal contempt proceedings in child support cases are appointed pursuant to procedures approved by the Office of Indigent Defense Services. [*See* G.S. § 7A-452]

(2) For more on the right to and appointment of counsel in criminal contempt proceedings in the context of child support enforcement, *see Enforcement of Child Support Orders,* Bench Book, Vol. 1, Chapter 3, Part 4.

I. Orders for criminal contempt.

1. Fundamentals of an order finding a person in criminal contempt. The order should:

a) Include a finding of guilty or not guilty. [G.S. § 5A-15(f)]

b) Indicate whether it is civil contempt or criminal contempt. [*See Watkins v. Watkins,* 136 N.C.App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

c) If imprisonment ordered, the judge should specify the beginning and end dates of the sentence. [Note that a sentence of imprisonment for criminal contempt is served day for day with no credit for good time, gain time or earned time. *See* State of North Carolina Department of Corrections Division of Prisons Policy and Procedure, Chapter B, sections .0111(d)(2) (good time); .0112(c)(2)(gain time); .0113(f)(1) (earned time).]

d) Indicate that the court applied the reasonable doubt standard. [G.S. § 5A-15(f); *State v. Ford,* 164 N.C.App. 566, 596 S.E.2d 846 (2004), *citing State v. Verbal,* 41 N.C.App. 306, 254 S.E.2d 794 (1979) (superior court order of contempt, entered in a de novo plenary proceeding on appeal from a summary finding of contempt in district court, must indicate that the reasonable doubt standard of proof was applied).]

e) Make findings of fact and enter judgment. [G.S. § 5A-15(f)]

2. The following AOC forms are available.

a) SHOW CAUSE ORDER, FINDINGS AND JUDGMENT – CONTEMPT OR FAILURE TO APPEAR FOR JURY DUTY (AOC-CR-219) (criminal or civil contempt).

b) DIRECT CRIMINAL CONTEMPT/SUMMARY PROCEEDINGS/FINDINGS AND ORDER (AOC-CR-390).

c) CONTEMPT ORDER DOMESTIC VIOLENCE PROTECTIVE ORDER (AOC-CV-309) (criminal or civil contempt).

d) CONTEMPT ORDER NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT (AOC-CV-529) (criminal or civil contempt).

J. Punishment for criminal contempt.

1. Censure, imprisonment, or a fine under G.S § 5A-12(a).

a) G.S. § 5A-12(a) provides generally that a person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, a fine not to exceed $500, or any combination of the three, subject to the following exceptions:

(1) A person who commits a contempt described in G.S. § 5A-11(a)(8) (willful refusal of witness given immunity to testify) is subject to imprisonment not to exceed six months, in addition to censure and a fine. [G.S. § 5A-12(a)(1)]

b) A judicial official who finds a person in criminal contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment if warranted by the contemnor's conduct and the ends of justice. [G.S. § 5A-12(c)]

c) The court may suspend a contemnor's incarceration and impose conditions of probation. [*See* G.S. § 15A-1343] The contemnor's probation may be revoked and the sentence activated if the contemnor violates or fails to fulfill the conditions of probation. [*See* G.S. §§ 15A-1344 and 15A-1345] *See* sections 2(d) and 3 below discussing suspension and conditions of probation in context of child support.

d) Criminal contempt may not be purged so provisions that can be avoided or terminated by compliance should not be included. However, a sentence in criminal contempt may be suspended upon conditions. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting).]

e) A fine imposed in a criminal contempt proceeding is payable to the state and may not be ordered to be paid to the aggrieved party or to applied to satisfy support arrearages owed by the contemnor. [*See In re Rhodes*, 65 N.C. 518 (1871) (per curiam) (stating that a fine for contempt is a punishment for a wrong to the state and payment goes to the state).]

f) Provision in a criminal contempt adjudication requiring defendant to pay $3,150 in damages to plaintiff was invalid. Amount exceeded that allowed by statute. [*M.G. Newell Co. v. Wyrick,* 91 N.C.App. 98, 370 S.E.2d 431 (1988).]

g) *See* chart, Overview of Criminal Contempt, at page 91.

2. Punishment for criminal contempt of a child support order.

a) An obligor who is found in criminal contempt is subject to censure, imprisonment for a definite and fixed term not to exceed 30 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)(3)]

b) However, a sentence of imprisonment up to 120 days may be imposed for criminal contempt resulting from the failure to pay child support, provided the sentence is suspended upon conditions reasonably related to the contemnor's payment of child support. [G.S. § 5A-12(a)(3), *amended by* 2009 N.C. Sess. Laws 335, § 1, effective December 1, 2009, and applicable to offenses committed on or after that date.]

c) An obligor who is found in criminal contempt for willfully failing to pay court-ordered child support may not be sentenced to jail under an order that allows him or her to be released from jail upon **purging** the contempt (usually by paying all or part of the child support arrearages he or she owes) as in the case of civil contempt. Purge conditions are imposed in civil, not criminal, contempt proceedings.

d) A court, however, may find an obligor in criminal contempt for willfully failing to pay court-ordered child support; sentence him or her to a definite period of incarceration, **suspend** the sentence for criminal contempt; and require the obligor to pay all or part of the child support arrearages or to continue to pay his or her court-ordered child support obligation as it becomes due as one of the conditions of the obligor's probation. [G.S. § 15A-1343(b)(4); *see Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988); *Reynolds v. Reynolds,* 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (defendant also required to post a cash bond or security to guarantee timely payment of future cash child support as well as other conditions).] These conditions are conditions of probation and are not purge conditions.

e) **Important note**: If a judge finds an obligor in criminal contempt, sentences the obligor, suspends the obligor's sentence, and the only conditions of probation require compliance with the underlying child support order, the order constitutes an order of civil, rather than criminal, contempt. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (where court imposed a determinate thirty-day term, suspended upon certain conditions, i.e., that obligor pay counsel fees and interest upon delinquent child support

payments, and that defendant post a cash bond as well as make each child support payment when due, order was for criminal contempt); *Hicks obo Feiock v. Feiock*, 485 U.S. 624, 108 S.Ct. 1423 (1988) (remand to determine whether father's payment of arrearages would purge his determinate jail sentence; if so, proceeding was civil in nature).]

3. Special conditions of probation.

a) As a special condition of probation, a defendant may be required to satisfy any conditions determined by the court to be reasonably related to his rehabilitation. [G.S. § 15A-1343(b1)(10)]

b) After finding an attorney guilty of criminal contempt and suspending his sentence, the court placed the attorney on probation on the condition that he not violate any state law, not speak profanely to any court official, and not appear as an attorney in any matter in the Wake County district or superior courts for one year. These conditions of probation did not constitute an abuse of discretion. [*State v. Key*, 182 N.C.App. 624, 643 S.E.2d 444, *review denied*, 361 N.C. 433, 649 S.E.2d 398 (2007) (noting that the attorney did not challenge the conditions of probation as not reasonably related to his rehabilitation under G.S. § 15A-1343(b1)(10)); *Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (active thirty day jail sentence suspended upon defendant's posting of a cash bond or security to secure timely payment of future child support, defendant's immediate payment of interest on delinquent child support payments and immediate payment of attorney fees, and defendant's timely payment of future child support).]

4. Disbarment.

a) Disbarment of attorney guilty of criminal contempt for willfully interrupting trial court proceedings upheld. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004 (1988).]

5. Criminal contempt and the Structured Sentencing Act.

a) Criminal contempt adjudication, assumed to be punishable by a 30-day maximum term, was not a "prior conviction" under a strict construction of the Structured Sentencing Act then applicable, based in significant part on the fact that there is no right to a trial by jury. [*State v. Reaves*, 142 N.C.App. 629, 544 S.E.2d 253 (2001) (not specifically addressing whether an adjudication of criminal contempt based upon failure to comply with a nontestimonial identification order for which the sentence was not to exceed 90 days, or a violation of G.S. § 5A-11(8), might constitute a "prior conviction" under the Act; case decided before 2009 amendment to G.S. §5A-12(a)(3) providing, under certain circumstances, for imprisonment up to 120 days for failure to pay child support).]

K. Attorney fees in criminal contempt proceedings.

1. A court may require a contemnor to pay an aggrieved party's attorney fees if there is statutory or case law authority to do so. [*M.G. Newell Co. v. Wyrick*, 91 N.C.App. 98, 370 S.E.2d 431 (1988) (condition of suspended sentence in criminal contempt adjudication that required defendant to pay plaintiff's attorney fees was invalid when award of fees not authorized by statute or case law); *see also Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion in* 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (affirming an order requiring a defendant held in criminal contempt to pay $55,000 in attorney fees in the underlying custody and support action as a condition of a suspended sentence); *Lafell v. Lafell*, 177 N.C.App. 811, 630 S.E.2d 257 (2006) (**unpublished**) (attorney fees allowed to father for mother's criminal contempt of custody order; attorney fees authorized by G.S. § 50-13.6).]

2. *See* section II.J at page 40 discussing when an award of attorney fees is authorized by statute, case law or agreement in contempt proceedings generally and in contempt proceedings in the family law area.

3. Attorney fees allowed as a sanction under Rule 11 in a criminal contempt case.

a) A trial court was within its discretion to award defendant mother attorney's fees as a sanction under Rule 11 for having to defend allegations by child's father that were not legally sufficient to constitute criminal contempt of a custody order. [*Jackson v. Jackson*, 192 N.C.App. 455, 665 S.E.2d 545 (2008) (mother not guilty of criminal contempt with respect to most of the custody violations alleged by father and was entitled to attorney fees for having to defend those claims; mother found in criminal contempt for failing to allow father reasonable telephone access with the child).]

L. Appeal of an order of criminal contempt.

1. Appeal by a person found in criminal contempt in either a civil or a criminal proceeding.

a) A person found in criminal contempt in district court may appeal to superior court for a trial de novo. [G.S. § 5A-17(a); G.S. § 15A-1431]

b) Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than 24 hours from the time of imposition of confinement without a bail determination being made by :

(1) A district court judge if the confinement is imposed by a clerk or a magistrate.

(2) A superior court judge if the confinement is imposed by a district court judge.

(3) A superior court judge other than the superior court judge that imposed the confinement.

(4) If a superior court judge has not acted within 24 hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. § 5A-17(b), (c), *added by* 2013 N.C. Sess. Laws 303, § 1, effective December 1, 2013, and applicable to confinement imposed on or after that date.]

c) The court of appeals lacks jurisdiction to hear an appeal of a district court order adjudicating a defendant in criminal contempt. [*See Reynolds v. Reynolds*, 356 N.C. 287, 569 S.E.2d 645 (2002), *adopting per curiam dissenting opinion* in 147 N.C.App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting); *Roberts v. Roberts*, __ N.C.App. __, 763 S.E.2d 926 (2014) (**unpublished**) (court of appeals lacked authority to review appeal of a district court order finding defendant in criminal contempt for violation of consent custody order).] *But cf. Jackson v. Jackson,* 192 N.C.App. 455, 665 S.E.2d 545 (2008) (a criminal contempt order that plaintiff alleged impermissibly modified child custody was properly appealed to the court of appeals; as to those aspects of the criminal contempt order that plaintiff argues impermissibly modify custody or exceed the trial court's authority, plaintiff has a right to appeal to the court of appeals); *see also File v. File,* 195 N.C.App. 562, 673 S.E.2d 405 (2009) (without addressing appropriateness of the appeal, court of appeals affirmed an order finding mother in criminal contempt of an order allowing father visitation with their child).

d) The de novo hearings in superior court are plenary proceedings that must be conducted in accordance with G.S. § 5A-15. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004).]

e) When reviewing a contempt order de novo, the superior court reviews the facts and law, and additional testimony can be heard. [*State v. Ford*, 164 N.C.App. 566, 596 S.E.2d 846 (2004).]

f) G.S. § 5A-17 addresses an appeal only by a person found in criminal contempt. It makes no provision for appeal when no contempt is found. The court of appeals has found no right to appeal a defendant's acquittal of criminal contempt charges. [*Patterson v. Phillips*, 56 N.C.App. 454, 289 S.E.2d 48 (1982) (noting that courts in other jurisdictions generally agree that no appeal lies to review an acquittal from criminal contempt charges; finding that the individual plaintiff, child's mother, could not appeal defendant attorney's acquittal of criminal contempt charges based on his alleged interference with a custody order).]

2. Standard of review.

a) After the de novo hearing in superior court, a criminal contempt order can be appealed to the court of appeals. The standard of review for contempt cases is "whether there is competent evidence to support the trial

court's findings of fact and whether the findings support the conclusions of law and ensuing judgment," not whether the trial court abused its discretion. [*State v. Phair*, 193 N.C.App. 591, 668 S.E.2d 110 (2008), *citing State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).]

b) While conclusions of law are reviewable de novo, the findings of fact are not. On appellant review of a contempt order, "the trial judge's findings of fact are conclusive ... when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008), *citing O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985); *File v. File*, 195 N.C.App. 562, 673 S.E.2d 405 (2009), *quoting State v. Simon*, 185 N.C.App. 247, 648 S.E.2d 853, *review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007).]

c) When a defendant alleges that the order giving rise to a finding of criminal contempt lacks sufficient clarity, the appellate court may review the order de novo. [*See Broadbent v. Allison*, 193 N.C.App. 454, 667 S.E.2d 342 (2008) (**unpublished**).]

d) There is no precedent or legal authority permitting the appellate court to remand for additional findings of fact by the trial court in an indirect criminal contempt matter. [*State v. Coleman*, 188 N.C.App. 144, 655 S.E.2d 450 (2008).]

3. Release of defendant pending appeal.

a) Upon appeal to superior court, the district court judge must review the case and fix conditions of pretrial release as appropriate. [G.S. § 15A-1431(d)]

b) Terms of a defendant's release are within the trial court's discretion. [*In re Paul*, 84 N.C.App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004 (1988) (citation omitted) (trial court did not abuse its discretion when it ordered the respondent attorney not to practice law during the appeal of his conviction for criminal contempt; release in this case was pursuant to G.S. § 15A-536, release after conviction in superior court).]

c) A pretrial release order remains in effect pending appeal unless the judge modifies the order. [G.S. § 15A-1431(e)]

4. Stay pending appeal of a criminal contempt order.

a) Appeal of a criminal contempt order to superior court stays execution of all portions of the judgment, including payment of a fine, probation or special probation, and active punishment. [G.S. § 15A-1431(f1)]

IV. Enforcement of a Nontestimonial Identification Order

A. Either civil or criminal contempt available.

1. A person who resists compliance with authorized nontestimonial identification procedures, by failing to appear or refusing to submit to the designated procedures, may be held in criminal contempt pursuant to G.S. § 5A-12(a)(2) or civil contempt pursuant to G.S. § 5A-5A-21(b). [G.S. § 15A-279(e)]

B. If found in criminal contempt.

1. A person found in criminal contempt, but not arrested, for failure to comply with a nontestimonial identification order is subject to censure, imprisonment not to exceed 90 days, a fine not to exceed $500, or any combination of the three. [G.S. § 5A-12(a)(2)]

C. If found in civil contempt.

1. A person found in civil contempt, but not arrested, for failure to comply with a nontestimonial identification order pursuant to G.S. § 15A-271 et seq., may not be imprisoned for more than 90 days unless the person is arrested on probable cause. [G.S. § 5A-21(b1)]

2. After imprisonment for 90 days, the person must be released or arrested for the offense to which the order is related.

3. If the person is arrested, he or she may be imprisoned for as long as he or she continues to refuse to comply with the nontestimonial identification order. [*See* Official Commentary to G.S. § 5A-21 stating that after arrest for probable cause, the 90 day limitation no longer applies.]

V. Other Resources on Contempt

A. Generally.

1. For an ONLINE MODULE on the law of contempt, see https://unc.ncgovconnect.com/p30019876/.

2. Note, *Distinction between Civil and Criminal Contempt in North Carolina*, 67 N.C.L.Rev. 1281 (1989).

B. Child support.

1. John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004.

C. News media.

1. Contempt: Special Issues When Dealing with the Media (Or What I Learned About Rule 15 and How I Learned It), Senior Resident Judge Jesse B. Caldwell, III, Superior Court Judges Conference Fall 2007, available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Caldwell.pdf.

	CRIMINAL CONTEMPT	CIVIL CONTEMPT
	5A-11 through 5A-17	5A-21 through 5A-25
Purpose:	To punish.	To force compliance with a court order.
Grounds:	Committing one of the willful acts specified in 5A-11(a). See chart, page 91.	Failure to comply with a court order, if the person is able to comply, or to take reasonable measures that would enable person to comply [5A-21(a)].
When The Grounds Must Exist:	During the court proceedings, or at any time since the entry of the original order (if an order is involved in the case).	At the time of the hearing; the alleged contemnor is no longer in civil contempt if he or she has complied with the court's order by the time of the hearing.
Procedure:	Plenary proceeding. (5A-14); Summary proceeding. (5A-15).	Plenary proceeding. (5A-23).
Order and Findings	A finding of criminal contempt must be based on evidence that supports findings of fact beyond a reasonable doubt. [5A-14(b); 5A-15(f)].	The order finding a person in civil contempt must include the facts constituting civil contempt and must specify the actions by which the person may purge himself or herself. [5A-23(e)].
Punishment:	[5A-12]. Under 5A-12(c) a judge may reduce the sentence or fine at any time based on the defendant's actions and on the ends of justice.	[5A-21(b)]. Imprisonment for as long as civil contempt continues; defendant must be released when civil contempt ceases.
Appeal:	To superior court. [5A-17; 15A-1431 et seq.]. See section III.L.	To the court of appeals. [5A-24; 1-268 et seq].

APPENDIX
Sample Summary Notice Language

[Mr./Mrs. Defendant or Party], you are hereby notified, as required by G.S. 5A-14, that you are charged with direct criminal contempt of court, in that when the court overruled an objection by your attorney to certain testimony by the witness Mr. X., you pounded the table with your fist and called the witness a "liar" and the court a "kangaroo court" [describe other conduct as appropriate]. When warned by the court, as the record will show, you repeated the "liar" and "kangaroo court" language and further threatened to "take care of" the witness after the trial. You are advised that you may now respond to this charge before the court takes further action. You may respond through your counsel or directly or both.

OVERVIEW OF CRIMINAL CONTEMPT

Grounds [5A-11]	**Showing of willfulness or prior warning required to impose fine or imprisonment** [5A-12(b)]	**Type of contempt** [5A-13, -14(a), -15(a)]	**Punishment** [any combination of the following, 5A-12]:
1. Willful behavior committed during sitting of a court and directly tending to interrupt its proceedings [5A-11(a)(1)]	Yes.	Direct or indirect.	Censure; 30 days; $500.
2. Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority [5A-11(a)(2)]	Yes.	Direct.	Censure; 30 days; $500.
3. Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, instruction, or its execution [5A-11(a)(3)]	Yes.	Direct or indirect.	Censure; 30 days (except if not arrested and fail to comply with nontestimonial identification order, 90 days; except if failure to pay child support, 120 days if sentence suspended upon conditions reasonably related to payment of support, 120 days); $500.
4. Willful refusal to be sworn or affirmed as witness, or when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified [5A-11(a)(4)]	Yes.	Direct.	Censure; 30 days; $500.
5. Willful publication of report of court proceedings as specified in 5A-11(a)(5)	No.	Indirect.	Censure; 30 days; $500.
6. Willful or grossly negligent failure by court officer to perform duties in an official transaction [5A-11(a)(6)]	Yes.	Direct or indirect.	Censure; 30 days; $500.

OVERVIEW OF CRIMINAL CONTEMPT (continued)

Grounds [5A-11]	**Showing of willfulness or prior warnings required to impose fine or imprisonment** [5A-12(b)]	**Type of contempt** [5A-13, -14(a), -15(a)]	**Punishment** [any combination of the following, 5A-12]:
7. Willful or grossly negligent failure to comply with court schedules or practices that substantially interfere with court's business [5A-11(a)(7)]	Yes.	Direct or indirect.	Censure; 30 days; $500.
8. Willful refusal to testify or produce other information on judge's order under Art. 61, G.S. Chapter 15A [5A-11(a)(8)]	Yes.	Direct.	Censure; 6 months; $500.
9. Willful communication with a juror in an improper attempt to influence juror's deliberations [5A-11(a)(9)]	No.	Direct or indirect.	Censure; 30 days; $500. Conduct also punishable under 14-225.2, but see limitation on punishment in 5A-12(e).
9(a) Willful refusal by a defendant to comply with a condition of probation [5A-11(a)(9a)]	Yes.	Indirect.	Censure; 30 days; $500.
10. Any other act or omission specified elsewhere as grounds for criminal contempt [5A-11(a)(10)]	Yes.	Direct or indirect.	Censure; 30 days; $500.

INDEX