

**Contempt**

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**School of Government ResourcesResources**

- District Court Bench Book Volume 2, Contempt Chapter (2014 version)
- Family Law Bench Book, Child Support Chapter (enforcement section)
  - Available on-line at <https://www.sog.unc.edu/resources/microsites/nc-district-court-judges>
  - Password: judges

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- Contempt (overview), AOJ Bulletin, M. Crowell 2015:
  - (<http://sogpubs.unc.edu/electronicversions/pdfs/aojb1503.pdf>)
- Contempt of Court - Online training module
  - (<https://www.sog.unc.edu/courses/online-modules/contempt-court>)
- Numerous blog posts at "On the Civil Side":
  - ([civil.sog.unc.edu/](http://civil.sog.unc.edu/))
- Numerous blog posts at Criminal Law Blog ([ccriminallaw.sog.unc.edu](http://ccriminallaw.sog.unc.edu))
- Family Law Bench Book: contempt section in most chapters
  - Available on-line at <https://www.sog.unc.edu/resources/microsites/nc-district-court-judges>
  - Password: judges

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**Contempt authority is statutory**

NC Gen. Stat. Chapter 5A  
 Criminal Contempt  
 Civil Contempt  
 Contempt by Juveniles

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**Criminal vs. Civil Contempt**

- Different purposes
- Different legal basis, grounds, elements
- Different legal procedure
- Different burden of proof
- Different legal rights
- Different sanctions
- Different appellate procedure

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<u>Criminal contempt</u>	<u>Civil contempt</u>
<ul style="list-style-type: none"> <li>• To vindicate the dignity of court by punishing disrespect to court or its orders</li> <li>• To deter future violations</li> <li>• A judgment, a "conviction" <small>(not a conviction for structured sentencing)</small></li> </ul>	<ul style="list-style-type: none"> <li>• To preserve &amp; enforce rights of party by coercing compliance with court's orders</li> <li>• To coerce compliance with court's order</li> <li>• A status</li> </ul>

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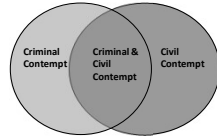
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### Criminal vs. Civil Contempt

- Distinction is “hazy at best”
  - Failure to comply with court order may be criminal, civil, or both
    - Cannot be held in both civil and criminal contempt for same act
  - Purpose of trial court may be unclear
  - Confusion regarding and failure to follow procedure & sanctions
  - Hesitance to use criminal contempt



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### Kolczak v. Johnson, 260 NC App 208 (2018)

- Trial court found civil contempt for violations of custody order:
  - failing to inform father of certain events as required by the custody order,
  - failing to give father the right of first refusal when she needed childcare for the child as specified in the custody order,
  - allowing her husband to be present when the children were at her home when order provided that children were to have no contact with the husband, and
  - scheduling the children for camps during times that interfered with father’s custodial time with the children.
- Court of Appeals stated:
  - It is not “apparent how an appropriate civil purge condition could coerce the defendant to comply with the court order as opposed to punishing her for a past violation.”

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### Criminal vs. Civil Contempt

- Civil contempt
  - Avoid or terminate status by compliance
- Criminal contempt
  - Punishment is imposed
  - Can’t avoid or terminate the “conviction” through compliance
    - Even if sentence suspended, judgment remains

- **“Bright line” rule**
  - **Sanction, not label, is determinative**
    - *Reynolds v. Reynolds*, 356 NC 287 (2002).

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**Reynolds v. Reynolds, 356 NC 287 (2002), adopting dissent in 147 NC App 566 (2001)**

- Criminal or Civil ???:
- “Defendant is guilty of ... contempt and ordered an active sentence of thirty days in [jail] suspended on the following conditions:
  - Defendant's posting of a cash bond or security of at least \$75,000.00 to secure and assure the timely payment of future cash child support;
  - Defendant immediately paying Plaintiff's attorney the sum of \$212.52, “representing interest on the four delinquent child support payments”;
  - Defendant timely paying each cash child support amount due; and Defendant immediately paying \$10,000.00 in attorney's fees.”

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**Wilson v. Guinyard, 801 SE2d 700 (2017)**

- Criminal or Civil ?????:
- Defendant in contempt for being late for visitation pick up;
- “Purge” contempt by picking up on time next three visits;
- If late, forfeit three visits and spend 72 hours in jail.

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**Criminal Contempt**

- Only those actions listed in GS 5A-11(a)
- Most common:
  - (1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
  - (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.
  - (3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

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**Criminal: Direct or Indirect. GS 5A-13**

Direct	Indirect
<ul style="list-style-type: none"> <li>• Occurs in sight of or within hearing of the court</li> <li>• In or near the courtroom</li> <li>• Likely to disrupt or interfere with court proceedings</li> <li>• Can use summary procedure or plenary procedure</li> <li>• GS 5A-14, GS 5A-15</li> </ul>	<ul style="list-style-type: none"> <li>• Must use plenary procedure</li> <li>• GS 5A-15</li> </ul>

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**Summary proceeding**

Summary proceeding appropriate *“when necessary to restore order or maintain dignity and authority of the court.”*

G.S. 5A-14

**Court must:**

1. Gives person summary notice of charges
2. Give “summary opportunity to respond.”

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**“summary opportunity to respond”**

“...[i]ntended not to provide for a hearing, or anything approaching that...but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.” -Official commentary to 5A-14 (quoted often in cases)

For an SOG instructional video see <https://www.sog.unc.edu/courses/online-modules/contempt-court>



Video

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**“Summary opportunity to respond”**

*In re Korfmann, 786 S.E.2d 768 (N.C. App. 2016).*

**Trial judge:**

This Court takes the strong position that technology is not to be utilized by jurors and, in fact, this jury has been warned several times not to use.

In my opinion the utilization by the juror is blatantly disrespecting the Court's order not to use.

Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court.

The ladies and gentlemen of this jury are now excused. You can get a certificate as to where you have been for the last several days. You are excused.

This gentleman is in your custody.

**Court of Appeals:**

**Contempt order VACATED:**

*“The trial court did not give appellant the necessary ‘summary notice of the charges and a summary opportunity to respond[.]”*

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**Summary proceeding**

Summary proceeding appropriate *“when necessary to restore order or maintain dignity and authority of the court.”*

G.S. 5A-14

**Court must:**

1. Gives person summary notice of charges
2. Give “summary opportunity to respond.”
3. Find facts supporting summary imposition of punishment.
  - Must find willfulness (or prior warning)
  - Must state that facts found “beyond reasonable doubt.”

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**Plenary Criminal Proceedings**

Initiated by Show Cause order:

- Motion, affidavit, probable cause not required
- Adequate notice
  - Basis of alleged contempt
  - Date, time, place of hearing
  - Order for arrest can issue if probable cause to believe alleged contemnor will not show for hearing
    - GS 5A-16(b)
- Copy of show cause must be “furnished” to alleged contemnor
  - Service under Rules 4 or 5?

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**Plenary Criminal Proceedings**

- Right to counsel
- Right against self-incrimination
- No right to jury trial
- Court may be represented by prosecutor
- Proof beyond reasonable doubt
- No burden shifting as result of show cause
  - Moving party goes first in evidentiary hearing

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**Punishment for Criminal Contempt**

- GS 5A-12(a):
  - Censure
  - Imprisonment up to 30 days
  - Fine not to exceed \$500, or
  - Any combination of the three

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**Civil contempt**

- Only purpose is to coerce compliance with a court order after court concludes party has the present ability to comply with the order

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**Consent Orders**

**General rule:**

- If court approves and adopts agreement of parties, contempt is not available
  - See *Crane v. Green*, 114 NC App 105 (1995)
- If court makes findings of fact and conclusions of law, contempt is available
  - See *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188 (1995)

**Domestic Relations Cases**

- All consent orders are enforceable by contempt
  - *Henderson v. Henderson*, 307 NC 401 (1983)
  - *Walters v. Walters*, 307 NC 381 (1983)

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**GS 5A-21(a)**

- Failure to comply with court order is continuing civil contempt as long as:
  - The order remains in force
  - The purpose of the order may still be served by the person's compliance with it
  - The person's failure to comply is **willful**, and
  - The person has the **present ability to comply** with the order or to take reasonable measures that would enable him to comply with the order

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**GS 5A-22(a)**

- 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 civil contempt must specify how the person may purge himself of the contempt.

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**Watson v. Watson**  
187 NC App 55 (2007)

- “A civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings.”
- Why??

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**Civil contempt**

- Contemnor must ‘hold the keys to the jail’
- Because contemnor can walk out of the jail at any time, there is no right to counsel or other safeguards required in criminal cases where liberty is in jeopardy
  - *Turner v. Rogers*, 564 US 431 (2011)(no right to counsel for child support contempt)
  - *Cf. McBride v. McBride*, 334 NC 124 (1993)(right to counsel for child support contempt)
  - *Wilson v. Guinyard*, 254 NC App 229(2017)(right to counsel in non-child support civil contempt is determined on a case-by-case basis)

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**Civil Contempt Procedure**

- Civil initiated either by:
  - Motion filed by a party.
    - GS 5A-23(a1)
  - Show cause order from court.
    - GS 5A-23
    - No statutory authority to issue order for arrest for failing to show up
- If initiated by motion, moving party has burden of going forward at hearing
- If initiated by show cause order, respondent obligor has burden of going forward at hearing.

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**Civil Contempt Procedure**

Show cause cannot issue unless judicial official determines, based on verified motion and sworn statement, there is probable cause to believe obligor is in civil contempt.

The finding of probable cause justifies the shifting of the burden of presenting evidence in the contempt trial

- Probable cause requires trustworthy information sufficient to warrant a prudent man in believing obligor is in civil contempt.
- *Young v. Mastron, Inc.*, 149 NC App 483 (2002)

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**GS 5A-23**

- (c). The person ordered to show cause may move to dismiss the order
- (e). At the conclusion of the hearing, the judicial official must enter a finding for or against the contemnor on each of the elements set out in GS 5A-21(a)

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**Civil Contempt**

- Order of civil contempt must contain findings of fact supported by evidence in the record establishing defendant has the present ability to comply with the purge ordered
  - *See Durham DSS ex rel Alston v. Hodges, COA January 2, 2018*
- There is no contempt by default
  - <http://civil.sog.unc.edu/no-default-judgment-in-contempt/>
  - <https://civil.sog.unc.edu/contempt-establishing-ability-to-pay/>
  - *Tigani v. Tigani*, 805 SE2d 546 (NC App 2017)

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Is this enough to support contempt?

Defendant was ordered to pay child support

Defendant has not paid

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What about this?

- Defendant has not paid and he:
  - Is healthy and able-bodied
  - Is presently employed
  - Owns a car
  - No ill health or incapacity since entry of order
  - Has ability to earn good wages as a salesman
  - Is experienced in the restaurant business
  - Never requested modification of order

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*Mauney v. Mauney*, 268 NC 254 (1966)

No – findings insufficient to establish defendant's ability to pay at any time during the period in which he was in arrears.

Court should "take an inventory of the property of the defendant; find what are his assets and liabilities and his ability to pay and work – an inventory of his financial position."

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What about...

- Alleged contemnor has not paid and:
  - Is an able-bodied 32-year old
  - Attended high school up to 10<sup>th</sup> grade
  - Has work experience in the furniture industry but prefers to work outside jobs
  - Worked full time for 8 months last year as a brick mason

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*Clark v. Gragg*, 171 NC App 120 (2005)

- Findings insufficient to show defendant's noncompliance was willful.
  - See also *County of Durham v. Burnette*, 262 NC App 17 (2018)(need evidence of income, assets, liabilities and reasonable subsistence needs)
- To support conclusion of willful noncompliance, must establish ability to pay "during the time he was in default".
- In addition, court must find present ability to comply with purge.
  - Order must show contemnor "holds the keys to the jail".

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Remedy for civil contempt  
GS 5A-21

<p>Person found in civil contempt "may be imprisoned as long as the civil contempt continues."</p> <ul style="list-style-type: none"> <li>• Indefinite incarceration:           <ul style="list-style-type: none"> <li>• Purge that does not require payment of money</li> <li>• Purge that requires payment of money for child support               <ul style="list-style-type: none"> <li>• GS 5A-21(b)</li> </ul> </li> <li>• Required review after 90 days.</li> <li>• Purge that requires payment of money for something other than child support               <ul style="list-style-type: none"> <li>• GS 5A-21(b2)</li> <li>• See <i>McKenzie v. McKenzie</i>, 275 NC App 126 (2000)</li> </ul> </li> </ul> </li> </ul>	<p>Imprisonment is the only remedy</p> <ul style="list-style-type: none"> <li>• Short 'stays' of incarceration are permissible but not suspended sentences           <ul style="list-style-type: none"> <li>• See <i>Blanchard v. Blanchard</i>, NC App (Sept. 21, 2021)(10-day stay upheld)</li> <li>• See <i>Gordon v. Gordon</i>, 233 NC App 477 (2014)(60-day stay okay where evidence showed ability to pay purge in 60 days)</li> <li>• <i>Watson v. Watson</i>, 187 NC App 55 (2007)(90-day stay okay where evidence showed party had property that could be sold)</li> </ul> </li> </ul>	<p>Contempt order must provide "purge"</p> <ul style="list-style-type: none"> <li>• Must specify how and when contempt will be lifted.           <ul style="list-style-type: none"> <li>• <i>Kolczak v. Johnson</i>, 817 SE2d 861 (2018)(civil contempt vacated for lack of a purge)</li> <li>• Indefinite civil contempt is not allowed               <ul style="list-style-type: none"> <li>• <i>Wellons v. White</i>, 748 SE2d 709 (2013)</li> <li>• <i>Spears v. Spears</i>, 784 SE2d 485 (2016)</li> </ul> </li> </ul> </li> </ul>
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Remedy for civil contempt

- Fines are not allowed
  - GS 5A-21(d)
- Costs and Damages are not allowed
  - Watson v. Watson*, 187 N.C. App. 55 (2007)(no expert witness fees)
  - Attassi v. Attassi*, 122 N.C. App. 356 (1996)(no compensatory damages)

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Attorney fees

- Generally not allowed in contempt
  - Baxley v. Jackson*, 179 N.C. App. 635 (2006)(court's inherent authority does not include power to award attorney fees in contempt); *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)(same)
  - But see *Blair v. Blair*, 8 N.C. App. 61 (1970)(power to punish for contempt includes power to award fees)
- Exception: Consent judgments that authorize fees
  - PCI Energy Services v. Wachs Tech. Services, Inc.*, 122 N.C. App. 436 (1996).
  - 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 "[e]ven in the face of a carefully drafted contractual provision indemnifying a party for such attorneys' fees... our courts have consistently refused to sustain such an award absent statutory authority therefor")
- Exception where statutes authorize attorney fees
  - Family Law matters
    - GS 50-13.6 (custody and child support)
    - GS 50-16.4 (alimony)
  - See also *Hartzell v. Hartzell*, 99 N.C. App. 380 (1990)(equitable distribution despite lack of statute)

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