

## 2024 Child Support Enforcement: Representing Respondents

### REVISED AGENDA

January 19, 2024 / Chapel Hill, NC

*Co-sponsored by the UNC School of Government &  
Office of Indigent Defense Services*

8:00 to 8:30	<i>Check-in</i>
8:30 to 8:45	<b>Welcome</b> <i>Timothy Heinle, Teaching Assistant Professor</i> UNC School of Government, Chapel Hill, NC
8:45 to 9:45	<b>Civil Contempt and Child Support Court</b> <i>Cheryl Howell, Professor of Public Law and Government</i> UNC School of Government, Chapel Hill, NC
9:45 to 10:45	<b>Civil Contemnors, Jail, and Attorneys' Ethical Responsibilities</b> [Ethics CLE] <i>Timothy Heinle, Teaching Assistant Professor</i> UNC School of Government, Chapel Hill, NC
10:45 to 11:00	Break
11:00 to 11:30	<b>Stories, Not Spreadsheets: Preparing Your Case</b> <i>Timothy Heinle, Teaching Assistant Professor</i> UNC School of Government, Chapel Hill, NC
11:30 to 12:15	Lunch
12:15 to 1:00	<b>Direct Examination of Child Support Contempt Respondents</b> <i>Elizabeth C. Ponder, Assistant Public Defender</i> Judicial District 3B
1:00 to 1:45	<b>Workshop: Direct Examination</b>
1:45 to 2:00	Break
2:00 to 3:00	<b>Legislative and Federal Guidance Updates</b> <i>Wendy Sotolongo, Parent Defender</i> <i>Office of Indigent Defense Services, Durham, NC</i>
3:00	Adjourn

**CLE HOURS: 5.00**

[Including 1.0 hour of ethics]

# Civil Contempt

Cheryl Howell  
School of Government  
January 2024

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## SOG Resources

- ▶ Family Law Bench Book, Child Support Chapter (enforcement section)
  - <http://defendermanuals.sog.unc.edu/content/other-manuals>
  - <http://www.ncids.org/ChildSupport/ReferenceMaterials/RefMaterialsLinks.htm>
- ▶ Bench Book Volume 2, Contempt Chapter
  - <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/Bench%20Book%20-%20Vol%202%20-%2004%20Contempt.pdf>

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## SOG Resources

- ▶ 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  
[nccriminallaw.sog.unc.edu](http://nccriminallaw.sog.unc.edu)

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## Contempt authority is statutory

NC Gen. Stat. Chapter 5A

Criminal Contempt

Civil Contempt

Contempt by Juveniles

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## Federal/State Regulations

- ▶ **Read** about federal and state direction to child support enforcement agencies regarding the use of contempt to enforce child support
  - <https://civil.sog.unc.edu/new-regulations-regarding-contempt-in-iv-d-child-support-cases/>

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## NC DSS Child Support Enforcement Manual

### • [GUIDELINES FOR USE OF CIVIL CONTEMPT IN IV-D CASES](#)

"The federal Office of Child Support Enforcement (OCSE) has stated: "Civil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice." Prior to considering the use of contempt proceedings in a delinquent case, CSS caseworkers should consider the use of administrative enforcement remedies. If a repayment plan can be negotiated successfully, this approach can be considered as a cost savings to the CSS agency."

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- "If caseworkers determine other enforcement remedies to be inadequate, then prior to initiating a contempt proceeding in court, they must screen the case for information regarding the NCP's [NCP is the noncustodial parent] ability to pay (or otherwise comply with the order, if appropriate)...."
- "Caseworkers must share the results of this review with the IV-D attorney, so that the IV-D attorney can present this information to the court, either if the court requests it or as is otherwise appropriate."
- "Alternatively, if the results of the review indicate that the amount of the current court-ordered obligation may no longer be consistent with the NCP's ability to pay, caseworkers should consider whether modification of the order might be appropriate."
- "Prior to a civil contempt hearing, the NCP must also be given notice that his/her ability to pay will be a critical question at the hearing."

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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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## Criminal vs. Civil Contempt

### Criminal contempt

- To vindicate the dignity of court by **punishing** disrespect to court or its orders
- To deter future violations
- A judgment, a "conviction" (not a conviction for structured sentencing)

### Civil contempt

- To preserve & enforce rights of party by **coercing** compliance with court's orders
- To coerce compliance with court's order
- A status

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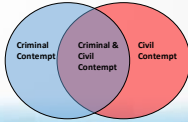
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## Criminal vs. Civil Contempt

- 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



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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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- 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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### 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 *Nahejil 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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- 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 them 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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- 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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### *McBride v. McBride*, 334 NC 124 (1993)

- Overruled *Jolly* wherein court held no right to counsel because civil contemnor "holds the keys to the jail."
- *McBride*: contemnor does not "hold keys to the jail" if contemnor cannot pay the purge.



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### *McBride v. McBride*, 334 NC 124 (1993)

- Despite requirements of the law, "experience has shown" "trial courts do not always make [the required] determination."
- Attorneys will prevent "unjustified deprivation of a defendant's physical liberty" and "increase the accuracy of the proceeding."



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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
    - GS 50-13.9 (child support)
      - Clerk or judge can issue show cause
      - Must be served by Rule 4 service.
- \*\*No statutory authority to issue order for arrest for failing to show up as ordered in show cause order for civil contempt
- 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. Mistrom, 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*, 257 NC App 288 (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*, 256 NC App 154 (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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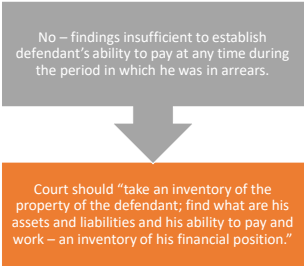
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*Mauney v. Mauney*,  
268 NC 254  
(1966)



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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

Person found in civil contempt "may be imprisoned as long as the civil contempt continues"	Imprisonment is the only remedy	Contempt order must provide "purge"
<ul style="list-style-type: none"> <li>• <b>Indefinite incarceration:</b></li> <li>• Purge that does not require payment of money</li> <li>• Purge that requires payment of money for child support</li> <li>• GS 5A-21(b)</li> <li>• <b>Required review after 90 days:</b></li> <li>• Purge that requires payment of money for something other than child support</li> <li>• GS 5A-21(b2)</li> <li>• See <i>Mckenzie v Mckenzie</i>, 275 NC App 126 (2020)</li> </ul>	<ul style="list-style-type: none"> <li>• Short stays of incarceration are permissible but not suspended sentences</li> <li>• See <i>Blanchard v Blanchard</i>, 366 S2 693 (N.C. Ct. App. Sept. 21, 2022) (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>	<ul style="list-style-type: none"> <li>• Must specify how and when contempt will be lifted</li> <li>• <i>Kolczak v Johnson</i>, 260 NC App 218 (2018) (civil contempt vacated for lack of a purge)</li> <li>• Indefinite civil contempt is not allowed</li> <li>• <i>Mellons v White</i>, 229 NC App 84 (2013)</li> <li>• <i>Spears v Spears</i>, 245 NC App 360 (2016)</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**

- Court can order contemnor to pay a "reasonable attorney fee" to moving party in child support case for contempt proceeding pursuant to GS 50-13.6
- But only if court finds:
  - Moving party has insufficient means to defray cost of litigation
  - Moving party acted in good faith
  - The lawyer's skill
  - The lawyer's hourly rate, and
  - The nature and scope of services rendered

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Civil Contempt -  
Appeal

To Court of Appeals

- Within 30 days
- Immediately appealable due to "substantial right"
- "On the record" review

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# New Regulations Regarding Contempt in IV-D Child Support Cases

This entry was contributed by Cheryl Howell on June 30, 2017 at 8:00 am and is filed under Contempt, Family Law.

Effective January 19, 2017, the federal Department of Health and Human Services (DHHS) adopted a final rule titled "Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs." 81 Federal Register 93492 (Dec. 20, 2016). This rule mandates numerous changes to the policies and procedures of state child support enforcement programs, but one change of particular importance to state trial courts involves the use of contempt procedures to enforce child support obligations. According to the Comments to the new rules, the change in the federal regulations regarding the use of contempt is intended to ensure that the "constitutional principles articulated in Turner v. Rogers, 564 U.S. 431 (2011)[addressing the rights of obligors in child support contempt proceedings], are carried out in the child support program, that child support case outcomes are just and comport with due process, and that enforcement proceedings are cost-effective and in the best interest of the child." 81 FR at 93532.

## Federal Direction to State Enforcement Programs

The new federal rule amends 45 CFR 303.6 to require all state enforcement programs to develop guidelines for the use of civil contempt as an enforcement mechanism in child support cases. The Comment to the new rule focuses on the US Supreme Court decision in Turner v. Rogers as justification for clarifying the need to better protect the due process rights of obligors in contempt proceedings. The Comment states:

"As the U.S. Supreme Court stated in Turner, a noncustodial parent's ability to pay constitutes the critical question in a civil contempt case. ... Contempt is an important tool for collection of child support when used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligations, but willfully fails to do so, and the purge amounts or conditions are within the noncustodial parent's ability to pay or meet. The Turner opinion provides the child support program with a guide for conducting fundamentally fair and constitutionally acceptable proceedings."

81 FR at 93532.

Effective January 19, 2017, 45 C.F.R. 303.6(c)(4) requires that all state child support offices establish guidelines for the use of civil contempt in IV-D cases. The guidelines must:

"include requirements that the IV-D agency:

- (i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order;
- (ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order, which may assist the court in making a factual determination regarding the noncustodial parent's ability to pay the purge amount or comply with the purge conditions; and
- (iii) Provide clear notice to the noncustodial parent that his or her ability to pay constitutes the critical question in the civil contempt action."

## North Carolina Response to the New Regulation

The North Carolina Child Support Enforcement Agency has complied with the new federal mandate by adopting the following guidelines, published in the Child Support Services Manual found on the website of the NC Department of Health and Human Services, <https://www2.ncdhhs.gov/info/olm/manuals/dss/cse/man/> :

### GUIDELINES FOR USE OF CIVIL CONTEMPT IN IV-D CASES

"The federal Office of Child Support Enforcement (OCSE) has stated: "Civil contempt that leads to incarceration is not, nor should it be, standard or routine child support practice." Prior to considering the use of contempt proceedings in a delinquent case, CSS caseworkers should consider the use of administrative enforcement remedies. If a repayment plan can be negotiated successfully, this approach can be considered as a cost savings to the CSS agency.

...

If caseworkers determine other enforcement remedies to be inadequate, then prior to initiating a contempt proceeding in court, they must screen the case for information regarding the NCP's [NCP is the noncustodial parent] ability to pay (or otherwise comply with the order, if appropriate). This review of the case is important because the NCP's ability to pay will be a critical issue at the contempt hearing, since the court must find that the NCP has the ability to comply with the underlying order before holding the NCP in civil contempt. Caseworkers must share the results of this review with the IV-D attorney, so that the IV-D attorney can present this information to the court, either if the court requests it or as is otherwise appropriate.

Alternatively, if the results of the review indicate that the amount of the current court-ordered obligation may no longer be consistent with the NCP's ability to pay, caseworkers should consider whether modification of the order might be appropriate.

Prior to a civil contempt hearing, the NCP must also be given notice that his/her ability to pay will be a critical question at the hearing. This notice is included in the Order To Appear And Show Cause (DSS-4663). However, if a county does not use the DSS-4663, then the county must ensure that this notice is provided to the NCP. "

### Show Cause Orders

As I said in my earlier blog post "[No Contempt by Default](#)," North Carolina law allows a show cause order to be issued to initiate a contempt proceeding only upon the establishment of probable cause that the obligor is in contempt of court. The information the state guidelines now require child support enforcement to obtain should provide the court with the information necessary to determine whether the party seeking the show cause order has the evidence necessary to support a contempt order. *See also* On The Civil Side blog post "[Contempt: Establishing Ability to Pay](#)."

This entry was tagged with the following terms: child support, child support enforcement, contempt, IV-D.

Cheryl Howell

Cheryl Howell is a Professor of Public Law and Government at the School of Government specializing in family law.

# No Contempt for the Nonpayment of Money Without Actual Evidence of Ability to Pay

This entry was contributed by Cheryl Howell on December 5, 2018 at 8:00 am and is filed under Civil Law, Contempt, Family Law.

In 2015, I wrote two blog posts summarizing the law relating to the use of contempt to enforce orders to pay support. [\*No Default Judgment in Contempt \(May 1, 2015\)\*](#) and [\*Contempt: Establishing Ability to Pay \(May 8, 2015\)\*](#). Recent appellate opinions justify revisiting this topic.

## No Default Judgment for Contempt

Because case law holds that the entry of a show cause order for civil contempt shifts the burden in the contempt hearing to the alleged contemnor to establish why he or she is not in civil contempt, *see .e.g. Shumaker v. Shumaker, 137 NC App 72 (2000)*, it is not uncommon for petitioners to argue that if no evidence of ability to pay is offered or if the court does not find the evidence of the respondent to be credible, the respondent should be held in contempt by default. The court of appeals repeatedly has rejected this argument. In the recent case of [\*Tigani v. Tigani, N.C. App. , 805 SE2d 546 \(October 17, 2017\)\*](#), the court of appeals reiterated that a party cannot be held in civil contempt for the nonpayment of money unless evidence is introduced sufficient to establish the parent has the actual present ability to pay.

In [\*Tigani\*](#), the trial court ordered Defendant to pay attorney fees but he did not pay. Plaintiff filed a motion requesting defendant be held in civil contempt. Defendant did not appear for the contempt hearing and the trial court concluded he had the ability to pay and held him in civil contempt. On appeal, defendant argued there was insufficient evidence in the record to establish that he had the present ability to pay the attorney fee at the time of the contempt hearing and the court of appeals agreed. The court noted that while the trial court reviewed bank account records of the defendant during the contempt hearing, the records were not introduced into evidence during the hearing and no witness testified. Therefore, there was no evidence in the record at all. The court of appeals also rejected plaintiff's argument that defendant waived any objection to the lack of evidence by not attending the contempt hearing and producing evidence of his inability to pay. The court of appeals held that a defendant's failure to participate in the hearing does not relieve the court of the need to make findings of fact regarding defendant's present ability to comply with the court order and the purge being imposed before holding a party in contempt. Those findings of fact must be supported by evidence in the record.

For cases involving a child support enforcement agency, recently revised federal regulations require that the IV-D agency provide the trial court with evidence regarding a parent's ability to pay in contempt proceedings. *See* blog post [\*New Regulations Regarding Contempt in IV-D Cases \(June 30, 2017\)\*](#).

## Evidence Sufficient to Establish Ability to Pay

The court of appeals also recently reaffirmed the NC Supreme Court opinion in [\*Mauney v. Mauney, 268 N.C. 254 \(1966\)\*](#), holding that conclusory findings by a trial court that a respondent has the ability to pay are not sufficient. Rather, a trial court must take an "inventory" of a party's "financial condition" in order to support a finding that the party has the ability to pay.

In [\*County of Durham ex rel. Wilson and King v. Burnette, N.C. App. , S.E.2d \(October 16, 2018\)\*](#), the trial court held father in civil contempt for failure to pay child support. Plaintiff presented no evidence in the contempt hearing other than the amount of arrears owed by father. Father presented evidence that he had no income and no ability to pay. The trial court order concluded that father acted willfully and had the ability to pay support based on findings that he:

"owns a boat, owns a car, spends money on gas, spends money on food, has medical issues that do not keep him from working, prepares and delivers food, repairs cars for money, pays for car insurance, and receives in-kind income from his sister."

The court of appeals held that while the evidence in the record supported these specific findings, the evidence and the trial court findings did not support the conclusion father had the ability to pay support or to pay the purge amount set by the trial court. According to the court of appeals, a trial court must "take an inventory" of a parent's "financial condition" in order to support the conclusion that the parent willfully failed to pay and has the present ability to comply with the purge condition. A trial court "must consider both sides of the equation: income or assets available to pay and reasonable subsistence needs of the [parent]".

The findings of fact in this case did not establish, for example, how much the boat or the car was worth, whether father needed the car to care for himself, how much money he makes from repairing cars or delivering food, or how much income he receives from his sister. In addition, there was no evidence in the record to establish father's subsistence needs. According to the court of appeals, "the central deficiency of the trial court's order is the complete failure to consider defendant's living expenses." Without such findings, the trial court



cannot hold a parent in contempt for failure to pay support. The court of appeals further explained that the court must allow a parent “legitimate reasonable needs and expenses” and held that a “defendant has the ability to pay only to the extent that he has funds or assets remaining after those expenses.”

Ability to work. The court of appeals also held that the trial court had no evidence to support the finding that father had the ability to work. Plaintiff presented no evidence of his ability to work and father presented evidence from a doctor that father had suffered a work related injury and had recurring pain that significantly restricted his movement. Plaintiff argued on appeal that the trial court simply did not find father’s evidence credible. The court of appeals held that while the trial court is the sole judge of credibility, “the lack of evidence is not evidence.” In other words, even if the trial court did not believe father’s evidence of his inability to work, the trial court erred in finding that he could work without evidence to support that finding.

In addition, the court of appeals held that “the ability to work means more than the ability to perform some personal household tasks; it means the present ability to maintain a wage-paying job.”

This entry was tagged with the following terms: ability to pay, alimony, child support, contempt.

Cheryl Howell

Cheryl Howell is a Professor of Public Law and Government at the School of Government specializing in family law.

# Civil Contempt and “Springing” Orders for Arrest

This entry was contributed by Cheryl Howell on March 7, 2018 at 9:00 am and is filed under Family Law.

The following post was written by Daniel Spiegel, a North Carolina Assistant Appellate Defender. It addresses the legality of a purge condition frequently imposed in civil contempt orders entered in child support enforcement proceedings across North Carolina.

This is a very important topic. Please share your thoughts and reactions.

## **MEMORANDUM ON THE UNLAWFULNESS OF “SPRINGING” ORDERS FOR ARREST UPON FUTURE NONPAYMENT OF PURGE PAYMENTS IN CHILD SUPPORT CIVIL CONTEMPT PROCEEDINGS WITHOUT CONTEMPORANEOUS INQUIRY INTO ABILITY TO PAY**

In child support proceedings throughout North Carolina, it is a practice in some counties to include in civil contempt orders a provision calling for the immediate issuance of an order for arrest upon future nonpayment of a “purge payment.” After a contested hearing or with the agreement of the parties, a civil contempt order is entered assigning a schedule of “purge payments” that must be satisfied to avoid future incarceration. Under the terms of the order, any failure to make a “purge payment” automatically results in an order for arrest being issued pursuant to “continuing civil contempt.” However, as shown below, such a provision calling for “springing” orders for arrest in the civil contempt context is unlawful.[1] [2]

### **Analysis**

North Carolina’s civil contempt statutes “require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt.” *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985); see also *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (defendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court). For this reason, courts have repeatedly described those incarcerated for civil contempt as “holding the keys to their own jail.” See *McBride v. McBride*, 334 N.C. 124, 128, 431 S.E.2d 14, 17 (1993); see also *Turner v. Rogers*, 564 U.S. 431, 442, 180 L. Ed. 2d 452, 462 (2011). In issuing an order calling for the automatic issuance of an order for arrest upon future nonpayment of a “purge payment,” the court unlawfully dispenses with a contemporaneous finding that defendant is, at the time of nonpayment, in fact able to make payment and thus able to obtain freedom.

In *Tigani v. Tigani*, \_\_\_ N.C. App. \_\_\_, 805 S.E.2d 546 (2017), the North Carolina Court of Appeals reversed a civil contempt order because the record did not contain support for the proposition that the defendant had the present ability to comply with an order to pay attorneys’ fees. Defendant was given a “suspended sentence” on July 25, 2016, ordering that he make payment by August 15, 2016, or be incarcerated for civil contempt. The plaintiff submitted bank statements purporting to show that the defendant had the ability to pay. However, the bank statements covered a period between November 2015 and March 2016. Our Court of Appeals held that these “records did not reflect defendant’s financial circumstances on 25 July 2016, which is the relevant time for purposes of determining defendant’s *present* ability to pay.” *Id.* (emphasis in original) Holding that the contempt order was unsupported by record evidence, the Court reversed. *Tigani* demonstrates that evidence showing ability to pay on a particular date is not adequate to show ability to pay after some months have passed. The inquiry into ability to pay must be contemporaneous with the order finding the defendant in contempt. *Id.* (“in order to address the requirement of willfulness, ‘the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default.’ . . . Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, ‘the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount” (quoting *Clark v. Gragg*, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-59 (2005)).

N.C. Gen. Stat. § 5A-21 clearly states that failure to comply with a court order is only a “continuing civil contempt [where] noncompliance by the person to whom the order is directed is willful. . . and 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.” This Court cannot make a future determination of what constitutes a continuing civil contempt because this Court cannot possibly know whether a future failure to make a “purge payment” is willful or whether the individual is simply unable to comply with the order for some unforeseen reason. See *Bearden v. Georgia*, 461 U.S. 660, 672-673, 76 L. Ed. 2d 221, 233 (1983) (it is contrary to the fundamental fairness guaranteed by the Fourteenth Amendment for an individual to be incarcerated due to an inability to make payment for reasons outside of the individual’s control); see also *Turner v. Rogers*, 564 U.S. 431, 445, 180 L. Ed. 2d 452, 464 (the threatened loss of liberty in civil contempt proceedings “demands” Due Process protection; “[g]iven the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking in respect to the key ‘ability to pay’ question”).

There is no statutory authority for this Court to call for the issuance of an order for arrest upon future nonpayment of a purge payment. An order for arrest under the Criminal Procedure Act can only be issued under certain circumstances, including failure to appear in a criminal proceeding, violation of the conditions of probation, or to secure an alleged contemnor's appearance for a criminal contempt proceeding. N.C. Gen. Stat. § 15A-305(b)(2), (4), (8) & (9). Chapter 5A references arrest as a means to assure the alleged contemnor's presence for proceedings when a person has been charged with direct or indirect criminal contempt, as permitted under § 15A-305(b)(9).[3] But there is no provision in the civil contempt statutes authorizing the issuance of an order for arrest upon future noncompliance with purge requirements, such as in a criminal probation violation.

N.C. Gen. Stat. § 5A-23 clearly sets forth the "proceedings for civil contempt." The proper procedure calls for a motion directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt. There is no authority to arrest an individual prior to providing the individual with an opportunity to show cause why the nonpayment was not willful.

In conclusion, the practice of calling for "springing" orders for arrest upon future nonpayment of purge payments is not lawful. Instead, courts should substitute a provision calling for the issuance of a show cause motion upon nonpayment providing the Defendant with an opportunity to be heard on the question of willfulness.

[1]A provision calling for an order for arrest to be issued upon nonpayment of a future regular child support obligation is also unlawful. See *Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (error for court to require defendant to make child support payments that accrued after his incarceration in order to obtain his release).

[2]To clarify, the analysis set forth in this memorandum may not apply where the trial court makes clear findings upon entry of a civil contempt order that the defendant is presently able to pay the sum total of all purge payments ordered. See *Abernethy v. Abernethy*, 64 N.C. App. 386, 307 S.E.2d 396 (1983). In such a case, it is within the defendant's power to pay the entire amount at the time the order is entered, and any delay in payment may fairly be deemed a willful violation. However, absent express findings that the defendant has the present ability to pay the sum total of all purge payments, a trial court cannot predetermine that a future failure to make a purge payment constitutes a willful violation of a court order.

[3]See N.C. Gen. Stat. § 5A-16 (requiring, in the context of plenary proceedings for criminal contempt, a finding of probable cause to believe the person ordered to appear will not appear, based on sworn statement or affidavit, before an order for arrest can be issued).

This entry was tagged with the following terms: contempt; civil contempt; child support; orders for arrest.

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## Contempt: Does an Order to Show Cause have to be served by Rule 4 service?

It is a common question: when the court issues an order to show cause for contempt, how is that order served on a respondent? Is the order required to be served pursuant to [Rule 4 of the Rules of Civil Procedure](#) (generally meaning personal service by the sheriff or certified mail) or is [Rule 5](#) service sufficient (generally meaning regular mail to the party or party's attorney)? Unfortunately, the answer to that question is a bit murky.

### Civil Contempt

As with most legal questions involving contempt, the analysis will differ based on whether the proceeding is for civil contempt or for criminal contempt.

[G.S. 5A-23\(a\)](#) states that a show cause order for civil contempt “must be given at least five days in advance of the hearing unless good cause is shown.” See *Smith v. Smith*, 247 N.C. App. 166, 785 S.E.2d 434 (2016) (the trial court had good cause to require father to appear at a hearing for civil contempt two days after issuance of a show cause order when the underlying order had been entered more than a month earlier and father had ample time to prepare a defense to enforcement of that order); and *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).

However, [G.S. Chapter 5A](#) does not specify how the show cause order for civil contempt must be served.

[Rule 5\(b\) of the Rules of Civil Procedure](#) applies in civil proceedings to regulate how service is made of orders and documents following initial Rule 4 service of process. [Rule 5\(b\)](#) provides:

“With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service shall be made upon the party's attorney of record and, if ordered by the court, also upon the party. If the party has no attorney of record, service shall be made upon the party.”

That statute then provides that service may be accomplished by personal delivery by anyone to either a party or the party's attorney, by regular mail, and by email or electronic filing in certain circumstances. The Rule also allows for service by any of the methods authorized by [Rule 4](#) but does not require Rule 4 service for any order or document.

As [Rule 5](#) will apply in a civil matter unless another statute specifically provides otherwise, it

appears that a show cause order for civil contempt issued in a pending civil proceeding can be served in several ways, including by mailing by regular mail to the respondent.

## **Criminal Contempt**

[Chapter 5A](#) indicates that some sort of personal service is required for a show cause order for criminal contempt. [G.S. 5A-15\(a\)](#) states that “a copy of the show cause order must be furnished to the person charged.” There is no clarification as to the meaning of the word ‘furnished’, but the term implies that Rule 5 service by regular mail may not be sufficient.

## **Child Support**

[G.S 50-13.9](#) is titled “A procedure to insure the payment of child support” and section (d) states:

“Upon affidavit of an obligee, the clerk or a district court judge may order the obligor to appear and show cause why the obligor should not be subjected to income withholding or adjudged in contempt of court, or both. ...The order may be signed by the clerk or a district court judge and shall be served on the obligor pursuant to G.S. 1A-1, Rule 4, Rules of Civil Procedure.”(emphasis added).

The statute makes no distinction between criminal and civil contempt. It also does not indicate that it is the exclusive method of enforcing a child support order.

## **What happens when a party does not appear as required by a show cause order for civil contempt?**

Unlike in criminal contempt cases as discussed below, [Chapter 5A](#) does not authorize the issuance of an order for arrest for the failure to appear as required by a show cause order for civil contempt. In addition, [G.S. 15A-305](#) is the statute setting out the court’s authority to issue orders for arrest. Section (b)(8) of that statute authorizes an order for arrest for failure to appear in a criminal contempt proceeding but it makes no reference to civil contempt proceedings.

The court may lack the authority to issue an immediate order for arrest in a civil proceeding because the civil contempt proceeding, like all civil trials, can go forward to trial without the presence of the respondent. If the respondent has notice of the trial or hearing, there is no requirement that the respondent be present. *See e.g. Tigani v. Tigani*, 256 NC App 154 (2017)(civil contempt proceeding was tried without the presence of the respondent but the trial court erred in holding respondent in contempt without evidence introduced regarding his ability to comply with the underlying order).

If the court finds the respondent in civil contempt, the court may then order the immediate arrest of the respondent. [G.S. 5A-21](#) (the only remedy for civil contempt is imprisonment until compliance

with purge condition); [AOC CV-110](#) (Commitment Order for Civil Contempt).

The court also has the option of initiating a separate criminal or civil contempt proceeding based on the respondent's failure to comply with the order to show cause.

**What happens when a party does not appear as required by a show cause order for criminal contempt?**

In a proceeding for criminal contempt, [Chapter 5A](#) authorizes the court to order the respondent's arrest if the court finds, based on a sworn statement or affidavit, probable cause to believe that the respondent will not appear in response to the show cause order or if the respondent fails to appear as required by the show cause order. [See [G.S. 5A-16\(b\)](#) and [15A-305\(b\) \(8\), \(9\)](#); Form [AOC-CR-217](#), Order for Arrest; 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 but the order for arrest will be reversed when the court fails to make a probable cause finding that plaintiff would not appear).]



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

Failure to comply with court order is continuing civil contempt as long as:

- Order remains in force
- Purpose of the order may be served by compliance
- Failure to comply is willful, and
- Has the present ability to comply with the order or to take reasonable measures that would enable them to comply with the order

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

Contempt order must specify how they may purge themselves of the contempt.

Must be released when civil contempt no longer continues.

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**Preamble**

"A lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of service rendered by the legal profession."

R. Prof'l Conduct, Preamble [6]

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**Competence**

"Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation."

R. Prof'l Conduct, Rule 1.1

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**Scope of Representation**

"A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances."

"Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances."

R. Prof'l Conduct, Rule 1.2(c) and Cmt. [7]

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**Communication**

Attorneys must consult with the client about how to achieve the client's objectives, keep the client informed about the status of a matter, and promptly comply with reasonable requests for information.

R. Prof'l Conduct, Rule 1.4

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**Diligence**

"A lawyer shall act with reasonable diligence and promptness in representing a client."

R. Prof'l Conduct, Rule 1.3

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**Diligence**

"A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor.

A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."

R. Prof'l Conduct, Rule 1.3, Cmts. [1],[3],[4]

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**Diligence**

"Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions."

R. Prof'l Conduct, Rule 1.3, Cmts. [1],[3],[4]

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**Diligence**

"Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."

R. Prof'l Conduct, Rule 1.3, Cmts. [1],[3],[4]

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**Terminating Representation**

Lawyers must give proper notice when terminating representation, including giving notice to the client and acting to protect their interests.

R. Prof'l Conduct, Rule 1.16(c), (d)

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**Other ethical considerations**

Lawyers must not bring frivolous actions, but an action "is not frivolous merely because the facts have not first been fully substantiated...[or] even though the lawyer believes the client's position ultimately will not prevail." Rule 3.1, Cmt. [2].

"Every lawyer has a professional responsibility to provide legal services to those unable to pay," though it is voluntary. Rule 6.1.

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"Attorneys will prevent 'unjustified deprivation of a defendant's physical liberty' and 'increase the accuracy of the proceeding.'"   
 McBride v. McBride, 334 NC 124 (1992)



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### Brainstorming solutions

- Can you ask the court for an alternative method of coercion?



Imprisonment is the only remedy for civil contempt.

**Remember what Cheryl (and the court of appeals) said!**

Short stays of incarceration are permissible but not suspended sentences. See, e.g., *Watson v. Watson*, 187 N.C. App. 55 (2007) (90-day stay okay where evidence showed party had property that could be sold)

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### Brainstorming solutions

- Appeal the civil contempt order to the Court of Appeals
  - *Immediately* appealable
  - Must give notice of appeal within 30 days
  - COA reviews the record to make a determination
  - A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. N.C. R. App. P. 8(a).

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### Brainstorming solutions

- Appeal the civil contempt order to the Court of Appeals

"Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

For example, if a lawyer has handled a judicial...proceeding that produced a result adverse to the client...the lawyer must consult with the client about the possibility of appeal before relinquishing responsibility for the matter."

Rule of Prof'l Cond., Rule 1.3, Cmt. [4]

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### Brainstorming solutions

- How are some jurisdictions handling the possibility of an indefinitely held contemnor?



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### Brainstorming solutions

- What else can be done?

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§ 5A-22. Release when civil contempt no longer continues.  
 (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. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

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 (b) On motion of the contemnor, the court must determine if he is subject to release and, on an affirmative determination, order his release. The motion must be directed to the judge who found civil contempt unless he is not available. Then the motion must be made to a judge of the same division in the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be. The contemnor may also seek his release under other procedures available under the law of this State. (1977, c. 711, s. 3, 1987 (Reg. Sess., 1988), c. 1037, s. 45.)

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- Seek review hearing in contempt order
  - Motion by DSS, or
  - Automatic, contingent on continued custody
- Respondent's counsel follow-up and motions if appropriate



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Questions?

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# CHILD SUPPORT CONTEMPT

## DIRECT EXAMINATION OF OBLIGOR

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### PROCEDURE

• CHAPTER 50



• IV-D



- 1) ORDER FOR PAYMENT
- 2) MOTION TO SHOW CAUSE
- 3) ORDER TO SHOW CAUSE
- 4) CONTEMPT HEARING

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### BURDEN OF PROOF

- Show Cause → Petitioner
- Contempt Hearing → Respondent

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### WHAT IS CONTEMPT?

- Two types: civil and criminal
- Different purposes for each
  - Civil: compliance
  - Criminal: punishment
- Different outcomes for each
  - Civil: can be ordered to perform certain tasks or incarceration - NCGS 5A-21(b)
  - Criminal: 30 days incarceration for each instance of contempt
- Willfulness is a requirement for *both* civil and criminal contempt

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### WILLFULNESS

#### CIVIL

- "If 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. Nobels*, 127 N.C. App. 705, 709 (1997).
- Unlimited amount of jail time with no statutory review!!! IF YOUR CLIENT IS HELD IN CIVIL CONTEMPT, PUSH FOR A REVIEW DATE IN THE ORDER
- Court must determine that obligor has the present ability to comply, or the present ability to take reasonable measures that would enable him to comply
- Obligor holds the keys to the jail
- Not punitive – meant to coerce behavior
- Purposeful, deliberate, stubborn, bad faith, without lawful excuse AND with the ability to comply

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### WILLFULNESS

#### CIVIL—INCARCERATION

#### 5A-21(b)

"...if a person is found in civil contempt for failure to pay child support or failure to comply with a court order to perform an act that does not require the payment of a monetary judgement, the person may be imprisoned as long as the civil contempt continues **without further hearing.**"

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WILLFULNESS

CRIMINAL

- "An act **done deliberately and purposefully** in violation of law, and without authority, justification, or excuse." *State v. Chriscoe*, 85 N.C. App 155, 158 (1987)
- "...more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." *Forte v. Forte*, 65 N.C. App. 615, 616 (1983)
- Judge must find the Defendant has the ability to comply with the court order. *Lamm v. Lamm*, 229 N.C. 248 (1984)
- 30 days incarceration for each act of contempt
- Punitive
- Willful disobedience, resistance, or interfere with a lawful court order

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PREPARING FOR COURT

- Payment history
- Education level
- Where has the child been living
- Language abilities and barriers
- Military service
- Employment history/Job Search log
- Medical history
- Family obligations
- Transportation
- Housing
- Payments made directly to obligee NCGS 50-13.10(e)
- Purchases of items for the child

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PREPARING FOR COURT

- Payments made directly to obligee

"When a child support payment that is to be made to the State Child Support Collection and Disbursement Unit is not received by the Unit when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled to receive it and that receipt is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt." (NCGS §50-13.10)

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PREPARING FOR COURT

- Participation in religious activities
- Volunteer activities
- Bankruptcies
- Foreclosures
- Other Children
- Review child support worksheet and differences
- Other court orders (ie. DSS involvement)
- Apply/Receiving for SSI/SSDI, VA Benefits, Medicaid/Medicare
- Working out a negotiated solution

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EVIDENCE

- Medical records (subpoena with an affidavit)
- Medical personnel (doctors, nurses, therapists, etc.)
- Bank records
- Receipts of payments made to obligee and/or receipts of items purchased
- Other financial records (401K, mutual funds, CDs, etc.)
- Lease agreements (include cost of housing, especially if it's recently increased)
- Transportation repairs
- Employment records/job search records
- Applications or acceptances of benefits (SSI/SSDI, VA, Medicare/Medicaid) or proof of appeal
- Anything else that puts your client in a good light or can provide support for an inability to pay

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PREPARE CLIENT FOR DIRECT EXAMINATION

- Review all evidence you want to introduce with your client
- Less is more with answers
- Courtroom temperament, attire, and punctuality
- Remind your client that you are there to help tell his/her story
- Practice answering questions regarding inability to pay
- Prepare your client for cross examination at the same time
- Prepare your client for all potential outcomes

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DIRECT EXAMINATION

- Know your judge
- Purpose is to show your client is not willfully non-compliant AND cannot currently comply.
- You have the burden to prove this
- Introduce and humanize your client – your client is a multidimensional person
- Do you need to subpoena any experts, doctors, therapists?
- Tell the client’s story through each chapter; start with the strongest

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DIRECT EXAMINATION

Best argument for civil and criminal contempt: was unable to comply during the period of non-payment/underpayment AND unable to comply now

Best argument for civil contempt: was able to comply during prior of non-payment/underpayment, but currently unable to comply

Best arguments against incarceration

- Client currently has employment: any jail time could likely result in loss of employment, thus no additional child support payments can be made.
- Client is currently unemployed: jail time will prevent your client from securing employment, thus no ability to make any child support payments

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# 2024 Update: what's new in child support and contempt cases

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1/19/2024

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## Rule 5 of RCivPro



**Changes to Rule 5-**  
Service can be made by mailing a copy to the attorney's "mailing address of record" with the court.  
Contact information with the Bar would be used as address of record

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### S.L. 2023-103 (H193) AOC Changes

**Changes to Rule 5**

- Allows service to be made on an **attorney** through the court's e-filing or case management system at an email address of record with the court.
- Allows service to be made on a **party** through the court's e-filing system or case management system at an email address of record with the court if the party has consented to receive service in that manner *and* a copy of the consent is filed w/ the court.
- Must be sent by 5 PM ET on a regular business day

8/1/2023

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### 2023 Child Support Guidelines

North Carolina has new Child Support Guidelines

The rules were established by the Court in January 19, 2023 at 10:00 am and in that order Family Law

As a result of GS 50-13.6(c), the North Carolina Conference of Chief District Court Judges recently approved the North Carolina Child Support Guidelines. The Chief Judges continued current law and

<https://civil.soc.ncscl.org/north-carolina-has-new-child-support-guidelines/>

Tips (within SOR). Get a copy of worksheet used for current support:  
*Do a new worksheet. A 15% deviation=automatic modification*  
*Does the income on the original worksheet or the current income meet the new self support reserve/minimum? Automatic modification?*

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### SL 23-134 (H259)

Incentives Payment legislation has been around since FY16. The state gets to keep 15% of the payments from feds and 85% goes to the counties.

Every FY from 2016-2022, NC has received at least \$14,000,000/year. Counties have flexibility with their 85% share. They must report to State DHHS every year. Ask about your county's use of the funds.

Fatherhood programs

Education and job programs for non-custodial parents

Visitation issue resolution\*

Teen pregnancy programs

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## SL 2023-65 (H190)

GS 110-129.1(a)

(a) In addition to other powers and duties conferred upon the DHHS, Child Support Enforcement Program, by this Chapter or other State law, DHHS shall have the following powers and duties:

...

(10) Certify obligors to the federal Office of CSE for the Passport Denial Program under G.S. 110-143.

(11) Certify to the federal Office of CSE determinations that an obligor in a IV-D case owes support arrearages in an amount equal to or greater than the federally mandated thresholds for offset of federal income tax refunds under 42 U.S.C. § 664(b)(2) if the arrearages are assigned to the State and 45 C.F.R. § 303.72(a)(2) if the arrearages are not assigned to the State.

(12) Certify obligors to the federal Office of CSE for the Administrative Offset Program under G.S. 110-144.

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## ACF Policy Change 7/29/2022

Previously-any child receiving IV-E funds for foster care placement was almost always referred for child support collection.

Now...

ACF wants to ensure that only cases that have been thoroughly reviewed, and will not disrupt the reunification process, are referred to the state IV-D agency for the establishment of paternity or a support order.

[https://www.acf.hhs.gov/sites/default/files/documents/ch/letter\\_regarding\\_assignment\\_rights\\_child\\_support\\_for\\_children\\_foster\\_care.pdf](https://www.acf.hhs.gov/sites/default/files/documents/ch/letter_regarding_assignment_rights_child_support_for_children_foster_care.pdf)



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## ACF Policy Change 7/29/2022

### Reasons cited for the change

- "Parents are already economically stressed. It is not in the best interests of any family to be pursued for child support when they have already been whipsawed by economic insecurity, family instability, and separation."
- Child welfare system has existing racial disparities that are compounded by the fees parents are assessed.
- Not cost effective
  - ✓ California collected \$0.41 for every dollar spent on collection of child support
  - ✓ Washington State collected \$0.39 for every dollar spent on collection of child support

Center on Budget and Policy Priorities. <https://www.cbpp.org/research/income-security/states-should-use-new-guidance-to-stop-charging-parents-for-foster-care>

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### Response

#### WASHINGTON STATE

Sept. 2022. "Washington State stopped forcing parents involved in the child welfare system to pay the state for the costs of caring for their child in foster care. Credible studies show that doing so often results in children lingering in foster care, causing needless damage to the child and costing taxpayers more than is likely to be collected.

As of now, Washington State is one of the first states in the country to put a stop to child support collections that cause financial hardship for parents and keep children in foster care longer." DCYF Secretary Ross Hunter

#### OTHER STATES

CA Stops Charging Parents for Their Kids in Foster Care and Eliminates Arrears. 11/30/2023 *The Imprint News*

NY bill 2023-A4027. Child support shall not be imposed if it will adversely affect the health, safety or welfare of the child ...or will adversely affect the length of the child's placement or impair the ability of the child to return home.

NM 2022. Per MOU, CW sends referral to CS with a recommendation of zero child support. This allows CS to establish parentage without establishing child support.

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### NC's Response...

#### SB 443-Senators Krawiec, Burgin, and Corbin

\*§ 110-135.1. Foster care assistance payments.

(a) Upon motion in the cause by either party and a showing that the child has been placed in foster care, all of the following shall occur:

(1) The obligor's child support obligation, if owed to the State, shall be suspended during any period when the child is placed in the custody of a county department of social services.

(2) Any foster care assistance arrears owed to the State for past paid foster care assistance shall be reduced to zero under G.S. 50-13.10.

#### SB 625-Senators Krawiec, Jarvis, and Batch

- No child support obligation established when in foster care
- No TPR based on failure to pay child support
- § 50-13.10. No arrearage accrues for foster care assistance owed to the State by the supporting party during any period when the child is placed in the custody of a department of social services.
- § 110-135.1. Copies SB 443 language (above)



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### NC legal authority

<b>Statutes</b>
§ 50-13.4. Action for support of minor child. (a) Any parent, or any person, agency, organization or institution having custody of a minor child, or bringing an action or proceeding for the custody of such child, or a minor child by his guardian may institute an action for the support of such child as hereinafter provided.
§ 7B-904. (d) At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, if the court finds that the parent is able to do so, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered...If the court places a juvenile in the custody of a county department of social services and if the court finds that the parent is unable to pay the cost of the support required by the juvenile, the cost shall be paid by the county department of social services in whose custody the juvenile is placed...
§ 7B-101(18) Reasonable efforts. - The diligent use of preventive or reunification services by a department of social services when a juvenile's remaining at home or returning home is consistent with achieving a safe, permanent home for the juvenile within a reasonable period of time...

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### Advocacy ideas for discussion

<b>Find out funding source for board payment.</b>
IV-E. Federal law was already flexible (don't refer for child support if not in the "best interests of the child") but largely ignored. New policy encourages referrals for child support only in "very rare circumstances."
If not IV-E, federal law does not apply. Only state law applies. Licensed foster home but not a IV-E child = SFHF case Court ordered, unlicensed placement and county paying its board rate = DSS custody case.
Court ordered, unlicensed placement and placement receives TANF = NPA case.

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### Advocacy ideas for discussion (A/N/D cases)

<b>Nonsecure custody hearing</b>
Initial disposition hearing
Motion in the cause (§ 7B-1000)
What is your strongest argument? a) Law b) Policy c) Client's facts d) All of the above

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Advocacy ideas for discussion (contempt cases)

§ 5A-21.  
 (a) Failure to comply with an order of a court is a continuing civil contempt as long as:  
 (1) The order remains in force;  
 (2) The purpose of the order may still be served by compliance with the order;  
 (2a) The noncompliance by the person to whom the order is directed is willful; and  
 (3) 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.

Argument #1-Is the purpose of the order still served by compliance given the federal policy?

Argument #2-Is your client able to comply given the burden of the requirements of the A/N/D order?

What is your strongest argument?  
 a) Law  
 b) Policy  
 c) Client's facts  
 d) All of the above

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Discussion?

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