

## Legal Issues in Enforcement

April 2008

### Question 1

- ▶ Show cause issued for contempt for failure to pay child support
- ▶ Dad filed motion to terminate support and requested blood tests
- ▶ Paternity and support order entered by consent 4 years ago
- ▶ "She told me 3 months ago that I am not dad."

### Do you order blood tests?

1. Yes
2. No
3. Don't know

### Paternity as a Defense

- ▶ Correct answer is No
- ▶ See *Bright v. Fleskrud*, 148 NC App 710 (2002)
- ▶ See discussion in Bench Book Family Law Volume Paternity Chapter p. 12-13; 12-20

### Paternity as a Defense

- ▶ "Once paternity order is entered, court cannot order genetic testing under GS 8-50.1(b1) until paternity order is set aside pursuant to Rule 60(b)."
- ▶ *Bright v. Fleskrud*, 148 NC App 710 (2002)
- ▶ Paternity must be attacked in case establishing paternity.
  - ▶ See *Leach v. Alford*, 63 NC App 118 (1983)
    - ▶ No collateral attack; must be filed in case establishing paternity
  - ▶ See *Reid v. Dixon*, 136 NC App 438 (2000)
    - ▶ No collateral attack of paternity in UIFSA enforcement proceeding

### Relief from Judgment

- ▶ Within one year – Rule 60(b)(1), (2) and (3)
  - ▶ Mistake
    - ▶ See *Leach v. Alford* (motion based on "mutual mistake as to paternity")
  - ▶ Excusable neglect
  - ▶ Newly discovered evidence
    - ▶ See *Leach* (blood test result may be newly discovered evidence)
  - ▶ Fraud, misrepresentation or misconduct

## Relief from Judgment

- ▶ Within “reasonable” time - Rule 60(b)(6)
  - ▶ For “any other reason” (compelling)
  - ▶ Meritorious defense
  - ▶ Broad discretion to grant or deny
  - ▶ But not intended to cover situations that would be covered under 60(b)(1), (2) or (3)
    - ▶ *Davis v. Adams*, 153 NC App 512 (2002)

## Acknowledgment

GS 110-132

- ▶ Can be rescinded within 60 days of execution
- ▶ After 60 days, can be challenged for “fraud, duress, mistake or excusable neglect”
- ▶ Subject to one-year time limit of Rule 60(b)(1),(2) and (3)
  - ▶ *Stevens v. Charles*, 182 NC App 505 (2007)

## Question #2

- ▶ Order: Dad pay medical expenses plus \$200 per month
- ▶ Mom: Dad stopped paying when he lost job in landscaping; he has work skills in furniture industry; he is young and ‘able-bodied’
- ▶ Dad: “I don’t like to work inside” - Still looking for outdoor job.
- ▶ Is this enough to support finding of contempt?

## Enough for Contempt?

1. Yes
2. No
3. Don’t know

## Question #2

- ▶ Answer is No
- ▶ Facts like this are not enough alone to support finding that dad’s noncompliance was willful, or that he has the present ability to comply with a purge condition (civil contempt)
- ▶ See *Clark. Gragg*, 171 NC App 120(2005)
- ▶ See Discussion in Bench Book Family Law Volume Child Support Chapter p. 3-199; 3-209-10

## Civil Contempt

- ▶ Order remains in effect
- ▶ Purpose of order may still be served by compliance
- ▶ Noncompliance is willful; and
- ▶ Obligor has present ability to comply or to take reasonable steps to comply
  - ▶ GS 5A-21(a)

## Civil Contempt

- ▶ Willfulness – 2 required findings:
  - ▶ Actual ability to comply at time of default, and
  - ▶ Deliberate and intentional failure to comply



## Civil Contempt

- ▶ Evidence to support finding of ability to comply:
  - ▶ “able-bodied” insufficient
  - ▶ “some income” insufficient
  - ▶ Need “inventory of obligor’s financial condition”
    - ▶ *Mauney*, 268 NC 254 (1966)

## Burden of Proof

- ▶ Initiated by show cause order: burden on obligor
- ▶ Initiated by aggrieved party pursuant to GS 5A-23(a1): burden on aggrieved party

## Burden of Proof

- ▶ Either case:
  - ▶ Order must contain findings re: willful noncompliance and present ability to pay, and
  - ▶ Evidence must support the findings
    - ▶ GS 5A-23(e)

## Question #3

- ▶ Show cause issued for contempt
- ▶ Alleges defendant in arrears six months
- ▶ Defendant does not show for hearing
- ▶ Can you issue an order for arrest?

## Can you issue order for arrest?

1. Yes
2. No
3. Don't know

### Question #3

- ▶ Answer is yes – can issue order for arrest
- ▶ Civil contempt:
  - ▶ failure to appear and court determines defendant's presence is necessary to proceed; GS 15A-305(b)(7)
  - ▶ See Bench Book Child Support Chapter p. 3-203
- ▶ Criminal contempt:
  - ▶ Must find probable cause to believe defendant will not appear?? GS 5A-16(b); GS 15A-305(b)(8)
  - ▶ See Bench Book Child Support Chapter p. 3-218

### Question #3a

- ▶ Would you
  - ▶ Choice #1: issue order for arrest and set new hearing date for contempt?
  - ▶ Choice #2: Proceed with contempt hearing without him?

### Please make your selection...

1. Choice One
2. Choice Two

### Question #3b

- ▶ Assume you order arrest
- ▶ You must set conditions of pretrial release pursuant to GS 15A-534
- ▶ Your order includes bond
- ▶ Defendant posted bond to secure release
- ▶ At contempt hearing, can you order bond paid to custodial parent in satisfaction of arrears?

### Does mom get the bond?

1. Yes
2. No
3. Maybe

### Question #3b

- ▶ Answer is No
- ▶ Bond posted pursuant to GS 15A-534 is an appearance bond.
- ▶ If bond forfeited, money goes to schools
- ▶ If bond returned to obligor before contempt hearing:
  - ▶ May be considered when determining ability to pay
  - ▶ May be subject to garnishment

**See Bench Book Child Support p. 3-203; 3-218**

### Bonds to Secure Support

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- ▶ Compare Compliance Bonds
    - ▶ GS 50-13.4(f)(1)
    - ▶ See Bench Book Child Support p. 3-229
  - ▶ Compare Appeal Bonds
    - ▶ *Clark v. Gragg*, 171 NC App 120 (2005)
    - ▶ GS 1-289(a) allows bond to stay contempt order of incarceration pending appeal
    - ▶ Okay to order bond in full amount of arrears, payable directly to custodial parent if contempt order affirmed on appeal
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### Question 4

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- ▶ Support order reduced arrears to judgment
  - ▶ Judgment orders defendant to pay \$15,000 to plaintiff
  - ▶ Mom files motion for civil contempt, alleging defendant has not paid judgment
  - ▶ Can you consider contempt in this case?
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### Contempt?

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1. Yes
  2. No
  3. Maybe
  4. Don't know
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### Question 4

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- ▶ Answer is No
  - ▶ Cannot use contempt to enforce a judgment – unless the judgment orders periodic payments
    - ▶ See *Brown v. Brown*, 171 NC App 358 (2005)
    - ▶ GS 50-13.4
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