

Compelling Inventories and Accounts in Decedents' Estates

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Goals for this Session

1. Clerk's Authority to Compel
2. The Compelling Process
3. Contempt Powers

Focus:

- *What's required v. What's discretionary*
- *Limitations on Contempt*



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Clerk's Authority to Compel



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PR required to file Inventory

G.S. 28A-20-1. Inventory within three months.

Unless the time for filing the inventory has been extended by the clerk of superior court, every personal representative and collector, within three months after the qualification of that personal representative or collector, shall return to the clerk, on oath, a just, true and perfect inventory of all the real and personal property of the deceased, which have come to the hands of the personal representative or collector, or to the hands of any person for the personal representative or collector, which inventory shall be signed by the personal representative or collector and be recorded by the clerk.



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PR required to file Annual/Final Accounts

G.S. 28A-21-1. Annual accounts.

Until the final account has been filed pursuant to G.S. 28A-21-2, **the personal representative** or collector **shall**, for so long as any of the property of the estate remains in the control, custody or possession of the personal representative or collector, **file annually** in the office of the clerk of superior court an inventory and account, under oath, of the amount of property received by the personal representative or collector, or invested by the personal representative or collector, and the manner and nature of such investment, and the receipts and disbursements of the personal representative or collector for the past year.

G.S. 28A-21-2. Final accounts.

(a) Unless the time for filing the final account has been extended by the clerk of superior court, **the personal representative** or collector **must file the final account** for settlement within one year after qualifying or within six months after receiving a State estate or inheritance tax release, or in the time period for filing an annual account pursuant to G.S. 28A-21-1, whichever is later.



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When the PR doesn't file on time...

"On time" can mean two things:

1. Deadline without extension
2. Deadline set by clerk's extension



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G.S. 28A-20-2(a). Compelling the inventory.

If the inventory specified in G.S. 28A-20-1 is ***not filed as prescribed***, the clerk of superior court must issue an order requiring the personal representative or collector to file it within the time specified in the order, not less than 20 days, or to show cause why the personal representative or collector should not be removed from office.

If, after due service of the order, the personal representative or collector does not on or before the return day of the order file such inventory or obtain further time in which to file it, the clerk may remove the personal representative or collector from office or may issue an attachment against the personal representative or collector for a contempt and commit the personal representative or collector until the personal representative or collector files said inventory report.



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Compelling the inventory – What's Required?

If the inventory specified in G.S. 28A-20-1 is not filed as prescribed, the clerk of superior court **must issue an order** requiring the personal representative or collector **to file** it within the time specified in the order, **not less than 20 days, or to show cause** why the personal representative or collector should not be removed from office.

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Compelling the inventory – Where's the Discretion?

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Discretion Alert!



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Compelling Decedents' Estates - Inventory G.S. 28A-20-1, 28A-20-2.

- Inventory due within 3 months of qualification (unless extension granted)
- **MUST** issue OTF (time specified in order – no less than 20 days)

OR

show cause hearing why PR should not be removed

- After due service of order
 - PR can get EXTN to file **or**
 - Clerk **MAY** remove PR **or**
 - Clerk **MAY** issue attachment for contempt and commit until filed
- PR personally liable for costs of compel proceedings



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§ 28A-21-4. Clerk may compel account.

If any personal representative or collector fails to account as directed in G.S. 28A-9-3, 28A-21-1 or 28A-21-2 or renders an unsatisfactory account, the clerk of superior court shall, upon motion of the clerk of superior court or upon the request of one or more creditors of the decedent or other interested party, promptly order such personal representative or collector to render a full satisfactory account within 20 days after service of the order.

If, after due service of the order, the personal representative or collector does not on or before the return day of the order file such account, or obtain further time in which to file it, the clerk may remove the personal representative or collector from office or may issue an attachment against the personal representative or collector for a contempt and commit the personal representative or collector until the personal representative or collector files said account. (C.C.P., s. 479; Code, s. 1400; Rev., s. 100; C.S., s. 106; 1933, c. 99; 1973, c. 1329, s. 3; 2011-344, s. 4.)



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Compelling Accounts – What’s Required?

If any personal representative or collector fails to account as directed in G.S. 28A-9-3, 28A-21-1 or 28A-21-2 or renders an unsatisfactory account, **the clerk** of superior court **shall**, upon motion of the clerk of superior court or upon the request of one or more creditors of the decedent or other interested party, **promptly order** such personal representative or collector **to render a full satisfactory account within 20 days** after service of the order.

If, after due service of the order, the personal representative or collector does not on or before the return day of the order file such account, or obtain further time in which to file it, the clerk may remove the personal representative or collector from office or may issue an attachment against the personal representative or collector for a contempt and commit the personal representative or collector until the personal representative or collector files said account. (C.C.P., s. 479; Code, s. 1400; Rev., s. 100; C.S., s. 106; 1933, c. 99; 1973, c. 1329, s. 3; 2011-344, s. 4.)



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Compelling Accounts – Where’s the Discretion?

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Compelling – Decedents’ Estates – Final/Annual Account G.S.28A-21-1, 28A-21-2, 28A-21-4.

- Final account due whichever is later of the below options (unless clerk has extended the time) (accountings must be filed on annual basis until final account is filed)
 - Within one year of qualification **or**
 - Within annual account filing timeframe
 - 30 days after expiration of one year from qualification **or**
 - Fiscal Year Election filed with first 506A (fiscal year-end cannot be more than 12 months after date of death)
- **SHALL** promptly OTF (within 20 days after service)
- After due service of order
 - PR can get EXTN to file **or**
 - Clerk **MAY** remove PR **or**
 - Clerk **MAY** issue attachment for contempt and commit until filed



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The Compelling Process



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Compelling checklist – Start to Finish

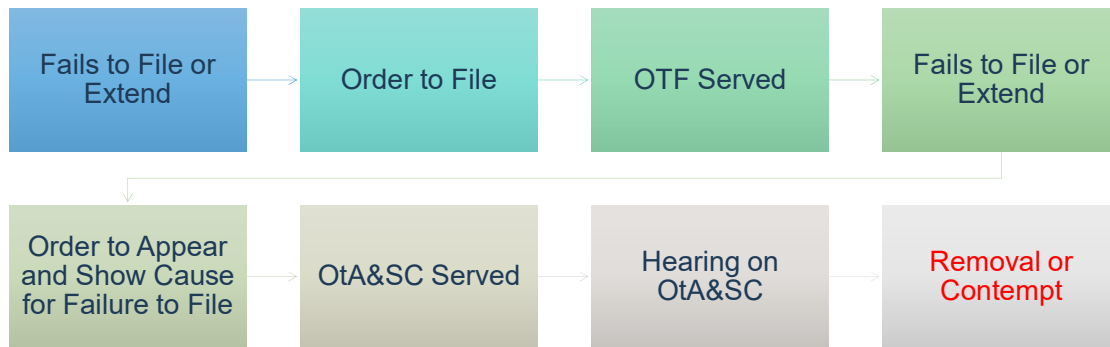
- ✓ Time to file expires
 - ✓ No filing
 - ✓ No extension of time (E-516)
- ✓ Order to File (E-502) Issued
- ✓ OTF Served
 - ✓ No filing
 - ✓ No extension of time (E-516)
- ✓ Order to Appear and Show Cause For Failure to File Issued (E-503)
- ✓ OtA&SC Served
- ✓ Show-Cause Hearing
 - ✓ May Remove
 - ✓ May Issue Attachment for Civil Contempt
 - ✓ Other?



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A Very Compelling Journey



What if.....





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OTF Not Served - Options

- ✓ Time to file expires
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to File Issued
 - Served on PR → Keep going
 - **NOT served on PR**
 - Options:
 1. Try to serve again



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Try to Serve Again – Why?

- Insufficient address?
- Information in the file?
- Other interested parties have info?

- Can issue new order and attempt service again.



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OTF (E-502) Not Served - Options

- ✓ Time to file expires
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to File Issued
 - Served on PR → Keep going
 - **NOT served on PR**
 - Options:
 1. Try to serve again
 2. **Summary revocation**



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OTF (E-502) Not Served - Basis for Summary Revocation G.S. 28A-9-2

1. Letters of administration issued, will later admitted to probate
2. Letters of testamentary issued, then (a) will is set aside, or (b) subsequent will revoking appointment is admitted to probate
3. PR fails to comply with the clerk's order for new or increased bond
4. Nonresident PR refuses or fails to obey any citation, notice, or process served on PR or process agent
5. Bankruptcy trustee, liquidating agent, receiver appointed for the PR or PR executes assignment for benefit of creditors
6. PR failed to file inventory or account and proceedings to compel such filing cannot be had because service cannot be completed because PR cannot be found
7. PR is licensed attorney and clerk receives order under GS 84-28 attorney is suspended, enjoined, or disbarred



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OTF (E-502) Not Served - Basis for Summary Revocation

G.S. 28A-9-2

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5. Bankruptcy trustee, liquidating agent, receiver appointed for the PR or PR executes assignment for benefit of creditors
6. **PR failed to file inventory or account and proceedings to compel such filing cannot be had because service cannot be completed because PR cannot be found**
7. PR is licensed attorney and clerk receives order under GS 84-28 attorney is suspended, enjoined, or disbarred



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“PR Cannot be Found”

- This is where try again can be helpful
- How many ways do you try to serve?
- Avoiding service vs. cannot be found
- Undeliverable at address on file –do you try to find another address?



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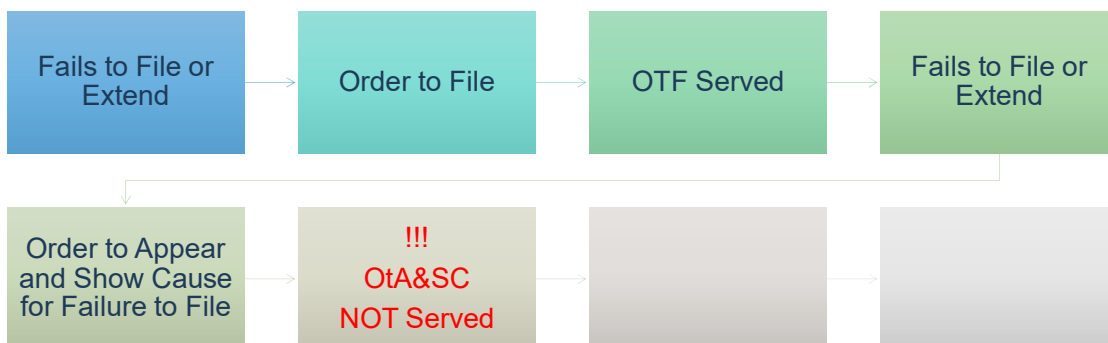
Summary Revocation: Procedure

- G.S. 28A-9-2(b)
- “Upon occurrence of the acts”
 1. Clerk shall enter order revoking letters.
 2. Clerk causes copy of the order to be served on PR or PR’s process agent.



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But what if????



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OtA&SC (E-503) NOT Served

- ✓ Time to file expires
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to File Issued
- ✓ OTF Served
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to Appear and Show Cause For Failure to File Issued
- ✓ OtA&SC NOT Served(!)
 - ✓ Options?



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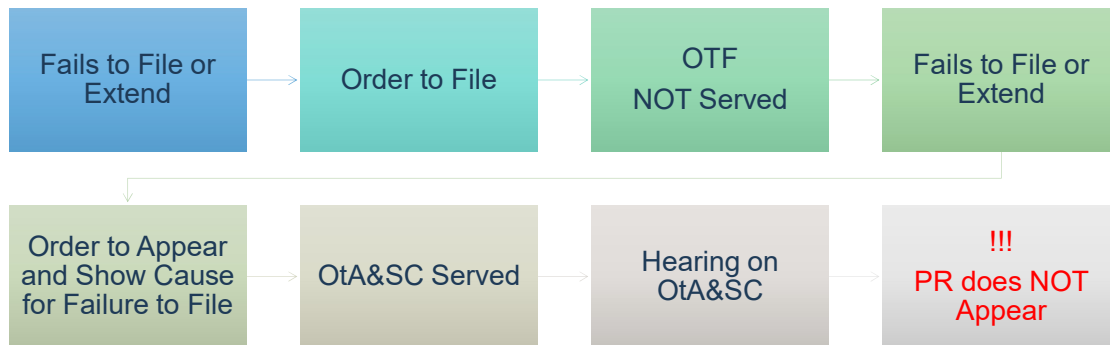
OtA&SC (E-503) NOT Served - Options

- ✓ Time to file expires
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to File Issued
- ✓ OTF Served
 - ✓ No filing
 - ✓ No extension of time (AOC-E-516)
- ✓ Order to Appear and Show Cause For Failure to File Issued
- ✓ OtA&SC NOT Served(!)
 - ✓ Options:
 1. Try to serve again
 2. Summary revocation – G.S. 28A-9-2



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But what if????



PR does NOT Appear at Show Cause Hearing

- ✓ Time to file expires
- ✓ Order to File Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File Issued/Served
- ✓ Hearing
 - ✓ PR does NOT Appear
 - ✓ Options?

PR does NOT Appear at Show Cause Hearing

- ✓ Time to file expires
- ✓ Order to File Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File Issued/Served
- ✓ Hearing
 - ✓ PR does NOT Appear
 - ✓ Options?
 1. Removal *after* hearing

Removal after Hearing

- But... there's no PR!
- You do have service.

- If you have service on PR, *you can go forward with the hearing*, even if the PR doesn't appear.

Revocation After Hearing

- G.S. 28A-21-4 creates its own pathway for removal
 - Different from process described in G.S. 28A-9-1.
- 1. After due service of the order
- 2. PR does not on or before the return day of the order file such account, or obtain further time in which to file it,
- 3. The clerk may remove from office
 - What's the basis for removal?



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Basis for Removal After Hearing, G.S. 28A-9-1

1. PR originally disqualified or has become disqualified since the issuance
2. Issuance of letters was obtained by false representation or mistake
3. PR violated a fiduciary duty through default or misconduct in the execution of the person's office
4. PR has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration



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Basis for Removal After Hearing, G.S. 28A-9-1

1. PR originally disqualified or has become disqualified since the issuance
2. Issuance of letters was obtained by false representation or mistake
3. PR **violated a fiduciary duty through default or misconduct** in the execution of the person's office
4. PR has a private interest, whether direct or indirect, that might tend to hinder or be adverse to a fair and proper administration



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Revocation Hearing: Procedure

1. Clerk enters order revoking letters.
2. Clerk causes copy of the order to be served on PR or PR's process agent.



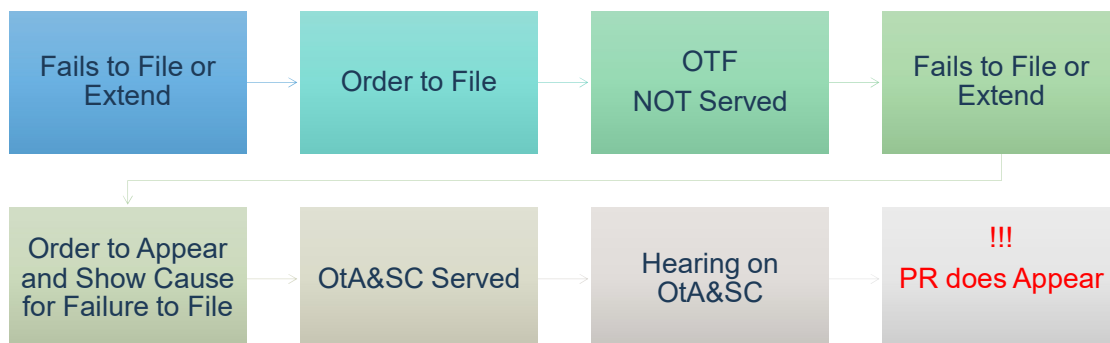
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PR does NOT Appear at Hearing - Options

- ✓ Time to file expires
- ✓ Order to File
- ✓ Order to Appear and Show Cause For Failure to File
- ✓ Hearing
 - ✓ PR does NOT Appear
 - ✓ Options
 1. Removal after hearing
 2. **Indirect Criminal Contempt****

But what if????



PR Appears at Show-Cause Hearing

- ✓ Time to file expires
- ✓ Order to File (E-502) Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File (E-503) Issued/Served
- ✓ Hearing
 - ✓ PR Appears
 - ✓ Options?



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PR Appears at Show-Cause Hearing - Options

- ✓ Time to file expires
- ✓ Order to File (E-502) Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File (E-503) Issued/Served
- ✓ Hearing
 - ✓ PR Appears
 - ✓ Options:
 1. May Remove after Hearing



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PR Appears at Show-Cause Hearing - Options

- ✓ Time to file expires
- ✓ Order to File (E-502) Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File (E-503) Issued/Served
- ✓ Hearing
 - ✓ PR Appears
 - ✓ Options:
 1. May Remove after Hearing
 2. May Issue Attachment for Civil Contempt**



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PR Appears at Show-Cause Hearing - Options

- ✓ Time to file expires
- ✓ Order to File (E-502) Issued/Served
- ✓ Order to Appear and Show Cause For Failure to File (E-503) Issued/Served
- ✓ Hearing
 - ✓ PR Appears
 - ✓ Options:
 1. May Remove after Hearing
 2. May Issue Attachment for Civil Contempt
 3. (Extend)
 4. (Continue)

Don't forget!

Discretion Alert!



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About Contempt...



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Clerk's Authority

G.S. 7A-103

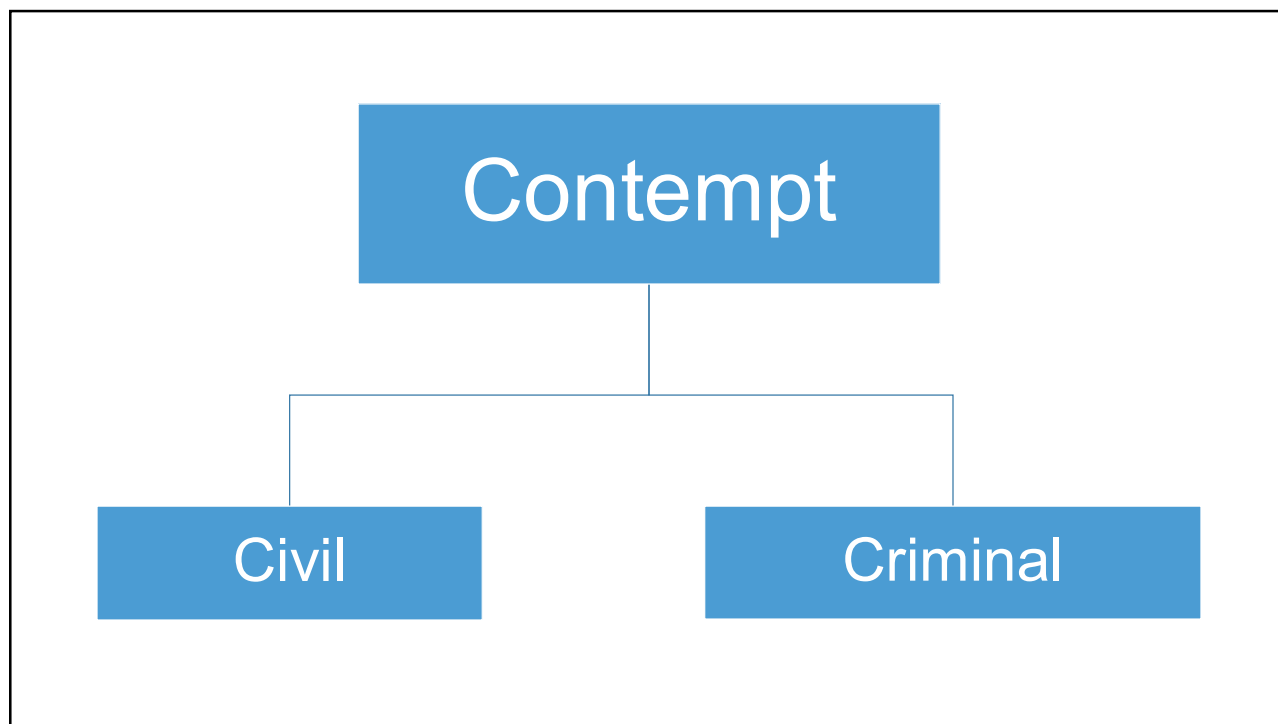
The Clerk of Superior Court is authorized to....

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina.



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What is the Purpose of Contempt?

- **Civil** – purpose is to ***preserve the rights of the parties*** and to ***compel future obedience*** in compliance with an order of the court
 - Punishment – jail (purge) until compliance (up to 1 year)
- **Criminal** – purpose is to ***preserve the authority and dignity*** of the court and to ***punish*** disobedience
 - Punishment – jail up to 30 days, fine up to \$500, censure, or combination thereof

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Criminal Contempt – Two Types

- Direct
- Indirect

Direct Criminal Contempt

- Is committed within the sight or hearing of the presiding judicial official; and
- Is committed in, or in the immediate proximity to, the room where proceedings are being held before the court; and
- Is likely to interrupt or interfere with matters before the court. G.S. 5A-13(a).

*Clerk handles in summary proceeding

Indirect Criminal Contempt

“Willful disobedience of, resistance to, or interference with a court’s lawful process, order, directive, or instruction or its execution.” GS 5A-11(3)

- **Basis:** Failure to appear after being served with E-503
- As a result, clerk could then enter a show cause order for criminal contempt ([CR-219](#) – complete section III and describe grounds for criminal contempt) that initiates a separate criminal contempt proceeding (separate CR file).
- The clerk then applies for an order for arrest if there is probable cause that the person ordered to appear will not appear at the criminal contempt hearing ([CR-217](#) is the order for arrest; #6 is probable cause will failure to appear).
- **Criminal Contempt NOT about filing what’s missing–** about **appearing** at the civil contempt hearing.



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Compelling Inventories & Accounts

Civil Contempt



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Clerk's Civil Contempt Authority

(b) Except when the clerk of superior court has *original subject matter jurisdiction and issued the order* or *when the General Statutes specifically provide for the exercise of contempt power* by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court.

G.S. 5A-23(b)



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Before you get to Civil Contempt....

1. **Order:** Is there an order?
2. **Appearance:** Did the person appear at the hearing?
3. **Counsel:** Is the person represented by counsel?



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Civil Contempt Precondition #1: Order

1. **Order:** Is there an order?

- Purpose of civil contempt is to compel compliance with an **order**.
- No order = No civil contempt



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Civil Contempt Precondition #2: Appearance

2. **Appearance:** Did the person appear at the hearing?

- Essential for the findings that you will need to make
- To enter a civil order for contempt, CSC must find evidence of:
 - Willfulness
 - +
 - Present Ability to Comply (or Reasonable Steps)
 - G.S. 5A-21(a).
 - See also *Little v. Bennington*, 109 NC App 482 (1993).



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Civil Contempt Precondition #3: Counsel

3. Counsel: Is the person represented by counsel?

- Ask Yourself: Is there a substantial likelihood of jail [and insufficient procedural safeguards to protect due process]? See *McBride v. McBride*. But see *Turner v. Rogers*, 564 US 431 (2011).
- Are they **indigent**? May use CR-226, Affidavit of Indigency; CR 224, Denial or Appointment of Counsel.
- In all cases,
 - **Explain they have a right to an attorney and an attorney will be appointed for them if they are indigent.**
 - **Explain the consequences of civil contempt – jail – and court's inability to enter contempt unless court finds willfulness and ability to comply.**
- Do they **waive** right to an attorney – **knowingly, voluntary, informed**.
 - If yes, put it on the record, may use CR 227.
 - **If no, then....APPOINT COUNSEL**



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Civil Contempt Preconditions Recap

Know the necessary **preconditions** to exercising civil contempt authority

1. **There must be an order for civil contempt.**
2. **If the alleged contemnor did not appear at the show cause hearing, consider:**
 1. Other options to protect the estate?
 2. Removal after hearing?
 3. Steps to compel: Order for Arrest through Indirect Criminal Contempt?
3. **If not represented and indigent** – appoint counsel or get knowing, voluntary, informed waiver in writing or on the record.



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Elements of Civil Contempt

Based on the evidence presented, CSC order must include findings of fact to support the conclusions that:

1. **Order in force and purpose may be served**
2. **Willfulness**
3. ****Ability to comply or take steps to comply****

*Identify the **necessary findings and conclusions in a civil contempt order**



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Order Still in Force and Purpose Served

1. Has the person complied by the hearing?
 - No contempt if complied by the hearing, even if after show cause
2. Purpose of the Order still served by compliance?
 - Would removal or other action suffice?



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“Willfulness”

The evidence must show that the person was guilty of “knowledge and stubborn resistance” in order to support a finding of willful disobedience with a court order.

Sharpe v. Nobles, 127 N.C. App. 705 (1997).



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Present Ability to Comply

The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

G.S. 5A-21(a)(3).

**Recommend make findings to this effect in the civil contempt order.*



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Civil Contempt Essentials

1. Order must identify a purge condition – no indefinite contempt
2. Jail is the only remedy – up to 1 year at 90 day intervals
3. Appeal within 10 days *de novo* to superior court



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Notify the State Bar

If an attorney held in contempt, clerk shall send a certified copy of the order to the NC State Bar within 10 days of entry of the order.

RRR 6.12.



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Recap



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Compelling checklist

1. Time to file expires

- ✓ No filing
- ✓ No extension of time (AOC-E-516)

- ✓ NOT served on PR
 - Try again
 - Summary revocation

2. Order to File

- ✓ Served on PR → Keep going
- ✓ NOT served on PR
 - Try again
 - Summary revocation

3. Order to Appear and Show Cause For Failure to File

- ✓ Served on PR → Keep going

4. Hearing

- ✓ PR does NOT Appear
 - Remove after hearing
 - Criminal Contempt
- ✓ PR appears
 - Remove after hearing
 - Civil contempt
 - Continue/Extend?



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Remember...

- Clerk has lots of discretion
- Lots of options at every stage
- What your order should always be in the estate's best interest
- If you choose contempt
 - Make sure it's for the right reasons
 - Have solid legal footing



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