CIVIL CONTEMPT

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Civil vs. criminal contempt — This paper is about civil contempt, not criminal. Criminal contempt is used to punish a person for violating a court order or expressing disrespect for the court. Civil contempt, on the other hand, is intended to make someone obey a court order. The purpose of criminal contempt is punishment; the purpose of civil contempt is compliance. Criminal contempt punishes behavior that already has occurred. Civil contempt tries to affect ongoing behavior.

> A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. – *Blue Jeans Corporation v. Amalgamated Clothing Workers of America, AFL-CIO*, 275 N.C. 503, 507-8, 169 S.E.2d 867 (1969) (quoting 17 Am. Jur. 2d, Contempt, § 4).
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> Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. – *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370 (1985).

Criminal contempt may be direct or indirect, a distinction not relevant to civil contempt. Direct criminal contempt is behavior that occurs in the court's presence. An example is *In the Matter of Nakell*, 104 N.C. App. 638, 411 S.E.2d 159 (1991), *disc. rev. denied*, 330 N.C. 851 (1992), in which the lawyer was held in criminal contempt and imprisoned for ten days and fined $500 for repeatedly interrupting the judge, refusing to stop talking, failing to sit down, and encouraging his client to be disruptive. Criminal contempt is indirect when it occurs outside the sight or hearing or immediate proximity of the court. For instance, in *In the Matter of Paul*, 84 N.C. App. 491, 353 S.E.2d 254, *cert. denied*, 319 N.C. 673 (1987), *cert. denied*, 484 U.S. 1004 (1988), the lawyer was held in criminal contempt and sentenced to thirty days in jail when it was discovered sometime after a trial that he had coached a spectator to attempt to disrupt the trial by standing up and yelling out a protest.

A direct criminal contempt may be punished summarily on the spot by the judge in front of whom the behavior occurs, while an indirect contempt requires issuance of a show cause order and a hearing.

For civil contempt, by contrast, there is no distinction between direct and indirect contempt. In essence, all civil contempt is indirect, and all civil contempt proceedings require, as discussed further below, notice and a hearing.

Criminal contempt requires proof beyond a reasonable doubt which is not necessary for civil contempt. Surprisingly, however, there appears to be no case law specifying the standard of proof for civil contempt, although there are plenty of decisions about the burden of proof and the standard of appellate review. With no other standard of proof defined, the fallback as in any civil case is preponderance of the evidence.

Nature and purpose of civil contempt — Civil contempt is not punishment, it is a means to force compliance with a court order.

> The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court. – *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135 (1980).

Because the purpose of civil contempt is compliance, the contempt order must always include an "out" for the person who is being held in contempt, a means to clear the contempt and avoid the imprisonment or other sanction that is being imposed by the court. If, for example, the defendant is being held in contempt for failing to transfer a deed to the other party as previously ordered by the court, the contempt order should say that the defendant is being imprisoned until the deed is signed over. It is an essential feature of civil contempt that the defendant always be given a means to purge the contempt and avoid the sanction. If there is no way to purge the contempt, then the defendant is being punished for criminal contempt rather than civil contempt.

> A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in contempt must specify how the person may purge himself of the contempt. – *N.C. Gen. Stat. § 5A-22(a).*
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> Furthermore, the contempt order must be vacated because it fails to specify as required by G.S. 5A-22(a) how the defendant might purge herself of contempt. The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). Thus the purging provision is essential to the order. – *Bethea v. McDonald*, 70 N.C. App. 566, 570, 320 S.E.2d 690 (1984).

Notice of hearing — A proceeding for civil contempt may be initiated several different ways as provided in G.S. 5A-23. First, an aggrieved party may simply file and serve a motion with the appropriate notice to the party alleged to be in contempt. The motion has to be accompanied by a sworn statement or affidavit explaining the basis for contempt, but no judicial official has to review the documents before the notice is sent out. A second option is for the complaining party to take the sworn statement or affidavit to a judge, have the judge review it and find probable cause to believe that contempt has occurred. The judge then has two choices, to either issue a notice of hearing or a show cause order. A court-issued notice of hearing informs the defendant that the hearing is being held and that the defendant will be held in contempt unless the defendant appears, but it does not specifically order the person to come to court. The show cause order does just that, it orders the defendant to appear and show cause why contempt should not be found. As a final possibility, the notice or show cause order does not have to be initiated by a party, it may be initiated by a judge filing a sworn statement or affidavit.

Each notice or order ought to specify whether the proceeding is for civil or criminal contempt, but the motion prepared by the complaining party may be ambiguous on that point. As explained later in this paper, a defendant in a criminal contempt proceeding has rights that do not apply in civil contempt, and the punishment that may be applied is different. It is important, therefore, for the judge who signs the notice or order or who hears the matter to be clear as to which form of contempt is at issue, so as to avoid error in the proceeding.

Although under each of the several procedures for initiating a civil contempt hearing the notice or order is supposed to be based on a sworn statement or affidavit, the defendant waives that requirement by appearing in court to answer the charges. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247 (1981). A defendant should be able to make a limited appearance to contest the sufficiency of the notice.

Whichever way the contempt proceeding is begun, G.S. 5A-23 requires that the motion or notice or order be served on the defendant at least five days before the hearing. The contempt is invalid if no notice or show cause order is issued. *Watkins v. Watkins*, 136 N.C. App. 844, 526 S.E.2d 485 (2000). In the case of *In re Ammons*, 344 N.C. 195, 473 S.E.2d 326 (1996), a judge was censured for, among other things, issuing an arrest order in a civil contempt proceeding without notice and an opportunity to be heard.

The statute allows the five-day notice to be shortened for good cause. The actual notice the defendant has received and the time the defendant has had to prepare are factors to be considered in determining whether notice of less than five days was sufficient.

> Thus, the judge was authorized to shorten the notice period [to five hours] for good cause, which he found upon undisputed facts to the effect that defendant had known for several months of the particular charges pending

> against him, had had ample opportunity to prepare and meet them, and all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties. – *M.G. Newell Company, Inc., v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431 (1988).

Order for arrest — General Statutes § 5A-16 states that a judge may issue an order for arrest for a defendant charged with *criminal* contempt, if it appears unlikely the person will appear. The statute on orders for arrest, G.S. 15A-305, likewise specifies in subdivision (b)(9) that an order for arrest may be issued as authorized by G.S. 5A-16. The *civil* contempt statutes have no provision comparable to G.S. 5A-16 about orders for arrest. There is no specific authority, therefore, for the court to issue an order for arrest for a person to appear for a civil contempt hearing.

To complicate matters, the statute on orders for arrest says in G.S. 15A-305(b)(7) that an order for arrest may be used in any situation in which the "common-law writ of capias has heretofore been issuable." In the days before Chapter 15A capias may have been used at some stage in a civil contempt proceeding, but there is no good case law on the subject to serve as a reference.

The order for arrest issue creates difficulty only with respect to the initial hearing on civil contempt. If the defendant fails to show for the civil contempt hearing, the defendant then is in criminal contempt for disobeying the court's notice to appear or show cause order, and an order for arrest clearly could be issued then to have the person taken into custody to appear in the criminal contempt proceeding. Or the capias justification may apply at that point.

Recusal — The statute on direct criminal contempt, *i.e.*, criminal contempt that takes place in the presence of the judge, includes this admonition about the show cause hearing: "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." *N.C. Gen. Stat. § 5A-15(a).* There is no comparable statutory provision for indirect criminal contempt, nor for civil contempt which by its nature occurs outside the presence of the judge. Nevertheless, there may be times when the history leading up to the civil contempt hearing involves an ongoing conflict between the judge and the defendant and suggests personal feelings on the part of the judge that warrant recusal. When any such question arises, the better practice is to recuse.

> Precedent decrees that a judge should recuse himself in contempt proceedings where they involve personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. Snyker's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666, 30 Am. Jur. 786. And it has been declared the better practice in recusations for prejudice to call upon some other judge whose rulings have not been ignored or disregarded, especially in cases of indirect or constructive contempt. – *Ponder v. Davis*, 233 N.C. 699, 704, 65 S.E.2d 356 (1951).

Right to counsel — An indigent defendant is entitled to have counsel appointed before being jailed for civil contempt. If the contempt proceeding is for failure to pay money, such as in a child support case, the nature of the findings required for contempt reduce the likelihood that the indigency question will arise. To find contempt in such a situation, the court first has to determine that the person has the present ability to pay the money. If the person has the present ability to pay, indigency is less likely. When the person can only afford partial payment, or the contempt is for a reason other than failure to pay money, the court may need to look more closely at the right to counsel.

For civil contempt, the right to counsel comes from the Due Process Clause, not from the Sixth Amendment as in criminal cases. Whether due process requires appointment of counsel depends on the likelihood of the person being imprisoned. An indigent defendant who is going to be jailed for civil contempt is presumed to be entitled to appointed counsel.

> The private interest at stake in the present case [civil contempt for failure to pay child support] is, perhaps, the most fundamental interest protected by the Constitution of the United States – the interest in personal liberty. A defendant who is found in civil contempt and incarcerated for nonsupport does not 'hold the keys to the jail' if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages. –*McBride v. McBride*, 334 N.C. 124, 130, 431 S.E.2d 14 (1993).

When faced with a potentially indigent defendant who might be jailed for civil contempt, the trial court is supposed to (1) determine how likely it is the defendant will be jailed, (2) if jail is likely, ask whether the defendant wants a lawyer and determine the ability to pay, and (3) if the defendant wants a lawyer but is indigent, appoint counsel. *King v. King*, 144 N.C. App. 391, 394, 547 S.E.2d 846 (2001). In the end, though, the right to counsel applies only if the defendant actually is jailed. Even though the indigent defendant faces the possibility of incarceration, if the court finally decides not to impose jail time then it does not matter that no lawyer was appointed. *Id.*

Right to jury trial — It does not appear that a defendant is entitled to a jury trial for civil contempt, but there is no appellate decision which explicitly says so. Although the annotations in the General Statutes list *In re Gorham*, 129 N.C. 481, 40 S.E. 311 (1901), as holding that there is no right to a jury trial for civil contempt, the punishment rendered in that case actually looks more like criminal contempt than civil. No later cases seem to have addressed the issue, though any number of sources assume there is no jury trial for civil contempt.

For many years, it was accepted that the right to jury trial did not apply to any form of contempt. Then in *Bloom v. Illinois*, 391 U.S. 194 (1968), the United States

Supreme Court held that criminal contempt is a crime in the ordinary sense of the term and that "serious" criminal contempts, *i.e,* contempts with punishment of imprisonment for more than six months or a fine of more than $500, are subject to the constitutional requirement of a jury trial. Because the maximum punishment for criminal contempt in North Carolina is thirty days' imprisonment and/or a $500 fine, the North Carolina Supreme Court held in *Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969), that the right to jury trial does not apply under either the federal or state constitution. Since that decision the criminal contempt punishment statute, G.S. 5A-12, has been amended to allow imprisonment for up to six months for refusing to testify after being granted immunity, and up to ninety days for failure to comply with a nontestimonial identification order. It may be that those changes raise questions about a state right to jury trial when the higher level of punishment is being imposed for criminal contempt. *See State v. Reaves*, 142 N.C. App. 629, 544 S.E.2d 253 (2001).

Whatever the questions about criminal contempt, this paper is about civil contempt, and there does not appear to be a right to a jury trial. Civil contempt is a civil proceeding, not criminal, and the purpose is not punishment but forcing compliance with a court order. The limits on imprisonment for civil contempt are discussed below. While some acts of contempt allow indefinite incarceration, most instances of failure to pay money — with the notable exception of child support — are limited to ninety days, subject to renewal if the person still refuses to pay. It is important to remember, though, that in all cases the imprisonment is only until the defendant complies. Thus, unlike criminal contempt which requires the full sentence of imprisonment to be served, incarceration for civil contempt always is subject to the defendant being released earlier by purging the contempt.

Standard of proof — The civil contempt statute now specifies in G.S. 5A-21(a)(2a) that contempt requires that the "noncompliance by the person to whom the order is directed is willful." Before that language was added, the courts already had mandated a finding of willfulness:

> Although the statutes governing civil contempt do not expressly require willful conduct . . ., case law has interpreted the statutes to require an element of willfulness. (citation omitted) In the context of a failure to comply with a court order, the evidence must show that the person was guilty of 'knowledge and stubborn resistance' in order to support a finding of willful disobedience. – *Sharpe v. Nobles*, 127 N.C. App. 705, 709, 493 S.E.2d 288 (1997).

Burden of proof — The burden of proof in civil contempt lies with the party who is asserting that the other person is in contempt. However, once a judge has found that probable cause exists for finding contempt and has issued a show cause order, the burden shifts to the defendant to show why contempt should not be found.

Recall that contempt can be initiated by the judge or by a party who claims that the other side is in contempt. The private party may either serve notice of the contempt hearing or may go to a judge and request a show cause order. When the private party initiates the contempt by simply serving notice and there has been no judicial finding of probable cause, G.S. 5A-23(a1) specifies that the complainer has the burden of proof: "The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." Because there has not yet been a finding of probable cause, the burden may not be shifted to the defendant in that circumstance. *Trivette v. Trivette*, 162 N.C. App. 55, 590 S.E.2d 298 (2004). More typically, though, the complaining party goes to a judge and makes a sufficient showing for issuance of a show cause order. When the judge has found probable cause, the burden then shifts to the defendant to show why contempt is not appropriate. *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985).

The contempt proceeding also may be initiated by the judge. Under G.S. 5A-23(a) the judge is supposed to provide a sworn statement or affidavit and there is supposed to be a finding of probable cause. The result is a show cause order, just as if the contempt was initiated by a private party providing an affidavit or sworn statement. If that has happened, the burden would be on the defendant to show why contempt is not appropriate.

Regardless of who has the burden of proof, the order holding the defendant in contempt has to include findings of fact which show that evidence has been introduced to support the conclusion that the defendant has the ability to comply and has acted willfully in refusing to do so. It is not enough for the order to just state that the defendant failed to show why contempt was not appropriate.

Right against self-incrimination — The right against self-incrimination does not apply to civil contempt proceedings, and a defendant who refuses to present evidence in response to a show cause order does so at that person's own peril. *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991). By contrast, G.S. 5A-15(e) says that a person charged with criminal contempt cannot be called as a witness against the person's own interest. It is important to remember, then, that if the proceeding began with the possibility of both criminal and civil contempt, and the defendant is required to testify, the court may punish only for civil contempt.

Validity of the original order — If the court which entered the original order did not have authority to do so, the order is a nullity and can be ignored and no one can be held in contempt for violating it. *Corey v. Hardison*, 236 N.C. 147, 72 S.E.2d 416 (1952). The critical issue is whether the first judge had jurisdiction to enter the order. If not, the order is considered void *ab initio* and a later judge may ignore it without violating the rule against one trial judge overruling another. If the first judge had jurisdiction, even though the order may be incorrect as a matter of law, the order is merely voidable and remains in effect, and must be honored by the second judge, until it has been voided by a direct challenge to its validity. *State v. Sams*, 317 N.C. 230, 345 S.E.2d 179 (1986).

Contempt to enforce a consent judgment — Although the general rule is that civil contempt may not be used to enforce a consent judgment, the exceptions almost swallow the rule. The reasoning behind the rule is that a consent judgment is a contract and should be enforced by the same means as other contracts, not by contempt.

One exception is a consent judgment in a domestic relations case, which of course is a district court matter. There, the private contract is considered superseded by the court's adoption of the agreement as its own determination of the parties' rights. *Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983).

For other kinds of consent judgments the issue is whether the court has made its own determination of facts and conclusions of law rather than simply approving the agreement of the parties. If the court has made its own determinations, the consent judgment may be enforced by contempt just like any other judgment. An example of a consent judgment that was not enforceable because it only recites the parties' agreement is *Crane v. Green*, 114 N.C. App. 105, 441 S.E.2d 144 (1994), where the judgment included no findings of fact or conclusions of law, it merely recited that it was being entered pursuant to the parties' agreement. On the other hand, in *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 461 S.E.2d 10 (1995), the agreement was enforceable by contempt because the consent order entered by the judge included findings of fact and conclusions of law. The findings and conclusions need not be created anew by the judge. In *PCI Energy Services v. Wachs Technical Services*, 122 N.C. App. 436, 470 S.E.2d 565 (1996), the court "adopted" and "incorporated" the parties' settlement agreement into a document which recited that it was an enforceable judgment of the court. That, in addition to the judge being familiar with the facts because he had entered a preliminary injunction in the case, was sufficient to make the agreement a court-ordered judgment subject to contempt.

Contempt against a state agency — A state agency may not be held in civil contempt. Sovereign immunity applies and the state has not consented to being held for contempt. *North Carolina Department of Transportation v. Davenport*, 334 N.C. 428, 432 S.E.2d 303 (1993). In *Davenport* the agency was ordered to reinstate a fired employee to the same position. When DOT put him in a different job he sought contempt, but the Supreme Court said it was not available.

The ability to purge the contempt — As already stated early in this paper, the purpose of civil contempt is not punishment, it is to obtain compliance with a court order. It follows, therefore, that the civil contempt order must specify the means by which the defendant can get in compliance and purge the contempt. This requirement has been codified in G.S. 5A-22: "The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." The purge provision is essential to the civil contempt order and without it the order must be vacated. *Bethea v. McDonald*, 70 N.C. App. 566, 320 S.E.2d 690 (1984).

It also follows logically from the purpose of civil contempt that the contempt order must include a finding that the defendant has the present ability to comply with the

order. *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E.2d 786 (1980). If the person cannot comply, there is no contempt. *Criminal* contempt requires a finding that the defendant had the ability to comply sometime in the past and willfully chose not to do so, but what happened earlier is irrelevant to civil contempt. Although it is preferable that the contempt order include specific findings about the defendant's ability to comply, a finding that says only that the defendant has "present means to comply" is "minimally sufficient" for the appellate courts. *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220 (1986).

Civil contempt often is for failure to pay money owed to another party. The court does not need to find that the defendant has the money on hand, it is sufficient that defendant has assets that can be liquidated. In *Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991), for example, the defendant's home equity of $60,000 was enough to establish the ability to pay $30,000. Likewise, in *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220 (1986), the defendant's ownership of three automobiles and three trucks in his business showed he could pay.

The present ability to pay also may be based on the defendant's ability to take a job or borrow money. *Teachey v. Teachey*, 46 N.C. App. 332, 264 S.E.2d 786 (1980). If the defendant does not have a job and testifies that no work is available, however, the court must find that work is available rather than just saying that the defendant can get a job. *Self v. Self*, 55 N.C. App. 651, 286 S.E.2d 579 (1982).

A defendant may be held in contempt if the defendant can pay a portion of the money owed, but the contempt order can require payment only of that portion. *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984).

As would seem obvious, a judge cannot hold a defendant in civil contempt after finding as a fact that defendant is *not* able to pay the amount due. *Carter v. Hill*, __ N.C. App. __, 650 S.E.2d 843 (2007).

Punishment — The only sanction the court may impose for civil contempt is imprisonment until the defendant complies with the court order. Keeping in mind that the only purpose of civil contempt is to compel compliance, a punitive sanction such as a fine or a set term of imprisonment would not be appropriate.

(Although G.S. 5A-21 lists only incarceration as a sanction for civil contempt, the possibility of a fine is mentioned in some appellate cases. In those cases, however, the discussion about a fine for civil contempt comes in the context of a general discussion about contempt and not when the court actually is reviewing the propriety of such a sanction. In *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980), for example, the court says that the purpose of a fine or imprisonment in civil contempt is to get the defendant to comply and that the fine or imprisonment is lifted once the defendant complies. The cited authority for that statement is a New Hampshire case, and in *Jolly v. Wright* itself the issue being decided was an indigent's right to counsel, not whether a fine had been

imposed properly. Likewise, the opinion in *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988), includes a useful explanation of the difference between civil and criminal contempt. In one example, the court says that if the relief is monetary the contempt still is civil if the money is paid to the complainant or if the defendant can avoid payment by performing an act required by the court. In *Bishop*, though, the sanction used was incarceration, not a fine, and other cases clearly state that a fine may not be imposed to award compensatory damages to a plaintiff in a civil contempt proceeding. *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991). Given the absence of authorization in G.S. 5A-21 for use of a fine as a sanction for civil contempt, and the absence of any case law directly upholding the use of a fine, it seems that the only permissible sanction is imprisonment.)

General Statutes § 5A-21 spells out the length of imprisonment that may be imposed for civil contempt. Although subsection (b) says that the defendant "may be imprisoned as long as the civil contempt continues," the remainder of the statute modifies that rule. The imprisonment indeed may continue indefinitely if the contempt is for something other than paying money (or if the contempt is for failure to pay child support, which is a district court matter). If the contempt is for failure to pay something other than child support, the imprisonment is for up to ninety days, keeping in mind that the defendant may go free at any time upon complying with the order and purging the contempt. If the person has not purged the contempt in ninety days, the court must conduct a new hearing and then, if it finds that the defendant still has the ability to pay, order incarceration for up to ninety more days. That process may be repeated until a full one year has been served. At that point, civil contempt is no longer available for the failure to pay.

If the civil contempt is for failure to comply with a nontestimonial identification order, G.S. 5A-21(b1) limits the imprisonment to ninety days total. At the end of that time, the person must be released or arrested for the offense to which the order is related.

Civil and criminal contempt for the same act — Both G.S. 5A-12(d) and 5A-21(c) specify that a person may not be held in both civil and criminal contempt for the same conduct. That provision was added to the statute in 1999 and negates previous case law such as *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981), which had said that both civil and criminal punishment were available in some instances. Sometimes a defendant's conduct may warrant either civil or criminal contempt and the hearing may proceed on the premise that both possibilities are in play. At the end, though, the judge has to choose one or the other. If the choice is criminal contempt, it is essential to confirm that the standard for a criminal conviction has been met and the particular rights of the defendant associated with a criminal proceeding have been satisfied.

Damages and costs for civil contempt — The general rule is that a court may not award costs or damages to a private party in a civil contempt proceeding. *Green v.*

Crane, 96 N.C. App. 654, 386 S.E.2d 757 (1990). North Carolina is in the minority on this issue, with most other jurisdictions allowing compensatory damages to the plaintiff. *See Atassi v. Atassi*, 122 N.C. App. 356; 470 S.E.2d 59 (1996); 85 A.L.R.3d 895. The plaintiff does not get costs either. Thus, for example, the court may not order the defendant to pay the cost of the other side's expert certified public accountant. *Watson v. Watson,* __N.C. App. __ 652 S.E.2d 310 (2007). Costs may be awarded, though, when the settlement agreement being enforced by the court through civil contempt (having been adopted by the court as its own judgment) specifically provides for the award of the costs of enforcement. *PCI Energy Services v. Wachs Technical Services, Inc.*, 122 N.C. App. 436, 470 S.E.2d 565 (1996).

Award of attorney's fees — In general attorney's fees are not available in a contempt proceeding, except for contempt related to child support and equitable distribution. The court's inherent authority to issue sanctions for failure to obey its orders does not include an award attorney's fees. *Baxley v. Jackson*, 179 N.C. App. 635, 634 S.E.2d 905, *rev. denied*, 360 N.C. 644 (2006). Nevertheless, if the court is enforcing a settlement agreement which has been adopted by the court as its own judgment, and that agreement provides for indemnification of the costs of enforcing the agreement, the court can award costs and can include attorney's fees in those costs. *PCI Energy Services v. Wachs Technical Services, Inc.*, 122 N.C. App. 436, 470 S.E.2d 565 (1996).

Trial court jurisdiction after appeal — A civil contempt order imposing sanctions for failing to comply with discovery is immediately appealable. Although the contempt order is interlocutory, it affects a substantial right and thus may be heard on appeal. *Benfield v. Benfield*, 89 N.C. App. 415, 366 S.E.2d 500 (1988). In a case involving contempt for noncompliance with child support and equitable distribution orders the Court of Appeals said that immediate appeal applies to all contempt orders: "The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable." *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E.2d 69 (2002). The court cites *Willis v. Power Co*., 291 N.C. 19, 229 S.E.2d 191 (1976), but *Willis* does not go so far, it addresses only contempt for failing to comply with discovery. The dissent in *Guerrier* argues that the contempt order sometimes may affect a substantial right and sometimes may not and that a blanket rule is not possible. The broad statement by the majority in *Guerrier* might be considered dictum, and one should not assume that all contempt orders are immediately appealable.

If a contempt order has been appealed, the giving of notice of appeal removes the case from the trial court's jurisdiction, meaning that the court may not enforce the contempt sanctions until the appeal is decided or it is determined that there is no right to immediate appeal. *Lowder v. All Star Mills, Inc.*, 301 N.C. 561, 273 S.E.2d 247 (1981).