

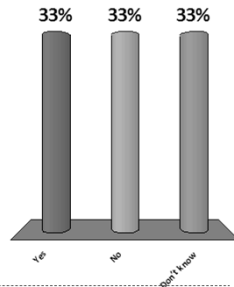
## Legal Issues in Enforcement

### 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. Maybe



### Paternity as a Defense

- ▶ Correct answer was no until Jan 1, 2012.
- ▶ See *Bright v. Fleskrud*, 148 NC App 710 (2002)(no blood tests can be ordered after paternity has been established by court order until paternity order is set aside pursuant to Rule 60(b))
- ▶ New statute G.S. 50-13.13: Relief from support order based on finding of nonpaternity
- ▶ If verified motion complies with statute, court shall order paternity testing

### GS 50-13.13

- ▶ Verified motion must be filed within 1 year of obligor learning he is not the father
- ▶ Must state with particularity:
  - ▶ Why he believes he is not the father
  - ▶ That he has not acknowledged the child or acknowledged only while believing he was the father
  - ▶ That he has not adopted or legitimated the child(including legitimation by marrying mother)
  - ▶ That he did not prevent the biological father from asserting parental rights

### G.S. 50-13.13

- ▶ Moving party pays costs of testing
- ▶ If testing shows he is not the father and court finds he did not acknowledge child, support obligation may be terminated prospectively only
- ▶ Arrears remain due and owing
- ▶ Mother can be ordered to reimburse support paid after motion filed only if court finds fraud on her part

## Relief from Paternity Judgment

- ▶ New statute GS 49-14(h)
  - ▶ Paternity judgment can be set aside at any time if putative father shows judgment entered as result of fraud, duress, mutual mistake, or excusable neglect, and genetic tests show he is not the father
  - ▶ If judgment set aside pursuant to this statute, obligor can request termination of child support pursuant to GS 50-13.13(f)

## Other Relief from Paternity Judgment

- ▶ Rule 60(b) motion to set aside paternity judgment
  - ▶ *Bright v. Flaskrud*, 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

## Rule 60(b) 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 of Paternity GS 110-132

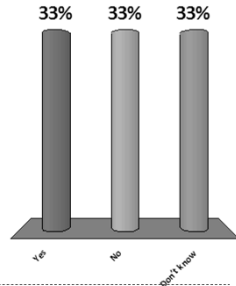
- ▶ Can be rescinded by putative father within 60 days of execution
- ▶ After 60 days, court can set aside if putative father shows:
  - ▶ Fraud, duress, mistake or excusable neglect, and
  - ▶ Genetic tests prove he is not father

## 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

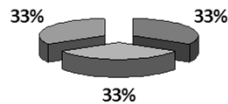
- ▶ Either case:
  - ▶ Order must contain findings re: willful noncompliance and present ability to pay, and
  - ▶ Evidence must support the findings
    - ▶ GS 5A-23(e)

## 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



■ Yes ■ No ■ Don't know

## Question #3

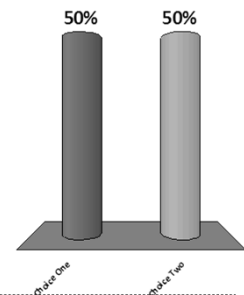
- ▶ Answer is yes – can issue order for arrest
  - ▶ Civil contempt:
    - ▶ failure to appear and court determines defendant's presence is necessary to proceed; GS 15A-305(b)(7)
    - ▶ See Bench Book Child Support Chapter p. 3-203
  - ▶ Criminal contempt:
    - ▶ Must find probable cause to believe 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

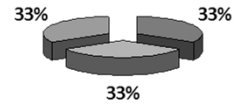


### Question #3b

- ▶ 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



Yes No 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

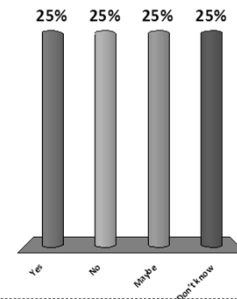
- ▶ Compare Compliance Bonds
  - ▶ GS 50-13.4(f)(1)
  - ▶ See Bench Book Child Support p. 3-229
- ▶ Compare Appeal Bonds
  - ▶ *Clark v. Gragg*, 171 NC App 120 (2005)
  - ▶ GS 1-289(a) allows bond to stay contempt order of incarceration pending appeal
  - ▶ Okay to order bond in full amount of arrears,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

### Question 4

- ▶ 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?

### Contempt?

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



#### 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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