TOC

Chapter 3: **Child Support**

Part 4. Enforcement of Child Support Orders

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I. Judicial Proceedings to Enforce Child Support Orders

A. Subject Matter Jurisdiction

1. Jurisdiction to enforce current or future support obligations.

    a. Subject to Section I.A.1.b, immediately below, any state with appropriate personal jurisdiction [See Section I.B, below.] has subject matter jurisdiction to enforce a registered child support order. [*See* G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (state shall recognize and enforce a registered support order issued in another state or a foreign country).]

    b. A court may **not** enforce a child support order **prospectively** (that is, enforce the order with respect to an obligor's **current** or **future** child support obligations as opposed to enforcing the obligor's obligation to pay vested, past due child support arrearages that have accrued under the order) unless the order is determined to be the "controlling" order under the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) (applicable to a child support order issued by a state tribunal and to a foreign support order) or the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) (applicable to a child support order issued by a state tribunal but not to a foreign support order).

        i. While the problem of multiple orders is "fast disappearing," at least on the appellate level, G.S. 52C-2-207 sets out a "relatively simple procedure to identify a single viable order that will be entitled to prospective enforcement in every state." [Official Comment (2015), G.S. 52C-2-207.]

        ii. If only one tribunal has issued a child support order, that order controls. [G.S. 52C-2-207(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] This order controls regardless of when and where it was issued and whether any of the individual parties or the child continue to reside in the issuing state. [Official Comment (2015), G.S. 52C-2-207.]

        iii. If two or more child support orders have been issued by tribunals in North Carolina, another state, or a foreign country for the same obligor and same child, a North Carolina tribunal having personal jurisdiction over both the obligor and individual obligee shall determine which order controls by applying the rules in G.S. 52C-2-207(b).

            (a) If only one of the tribunals would have continuing, exclusive jurisdiction under UIFSA, the order of that tribunal controls. [G.S. 52C-2-207(b)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

(b) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA, an order issued by a tribunal in the child's current home state controls. [G.S. 52C-2-207(b)(2)a., *amended by* S.L. 2015-117, § 1, effective June 24, 2015; see definition of "home state" in G.S. 52C-1-101(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to include a foreign country.]

(c) If more than one tribunal would have continuing, exclusive jurisdiction under UIFSA and no order has been issued in the child's current home state, the order most recently issued controls. [G.S. 52C-2-207(b)(2)b., *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] or

(d) If none of the tribunals would have continuing, exclusive jurisdiction under UIFSA, a North Carolina tribunal must issue a child support order, which controls. [G.S. 52C-2-207(b)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

2. Jurisdiction to enforce payment of arrearages.

a. A court has subject matter jurisdiction to enforce a valid child support order of another state (regardless of whether the order is entitled to recognition as the "controlling" order under the Uniform Interstate Family Support Act (UIFSA)) with respect to vested, past due arrearages that are entitled to recognition and enforcement under the Full Faith and Credit Clause of the U.S. Constitution. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (North Carolina required to enforce arrearages arising out of sister state's order).]

b. A court retains subject matter jurisdiction following termination of an obligor's court-ordered child support obligation (for example, following the child's death, emancipation, completion of high school, adoption, etc.) to enforce vested, past due child support arrearages that accrued before the obligor's child support obligation terminated. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (legal obligation to provide child support and the failure to meet that obligation both arose while the court had jurisdiction; court had jurisdiction to enforce arrearages after child's majority), *review denied,* 296 N.C. 106, 249 S.E.2d 804 (1978).]

c. If a child support order issued by a North Carolina tribunal is modified by a tribunal of another state which assumed jurisdiction pursuant to UIFSA, the North Carolina tribunal:

i. May enforce the order that was modified only as to arrearages and interest accruing before the modification; [G.S. 52C-6-612(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. May provide other appropriate relief for violations of its order that occurred before the effective date of modification; [G.S. 52C-6-612(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] and

iii. Must recognize the modifying order of the other state, upon registration, for purposes of enforcement. [G.S. 52C-6-612(4), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] NOTE: Before June 25, 2015, G.S. 52C-6-612(2), which was repealed, allowed a North Carolina tribunal to enforce only nonmodifiable aspects of its order.

3. Jurisdiction to enforce a child support order when child and/or parties are reservation Indians.
    a. A state court lacks jurisdiction to enforce a child support order against a Native American obligor who resides within the boundaries of a federally recognized Indian reservation and is subject to the jurisdiction of a tribal court or against the property of such an obligor located on an Indian reservation. [*See Wildcatt v. Smith*, 69 N.C. App. 1, 316 S.E.2d 870 (1984).]
    b. A state court does not have jurisdiction to determine the paternity of a child born out of wedlock when the child, mother, and putative father are all Native Americans living within a federally recognized Indian reservation. [*See Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (exercise of state court jurisdiction to determine paternity would unduly infringe on tribal self-governance; exclusive tribal court jurisdiction over the determination of paternity especially important to tribal self-governance), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]
    c. If the matter at issue does not unduly infringe upon the tribe's right of self-governance, the tribal court and district court have concurrent jurisdiction, except in cases where the tribal court has first exercised jurisdiction and retains jurisdiction.
        i. District court had concurrent jurisdiction with the tribal court for action to recover Aid to Families with Dependent Children (AFDC) payments. [*Jackson Cty. ex rel. Jackson v. Swayney*, 319 N.C. 52, 352 S.E.2d 413 (tribe's interest in self-government not significantly affected; no prior action for the same claim filed in tribal court), *cert. denied*, 484 U.S. 826, 108 S. Ct. 93 (1987).]
        ii. When a claim for child support had been filed in tribal court and that court had retained jurisdiction, the district court did not have jurisdiction of an action to recover AFDC payments. [*Jackson Cty. ex rel. Smoker v. Smoker*, 341 N.C. 182, 459 S.E.2d 789 (1995) (claim for AFDC payments was based on defendant's duty to support his children, jurisdiction over which had been retained by tribal court). *See also State ex rel. West v. West*, 341 N.C. 188, 459 S.E.2d 791 (1995) (per curiam) (action to establish current and future child support payable by non-Indian mother for child in custody of Indian father properly dismissed; tribal court exercised jurisdiction first and continued to exercise jurisdiction).]

B. Personal Jurisdiction and Jurisdiction Over Property

1. To enforce a child support order, a court must have:
    a. Personal jurisdiction over the obligor if the remedy is directed against the obligor's person (for example, contempt) **or**
    b. Jurisdiction over the obligor's property if the remedy is directed against the obligor's property (for example, execution of judgment for child support against the obligor's real property). [*See Pinner v. Pinner*, 33 N.C. App. 204, 234 S.E.2d 633 (1977) (to enforce an order, the court must determine whether jurisdiction exists over the person or property of the obligor).]

2. A court that acquires personal jurisdiction over an obligor and enters a valid child support order against the obligor generally retains personal jurisdiction for purposes of enforcing the order against the obligor, even if the obligor no longer resides in the issuing state. [*See, e.g.,* G.S. 52C-2-202, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (service on attorney of record pursuant to G.S. 1A-1, Rule 5 was sufficient notice of enforcement proceedings against out-of-state defendant), *review denied,* 296 N.C. 106, 249 S.E.2d 804 (1978).] NOTE: This is not the same as retaining "continuing, exclusive jurisdiction" under the Uniform Interstate Family Support Act or Full Faith and Credit for Child Support Orders Act.
3. A North Carolina court generally lacks jurisdiction over real or personal property that is located outside of North Carolina. [*See Cole v. Hughes*, 114 N.C. App. 424, 442 S.E.2d 86 (North Carolina court did not have jurisdiction to decide ownership of a lottery ticket in possession of Virginia lottery authorities; no in rem jurisdiction over personal property located outside North Carolina), *review denied,* 336 N.C. 778, 447 S.E.2d 418 (1994).]

C. Standing

1. Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Aubin v. Susi,* 149 N.C. App. 320, 560 S.E.2d 875 (2002)).]
2. To establish standing, a party must have a substantial stake or interest in a justiciable controversy. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Street v. Smart Corp.,* 157 N.C. App. 303, 578 S.E.2d 695 (2003)) (father had standing to bring an action for an accounting by mother, as father had a substantial interest in her use of monies in a fund established as a supplemental source for payment of father's child support obligations, which interest was affected by her failure to account; additionally, provision in parties' consent order required mother to provide periodic accountings, which provision father could seek to enforce).]
3. An obligee (that is, a party to whom court-ordered child support is owed) has standing to seek judicial remedies to enforce the obligor's child support obligation. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30 (obligee is the real party in interest in action to recover arrearages that accrued while child was a minor), *review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).]
4. An obligor has standing to enforce obligations of the obligee set out in a support order. [*See Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (father had standing to seek enforcement of provisions in a 2004 consent order that required mother to provide periodic accountings of her use of monies in a special account).]
5. A public agency or other person to whom an obligee's child support rights have been assigned has standing to intervene and seek judicial remedies to enforce the obligee's child support rights. [*Tate v. Tate*, 95 N.C. App. 774, 384 S.E.2d 48 (1989) (department of social services, as assignee of mother's right to child support payments, had standing to contest elimination of arrearages).] For more on the state or county as the real party in interest in a claim for reimbursement of public assistance under G.S. 110-135, see *Liability and Amount*, Part 1 of this Chapter, Section VII.E.

6. When an obligee is receiving child support enforcement services from a child support enforcement (IV-D) agency, the state or county (through the IV-D agency) may seek judicial enforcement of a child support order on behalf of the obligee, regardless of whether the obligee's child support rights have been assigned to the state or county. [*See* G.S. 110-130 and 110-130.1(c).]

D. Procedure in Child Support Enforcement Proceedings

1. Generally.
   a. A party seeking one of the judicial child support remedies discussed in the following sections of this Part must comply with the procedural requirements that apply to the particular remedy sought.
   b. Unless otherwise noted, the procedures in judicial proceedings to enforce child support orders are the same in IV-D and non-IV-D cases.
      i. A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).] "IV-D" references the program's legal authorization under Title IV-D of the Social Security Act.
      ii. A "non-IV-D case" is any case, other than a IV-D case, in which child support is legally obligated to be paid. [G.S. 110-129(7).]
2. Procedure.
   a. Initiated by a motion in the cause.
      i. Unless otherwise provided by law, judicial remedies to enforce a child support order may be sought by filing a motion in the cause in the pending child support action. [*See* G.S. 50-13.4(f)(4) (continuing wage garnishment instituted by motion in the original child support proceeding); 50-13.4(f)(8) (past due periodic payments may by motion in the cause be reduced to judgment); *see also Lang v. Lang,* 157 N.C. App. 703, 579 S.E.2d 919 (2003) (mother and daughter filed separate motions in the cause to enforce a German support judgment under the Uniform Reciprocal Enforcement of Support Act).]
      ii. A motion or other pleading seeking a judicial remedy to enforce a child support order generally must be made in writing, state the facts upon which the motion is based, and indicate the specific relief sought. [*See generally* G.S. 1A-1, Rule 7(b).]
   b. Notice. Unless waived, an obligor is entitled to timely and adequate notice of a motion or other pleading seeking a judicial remedy to enforce a child support order. [*See Sampson Cty. ex rel. Bolton v. Bolton*, 93 N.C. App. 134, 377 S.E.2d 88 (1989) (contesting wage garnishment).]
   c. Burden of proof. Unless otherwise provided by law, the party seeking enforcement of a child support order has the burden of proving that she is entitled to the relief sought. [*See Castle McCulloch v. Freedman,* 169 N.C. App. 497, 610 S.E.2d 416 (burden of proving damages is on the party seeking them), *aff'd per curiam,* 360 N.C. 57, 620 S.E.2d 674 (2005); *see also Trevillian v. Trevillian,* 164 N.C. App. 223, 595 S.E.2d

206 (2004) (burden of demonstrating changed circumstances to modify child support rests upon the moving party).]

d. Right to counsel. Except as otherwise provided (for example, in contempt proceedings to enforce child support orders), an indigent obligor is not entitled to court-appointed counsel in child support enforcement proceedings. [*King v. King,* 144 N.C. App. 391, 547 S.E.2d 846 (2001) (defendant not entitled to appointed counsel in hearing on motion to modify her child support obligation because her liberty interest was not threatened).] See Section VII.B.11, below.

3. Enforcement of a North Carolina order by a nonresident.

a. An obligee who is not a resident of North Carolina may file a Uniform Interstate Family Support Act (UIFSA) petition for enforcement of a North Carolina order. [See G.S. 52C-2-206(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to provide that a tribunal of this state having continuing jurisdiction over a support order may act as a responding tribunal to enforce the order; Official Comment (2015), G.S. 52C-2-206 (subsection (b) makes clear that the issuing tribunal has jurisdiction to serve as a responding tribunal to enforce its own order if requested to do so by another tribunal).].

b. A petitioner's personal appearance is not required. [G.S. 52C-3-315(a).]

c. Special rules governing discovery, admissibility of evidence, and communication between courts apply to UIFSA proceedings in which a nonresident requests a responding tribunal to enforce a child support order issued by that court. [*See* G.S. 52C-3-315, 52C-3-316, and 52C-3-317.]

E. Availability and Election of Remedies

1. North Carolina law provides more than a dozen legal remedies to enforce a child support order that has been entered by a North Carolina court or that has been registered for enforcement in North Carolina. Unless otherwise noted, all of the judicial remedies discussed in the following sections of this Part are available in both IV-D and non-IV-D cases. For definition of a IV-D case and a non-IV-D case, see Section I.D.1, above.

2. Remedies for enforcing child support orders are not mutually exclusive. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (reducing arrearage to judgment and collecting the arrearage by income withholding are not inconsistent enforcement remedies); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (*citing Griffin*) (party seeking to collect arrearages that have been reduced to judgment is not limited solely to execution pursuant to G.S. 1-302).] Unless otherwise provided by law, a party may pursue multiple child support enforcement remedies concurrently.

3. A court may award attorney fees pursuant to G.S. 50-13.6 to either party in connection with a proceeding to enforce a child support order if fees could have been awarded when the obligation was established. [*See Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (obligor ordered to pay obligee's attorney fees in case enforcing consent judgment). See *Liability and Amount*, Part 1 of this Chapter, Section VIII, on attorney fees.]

4. Specific performance is not available as a remedy to enforce a court order. [*Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (specific performance is a remedy that applies to enforcement of a contract, not to enforcement of a court order).]

F. Defenses in Child Support Enforcement Proceedings

1. Defenses that are or may be valid.

   a. *Bankruptcy*. The automatic stay resulting from the obligor's filing of a bankruptcy proceeding under the federal Bankruptcy Code may prevent a state court from taking certain actions against the obligor or the obligor's property to enforce a child support order. [See Section XI, below.]

   b. *Lack of jurisdiction*.

      i. Unless precluded by the doctrines of res judicata or collateral estoppel, the issuing court's lack of subject matter or personal jurisdiction to enter the child support order for which enforcement is sought is a valid defense in a subsequent judicial proceeding seeking enforcement of that order. [*See* G.S. 1A-1, Rule 12(b).]

      ii. A court's lack of personal jurisdiction over the obligor may be asserted as an affirmative defense in a child support enforcement proceeding against the obligor or the obligor's property, but this defense is waived if not asserted in a timely manner. [*See* G.S. 1A-1, Rule 12(b).]

   c. *Status of the order*. The suspension, vacation, or modification of a child support order may be raised as a defense in a proceeding to enforce a registered order. [*See* G.S. 52C-6-607(a)(3).]

   d. *Appeal is pending*. The appeal of a child support order precludes judicial proceedings to enforce the order while the appeal is pending, except that a child support order may be enforced by civil contempt pending appeal. [*See* G.S. 50-13.4(f)(9); 1-294.] For a discussion on the use of contempt to enforce a child support order pending an appeal of the order, see Section VII.B.19, below. For more on the appeal of a child support order generally, including the effect of G.S. 50-19.1 and the effect of an appeal on a trial court's jurisdiction, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Sections I.I and I.I.6.

   e. *Order not the controlling order*. If the child support order for which enforcement is sought is not the one "controlling" order under the Uniform Interstate Family Support Act (UIFSA) and Full Faith and Credit for Child Support Orders Act (FFCCSOA), there can be no prospective enforcement of the order, but the obligee can proceed with enforcement of vested, past due child support arrearages. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (parent had continuing obligation to pay vested child support arrearages).] For more on determining when an order is the controlling order, see *Modification of Child Support Orders,* Part 3 of this Chapter, Section III.B.3.

   f. *Direct payment to obligee*. Payments made by, or on behalf of, the obligor directly to the obligee (rather than through the court or the State Child Support Collection and Disbursement Unit) or on behalf of the child **may** constitute a valid defense with respect to a proceeding seeking enforcement of vested, past due child support arrearages that would otherwise be owed by the obligor. [*See* G.S. 50-13.10(e) (authorizing credit for timely and adequately documented payments made directly to obligee); see Section I.F.3, below, for a discussion of credits for expenditures by a delinquent parent.]

g. *Payment made under an order other than the order being enforced*. In determining whether an obligor owes past due child support, child support payments that are made by an obligor for a child under one child support order (Order A) must be credited against the obligor's child support obligation under the child support order that is being enforced (Order B) if the payments under the other order (Order A) are for the same child or children and are for the same period of time as the payments allegedly owed under the order in the pending enforcement proceeding (Order B). [*See* G.S. 52C-2-209.]

2. Defenses that are not valid.

a. *Equitable estoppel*. North Carolina's court of appeals has not recognized equitable estoppel as a valid defense against the enforcement of an obligor's legal obligation to pay court-ordered child support. [*See Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004) (wife not estopped from enforcing child support order when husband failed to show detrimental reliance on alleged oral agreement that changed his obligation to provide health insurance); *Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (when obligor/wife unable to demonstrate that she relied to her detriment on the written and oral agreement of the parties for reduced child support, trial court did not err by declining to apply the doctrine of equitable estoppel; wife's reduced payments were to wife's benefit, as they allowed her to buy a townhome); *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989) (indicating that equitable estoppel is never appropriate in an action to enforce arrears; holding that the obligor could not show detrimental reliance in this particular case); *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (obligor did not reasonably rely on representations by obligee).]

b. *Agreements between the parties*.

i. Court orders for support can be modified only by court order. Therefore, oral or written agreements between parties to reduce or waive child support established by court order are ineffective. [*Baker v. Showalter*, 151 N.C. App. 546, 566 S.E.2d 172 (2002) (parties could not modify a child support order by oral agreement; amount of support in incorporated separation agreement remained in effect); *Griffin v. Griffin*, 96 N.C. App. 324, 385 S.E.2d 526 (1989) (father obligated to pay full amount of support even though trial court found wife agreed to accept less than amount ordered).]

ii. Established child support rights generally cannot be bargained or traded off in exchange for other legal rights or property as between the child's parents. [*See Brinkley v. Brinkley*, 135 N.C. App. 608, 522 S.E.2d 90 (1999) (defendant not entitled to a credit for the amount his former wife owed him under the parties' equitable distribution judgment); *Nisbet v. Nisbet*, 102 N.C. App. 232, 402 S.E.2d 151 (parent's obligation to pay child support pursuant to an unincorporated separation agreement was not dependent on the other spouse's compliance with visitation, nonharassment, or noncohabitation provisions in the same agreement), *review denied,* 329 N.C. 499, 407 S.E.2d 538 (1991).]

iii. An agreement to release an obligor from his past, current, or future child support obligations in consideration of the obligor's giving consent for the child's

adoption by a third party is void as a violation of public policy as expressed in the state's adoption law. [*See Stanly Cty. Dep't of Soc. Servs. ex rel. Dennis v. Reeder*, 127 N.C. App. 723, 493 S.E.2d 70 (1997) (father's consent to adoption, in return for mother's waiver of past and future support, void); *State ex rel. Raines v. Gilbert*, 117 N.C. App. 129, 450 S.E.2d 1 (1994) (mother's agreement to drop child support arrearage action and accept less than amount due, in exchange for father's consent to adoption of child, void).] See *Adoption*, Bench Book, Vol. 1, Chapter 8.

c. *One party's intent or understanding of the provisions in an agreement.*

i. Defendant believed that he did not have to comply with an incorporated separation agreement requiring him to continue child support while his adult child was in good academic standing at a college or trade/technical school. His belief was based on his interpretation of "good academic standing" to mean "enrolled as a full-time student and earning at least a "C" average." Defendant was ordered to pay child support for the months his son was enrolled in college when, by the time of the hearing, the son had completed his degree requirements. [*Wilson v. Wilson,* 214 N.C. App. 541, 545, 714 S.E.2d 793, 796 (2011) (court noted that "[t]he effect of the agreement is not controlled by what one of the parties intended or understood"); *Barker v. Barker,* 228 N.C. App. 362, 745 S.E.2d 910 (2013) (defendant's belief that his daughter's poor academic performance, a 1.658 GPA after three semesters, relieved him of his obligation in a consent order to pay 90 percent of her college expenses as long as she "diligently applied" herself, was rejected; because conclusion that daughter diligently applied herself was supported by findings, defendant found in civil contempt for willful refusal to pay expenses for her second year).]

d. *Reconciliation.*

i. Reconciliation or resumption of a sexual relationship by a child's parents does not terminate a parent's court-ordered child support obligation. [*See Walker v. Walker*, 59 N.C. App. 485, 297 S.E.2d 125 (1982) (parties' periodic sexual relations and temporary reconciliation did not void judgment for child support); *see also Latham v. Latham*, 74 N.C. App. 722, 329 S.E.2d 721 (1985) (once a court has acquired jurisdiction over the custody or support of a minor child, remarriage of the parties to each other does not divest a court of its continuing jurisdiction over a child for purposes of determining custody or child support).]

ii. An obligor is not liable for child support arrearages that accrued while the child was living with the obligor pursuant to a valid court order or an express or implied agreement transferring primary custody to the obligor. [*See* G.S. 50-13.10(d); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (father's child support reduced for period children lived with him).]

e. *One child reaching majority without express provision in order for reduction in support.* When a child support order requires an obligor to pay child support for more than one child and the child support award is not stated separately with respect to each child and the obligor has not sought modification of the order, the fact that the obligor no longer owes child support for one of the children (for example, because

the older child has reached the age of 18 and is no longer in high school) does not constitute a defense against enforcement of the full amount of the order. [*See Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991) (father had no authority to unilaterally modify the amount of child support upon older child turning 18 when support order did not allocate amount for each individual child and was silent as to any reduction in support upon one child reaching age 18); see *Liability and Amount,* Part 1 of this Chapter, Section II.B.3 for further discussion.]

f. *Termination of support obligation not a valid defense against existing arrearages*.

   i. Effective July 1, 2003, if an arrearage for child support or fees exists at the time that a child support obligation terminates, payments shall continue in the same total amount that was due under the terms of the previous court order or income withholding in effect at the time of the support obligation. [G.S. 50-13.4(c).]

   ii. The total amount of these payments is to be applied to the arrearage until all arrearages and fees are satisfied or until further order of the court. [G.S. 50-13.4(c).]

   iii. The fact that a child for whom support was owed has reached the age of 18 and is no longer in elementary and secondary school does not constitute a valid defense against the enforcement of vested, past due child support arrearages that accrued before the date the obligor's child support obligation for the child terminated. [*See Griffith v. Griffith*, 38 N.C. App. 25, 247 S.E.2d 30, *review denied*, 296 N.C. 106, 249 S.E.2d 804 (1978).]

g. *Inability to pay*.

   i. Although an obligor's financial inability to pay child support may preclude imposition of some child support enforcement remedies (for example, civil contempt), it does not discharge the obligor's liability for vested, past due child support arrearages. [*See Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985) (failing to find the obligor in contempt does not affect the underlying debt).]

   ii. An obligor, however, is not liable for child support payments that accrue while the obligor is incarcerated if the obligor is not on work release and has no resources from which child support could be paid. [*See* G.S. 50-13.10(d)(4).]

h. *Homestead exemption*. An obligor may not claim any of the constitutional or statutory "homestead" exemptions to prevent the enforcement of a valid child support claim against the obligor's property. [*See* G.S. 1C-1601(e)(9) (exemptions in G.S. Chapter 1C, Article 16 are not applicable to claims for child support); *Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933) (child support not an ordinary debt against which a person may claim homestead and personal property exemptions).]

i. *Nonpaternity when that issue previously decided*. Attempts to challenge paternity have been rejected on the following grounds.

   i. A prior determination of paternity is itself a bar. [*See Helms v. Landry,* 363 N.C. 738, 686 S.E.2d 674 (2009) (finding in 2002 custody order involving unmarried parents that plaintiff was the biological father was a judicial determination of paternity and was binding in a 2007 proceeding filed by mother contesting

paternity; trial court properly denied mother's motion for paternity testing), *rev'g per curiam for reasons stated in dissenting opinion in* 194 N.C. App. 787, 671 S.E.2d 347 (2009) (Jackson, J, concurring in part and dissenting in part); *see also* G.S. 52C-3-314 and *Reid v. Dixon,* 136 N.C. App. 438, 524 S.E.2d 576 (2000) (when paternity was previously established by Alaska legal proceeding based on father's admission of paternity, father could not later plead nonparentage as a defense in a UIFSA enforcement proceeding); *Heavner v. Heavner,* 73 N.C. App. 331, 326 S.E.2d 78 (parentage already decided when former husband pled guilty in criminal nonsupport action and admitted paternity in divorce complaint), *review denied,* 313 N.C. 601, 330 S.E.2d 610 (1985).]

ii. A prior adjudication is res judicata in a later proceeding. [*See Williams v. Holland*, 39 N.C. App. 141, 249 S.E.2d 821 (1978) (defendant barred by res judicata from putting paternity in issue in child support enforcement action based on Nevada divorce decree that found child to be child of the marriage).] For more on nonpaternity as a defense in a child support proceeding, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.G.4.

iii. **NOTE**: S.L. 2011-328, § 1, effective Jan. 1, 2012, and applicable to motions or claims for relief filed on or after that date, added G.S. 49-14(h), 50-13.13, and 110-132(a1) and (a2), which provide procedures to set aside orders of paternity or affidavits of parentage and to order genetic testing under G.S. 8-50.1(b1) under certain circumstances.

iv. Issues relating to paternity, including a paternity determination as res judicata, are discussed in more detail in *Paternity,* Bench Book, Vol. 1, Chapter 10.

j. *Lack of or interference with visitation*. Denial or frustration of the obligor's legal right to visit the child does not constitute a valid defense against enforcement of the obligor's child support obligation. [*See Appert v. Appert*, 80 N.C. App. 27, 341 S.E.2d 342 (1986) (right to receive child support is independent of the noncustodial parent's right to visitation).]

k. *Statute of limitations*.

i. North Carolina's ten-year statute of limitations for judgments in G.S. 1-47(1) may be raised as an affirmative defense in actions to collect child support arrearages that accrued more than ten years before the date the enforcement proceeding was initiated. [*Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999), *review denied,* 351 N.C. 480, 543 S.E.2d 510 (2000); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989).]

ii. If, however, past due child support arrearages are reduced to judgment pursuant to G.S. 50-13.4(f)(8), all child support arrearages included in the judgment may be enforced within ten years of the date of the judgment, notwithstanding that some or all of the arrearages included in the judgment may have accrued more than ten years before the date a child support enforcement proceeding based on the judgment was initiated. [*Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999) (quoting *Silvering v. Vito*, 107 N.C. App. 270, 419 S.E.2d 360 (1992)), *review denied*, 351 N.C. 480, 543 S.E.2d 510 (2000).] Note that if a judgment for past due child support arrearages remains unsatisfied, a party may

initiate an independent action on that judgment to obtain a new judgment for the amount still owed. [*See* G.S. 1-47(1) (complaint on a judgment must be filed within ten years of the entry of the original judgment); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (upon nonpayment of a judgment for child support arrearages of $23,600 entered in 2001, in a new action brought in 2010, the trial court properly entered a new judgment on the amount owed, $23,600, which defendant was properly ordered to pay in periodic payments of $275/month pursuant to G.S. 50.13.4(f)(8); the 2010 action was not a renewal of the 2001 judgment, for which North Carolina has no procedure, but was a new action on the prior debt, separate and distinct from the 2001 action in which the arrearages were originally reduced to judgment).]

iii. Failure to plead the statute of limitations as an affirmative defense in a timely manner constitutes a waiver of the defense. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (defendant could not raise statute of limitations defense for the first time on appeal).]

iv. The ten-year statute of limitations begins to run from the date each unpaid child support payment under a child support order becomes due, not from the date the child support order was entered. [*Belcher v. Averette,* 136 N.C. App. 803, 526 S.E.2d 663 (2000); *Michigan ex rel. Pruitt v. Pruitt*, 94 N.C. App. 713, 380 S.E.2d 809 (1989).]

v. Application of payments made during the ten-year statute of limitations period may determine whether a claim is barred by the statute of limitations. [*See Belcher v. Averette,* 136 N.C. App. 803, 526 S.E.2d 663 (2000) (in determining whether father's arrearages were barred by ten-year statute of limitations, trial court properly applied father's child support payments within ten-year statute of limitations period to earlier arrearages first and then to later arrearages, thus allowing mother's claim to proceed).]

vi. In a UIFSA proceeding for arrearages under a registered child support order, the statute of limitations of the issuing state or foreign country, or North Carolina's ten-year statute of limitations, whichever is longer, applies. [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (decided before amendment of G.S. 52C-6-604(b) to include a foreign country) (trial court must apply whichever statute of limitations is longer as between North Carolina and the second state).]

l. *Laches.*

i. When North Carolina law has been applied, laches has not been a valid defense in a proceeding to collect vested, past due child support arrearages under a North Carolina or a foreign order, to the extent not barred by North Carolina's ten-year statute of limitations (discussed in the preceding section). [*See Malinak v. Malinak*, 775 S.E.2d 915 (N.C. Ct. App. 2015) (citing *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981)) (trial court erred in applying the doctrine of laches to bar recovery of court-ordered child support not barred by the statute of limitations); *Stephens v. Hamrick*, 86 N.C. App. 556, 358 S.E.2d 547 (1987)

(laches did not bar enforcement under North Carolina law of a South Carolina order for child support entered eighteen years earlier; mother entitled to seek arrearages accruing under the South Carolina order within the ten years allowed under the North Carolina statute of limitations); *Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (laches not a bar to action enforcing Florida support order even though enforcement not sought until fourteen years after order entered and after obligor's death; recovery allowed except to the extent barred by the ten-year statute of limitations), *review denied,* 304 N.C. 728, 288 S.E.2d 381 (1982); *Lindsey v. Lindsey*, 34 N.C. App. 201, 237 S.E.2d 561 (1977) (laches did not prevent mother from seeking enforcement of a North Carolina child support order for period not barred by statute of limitations).]

ii. But when enforcing an order entered by another state based on that state's law, laches may be a valid defense. [*See Tepper v. Hoch,* 140 N.C. App. 354, 536 S.E.2d 654 (2000) (based on laches, as construed by the Illinois courts, the trial court correctly vacated registration of the Illinois child support order; wife's claim for arrearages denied).]

iii. *But see Elliott v. Estate of Elliott*, 163 N.C. App. 577, 596 S.E.2d 819 (federal Full Faith and Credit Clause required application of California law to substantive determinations, but whether to recognize laches as a defense is a matter of procedural law analyzed under North Carolina law), *cert. denied,* 358 N.C. 731, 601 S.E.2d 530 (2004).]

3. Credits against arrearages.

a. Generally.

i. A trial judge has discretion to allow a credit against accrued child support arrearages for expenses incurred while the child was with the noncustodial parent if injustice would exist if a credit was not given. [*See Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977) (enunciating the principle on giving credit for voluntary expenditures for the first time and offering some guidelines for trial judges; case remanded to consider father's request for credit for expenditures for food, clothing, recreation, and medical care), *superseded by statute on other grounds as stated in Craig v. Craig,* 103 N.C. App. 615, 406 S.E.2d 656 (1991); *see also Transylvania Cty. Dep't of Soc. Servs. ex rel. Dowling v. Connolly,* 115 N.C. App. 34, 443 S.E.2d 892 (applying similar law in Georgia to allow credit for payments made by obligor's mother to custodial mother; Judge Greene concurring and noting that credits on a court-ordered child support obligation are permitted if the obligor has substantially complied with the child support order), *review denied,* 337 N.C. 806, 449 S.E.2d 758 (1994).]

ii. Decision whether to allow a credit is not bound by hard and fast rules, but is to be decided according to the equitable considerations of the facts and circumstances in each case. [*Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981).]

iii. For discussion of credits against future child support or credits when establishing child support, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.H.8.

b. Procedure.

i. A delinquent parent's right to receive credit against arrearages for child support payments made outside of a court order, in this case made directly to the children's mother or to the children themselves, is an affirmative defense and must be pleaded by the party asserting it. [*Shaw v. Shaw*, 63 N.C. App. 775, 306 S.E.2d 506 (1983).]

ii. Party seeking credit against arrearages for child support payments outside court order has burden of producing evidence showing that he has made such payments and the amount thereof. [*Shaw v. Shaw*, 63 N.C. App. 775, 306 S.E.2d 506 (1983) (father failed to show the amount for which he sought credit).]

c. Amount of credit.

i. The trial court has wide discretion, both in deciding initially whether justice requires that a credit be given under the facts of each case, and then in what amount the credit is to be awarded. [*Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981) (considering credit for expenditures made by father during children's visitation).]

ii. No abuse of discretion in awarding credit in amount lower than the actual expenditure. [*Lynn v. Lynn,* 44 N.C. App. 148, 260 S.E.2d 682 (1979) (obligor given $375 credit for furnace that cost $515).]

iii. Credit should not be allowed for obligations incurred before entry of the support order. [*Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977), *superseded by statute on other grounds as stated in Craig v. Craig,* 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

d. Contempt still available. Fact that an obligor was given credit does not excuse the obligor from willfully violating the terms of a judicial order. The obligor can still be held in contempt. [*See Lynn v. Lynn*, 44 N.C. App. 148, 260 S.E.2d 682 (1979) (obligor given credit against arrearages for having a furnace installed but still in contempt for willful violation of child support order).]

e. Contents of order giving credit. In those rare cases in which a trial court properly awards a credit against future child support, it should conclude in its written order that, as a matter of law, an injustice would exist if the credit were not allowed, and it should support that conclusion by findings of fact based on competent evidence. [*Brinkley v. Brinkley,* 135 N.C. App. 608, 522 S.E.2d 90 (1999).]

f. Effect of final judgment establishing amount of arrearages. After a judgment has been entered establishing the amount of arrearages, it is error for a court to allow a credit for payments made before entry of the judgment. [*See Pieper v. Pieper,* 108 N.C. App. 722, 425 S.E.2d 435 (1993) (after entry of Iowa judgment establishing amount of arrearages, court erred in allowing father credit for payments directly to child for certain college expenses; Iowa judgment entitled to full faith and credit and not subject to modification except as provided in G.S. 50-13.10(a).]

II. UIFSA Proceedings to Enforce Child Support Orders of Another State or a Foreign Country

A. Child Support Orders Registered under Uniform Interstate Family Support Act (UIFSA)

1. Registration of a support order issued in another state or a foreign support order for the purpose of enforcement. [For the definition of a "foreign support order", see G.S. 52C-1-101(3b).]

   a. A support order or income withholding order issued in another state or a foreign support order may be registered in North Carolina for enforcement. [G.S. 52C-6-601, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

   b. A North Carolina court must enforce a support order issued in another state (for the definition of "state", see G.S. 52C-1-101(19)) or a foreign support order if:

      i. The order is properly registered for enforcement in North Carolina pursuant to G.S. 52C-6-602,

      ii. The obligor has been given notice of registration pursuant to G.S. 52C-6-605,

      iii. The obligor fails to contest the validity or enforcement of the registered order pursuant to G.S. 52C-6-606 or fails to prove a valid defense to the validity or enforcement of the registered order pursuant to G.S. 52C-6-607, and

      iv. The court has jurisdiction over the obligor or the obligor's property.

   c. Prior to June 24, 2015, a foreign country that had enacted a law or established procedures substantially similar to UIFSA's procedures was considered a "state" as that term was then defined. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (England was considered a "state" under G.S. 52C-1-101(19)(b)).] Definitions for "foreign country" and "foreign tribunal" were added in 2015, and the definition of "state" was revised to delete the reference to a foreign country with substantially similar procedures. [G.S. 52C-1-101(3a) (foreign country), 52C-1-101(3c) (foreign tribunal), *both added by* S.L. 2015-117, § 1, effective June 24, 2015; 52C-1-101(19) (state), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

   d. Cases decided before 2015 amendments to UIFSA.

      i. Enforcement of support orders of another state or foreign country under G.S. Chapter 52C provides a legal, not equitable, remedy. [*State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007) (any equitable defenses to the child support obligations that an obligor may wish to raise can be raised only in the initiating state).] G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, on choice of law is discussed in Section II.A.7, below.

      ii. See *Lang v. Lang,* 132 N.C. App. 580, 583, 512 S.E.2d 788, 790 (1999), a case decided under the Uniform Reciprocal Enforcement of Support Act (URESA) and G.S. Chapter 52A (now repealed), in which mother and daughter plaintiffs sought only to register, not enforce, a foreign support order (not clear but appears to be a German order or agreement). After dismissing the appeal as interlocutory, the court made clear that following registration of the order, a plaintiff is not required to file a separate action to enforce a properly registered order from another jurisdiction, nor must a summons be issued. The court

stated that a plaintiff need only file "a motion in the underlying causes to enforce the existing judgment." *See also Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127 (decided following adoption of UIFSA) (petitioner could seek enforcement of a Swiss support order by filing a civil complaint seeking enforcement or by filing a petition for registration pursuant to UIFSA), *review denied,* 354 N.C. 217, 554 S.E.2d 338 (2001).

2. Procedure when the obligor fails to contest the validity or enforcement of a registered support order.
   a. If the obligor fails to request a hearing to contest the validity or enforcement of a registered support order within twenty days of the date he is served with notice of registration:
      i. The order is confirmed by operation of law, without any hearing or court approval [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015. *See Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (Tennessee support order confirmed by operation of law when defendant did not contest registration).] and
      ii. Upon confirmation, whether by operation of law or after notice and hearing, the obligor is precluded from further contesting the order with respect to any matter that could have been raised at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]
   b. Confirmation by operation of law can be set aside for excusable neglect.
      i. If the obligor fails to contest registration and enforcement of the out-of-state order in a timely manner, the court may, upon a showing of excusable neglect, set aside confirmation of the registered order and allow the obligor to contest registration and enforcement of the out-of-state order. [*See Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (confirmation set aside under G.S. 1A-1, Rule 60(b)(1) due to former husband's inadvertent failure to request a hearing).]
3. Contesting the validity or enforcement of a registered support order. [G.S. 52C-6-606.]
   a. A respondent may contest the validity of a registered support order or seek to vacate the registration by asserting one or more of the following defenses:
      i. The issuing tribunal lacked personal jurisdiction over the nonregistering party in the original proceeding; [G.S. 52C-6-607(a)(1); Official Comment (2015), G.S. 52C-6-607.]
      ii. The order was obtained by fraud; [G.S. 52C-6-607(a)(2).]
      iii. The order has been vacated, suspended, or modified by a later order; [G.S. 52C-6-607(a)(3).]
      iv. The issuing tribunal has stayed the order pending appeal; [G.S. 52C-6-607(a)(4).]
      v. The registering state's law provides a defense against the remedy sought; [G.S. 52C-6-607(a)(5).]
         (a) "Remedy sought" refers only to the procedural means of enforcing child support orders, such as wage withholding, license revocation, or imprisonment. Under this interpretation, an obligor is not allowed to assert

equitable defenses under North Carolina law as to the amount of arrearages. [*State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998) (obligor would have to assert equitable defenses recognized in the issuing state).]

(b) This provision allows a defendant to assert defenses under North Carolina law to the enforcement procedures sought but does not allow a defendant to assert equitable defenses under North Carolina law to the amount of arrearages. [*Lacarrubba v. Lacarrubba,* 202 N.C. App. 532, 688 S.E.2d 769 (2010) (citing *State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998)); *State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007).]

vi. Full or partial payment has been made; [G.S. 52C-6-607(a)(6).]

vii. The statute of limitations under G.S. 52C-6-604 precludes enforcement of some or all of the alleged arrearages; [G.S. 52C-6-607(a)(7), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] or

viii. The alleged controlling order is not the controlling order. [G.S. 52C-6-607(a)(8), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. The respondent has the burden of proving any of the defenses listed immediately above. [G.S. 52C-6-607(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (trial court erred in placing the burden on the registering party to prove that a Virginia order should be registered in North Carolina; dispute as to amount of arrearages did not shift burden of proof to registering party).]

c. If the respondent presents evidence sufficient to establish a full or partial defense under at least one of the enumerated defenses in G.S. 52C-6-607(a), a tribunal may:

i. Stay enforcement of the registered order,

ii. Continue the proceeding to permit production of additional relevant evidence, and

iii. Issue other appropriate orders. [G.S. 52C-6-607(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. If the respondent does not establish a defense under G.S. 52C-6-607(a), the registering tribunal must issue an order confirming the registered support order. [G.S. 52C-6-607(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

e. If the respondent does not establish one of the eight specified defenses in G.S. 52C-6-607(a), the registering tribunal must issue an order confirming the registered support order. [G.S. 52C-6-607(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007) (where defendant's only defense to enforcement of two Florida orders was that he was denied visitation, which is not one of the (then) seven enumerated defenses, the trial court erred by refusing to confirm the registration of the Florida orders in full and without modification; enforcement of the order was compulsory); *Carteret Cty. ex rel. Amor v. Kendall,* 231 N.C. App. 534, 752 S.E.2d 764 (2014) (trial court erred when it denied registration of a Colorado child support order based not on any of the statutory

defenses, but on defendant's contention that he was unable to secure employment, rendering him unable to pay support, because he had been wrongfully required to register in North Carolina as a sex offender; a defendant cannot assert an equitable defense against enforcement of an out-of-state support order).]

f. The respondent's failure to contest the validity or enforcement of the registered support order in a timely manner constitutes a waiver of the defense, resulting in the order being confirmed by operation of law. [G.S. 52C-6-606(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

g. Confirmation of a registered support order, whether by operation or law or after notice and hearing, precludes further contest of the order as to any matter that could have been asserted at the time of registration. [G.S. 52C-6-608, *amended by* S.L. 2015-117, § 1, effective June 24, 2015; Official Comment (2015), G.S. 52C-6-608 (confirmation of a support order, whether by action or as the result of inaction, validates both the terms of the order and the asserted arrearages).]

h. The district court judge must consider and rule on the validity of any of the defenses in G.S. 52C-6-607 asserted by respondent (including defenses based on the issuing court's lack of jurisdiction, unless the issue of jurisdiction has been conclusively determined by a prior decision that is res judicata). [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (conflicts in the evidence presented by defendant and by plaintiff are for the trial court to resolve; their mere presence does not justify or permit vacation of the prior registration).]

i. A partial registration of a foreign order may result in an impermissible modification of the order. [*See State ex rel. Lively v. Berry,* 187 N.C. App. 459, 653 S.E.2d 192 (2007) (trial court did not have authority to register a portion of a Florida child support order, the ongoing monthly child support, yet deny registration of the arrearages portion of that order; also, it was error to deny confirmation of a Florida public assistance order requiring payment of arrearages arising from time child was in foster care; refusal to register the arrearages portion of the orders affected the amount of the orders and was an impermissible modification).]

j. Additionally, a nonregistering party is permitted to contest a registered order by asserting any defense recognized in the issuing state. [*Tepper v. Hoch*, 140 N.C. App. 354, 536 S.E.2d 654 (2000) (North Carolina court correctly vacated the registration of an Illinois child support order based on laches, as construed by the Illinois courts, even though laches is not a defense available in North Carolina in a proceeding to enforce vested, past due child support arrearages).] G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, on choice of law is discussed in Section II.A.7, below.

4. Defense that full or partial payment has been made. [G.S. 52C-6-607(a)(6) (this provision was not amended in 2015).]

a. An obligor often contests the amount of arrearages by asserting that full or partial payment has been made. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 269, 535 S.E.2d 903, 906 (2000) (when obligor sought credit for the time he was incarcerated and for additional support payments he contends he made, court

noted it was "not unusual" for questions about the correct amount of arrearages to be raised in multi-state child support matters).]

b. Dispute as to amount of arrearages does not preclude registration and enforcement. A North Carolina court may not refuse to register, confirm, or enforce a valid child support order issued by a court of another state simply because there is a dispute regarding the amount of arrearages owed under the order. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 535 S.E.2d 903 (2000) (dispute over amount of arrearages not grounds for vacating a registered foreign support order).]

c. Procedure when amount of arrearages has been determined by order. If a court of another state has entered a valid order determining the amount of arrearages owed under the registered order:

i. The obligor is bound by that order and

ii. The registering court must recognize the other court's decision with respect to the amount of arrearages owed. [*See Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993); *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980).]

d. Procedure when amount of arrearages not determined by order. If a court of another state has not entered a valid order determining the amount of arrearages owed under the registered order:

i. The obligor may contest registration and enforcement by contesting the amount of arrearages claimed and

ii. The registering court must make a determination with respect to the amount of child support arrearages owed. [*See Martin Cty. ex rel. Hampton v. Dallas*, 140 N.C. App. 267, 269–70, 535 S.E.2d 903, 906 (2000) (stating that "[t]he correct amount of arrearage can be determined in a case of this sort just as it could in a dispute arising out of a North Carolina child support order").] Note that if an order of another state determines arrearages, confirmation of the order, whether by action or as the result of inaction, validates both the terms of the order and the asserted arrearages. [Official Comment (2015), G.S. 52C-6-608.]

5. Effect of an order registered for enforcement.

a. A registered support order issued in another state or a foreign country is enforceable in the same manner and is subject to the same procedures as a support order issued by a tribunal of the registering state. [G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (not paginated on Westlaw) (emphasis in original) (once a foreign support order is registered and confirmed in North Carolina, it becomes "an *order* of our State's courts, explicitly enforceable as such").]

b. A trial court has authority to enforce by contempt all paragraphs and provisions in a foreign support order registered and confirmed in North Carolina, not just those related to support. [*Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (rejecting the notion of partial enforcement of a registered order and holding that trial court had jurisdiction to consider whether defendant was in contempt of provisions in order requiring support payments to wife, as well as provisions

restraining defendant from harassing wife and other named individuals, and requiring defendant to give up certain causes of action).]

c. Registration in North Carolina does not, standing alone, give a North Carolina court jurisdiction to modify the registered order. [*See* G.S. 52C-6-603(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (except as otherwise provided in G.S. Chapter 52C, a tribunal of this state shall recognize and enforce, but may not modify, a registered support order if the issuing tribunal had jurisdiction); *see also Hinton v. Hinton*, 128 N.C. App. 637, 496 S.E.2d 409 (1998) (error for North Carolina court to modify an order when there was no evidence in the record that issuing state had lost jurisdiction or that parties had consented to North Carolina jurisdiction to modify the order).] See *Modification of Child Support Orders*, Part 3 of this Chapter, on limited circumstances that allow modification.

6. Enforcement of a registered order.

a. Enforcement when registered order is the controlling child support order.

i. A North Carolina court may enforce current and ongoing child support under a registered child support order if, and only if, the registered order is the controlling child support order that is entitled to recognition under the Uniform Interstate Family Support Act (UIFSA) (G.S. Chapter 52C) (applicable to a child support order issued by a state tribunal and to a foreign support order) and the federal Full Faith and Credit for Child Support Orders Act (FFCCSOA) (28 U.S.C. § 1738B) (applicable to a child support order issued by a state tribunal but not to a foreign support order). [See *Modification of Child Support Orders*, Part 3 of this Chapter, for more on the controlling order.]

ii. A North Carolina court is required to enforce child support arrearages that have accrued under the controlling child support order that is entitled to recognition under UIFSA and FFCCSOA.

iii. Trial court erred when it determined that the amount of child support arrearages owed under a Michigan judgment was $2,916, which was the amount of arrearages for the six-month period starting after registration of the Michigan judgment was confirmed, instead of $4,860, which was the amount of arrearages for the ten-month period starting with registration of the Michigan order. Because $4,860 in monthly support payments had accrued and vested under the Michigan judgment and Michigan law, the trial court erred in determining that a different amount was owed. [*State ex rel. Benford v. Bryant,* 208 N.C. App. 165, 701 S.E.2d 387 (2010).]

b. Enforcement when registered order is not the controlling child support order.

i. The Full Faith and Credit Clause of the U.S. Constitution requires a North Carolina court to enforce vested, past due child support arrearages that accrued under a child support order that is not entitled to recognition as the one "controlling" order under UIFSA and FFCCSOA if the arrearages accrued prior to the date the order was validly modified under UIFSA, FFCCSOA, or other applicable law or prior to the date another order was determined to be the one "controlling" order entitled to recognition under UIFSA and FFCCSOA. [*See New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d

610 (2003) (calculating arrearages under two URESA orders for child support); *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980) (calculating arrearages under URESA orders for child support and alimony).] Note that neither the Full Faith and Credit Clause of the U.S. Constitution nor the FFCCSOA applies to orders entered by foreign countries.

ii. When the trial court determined that a 1989 Washington order was not the one "controlling" order but found controlling a 1991 Tennessee order which held that defendant had paid all support due under that order and thus owed no outstanding arrearages, trial court's dismissal of plaintiff's enforcement action was upheld. [*Uhrig v. Madaras,* 174 N.C. App. 357, 620 S.E.2d 730 (2005), *review denied,* 360 N.C. 367, 630 S.E.2d 455 (2006).]

7. Choice of law when enforcing a registered child support order.

a. G.S. 52C-6-604, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, establishes choice of law rules based on the Uniform Interstate Family Support Act (UIFSA) principle that throughout the process, the controlling order remains the order of the tribunal of the issuing state or foreign country until a valid modification. [Official Comment (2015), G.S. 52C-6-604.]

b. Except as otherwise provided by G.S. 52C-6-604(d), a North Carolina court must:

i. Apply the law of the issuing state or foreign country with respect to the nature, extent, amount, and duration of current payments under a registered support order; [G.S. 52C-6-604(a)(1), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (substantive questions of law regarding support orders are determined according to the law of the "issuing state").]

ii. Apply the law of the issuing state or foreign country with respect to the computation and payment of arrearages and accrual of interest on the arrearages under the support order; [G.S. 52C-6-604(a)(2), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

iii. Apply the law of the issuing state or foreign country with respect to the existence and satisfaction of other obligations under the support order; [G.S. 52C-6-604(a)(3), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

iv. Apply, in a proceeding for arrearages under a registered support order, the statute of limitations of the issuing state or foreign country, or of North Carolina, whichever is longer; [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

v. Apply the procedures and remedies of this state to enforce current support and collect arrearages and interest due on a support order of another state or a foreign country registered in this state. [G.S. 52C-6-604(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] Under this subsection, the responding tribunal applies local law with respect to enforcement. [Official Comment (2015), G.S. 52C-6-604.]

vi. After a tribunal of this state or another state determines which is the controlling order and issues an order consolidating arrearages, if any, a tribunal of this state

must prospectively apply the law of the state or foreign country issuing the controlling order, including its law of interest on arrearages, on current and future support, and on consolidated arrearages. [G.S. 52C-6-604(d), *added by* S.L. 2015-117, § 1, effective June 24, 2015.] Under this subsection, the responding tribunal applies the law of the issuing state or foreign country to the consolidated arrearages, "most particularly to the interest to be charged prospectively, even if the support orders of other states contributed a portion to those arrears." [Official Comment (2015), G.S. 52C-6-604.]

c. The applicability of the law of another tribunal, or whether there is a conflict between the laws of North Carolina and the laws of another state or a foreign jurisdiction, must be raised by a pleading or other reasonable written notice. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (merely attaching an English order to defendant's motion to modify did not provide sufficient notice to the trial court that there was a conflict between North Carolina law and the law of a foreign jurisdiction).]

d. Where defendant failed to properly assert that English law should be applied to determine whether arrearages existed under an English support order, court's failure to do so could not be considered on appeal. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (unclear whether court applied English or North Carolina law to decide question since there was no finding of fact on the issue; no error in any event) (*Ugochukwu* was decided before amendment of G.S. 52C-6-604(b) to include a foreign country).]

e. In a UIFSA proceeding for arrears under a registered child support order, a North Carolina court must apply North Carolina's ten-year statute of limitations, or the statute of limitations of the issuing state or foreign country, whichever is longer. [G.S. 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; *New Hanover Cty. ex rel. Mannthey v. Kilbourne*, 157 N.C. App. 239, 578 S.E.2d 610 (2003) (trial court must apply whichever statute of limitations is longer as between North Carolina and the second state); *State ex rel. George v. Bray*, 130 N.C. App. 552, 503 S.E.2d 686 (1998) (applying Indiana's limitations period for enforcement of child support arrearages since it was longer than North Carolina's) (both *Mannthey* and *Bray* were decided before amendment of G.S. 52C-6-604(b) to include a foreign country).]

B. Child Support Orders Not Registered under UIFSA

1. A North Carolina court may enforce a child support order even if the order has not been, or could not be, registered for enforcement under the Uniform Interstate Family Support Act (UIFSA) (for example, because it was issued by a court of a foreign country that is not considered a "state" under UIFSA). The court, however, may lack jurisdiction to enforce the nonregistered order prospectively if another child support order is entitled to recognition under UIFSA and the Full Faith and Credit for Child Support Orders Act (FFCCSOA) as the "controlling" order governing the obligor's duty to support the child. [See Section I.A, above, on subject matter jurisdiction.]

2. An obligee may file a civil action to "domesticate" and enforce a support order issued in another state. [*See Pieper v. Pieper*, 108 N.C. App. 722, 425 S.E.2d 435 (1993) (following dismissal of Uniform Reciprocal Enforcement of Support Act action in *Pieper I*, plaintiff

could obtain a final money judgment in Iowa and then return to North Carolina for enforcement of that judgment).]

3. The Full Faith and Credit Clause of the U.S. Constitution requires a North Carolina court to enforce vested, past due arrearages under a valid child support order issued by a court or tribunal in another state if the child support arrearages constitute a final judgment under the law of the issuing state. [*See Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980) (North Carolina court bound by Arizona decree that determined amount of arrearages as of date decree was entered).]
4. Other statutes relating to enforcement of support judgments issued by courts of other states or foreign countries.
    a. North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1850 *et seq*.]
        i. A "foreign-country judgment" is a judgment of a court of a foreign country. [G.S. 1C-1851(2).] A "foreign country" is a government other than the United States, a state, district, commonwealth, territory, or insular possession of the United States, or any other government with regard to which the decision in this state as to whether to recognize a judgment of that government's courts is initially subject to determination under the Full Faith and Credit Clause of the U.S. Constitution. [G.S. 1C-1851(1).] This act does not apply to recognition of sister-state judgments. [Official Comment, G.S. 1C-1851.]
        ii. A foreign-country judgment for child support may **not** be recognized in North Carolina pursuant to the North Carolina Uniform Foreign-Country Money Judgments Recognition Act. [G.S. 1C-1852(b)(3), *added by* S.L. 2009-325, § 2, effective Oct. 1, 2009, and applicable to all actions commenced on or after that date in which the issue of recognition of a foreign-country judgment is raised (excluding from recognition judgments for alimony, support, or maintenance in matrimonial or family matters).] For a case recognizing a foreign-country money judgment for attorney fees and expenses, awarded to plaintiff at the conclusion in his favor of an action for support under the Family Law (Scotland) Act, see *Savage v. Zelent*, 777 S.E.2d 801 (N.C. Ct. App.) (rejecting defendant's assertion that attorney fees awarded in a family law matter are in fact a judgment for support or alimony not subject to recognition under G.S. 1C-1852; even though the Scottish judgment for attorney fees arose from defendant's unsuccessful claim for maintenance, the judgment itself was for attorney fees, which may be recognized in North Carolina), *review denied*, 782 S.E.2d 898 (N.C. 2016).]
        iii. This act does not prevent the recognition under principles of comity or otherwise of a foreign-country judgment to which this act does not apply. [G.S. 1C-1852(d).]
    b. Uniform Enforcement of Foreign Judgments Act. [G.S. 1C-1701 *et seq*.]
        i. A foreign judgment under this act means any judgment, decree, or order of a court of the United States or a court of any other state which is entitled to full faith and credit in this state, except a "child support order", as defined in G.S. 52C-1-101 (UIFSA); a "custody decree", as defined in G.S. 50A-102

(Uniform Child-Custody Jurisdiction and Enforcement Act); or a domestic violence protective order, as provided in G.S. 50B-4(d). [G.S. 1C-1702(1).]

ii. Being excluded by G.S. 1C-1702(1), a foreign judgment for child support may **not** be enforced in North Carolina pursuant to the Uniform Enforcement of Foreign Judgments Act.

5. Enforcement in North Carolina of an income withholding order issued by another state without registration after June, 24, 2015.

   a. Direct filing or recognition in North Carolina of an out-of-state withholding order means that an employer or payor in this state is notified of the out-of-state withholding order without the involvement of initiating or responding tribunals. [Official Comment (2015), G.S. 52C-5-501.]

   b. Except as provided in G.S. 52C-5-507 addressing the administrative enforcement of orders, none of the provisions in G.S Chapter 52C, Article 5 are intended to apply to foreign support orders. [Official Comment (2015), G.S. 52C-5-501.]

   c. A district court in North Carolina has jurisdiction to hear cases in which an obligor registers the out-of-state income withholding order in North Carolina and files a contest to that order as provided in G.S Chapter 52C, Article 6, or otherwise contests the order in the same manner as if the order had been issued by a North Carolina tribunal. [G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

6. Judgments for child support issued by courts or tribunals in foreign countries.

   a. Judgments for child support issued by courts or tribunals in foreign countries are not entitled to recognition and enforcement under the Full Faith and Credit Clause of the U.S. Constitution but may be enforced by a North Carolina court under the doctrine of comity. [*See State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 523 S.E.2d 125 (1999) (neither Full Faith and Credit Clause of the U.S. Constitution nor Full Faith and Credit for Child Support Orders Act applies to orders entered by foreign countries), *cert. denied*, 351 N.C. 479, 543 S.E.2d 509 (2000); *Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979) (Full Faith and Credit Clause does not apply to decrees of foreign nations).]

   b. A North Carolina court may enforce a child support order entered by a court or tribunal of a foreign country if:

      i. The foreign court or tribunal had jurisdiction over the obligor;

      ii. The order was valid under the law of the foreign country;

      iii. The procedures in the foreign proceeding were fair (for example, the obligor received adequate notice and an opportunity to be heard); and

      iv. Enforcement of the foreign order would not be contrary to the public policy of North Carolina. [*See Haker-Volkening v. Haker*, 143 N.C. App. 688, 547 S.E.2d 127 (under comity, North Carolina court may enforce support order issued by court in foreign jurisdiction provided foreign court had jurisdiction over cause and parties), *review denied*, 354 N.C. 217, 554 S.E.2d 338 (2001); *State ex rel. Desselberg v. Peele*, 136 N.C. App. 206, 523 S.E.2d 125 (1999) (if foreign court had jurisdiction over the cause and parties, North Carolina court may choose to enforce a foreign order), *cert. denied*, 351 N.C. 479, 543 S.E.2d 509 (2000);

Mayer v. Mayer, 66 N.C. App. 522, 311 S.E.2d 659 (comity did not require North Carolina to recognize a Dominican divorce decree that offended North Carolina's public policy against the hasty dissolution of marriages), *review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984); *Southern v. Southern*, 43 N.C. App. 159, 258 S.E.2d 422 (1979) (English court lacked jurisdiction to render a judgment in personam against defendant, so North Carolina court could not enforce it).]

c. Provisions in the Uniform Interstate Family Support Act (UIFSA) addressing the recognition and enforcement of a support order entered in another country on the basis of comity after June 24, 2015.

i. Remedies provided by G.S. Chapter 52C are cumulative and do not affect the availability of remedies under other law or the recognition of a foreign support order on the basis of comity. [G.S. 52C-1-103, *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to add the comity language.]

ii. G.S. 52C-1-103 facilitates the recognition and enforcement of a support order from a nation state that is entitled to have its orders recognized by comity but is not a "foreign country" as defined in G.S. 52C-1-10(3a). [Official Comment (2015), G.S. 52C-1-103.]

iii. Applying comity to enforce a support order of a tribunal of another nation state intends courtesy and good will and extends due regard for the legislative, executive, and judicial acts of another nation, which is not a "foreign country" as defined in G.S. 52C-1-10(3a). [Official Comment (2015), G.S. 52C-1-103.]

iv. A North Carolina tribunal that is requested to recognize and enforce a support order on the basis of comity may apply the procedural and substantive provisions of Articles 1 through 6 of G.S. Chapter 52C (UIFSA). [G.S. 52C-1-104(b), *added by* S.L. 2015-117, § 1, effective June 24, 2015.]

III. Income Withholding, Wage Garnishment, and Wage Assignment

A. Income Withholding in Non-IV-D Cases

1. Generally.

a. For definition of a IV-D case and a non-IV-D case, see Section I.D.1, above.

b. Income withholding is both a means for paying child support (regardless of whether the obligor has failed to pay child support, owes past due support, or is delinquent in paying court-ordered child support) and a remedy for enforcing the child support obligation of an obligor who has failed to pay court-ordered child support, owes past due support, or is delinquent in paying child support.

i. Income withholding is intended to be a **preventive** and **remedial** measure and is not punitive in nature.

ii. When an obligor owes past due child support and is employed or receives regular income from any nonexempt source, income withholding should be

employed as the **preferred** remedy to enforce the obligor's child support obligation.

c. Except as otherwise noted, the income withholding procedures discussed below apply with respect to child support orders issued by North Carolina courts as well as to child support orders that are registered for enforcement or "domesticated" in North Carolina under the procedures discussed in Section II, above. [See G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, to include registered support orders issued in a foreign country.]

d. North Carolina's statutes allowing income withholding and garnishment of an obligor's current and future earnings to collect child support are an exception to the general rule (under G.S. 1-362 and prior case law) prohibiting ongoing wage garnishment to collect debts. [*See Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).]

e. Income withholding may be used to collect child support arrearages regardless of whether the obligor is still required to make ongoing payments for the current support of a child. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (affirming order to withhold husband's wages to collect child support arrearages that had been reduced to judgment; finding no distinction between a parent who owes both arrearages and current support payments and one whose total support obligation consists of arrearages); *McGee v. McGee*, 118 N.C. App. 19, 453 S.E.2d 531 (finding that the mandatory income withholding in IV-D cases applies with equal force to orders for current support and to orders directing payment of arrearages), *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).]

f. Child support payments collected via income withholding in both IV-D and non-IV-D cases must be paid through the State Child Support Collection and Disbursement Unit in Raleigh. [*See* G.S. 110-136.8(b)(1), 110-136.9, and 110-139(f).]

2. Withholding requirement in an enforcement action pursuant to G.S. 50-13.9(d).

a. Until Jan. 1, 2007, when an enforcement order was issued pursuant to G.S. 50-13.9(d) and the court found that the obligor had failed to pay court-ordered child support in a timely manner and had disposable income from which child support payments could be withheld, the court was to require income withholding pursuant to G.S. 110-136.5 unless income withholding was not an available or adequate remedy. [G.S. 50-13.9(d).]

b. Effective Jan. 1, 2007, the provisions in G.S. 50-13.9(d) set out in Section III.A.2.a, immediately above, were repealed. G.S. 50-13.9(d) was amended to allow the clerk or a district court judge, upon affidavit, to order a delinquent obligor to appear and show cause why she should not be subjected to income withholding, contempt, or both. [*See* G.S. 50-13.9(d), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]

3. Withholding requirement for initial orders entered on or after Jan. 1, 1994.

a. Immediate income withholding is required for all initial child support orders entered in non-IV-D cases on or after January 1, 1994, unless:

i. There is "good cause" not to require immediate income withholding (for a definition of "good cause", see G.S. 110-136.5(c1)) or

ii. The parties agree in writing to an alternative arrangement. [G.S. 110-136.3(a), 110-136.5(c1).]

b. The court does not have to find that the obligor is or has been delinquent or erratic in paying child support.

4. Withholding requirement for orders entered before Jan. 1, 1994. In cases in which the support order was entered before Jan. 1, 1994, an obligor becomes subject to court-ordered withholding on the earliest of:

a. The date on which the obligor fails to make payments equal to one month's support; [G.S. 110-136.3(b)(2)(a).]

b. The date on which the obligor requests withholding; [G.S. 110-136.3(b)(2)(b) and 110-136.5(b).] or

c. The date on which the court determines, pursuant to a request by the obligee, that the obligor is or has been delinquent or erratic in making support payments. [G.S. 110-136.3(b)(2)(c) and 110-136.5(a).]

5. Requests for withholding. Withholding may be implemented upon request of either the obligor or the obligee.

a. Request of the obligor. [G.S. 110-136.3(b)(2)(b) and 110-136.5(b).]

i. A court must order income withholding if the obligor requests, in open court or in a written request filed with the clerk of superior court, that income withholding be implemented. [G.S. 110-136.5(c).]

ii. If the obligor files a written request for income withholding and is delinquent in paying child support, the court must hold a hearing before entering an income withholding order, unless the obligor waives the right to a hearing. [G.S. 110-136.5(b)(2).]

b. Request of the obligee.

i. An obligee may request the court to order income withholding by filing a verified motion in the cause or by filing a verified complaint in an independent action alleging that the obligor has been "erratic" or is "delinquent" in paying child support. [G.S. 110-136.5(a).]

ii. This provision applies with respect to child support payable:

(a) Under orders entered before, on, or after Jan. 1, 1994, that do not require income withholding [*See* G.S. 110-136.3(b)(2) and 110-136.5(a).] and

(b) Pursuant to a legally enforceable agreement other than a court order. [*See* G.S. 110-136.5(a).]

iii. A court must order income withholding if the obligor has been "erratic" or is "delinquent," at the time a motion or complaint requesting income withholding is filed or on the date the hearing on the motion or complaint is held, in making child support payments. [G.S. 110-136.5(c).]

iv. At any time the parties may agree to income withholding by consent order. [G.S. 110-136.5(a).]

v. An obligor is "delinquent" in paying child support if he owes past due child support and is not in compliance with a court order specifying the manner in which he may satisfy his obligation to pay the arrearage (usually, by making regular payments on the arrearage in addition to the obligor's payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]

6. Defenses to a request for income withholding.
   a. Statutory defenses. An obligor may raise the following defenses in response to an obligee's request for income withholding pursuant to G.S. 110-136.3(b)(3) or 110-136.5(a):
      i. The obligor was not, at the time the motion or complaint was filed and at the time of the hearing, delinquent in paying child support and has not been erratic in making child support payments (if income withholding is sought pursuant to G.S. 110-136.5(a)).
      ii. The obligor did not owe child support arrearages equal to at least the amount of child support owed for one month (if income withholding is sought pursuant to G.S. 110-136.3(b)(2)(a)). [*See* G.S. 110-129(10)(a).]
      iii. Child support payments can be ensured without income withholding [G.S. 110-136.5(c)(2).]
      iv. The obligor has no disposable income subject to withholding or income withholding is not feasible. [G.S. 110-136.5(c)(3).]
   b. Other possible defenses.
      i. Payment of arrearages. Except in child support enforcement proceedings pursuant to G.S. 50-13.9(d), the obligor's payment of child support arrearages before the hearing is not a defense to the entry of an income withholding order. [G.S. 110-136.4(a)(5) (IV-D cases); 110-136.5(c) (non-IV-D cases).] Effective Jan. 1, 2007, the provision in G.S. 50-13.9(d) allowing the clerk to withdraw the order upon receipt of the delinquent payment was repealed. [*See* G.S. 50-13.9(d), *amended by* S.L. 2005-389, § 1 and S.L. 2006-264, § 97.]
      ii. Lack of willfulness. The obligor's willfulness or lack thereof in failing to pay child support is not relevant with respect to the question of whether income withholding is an appropriate remedy. [*See Champion v. Champion*, 64 N.C. App. 606, 307 S.E.2d 827 (1983) (garnishment proper to collect child support even though no finding that defendant's failure to pay was "wilful").]

7. Service on the payor of an order or notice of withholding.
   a. Employers or other payors that may be served with an income withholding order or notice include federal, state, and local government employers or agencies, the military, banks, trusts, insurance companies, tenants, customers, and others. [G.S. 110-129(13).]

b. If the court orders income withholding in a non-IV-D case, a copy of the order or notice of income withholding must be served on the payor pursuant to G.S. 1A-1, Rule 5, served on the obligor by first class mail, and filed with the clerk of superior court. [G.S. 110-136.5(d).]

c. An income withholding order or notice may be served on any employer or other payor who is domiciled in North Carolina, does business in North Carolina, or is otherwise subject to the exercise of personal jurisdiction by a North Carolina court.

d. An income withholding order or notice also may be served on any employer or other payor who is not subject to North Carolina's jurisdiction but is subject to the jurisdiction of a state that has enacted the Uniform Interstate Family Support Act. [*See* G.S. 52C-5-501.]

e. If the obligor changes employment within North Carolina while an income withholding order remains in effect, the clerk of superior court must serve a notice of income withholding on the obligor and the obligor's new employer and schedule the case for hearing if the obligor or the obligor's new employer gives notice that the income withholding order requires modification or adjustment. [*See* G.S. 110-136.8(c)(2).]

8. Contents of the order or notice for withholding.

a. Federal law requires that all income withholding orders and notices comply substantially with a standardized, federally approved income withholding notice. [The approved form, Income Withholding for Support (OMB 0970-0154), is available through the Administrative Office of the Courts and IV-D agencies.]

b. An income withholding order or notice must state, as a sum certain, the amount of current support and support arrearages that an employer or other payor must withhold from the obligor's disposable income. [*See* G.S. 110-136.6(a), (c).]

c. To the extent that it is not inconsistent with the federal requirements set out in Section III.A.8.a, above, an income withholding order or notice must contain additional information concerning the obligor's disposable income, the maximum withholding rates, and the payor's rights and responsibilities as specified in G.S. 110-136.6(c) and 110-136.8.

9. Priority of an order for income withholding and multiple orders.

a. Income withholding for child support has priority against any other garnishment or income withholding from the same disposable income. [*See* G.S. 110-136.8(b)(3).]

b. When an obligor is subject to more than one income withholding order for child support, withholding for current child support must be given priority over withholding for past due child support. [G.S. 110-136.7. *See also Guilford Cty. ex rel. Gray v. Shepherd*, 138 N.C. App. 324, 532 S.E.2d 533 (2000) (trial court erred in ordering that payments received through wage withholding be prorated between current and past due support).]

c. When an obligor is subject to more than one income withholding order for current child support, the amount withheld must be prorated based upon the amount of each order. [G.S. 110-136.7.]

10. Amount to be withheld.
    a. Mandatory amount. The amount to be withheld from the obligor's disposable wages or other disposable income must include:
        i. An amount sufficient to pay current or ongoing child support,
        ii. An additional amount to liquidate any arrearages, and
        iii. A processing fee retained by the employer unless waived. [G.S. 110-136.6(a).]
    b. Discretionary amount. The amount to be withheld also may include court costs and attorney fees awarded in child support cases. [G.S. 110-136.6(a).]
        i. The language in G.S. 110-136.6(a) allowing court costs and attorney fees to be included in the amount withheld by the court clearly contemplates that such claims should be asserted prior to the entry of the withholding order. [*Glatz v. Glatz,* 98 N.C. App. 324, 390 S.E.2d 763 (denial of motion for attorney fees filed three months after entry of the income withholding order affirmed), *review denied,* 327 N.C. 427, 395 S.E.2d 677 (1990). *Cf.* G.S. 50-13.6; *Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (not paginated on Westlaw) (order awarding attorney fees was upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint was filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in custody and support action and prior to any appeal; court of appeals noted its research revealed "no case law imposing a time limitation for the filing of a motion for attorney's fees in a child custody and child support action pursuant to N.C. Gen. Stat. § 50-13.6, other than that a proper notice of appeal divests the trial court of jurisdiction to hear a motion filed after notice of appeal has been given in the case").]
        ii. For more on requesting an award of attorney fees, see *Liability and Amount,* Part 1 of this Chapter, Section VIII.A.4.
    c. Maximum amount when order is only for child support (no spousal support). The total amount withheld may not exceed:
        i. 40 percent of an obligor's disposable income (per pay period per payor) when the obligor is subject to only one order for withholding for child support and related costs or fees during any pay period; [G.S. 110-136.6(b).]
        ii. If there are multiple orders for withholding, 45 percent of the obligor's disposable income if the obligor is supporting a spouse or dependent children other than those who are supported via one of the income withholding orders; [G.S. 110-136.6(b)(1).]
        iii. If there are multiple orders for withholding, 50 percent of the obligor's disposable income if the obligor is not supporting a spouse or dependent children other than those who are supported via one of the income withholding orders. [G.S. 110-136.6(b)(2).]
    d. Total withholding for child support and alimony or postseparation support. When there is an income withholding order for alimony or postseparation support pursuant to G.S. 50-16.7, the total amount withheld for child support, alimony, and postseparation support may not exceed:

i. 50 percent of the obligor's aggregate disposable earnings, as defined in the federal Consumer Credit Protection Act (earnings minus legally required deductions), if the obligor is supporting a spouse or dependent child other than the spouse or child who is supported via the income withholding order;

ii. 55 percent of the obligor's disposable earnings if the obligor is supporting a spouse or dependent child and owes support arrearages that accrued at least twelve weeks prior to the date of withholding;

iii. 60 percent of the obligor's disposable earnings if the obligor is not supporting a spouse or dependent child other than the spouse or child who is supported via the income withholding order; or

iv. 65 percent of the obligor's disposable earnings if the obligor is not supporting a spouse or dependent child and owes support arrearages that accrued at least twelve weeks prior to the date of withholding. [*See* G.S. 110-136.6(b1); 15 U.S.C. § 1673(b)(2).]

e. Withholding for obligor's share of child's health care premiums. When an employer is required to withhold the obligor's share of the cost of health care premiums for court-ordered health insurance for the child for whom support is owed, that amount plus the amount of child support withheld from the obligor's earnings may not exceed the applicable amounts allowed under the federal Consumer Credit Protection Act (15 U.S.C. § 1673(b)). [*See* G.S. 108A-69(b)(4).]

11. Income or wages subject to withholding.

a. An obligor's disposable income includes any periodic payments made to the obligor, including wages, salary, commissions, self-employment income, bonus pay, severance pay, sick pay, incentive pay, vacation pay, compensation as an independent contractor, workers' compensation, unemployment compensation (in IV-D cases only), Social Security or other disability benefits, annuity benefits, survivor's benefits, pension and retirement benefits (including Social Security retirement benefits), interest, dividends, rents, royalties, trust income, and other similar payments, which remain after deduction of federal, state, and local taxes, Social Security, and involuntary retirement contributions. [G.S. 110-129(6). *See Evans v. Evans*, 111 N.C. App. 792, 434 S.E.2d 856 (portion of husband's Social Security benefits properly awarded to wife as alimony), *review denied,* 335 N.C. 554, 439 S.E.2d 144 (1993); *State v. Miller*, 77 N.C. App. 436, 335 S.E.2d 187 (1985) (requiring father to pay child support out of his workers' compensation benefits did not violate G.S. 97-21); *Felts v. Felts,* 192 N.C. App. 543, 665 S.E.2d 594 (**unpublished**) (not paginated on Westlaw) (workers' compensation lump sum settlement of $125,000 constituted "one-time, nonrecurring" income to the father under the child support guidelines), *review denied,* 362 N.C. 680, 670 S.E.2d 232 (2008).]

i. An obligor's disposable income, for purposes of income withholding for child support, is the amount of the obligor's gross income (or gross wage in the case of employment) minus amounts withheld for federal, state, and local taxes, federal Social Security contributions, and involuntary retirement contributions. [*See* G.S. 110-129(6).]

ii. Amounts that are deducted from an obligor's income but are not required under federal or state law to be withheld are **not** deducted from the obligor's income in determining the amount of the obligor's disposable income for child support income withholding. For example, health insurance premiums (even court-ordered health insurance for the child for whom support is owed), union dues, and voluntary retirement or stock option plans would not be deducted.

b. Under the Wage and Hour Act, "wage" includes all compensation for labor or services rendered by an employee, including vacation pay; sick pay; bonuses; commissions; severance pay; the reasonable cost of employer-furnished board, lodging, and other facilities; and other amounts promised when the employer has a policy or procedure of making such payments. [G.S. 95-25.2(16).]

c. Military pay and allowances (including basic allowance for quarters) and veterans' benefits are subject to withholding. [*See* 42 U.S.C. § 659 (making federal benefits, including those payable to members of the armed services, subject to income withholding for child support).]

12. Benefits or payments not subject to withholding.

a. Supplemental Security Income, Work First, and other public assistance benefits payable to an obligor. [G.S. 110-129(6).]

b. An obligor's unemployment compensation benefits in a non-IV-D case. [G.S. 110-129(6).]

c. One-time, lump sum payments, such as lump sum payments resulting from legal settlements, insurance claims, or inheritance (not subject to income withholding because they are not periodic payments).

d. Other income that is exempt from execution or levy under federal or state law. [*See, e.g., Rose v. Rose,* 481 U.S. 619, 107 S. Ct. 2029 (1987) (veterans' disability benefits funds are exempt from garnishment or attachment while in the hands of the benefits administrator of Veterans Affairs, but once funds are delivered to the veteran, a state court can require the veteran to use them to satisfy an order of child support); 5 C.F.R. § 581.103 (listing monies that are subject to garnishment).]

13. Income withholding of retirement funds subject to Employee Retirement Income Security Act (ERISA).

a. To implement income withholding with respect to a pension, annuity, or retirement plan subject to ERISA, a court must enter a qualified domestic relations order (QDRO). [*See* 29 U.S.C. § 1056(d)(3).] For more on QDROs, including what an order must contain, how it becomes qualified and what prevents it from being qualified, see *Pension and Retirement Benefits*, Bench Book, Vol. 1, Chapter 6, Part 5.

b. A QDRO is a court order that:

i. Requires a participant in a covered pension plan to pay support for his child;

ii. Creates or recognizes an alternate payee's right to, or assigns to the alternate payee the right to, receive all or a portion of the benefits payable by the plan to the plan participant; [29 U.S.C. §§ 1056(d)(3)(B)(i)(I), (B)(i)(I).]

iii. Specifies the plan to which the order applies; [29 U.S.C. § 1056(d)(3)(C)(iv).]

iv. Specifies the number of payments or period to which the order applies; [29 U.S.C. § 1056(d)(3)(C)(iii).]

v. Designates the participant's child, former spouse, or spouse as an alternate payee under the plan; [29 U.S.C. §§ 1056(d)(3)(B)(i)(I), 1056(d)(3)(K).]

vi. States the names and mailing addresses of the participant and alternate payee; [29 U.S.C. § 1056(d)(3)(C)(i).]

vii. Specifies the amount or percentage of the participant's benefits that must be paid by the plan to the alternate payee or the manner in which the amount or percentage must be determined; [29 U.S.C. § 1056(d)(3)(C)(ii).] and

viii. Is served on and approved by the plan administrator. [29 U.S.C. § 1056(d)(3)(G)(i) (implied service requirement). *See Sippe v. Sippe,* 101 N.C. App. 194, 398 S.E.2d 895 (1990) (pension plan itself makes initial determination of whether a domestic relations order issued by the district court is a QDRO under the terms of the plan), *review denied*, 329 N.C. 271, 407 S.E.2d 840 (1991).]

c. A QDRO may not require a plan to:

i. Provide an alternate payee or participant with any type or form of benefit, or any option, not otherwise provided under the plan;

ii. Provide increased benefits (determined on the basis of actuarial value);

iii. Pay benefits to an alternate payee that are required by a prior QDRO to be paid to another alternate payee;

iv. Pay benefits to an alternate payee in the form of a qualified joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse; [U.S. Dep't of Labor, Emp. Benefits Sec. Admin., QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders ch. 1, Question 1-6, p. 17, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf.] or

v. Begin payment earlier than the date the obligor is first eligible to receive benefits under the plan (usually the obligor's attainment of the earliest retirement age under the plan). [29 U.S.C. § 1056(d)(3)(E)(i).]

d. Plans subject to ERISA.

i. Most, but not all, pension plans (including 401(k) plans, simplified employee pensions, and employee stock ownership plans) sponsored by private sector employers and unions are subject to ERISA. [See 29 U.S.C. § 1003 for employee benefit plans subject to ERISA and 29 U.S.C. § 1002 for relevant definitions.]

ii. Federal, state, and local government pensions for the military, teachers, and government employees; pension plans established by religious or charitable organizations; pension plans established under the Railroad Retirement Act; and Individual Retirement Accounts (IRAs) are **not** subject to ERISA. [See 29 U.S.C. § 1003(b), exempting from ERISA coverage governmental plans and certain church plans.]

e. Distribution of plans not covered by ERISA. Plans not subject to ERISA may be distributed as follows:

i. Federal military retirement plans.

(a) Procedures for submitting orders to divide military pensions are set forth in Title 32, part 63 of the Code of Federal Regulations (C.F.R.). For discussion of procedures and samples of model orders, see Gary A. Shulman, David I. Kelley, & Daniel E. Kelley, Dividing Pensions in Divorce ch. 23 (3d ed. 2010).

(b) Pursuant to the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408(e), the total amount of the disposable retirement pay of a servicemember payable under all court orders may not exceed 50 percent of such disposable retirement pay.

(c) Also pursuant to USFSPA, a court cannot order that a plan administrator make direct payments to the nonparticipant spouse unless the servicemember has at least ten years of service. [10 U.S.C. § 1408(d).]

ii. Railroad retirement benefits. Tier II benefits can be distributed by an order complying with regulations found in Title 20, part 295 of the C.F.R. For discussion of procedures and samples of form orders, see Gary A. Shulman & David I. Kelley, Dividing Pensions in Divorce ch. 21 (2d ed. 1995) (hereinafter Dividing Pensions in Divorce 2d ed.).

iii. Federal civil service retirement systems. Guidelines for Interpreting State Court Orders Dividing Civil Service Retirement Benefits (federal Office of Personnel Management, 50 Fed. Reg. 20,081 (May 13, 1985); 5 C.F.R., Ch. I, subch. B, pt. 838, subpt. J (Court Orders Affecting Civil Service Retirement Benefits)). For discussion of procedures and samples of form orders, see Dividing Pensions in Divorce 2d ed., at ch. 21.

iv. North Carolina state retirement plan. Plan benefits held assignable by a consent order entered in an equitable distribution case. [*See* G.S. 135-9; *Patterson ex. rel. Jordan v. Patterson*, 137 N.C. App. 653, 529 S.E.2d 484, *review denied*, 352 N.C. 591, 544 S.E.2d 783 (2000).]

14. Required contents of an income withholding order. All non-IV-D child support orders that require payment of child support through income withholding must:

a. Require the obligor to:

i. Keep the clerk of superior court informed of the obligor's current residence and mailing address, [G.S. 110-136.3(a)(1).]

ii. Cooperate fully in verifying the amount of the obligor's disposable income, [G.S. 110-136.3(a)(3).] and

iii. Keep the obligee informed of the name and address of any payor of the obligor's disposable income and of the amount and effective date of any substantial change in the obligor's disposable income. [G.S. 110-136.3(a)(5).]

b. Require the custodial party to keep the obligor informed of the custodial party's disposable income and the amount and effective date of any substantial change in that income. [G.S. 110-136.3(a)(4).]

c. Include the current residence and mailing address of the custodial parent or the address of the child if the address of the custodial parent and the address of the child are different. There is no requirement that the child support order contain the address of the custodial parent or the child if (1) there is an existing order prohibiting disclosure of the custodial parent's or child's address to the obligor or (2) the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats of violence that constitute domestic violence under G.S. Chapter 50B. [G.S. 110-136.3(a)(4a), *amended by* S.L. 2014-115, § 44.5, effective Aug. 2, 2014.]

15. Payor (for example, an employer) who fails to comply with order to withhold or who engages in prohibited conduct.
    a. A payor who willfully fails to withhold child support from an obligor's disposable income as required is liable to the obligee for the amount of support that should have been withheld. [*See* G.S. 110-136.8(e).]
        i. The payor's liability may be enforced by filing a motion in the cause joining the payor as a third-party defendant.
        ii. If the payor is joined, the payor has thirty days to file an answer. [*See* G.S. 110-136.8(e).]
    b. A payor who refuses to hire, takes disciplinary action against, or discharges an obligor due to child support income withholding may be liable for civil penalties, damages, and other relief in a civil action brought by the obligor within one year. [G.S. 110-136.8(e).]
16. Modification or termination of income withholding.
    a. Modification.
        i. Any party may file a motion in the cause seeking modification of an income withholding order based on changed circumstances. [G.S. 110-136.5(e).]
        ii. In addition, the clerk or court on its own motion may initiate a hearing for modification if modification appears to be required or appropriate. [G.S. 110-136.5(e).]
    b. Termination. An income withholding order terminates when the court or IV-D agency notifies the payor that:
        i. The child support order has expired or become invalid,
        ii. The parties and court have agreed that income withholding may be terminated because there is another adequate means of collecting child support or arrearages, or
        iii. The whereabouts of the obligee and child are unknown and all child support arrearages owed to the state have been paid in full. [G.S. 110-136.10.]
    c. Effect of the order on the underlying obligation to support.
        i. The order modifying or terminating withholding will not modify or terminate the underlying child support obligation or accrued arrearages unless specifically ordered by the judge.

ii. A party in a civil support action desiring to modify the underlying support obligation (and not simply the order for income withholding) may file a motion to modify the support order pursuant to G.S. 50-13.7.

B. Income Withholding in IV-D Cases

1. Generally.
   a. Except as noted, the statutory provisions that apply to income withholding in non-IV-D cases (discussed in Section III.A, above) apply with respect to income withholding in IV-D cases in which a new or modified child support order is entered. [G.S. 110-136.3(b)(1).]
   b. The statutory provisions for mandatory income withholding in IV-D cases [G.S. 110-136.3 and 110-136.4.] apply with equal force to orders for current support and to orders directing payment of arrearages. [*McGee v. McGee,* 118 N.C. App. 19, 453 S.E.2d 531, *review denied*, 340 N.C. 359, 458 S.E.2d 189 (1995).]
   c. G.S. 110-136.3 and 110-136.4 require the trial court to order wage withholding in IV-D cases and eliminate the discretion the trial court generally has to establish an appropriate remedy. [*Guilford Cty. ex rel. Norwood v. Davis*, 177 N.C. App. 459, 629 S.E.2d 178 (2006) (when trial court failed to order wage withholding in IV-D case, matter reversed and remanded for entry of immediate withholding pursuant to G.S. 110-136.4).]
2. Immediate withholding required for orders entered or modified on or after Oct. 1, 1989.
   a. A IV-D child support order entered or modified on or after Oct. 1, 1989, must order payment of child support through income withholding. [G.S. 110-136.3(a), 110-136.3(b)(1), and 110-136.4(b).] The court is not required to find that the obligor is delinquent or owes past due child support.
   b. This requirement does not apply if the obligor is unemployed, information regarding the obligor's disposable income is unavailable, or the parties agree to an alternative arrangement for the payment of child support. [G.S. 110-136.4(b).]
3. Implementation of immediate income withholding: service on the payor.
   a. If the court orders income withholding, the IV-D agency must serve an income withholding notice on the obligor's payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mail a copy of the notice to the obligor, and file a copy of the notice with the clerk of superior court. [*See* G.S. 110-136.4(b), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]
   b. If the obligor's employment or source of disposable income changes, the IV-D agency, without further order of the court, may serve an income withholding notice on the new payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mail a copy of the notice to the obligor, and file a copy of the notice with the clerk of superior court. [*See* G.S. 110-136.4(c), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]

4. Administrative withholding when obligor is in arrears or upon request.
    a. If an obligor is required to pay child support under an order entered before Oct. 1, 1989, or an order for immediate income withholding has not been entered, a IV-D agency may implement income withholding administratively (without a court order) if the obligor or obligee requests withholding or if the obligor has failed to make court-ordered child support payments in an amount equal to the support payable for one month. [G.S. 110-136.3(b)(1) and 110-136.4(a).]
    b. A IV-D agency may implement income withholding administratively by serving an advance notice of income withholding on the obligor pursuant to G.S. 1A-1, Rule 4 after verifying the obligor's mailing address, the payor, and the obligor's disposable income. [G.S. 110-136.4(a)(1).]
    c. Uncontested withholding. If the obligor fails to contest income withholding, the IV-D agency may implement income withholding by serving an income withholding notice on the payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mailing a copy of the notice to the obligor, and filing a copy of the notice with the clerk of superior court. [G.S. 110-136.4(a)(4), *amended by* S.L. 2015-117, § 4, effective June 24, 2015.]
    d. Contested withholding.
        i. An obligor may contest income withholding by requesting a hearing before the district court in the county in which the support order was entered within ten days of receipt of the advance notice of income withholding. [G.S. 110-136.4(a)(3).]
        ii. The obligor must notify the IV-D agency of the request for hearing and specify the grounds on which the obligor is contesting income withholding. [G.S. 110-136.4(a)(3).] An obligor may contest income withholding based on the following "mistakes of fact" only:
            (a) The obligor is not in arrears in an amount equal to the support payable for one month (unless income withholding has been requested by the obligor),
            (b) The obligor did not request income withholding (if income withholding was allegedly requested by the obligor),
            (c) The obligor is not the person subject to the child support order indicated in the advance notice of income withholding,
            (d) The obligor does not owe the amount of current support or arrearages specified in the advance notice of income withholding, or
            (e) The advance notice of income withholding specifies a withholding rate in excess of that allowed by law. [*See* G.S. 110-129(10).]
        iii. The payment of past due child support by the obligor after an income withholding notice or order has been issued does not constitute a defense against implementing or continuing income withholding. [*See* G.S. 110-136.4(a)(5).]
        iv. If the parties are unable to resolve the asserted mistake of fact by agreement, the court must hold a hearing within thirty days of the obligor's receipt of the advance notice of withholding to determine whether income withholding is precluded, in whole or in part, based on the asserted mistake of fact. The IV-D

agency may not implement income withholding pending the hearing decision. [G.S. 110-136.4(a)(3).]

v. If the court determines that income withholding is not precluded based on a "mistake of fact," the IV-D agency may implement income withholding by serving an income withholding notice on the payor pursuant to G.S. 1A-1, Rule 5 or by electronic transmission in compliance with the federal Office of Child Support Enforcement electronic income withholding procedures, mailing a copy of the notice to the obligor, and filing a copy of the notice with the clerk of superior court. [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 4, effective June 24, 2015, and 110-136.4(c).]

e. No stay pending appeal. An appeal of the court's decision does not stay implementation of income withholding, but if the appeal is decided in the obligor's favor, the obligee must promptly repay any moneys wrongly withheld from the obligor and notify the payor to cease income withholding. [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

5. Administrative modification of an order for income withholding.

a. When an income withholding order has been entered, the IV-D agency, without further order of the court, may modify the order based on changed circumstances by serving the obligor with an advance notice of income withholding pursuant to G.S. 110-136.4(a)(1). [*See* G.S. 110-136.4(e).]

b. If an obligor owes past due child support, a IV-D agency, without further order of the court, may increase the amount of income withholding, subject to the limitations under G.S. 110-136.6, by serving the obligor with an advance notice of income withholding pursuant to G.S. 110-136.4(a)(1). [*See* G.S. 110-129.1(a)(8)c.; *cf. Sampson Cty. ex rel. Bolton v. Bolton*, 93 N.C. App. 134, 377 S.E.2d 88 (1989) (decided before G.S. 110-129.1 was enacted and holding that due process requires that garnishment be at rate set out in controlling support order unless IV-D agency moves for modification).]

6. Income withholding of unemployment compensation benefits.

a. A responsible parent may voluntarily assign unemployment compensation benefits to a IV-D agency, or a IV-D agency may request that a responsible parent voluntarily assign unemployment compensation benefits, to satisfy a child support obligation. [G.S. 110-136.2(a).]

b. In the absence of a voluntary assignment of unemployment compensation benefits, the N.C. Department of Health and Human Services must implement income withholding as provided for in IV-D cases. [G.S. 110-136.2(f).]

c. The amount withheld for child support must not exceed 25 percent of the obligor's unemployment compensation benefits. [G.S. 110-129(6) and 110-136.2(f).]

d. The Employment Security Commission is exempt from the requirements of G.S. 110-136.8 (setting out the responsibilities of a payor), other than the requirements to withhold child support from the obligor's unemployment benefits and to transmit the payments to the N.C. Department of Health and Human Services or the child support agency of another state as required by G.S. 110-136.2(f). [G.S. 110-136.2(f).]

7. Required contents of an income withholding order. All IV-D child support orders that require payment of child support through income withholding must:
    a. Require the obligor to:
        i. Keep the IV-D agency informed of the obligor's current residence and mailing address, [G.S. 110-136.3(a)(1).]
        ii. Cooperate fully in verifying the amount of the obligor's disposable income, [G.S. 110-136.3(a)(3).] and
        iii. Keep the IV-D agency informed of the name and address of any payor of the obligor's disposable income and the amount and effective date of any substantial change in the obligor's disposable income; [G.S. 110-136.3(a)(5).]
    b. Require the custodial party to keep the obligor informed of the custodial party's disposable income and the amount and effective date of any substantial change in this disposable income; [G.S. 110-136.3(a)(4).]
    c. Include the current residence and mailing address of the custodial parent or the address of the child if the address of the custodial parent and the address of the child are different. There is no requirement that the child support order contain the address of the custodial parent or the child if (1) there is an existing order prohibiting disclosure of the custodial parent's or child's address to the obligor or (2) the court has determined that notice to the obligor is inappropriate because the obligor has made verbal or physical threats of violence that constitute domestic violence under G.S. Chapter 50B. [G.S. 110-136.3(a)(4a), *amended by* S.L. 2014-115, § 44.5, effective Aug. 11, 2014.]

C. Income Withholding Orders Issued In Another State

1. Direct enforcement of an out-of-state order.
    a. A child support income withholding order issued in another state may be sent by or on behalf of the obligee, or by the child support enforcement agency, to an employer or payor in North Carolina without first filing a petition or comparable pleading or registering in North Carolina the order on which it is based. [G.S. 52C-5-501(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.] Receipt of a copy of a withholding order by fax, regular first class mail, registered or certified mail, or any other type of direct notice is sufficient to provide the requisite notice to trigger direct income withholding in the absence of a contest by the employee-obligor. [Official Comment (2015), G.S. 52C-5-501.]
    b. A North Carolina employer who receives an income withholding order that appears regular on its face must:
        i. Treat the order as if it had been issued by a North Carolina court; [G.S. 52C-5-502(b).]
        ii. Immediately provide a copy of the order to the obligor; [G.S. 52C-5-502(a).] and
        iii. Except as otherwise provided in G.S. 52C-5-502(d) and 52C-5-503, withhold and distribute the funds as directed in the income withholding order. [G.S. 52C-5-502(c), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

c. Contest by obligor.

i. An obligor may contest implementation of an out-of-state income withholding order:

(a) Based on a "mistake of fact" (see G.S. 110-129(10) for definition) [G.S. 110-136.4(a)(3), *amended by* S.L. 2015-117, § 1, effective June 24, 2015; 110-136.5(c)(1).] or

(b) By registering the order in a tribunal of this state and filing a contest to the order as provided in G.S. Chapter 52C, Article 6 or otherwise contesting the order in the same manner as if the order had been issued by a North Carolina tribunal. [G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (contest of an order received directly by an employer in this state).]

ii. To contest implementation of an out-of-state income withholding order, the obligor must give notice of the contest to:

(a) A child support enforcement agency providing services to the obligee;

(b) Each employer that has directly received an income withholding order relating to the obligor; and

(c) The person designated to receive payments in the income withholding order or, if no person is designated, to the obligee. [G.S. 52C-5-506(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

d. Employer noncompliance.

i. An employer that willfully fails to comply with an income withholding order issued by a court or tribunal in another state and received for enforcement is subject to the same penalties that may be imposed for noncompliance with an income withholding order issued by a North Carolina court (discussed in Section III.A.15, above). [G.S. 52C-5-505, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

ii. If an employer fails to comply with an out-of-state income withholding order, the obligee may request that a North Carolina court enforce the underlying child support order and the income withholding order against the employer and the obligor by registering those orders for enforcement pursuant to G.S. 52C-6-601.

2. Enforcement by registration.

a. An income withholding order issued in another state may be registered in North Carolina for enforcement. [G.S. 52C-6-601, *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

b. A registered support order issued in another state or a foreign support order is enforceable in the same manner and is subject to the same procedures as an order issued by a North Carolina tribunal. [G.S. 52C-6-603(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015.]

3. Choice of law.
    a. Except as provided in G.S. 52C-6-604(d), when a North Carolina court is asked to enforce an out-of-state income withholding order, it must apply:
        i. The law of the issuing state or foreign country with respect to the nature, extent, amount, and duration of the obligor's child support obligation, the computation and payment of arrearages and interest on the arrearages, and the existence and satisfaction of other obligations under the support order; [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of out-of-state income withholding orders but not foreign orders).]
        ii. In a proceeding for arrearages under a registered support order, the statute of limitations of North Carolina or of the issuing state or foreign country, whichever is longer; [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of out-of-state income withholding orders but not foreign orders), and 52C-6-604(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to enforcement by registration of orders issued by another state or foreign country).]
        iii. The procedures and remedies of North Carolina to enforce current support and collect arrearages and interest due on a support order of another state or a foreign country registered in this state. [*See* G.S. 52C-5-506(a), *amended by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to direct enforcement of income withholding orders issued in another state but not foreign orders), and 52C-6-604(c), *added by* S.L. 2015-117, § 1, effective June 24, 2015 (applicable to enforcement by registration of orders issued by another state or foreign country).]
    b. The law of the state of the obligor's principal place of employment governs the fee that the employer may charge in connection with income withholding, the maximum amount that may be withheld from the obligor's income, and the time limits for implementing income withholding and forwarding support payments. [*See* G.S. 52C-5-502(d) (applicable to direct enforcement).]
4. The alternative pre-UIFSA (Uniform Interstate Family Support Act) procedure established by G.S. 110-136.3(d) for enforcing interstate child support orders through income withholding has been rendered practically obsolete and redundant by the UIFSA procedures discussed above but has not been repealed. [*See* G.S. 110-136.3(d).]

D. Wage Garnishment

1. The post-judgment child support wage garnishment procedure established by G.S. 110-136 in 1976 is seldom used, given the availability of income withholding under G.S. 110-136.3 through 110-136.10.
2. Post-judgment wage garnishment differs from income withholding to enforce child support in a number of ways, including the following:
    a. A court may order garnishment only if the obligor is delinquent or erratic in paying support under a court order. [G.S. 110-136(b) and (b1).]

b. Garnishment applies only to an obligor's "disposable earnings" and not to other types of income. [G.S. 110-136(a).]

c. The obligor's employer must be joined as a third-party defendant before the garnishment order is issued. [G.S. 110-136(b).]

d. An employer who violates a garnishment order is subject to contempt but not to the civil penalties set out in G.S. 110-136.8(e). [G.S. 110-136(e).] and

e. The garnishment rate may never exceed 40 percent of the obligor's disposable earnings. [G.S. 110-136(c).]

E. Wage Assignment

1. The wage assignment provisions of G.S. 50-13.4(f)(1) and 110-136.1 are seldom used, given the availability of income withholding under G.S. 110-136.3 through 110-136.10.
2. A court may order an obligor to execute a wage assignment to ensure the future payment of the obligor's child support obligation or as a remedy based on the obligor's past failure to pay court-ordered child support. [G.S. 50-13.4(f)(1); 110-136.1.]
3. The wage assignment provisions of G.S. 50-13.4(f)(1) and 110-136.1 apply only with respect to wages, salary, or other income payable to an obligor by the obligor's employer. [G.S. 110-136.1.]
4. A wage assignment is effective only if the obligor's employer agrees in writing to recognize the wage assignment. [G.S. 95-31; 110-136.1.] An employer who has accepted an obligor's wage assignment for child support may terminate the assignment at any time by filing a written revocation with the court. [G.S. 110-136.1.]
5. A wage assignment is a "garnishment" under the federal Consumer Credit Protection Act (15 U.S.C. §§ 1672 *et seq.*) and is subject to the limits imposed by 15 U.S.C. § 1673 on the amount that may be garnished from an employee's disposable earnings for payment of child support. [See Section III.A.10, above.]

IV. License Revocation

A. License Revocation Pursuant to G.S. 50-13.12

The revocation procedure set out in G.S. 50-13.12 is applicable to both IV-D and non-IV-D cases. However, additional revocation procedures are available in IV-D cases. [See Section IV.B, below.]

1. Licenses subject to revocation.
   a. G.S. 50-13.12 authorizes a district court judge to revoke some or all of the following state licensing privileges:
      i. Hunting, fishing, or trapping;
      ii. Occupational, professional, or business; and
      iii. Driving (regular and commercial). [G.S. 50-13.12(a)(2).]
   b. G.S. 50-13.12 does not apply with respect to local (county or municipal) business or occupational licenses.

2. Basis for revocation.
    a. G.S. 50-13.12(b) authorizes revocation of some or all of the state licensing privileges listed above if an obligor is **willfully delinquent** in paying child support and owes an amount of past due child support that equals at least one month's support.
        i. An obligor is "delinquent" in paying child support if she:
            (a) Owes past due child support and
            (b) Is not in compliance with a court order specifying the manner in which she may satisfy her obligation to pay the arrearage (usually, by making regular payments on the arrearage in addition to her payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part,* 349 N.C. 208, 505 S.E.2d 77 (1998).]
        ii. An obligor's delinquency is "willful" if he has failed, without just cause, to pay court-ordered child support and has the present ability to pay his current child support obligation plus an amount that would pay in full over time the child support arrearages that he owes. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (in contempt proceeding, willful imports knowledge and a stubborn resistance); *Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (in contempt proceeding, willfulness means a bad faith disregard for authority and the law).]
    b. A person's licensing privileges also may be revoked based on the person's willful failure to comply with a subpoena issued in a child support or paternity establishment proceeding. [G.S. 50-13.12(b).]
3. Stay of revocation. If the court determines that the obligor's licensing privileges are subject to revocation, the court may order that revocation of the obligor's licensing privileges be stayed on the condition that the obligor continue paying her current child support obligation plus an additional amount to pay in full over time the child support arrearage that she owes. [G.S. 50-13.12(b).]
4. No stay of revocation. If the court does not stay revocation of the obligor's licensing privileges, the clerk of superior court must notify each licensing agency that the obligor's licensing privileges have been revoked. [G.S. 50-13.12(b).]
    a. If the court revokes an obligor's driver's license, the obligor must surrender his license to the clerk of superior court. The clerk must send the obligor's driver's license to the Division of Motor Vehicles (DMV) along with the order and receipt for the license or must destroy the obligor's driver's license if notice of the revocation is transmitted electronically to DMV. [G.S. 20-24(a).]
    b. If the court revokes an obligor's driver's license, the court may permit the obligor to retain limited driving privileges. [*See* G.S. 20-179.3.]
    c. A licensing board must take all necessary steps to implement and enforce the license revocation. The obligor is not entitled to request a hearing under the state Administrative Procedure Act (G.S. Chapter 150B) in connection with the board's revocation of licensing privileges pursuant to G.S. 50-13.12. [G.S. 50-13.12(f).]

d. The revocation of the obligor's licensing privileges remains in effect until the licensing board receives certification that the obligor is no longer delinquent in child support payments. [G.S. 50-13.12(f).]

5. Reinstatement pursuant to court order.
   a. An obligor whose licensing privileges are revoked under G.S. 50-13.12 may petition the court for reinstatement of her licensing privileges. [G.S. 50-13.12(d).]
   b. The court may enter an order authorizing reinstatement of the obligor's licensing privileges conditioned on the obligor's paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage owed. [G.S. 50-13.12(d).]
6. Reinstatement pursuant to clerk certification (no court order).
   a. An obligor whose licensing privileges were revoked under G.S. 50-13.12 but who is no longer delinquent with respect to her court-ordered child support obligation may request that the clerk of superior court certify that she is no longer delinquent. [G.S. 50-13.12(c).]
   b. If there is satisfactory proof that the obligor is no longer delinquent, the clerk must, without a court order, issue a certificate authorizing reinstatement of the obligor's licensing privileges and, upon the obligor's request, mail a copy of the certificate to the appropriate licensing board(s). [G.S. 50-13.12(c).]

B. Additional License Revocation Procedure for IV-D Cases Pursuant to G.S. 110-142.2

1. Licenses and registrations subject to revocation.
   a. In IV-D cases, G.S. 110-142.2(a) authorizes a district court judge to revoke some or all of the following state licensing privileges:
      i. Hunting, fishing, or trapping and
      ii. Driving (regular and commercial driver's licenses and motor vehicle registration).
   b. G.S. 110-142.2 does not apply with respect to business, occupational, or professional licenses. [See Section IX.E, below.]
2. Basis for revocation.
   a. In IV-D cases, G.S. 110-142.2(a) and (b) authorize revocation of some or all of the state licensing privileges listed above if the obligor has willfully failed to pay court-ordered child support and is at least ninety days in arrears.
   b. A person's licensing privileges also may be revoked based on the person's willful failure to comply with a subpoena issued in a child support or paternity establishment proceeding. [G.S. 110-142.2(b).]
   c. The court must enter an order instituting any one or more of the sanctions, if applicable, as provided in G.S 110-142.2(a) if the obligor is found in civil or criminal contempt for a third or subsequent time for failure to comply with a child support order. [G.S. 110-142.2(b).]

3. How to request revocation. A request to revoke an obligor's licensing privileges pursuant to G.S. 110-142.2 must be made through a child support enforcement proceeding initiated pursuant to G.S. 50-13.9(d). [*See* G.S. 110-142.2(a).]
4. Stay of revocation.
    a. If the court determines that the obligor's licensing privileges are subject to revocation, the court may order that revocation of the obligor's licensing privileges be stayed on the condition that the obligor continue paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage that he owes. [G.S. 110-142.2(b).]
    b. The stay must be conditioned on the obligor's making an immediate payment of $500 or 5 percent of the child support arrearage (whichever is less), payment of the remaining delinquency within a reasonable time, and maintenance of current support. The obligor's total obligation for current support and arrearages may not exceed the income withholding limits pursuant to G.S. 110-136.6(b). [G.S. 110-142.2(b).]
    c. If the court stays revocation of the obligor's privileges with respect to motor vehicle registration and the obligor fails to comply with the conditions of the stay, the IV-D agency may, without further court order, notify the Division of Motor Vehicles (DMV) to refuse to register the obligor's vehicle pursuant to G.S. 20-50.4. [G.S. 110-142.2(h).]
5. No stay of revocation.
    a. If the court does not stay revocation of the obligor's licensing privileges, the obligor must surrender her licenses to the child support enforcement agency, and the agency must notify each licensing authority that the obligor's licensing privileges have been revoked. [G.S. 110-142.2(b).]
    b. If the court revokes an obligor's driver's license, the obligor must surrender his license to the IV-D agency. The agency must send the obligor's driver's license to the DMV along with the order and receipt for the license or must destroy the obligor's driver's license if notice of the revocation is transmitted electronically to DMV. [G.S. 20-24(a).]
    c. If the court revokes an obligor's driver's license, the court may permit the obligor to retain limited driving privileges. [*See* G.S. 110-142.2(c) and 20-179.3.]
    d. The revocation of the obligor's licensing privileges remains in effect until the licensing board or DMV receives certification authorizing reinstatement of the obligor's licensing privileges. [G.S. 110-142.2(f); 50-13.12(f).]
6. Reinstatement pursuant to court order.
    a. An obligor whose licensing privileges are revoked under G.S. 110-142.2 may petition the district court for reinstatement of her licensing privileges. [G.S. 110-142.2(e).]
    b. The court may enter an order authorizing reinstatement of the obligor's licensing privileges conditioned on the obligor's paying his current child support obligation plus an additional amount to pay in full over time the child support arrearage that he owed. [G.S. 110-142.2(e).]

7. Reinstatement pursuant to IV-D agency certification (no court order).
    a. An obligor whose licensing privileges were revoked under G.S. 110-142.2 but who is no longer delinquent with respect to her court-ordered child support obligation may request that the IV-D agency certify that she is no longer delinquent. [G.S. 110-142.2(d).]
    b. If there is satisfactory proof that the obligor is no longer delinquent, the agency must, without a court order, certify that the obligor is no longer delinquent and provide a copy of the certification to the obligor. [G.S. 110-142.2(d).]

V. Judgment and Execution

A. Judgment for Child Support Arrearages

1. When a child support judgment constitutes a judgment lien. Although a vested, past due court-ordered child support obligation constitutes a judgment under G.S. 50-13.10, a child support order or judgment may not be entered as a judgment on the judgment docket, does not constitute a judgment lien against the obligor's real property, and may not be enforced through a writ of execution unless:
    a. It is perfected as a lien pursuant to G.S. 44-86; [See Sections VI.B and C, below.]
    b. It expressly provides that it may be enforced as a judgment, sets out the amount of the judgment lien as a sum certain, and adequately describes the real property affected; [G.S. 50-13.4(f)(8).] or
    c. The past due child support arrearage has been reduced to judgment pursuant to G.S. 50-13.4(f)(8).
2. Procedure to reduce a support arrearage to judgment pursuant to G.S. 50-13.4(f)(8).
    a. The proceeding may be filed as a motion in the cause or as a separate action. [G.S. 50-13.4(f)(8).]
        i. An order granting a money judgment for child support and alimony arrearages entered pursuant to defendant's answer and counterclaim seeking specific performance of those obligations has been upheld. [*Lasecki v. Lasecki*, 786 S.E.2d 286, 299 (N.C. Ct. App. 2016) (defendant specifically requested in her counterclaim that plaintiff be ordered to pay child support and alimony arrearages owed pursuant to a separation agreement and, while she had not requested that the court enter a money judgment, she had requested "such other and further relief as to the court may seem just, fit and proper;" it is not clear whether the money judgment was entered pursuant to G.S. 50-13.4(f)(8)).]
    b. The obligor may raise the ten-year statute of limitations under G.S. 1-47(1) as a defense against entry of a judgment with respect to child support arrearages that accrued more than ten years before the date the enforcement motion or proceeding was filed. [See Section I.F.2.k, above.]
    c. A trial court may reduce the obligor's arrearage to judgment under G.S. 50-13.4(f)(8) without finding that the obligor willfully failed to pay the support owed. [*Bogan*

v. Bogan, 134 N.C. App. 176, 516 S.E.2d 641 (1999) (trial court may reduce child support arrearages to judgment upon proper motion, a judicial determination of amount properly due, and final judgment for the proper amount due).]

d. Note that if a judgment for past due child support arrearages remains unsatisfied, a party may initiate an independent action on that judgment to obtain a new judgment for the amount still owed. [*See* G.S. 1-47(1) (complaint on a judgment must be filed within ten years of the entry of the original judgment); *Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013) (upon nonpayment of a judgment for child support arrearages of $23,600 entered in 2001, in a new action brought in 2010, the trial court properly entered a new judgment on the amount owed, $23,600, which defendant was properly ordered to pay in periodic payments of $275/month pursuant to G.S. 50.13.4(f)(8); the 2010 action was not a renewal of the 2001 judgment, for which North Carolina has no procedure, but was a new action on the prior debt, separate and distinct from the 2001 action in which the arrearages were originally reduced to judgment).]

3. Payments on the judgment.

a. A judgment for past due child support arrearages entered pursuant to G.S. 50-13.4(f)(8) may require the obligor to make periodic payments to satisfy the judgment in addition to paying current or ongoing child support. [*See* G.S. 50-13.4(f)(8).] A trial court is authorized to order periodic payments in the original action reducing arrearages to judgment and in a new action on that judgment for amounts still owed. [*See Duplin Cty. DSS ex rel. Pulley v. Frazier*, 230 N.C. App. 480, 751 S.E.2d 621 (2013), discussed immediately above.] A trial court also may order income withholding to collect child support arrearages that have been reduced to judgment. [*See Griffin v. Griffin*, 103 N.C. App. 65, 404 S.E.2d 478 (1991) (reducing arrearage to judgment and collecting the arrearage by income withholding are not inconsistent enforcement remedies).]

b. A judgment for past due child support arrearages pursuant to G.S. 50-13.4(f)(8) bears interest at the rate of 8 percent per annum from the date the judgment is entered until the date the judgment is satisfied. [*See* G.S. 50-13.4(f)(8); 24-1 and 24-5(c) (actions other than contract).]

c. When a support arrearage has not been reduced to judgment, the trial court has discretion whether to order interest on past due child support. [*See Wright v. Anderson,* 175 N.C. App. 422, 623 S.E.2d 367 (2006) (**unpublished**) (trial court did not abuse its discretion when it failed to order defendant to pay interest on past due child support; trial court rejected plaintiff's argument that because she had lost the use of the funds that defendant failed to pay for more than three years, although he had the means and ability to pay do so, she was entitled to interest).]

d. But where order allowed defendant approximately four years to pay past due support of $55,500, with no interest on the installment payments, matter remanded for findings regarding interest due on the installment plan payments going forward. [*Wright v. Anderson,* 175 N.C. App. 422, 623 S.E.2d 367 (2006) (**unpublished**).]

e. Unless otherwise provided by law, payments by the obligor to satisfy a judgment for child support arrearages should be credited first to accrued interest on the judgment

and then to the principal amount of the judgment. [*See Morley v. Morley,* 102 N.C. App. 713, 403 S.E.2d 574 (1991).]

4. Judgment is a lien on obligor's real property. A judgment for past due child support arrearages pursuant to G.S. 50-13.4(f)(8) constitutes a lien on the obligor's interest in real property (except when that interest is in the form of a tenancy by the entirety) in any county in which the judgment is docketed and, except as noted in Section VI, below, may be enforced in the same manner and to the same extent as a civil judgment. [G.S. 44-86(b), (d).]

B. Execution of Judgment for Child Support Arrearages

1. Issuance of a writ of execution.
   a. If a judgment for past due child support arrearages has been entered pursuant to G.S. 50-13.4(f)(8) and remains unsatisfied, the clerk of superior court, upon request of the obligee and after the time for appealing the judgment has expired, must issue a writ of execution on the judgment. [*See* G.S. 50-13.4(f)(10) and 1-305.]
   b. The clerk may not issue a writ of execution on a judgment more than ten years from the date the judgment was entered. [G.S. 1-306.]
   c. The writ of execution must be issued by the clerk of the county in which the judgment was rendered. A writ of execution may be issued to the sheriff of any county in the state in which the judgment has been docketed. [*See* G.S. 1-307 and 1-308.]
   d. The exemptions from execution under North Carolina's constitutional "homestead" exemption provision and G.S. 1C-1601 do not apply to judgments for child support arrearages. [*See* G.S. 1C-1601(e)(9); 50-13.4(f)(10); *Walker v. Walker*, 204 N.C. 210, 167 S.E. 818 (1933) (child support not an ordinary debt against which a person may claim homestead and personal property exemptions); *Barber v. Barber*, 217 N.C. 422, 8 S.E.2d 204 (1940) (homestead exemption cannot be used to defeat an allowance of alimony).]
2. Execution against personal property of the obligor.
   a. A judgment for past due child support does not constitute a lien on the obligor's personal property until the sheriff levies on (seizes) the property pursuant to a writ of execution. [G.S. 1-313(1).]
   b. The obligor's interest in tangible personal property (for example, furniture, jewelry, clothing, automobiles, appliances, boats, animals, crops, and other goods or chattels), money in the hands of the obligor, and the obligor's interest in choses in action represented by an indispensable instrument (for example, bank notes, checks, money orders, promissory notes, and stock certificates) in the obligor's possession are subject to levy under a writ of execution regardless of whether the property is subject to a lien or the property is jointly owned by the obligor and a third party (except when the property is a mobile home owned by the obligor and a spouse as tenants by the entirety). [*See* G.S. 1-315.]
   c. Except as noted below, tangible personal property owned by the obligor in the hands of a third party, the obligor's interest in a bank account, debts owed to the obligor by

third parties, and property held in active trust for the obligor are not subject to levy under a writ of execution. [*See* G.S. 1-315.]

d. Unless the obligor satisfies the judgment and pays related execution costs, property seized by the sheriff under a writ of execution must be sold pursuant to G.S. Chapter 1, Article 29B and the net proceeds of the sale must be applied to satisfy the judgment. [*See* G.S. 1-315 and 1-339.41.]

3. Execution against personal property of the obligor in hands of third party.

a. If a writ of execution has been issued to enforce a judgment for child support arrearages, a bank in which the obligor has a checking, savings, or other account (or any other person or entity that owes money to the obligor) may, but is not required to, pay to the sheriff all or part of the amount of the obligor's interest in the bank account (or the amount owed to the obligor) to the extent necessary to satisfy the execution. [*See* G.S. 1-359(a), *amended by* S.L. 2015-238, § 2.5(a), effective Sept. 10, 2015.]

b. If a judgment for child support arrearages has been entered, the obligee may use supplemental proceedings pursuant to G.S. Chapter 1, Article 31 before the clerk or a district court judge to enforce the judgment against the obligor's personal property in the hands of third parties, to enforce the judgment against debts owed to the obligor by third parties, or to determine what property the obligor owns if execution has been returned unsatisfied.

4. Execution against real property of the obligor.

a. The obligor's interest (except when that interest is in the form of a tenancy by the entirety) in real property (including real property that is subject to a prior mortgage or lien) in any county in which a judgment for child support arrearages has been docketed may be sold pursuant to G.S. Chapter 1, Article 29B if the obligor's personal property is insufficient to satisfy the judgment. [*See* G.S. 1-313(1).]

b. If an obligor's real property is subject to a properly docketed judgment lien for child support arrearages and the obligor sells or transfers the property to a third party before satisfying or discharging the lien on the property, the property remains subject to the judgment lien, and judgment may be executed through sale of the property pursuant to G.S. Chapter 1, Article 29B. [*See Moses v. Major*, 201 N.C. 613, 160 S.E. 890 (1931) (land is not relieved of the judgment lien by a transfer of the debtor's title); G.S. 1-339.68(b) (real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held).]

5. Execution against obligor's person.

a. If a judgment for child support arrearages has been entered and a writ of execution against the obligor's property has been returned unsatisfied, an order for arrest and writ of execution against the obligor's person may be issued if the court finds that the obligor:

i. Is about to flee the jurisdiction to avoid his creditors,

ii. Has concealed or diverted assets in fraud of his her creditors, or

iii. Will conceal or divert assets in fraud of his creditors unless he is immediately detained. [G.S. 1-311.]

b. An indigent obligor is entitled to court-appointed counsel if she is arrested and detained pursuant to an order for arrest or writ of execution against the person issued pursuant to G.S. 1-311 and 1-313(3). [*See* G.S. 1-311 and 1-313(3).]

6. Effect of an appeal of the child support order on execution.

a. An order for the payment of child support is a judgment directing the payment of money under G.S. 1-289. [*See Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick,* 305 N.C. 446, 290 S.E.2d 653 (1982)) (a distributive award entered in an equitable distribution proceeding was a money judgment within the meaning of G.S. 1-289 and was subject to enforcement through execution).]

b. A judgment directing the payment of money is subject to execution even while the judgment is on appeal, unless the party against whom the execution will issue posts a bond to stay execution pursuant to G.S. 1-289. [G.S. 1-289(a); *Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Quick v. Quick,* 305 N.C. 446, 290 S.E.2d 653 (1982), and *Joyner v. Joyner,* 256 N.C. 588, 124 S.E.2d 724 (1962)) (orders for the payment of alimony or child support have been recognized as judgments under G.S. 1-289 that may be enforced by execution during an appeal unless stay or supersedeas is ordered).]

c. However, if a child support award is payable over time, only the amount presently due and owing when the appeal is filed is subject to execution. [*See Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (considering a distributive award in an equitable distribution proceeding).] While a child support order is on appeal, the trial court does not have jurisdiction to (1) determine the amount of periodic payments that come due under the child support order after appeal is taken or (2) if unpaid, to reduce that amount to a judgment enforceable by execution. [*Romulus v. Romulus,* 216 N.C. App. 28, 715 S.E.2d 889 (2011) (citing *Carpenter v. Carpenter,* 25 N.C. App. 307, 212 S.E.2d 915 (1975)) (treating distributive award payments and alimony payments the same for purposes of G.S. 1-289); *Carpenter* (husband's appeal of an order entered in June 1974 finding him in arrears of provisions in a separation agreement for support of his wife and children divested the trial court of jurisdiction to determine in an order entered in November 1974 the amounts owed by husband).] Thus, while a child support order is "theoretically" enforceable by execution during appeal when the appealing spouse does not post an execution bond, a trial court may not reduce to judgment, and execution may not issue for, amounts that come due during the appeal making contempt a "more satisfactory answer" during appeal of an order for child support. [*See Romulus v. Romulus,* 216 N.C. App. 28, 38, 715 S.E.2d 889, 895 (2011) (discussing execution for payments due under a distributive award payable over time).]

VI. Child Support Liens

A. Judgment Liens for Child Support Arrearages

1. Generally, a judgment (order) for child support does not become a lien against real property of the obligor. [*See* G.S. 50-13.4(f)(8).]
2. A judgment for child support arrearages entered pursuant to G.S. 50-13.4(f)(8) constitutes a lien on the obligor's interest (except when that interest is in the form of a tenancy by the entirety) in real property in any county in which the judgment has been docketed. [See Section V, above.]
3. A judgment for child support arrearages entered pursuant to G.S. 50-13.4(f)(8) does not constitute a lien on the obligor's interest in personal property until the property is levied on pursuant to a writ of execution. [See Section V.B.2, above.]

B. Judicial Liens for Child Support Arrearages in Non-IV-D Cases

1. G.S. 44-86 creates a general lien on the real and personal property of an obligor who owes past due, court-ordered child support arrearages of at least $3,000 or the amount of support payable for three months, whichever occurs first. [G.S. 44-86(b).]
2. The benefit of G.S. 44-86 is that it allows a lien to be created without having to reduce the arrearage to judgment.
3. In order to perfect a child support lien under G.S. 44-86, an obligee must file a verified statement of child support delinquency with the clerk of superior court in the county in which the child support order was entered. [G.S. 44-86(c), (d).] The obligee must serve a notice of the lien on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 44-86(d).]
4. If the obligor fails to contest the lien within thirty days of service of notice, the obligee may request that the clerk perfect the lien by recording it on the judgment docket. [G.S. 44-86(d)(2).]
5. If the obligor makes a timely request for a hearing contesting the lien, the district court must determine, after hearing, whether the lien is valid. If the district court judge determines that the lien is valid, the judge must order the clerk to perfect the lien by recording and indexing it on the judgment docket. [G.S. 44-86(d)(2).]
6. Upon the obligee's request, the clerk must issue a transcript of judgment to docket the lien in another county. [G.S. 44-86(d).]
7. Except as otherwise provided by law, a perfected lien for child support arrearages under G.S. 44-86 takes priority over all subsequent liens. [G.S. 44-86(e).]
8. A perfected child support lien under G.S. 44-86 may be enforced in the same manner as a civil judgment, [G.S. 44-86(f) and Section V, above.] except that no interest accrues.
9. An obligor may discharge a child support lien under G.S. 44-86 by depositing with the clerk of superior court an amount of money equal to the amount of the lien and by filing a petition in the cause requesting that the district court determine the validity of the lien. The money deposited by the obligor may be disbursed to the obligor or obligee only upon order of the court following a hearing on the merits. [G.S. 44-87(a)(2).]

10. If the obligor satisfies the lien in full, the obligee, within thirty days of receipt of payment, must file an acknowledgment with the clerk directing the clerk to note on the judgment docket that the lien has been satisfied or discharged. If the obligor satisfies the lien in full and the obligee does not notify the clerk to discharge the lien as required by law, the obligor may file a civil action in district court seeking discharge of the lien and reasonable attorney fees to be taxed as court costs against the obligee. [G.S. 44-87(a)(1), (b).]

C. Judicial Liens for Child Support Arrearages in IV-D Cases

1. Except as noted below, the procedure for creating and enforcing a child support lien under G.S. 44-86 in a IV-D case is the same as that described in Section VI.B, immediately above.
2. In a IV-D case, a child support lien is perfected as soon as the verified statement of lien is filed with the clerk of superior court. [G.S. 44-86(d)(1).]
3. An obligor may file a motion in the cause contesting the lien. [G.S. 44-86(d)(1).]
4. The lien may not be enforced through a writ of execution or otherwise until thirty days after the perfected lien has been docketed by the clerk. [G.S. 44-86(f).]
5. In IV-D cases, federal law requires that the IV-D agency enter into agreements with financial institutions doing business in the state under which a financial institution, in response to a notice of lien or levy, will encumber or surrender assets held by the institution on behalf of an obligor against whose property a child support lien has been imposed. [*See* 42 U.S.C. § 666(a)(17)(ii); G.S. 110-139.2; *see also* G.S. 1-359(a).]

D. Enforcing Out-of-State Child Support Liens

1. G.S. 44-86(g) requires a North Carolina court to give "full faith and credit" to a child support lien arising in another state if the child support lien is registered, perfected, and docketed in North Carolina under the procedures set forth in G.S. 44-86 and 1C-1701 *et seq*.
2. If an out-of-state child support lien is registered, perfected, and docketed in North Carolina pursuant to G.S. 44-86(g), the lien may be enforced only with respect to the obligor's interest in personal property that (1) is subject to execution or supplemental proceedings under G.S. Chapter 1, Articles 28 and 31 and (2) was subject to the issuing state's jurisdiction (usually located within the issuing state) at the time the lien was created. An out-of-state child support lien cannot be enforced against the obligor's interest in real property located in North Carolina. [*See Hawley v. Murphy,* 736 A.2d 268 (Me. 1999) (portion of Connecticut divorce decree imposing a lien on obligor's real property in Maine void; case remanded so that obligee could petition Maine court to impose a lien on the property).]

E. Mortgages, Deeds of Trust, and Security Interests

1. A court may, at the time it enters a child support order or upon motion in a proceeding to enforce a child support order, require the obligor to execute a mortgage, deed of trust, or security interest with respect to real or personal property owned by the obligor in order to secure the obligor's **future** payment of child support. [*See* G.S. 50-13.4(f)(1), *amended by* S.L. 2015-23, § 2, effective Oct. 1, 2015.]

2. If the obligor has not previously defaulted in paying court-ordered child support, the court should not require the obligor to execute a mortgage, deed of trust, or security interest securing child support payments unless the court finds there is good reason to believe that such security is required. [*See Gilbert v. Gilbert*, 71 N.C. App. 160, 321 S.E.2d 455 (1984) (trial judge did not find sufficient facts to support conveyance of a half interest in the marital home and other real estate as security for the payment of alimony).]
3. If the obligor refuses to execute a mortgage, deed of trust, or security interest as required by the court, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing that the mortgage, deed of trust, or security interest be executed by another person on behalf of the obligor pursuant to G.S. 1A-1, Rule 70. [G.S. 50-13.4(f)(1), (2).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016).]
4. A mortgage, deed of trust, or security interest in property required under G.S. 50-13.4(f)(1) must be filed, recorded, and perfected in accordance with other applicable law. It may then be enforced by the obligee, upon the obligor's default in paying court-ordered child support, in accordance with the terms of the mortgage, deed of trust, or security interest and other applicable law without further order of the court in the child support action.

F. Statutory Lien on Insurance Benefits

1. An obligee (IV-D or non-IV-D) may establish a lien for child support arrearages against insurance proceeds payable to an obligor who is a claimant or beneficiary under any insurance policy (life, health, property, automobile, workers' compensation, etc.) issued pursuant to North Carolina's insurance law and who owes past due child support. [*See* G.S. 58-3-185(a).]
    a. A lien pursuant to G.S. 58-3-185 attaches only if the insurance proceeds payable to the obligor are at least $3,000 (either as a lump sum amount or aggregate periodic payments). [G.S. 58-3-185(a).]
    b. A lien pursuant to G.S. 58-3-185 is subordinate to liens on insurance proceeds pursuant to G.S. 44-49 and 44-50 (giving unpaid medical expenses a lien on personal injury recoveries). [G.S. 58-3-185(b).]
    c. A lien pursuant to G.S. 58-3-185 is subordinate to valid health care provider claims covered by health benefit plans other than disability income insurance. [G.S. 58-3-185(b).]
    d. Except as noted above, a lien pursuant to G.S. 58-3-185 attaches to the entire amount of the insurance proceeds payable to the obligor (not just the insurance proceeds in excess of $3,000) up to the amount of the past due child support owed, without deduction for attorney fees (except attorney fees awarded pursuant to G.S. 97-90 in connection with workers' compensation insurance settlements) or other claims. [*See Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (plaintiff had a valid lien for past due child support on defendant's entire $18,000 settlement).]
2. G.S. 58-3-185 does not require a showing that the obligor's failure to pay child support is willful.

3. A lien pursuant to G.S. 58-3-185 is created by the obligee's giving written notice of the lien to the insurance company along with a certified copy of the child support order and proof regarding the existence and amount of the child support arrearage. [G.S. 58-3-185(a).]
   a. The obligee is not required to reduce the child support arrearage to judgment pursuant to G.S. 50-13.4(f)(8) or to obtain a court order authorizing the imposition of a lien pursuant to G.S. 58-3-185.
   b. G.S. 58-3-185 is silent with respect to whether or how the lien may be enforced judicially if the insurer fails to recognize the lien.
   c. A court has no authority to "apportion" the insurance proceeds payable to an obligor or limit the amount of insurance proceeds applied to satisfy the lien in any manner inconsistent with the provisions of G.S. 58-3-185, but it may determine the amount of the obligor's child support arrearage. [*See Orange Cty. ex rel. Byrd v. Byrd*, 129 N.C. App. 818, 501 S.E.2d 109 (1998) (trial court erred in apportioning defendant's workers' compensation settlement between defendant's counsel, his child support arrearages, and defendant personally).]

VII. Contempt

A. Distinction Between Civil and Criminal Contempt

1. For more on civil or criminal contempt generally, and for a checklist for use when finding a party in either civil or criminal contempt, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.
2. For an online module on contempt, see Michael Crowell, *Contempt of Court* (UNC School of Government, Nov. 2010), https://sog.adobeconnect.com/p30019876/.
3. Importance of distinction. Distinguishing between civil and criminal contempt is important because the nature of the proceeding determines in large part:
   a. The procedures that must be followed by the court,
   b. The legal rights accorded to the alleged contemnor,
   c. The elements that must be proved to establish contempt,
   d. The burden of proof,
   e. The available sanctions and remedies, and
   f. The appellate procedure. [John. L. Saxon, *Using Contempt to Enforce Child Support Orders*, Special Series No. 17 (UNC School of Government, Feb. 2004) (hereinafter Saxon Special Series No. 17).]
4. Civil contempt.
   a. Civil contempt is a civil remedy to be utilized exclusively to enforce compliance with court orders. [*Reynolds v. Reynolds,* 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (civil contempt is remedial in nature; its purpose is to compel an obligor to comply with a court order); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (civil

contempt is employed to coerce disobedient defendants into complying with orders of the court).]

b. The length of time that a defendant can be imprisoned for civil contempt is not limited by law, except as limited by G.S. 5A-21(b1) and (b2), since the defendant can obtain his release immediately upon complying with the court's order. [G.S. 5A-21(b); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984).]

5. Criminal contempt.

a. Criminal contempt is punitive in purpose and the contemnor "cannot undo or remedy what has been done, . . . nor shorten the term by promising not to repeat the offense." [*Reynolds v. Reynolds,* 147 N.C. App. 566, 577, 557 S.E.2d 126, 133 (2001) (John, J., dissenting) (citations omitted), *rev'd per curiam for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002).]

b. Criminal contempt is administered as punishment for acts already committed that have impeded the administration of justice in some way. The punishment that courts can impose, either a fine or imprisonment, is circumscribed by law. [*Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984).]

6. Appeal.

a. Appeals in district court civil contempt matters are directly to the court of appeals pursuant to G.S. 5A-24.

b. A person who is found in criminal contempt by a judicial official inferior to a superior court judge may appeal to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b).] Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

7. Standard of proof.

a. The facts upon which the determination of criminal contempt is based must be established beyond a reasonable doubt. [G.S. 5A-15(f).]

b. G.S. Chapter 5A does not clearly specify the standard of proof in civil contempt proceedings. At a minimum, a court should not find an obligor in civil contempt unless there is sufficient proof, based on a preponderance of the evidence, that the obligor's failure to comply with a child support order is willful.

8. Order entered without jurisdiction.

a. It is not contempt to disobey an order entered by a court without jurisdiction. [*Harding v. Harding,* 46 N.C. App. 62, 264 S.E.2d 131 (1980) (court was without subject matter jurisdiction to modify a parent's duty to support after the age of majority that arose in a contract; to whatever extent the court exceeded father's contractual obligation of support the order was void, and father could not be held in contempt for his failure to comply with the void portions).]

B. Civil Contempt

1. Generally.
   a. A person may be held in civil contempt for failure to comply with a child support order as long as:
      i. The order remains in force,
      ii. The purpose of the order may still be served by the person's compliance with the order,
      iii. The person's failure to comply with the order is willful, and
      iv. The person has the present ability to comply with the order (in whole or in part) or to take reasonable measures that would enable him to comply with the order (in whole or in part). [*See* G.S. 5A-21(a); *Jones v. Jones,* 52 N.C. App. 104, 278 S.E.2d 260 (1981).] For a discussion on the required findings on willfulness precluding a default judgment in contempt matters, see Cheryl Howell, *No Default Judgment in Contempt*, UNC Sch. of Gov't: On the Civil Side Blog (May 1, 2015), http://civil.sog.unc.edu/no-default-judgment-in-contempt.
   b. An obligor or obligee may be held in civil contempt for willfully failing to comply with a child support order. [*See* G.S. 50-13.4(f)(9).]
   c. Although civil contempt may be an effective remedy for enforcing child support orders, it is also an overused and misused remedy.
   d. Although an obligor may be cited for both civil and criminal contempt for failing to pay court-ordered child support, he may not be held in both civil and criminal contempt with respect to a particular failure to pay court-ordered child support. [*See* G.S. 5A-12(d), 5A-21(c), 5A-23(g).]
2. Orders that are enforceable by contempt.
   a. All civil child support orders, including registered child support orders of another state or foreign child support orders. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (obligor in contempt of a registered child support order issued in England; when *Ugochukwu* was decided, a foreign country that had enacted a law or established procedures substantially similar to procedures in the Uniform Interstate Family Support Act (UIFSA) was considered a "state" as that term was then defined); *Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (**unpublished**) (Tennessee marital dissolution agreement registered in North Carolina as a support order under UIFSA was enforceable by civil contempt). *See* G.S. Chapter 52C, Article 6, Part 3 (registration and modification of child support order of another state); Chapter 52C, Article 6, Part 4 (registration and modification of foreign child support order).]
   b. Consent orders. [*White v. White*, 289 N.C. 592, 223 S.E.2d 377 (1976) (prior version of the contempt statute); *Barker v. Barker,* 228 N.C. App. 362, 745 S.E.2d 910 (2013); *Ross v. Voiers,* 127 N.C. App. 415, 490 S.E.2d 244, *review denied,* 347 N.C. 402, 496 S.E.2d 387 (1997) (in *Barker* and *Ross*, the defendants were held in contempt for violating consent orders requiring payment of child's college expenses); *Blazer v. Blazer*, 109 N.C. App. 390, 427 S.E.2d 139 (1993) (husband in contempt for violating consent order directing him to provide medical insurance); *Hartsell v. Hartsell,* 99 N.C. App.

380, 393 S.E.2d 570 (1990) (in domestic relations action, a consent judgment adopted by the court may be enforced by civil contempt), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

c. Voluntary separation agreements filed with and approved by a district court judge under G.S. 110-132(a3) and 110-133.

d. Child support provisions included in separation agreements that have been incorporated into divorce decrees or court orders. [*Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (consent judgment incorporating former spouses' separation agreement, as modified, was enforceable through court's contempt powers).]

3. Actions that can be the basis for civil contempt.

a. Nonpayment of child support. [*Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006).]

b. Unilateral reduction in court-ordered child support payments. [*Chused v. Chused,* 131 N.C. App. 668, 508 S.E.2d 559 (1998) (father in contempt for unilaterally reducing child support payment from $3,200 to $1,050 per month while request for modification was pending; father had ability to pay full amount from his sizeable estate).]

c. Nonpayment of court-ordered attorney fees. [*See Cox v. Cox,* 133 N.C. App. 221, 515 S.E.2d 61 (1999) (defendant in contempt for not paying plaintiff's attorney fees as directed by an earlier order).]

d. Partial payment of support during pendency of appeal. [*Burnett v. Wheeler,* 133 N.C. App. 316, 515 S.E.2d 480 (1999) (father in contempt when he refused to pay higher child support during appeal of order requiring larger amount).]

e. Failure to comply with specific directions in a court order. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (mother's willful use of money in a fund for purposes other than those established by court orders and her failure to account for her use of the funds in response to an order to do so constituted contempt); *Barker v. Barker,* 228 N.C. App. 362, 363, 745 S.E.2d 910, 912 (2013) (defendant in civil contempt of consent order that required him to pay 90 percent of children's college expenses "as long as they diligently applied themselves to the pursuit of education"); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (husband in contempt of child support provisions in a separation and property settlement agreement incorporated into a consent judgment); *Sharpe v. Nobles,* 127 N.C. App. 705, 493 S.E.2d 288 (1997) (father's failure to comply with order to deposit money for child's college education and to provide certified copy of deposit to former wife was basis for contempt); *Ross v. Voiers,* 127 N.C. App. 415, 490 S.E.2d 244 (ex-husband in civil contempt for noncompliance with consent order in which he agreed to pay all college expenses of parties' daughter), *review denied,* 347 N.C. 402, 496 S.E.2d 387 (1997); *Blazer v. Blazer,* 109 N.C. App. 390, 427 S.E.2d 139 (1993) (husband in contempt for willfully avoiding his obligation to provide insurance in contravention of consent order); *Powers v. Powers*, 103 N.C. App. 697, 407 S.E.2d 269 (1991) (father in contempt because he unreasonably withheld consent to daughter's choice of college; consent judgment provided that husband could not unreasonably withhold consent to daughter's selection of a college).]

4. When contempt should not be used.

   a. Civil contempt may not be used when no underlying order has been entered pursuant to G.S. 1A-1, Rule 58. In other words, there can be no contempt when no order is "in force" when the contempt order is entered. [*Spears v. Spears*, 784 S.E.2d 485 (N.C. Ct. App. 2016) (trial court erred when it found that defendant had not complied with purge conditions in a contempt order when the contempt order had not been entered pursuant to G.S. 1A-1, Rule 58 before the hearing to review defendant's purge condition noncompliance); *Carter v. Hill*, 186 N.C. App. 464, 650 S.E.2d 843 (2007) (contempt reversed when trial court gave an oral judgment for plaintiffs but never reduced the judgment to writing or entered it; since an order is not enforceable by contempt until entered pursuant to G.S. 1A-1, Rule 58, defendants could not be in contempt of it); *Carland v. Branch*, 164 N.C. App. 403, 595 S.E.2d 742 (2004) (custody arrangement announced in open court on November 19, 2001, was not an enforceable order until it was entered on May 13, 2002); *Cty. of Durham ex rel. Willis v. Roberts,* 228 N.C. App. 567, 749 S.E.2d 110 (2013) (**unpublished**) (not paginated on Westlaw) (citing *Carland*) (2012 contempt order, based on defendant's failure to pay $110/month toward child support arrearages as required by a 2002 consent order, reversed; 2002 consent order not in effect in 2012 when a 2003 order had declined to order defendant to pay $110/month toward child support arrearages and had declined to order that defendant owed $9,306 in arrears; that defendant had made child support payments in 2004 and 2011 did "not alter the fact" that there was no order subsequent to the 2003 order requiring defendant to make arrearages payments).]

   b. Civil contempt may not be used to enforce a child support order unless the obligor has the **present ability** to pay at least part of the child support that he owes and, despite his present ability to do so, stubbornly, recalcitrantly, deliberately, willfully, or intentionally refuses to pay support to the extent he is able to do so. [*See* G.S. 5A-21(a).] For more on ability to pay in contempt matters, see Cheryl Howell, *Contempt: Establishing Ability to Pay*, UNC Sch. of Gov't: On the Civil Side Blog (May 8, 2015), http://civil.sog.unc.edu/contempt-establishing-ability-to-pay.

   c. Civil contempt may not be used to enforce a judgment for support arrearages that does not include a provision for periodic payments or other deadline for payment. [*Brown v. Brown,* 171 N.C. App. 358, 615 S.E.2d 39 (North Carolina judgment giving full faith and credit to Maryland judgment required father to pay back child support and provided for execution against father's property but did not provide for scheduled payments on the support arrearages; a money judgment for a liquidated sum of child support arrearages that does not require periodic payments in a specific amount nor set any deadlines or ongoing monthly dates for arrearages payments is not enforceable by contempt; under G.S. 50-13.4(f)(8)–(9), a money judgment for a liquidated sum of child support arrearages that provides for periodic payments is enforceable by contempt), *review denied,* 360 N.C. 60, 621 S.E.2d 175 (2005).] Construing *Brown* in *Smith v. Smith*, 785 S.E.2d 434, 438 (N.C. Ct. App. 2016), the court of appeals found that a directive for payment of private school tuition is a "periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months."

d. Civil contempt may not be the most appropriate remedy to enforce a child support order if the obligor has identifiable income or property from which child support can be paid and other remedies (for example, income withholding, execution of judgment or liens, etc.) can be used to enforce the order against the obligor's income or property. [See Section III, above, on income withholding; Section V, above, on judgment and execution; and Section VI, above, on child support liens.]

e. Child support provisions included in unincorporated separation agreements may not be enforced through civil contempt. [*See Jones v. Jones,* 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").] For more on the enforcement of an unincorporated separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

5. Reimbursement of sums paid pursuant to a contempt order later vacated.

   a. In *Brown v. Brown,* 181 N.C. App. 333, 638 S.E.2d 622 (2007), father sought reimbursement of amounts he had paid to purge himself of contempt after the contempt orders were vacated on appeal. [*See Brown v. Brown,* 171 N.C. App. 358, 615 S.E.2d 39 (judgment for liquidated sum of support arrearages with no provision for periodic payment not enforceable by contempt), *review denied,* 360 N.C. 60, 621 S.E.2d 175 (2005) (discussed at Section VII.B.4.c, above).] The trial court set off, apparently as a matter of right, the amount of support arrearages the father owed against the amount father had paid pursuant to the vacated contempt orders. The appellate court reversed and remanded the issue of set-off. On remand, the trial court was to:

      i. Decide in its discretion and as a matter of equity whether set-off was appropriate;

      ii. Consider the equitable principles of set-off, such as clean hands and the fact that mother had caused the contempt power to be misused, as well as any deceptive or fraudulent conduct of father in attempting to avoid paying child support; and

      iii. Include findings of fact or conclusions of law to support the decision on set-off. [As to the attorney fees that defendant was ordered to pay plaintiff's attorney for obtaining the invalid contempt order, the court stated that it would be "unconscionable" to require defendant to pay for the services of an attorney who improperly instituted contempt proceedings resulting in defendant's incarceration).]

6. How civil contempt proceedings are initiated in a child support action.

   a. The obligee or another person interested in enforcing a child support order, including a judge, may file a verified motion or a motion accompanied by a sworn statement or affidavit, pursuant to G.S. 5A-23(a).

   b. An obligee or other aggrieved party may serve a verified motion or motion accompanied by a sworn statement or affidavit and notice of hearing on the obligor pursuant to G.S. 5A-23(a1).

c. Upon affidavit of an obligee, the clerk or district court judge may order an obligor to appear and show cause why the obligor should not be adjudged in contempt. [G.S. 50-13.9(d).]

7. Contempt proceedings initiated pursuant to G.S. 5A-23(a).

a. The verified motion or motion accompanied by a sworn statement or affidavit must (1) allege that the obligor has willfully failed to pay court-ordered child support or comply with other provisions contained in a child support order despite the present ability to do so and (2) request that a judicial official issue an order or notice requiring the obligor to show cause why he or she should not be held in contempt. A judicial official is defined in G.S. 5A-23(d) as "the trier of facts at the show cause hearing." Therefore, a clerk cannot issue a show cause order pursuant to G.S. 5A-23(a) unless in a situation where a clerk is statutorily authorized to exercise contempt authority. [*Moss v. Moss*, 222 N.C. App. 75, 730 S.E.2d 203 (2012).] But see G.S. 50-13.9(d), specifically authorizing clerk to issue show cause orders in proceedings initiated pursuant to that statute.

b. A judicial official must determine, based on the verified motion and sworn statement or affidavit filed by the obligee or other interested person, whether there is **probable cause** to believe that the obligor is in civil contempt. [*See* G.S. 5A-23(a).]

i. Probable cause, in the context of civil contempt proceedings in child support actions, refers to credible allegations that provide a reasonable ground for believing that an obligor is willfully failing to comply with a child support order. [See Section VII.B.12, below.]

(a) An allegation that the obligor owes arrearages under a valid child support order is probably insufficient, standing alone, to support a finding of probable cause because there must be a reasonable ground to believe that failure to pay is willful.

(b) "Probable cause refers to those facts and circumstances within [the judicial official's] knowledge and of which he ha[s] reasonably trustworthy information which are sufficient to warrant a prudent man in believing that the alleged contemnor is in civil contempt." [*Young v. Mastrom, Inc.*, 149 N.C. App. 483, 484–85, 560 S.E.2d 596, 597 (2002) (contempt action brought for failure to comply with order directing payment of money).]

ii. A judicial official's determination of probable cause under G.S. 5A-23(a) is generally ex parte. The obligor is not entitled to prior notice or an opportunity to be heard before the judicial official issues an order or notice to show cause pursuant to G.S. 5A-23(a).

c. If there is probable cause to believe that an obligor is in civil contempt, the judicial official must issue a notice or order to show cause directed to the obligor. [*See* G.S. 5A-23(a).]

i. An **order** to show cause requires the obligor to appear before a district court judge at a specified reasonable time to show cause why she should not be held in civil contempt.

ii. A **notice** to show cause does not require the obligor's appearance but notifies the obligor that he will be found in civil contempt unless he appears before a district court judge at a specified reasonable time and shows cause why he should not be held in civil contempt.

iii. Most contempt proceedings initiated pursuant to G.S. 5A-23(a) in child support actions involve the issuance of **show cause orders** rather than notices to show cause.

d. Absent good cause, a show cause order or notice issued pursuant to G.S. 5A-23(a) must be served on the alleged contemnor at least five days before the scheduled hearing. [G.S. 5A-23(a).]

i. G.S. 5A-23(a) does not specify the manner in which a show cause order or notice must be served. G.S. 1A-1, Rule 5 allows all orders to be served either pursuant to Rule 4 or pursuant to Rule 5.

ii. However, G.S. 50-13.9(d) provides that an order to appear and show cause issued pursuant to that statute shall be served pursuant to G.S. 1A-1, Rule 4.

iii. A trial court may shorten the five-day notice period on good cause. [*Smith v. Smith*, 785 S.E.2d 434 (N.C. Ct. App. 2016) (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 had ample time to prepare a defense to enforcement of that order).]

e. Failure to appear as required by a show cause order. There is no statute or case law authorizing the court to order the alleged contemnor's arrest if she fails to appear in a civil contempt proceeding. [*But see* G.S. 15A-305(b)(8) (allowing arrest when show cause violated in criminal contempt case) and 5A-16(b) (judicial official who finds probable cause to believe a person charged with criminal contempt will not appear may issue an order for arrest).]

f. Burden of proof. Proceeding initiated by an order or notice issued by a judicial official pursuant to G.S. 5A-23(a).

i. A show cause order in a civil contempt proceeding that is based on a sworn affidavit and a finding of probable cause by a judicial official shifts the burden of proof to the defendant to show cause why he should not be held in contempt. [*Shumaker v. Shumaker*, 137 N.C. App. 72, 527 S.E.2d 55 (2000) (the sworn statement or affidavit from which the court determines probable cause moves the burden to the opposing party to show cause why he should not be found in contempt for failure, in this case, to pay alimony); *Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000) (father failed to meet burden of proof when he neither argued nor presented any evidence at the civil contempt hearing that he was unable to pay child support arrearages or that he did not act willfully in failing to pay same); *Plott v. Plott,* 74 N.C. App. 82, 327 S.E.2d 273 (1985) (party alleged to be delinquent clearly has burden of proof).]

ii. However, the obligee or other party seeking to hold an obligor in civil contempt for failing to pay court-ordered child support probably has the ultimate burden of persuasion with respect to the issue of contempt. [*See Henderson*

v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983) (finding of willfulness unsupported by the evidence when no evidence was presented at hearing as to any assets or liabilities of defendant, any inventory of his property, his present ability to work, or even his present salary); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (no evidence offered at hearing to rebut defendant's assertion that he lacked ability to comply with alimony order, so judgment of contempt set aside).]

iii. If the obligor fails to offer any evidence at the contempt hearing, the court may find the obligor in contempt based upon the obligee's sworn statement or affidavit and the court's finding of probable cause to believe that the obligor is in contempt. [*See Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990) (stating that a defendant who refuses to present evidence that he was not in contempt does so at his own peril), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991); *Plott v. Plott,* 74 N.C. App. 82, 327 S.E.2d 273 (1985) (where obligor offered no evidence except a stipulation as to the amount of the arrearage, obligor's showing not sufficient to refute the motion's verified allegations on contempt).]

8. Contempt proceedings initiated pursuant to G.S. 5A-23(a1).

   a. When contempt proceedings in a child support action are initiated by motion pursuant to G.S. 5A-23(a1), the obligee must serve a copy of the motion, sworn statement or affidavit, and notice of hearing on the obligor pursuant to G.S. 1A-1, Rule 5 at least five days before the scheduled hearing, absent good cause. [*See* G.S. 5A-23(a1) and *Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004) (pursuant to G.S. 5A-23(a1), service at least five days in advance of the hearing is adequate notice of a contempt proceeding).]

   b. G.S. 5A-23(a1) allows a contempt proceeding to be initiated upon motion and notice by an alleged aggrieved party without a judicial finding of probable cause. [*Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004).]

   c. In a proceeding initiated pursuant to G.S. 5A-23(a1), the burden of proof is on the aggrieved party. [G.S. 5A-23(a1).] It does not shift to the alleged contemnor. [*Trivette v. Trivette,* 162 N.C. App. 55, 590 S.E.2d 298 (2004) (trial court erroneously placed burden on defendant to prove a lack of willful contempt).]

9. Contempt proceeding initiated pursuant to G.S. 50-13.9.

   a. Upon affidavit of an obligee, a 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. [G.S. 50-13.9(d).]

   b. Form AOC-CV-602, Order to Appear and Show Cause for Failure to Comply with Support Order and Order to Produce Records and Licenses, may be used to initiate a contempt proceeding pursuant to G.S. 50-13.9(d). An obligor's failure to bring to the hearing records and information related to the obligor's employment and income is grounds for contempt. [G.S. 50-13.9(d)(5).]

   c. An enforcement order issued pursuant to G.S. 50-13.9(d) must be served on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 50-13.9(d).]

10. Hearing.
    a. Civil contempt hearings are held before a district court judge, without a jury, in the pending child support action. [*See* G.S. 5A-23(d).]
    b. A person ordered to show cause may move to dismiss a show cause order. [G.S. 5A-23(c).]
11. Right to and appointment of counsel.
    a. An alleged contemnor has the right to be represented by legal counsel in civil contempt proceedings.
        i. The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt hearing begins, that she may be incarcerated if found in civil contempt, that she has the right to be represented by retained counsel, and that she may be entitled to court-appointed counsel if unable to afford an attorney. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (at the outset of a contempt proceeding, the trial court should (1) assess how likely it is that the defendant will be incarcerated; (2) if it is likely, the court should inquire of the defendant if he desires counsel and determine his ability to pay for representation; and (3) if the defendant desires counsel but is indigent, the court is to appoint counsel to represent him).]
        ii. An alleged contemnor may waive her right to legal representation. [G.S. 7A-457(a).]
            (a) Any waiver must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must make a written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and of the consequences of the waiver." [G.S. 7A-457(a).]
            (b) Even though G.S. 7A-457 speaks to waiver by an indigent, any waiver must be in accordance with G.S. 7A-457, notwithstanding its limiting language. [*State v. Williams,* 65 N.C. App. 498, 309 S.E.2d 721 (1983).]
        iii. If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the civil contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.
    b. An alleged contemnor is entitled to court-appointed counsel in a civil contempt proceeding if (1) he is indigent **and** (2) there is a significant likelihood that he will actually be incarcerated as a result of the hearing. [*See McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *King v. King,* 144 N.C. App. 391, 547 S.E.2d 846 (2001) (for appointment of counsel, a defendant must show that she is indigent and that her liberty interest is at stake); *Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (citing *Turner v. Rogers,* 564 U.S. 431, 131 S. Ct. 2507 (2011), and *King*) (father who failed to meet his burden of proving indigence not entitled to counsel at civil contempt hearing for failure to pay child support); *cf. Turner,* 564 U.S. at 446, 448, 131 S. Ct. at 2518, 2520 (the Fourteenth Amendment Due Process Clause does not automatically require the state to appoint counsel at civil contempt proceedings for an indigent individual who is subject to a child support order if the state provides

"alternative" or "additional or substitute" procedural safeguards).] It has not been clear whether the holding in *McBride* was broad enough to require the appointment of counsel for civil contempt proceedings arising in contexts other than child support enforcement. In *D'Alessandro v. D'Alessandro*, 235 N.C. App. 458, 464, 762 S.E.2d 329, 334 (2014), the court of appeals extended the right to court-appointed counsel to an indigent defendant subject to civil contempt for failure to comply with a child custody order. In separate proceedings, consolidated on appeal, a trial court found a pro se father in civil contempt of custody and child support orders. After finding an "obvious likelihood" that father might be incarcerated if found in contempt, that father had not been advised of his right to counsel and had not waived that right, and that it appeared from the record that father was indigent, both orders were reversed "to the extent that they [held] defendant in contempt of the custody order and the child support order."

i. Determinations of indigency and entitlement to counsel and appointment of counsel may be made by a district court judge or by the clerk of superior court. [*See* G.S. 7A-452(a), (c).]

ii. An alleged contemnor is indigent if he has insufficient income and resources, based on guidelines approved by the state's Office of Indigent Defense Services, to retain an attorney to represent him in the contempt hearing. [*See* G.S. 7A-452; see G.S. 7A-450(a) for definition of "indigent person".]

iii. A finding that an obligor is entitled to court-appointed counsel based on indigency may indicate that the obligor lacks the present financial ability to pay court-ordered child support and, therefore, may preclude a finding of civil contempt for willfully failing to pay court-ordered child support.

iv. Counsel for indigent obligors in civil contempt proceedings in child support cases are appointed pursuant to procedures approved by the state's Office of Indigent Defense Services. [*See* G.S. 7A-452(a).] For more on appointed counsel, see Austine Long, *Appointed Counsel in Child Support Cases: How Far Do You Go?*, UNC Sch. of Gov't: On the Civil Side Blog (Feb. 25, 2015), http://civil.sog.unc.edu/appointed-counsel-in-child-support-cases-how-far-do-you-go.

c. An indigent obligor may not be incarcerated for civil contempt in a child support action unless she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993) (due process requires that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages).]

12. Requirement that the obligor acted willfully.

a. The primary issue in most contempt proceedings in child support cases is whether the obligor is **willfully** failing to pay court-ordered child support. [*See Henderson v. Henderson*, 307 N.C. 401, 298 S.E.2d 345 (1983) (setting aside decree committing defendant to imprisonment for contempt because finding that failure to pay was willful was not supported by the record); *Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988) (husband was in willful contempt for failure to make court-ordered child support payments); *Brower v. Brower*, 75 N.C. App. 425, 331 S.E.2d 170 (1985)

(rejecting defendant's argument that voluntary placement of his assets in bankruptcy made his noncompliance with the child support order not only "non-willful" but impossible), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

b. A finding of willful failure to pay court-ordered child support must be based on evidence that the obligor is purposefully, deliberately, stubbornly, or in bad faith disobeying a child support order or disregarding an obligation to pay child support required by a court order despite the present ability to do so. [*See Lueallen v. Lueallen*, 790 S.E.2d 690 (N.C. Ct. App. 2016) (mother's argument that her failure to pay child support pursuant to a temporary child support order was not willful because she was unemployed at the time was rejected based on findings that mother had (1) not applied for a teaching position in Mecklenburg County in the past three years, despite stating in a verified motion to modify support that she had; (2) resigned from a teaching position in Union County without having another job lined up; and (3) told father that mothers did not have to pay child support); *Clark v. Gragg*, 171 N.C. App. 120, 614 S.E.2d 356 (2005) (willfulness is an ability to comply with the court order and a deliberate and intentional failure to do so); *Barker v. Barker,* 228 N.C. App. 362, 745 S.E.2d 910 (2013), *Meehan v. Lawrance,* 166 N.C. App. 369, 602 S.E.2d 21 (2004), and *Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (all three cases noting that willfulness imports knowledge and a stubborn resistance); *Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (willfulness involves more than deliberation or conscious choice; it imports a bad faith disregard for authority and the law).]

c. An obligor's failure to pay court-ordered child support is not willful if it is based on the obligor's good faith reliance on the obligee's agreement to terminate, suspend, or reduce the obligor's child support payments. [*See Forte v. Forte*, 65 N.C. App. 615, 309 S.E.2d 729 (1983) (no contempt where husband stopped making payments in reliance on wife's agreement to support child if he would waive his visitation rights).]

d. Failure to pay may be willful within the meaning of the contempt statutes when a supporting spouse is unable to pay because she voluntarily takes on additional financial obligations or divests herself of assets or income after entry of the support order. [*See Shippen v. Shippen*, 204 N.C. App. 188, 693 S.E.2d 240 (2010) (father who admitted that he was physically and mentally able to be employed, and in fact was employed full-time when the child support order was entered, but who voluntarily quit his job thereafter to become a member of a religious community that prohibited its members from earning outside income, and who testified that he would not take outside employment under any circumstances, willfully failed to pay support and was properly held in civil contempt; that father's religious beliefs were sincerely held was irrelevant); *cf. Spears v. Spears*, 784 S.E.2d 485, 497 (N.C. Ct. App. 2016) (trial court found defendant in civil contempt of an order requiring defendant to pay a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees; trial court further found that defendant showed "disregard for his familial and legal obligations" by quickly remarrying and having four additional children; court of appeals found that defendant's exercise of his fundamental right to

marry and procreate, in this particular situation, did not demonstrate disregard of obligations to his family).]

e. Father's noncompliance with consent order, requiring him to pay 90 percent of child's college expenses as long as she "diligently applied" herself, was willful based on finding that father unilaterally decided that daughter was not diligently applying herself and his testimony that he withheld payment as "leverage" to get daughter to improve her grades. [*Barker v. Barker,* 228 N.C. App. 362, 745 S.E.2d 910 (2013).]

13. Present ability to comply.

a. Generally.

i. The present ability to comply includes the present ability to take reasonable measures that would enable one to comply. [*Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991).]

ii. "Reasonable measures" may well include liquidating equity in encumbered assets. [*Adkins v. Adkins,* 82 N.C. App. 289, 346 S.E.2d 220 (1986).] It is not reasonable to require or expect a defendant to liquidate an encumbered asset to pay a support obligation to a former spouse if the encumbered asset is real property owned as tenants by the entirety with a subsequent spouse. [*See Spears v. Spears*, 784 S.E.2d 485 (N.C. Ct. App. 2016) (error for trial court to "fault" defendant for not making an effort to sell a beach house owned as tenants by the entirety with his second wife; appellate court further noted that even if a sale had occurred, it would have only eliminated defendant's monthly mortgage payment and would not have generated cash to pay arrears).]

iii. The majority of cases have held that to satisfy the "present ability" test, a defendant must possess some amount of cash or assets readily converted to cash. [*McMiller v. McMiller,* 77 N.C. App. 808, 336 S.E.2d 134 (1985) (no finding relating to defendant's ability to come up with $4,320 in readily available cash). *Cf. Barker v. Barker,* 228 N.C. App. 362, 745 S.E.2d 910 (2013) (defendant's present ability to comply with obligation to pay daughter's second-year college expenses could be inferred from his testimony that he paid those expenses for her first year and was willing and able to pay for her third year and that his failure to pay for her second year was based on her poor academic performance, not because of an inability to pay).]

iv. Where findings demonstrated that defendant had several assets (automobiles and real estate) available to him at the time of the hearing that could have been sold or liquidated, as well as consistent and recurring deposits and monies from a "friend" and present income from service on a city council, trial court did not err when it concluded defendant had the present ability to comply with the child support order. [*Onslow Cty. ex rel. Eggleston v. Willingham,* 199 N.C. App. 755, 687 S.E.2d 541 (2009) (**unpublished**).]

v. The following findings, drawn in part from father's own testimony or admissions, established that father had sufficient income and assets to comply with an order requiring payment of private school tuition: father had substantial monthly income, having listed his income at $47,000/month on a

loan application; father owned stocks, bonds, and securities valued at over $140,000 and had retirement accounts worth in excess of $900,000; and father had claimed unreasonable monthly expenses in his financial affidavit. [*Smith v. Smith*, 785 S.E.2d 434 (N.C. Ct. App. 2016).]

vi. The argument that if a parent's monthly salary is less than the monthly amount of support owed, the parent does not have the ability to comply has been rejected. [*Adams v. Adams,* 171 N.C. App. 514, 615 S.E.2d 738 (2005) (**unpublished**) (a trial court is not limited to considering only the monthly salary a parent receives, noting in this case that the father had a "number of avenues by which to obtain funds").] Note that in *Spears v. Spears*, 784 S.E.2d 485, 497 (N.C. Ct. App. 2016), when defendant servicemember's "clear and undisputed" income information established a monthly disposable income of $2,288 and a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees, the trial court erred when it found that defendant had the ability to comply.

vii. Amounts not considered as income in the original child support calculation may not be considered in a related contempt proceeding. [*See Cty. of Durham ex rel. Wood v. Orr,* 229 N.C. App. 196, 749 S.E.2d 113 (2013) (**unpublished**) (because Supplemental Security Income (SSI) payments are not considered in initial child support calculations, a defendant's SSI payments could not be considered in determining his ability to pay in a related contempt proceeding; order for civil contempt based on defendant's receipt of SSI payments, which was defendant's only income and was used in full each month to pay rent for himself and a child not subject to support order being enforced, reversed).]

viii. The trial court must find as a fact that the defendant presently possesses the means to comply. [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966).]

b. The obligor's ability to comply with a child support order often is subsumed within the issue of willfulness. [Saxon Special Series No. 17.]

i. An obligor's failure to pay court-ordered child support cannot be willful unless the obligor has the **present ability** to pay at least part of the child support owed under the order or to take reasonable measures that would enable him to comply with the order. [*See Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered); *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002) (to find willfulness, court must find failure to comply and that obligor presently possesses means to comply); *Teachey v. Teachey,* 46 N.C. App. 332, 264 S.E.2d 786 (1980) (for court to find willfulness, it must be established as an affirmative fact that defendant possessed the means to comply with the support order at some time after its entry); *Goodson v. Goodson*, 32 N.C. App. 76, 231 S.E.2d 178 (1977) (for court to find failure to pay support willful, there must be particular findings as to the ability to pay during the period of delinquency), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C. App. 615, 406 S.E.2d 656 (1991).]

ii. Ability to pay part of arrearage is insufficient to support incarceration until entire amount is paid. [*See Green v. Green*, 130 N.C. 578, 41 S.E. 784 (1902)

(where court found that obligor could pay at least a portion of the alimony, it was error to imprison him until he paid the whole amount); *Spears v. Spears*, 784 S.E.2d 485, 500 (N.C. Ct. App. 2016) (citing *Green*) (error to find defendant in civil contempt for failure to pay a total monthly obligation of $5,880 for child support, alimony, equitable distribution, and attorney fees when trial court's findings established that defendant could pay only a portion; trial court erred further when it required defendant to pay indefinitely as a purge condition an additional $900/month when defendant was unable to pay the total monthly obligation, "much less $900.00 in addition to that amount"); *Brower v. Brower,* 70 N.C. App. 131, 318 S.E.2d 542 (1984) (citing *Green*) (order that required defendant's imprisonment until he paid entire arrearage was vacated when supported only by finding that defendant had present ability to pay a portion of that amount).] Note, however, that the ability to pay part of an arrearage is sufficient to support incarceration until that part is paid. [*But see Clark v. Gragg,* 171 N.C. App. 120, 125, 614 S.E.2d 356, 360 (2005) (emphasis in original) (court's finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court" was insufficient to support a finding of willfulness; case remanded for specific findings addressing plaintiff's willful noncompliance, including findings regarding his ability to pay during the period that he was in default).]

iii. A present ability to pay court-ordered child support may not be presumed based solely on the existence of a prior order and the absence of a motion to modify that order. [*See Smithwick v. Smithwick*, 218 N.C. 503, 11 S.E.2d 455 (1940) (right to move for modification does not sustain conclusion that failure to comply was willful and contemptuous); *Graham v. Graham*, 77 N.C. App. 422, 335 S.E. 2d 210 (1985) (failure to move for modification is not evidence of willful contempt).]

iv. Mother who failed to pay child support pursuant to a temporary support order was properly found in civil contempt based on a finding that mother had the ability to pay based in part on her earning capacity rather than her actual income. [*Lueallen v. Lueallen*, 790 S.E.2d 690, 707 (N.C. Ct. App. 2016) (trial court properly concluded that mother had "willfully suppressed her income to avoid her child support obligation" and "that she had acted in bad faith based on her failure to make reasonable efforts to obtain a new full-time position").]

v. Evidence that an obligor is able-bodied, not incapacitated, presently employed, or able to work is generally insufficient, standing alone, to support a finding that the obligor has willfully failed to pay court-ordered child support despite her present ability to do so. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (court must find not only failure to comply but that defendant presently possesses the means to comply); *Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005) (findings that defendant was an able-bodied, 32-year-old man with a tenth grade education, whose work experience included running a Tenon machine in the furniture industry, was insufficient); *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577 (1983) (finding that defendant was able-bodied at least part of the time and "was capable of and had the means or should

have had the means" to make support payments was not sufficient); *Self v. Self*, 55 N.C. App. 651, 286 S.E.2d 579 (1982) (while evidence established that defendant was physically able to work, it did not establish that work was available to him, so his conduct was not willful).]

vi. A court, however, may find that an unemployed obligor's failure to pay court-ordered child support is willful if the obligor is able to work but deliberately and in bad faith fails to look for work or accept available employment. [*See Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (concurring with official commentary to G.S. 5A-21 stating that a person can be guilty of civil contempt, even if he does not have the money to make court-ordered payments, if he could take a job that would enable him to make the payments but does not do so).]

vii. Evidence that the obligor has the present ability to pay all or part of the child support owed under an order may not be sufficient, in and of itself, to support a finding that the obligor's failure to pay court-ordered child support is willful. Although ability to pay is a necessary condition precedent to a finding of willful nonpayment, willfulness may be an issue even when there is no issue regarding the obligor's ability to pay court-ordered child support. [*See Spencer v. Spencer*, 133 N.C. App. 38, 514 S.E.2d 283 (1999) (obligor's unilateral reduction in court-ordered child support payments when she obtained physical custody of one of the parties' two children did not constitute willful failure to comply with child support order); *see also Meehan v. Lawrance*, 166 N.C. App. 369, 602 S.E.2d 21 (2004) (where parties orally agreed to modify defendant's child support obligation, trial court's finding that defendant did not act willfully was affirmed).]

c. The court must determine a party's ability to comply during two periods of time. The trial court must find that the party:

i. Possessed the means to comply with the court's order during the period the party was in default [*Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (requiring a finding that defendant possessed the means to comply with alimony and child support orders during the period when he was in default); *Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005) (to address the requirement of willfulness, the trial court must make findings as to the ability of the party to comply with the order at issue during period of default); *Sowers v. Toliver,* 150 N.C. App. 114, 562 S.E.2d 593 (2002) (contempt order vacated when it lacked findings as to plaintiff's ability to comply with order during period when in default).] and

ii. Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen,* 204 N.C. App. 188, 191, 693 S.E.2d 240, 244 (2010) (quoting *McMiller v. McMiller,* 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985)) ("[t]o justify conditioning defendant's release from jail for civil contempt upon payment of a large lump sum of arrearages, the district court must find as fact that defendant has the present ability to pay those arrearages"); *Spears v. Spears*, 784 S.E.2d 485, 500 (N.C. Ct. App. 2016) (trial court erred further when it required defendant to pay indefinitely as a purge condition an additional $900/month over and above the total monthly obligation of $5,880 when defendant was

unable to pay $5,880, "much less $900.00 in addition to that amount"); *Bishop v. Bishop,* 90 N.C. App. 499, 369 S.E.2d 106 (1988) (contempt reversed when no findings made as to defendant's ability to pay at date of hearing); *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983) (contempt order vacated when court did not determine ability to pay as of date of hearing); *Cox v. Cox*, 10 N.C. App. 476, 179 S.E.2d 194 (1971) (remanded for court to find whether defendant presently possessed means to comply).]

iii. An obligor's inability to comply at the time of the contempt hearing must be genuine and not deliberately effected. [*See Bennett v. Bennett*, 21 N.C. App. 390, 393, 204 S.E.2d 554, 556 (1974) (affirming contempt in child support context, noting that a "defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply with the court order").]

d. Full payment of arrearage by time of hearing is a defense.

i. An obligor who is ordered to show cause for failing to pay court-ordered child support may not be held in civil contempt if he pays the full amount of the arrearage before the contempt hearing is held. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (husband not in contempt when he paid all arrearages due, even though compliance did not occur until after he was served with motion to show cause), *rev'd on other grounds per curiam for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002); *Hudson v. Hudson*, 31 N.C. App. 547, 230 S.E.2d 188 (1976) (no contempt where, between filing of contempt motion and hearing thereon, defendant brought support payments up to date); *see also Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (in custody case, compliance after party was served precluded finding of contempt).]

e. Use of a defendant's prior statement or position to preclude defendant from taking a contrary position, i.e., use of judicial estoppel.

i. Father was judicially estopped from asserting as a defense in a 2002 contempt proceeding for failure to pay child support that he had not been properly served in a 1994 North Carolina proceeding to establish that support. Judicial estoppel was based on father's assertion in a 1996 complaint filed in Washington state seeking marital dissolution that the 1994 North Carolina judgment ordering father to pay child support was conclusive on that issue. [*Price* (*Nercessian*) *v. Price,* 169 N.C. App. 187, 609 S.E.2d 450 (2005) (father's legal contention in 1996 proceeding that the 1994 North Carolina order was conclusive on the issue of child support, and his legal argument in 2002 that the contempt matter should be dismissed and the 1994 child support order vacated, were inconsistent legal contentions warranting application of judicial estoppel; also favoring use of judicial estoppel was fact that father waited to have his motion to dismiss heard until after children had reached age of majority, which, if granted, would have precluded wife from seeking arrearages or support).]

14. Orders for contempt.
    a. When an obligor is held in contempt for willfully failing to pay child support, the order should indicate clearly and unambiguously whether the obligor is being held in civil contempt or in criminal contempt.
    b. Findings.
        i. At the conclusion of the hearing, the judicial official must enter a finding for or against the alleged contemnor on each of the elements set out in G.S. 5A-21(a). If civil contempt is found, the judicial official must enter an order finding the facts constituting contempt and specifying the action that the contemnor must take to purge herself of the contempt. [G.S. 5A-23(e).]
        ii. An order adjudicating an obligor in civil contempt for failing to pay court-ordered child support is fatally defective if it does not include ultimate findings of fact that the obligor's failure to comply with the child support order is willful and that the obligor has the present ability to comply with the order. [*See Smith v. Smith*, 247 N.C. 223, 100 S.E.2d 370 (1957) (no finding as to willful noncompliance); *Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005) (trial court never actually found that plaintiff's noncompliance was "willful" and never specifically found that he had the means to comply with the orders during the period of default); *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983) (no finding as to present ability to comply, and evidence otherwise insufficient to plainly show that defendant was capable of complying with the court's order).]
        iii. An unspecific finding of a present means to comply has been found sufficient when competent evidence was presented in support of the finding. [*Maxwell v. Maxwell,* 212 N.C. App. 614, 619, 713 S.E.2d 489, 493 (2011) (*citing Adkins v. Adkins,* 82 N.C. App. 289, 346 S.E.2d 220 (1986)) (finding that "[a]t all times since entry of the Consent Order, Plaintiff/Father has been aware of its terms, has had the ability to comply with the child support provisions, and has willfully failed to provide any child support as ordered without any justification" was sufficient when supported by wife's testimony that husband had threatened her by saying he had sufficient financial resources to keep her in court for her lifetime and that, to her knowledge, father had been employed since support order entered); *Watson v. Watson,* 187 N.C. App. 55, 652 S.E.2d 310 (2007) (citing *Adkins*) (a general finding of present ability to comply with a support order was held to be sufficient when there was evidence in the record regarding defendant's assets), *review denied,* 362 N.C. 373, 662 S.E.2d 551 (2008); *Shippen v. Shippen,* 204 N.C. App. 188, 191, 693 S.E.2d 240, 244 (2010) (trial court found that "[d]efendant has the ability to comply or take reasonable efforts to do so" but made no finding that defendant had the present ability to pay the arrearage at issue and purge himself of contempt; finding was not as specific or detailed as might be preferred but was minimally sufficient); *Shumaker v. Shumaker,* 137 N.C. App. 72, 527 S.E.2d 55 (2000) (contempt order sufficient if it is implicit in the court's findings that the delinquent obligor both possessed the means to comply and willfully refused to do so); *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990) (although specific findings as to contemnor's present ability to comply are preferable, a general finding of present ability to comply is sufficient),

aff'd per curiam, 328 N.C. 729, 403 S.E.2d 307 (1991); *Plott v. Plott*, 74 N.C. App. 82, 327 S.E.2d 273 (1985) (although explicit findings are preferable, they are not absolutely essential where the findings otherwise indicate that a contempt order is warranted); *Medlin v. Medlin*, 64 N.C. App. 600, 602, 307 S.E.2d 591, 592 (1983) (explicit findings of present ability to comply or to take reasonable measures to enable compliance, and of willful failure or refusal to do so, are preferable, but finding that obligor "has sufficient assets to pay alimony as ordered" was adequate); *Moore v. Moore*, 35 N.C. App. 748, 242 S.E.2d 642 (1978) (implicit findings of willfulness and present ability are sufficient if supported by evidence in record).]

c. Appellate court's consideration of findings.

   i. While the order must include the ultimate finding that the failure to pay is willful, specific findings of fact regarding the obligor's willful failure to pay court-ordered child support are often useful with respect to appellate review but are not required. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (noting that specific findings supporting the contemnor's present means are preferable).]

   ii. The court's order must be supported by its conclusions of law, its legal conclusions must be supported by its findings of fact, and its findings of fact must be supported by sufficient, competent evidence in the record. [*See Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986) (discussing review in contempt proceedings).]

d. Purge conditions.

   i. If the court incarcerates an obligor for civil contempt, the court's order must clearly specify the conditions under which the obligor may purge herself of contempt. [*See* G.S. 5A-23(e) and 5A-22(a).] If the order does not clearly specify what the defendant can and cannot do to purge herself of the civil contempt, the order will be reversed. [*See Cox v. Cox,* 133 N.C. App. 221, 515 S.E.2d 61 (1999) (vague condition that mother shall not place children in a stressful situation or a situation detrimental to their welfare and not punish children in manner that is stressful, abusive, or detrimental did not set out what mother could do to purge herself of contempt; contempt order reversed).]

   ii. A contempt order must include a definite date by which a defendant may purge the contempt. [*Lueallen v. Lueallen*, 790 S.E.2d 690 (N.C. Ct. App. 2016) (contempt order requiring purge payments to be applied to child support arrearages was impermissibly vague when ending date for the payments was uncertain); *Spears v. Spears*, 784 S.E.2d 485 (N.C. Ct. App. 2016) (contempt order vacated as impermissibly vague when it did not set an ending date for defendant's alimony purge payments); *Wellons v. White*, 229 N.C. App. 164, 183, 748 S.E.2d 709, 722 (2013) ("We will not allow the district court to hold [defendant] indefinitely in contempt.").]

   iii. The conditions under which an obligor may purge himself of contempt must be conditions that he has the **actual, present ability** to meet, so that the obligor "holds the key to his own jail by virtue of his ability to comply." [*See Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980), *overruled on other*

grounds by McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993); Official Comment, G.S. 5A-21.]

iv. A court is authorized to allow a defendant to purge herself of contempt upon a payment of some amount less than that owed. [*Bogan v. Bogan,* 134 N.C. App. 176, 516 S.E.2d 641 (1999) (allowing payment of amount less than amount owed was not an impermissible modification of order).]

v. A court may not incarcerate an obligor for civil contempt and condition his release on payment of the entire amount of the child support arrearage owed under the order unless the court finds that the obligor has the present ability to pay the entire amount of the arrearage. [*See Clark v. Gragg,* 171 N.C. App. 120, 614 S.E.2d 356 (2005) (if the party is to be imprisoned until he pays the full amount of any arrearages, the court must find that the party has the present ability to pay the total outstanding amount); *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (where there were no findings of defendant's ability to pay entire arrearage, contempt reversed); *Brower v. Brower*, 70 N.C. App. 131, 318 S.E.2d 542 (1984) (order vacated that required defendant's imprisonment until full payment of arrearages when supported by a finding that defendant could pay only a portion of arrears); *Jones v. Jones*, 62 N.C. App. 748, 303 S.E. 2d 583 (1983) (contempt reversed when there was no evidence in record that defendant actually possessed arrearage amount or could take reasonable measures that would enable him to comply).]

vi. If an unemployed obligor is found in civil contempt and has no income or property from which child support may be paid, the court may require her to purge contempt by taking reasonable measures, such as looking for work, accepting employment, or applying for public assistance or disability benefits to which she may be entitled that are within her present ability and which would enable her to comply with the order. [*See Frank v. Glanville*, 45 N.C. App. 313, 262 S.E.2d 677 (1980) (concurring with official commentary to G.S. 5A-21 stating that a person can be guilty of civil contempt, even if he does not have the money to make court-ordered payments, if he could take a job that would enable him to make the payments but does not do so).]

vii. A finding that the obligor has the present ability to purge herself of contempt must be supported by competent evidence in the record. [*See Lee v. Lee*, 78 N.C. App. 632, 337 S.E. 2d 690 (1985) (evidence that obligor was employed at minimum wage job was insufficient to support finding that he had present ability to pay $1,000 child support arrearage).]

viii. Purge conditions established in civil contempt proceedings may not require the obligor to make continued or future child support payments or take other future actions (because doing so is not within the obligor's present ability). [*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).]

15. Sanctions for civil contempt

a. Imprisonment is the only authorized sanction for civil contempt. [G.S. 5A-21(b).]

b. A person who is found in civil contempt is not subject to the imposition of a fine. [G.S. 5A-21(d), *added by* S.L. 2015-210, § 1, effective Oct. 1, 2015, and applicable to civil contempt orders entered on or after that date.] The 2015 amendment to G.S. 5A-21 changed the result in *Tyll v. Berry,* 234 N.C. App. 96, 758 S.E.2d 411 (a fine is a "statutorily permitted" sanction for civil contempt proceedings), *review denied*, *appeal dismissed*, 367 N.C. 532, 762 S.E.2d 207 (2014).]

c. A person who is incarcerated for civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations in G.S. 5A-21(b1) and (b2). [G.S. 5A-21(b) (neither 5A-21(b1) nor (b2) apply to nonpayment of child support).] The limitations on incarceration for civil contempt under G.S. 5A-21(b1) and (b2) do **not** apply to cases in which a person is found in civil contempt for failing to pay court-ordered child support or for failing to comply with other provisions of child support orders that do not involve the payment of a money judgment.

d. There is no limitation on the term of imprisonment when a person is held in civil contempt for failing to pay court-ordered child support or for failing to comply with a court order that does not involve the payment of money. [G.S. 5A-21(b).]

e. The court of appeals does not seem to prohibit orders providing that the obligor be incarcerated at some future time if he fails to purge himself of contempt. [*See Abernethy v. Abernethy*, 64 N.C. App. 386, 307 S.E.2d 396 (1983) (order of commitment activated when defendant failed to comply with purge condition requiring payment of arrearages and attorney fees over four-month period); *Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002) (commitment stayed to give defendant an opportunity to purge himself of contempt by compliance with the order and judgment); *Ruth v. Ruth,* 158 N.C. App. 123, 579 S.E.2d 909 (2003) (commitment suspended on condition that wife purge herself of contempt by paying $2,637 into trust account of former husband's attorney).]

16. Release from incarceration.

a. Release without further order from the court. An obligor who is incarcerated for civil contempt for failing to pay court-ordered child support must be released when her civil contempt no longer continues. The civil contempt order must specify how the person may purge herself of the contempt. Upon finding compliance with the order's specifications, the sheriff or other officer having custody may release the person without further order from the court. [G.S. 5A-22(a).]

b. Release pursuant to obligor's motion upon compliance or if compliance no longer possible.

i. On motion by an incarcerated obligor directed to the judge who found the obligor in contempt, the judge (or another district court judge if the judge who held the obligor in contempt is not available) must determine if the obligor is subject to release. On an affirmative determination, the judge must order the obligor's release. [G.S. 5A-22(b).]

ii. The obligor may also seek his release under other procedures available under the law of North Carolina. [G.S. 5A-22(b).]

17. Award of attorney fees in contempt proceeding to enforce child support.
    a. The court may award attorney fees to an obligee pursuant to G.S. 50-13.6 in connection with civil contempt proceedings to enforce a child support order. [*See Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (citing *Blair v. Blair,* 8 N.C. App. 61, 173 S.E.2d 513 (1970)) (award of fees to wife based on husband's willful contempt for failure to pay child support upheld; payment of fees does not appear to be a purge condition); *Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (defendant in contempt of child support provisions in a consent decree ordered to pay plaintiff's attorney fees pursuant to G.S. 50-13.6); *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (agreement to pay college expenses is in nature of child support, so court was authorized to award attorney fees when father failed to pay those expenses). *But cf. Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring husband to pay for child's college expenses, holding that order was not for "child support").]
    b. Contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order. [*See Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010) (quoting *Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008)) (order required payment of attorney fees as a condition of being purged of contempt for failure to comply with an order for child support and post-separation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes* (citing *Blair v. Blair,* 8 N.C. App. 61, 173 S.E.2d 513 (1970)) (contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order).]
    c. Required findings.
        i. Before any award of attorney fees, including for contempt, the trial court must make specific findings of fact concerning:
            (a) The ability of a party to defray the cost of the suit, i.e., that the party is unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
            (b) The good faith of the party in proceeding with the suit;
            (c) The lawyer's skill;
            (d) The lawyer's hourly rate;
            (e) The nature and scope of the legal services rendered. [*Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010); *Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (orders in both *Shippen* and *Eakes* required payment of attorney fees as a condition of being purged of contempt for failure to comply with a child support order; both orders vacated and remanded for required findings).]
        ii. Note, however, that in an unpublished opinion the court of appeals has held that when a court orders payment of attorney fees to opposing counsel as a condition

of being purged of contempt, rather than as a discretionary award pursuant to G.S. 50-13.6, findings as to the plaintiff's good faith and insufficient means are unnecessary. [*Walker v. Hamer,* 175 N.C. App. 796, 625 S.E.2d 202 (2006) (**unpublished**) (mother in contempt of an order allowing father visitation). *Cf. Best v. Gallup,* 234 N.C. App. 115, 761 S.E.2d 755 (2014) (**unpublished**) (citing *Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009)) (defendant ordered to pay attorney fees as a purge condition in custody contempt order; award of fees reversed when contempt order awarding fees contained only one of the two findings required by G.S. 50-13.6).]

d. As a general rule, attorney fees in a civil contempt action are not available unless the moving party prevails. However, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion to show cause is issued and prior to the contempt hearing, an award of attorney fees has been found proper. [*Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (when mother had returned children to father at time of contempt hearing, no contempt was found, but award of attorney fees to father under G.S. 50-13.6 affirmed). *See also Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party;" father's argument that party awarded fees must have prevailed is contrary to *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002), which awarded attorney fees to a nonprevailing party in an action involving child custody and support but not contempt).]

18. Appeal of a civil contempt order.

a. To whom directed.

i. An aggrieved party may appeal the district court's order in a civil contempt proceeding to the court of appeals by filing a notice of appeal within thirty days after the order is entered. [*See* N.C. R. App. P. 3(c); G.S. 5A-24 and 7A-27(b)(2) (if order is a final order) or (b)(3)a. (if order affects a substantial right).]

ii. 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).]

b. Contempt order as interlocutory.

i. A contempt order is interlocutory when it delays the entry of the sanction of imprisonment or resolves less than all the matters before the trial court. [*Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002).]

ii. Even though a contempt order may be interlocutory, the appeal of an interlocutory order that finds a party in civil contempt affects a substantial right and is therefore immediately appealable. [*Ross v. Ross,* 215 N.C. App. 546, 715 S.E.2d 859 (2011) (citing *Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002)); *Guerrier* (stating that appeal of "any contempt order" affects a substantial right and is immediately appealable). *See also Whitaker v. Whitaker,* 181 N.C. App.

609, 640 S.E.2d 446 (2007) (**unpublished**) (finding that court of appeals could consider plaintiff's appeal of a contempt order, regardless of the fact that it provided for further proceedings, based on *Guerrier* statement that "any contempt order" is immediately appealable), *review denied,* 361 N.C. 370, 646 S.E.2d 774 (2007), *appeal dismissed, review denied,* 361 N.C. 370, 662 S.E.2d 552 (2008). *But see Anderson v. Lackey,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (a contempt order does not affect a substantial right when the party is not at imminent risk of punishment; mother in *Anderson* not at imminent risk of punishment because trial court took under advisement the sanctions to be imposed for her contempt; appellate court distinguished *Guerrier* on the basis that the court in that case did not take sanctions under advisement); *Moore v. Moore,* 226 N.C. App. 583, 741 S.E.2d 513 (2013) (**unpublished**) (appeal of an order dismissing a motion for criminal contempt does not affect a substantial right; appeal of the order dismissing defendant's motion for civil contempt did not affect a substantial right when defendant failed to show the possibility of inconsistent verdicts absent appellate court's consideration of the appeal).]

c. Standard of review on appeal.

i. The standard of review the court of appeals follows in a contempt proceeding is limited to determining whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008); *Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006); *Miller* (*Sikes*) *v. Miller,* 153 N.C. App. 40, 568 S.E.2d 914 (2002); *McKillop v. Onslow Cty.*, 139 N.C. App. 53, 532 S.E.2d 594 (2000).]

ii. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment. [*Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (citing *Hartsell v. Hartsell,* 99 N.C. App. 380, 393 S.E.2d 570 (1990)).]

19. Contempt after appeal of child support order filed.

a. Pursuant to G.S. 1-294, when an appeal is perfected, the trial court is divested of jurisdiction "upon the judgment appealed from, or upon the matter embraced therein, unless otherwise provided by the Rules of Appellate Procedure." [G.S. 1-294, *amended by* S.L. 2015-25, § 2, effective May 21, 2015. *See Lowder v. All Star Mills, Inc.,* 301 N.C. 561, 273 S.E.2d 247 (1981) (noting as "well settled" that an appeal, even of an appealable interlocutory order, operates as a stay of all proceedings relating to issues included therein until the matters are determined on appeal; further noting that jurisdiction of the trial court is divested from the date that notice of appeal was given); *Guerrier v. Guerrier,* 155 N.C. App. 154, 159 n.4, 574 S.E.2d 69, 72 n.4 (2002) (noting in dicta that appeal of an order finding father in contempt of an equitable distribution (ED) judgment for removing funds from children's investment accounts left the trial court without jurisdiction to address issues in an enforcement order such as reimbursement of the funds removed or removal of father as custodian of the accounts; enforcement order vacated on other grounds, but court noted that unlike child support, child custody, and alimony, no statute provided that an ED order

remains enforceable pending appeal); *Smith v. Smith*, 785 S.E.2d 434, 437 (N.C. Ct. App. 2016) (citing *Guerrier*) (G.S. 50-13.4(f)(9) "establishes an express exception" to the stay rule in G.S. 1-294 when the trial court enters an order for child support).]

b. Notwithstanding G.S. 1-294, an order for the periodic payment of child support or a child support judgment that provides for periodic payments may be enforced through civil contempt pending appeal of those orders. [G.S. 50-13.4(f)(9); *Smith v. Smith*, 785 S.E.2d 434, 438 (N.C. Ct. App. 2016) (construing *Brown v. Brown*, 171 N.C. App. 358, 615 S.E.2d 39 (2005)) (an order requiring father to pay private school tuition was an order for the periodic payment of child support, even though father could choose between several payment options offered by the school; payments would constitute "a periodic payment, whether [plaintiff] chooses to pay it once a year, once a semester or over ten months;" moreover, mother's cross-appeal of the order did not preclude enforcement pursuant to G.S. 50-13.4(f)(9) of father's obligation to pay the required tuition during appeal of the order).] The original order, and the finding of contempt based on a violation of that order, may be enforced pending appeal. [*See Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002) (G.S. 50-13.4(f)(9) is an exception to G.S. 1-294 and allows enforcement of orders for the payment of child support pending appeal, including any sanctions entered pursuant to an order of civil contempt; appeal of an order finding defendant in contempt for failure to pay child support did not divest the court of jurisdiction to enter an enforcement order sanctioning defendant $100 for failure to comply with purge condition that required payment of past child support and medical expenses).]

c. When the trial court enters an order of contempt while the child support order is on appeal, the court of appeals may, upon motion of an aggrieved party, stay an order for civil contempt entered for child support until the appeal is decided, if justice requires. [G.S. 50-13.4(f)(9); N.C. R. App. P. 23.]

d. For more on the appeal of a support order generally, including the effect of G.S. 50-19.1, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I. For more on the effect of an appeal on a trial court's jurisdiction, see *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section I.I.6. For a discussion of contempt when appeal of an order is pending, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

C. Criminal Contempt

1. Generally.

a. An obligor may be held in criminal contempt for willfully failing to comply with a civil child support order. [*See* G.S. 50-13.4(f)(9); 5A-12(a)(3), *amended by* S.L. 2009-335, § 1, effective Dec. 1, 2009.]

b. The purpose of criminal contempt is to **punish** the contemnor's willful noncompliance with the court's order, not to **compel** the contemnor's compliance with the order. [*See Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988) (discussing distinction between civil and criminal contempt).]

c. For more on criminal contempt, see *Contempt of Court*, Bench Book, Vol. 2, Chapter 4.

2. Direct vs. indirect criminal contempt.
    a. Criminal contempt is direct criminal contempt when the act:
        i. Is committed within the sight or hearing of a presiding judicial official;
        ii. Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
        iii. Is likely to interrupt or interfere with matters then before the court. [G.S. 5A-13(a)(1)–(3).]
    b. Any criminal contempt other than direct criminal contempt is indirect criminal contempt.
    c. The distinction between direct and indirect criminal contempt is important because summary proceedings are available only for direct criminal contempt.
        i. Because G.S. 5A-13(b) requires plenary proceedings for indirect criminal contempt, it would be reversible error to proceed summarily in the case of indirect criminal contempt.
        ii. Because proceedings for direct criminal contempt may be plenary or summary, direct contempt mislabeled as indirect contempt has been found not to warrant reversal. [*See Adams Creek Assocs. v. Davis,* 186 N.C. App. 512, 652 S.E.2d 677 (2007) (incorrectly identifying contempt as indirect when it was direct was not reversible error), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900 (2008).]
    d. Willful failure to pay child support as required by court order constitutes **indirect** criminal contempt, rather than **direct** criminal contempt. [See G.S. 5A-13, defining direct and indirect criminal contempt.]
    e. The court therefore must follow the plenary procedures applicable to indirect criminal contempt under G.S. 5A-15, rather than the summary procedures applicable to direct criminal contempt under G.S. 5A-14, when faced with a willful failure to pay court-ordered child support. [*See* G.S. 5A-15.]
3. Procedure.
    a. Criminal contempt proceedings for willful nonpayment of court-ordered child support are probably ancillary proceedings in the pending child support action rather than independent criminal actions. [See G.S. 5A-15(a), providing that proceedings are initiated by order to appear and show cause; *Blue Jeans Corp. v. Amalgamated Clothing Workers,* 275 N.C. 503, 169 S.E.2d 867 (1969) (proceeding with a contempt matter based on violation of an injunction not as an independent proceeding but as part of the original injunction suit).]
    b. Criminal contempt hearings are tried before a district court judge, without a jury, in the pending child support action. [*See* G.S. 5A-15(d).]
    c. A judicial official (district court judge or clerk or assistant clerk of superior court) may initiate criminal contempt proceedings in a child support case by issuing an order requiring the alleged contemnor to appear before a district court judge, at a reasonable time specified in the order, to show cause why she should not be held in contempt for willfully disobeying a child support order. [G.S. 5A-15(a).]

d. Although a party is not required to file a verified petition or affidavit as a prerequisite to the issuance of a show cause order for criminal contempt, a proceeding for criminal contempt may be initiated by a motion requesting that a party be required to show cause why the party should not be held in contempt. [*See Mather v. Mather*, 70 N.C. App. 106, 318 S.E.2d 548 (1984) (husband's motion alleged sufficient facts to show wife's willful disobedience of order setting out husband's visitation rights).]

e. The show cause order in a criminal contempt proceeding must provide the alleged contemnor with adequate notice of the specific factual basis for the alleged contempt. [*See O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E. 2d 370 (1985) (criminal contempt order was reversed where notice to plaintiff did not inform her that she should be prepared to defend herself for her failures to appear at prior hearings on contempt charges).]

f. G.S. 5A-15 does not specify the manner in which a show cause order must be served. In practice, most show cause orders in child support cases are served by the sheriff pursuant to G.S. 1A-1, Rule 4.

g. An obligor who has been cited for alleged criminal contempt may not be compelled to testify against himself. [G.S. 5A-15(e).]

h. An alleged contemnor may move to dismiss a show cause order. [G.S. 5A-15(c).]

4. Order for arrest of a person charged with criminal contempt to be heard at a plenary proceeding.

a. In a proceeding for criminal contempt, the court may order the obligor's arrest if the court finds, based on a sworn statement or affidavit, probable cause to believe that the obligor will not appear in response to the show cause order or if the obligor fails to appear as required by the show cause order. [*See* G.S. 5A-16(b) and 15A-305(b)(8), (9); *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).] An order for arrest has been reversed when the court failed to make a probable cause finding that plaintiff would not appear. [*Mather v. Mather*, 70 N.C. App. 106, 318 S.E.2d 548 (1984).]

b. If a court issues an order for an obligor's arrest and the obligor is not brought before a judge for hearing in the contempt proceeding immediately following arrest, the obligor must be released from jail pending the contempt hearing upon posting an appearance bond or satisfying other pretrial release requirements pursuant to G.S. 15A-534. [*See* G.S. 5A-16(b).]

c. The bond posted by (or on behalf of) an arrested obligor in a contempt proceeding is an **appearance** bond—**not** a compliance bond imposed pursuant to G.S. 50-13.4(f)(1). The amount of the appearance bond posted by or on behalf of an arrested obligor in a contempt proceeding may not be applied to satisfy the obligor's child support arrearage unless it is returned to the obligor when she appears for the contempt hearing and the obligor agrees to apply it toward the child support arrearage, or unless the bond is garnished through supplemental proceedings or other legal process after the obligor appears.

d. If the obligor fails to appear at the contempt hearing after being arrested and released from custody, the obligor's appearance bond may be forfeited for the benefit of the

public schools but may not be applied to satisfy the obligor's child support arrearage. [*See Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988) (discussing distinction between appearance bond and compliance bond in contempt proceeding relating to civil action for child custody); G.S. 15A-544.7(c)(1) (providing for "clear proceeds" to go to county finance officer for benefit of the public schools).]

5. Right to and appointment of counsel.
   a. An alleged contemnor has the right to be represented by legal counsel in criminal contempt proceedings.
      i. The court should advise each alleged contemnor, in writing in the notice or order to show cause and orally before the contempt proceeding begins, that he may be incarcerated if found in criminal contempt, that he has the right to be represented by retained counsel, and that he may be entitled to court-appointed counsel if unable to afford an attorney.
      ii. An alleged contemnor may waive her right to legal representation. [G.S. 7A-457(a).]
         (a) An alleged contemnor's waiver of legal representation must be knowing, informed, voluntary, and written. If an alleged contemnor waives the right to legal representation, the court must a make written finding that at the time of waiver the alleged contemnor acted "with full awareness of his rights and of the consequences of the waiver." [G.S. 7A-457(a).]
         (b) Even though G.S. 7A-457 speaks to waiver by an indigent, any waiver must be made in accordance with G.S. 7A-457, notwithstanding its limiting language. [*State v. Williams,* 65 N.C. App. 498, 309 S.E.2d 721 (1983).]
      iii. If an alleged contemnor does not waive the right to legal representation, the court must determine, before it hears the criminal contempt proceeding, whether the alleged contemnor is entitled to court-appointed counsel.
   b. An alleged contemnor is entitled to court-appointed counsel in a criminal contempt proceeding if (1) she is indigent **and** (2) there is a significant likelihood that she will actually be incarcerated as a result of the hearing. [G.S. 7A-451(a)(1) (an indigent person is entitled to court-appointed counsel in any case in which imprisonment, or a fine of $500, or more, is likely to be adjudged); *Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990) (noting that G.S. 7A-451(a)(1) requires appointment of counsel in any case in which imprisonment is likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders).]
      i. Determinations of indigency and entitlement to counsel and appointment of counsel may be made by the district court judge or by the clerk of superior court. [*See* G.S. 7A-452(c).]
      ii. An alleged contemnor is indigent if he has insufficient income and resources, based on guidelines approved by the state's Office of Indigent Defense Services, to retain an attorney to represent him in the contempt hearing. [*See* G.S. 7A-452; see G.S. 7A-450(a) for definition of "indigent person".]
      iii. Counsel for indigent obligors in criminal contempt proceedings in child support cases are appointed pursuant to procedures approved by the state's Office of Indigent Defense Services. [*See* G.S. 7A-452.]

c. An indigent obligor may not be incarcerated for criminal contempt in a child support action unless she has waived or forfeited the right to court-appointed counsel or has been represented by court-appointed counsel. [*See Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990).]

6. Requirement that defendant acted willfully.

a. A person may not be held in criminal contempt for failing to pay court-ordered child support unless he has willfully failed to pay child support as required by the order. [*See Harris v. Harris*, 91 N.C. App. 699, 373 S.E.2d 312 (1988); G.S. 5A-11(a)(3) (requiring willful disobedience of a court's order or of its execution).]

i. In most cases, a finding of willful failure to pay court-ordered child support must be based on evidence that the obligor was financially able to pay at least part of her court-ordered child support obligation when it became due (or thereafter) and yet deliberately and purposefully failed to do so without justification or excuse. [*See Mauney v. Mauney*, 268 N.C. 254, 150 S.E.2d 391 (1966) (civil contempt judgment for failure to pay alimony set aside because no finding made that husband presently possessed means to comply); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (civil contempt set aside when no evidence presented that husband possessed means to comply with order for alimony and counsel fees); *Faught v. Faught*, 67 N.C. App. 37, 312 S.E.2d 504 (defendant in criminal contempt when he became unable to pay after he voluntarily took on additional financial obligations after entry of support order; failure to pay was willful), *review denied,* 311 N.C. 304, 317 S.E.2d 680 (1984).]

ii. An obligor who has willfully failed to pay court-ordered child support, who is cited for civil or criminal contempt, and who pays the child support arrearages in full before the date of the contempt hearing may be punished for criminal contempt even though he cannot be held in civil contempt. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (trial court concluding that father's payment of arrearages after contempt motion was filed eliminated option of civil, but not criminal, contempt), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

7. Standard of proof.

a. The court in a criminal contempt proceeding must find, beyond a reasonable doubt, that the alleged contemnor willfully disobeyed a valid court order. [*See* G.S. 5A-15(f).]

8. Orders for contempt.

a. At the conclusion of a hearing for criminal contempt, the judge must enter a finding of guilty or not guilty. [G.S. 5A-15(f).]

b. The implicit requirement in G.S. 5A-14(b), that in a summary proceeding the findings must indicate that the reasonable doubt standard was applied, has been required in an order for criminal contempt issued in a plenary hearing. [*State v. Ford,* 164 N.C. App. 566, 596 S.E.2d 846 (2004) (citing *State v. Verbal,* 41 N.C. App. 306, 254 S.E.2d 794 (1979)) (the import and consequences of the two hearings are substantially equivalent; holding an order of superior court, entered in a de novo plenary

proceeding on appeal from a summary finding of contempt in district court, deficient for not indicating that the reasonable doubt standard had been applied).]

c. When a district court judge holds an obligor in contempt for willfully failing to pay court-ordered child support, the judge should indicate clearly and unambiguously in the order whether the obligor is being held in civil contempt or criminal contempt. [*See Watkins v. Watkins,* 136 N.C. App. 844, 526 S.E.2d 485 (2000) (urging trial courts to identify whether contempt proceedings are in the nature of criminal or civil contempt).]

9. Punishment that may be imposed.

a. A person who commits criminal contempt by failing to comply with an order to pay child support is subject to censure, imprisonment for a **definite** and **fixed** term not to exceed 30 days, a fine not to exceed $500, or any combination of the three. [G.S. 5A-12(a)(3), *amended by* S.L. 2009-335, § 1, effective Dec. 1, 2009, and applicable to offenses committed on or after that date.]

i. An order sentencing a defendant to six consecutive 30-day terms of imprisonment based on six findings of direct criminal contempt has been affirmed in a case of first impression. [*State v. Burrow*, 789 S.E.2d 923 (N.C. Ct. App. 2016) (neither G.S. 5A-12 nor any other statute in G.S. Chapter 5A prohibit consecutive sentences for multiple findings of contempt; a criminal contempt adjudication is not a misdemeanor for which consecutive sentences may not be imposed).] Note that stacked sentences that exceed 180 days could trigger a defendant's Sixth Amendment right to a jury trial, as discussed in Jamie Markham, *Consecutive Sentences for Criminal Contempt*, UNC Sch. of Gov't: N.C. Crim. L. Blog (Aug. 11, 2016), http://nccriminallaw.sog.unc.edu/consecutive-sentences-criminal-contempt.

b. However, a sentence of imprisonment up to 120 days may be imposed for criminal contempt resulting from the failure to pay child support, provided the sentence is suspended upon conditions reasonably related to the contemnor's payment of child support. [G.S. 5A-12(a)(3), *amended by* S.L 2009-335, § 1, effective Dec. 1, 2009, and applicable to offenses committed on or after that date.]

i. A judge who finds an obligor in criminal contempt also may remit or reduce the fine imposed on the obligor or terminate or reduce the obligor's sentence if warranted by the obligor's conduct and the ends of justice. [G.S. 5A-12(c).]

ii. A fine imposed in a criminal contempt proceeding is payable to the state and may not be applied to satisfy child support arrearages owed by the contemnor. [*See In re Rhodes*, 65 N.C. 518 (1871) (per curiam) (stating that a fine for contempt is a punishment for a wrong to the state and goes to the state).]

iii. An obligor who is found in criminal contempt for willfully failing to pay court-ordered child support may not be sentenced to jail under an order that allows her to be released from jail upon **purging** the contempt (usually by paying all or part of the child support arrearages she owes) as in the case of civil contempt. Purge conditions are imposed in civil, not criminal, contempt proceedings.

iv. A court may, however, find an obligor in criminal contempt for willfully failing to pay court-ordered child support; sentence him to a definite period of incarceration; **suspend** the sentence for criminal contempt; and require the obligor to pay all or part of the child support arrearages or to continue to pay his court-ordered child support obligation as it becomes due as one of the conditions of his probation. [*See Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988); *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (defendant also required to post a cash bond or security to guarantee timely payment of future cash child support as well as other conditions), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002).]

v. **Important note**: If a judge finds an obligor in criminal contempt, sentences the obligor, suspends the obligor's sentence, and the only conditions of probation require compliance with the underlying child support order, the order constitutes an order of civil, rather than criminal, contempt. [*See Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (where court imposed a determinate 30-day term, suspended upon certain conditions—that obligor pay counsel fees and interest upon delinquent child support payments, that defendant post a cash bond as well as make each child support payment when due—order was for criminal contempt), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002); *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 108 S. Ct. 1423 (1988) (remand to determine whether father's payment of arrearages would purge his determinate jail sentence; if so, proceeding was civil in nature).]

10. Appeal of an order for criminal contempt.

a. A person who is found in criminal contempt by a judicial official inferior to a superior court judge may appeal to the superior court for hearing de novo. [G.S. 5A-17(a); 15A-1431(b); *Jones v. Jones*, 121 N.C. App. 529, 466 S.E.2d 344 (1996) (per curiam) (appeal from orders modifying child support and finding obligor in criminal contempt subject to dismissal for failure to file proposed record on appeal; court of appeals noted that even if record had been filed, it would only have had jurisdiction of the appeal of the modification order and not of the appeal of the criminal contempt order, appeal of which was to superior court); *Michael v. Michael*, 77 N.C. App. 841, 336 S.E.2d 414 (1985) (G.S. 5A-17 vests exclusive jurisdiction in the superior court to hear appeals from district court criminal contempt order), *review denied*, 316 N.C. 195, 341 S.E.2d 577 (1986).]

b. Upon appeal in a case imposing confinement for criminal contempt, a bail hearing must be held within a reasonable time after imposition of the confinement, with the contemnor being retained in custody no more than twenty-four hours from the time of imposition of confinement without a bail determination being made by a superior court judge. If a superior court judge has not acted within twenty-four hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. 5A-17(b), (c), *added by* S.L. 2013-303, § 1, effective Dec. 1, 2013, and applicable to confinement imposed on or after that date.]

VIII. Other Judicial Remedies

A. Enforcement Orders [G.S. 50-13.9(d).]

1. Responsibility of the clerk.
   a. In non-IV-D cases the clerk maintains all official records and all case data concerning child support matters previously enforced by the clerk. [G.S. 50-13.9(b2)(2).]
   b. In IV-D cases the clerk maintains all official records in the case. [G.S. 50-13.9(b1)(2).]
   c. For the definition of a IV-D case and a non-IV-D case, see Section I.D.1, above.
2. Issuance of the enforcement order.
   a. Upon affidavit of an obligee, the clerk or a district court judge may order a delinquent child support obligor to appear and show cause why the obligor should not be held in contempt, subjected to income withholding, or both. [G.S. 50-13.9(d).] See Section VII.B.9, above.
   b. The clerk or a district court judge may sign the order. [G.S. 50-13.9(d).]
   c. The order must be served on the obligor pursuant to G.S. 1A-1, Rule 4. [G.S. 50-13.9(d).]
   d. Upon motion of the obligee, no order is to be issued if the district court judge finds that not issuing an enforcement order would be in the child's best interest. [G.S. 50-13.9(d).]
   e. If income withholding is not an available or appropriate remedy, the court may determine whether the obligor is in contempt or whether any other enforcement remedy is appropriate. [G.S. 50-13.9(d)(6).] See Section III.A.2, above, for more about income withholding in the contempt context.

B. Enforcing Unincorporated Separation Agreements

1. A parent's obligation to pay child support pursuant to an **unincorporated** separation agreement or property settlement is enforced in the same manner as any other contract. [*See Herring v. Herring*, 231 N.C. App. 26, 752 S.E.2d 190 (2013) (citing *Gilmore*; *v. Garner*, 157 N.C. App. 664, 580 S.E.2d 15 (2003)) (unincorporated separation agreement is subject to the same rules pertaining to enforcement as any other contract); *Morrow v. Morrow*, 103 N.C. App. 787, 407 S.E.2d 286 (1991) (unincorporated separation agreement enforceable only as ordinary contract); *Rosen v. Rosen*, 105 N.C. App. 326, 413 S.E.2d 6 (1992) (applying contract principle of mutuality of agreement; defendant's obligation to provide for children's educational training beyond high school not enforceable; no meeting of the minds as to amount of his contribution).]
2. Unincorporated agreements are enforced through an action for breach of contract.
   a. A party may sue for breach of contract and seek money damages, or the party may elect to rescind the contract based on a substantial breach, and, if the statutory requirements are met, the party may seek other remedies, such as alimony [*Wilson v. Wilson,* 261 N.C. 40, 134 S.E.2d 240 (1964).] or equitable distribution. [*See Lee v. Lee,* 93 N.C. App. 584, 378 S.E.2d 554 (1989).]

b. A party may sue for breach of contract and seek specific performance when the legal remedy for breach of contract is inadequate. See *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1, Section IV.I.2.g.

c. A trial court can award both a money judgment for amounts past due under the contract and specific performance of future payments. [*Lasecki v. Lasecki*, 786 S.E.2d 286 (N.C. Ct. App. 2016) (trial court did not err in entering money judgment for arrearages along with the order of specific performance, even though plaintiff's complaint requested only specific performance).]

3. Breach of the separation agreement.

a. The elements of breach of contract are:

i. The existence of a valid contract and

ii. Breach of the terms of the contract. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (citing *Poor v. Hill*, 138 N.C. App. 19, 530 S.E.2d 838 (2000)).]

b. The statute of limitations for breach of an unincorporated agreement:

i. Is generally three years; [G.S. 1-52(1).]

ii. Under seal is ten years; [G.S. 1-47(2); *Crogan v. Crogan*, 236 N.C. App. 272, 763 S.E.2d 163 (2014).]

iii. Begins to run when the claim accrues, and in a breach of contract action, the claim generally accrues upon breach. [*Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.,* 196 N.C. App. 290, 677 S.E.2d 848 (2009); *Greene v. Colby,* 193 N.C. App. 454, 667 S.E.2d 340 (2008) (**unpublished**) (not paginated on Westlaw) (citing *Pearce v. Highway Patrol Volunteer Pledge Comm.,* 310 N.C. 445, 312 S.E.2d 421 (1984)) (ten-year statute of limitations for a separation agreement under seal had run when defendant, some eleven years prior to filing of complaint, committed an act indicating breach when she presented a deed for plaintiff's signature that contained "clear language" violating the terms of the parties' separation agreement).]

c. For a breach of contract to be actionable, "it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." [*Long v. Long,* 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003) (citing *Fletcher v. Fletcher*, 123 N.C. App. 744, 474 S.E.2d 802 (1996)); *Lancaster v. Lancaster,* 138 N.C. App. 459, 466, 530 S.E.2d 82, 87 (2000) (noting that "[s]mall lapses or inconsequential breaches are not substantial breaches requiring rescission").]

i. Husband's deviation in the method of paying child support was not a substantial breach. [*Long v. Long,* 160 N.C. App. 664, 588 S.E.2d 1 (2003) (husband's payment of child support by check sometime after the first of the month was not a substantial breach of agreement that called for payment by direct deposit on the first of the month).]

4. Child support provisions included in an unincorporated separation agreement may not be enforced through civil or criminal contempt because there is no court **order** requiring the obligor to pay child support. [*See Jones v. Jones,* 144 N.C. App. 595, 601, 548 S.E.2d 565, 569 (2001) (alimony case stating that "[w]here a separation agreement is neither submitted, by one or both parties thereto, to the trial court for its approval, nor specifically

incorporated into a court order or judgment, the separation agreement is preserved as a contract and remains enforceable and modifiable only under traditional contract principles").]

5. A court may, however, hold an obligor in civil or criminal contempt if the court has ordered the obligor to specifically perform the contractual child support requirements contained in an unincorporated separation agreement and the obligor willfully disobeys or fails to comply with the court's order requiring specific performance. [*Gen. Motors Acceptance Corp. v. Wright,* 154 N.C. App. 672, 573 S.E.2d 226 (2002) (wife in contempt of consent judgment that required her to specifically perform an obligation created under an unincorporated separation agreement); *Moore v. Moore,* 297 N.C. 14, 252 S.E.2d 735 (1979); *McDowell v. McDowell*, 55 N.C. App. 261, 284 S.E.2d 695 (1981) (noting that order for specific performance of an unincorporated separation agreement is enforceable through contempt proceedings).]

6. Reconciliation terminates executory child support obligations under an unincorporated separation agreement between a husband and wife. [*See Campbell v. Campbell*, 234 N.C. 188, 66 S.E.2d 672 (1951) (separation agreement annulled, avoided, and rescinded, at least as to future child support, when spouses resumed conjugal cohabitation); *Stegall v. Stegall*, 100 N.C. App. 398, 397 S.E.2d 306 (1990), *review denied,* 328 N.C. 274, 400 S.E.2d 461 (1991).] See *Spousal Agreements,* Bench Book, Vol. 1, Chapter 1, for more on the effect of reconciliation on the support provisions in a separation agreement.

7. Enforcement of provisions in an unincorporated separation agreement does not transform the unincorporated agreement into a court order. [*See Condellone v. Condellone,* 129 N.C. App. 675, 501 S.E.2d 690 (despite the fact that two money judgments had been entered against husband for unpaid alimony, one of which ordered specific performance of the alimony provisions in the parties' separation agreement, the trial court had no authority under G.S. Chapter 50 to modify the alimony provisions based on changed circumstances because the agreement had not been incorporated), *review denied,* 349 N.C. 354, 517 S.E.2d 889 (1998)*; Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (not paginated on Westlaw) (stating that "[w]ere we to find that a court's enforcement of a separation agreement by applying contract remedies acted as a *de facto* incorporation of an otherwise unincorporated agreement, we, in effect, would force a level of jurisdiction over separation agreements not desired or intended by the parties to the agreement and which would infringe on their freedom to contract"); *cf. Young v. Young,* 224 N.C. App. 388, 736 S.E.2d 538 (2012) (contempt order requiring husband to specifically perform an unincorporated provision of a separation agreement resulted in that provision being incorporated going forward).]

8. "To the extent an [unincorporated] agreement makes provision for the maintenance and support of a child *past his majority,* it is beyond the inherent power of the court to modify absent the consent of the parties," and agreement is "enforceable at law as any other contract." [*Shaffner v. Shaffner,* 36 N.C. App. 586, 588, 244 S.E.2d 444, 446 (1978) (emphasis added) (citing *Church v. Hancock,* 261 N.C. 764, 136 S.E.2d 81 (1964)) (father bound by contractual obligation in separation agreement to support son until age 21).] Enforcement of a provision in an unincorporated separation agreement after the child reaches majority is by a civil action and not a motion in the cause. [*Morrow v. Morrow*, 103 N.C. App. 787, 407 S.E.2d 286 (1991) (mother's motion in the cause, filed after son reached majority, for

specific performance of a provision in an unincorporated agreement requiring father to support parties' son while he pursued postsecondary education did not provide jurisdiction; G.S. 1A-1, Rules 2 and 3 require a civil action and do not allow a motion in the cause under these circumstances).]

9. For more on the enforcement of an unincorporated separation agreement, see *Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

C. Arrest and Bail [G.S. 1-410(5) (arrest); 1-420 *et seq.* (bail).]

1. Arrest and bail is available in child support actions to the same extent as in other cases. [G.S. 50-13.4(f)(3). *See also Earnhardt v. Earnhardt,* 9 N.C. App. 213, 175 S.E.2d 744 (1970) (order finding defendant in civil contempt for nonpayment of alimony and ordering his arrest remanded for findings on defendant's ability to comply).]
2. Arrest and bail under G.S. Chapter 1, Article 34 is a prejudgment remedy.
3. A defendant in a child support action may not be arrested and held for bail under G.S. Chapter 1, Article 34 unless the court finds, based on an affidavit filed by the plaintiff, that the defendant has removed or disposed of her property, or is about to do so, with the intent of defrauding a minor child for whom support is owed and the plaintiff posts an adequate, written undertaking, with sufficient surety, to pay damages incurred by the defendant if the order for arrest is vacated. [*See* G.S. 1-410(5), 1-411, 1-412, 1-417.]
4. An indigent defendant who is arrested under G.S. Chapter 1, Article 34 is entitled to court-appointed counsel. [*See* G.S. 1-413; 7A-451(a)(7).]
5. A defendant who is arrested under G.S. Chapter 1, Article 34 may be released by posting bail as provided under G.S. 1-420 or by making a deposit in lieu of bail under G.S. 1-426.

D. Attachment and Garnishment [G.S. 1-440.1 *et seq.* and 110-128 *et seq.*]

1. Nature of attachment.
    a. Attachment and garnishment are available as remedies in child support actions to the same extent as in other cases. [G.S. 50-13.4(f)(4); 1-440.2.]
        i. An attachment proceeding is ancillary to the pending child support action, not an independent civil action. [G.S. 1-440.1(a) (attachment ancillary to the pending principal action).]
        ii. A garnishment proceeding is ancillary to the pending attachment proceeding in a child support action, not an independent civil action. [G.S. 1-440.21(a) (garnishment ancillary to attachment).]
    b. Attachment and garnishment under G.S. Chapter 1, Article 35 are prejudgment remedies; they cannot be used after a child support order has been entered to collect past due child support owed under the order. [*See* G.S. 1-440.1, 1-440.6(b), 1-440.22(a)(2); *cf. Holt v. Holt*, 41 N.C. App. 344, 255 S.E.2d 407 (1979) (where wife obtained an order of attachment against husband's North Carolina real property after entry of divorce decree in Missouri).]
        i. Attachment and garnishment are in the nature of a preliminary execution against a defendant's property.

ii. A levy on the defendant's property under an order for attachment or garnishment creates a lien on the property, which may be executed to satisfy a subsequent judgment entered against the defendant for child support.

2. Procedure to secure an order of attachment.
   a. An obligee requesting attachment and garnishment in a child support action must:
      i. File a verified complaint or an affidavit setting forth the factual basis for attachment and garnishment and
      ii. Post a secured bond. [*See* G.S. 1-440.8, 1-440.10, and 1-440.11.]
   b. An order of attachment and garnishment in a child support action may be issued ex parte and without hearing by a district court judge or clerk or assistant clerk of superior court. [*See* G.S. 1-440.5(a).]
3. Grounds for attachment. [G.S. 1-440.3.] An order of attachment may be issued if the defendant in a child support action is:
   a. Not a resident of North Carolina; [G.S. 1-440.3(1).]
   b. A North Carolina resident who, with intent to defraud his creditors or to avoid service of summons:
      i. Has left the state or is about to leave the state or
      ii. Is hiding, or is about to hide, in the state; [G.S. 1-440.3(4).]
   c. A person, who with intent to defraud creditors:
      i. Has removed, or is about to remove, her property from the state or
      ii. Has disposed of or hidden, or is about to dispose of or hide, his property. [G.S. 1-440.3(5).]
4. Property subject to attachment and garnishment includes:
   a. Real property (other than property owned as tenancy by the entirety); [G.S. 1-440.17.]
   b. Tangible personal property in the defendant's possession; [G.S. 1-440.18.]
   c. Stock certificates in the defendant's possession; [G.S. 1-440.19.]
   d. Goods delivered to a warehouse for storage; [G.S. 1-440.20.]
   e. Tangible personal property owned by the defendant but in the possession of others; [G.S. 1-440.21.]
   f. Intangible personal property owned by the defendant; [G.S. 1-440.21.] and
   g. Debts owed to the defendant. [G.S. 1-440.21.]
5. Certain earnings of the judgment debtor are not subject to attachment and garnishment.
   a. Garnishment proceedings cannot reach a defendant's earnings for the sixty-day period preceding service of a garnishment summons when it appears that those earnings are necessary for the use of a family supported wholly or partly by the defendant's labor. [G.S. 1-362.] The family for whose support the earnings are necessary can be defendant's second family. [*See Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978).]

b. Garnishment proceedings cannot reach a defendant's future earnings. [*Harris v. Hinson,* 87 N.C. App. 148, 360 S.E.2d 118 (1987) (not permitting a supplemental proceeding as to future earnings); *Motor Fin. Co. v. Putnam,* 229 N.C. 555, 50 S.E.2d 670 (1948) (prospective earnings of a judgment debtor are neither property of the judgment debtor nor a debt due the judgment debtor from a third person; earnings not reachable in a supplemental proceeding).]

6. The sheriff may levy on the defendant's real property before levying against the defendant's personal property. [G.S. 1-440.15(b).]

   a. Levy on defendant's real property.

      i. After an order of attachment is issued, the plaintiff may request that the clerk file notice of lis pendens in any county in which the defendant owns real property. [*See* G.S. 1-440.33(a).]

      ii. The sheriff's levy on the defendant's real property constitutes a lien when it is docketed by the clerk. If notice of lis pendens was docketed, the lien attaches and relates back to the date the notice of lis pendens was docketed. [*See* G.S. 1-440.17 and 1-440.33(b).]

   b. Levy on defendant's personal property.

      i. The sheriff's levy on the defendant's tangible personal property is made by seizing the property and taking it into the sheriff's possession. [G.S. 1-440.18.]

      ii. The levy and seizure of the defendant's personal property constitutes a lien on the property. [*See* G.S. 1-440.33(c).]

7. Garnishment proceedings are used to levy upon tangible personal property owned by the defendant but in a third party's (garnishee's) hands or intangible personal property or indebtedness that a third party owes to the defendant. [*See* G.S. 1-440.21(a).]

   a. Garnishment under an attachment is an entirely separate procedure from garnishment for child support set out in G.S. 110-136. [See Section III.D, above.]

   b. Service on and answer by garnishee.

      i. The levy on the defendant's property in garnishment proceedings is made by serving the order of attachment, a garnishment summons, and a notice of levy on the garnishee. [*See* G.S. 1-440.22 through 1-440.25.]

      ii. If the garnishee admits that she has personal property belonging to the defendant, the clerk must enter judgment requiring the garnishee to deliver the property to the sheriff. [G.S. 1-440.28(b).]

      iii. If the garnishee admits that he was indebted to the defendant at the time of service or thereafter, the clerk must enter judgment in favor of the plaintiff and against the garnishee in the amount of the debt or the amount of the plaintiff's claim, whichever is less. [G.S. 1-440.28(a).]

      iv. If the garnishee's answer indicates that the garnishee does not have personal property belonging to the defendant and is not indebted to the defendant, the plaintiff may file a reply and either party may request that the garnishee's liability be determined by a jury. [*See* G.S. 1-440.29 and 1-440.30.]

      v. If the garnishee fails to file a verified answer as required, the clerk must enter a conditional judgment against the garnishee for the amount claimed by the

plaintiff, plus costs, and enter a final judgment against the garnishee if the garnishee fails to appear and show cause why final judgment should not be entered. [G.S. 1-440.27.]

vi. A garnishee who is properly served in a garnishment proceeding and thereafter delivers the defendant's personal property to the defendant or pays a debt owed to the defendant remains liable to the plaintiff. [*See* G.S. 1-440.31.]

c. A judgment against a garnishee may be executed, without notice or hearing, prior to entry of judgment against the defendant in the pending child support action, but all property seized pursuant to the execution must be held subject to court order pending judgment in the child support action. [*See* G.S. 1-440.32.]

8. A defendant whose property has been attached may file a motion with the clerk or judge to discharge the attachment through execution of a bond. [*See* G.S. 1-440.39 through 1-440.42.]

a. A defendant whose property has been attached may file a motion with the clerk or judge to dissolve or modify the order of attachment prior to entry of judgment in the pending child support action. [*See* G.S. 1-440.36 through 1-440.38.]

b. A person other than the defendant who claims an interest in attached property may request that the court dissolve or modify the attachment order or grant other relief. [*See* G.S. 1-440.43.]

9. When plaintiff prevails in the pending child support action. If judgment is entered in favor of the plaintiff in the prevailing child support action, the judgment may be satisfied from the defendant's property seized through attachment and garnishment. [*See* G.S. 1-440.46.]

10. When defendant prevails in the pending child support action.

a. If the defendant prevails in the pending child support action, if the order of attachment is dissolved, or if proper service "is not had on the defendant:"

i. The defendant is entitled to delivery of any property seized through attachment and garnishment [G.S. 1-440.45(a)(1).] and

ii. Any judgment against a garnishee must be vacated. [G.S. 1-440.45(a)(2).]

b. If the defendant prevails in the pending child support action, the defendant is entitled to recover, by motion in the cause or an independent action, damages against the plaintiff's bond. [G.S. 1-440.45(c).]

11. For more on attachment, see Joan Brannon and Ann Anderson, North Carolina Clerk of Superior Court Procedures Manual Vol. 1, Pt. III (Civil Procedures), ch. 34 (Attachments) (UNC School of Government, 2012).

E. Compliance Bonds

1. Distinction between appearance bonds and compliance bonds in child support matters.

a. An **appearance** bond is a bond that is posted by or on behalf of a child support obligor to secure the obligor's appearance at a contempt hearing.

i. The posting of bond is a condition of the obligor's release from jail based on an order for arrest issued in connection with a contempt proceeding in a child support case.

ii. The sole purpose of the bond is to secure the obligor's appearance at the contempt hearing, not to secure the obligor's payment of court-ordered child support. [*See Mussallam v. Mussallam*, 321 N.C. 504, 364 S.E.2d 364 (1988) (bond in question determined to be an appearance bond given to guarantee father's appearance).]

b. On forfeiture of an appearance bond, the clerk must send the "clear proceeds" to the county finance officer for use in maintaining the public schools. [*See* N.C. Const. art. IX, § 7; G.S. 115C-452 (codification of constitutional provision).] A **compliance** bond is a bond that is posted by a child support obligor to secure her **future** payment of court-ordered child support.

i. In other words, a compliance bond is a written undertaking that the obligor will pay child support as ordered by the court.

ii. On forfeiture of a compliance bond, proceeds go to the injured party. [*See Mussallam v. Mussallam*, 321 N.C. 504, 511, 364 S.E.2d 364, 368 (1988) (Frye, J., and Exum, C.J., dissenting).]

2. When an obligor may be required to post a compliance bond.

a. A court may, at the time it enters a child support order or after notice and hearing in a proceeding to enforce a child support order, require the obligor to post a compliance bond. [*See* G.S. 50-13.4(f)(1).]

b. If the obligor has not previously defaulted in paying court-ordered child support, the court should not require the obligor to execute a compliance bond unless the court finds there is good reason to believe that such security is required. [*See Gilbert v. Gilbert*, 71 N.C. App. 160, 321 S.E.2d 455 (1984) (error for trial judge to convey interest in the marital home and other real estate as security for alimony award when there was no reason to suspect that payments would not be made in full).]

3. A compliance bond should be payable, in an amount not to exceed a sum certain, to or on behalf of the obligee on the condition of the obligor's subsequent default in paying court-ordered child support.

4. A compliance bond should specify clearly what constitutes default and the procedures through which the obligee may recover against the bond or sureties in the event of the obligor's default.

F. Transfer of Property

1. A court may order the obligor to transfer title to real property solely owned by the obligor (located anywhere within North Carolina or in another state) in payment of past due court-ordered child support as long as the net value of the property being transferred does not exceed the amount of the arrearage. [G.S. 50-13.4(e).]

2. A court may order an obligor to pay child support by transferring title or possession of personal property. [G.S. 50-13.4(e).]

3. If the court orders an obligor to transfer title to real or personal property under G.S. 50-13.4(e) and the obligor fails to execute the necessary documents, the court may enter an order transferring title to the property pursuant to G.S. 1A-1, Rule 70 and G.S. 1-228 or directing that the necessary documents be executed by another person on

behalf of the obligor pursuant to G.S. 1A-1, Rule 70. [G.S. 50-13.4(f)(2).] G.S. 1A-1, Rule 70 allows a court in an order to "direct" another to execute on behalf of the party who failed to act, but the order must be written, signed, and filed to be effective. [*Dabbondanza v. Hansley*, 791 S.E.2d 116 (N.C. Ct. App. 2016).]

G. Appointment of Receiver

1. A receiver may be appointed in an action for child support to the same extent as in other cases. [G.S. 50-13.4(f)(6).]
2. A district court judge may appoint a receiver to take possession of an obligor's property or income when necessary to enforce the obligor's court-ordered child support obligation. [*See* G.S. 1-502; *Lambeth v. Lambeth,* 249 N.C. 315, 106 S.E.2d 491 (1959) (court was authorized to order the sale of husband's nonincome-producing real estate, and the investment of the proceeds thereof, so that sufficient income would be generated for the receiver to pay certain expenses and alimony awarded to plaintiff wife); *Murphy v. Murphy*, 261 N.C. 95, 134 S.E.2d 148 (1964) (receiver not warranted in child support case where property consisted of two small cash deposits that could be attached); *Harris v. Harris*, 257 N.C. 416, 126 S.E.2d 83 (1962) (in alimony case, appointment of receiver overturned where not requested and not necessary).]
3. After a child support order has been entered, the court may appoint a receiver in a child support case:
   a. To carry the judgment into effect,
   b. To dispose of property as required by the order,
   c. To preserve property pending appeal, or
   d. When an execution has been returned unsatisfied and the obligor refuses to apply his property to satisfy the judgment. [G.S. 1-502(2) and (3).]
4. Bond requirements.
   a. The court may not appoint a receiver unless the **obligee** posts a bond. [G.S. 1-502.1 (person making application for a receiver furnishes bond).]
   b. The judge may refuse to appoint a receiver if the **obligor** posts a secured compliance bond. [G.S. 1-503 (party against whom relief is sought posts bond).]
   c. If the court appoints a receiver, the **receiver** must post a secured bond with the clerk of superior court. [G.S. 1-504.]
5. Sale of property held by the receiver.
   a. When a receiver has been appointed in a child support case, the chief district court judge, or any district court judge designated by the chief district court judge to hear motions and enter interlocutory orders, may order the sale of real or personal property held by the receiver. [G.S. 1-505.]
   b. The judicial sales procedure set forth in G.S. Chapter 1, Article 29A governs the sale of property held by the receiver. [G.S. 1-505.]

H. Setting Aside a Voidable Transaction

1. A district court may enforce a child support order pursuant to the Uniform Voidable Transactions Act (G.S. Chapter 39, Article 3A). [*See* G.S. 50-13.4(f)(7), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
2. The minor child or other person for whose benefit a child support order was entered shall be a creditor within the meaning of the Uniform Voidable Transactions Act (G.S. 39-23.1 *et. seq*.). [G.S. 50-13.4(f)(7).]
3. When a transfer is voidable.
    a. If an obligor transfers property, or incurs an obligation, after the obligee's child support claim arises, the transfer or obligation is voidable if the obligee proves by a preponderance of the evidence that the obligor did not receive a reasonably equivalent value in exchange for the transfer or obligation and the obligor was insolvent at the time of the transfer or obligation or became insolvent as a result of the transfer or obligation. [G.S. 39-23.5(a), (c), *amended and added, respectively, by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
    b. The transfer of property or obligation incurred by an obligor is also voidable, whether the obligee's claim arose before or after the transfer was made or the obligation was incurred, if the obligee proves by a preponderance of the evidence that the obligor made the transfer or incurred the obligation:
        i. With the intent to hinder, delay, or defraud the obligee with respect to a valid child support claim against the obligor or
        ii. Without receiving a reasonably equivalent value in exchange for the transfer (or obligation) and the obligor:
            (a) Was engaged, or was about to engage, in a transaction for which the obligor's remaining assets were unreasonably small or
            (b) Intended to incur, or believed that he or she would incur, debts beyond the obligor's ability to pay as they become due. [G.S. 39-23.4(a), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
4. An obligee generally must bring a claim for relief based on an obligor's voidable transfer of property or incurring of an obligation not later than four years after the transfer was made or the obligation was incurred. [*See* G.S. 39-23.9(1), (2), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]
5. If an obligor has made a voidable transfer of property or incurred a voidable obligation, the court, subject to the limitations in G.S. 39-23.8, may avoid the transfer or obligation to the extent necessary to satisfy the obligee's claim for child support. [G.S. 39-23.7(a)(1).]
    a. If a transfer is voidable under G.S. 39-23.7(a)(1), the court may enter judgment (for the value of the property at the time of the transfer or the amount of the claim, whichever is less) against the first transferee, or an immediate or mediate transferee of the first transferee, as set out in G.S. 39-23.8(b)(1). [G.S. 39-23.8(b)(1), (c),

amended by S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

b. If the obligee has obtained a judgment for child support arrearages, the court may allow the obligee to levy execution against the transferred property or its proceeds. [G.S. 39-23.7(b).]

c. A court also may issue an injunction, appoint a receiver, order attachment or other provisional remedy against the property transferred or other property of the obligor if available under applicable law, or grant other appropriate relief. [G.S. 39-23.7(a)(2), (3), *amended by* S.L. 2015-23, § 1, effective Oct. 1, 2015, and applicable to a transfer made or obligation incurred after that date.]

I. Injunction [G.S. 1-494 and 1A-1, Rule 65.]

1. A district court judge may issue an injunction in a child support enforcement case. [G.S. 50-13.4(f)(5).]

2. A temporary restraining order or preliminary injunction must be issued in accordance with the requirements set forth in G.S. 1A-1, Rule 65 and G.S. Chapter 1, Article 37.

3. A judge may issue a preliminary injunction in a child support case when, during the pendency of the action, it appears by affidavit that the obligor threatens to, or is about to, remove or dispose of her property with the intent to defraud the obligee. [G.S. 1-485(3); *Hinnant v. Hinnant*, 258 N.C. 509, 128 S.E.2d 900 (1963) (injunction affirmed based on defendant's threats to remove his property from the state); *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984) (trial court injunction against disposition of certain marital assets).]

J. Work Requirements

1. In a IV-D case in which the obligor owes past due child support and income withholding has been ordered but cannot be implemented against the obligor, the court may order an obligor (other than an obligor who is physically or mentally incapacitated) to participate in any or all of the following work and work-related activities:

   a. Unsubsidized employment,

   b. Subsidized public or private sector employment,

   c. Community service programs,

   d. A work experience program (if sufficient private sector employment is unavailable),

   e. On-the-job training,

   f. Job readiness activities,

   g. Job search activities,

   h. Vocational education or job skills training,

   i. Providing child care to persons engaged in community service programs, or

   j. Specified educational activities or programs (if the obligor has not received a high school diploma or GED). [G.S. 110-136.3(a1); 42 U.S.C. § 607(d).]

2. After a court enters a child support order or approves a voluntary support agreement in a IV-D case, the court may order the obligor (other than an obligor who is physically or

mentally incapacitated) to participate in any or all of the work and work-related activities listed above, if appropriate. [G.S. 50-13.4(b); 110-132(b).]

K. Criminal Nonsupport

1. An obligor who willfully fails to pay child support as required by a court order may be prosecuted for criminal nonsupport under G.S. 14-322(d), 14-322.1, or 49-2. [See *Procedure for Initial Child Support Orders*, Part 2 of this Chapter, Section IV, for more on specific offenses.]
2. A first offense under G.S. 14-322(d) is a Class 2 misdemeanor. [G.S. 14-322(f).] The maximum punishment under structured sentencing for a Class 2 misdemeanor is 60 days' incarceration and a fine of up to $1,000. [G.S. 15A-1340.23(b), (c).]
3. If an obligor is convicted of criminal nonsupport, the court may suspend the obligor's incarceration and place the obligor on probation. The court must require the obligor, as a condition of probation, to satisfy child support and other family obligations as required by the court. [G.S. 15A-1343(b)(4).]
    a. In order to avoid the entry of multiple, inconsistent child support orders and to comply with the "one order" rules established by the Uniform Interstate Family Support Act and the federal Full Faith and Credit for Child Support Orders Act, the court should not enter a new child support order in the criminal proceeding pursuant to G.S. 14-322(e) or 49-7 if the obligor is required to pay child support under an existing valid child support order.
    b. If the obligor is required to pay child support under a prior valid order entered in a civil action, the court may not modify the child support order in the criminal proceeding.
4. If the court orders the obligor to pay child support as a condition of probation and the obligor willfully fails to do so, the court may revoke the obligor's probation or hold the obligor in contempt. [*See* G.S. 15A-1344, 15A-1344.1, and 15A-1345.]
5. An obligor who has been convicted or acquitted of criminal nonsupport may be charged and convicted based on his subsequent (or continued) failure to pay court-ordered child support. [*See Stephens v. Worley*, 51 N.C. App. 553, 277 S.E.2d 81 (1981) (previous acquittal on a charge of willful nonsupport not a bar to subsequent prosecution; G.S. 49-2 creates a continuing offense); *State v. Johnson*, 212 N.C. 566, 194 S.E. 319 (1937) (defendant's conviction for willfully failing to support his child did not bar prosecution for same offense committed after defendant served sentence imposed; offense was a continuing one).]
6. For more on criminal nonsupport under G.S. 49-2, see *Paternity*, Bench Book, Vol. 1, Chapter 10, Section V.

L. Federal Child Support Recovery Act (CSRA)

1. The federal Child Support Recovery Act (18 U.S.C. § 228) makes the willful failure to pay child support a federal crime if the obligor:
    a. Owes at least $5,000 in past due support (or has owed delinquent support for at least one year) for a child who lives in a state other than the state in which the obligor resides,

b. Travels in interstate or foreign commerce with the intent to evade a support obligation in the amount of at least $5,000 (or an obligation owed for at least one year), or

c. Owes at least $10,000 in past due support (or has owed delinquent support for at least two years) for a child who lives in a state other than the state in which the obligor resides. [18 U.S.C. § 228(a).]

2. State courts do not have jurisdiction over criminal prosecutions under the CSRA.

3. Referrals for prosecution under the CSRA may be made to United States Attorneys by individual obligees or their attorneys or by agencies involved in child support enforcement.

4. The United States Court of Appeals for the Fourth Circuit and other federal courts have upheld the constitutionality of the CSRA. [*See United States v. Johnson*, 114 F.3d 476 (4th Cir.) (CSRA is valid exercise of Commerce Clause powers and does not violate Tenth Amendment), *cert. denied,* 522 U.S. 904, 118 S. Ct. 258 (1997).]

IX. Non-Judicial Remedies

A. Administrative Subpoena

1. In IV-D cases, a IV-D agency may issue an administrative subpoena requiring the production of documents, records, or other information relevant to a child support enforcement proceeding. [G.S. 110-129.1(a)(1).] A "IV-D case" is a case in which services have been applied for or are being provided by a child support enforcement agency established pursuant to Title IV-D of the federal Social Security Act, as amended, and Article 9 of G.S. Chapter 110. [G.S. 110-129(7).]

a. If a person refuses to comply with an administrative subpoena issued under G.S. 110-129.1(a)(1), the IV-D agency may request that a district court judge order the person to comply with the subpoena. [G.S. 110-129.1(a)(1).]

b. The court may hold an individual in contempt or revoke the individual's licensing privileges under G.S. 50-13.12 or 110-142.2 if she willfully fails to comply with a court order requiring compliance with an administrative subpoena. [G.S. 50-13.12(b); 110-142.2(b).]

B. Enforcing Orders for Medical Support

1. When a court order requires a parent to provide health benefit plan coverage for a child, state law requires the parent's employer or health insurer to allow the parent to enroll the child for family coverage and to enroll the child for family coverage upon the request of the child's other parent (or a IV-D agency representing the other parent) if the parent fails to do so. [*See* G.S. 58-51-120(b); 108A-69(b); 42 U.S.C. § 1396g-1.]

a. State law also requires a parent's employer to withhold from the parent's compensation the parent's share of the cost of health insurance for a child when the court has ordered the parent to provide health insurance for the child. [G.S. 108A-69(b)(4).]

b. When a noncustodial parent has been ordered to provide health benefit plan coverage, state law requires the parent's health insurer to allow the custodial parent to

submit claims and receive payments for covered medical care provided to the child. [G.S. 58-51-120(c)(2) and (3).]

c. If the health insurer is a group health plan covered by the federal Employee Retirement Income Security Act (ERISA), the order requiring health insurance must be a "qualified medical child support order" (QMCSO) that creates or recognizes a child's right as an alternate recipient to receive benefits under the plan and indicates the names and mailing addresses of the parent and child, the period to which the order applies, the plan to which the order applies, and the type of coverage that must be provided. [*See* 29 U.S.C. § 1169.]

2. A IV-D agency may send a medical support notice to a parent's employer or health insurer to enforce the parent's obligation to provide health benefit plan coverage to a child. [*See* G.S. 110-136.11 through 110-136.14.]

3. An employer or health insurer who fails to comply with the requirements of G.S. 110-136.13 and 110-136.14 may be held liable for damages in a civil action. [G.S. 110-136.13(j); 110-136.14(e).]

C. Federal Income Tax Refund Offset

1. In a IV-D case, a IV-D agency may request that the Internal Revenue Service (IRS), via the federal Office of Child Support Enforcement, withhold from the federal income tax refund due an obligor the amount of child support arrearages owed by the obligor if the obligor owes at least $500 in past due child support (or at least $150 in past due child support if the child support arrearage has been assigned to the state or county as a condition of public assistance paid on behalf of the child). [*See* 42 U.S.C. § 664; 45 C.F.R. §§ 303.72(a)(2) and (3).]

   a. For more on the topic of tax intercept policy, see N.C. Dep't of Health & Human Servs., *DHHS On-Line Manuals*, *Child Support Services Enforcement*, "Tax Intercept: General Information," http://info.dhhs.state.nc.us/olm/manuals/dss/cse/man/CSEcP-20.htm#P2740_280836.

   b. An obligor is "delinquent" under 42 U.S.C. § 664 if he has failed to pay currently due court-ordered support or reimbursement payments. [*See Davis v. Dep't of Human Res.*, 349 N.C. 208, 505 S.E.2d 77 (1998) (no intercept of obligor's federal income tax refund when he was current in his court-ordered repayment plan, even though he had not completely extinguished his child support arrearage).]

2. Before an obligor's federal income tax refund is attached, the IV-D agency must notify the obligor that her federal income tax refund will be attached to pay past due child support. [42 U.S.C. § 664(a)(3)(A); 45 C.F.R. § 303.72(e)(1).] The obligor may request an administrative hearing pursuant to the state Administrative Procedure Act (G.S. Chapter 150B, Article 3 to contest attachment of her federal income tax refund to pay past due child support and may request judicial review, in superior court, of the agency's final decision. [*See Davis v. Dep't of Human Res.*, 349 N.C. 208, 505 S.E.2d 77 (1998).]

3. If the obligor has filed a joint income tax return with his current spouse, the IRS will notify the obligor's spouse of the steps to take to secure or protect his or her proper share of the refund. [42 U.S.C. § 664(a); 45 C.F.R. § 303.72(e)(1)(iv).]

D. State Income Tax Refund Offset

1. In a IV-D case, a IV-D agency may request that the state Department of Revenue withhold from the state income tax refund due an obligor the amount of child support arrearages owed by the obligor if that amount is at least $50. [*See* G.S. Ch. 105A; see G.S. 105A-4 for minimum debt).]
2. After an obligor's state income tax refund is attached, the IV-D agency must notify the obligor, in writing, that the agency has received the obligor's refund and that the agency intends to apply her state income tax refund against the child support arrearages owed by the obligor, unless the obligor makes a timely request for a hearing. [G.S. 105A-8(a).]
3. The obligor may request an administrative hearing pursuant to the state Administrative Procedure Act (G.S. Chapter 150B, Article 3) to contest attachment of his state income tax refund to pay past-due child support and may request judicial review, in superior court, of the agency's final decision. [G.S. 105A-8 and 105A-9. *See also Davis v. Dep't. of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (contested case hearing before an administrative law judge, followed by final agency decision, then appeal taken to superior court), *aff'd in part and rev'd in part,* 349 N.C. 208, 505 S.E.2d 77 (1998).]

E. License Revocation

1. In IV-D cases, the state Department of Health and Human Services may notify any state board that an obligor is "not in compliance" with a child support order or with a subpoena issued pursuant to a support proceeding. [G.S. 110-142.1(a).] "Board" in this context means any department, division, agency, officer, board, or other unit of state government that issues licenses. [G.S. 110-142(2).]
2. After notifying the obligor, each board is required to deny, suspend, or revoke the state business, occupational, or professional license of an obligor who is "not in compliance" with a child support order until such time as it receives notice from a IV-D agency that the obligor's licensing privileges may be reinstated. [G.S. 110-142.1(d), (e), (l).]
3. An obligor may not request an administrative hearing to consider a board's denial or failure to issue or renew the obligor's licensing privileges pursuant to G.S. 110-142.1. [G.S. 110-142.1(n).]
4. An obligor may, by motion in the pending child support action, request that a district court judge review the IV-D agency's actions with respect to revocation of the obligor's state business, occupational, or professional licensing privileges or to determine whether the obligor is "not in compliance" with a child support order. [G.S. 110-142.1(i), (j), (k).]

F. Administrative Liens on Bank Accounts

1. G.S. 110-139.2(b1) authorizes a IV-D agency to impose an administrative lien on the bank account of an obligor who owes unpaid child support equal to at least six months of support or $1,000, whichever is less.
    a. The administrative lien procedure under G.S. 110-139.2(b1) may be used only in IV-D cases.
    b. The administrative lien procedure under G.S. 110-139.2(b1) may be used to enforce child support orders entered by administrative agencies or courts of other states as well as child support orders entered by North Carolina courts. [G.S. 110-139.2(b1).]

2. Notice of the attachment.
   a. The IV-D agency must serve the obligor and any nonliable account owner of a joint account pursuant to G.S. 1A-1, Rule 4. [G.S. 110-139.2(b1).]
   b. The IV-D agency must serve the financial institution pursuant to G.S. 1A-1, Rule 5. [G.S. 110-139.2(b1).]
3. Contesting the attachment.
   a. An obligor or joint account owner may contest the imposition of an administrative lien against her bank account by requesting a hearing before the district court in the county in which the child support order was entered within ten days after service of the notice of lien. [G.S. 110-139.2(b1).]
   b. An obligor or joint account owner may contest the imposition of an administrative lien against his bank account based on the fact that the amount owed is less than six months of support or $1,000, whichever is less, or that he is not the person subject to the child support order being enforced. [G.S. 110-139.2(b1).]
   c. If the obligor or joint account owner contests the imposition of an administrative lien against her bank account, the district court may award court costs against the nonprevailing party. [G.S. 110-139.2(b1).]
4. A bank or financial institution that complies, in good faith, with the administrative lien procedure under G.S. 110-139.2(b1) is not liable to any person with respect to such compliance. [G.S. 110-139.2(b1).]
5. Use of the administrative lien procedure under G.S. 110-139.2(b1) does not preclude the use of other child support enforcement remedies. [G.S. 110-139.2(b1).]

G. Credit Reporting

1. In IV-D cases, IV-D agencies are required to report the names of obligors who are delinquent in paying child support and the amount of past due child support they owe. [*See* 42 U.S.C. § 666(a)(7).]
2. An obligor is "delinquent" in paying child support if he (1) owes past due child support and (2) is not in compliance with a court order or agreement specifying the manner in which the obligor may satisfy his obligation to pay the arrearage (usually, by making regular payments on the arrearage in addition to the obligor's payments for current or ongoing child support). [*See Davis v. Dep't of Human Res.*, 126 N.C. App. 383, 485 S.E.2d 342 (1997) (considering delinquency for purposes of federal income tax refund intercept), *aff'd in part and rev'd in part*, 349 N.C. 208, 505 S.E.2d 77 (1998).]
3. A IV-D agency may not report an obligor's child support arrearage to a consumer reporting agency unless it has given the obligor adequate, advance notice and a reasonable opportunity to contest the accuracy of the reported information. [*See* 42 U.S.C. § 666(a)(7)(B).]

H. Administrative Authority of IV-D Agencies

1. Federal law [42 U.S.C. §§ 666(c)(1)(G), (H).] requires that IV-D agencies have the legal authority to take the following administrative actions to enforce an obligor's child support

obligation **without prior judicial approval** when the obligor owes past due child support arrearages:

a. Intercept or seize lump sum payments from state or local agencies (including workers' compensation benefits), judgments, settlements, and lotteries; [42 U.S.C. § 666(c)(1)(G)(i).]

b. Attach and seize the obligor's assets held by financial institutions; [42 U.S.C. § 666(c)(1)(G)(ii).]

c. Attach public and private retirement funds; [42 U.S.C. § 666(c)(1)(G)(iii).]

d. Impose liens for past due child support and enforce those liens by forcing the sale of property and distribution of proceeds; [42 U.S.C. § 666(c)(1)(G)(iv).] and

e. Increase the amount of the obligor's monthly support payment to include a payment toward the child support arrearage. [42 U.S.C. § 666(c)(1)(H).]

2. Most of the federal requirements outlined above have not yet been implemented through state law. [*But see* G.S. 44-86(d)(2) (creating lien on real and personal property of a delinquent obligor in a non-IV-D case); 58-3-185 (creating lien on insurance proceeds due a beneficiary who is delinquent in child support); 110-129.1(a)(8)c (administratively increasing amount of monthly support payments); 110-136.2 (voluntary assignment by a responsible parent of unemployment compensation benefits to satisfy a child support obligation); 110-139.2 (providing for agreements between DHHS and financial institutions to facilitate enforcement of child support).]

I. Passport Denial

1. In IV-D cases, a IV-D agency, after providing notice to the obligor, may request that the U.S. Department of State, via the federal Office of Child Support Enforcement, deny an obligor's application for **issuance or renewal** of a U.S. passport or revoke, restrict, or limit a passport issued previously to the obligor, if the obligor owes at least $2,500 in past due child support. [*See* 42 U.S.C. §§ 652(k) and 654(31).]

J. Allotment of Military Pay and Pensions

1. A IV-D agency or IV-D attorney in a IV-D case, or the court (but not the obligee or obligee's attorney) in a non-IV-D case, may request that the Army, Air Force, Navy, or Marine Corps enforce a child support order against an obligor who is on active military duty if the obligor owes child support arrearages in an amount that is at least twice the amount of her monthly obligation for current support. [*See* 42 U.S.C. § 665.]

2. The procedures for requesting an involuntary military allotment to enforce an obligor's court-ordered child support obligation are set forth in 32 C.F.R. § 54.6. See also, on the use of involuntary allotments, N.C. Dep't of Health & Human Servs., *DHHS On-Line Manuals*, *Child Support Services MILITARY POLICY/PROCEDURES* "Involuntary Allotments," https://www2.ncdhhs.gov/info/olm/manuals/dss/cse/man/CSEcS-05.htm#P458_42646.

3. In many cases, requesting an involuntary allotment under 42 U.S.C. § 665 may be easier and faster than using income withholding to collect child support from an obligor who is on active military duty.

4. If an obligor receives disposable retired pay and is subject to a child support obligation contained in a divorce decree or an incorporated separation agreement (regardless of whether the obligor owes past due child support), the obligor's former spouse to whom child support is owed may request "direct payment" of the obligor's child support obligation from the obligor's military pension pursuant to the Uniformed Services Former Spouses' Protection Act. [*See* 10 U.S.C. § 1408(d).]

X. Enforcing a Claim for Child Support after the Death of the Obligor

A. Support Claims That May Be Asserted Against a Decedent's Estate

1. Even though a parent's obligation to support a minor unemancipated child terminates upon the parent's death, the parent's estate may be liable for child support arrearages that accrued before the parent's death. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (order awarding payment of past due child support from father's estate to the extent not barred by the ten-year statute of limitations affirmed), *review denied,* 304 N.C. 728, 288 S.E.2d 381 (1982).]
2. A parent may by contract or agreement create a support obligation that survives the parent's death and becomes an obligation of the parent's estate. [*See In re N.C. Inheritance Taxes,* 303 N.C. 102, 277 S.E.2d 403 (1981) (support obligation constitutes a charge against the spouse's estate if the intention that the obligation survive the spouse's death is clearly expressed); *Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (recognizing that father's common law duty to support his children terminated on his death but finding that father had by separation agreement obligated himself to pay support, which obligation survived his death and for which his estate was liable).]

B. Enforcing a Support Claim Against the Estate of the Obligor

1. For arrearages.
   a. No action pending upon death of the obligor. The surviving parent may file:
      i. A claim with the personal representative as set out in G.S. 28A-19-1 or
      ii. A complaint to recover past due child support. [*See Larsen v. Sedberry*, 54 N.C. App. 166, 282 S.E.2d 551 (1981) (mother awarded summary judgment against father's estate for unpaid child support for ten-year period prior to father's death), *review denied,* 304 N.C. 728, 288 S.E.2d 381 (1982).]
   b. For action pending, see Section X.B.3, below.
2. For support due pursuant to an unincorporated separation agreement.
   a. No action pending upon death of the obligor. The surviving parent or children may file:
      i. A claim with the personal representative as set out in G.S. 28A-19-1 for the amount claimed under the separation agreement or
      ii. A complaint against the personal representative of the decedent's estate to enforce the decedent's obligation to provide support pursuant to the separation

agreement. [*See Bradshaw v. Smith*, 48 N.C. App. 701, 269 S.E.2d 750 (1980) (children commenced an action against father's estate that sought to enforce father's support obligation, as set out in an unincorporated agreement).]

b. For action pending, see Section X.B.3, immediately below.

3. If an action is pending upon death of the obligor, a motion to substitute the personal representative of the estate of the deceased parent must be made within the time specified in the notice to creditors set out in G.S. 28A-19-3. [G.S. 1-1A, Rule 25(a).]

4. For claims filed against the decedent's estate.

   a. The claim must be filed within the time specified in the personal representative's letter to creditors or it is barred. [G.S. 28A-19-3.]

   b. If the personal representative rejects the claim, the claimant has three months after written notice of the rejection to commence an action to recover the sums sought or be forever barred. [G.S. 28A-19-16.]

   c. To trigger the three-month statute of limitation in G.S. 28A-19-16, there must be a rejection of the claim and the rejection must be absolute and unequivocal. [*Elliott v. Estate of Elliott,* 163 N.C. App. 577, 596 S.E.2d 819 (rejection of claim form accompanied by a letter inviting negotiations did not constitute an unequivocal rejection, so wife's claim for unpaid alimony was not barred by G.S. 28A-19-16), *review denied,* 358 N.C. 731, 601 S.E.2d 530 (2004).]

C. Enforcing a Support Claim Against Beneficiaries of a Decedent's Estate

1. Trial court properly imposed a constructive trust on proceeds received by sons 1 and 2 upon father's death, based on a consent order that required father to name son 3 as a beneficiary, with at least a 33 percent interest, of any life insurance policies and any other death benefits to which father was entitled through his employment. Father's failure to name son 3 as beneficiary of the relevant plans, as required by the consent order, constituted inequitable conduct that unjustly enriched sons 1 and 2. [*Myers v. Myers,* 213 N.C. App 171, 714 S.E.2d 194 (2011).]

2. The term "any other death benefits to which [father] is entitled through his employment" was not ambiguous and included proceeds, paid upon father's death, of a retirement plan and an investment plan in which father was a participant. [*Myers v. Myers,* 213 N.C. App. 171, 178, 714 S.E.2d 194, 200 (2011).]

3. While the proceeds of father's retirement and investment plans were payable under the Employee Retirement Income Security Act (ERISA) to the named beneficiaries, which were sons 1 and 2, once the funds were paid out, they were no longer governed by ERISA and became subject to a consent order that provided son 3 an interest in the funds. [*Myers v. Myers,* 213 N.C. App. 171, 714 S.E.2d 194 (2011) (trial court had concluded that, though ERISA dictated that the plan benefits be paid to the named beneficiaries, once paid, the proceeds were no longer governed by ERISA but were subject to the consent order).]

D. Servicemembers Group Life Insurance Death Benefits

1. Despite provision in Hawaii divorce decree (1) requiring father to maintain life insurance in the amount of $50,000 with his child as the primary and irrevocable beneficiary as long

as father was subject to a child support obligation and (2) further providing that if father died without doing so, father's estate would be liable, father's change of beneficiary on his Servicemembers Group Life Insurance (SGLI) policy to second wife was upheld. U.S. Supreme Court precedent holds that a servicemember's designation of beneficiary under the SGLI Act prevails over a state child support order requiring the servicemember to maintain life insurance for his child. Further support found in the anti-attachment provisions of the SGLI Act. [*Lewis v. Estate of Lewis,* 137 N.C. App. 112, 527 S.E.2d 340 (2000) (dismissal of claim for constructive trust and claims for specific performance and enforcement of the Hawaiian decree per summary judgment upheld).]

XI. Bankruptcy and Child Support Enforcement

Important Note: Except as noted, this section describes provisions of the federal bankruptcy law effective Oct. 17, 2005.

A. Bankruptcy Reform Legislation

1. On Apr. 20, 2005, the federal Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 [Pub. L. No. 109-8, 119 Stat. 23 (2005) (hereinafter Bankruptcy Reform Act).] was signed into law. It amended certain provisions of the Bankruptcy Code. The amendments relating to family law were effective Oct. 17, 2005, and apply to bankruptcy cases commenced on or after that date.
2. This legislation made several changes with respect to the treatment of child support claims in bankruptcy cases.
    a. Unsecured claims for child support arrearages owed as of the date a bankruptcy case is filed are given first priority for payment in Chapter 7 cases in which assets are to be distributed to creditors.
    b. The automatic stay (see Section XI.C, below) does not apply to the withholding of child support obligations from income that is property of the debtor or the bankruptcy estate.
    c. Confirmation of a debtor's Chapter 13 plan is conditioned on the debtor's payment of all court-ordered child support obligations that have accrued since the bankruptcy case was filed.
    d. A debtor's Chapter 13 case may be dismissed if the debtor fails to pay any child support obligation that first becomes payable after the bankruptcy case is filed.
    e. Discharge in a Chapter 13 case is contingent on the debtor's payment of all prebankruptcy child support arrearages (to the extent provided in the plan) and all court-ordered child support obligations that accrued while the bankruptcy was pending.
    f. Bona fide prebankruptcy payments of child support are not avoidable by the bankruptcy trustee.
3. For an overview of the Bankruptcy Reform Act in the area of family law, see John L. Saxon, *Impact of the New Bankruptcy Reform Act on Family Law in North*

Carolina, Fam. L. Bull. No. 20 (UNC School of Government, June 2005) (hereinafter 2005 Saxon Bulletin).

4. The provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act relating to child support and other family law matters will continue to apply in bankruptcy cases filed before Oct. 17, 2005, and pending on or after that date.
5. Additionally, provisions of the Bankruptcy Code in effect before passage of the Bankruptcy Reform Act that were not amended or repealed will continue to apply in bankruptcy cases that are filed on or after Oct. 17, 2005.

B. Definitions

1. Domestic support obligation.
   a. A "domestic support obligation" is a debt that:
      i. Accrues before, on, or after the date of the order for relief in the bankruptcy case, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of Title 11 of the U.S. Code; [11 U.S.C. § 101(14A).]
      ii. Is owed to or recoverable by the debtor's spouse, former spouse, or child, the child's parent, legal guardian, or responsible relative, or a governmental unit; [11 U.S.C. § 101(14A)(A).]
      iii. Is in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) for a debtor's spouse, former spouse, or child, or for the child's parent; [11 U.S.C. § 101(14A)(B).]
      iv. Has been established or is subject to establishment before, on, or after the date of the order for relief by a court order, divorce decree, separation agreement, property settlement agreement, or a determination by a governmental unit in accordance with applicable nonbankruptcy law; [11 U.S.C. § 101(14A)(C).] and
      v. Has not been assigned to a nongovernmental entity, unless the assignment is voluntary and for the purpose of collecting the debt. [11 U.S.C. § 101(14A)(D).]
   b. A "domestic support obligation" includes:
      i. Payments for public assistance or foster care provided on behalf of a debtor's child;
      ii. Child support permanently or temporarily assigned to a state or local government as a condition of receiving public assistance or assigned to public child support enforcement agencies for the purpose of collection; and
      iii. Child support that is owed or payable to the debtor's child or the parent, legal guardian, or responsible relative of the debtor's child. [11 U.S.C. § 101(14A); 2005 Saxon Bulletin.]
2. Debts arising from a separation or divorce other than those that qualify as domestic support obligations (DSOs).
   a. 11 U.S.C. § 523(a)(15) identifies a second type of divorce-related debt, that is, a debt to a spouse, former spouse, or child of the debtor that is not a DSO and is incurred by

the debtor in the course of a divorce or separation or in connection with a separation agreement, divorce decree, or other order of a court of record.

b. Debts under 11 U.S.C. § 523(a)(15) commonly are referred to as being in the form of a property settlement, while debts under § 523(a)(5) commonly are referred to as alimony or support. [*See In re Zeitchik*, 369 B.R. 900 (Bankr. E.D.N.C. 2007) (not subject to the Bankruptcy Reform Act).] A § 523(a)(15) debt is generally referred to herein as "a divorce-related debt that that does not qualify as a domestic support obligation" or as "a divorce-related debt that is not a domestic support obligation"

c. Whether debts are classified under § 523(a)(5) as DSOs or under § 523(a)(15) as divorce-related debts that do not qualify as DSOs is significant because DSOs generally receive preferential treatment under the Bankruptcy Code. [*See* 2005 Saxon Bulletin and Sections XI.C, D and E, below.]

d. Case law: Determining whether a claim is a domestic support obligation or a property settlement.

   i. If a party asserts a claim for unpaid child support arising from an agreement between the parties, in considering whether the claim constitutes a domestic support obligation, the bankruptcy court must determine whether the parties intended for the obligation to be in the nature of support at the time they executed the agreement. If the claim arose from a court order, the issue is whether the court issuing the order intended for the obligation to be in the nature of support. [*In re Peterson,* No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C. Nov. 29, 2012) (citing *Tilley v. Jessee,* 789 F.2d 1074 (4th Cir. 1986)) (case sets out other relevant factors for court to consider when making determination and notes that whether an obligation is in the nature of support focuses on the parties' mutual intent, making evidence of a party's unilateral intent insufficient to rebut the intent of the parties reflected in a separation agreement).]

   ii. To distinguish a domestic support obligation from property division obligations, a court may consider the labels in the agreement or court order, the income and needs of the parties at the time the obligation became fixed, the amount and outcome of property division, whether the obligation terminates on the obligee's death or remarriage or on emancipation of children, the number and frequency of payments, the waiver of alimony or support rights in the agreement, the availability of state court procedures to modify or enforce the obligation through contempt, and the tax treatment of the obligation. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (citing *In re Gianakas,* 917 F.2d 759 (3d. Cir. 1990), and 4 Collier on Bankruptcy §§ 523.11[6][a]–[h] (16th ed. 2013)); *In re Baker*, No. 12-01090-8-SWH, 2012 WL 6186683 (Bankr. E.D.N.C. Dec. 12, 2012) (factors to consider include nature of the obligation, whether there are dependent children, the relative earning power of the spouses and an indication that the obligation was an attempt to balance it, the adequacy of the dependent spouse's support without the assumption of the obligation, the dependent spouse's receipt of inadequate assets in settlement, status of the obligation upon death or remarriage, timing of payments (lump sum or periodic), the payee (direct vs. indirect),

waivers of maintenance, whether the obligation is modifiable, location of the paragraph containing the obligation within the agreement (whether or not it is located within the property distribution section), and the tax treatment of the obligation).]

e. Case law: obligations that qualified as domestic support obligations (DSOs).

i. Chapter 13 father/debtor's ongoing obligation in a separation agreement that required him to pay $680/month in child support was a DSO when it terminated when the child turned 18, left high school, or left his mother's home. Agreement by the parties to defer father's payments until the sale of the marital residence, which had not occurred four years after execution of the separation agreement, did not change the nature of the obligation into a division of marital assets. [*In re Miller*, 501 B.R. 266, 284, n.21 (Bankr. E.D. Pa. 2013) (DSO determination made in the context of the nondebtor spouse's motion for relief of the automatic stay, which is a summary proceeding conducted within thirty days of filing of a motion for relief from the stay, rather than in the context of a dischargeability proceeding, which the bankruptcy judge noted as more common and as having the "formal characteristics of full, civil litigation").]

ii. Chapter 13 father/debtor's obligation in a separation agreement to repay son $8,000 that debtor took from son's account was a DSO. Predominant purpose in requiring reimbursement was to provide for son's education, thus making obligation in the nature of support. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013).]

iii. Wake County district court judge's pre-petition determination that husband owed a child support arrearage in excess of $41,000, along with language in the separation agreement, was basis for bankruptcy court's determination that child support arrearage, was a domestic support obligation. [*In re Peterson,* No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C. Nov. 29, 2012); *In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (a pre-petition determination in a state court contempt proceeding that father owed $18,000+ in past due child support was a DSO).]

iv. Interest that accrued pursuant to nonbankruptcy law on unpaid child support was itself a DSO. [*In re Wright,* 438 B.R. 550 (Bankr. M.D.N.C. 2010) (per the definition in 11 U.S.C. § 101(14A), a domestic support obligation based on unpaid child support includes the interest that accrues pursuant to applicable nonbankruptcy law; under Alabama law, court-ordered child support payments become final judgments as of the date due and accrue interest at the 12 percent statutory rate from that date; accrued interest of $7,325 on arrearages of $3,143 was a DSO).]

f. Case law: overpayments of child support or orders for reimbursement of wrongly paid child support as domestic support obligations (DSOs).

i. Whether overpayment of child support or an order for reimbursement of wrongly paid child support constitutes a DSO depends on the facts of the case. [*See In re Kloeppner,* 460 B.R. 759 (D. Minn. 2011) (individual who paid support for child he believed he fathered was awarded in state court $10,622 for

amount of support paid and costs of genetic testing; claim was discharged in debtor/mother's bankruptcy proceeding as not being a DSO; individual was not a spouse or former spouse of the debtor when parties never married, award was not for the child and was not in the nature of support but was, rather, return of money that should never have been paid), and *In re Knott,* 482 B.R. 852 (Bankr. N.D. Ga. 2012) (final order of Florida court determined husband had overpaid child support during five-year period of shared custody and also after he obtained full custody; overpayment in excess of $41,000, the majority of which was the result of wife's improper actions, was in the nature of support and was a nondischargeable DSO).] Both cases cite decisions that have reached different results.]

g. Case law: attorney fees as domestic support obligations (DSOs).

i. Award in district court of $35,000 in attorney fees pursuant to G.S. 50-13.6 in proceeding for child custody and child support was a DSO. [*In re Peterson,* No. 12-00793-8-SWH, 2012 WL 5985269 (Bankr. E.D.N.C. Nov. 29, 2012) (even if all the attorney fees did not directly relate to the enforcement of child support, the bankruptcy court found the entire fee award was in the nature of support, interpreting the district court finding that mother had insufficient means to pay the fees to mean that the district court judge intended for the fees themselves to be for support; bankruptcy court also rejected father's argument that because district court ordered child support arrearages to be paid in $100 monthly installments and attorney fees to be paid in $3,000 quarterly payments, that those claims should be treated in the debtor's Chapter 13 plan as a long-term debt obligation under 11 U.S.C. § 1322(b)(5); as a priority claim, a DSO must be paid in full through the plan unless holder of claim agrees to other treatment); *In re Pennington*, No. 10-31642, 2011 WL 6210729 (Bankr. W.D.N.C. Dec. 14, 2011) (attorney fees that father incurred in a custody case, which state court ordered mother to pay, was a nondischargeable DSO in mother's Chapter 7 bankruptcy proceeding; general rule is that award of attorney fees in domestic cases generally deemed to be in the nature of support for purposes of 11 U.S.C. § 523(a)(5); 11 U.S.C. § 523(a)(15) was alternate basis for finding attorney fees award nondischargeable); *In re Baker*, No. 12-01090-8-SWH, 2012 WL 6186683 (Bankr. E.D.N.C. Dec. 12, 2012) (entire amount of attorney fees awarded in divorce and related proceedings was a DSO, even if a portion of the fees may have been unrelated to support payments).]

ii. Even though the statutory definition of a DSO provides that it is a debt that is "owed to or recoverable by" a spouse, former spouse, or child of the debtor, a debt owed or payable to an attorney arising out of a domestic case may be a DSO because it is the nature of the debt that controls, not the identity of the payee. [*McNeil v. Drazin*, 499 B.R. 484, 491 (D. Md. 2013) (citing *In re Pennington*, No. 10-31642, 2011 WL 6210729 (Bankr. W.D.N.C. Dec. 14, 2011)) (fees of attorney appointed to represent children of the divorcing couple were a DSO in debtor/father's Chapter 13 proceeding; as long as debt is "in the nature of support," it does not have to be directly payable to a spouse or a minor child), *aff'd per curiam*, 562 F. App'x 179 (4th Cir. 2014) (**unpublished**); *Pennington* (it is the

nature of the debt, not the identity of the creditor, that controls; it was irrelevant that family members had paid a portion of fees father had incurred and that debtor mother was ordered to pay).]

3. Property of the bankruptcy estate.
   a. Chapter 7.
      i. In a Chapter 7 bankruptcy case, the bankruptcy estate generally includes property that the debtor owned at the time he filed for bankruptcy (as well as certain property previously owned by the debtor) and excludes most, **but not all**, income and property acquired by the debtor **after** he filed for bankruptcy. [*See* 11 U.S.C. § 541.]
      ii. Property of the estate does not include property that the debtor is allowed to keep as exempt from bankruptcy. [*See* 11 U.S.C. § 522 on exemptions.] For other property that is not included as property of the estate, including but not limited to funds placed in education individual retirement accounts, 529 college savings plans, and amounts withheld or placed in certain pension or retirement plans, see 11 U.S.C. § 541(b).
   b. In a Chapter 13 bankruptcy case, the bankruptcy estate includes the property included in the estate of a Chapter 7 debtor described above, as well as property (including wages and income) acquired by the Chapter 13 debtor **after** she files for bankruptcy. [*See* 11 U.S.C. § 1306(a); *In re Gellington*, 363 B.R. 497 (Bankr. N.D. Tex. 2007) (when the debtor's postconfirmation wages are provided for in, and used to fund, his Chapter 13 plan, they are considered property of the estate).]

C. Automatic Stay

1. When a debtor files a bankruptcy petition, federal law automatically and immediately imposes a stay precluding the debtor's creditors (including child support obligees and IV-D agencies) and others (including state courts) from taking certain actions against the debtor, the debtor's property, or property of the bankruptcy estate. [*See* 11 U.S.C. § 362(a).]
   a. The automatic stay applies to:
      i. Any act to collect, assess, or recover a claim against the debtor that arose before the debtor filed for bankruptcy; [11 U.S.C. § 362(a)(6).]
      ii. The setoff of any prebankruptcy debt owed to the debtor against any claim against the debtor (regardless of whether the claim against the debtor arose before or after the debtor's bankruptcy); [11 U.S.C. § 362(a)(7).] and
      iii. The commencement or continuation of any legal proceeding to recover a claim against the debtor that arose before the debtor's bankruptcy. [11 U.S.C. § 362(a)(1).] This provision stays:
         (a) The commencement or continuation of a civil contempt proceeding against a debtor for failure to pay a prepetition domestic support obligation (DSO), even if the proceeding does not involve property of the bankruptcy estate; 2005 Saxon Bulletin.]

(b) A proceeding to attach or garnish a debtor's bank account or other property to collect a prepetition DSO. [2005 Saxon Bulletin.]

iv. The enforcement against the debtor or against property of the estate of a judgment obtained before the debtor's bankruptcy. [11 U.S.C. § 362(a)(2).] This provision stays:

(a) The issuance or execution of a writ of execution or the commencement or continuation of supplemental proceedings to enforce a judgment for a prepetition domestic support obligation (DSO); [2005 Saxon Bulletin.]

(b) The commencement of a civil contempt proceeding against a debtor for failure to pay a postpetition DSO **unless** the support will be paid from property that is not property of the estate. [2005 Saxon Bulletin.]

v. Any act to create, perfect, or enforce any lien against property of the estate. [11 U.S.C. § 362(a)(4).] This provision stays:

(a) The enforcement or collection of a postpetition DSO through the creation, perfection, or enforcement of a lien on property of the estate. [2005 Saxon Bulletin.]

vi. Any act to create, perfect, or enforce against property of the debtor any lien to the extent the lien secures a claim that arose before the commencement of the case. [11 U.S.C. § 362(a)(5).] This provision stays:

(a) The creation, perfection, or enforcement of a lien against the debtor's property or property of the estate that secures a prepetition DSO. [2005 Saxon Bulletin.]

b. Any action taken in violation of the automatic stay is void, and a creditor who willfully violates the automatic stay may be liable for actual damages, including costs and attorney fees, and, in appropriate circumstances, may recover punitive damages. [11 U.S.C. § 362(k); *In re Gruntz,* 202 F.3d 1074, 1082 n.6 (9th Cir. 2000) (because judicial proceedings in violation of the stay are void *ab initio,* the bankruptcy court is not obligated to extend full faith and credit to such judgments).]

2. Actions to which the automatic stay is not applicable or that do not violate the automatic stay. The automatic stay does not apply to:

a. "[T]he commencement or continuation of a civil action or proceeding . . . for the establishment or modification of an order for [a] domestic support obligation[.]" [11 U.S.C. § 362(b)(2)(A)(ii).]

i. Relief from the stay is not needed to seek an order in state court establishing or modifying the amount of the debtor's permanent child support obligation. [11 U.S.C. § 362(b)(2)(A)(ii); *In re Miller*, 501 B.R. 266 (Bankr. E.D.Pa. 2013) (under 11 U.S.C. § 362(b)(2)(A)(ii), determinations as to the existence and amount of a DSO are not subject to the automatic stay); *In re Forkish*, No. 09-06373-8-SWH, 2010 WL 468092 (Bankr. E.D.N.C. Feb. 2, 2010) (noting that if debtor's ex-spouse had taken action to establish or modify child support in state court after debtor filed his bankruptcy petition, that action would be excepted from the automatic stay); *In re Diaz*, No. 03-14091C-7G, 2004 WL 252049 (Bankr. M.D.N.C. Feb. 11, 2004) (**unpublished**) (movant free to seek in

state court an order establishing the amount of debtor's permanent child support obligation without obtaining relief from the stay) .]

ii. Appearing in state court to establish the amount of attorney fees related to the nonpayment of child support did not violate the automatic stay. [*In re Forkish,* No. 09-06373-8-SWH, 2010 WL 468092 (Bankr. E.D.N.C. Feb. 2, 2010) (no attempt after the bankruptcy filing to collect the attorney fees or to have the debtor incarcerated for nonpayment).]

b. The collection of a domestic support obligation (DSO) from property that is not property of the bankruptcy estate. [11 U.S.C. § 362(b)(2)(B); see Section XI.B.3, above, for definition of property of the estate.] Conversely, the collection of a DSO from property of the bankruptcy estate **is** subject to the automatic stay.

i. Under 11 U.S.C. § 362(b)(2)(B), the actual collection of a DSO may proceed when collection is from a source other than property of the bankruptcy estate. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013).]

c. The continuation or commencement of income withholding against property of the bankruptcy estate or property of the debtor for payment of a DSO under a judicial or administrative order or statute. [11 U.S.C. § 362(b)(2)(C).] This authorizes income withholding against a debtor's postpetition wages for current and past due child support after a debtor files a Chapter 13 bankruptcy case. [2005 Saxon Bulletin.]

i. This exception is broader than the exception in 11 U.S.C. § 362(b)(2)(B), set out above, in that it allows for withholding of income that is property of the estate and therefore, includes postpetition property such as the postpetition earnings of a Chapter 13 debtor. [*In re Miller*, 501 B.R. 266, 279 n.15 (Bankr. E.D. Pa. 2013) (calling the revision by the Bankrtupcy Reform Act of this provision to allow withholding from property of the estate "significant" but noting in footnote 15 a division regarding the scope of this exception to the automatic stay; some courts have construed the exception broadly to allow "virtually any creditor action to enforce a DSO," including effectuating withholding through contempt, while other courts have construed the provision more narrowly, allowing only actions to withhold income in order to collect on a DSO).]

ii. The state of Florida's continued collection through wage garnishment of a prepetition DSO did not violate the automatic stay. [*In re Fort,* 412 B.R. 840 (Bankr. W.D. Va. 2009) (however, Florida's post-confirmation continuation of a wage deduction order, in excess of the amount provided in the debtor's confirmed plan, violated 11 U.S.C. § 1327(a), which makes the provisions in a confirmed plan binding upon each creditor).] .

d. The withholding, suspension, or restriction of a driver's license, a professional or occupational license, or a recreational license, in accordance with applicable state and federal law. [11 U.S.C. § 362(b)(2)(D).] This allows a debtor's child support obligation to be enforced postpetition through license revocation proceedings. [2005 Saxon Bulletin.]

e. Reporting of overdue child support to consumer reporting agencies. [11 U.S.C. § 362(b)(2)(E).]

f. The collection or enforcement of a DSO through the interception of a tax refund in accordance with federal and state law. [11 U.S.C. § 362(b)(2)(F).] A child support agency is authorized to attach a debtor's state or federal tax refund to enforce a debtor's child support obligation. [2005 Saxon Bulletin.]

g. The enforcement of a debtor's medical support obligation, as specified under title IV of the Social Security Act. [11 U.S.C. § 362(b)(2)(G).]

h. The commencement or continuation of a criminal action or proceeding against the debtor. [11 U.S.C. § 362(b)(1).]

i. Notwithstanding the language of the statute, some courts have determined that if the actual purpose of the criminal proceeding is to collect a debt, then the automatic stay is applicable. [*See In re Bibbs,* 282 B.R. 876 (Bankr. E.D. Ark. 2002) (finding that stay did not apply to criminal proceedings relating to debtor's hot check offenses, including enforcement of orders to pay fines and restitution; opinion includes lengthy review of cases finding stay applicable).]

ii. Other courts have found the automatic stay not applicable to any criminal proceeding.

(a) Automatic stay did not apply to preclude state court criminal proceedings against Chapter 11 debtor for failure to pay child support. [*In re Gruntz,* 202 F.3d 1074 (9th Cir. 2000) (state criminal action not enjoined by automatic stay even if the prosecution was motivated by the complaining witness's desire to collect a debt).]

(b) Automatic stay not applicable to government's enforcement of criminal fine and costs imposed on a debtor in a prepetition criminal proceeding. [*United States v. Troxler Hosiery Co.,* 41 B.R. 457 (M.D.N.C. 1984), *aff'd,* 796 F.2d 723 (4th Cir. 1986), *cert. denied,* 480 U.S. 930, 107 S. Ct. 1566 (1987).]

(c) Automatic stay did not preclude the holding of a probation violation hearing based on debtor's failure to repay restitution and fees as set out in a pre-petition schedule. [*In re Coulter,* 305 B.R. 748 (Bankr. D.S.C. 2003) (review of unpublished Fourth Circuit Court of Appeals opinions on the subject included).]

(d) Automatic stay did not apply to action of the state to revoke probation for failure to make restitution payments arising from a felony theft conviction, regardless of the motive behind the state's actions. [*Bryan v. Rainwater,* 254 B.R. 273 (N.D. Ala. 2000) (stating that continuation of a criminal proceeding is not subject to the automatic stay, notwithstanding the fact that the proceedings might involve an attempt to collect, assess, or recover a claim).]

(e) Government prosecutors could initiate and continue criminal prosecution of debtor without violating automatic stay, even if the primary purpose of the prosecution was to collect a dischargeable debt. [*In re Byrd*, 256 B.R. 246 (Bankr. E.D.N.C. 2000) (prepetition criminal proceedings for larceny based on bad checks issued by debtor to Las Vegas casinos did not violate automatic stay or discharge injunction).]

(f) Criminal proceeding to revoke probation for debtor's failure to pay child support not stayed by a bankruptcy filing, regardless of motivation. [*In re Rollins,* 243 B.R. 540 (N.D. Ga. 1997) (noting that most courts that have construed 11 U.S.C. § 362(b)(1) have concluded that the plain meaning of the term "criminal action" includes all criminal actions, regardless of the motivation or purpose behind the criminal action), *aff'd in unpublished opinion,* 140 F.3d 1043 (11th Cir. 1998).]

3. Duration of the stay.
   a. The automatic stay against actions against the debtor or the debtor's property remains in effect until:
      i. The bankruptcy court grants relief from the stay for cause; [11 U.S.C. § 362(d)(1).]
      ii. The debtor's bankruptcy case is closed or dismissed; [11 U.S.C. § 362(c)(2).] or
      iii. The debtor is denied or granted a discharge (usually about sixty days after the creditors meeting in a Chapter 7 case or, in a Chapter 13 case, after the debtor completes her Chapter 13 plan, generally within three to five years of the debtor's bankruptcy). [11 U.S.C. § 362(c)(2).]
   b. The automatic stay against actions against property of the bankruptcy estate remains in effect until the bankruptcy court grants relief from the stay or the property is no longer property of the bankruptcy estate. [*See* 11 U.S.C. § 362(c)(1); see Section XI.B.3, above, for definition of property of the estate.]
   c. The duration of the stay is limited in cases where the debtor has multiple filings. [*See* 11 U.S.C. § 362(c)(3).]
4. Effect of confirmation of a Chapter 13 plan on the automatic stay.
   a. A debtor's Chapter 13 plan generally (but not always) provides that property of the bankruptcy estate becomes the debtor's property upon confirmation of the plan, except to the extent necessary to fund the plan. [*See* 11 U.S.C. § 1327(b).]
   b. When the property of the bankruptcy estate becomes the debtor's property following confirmation of the debtor's Chapter 13 plan, it is no longer subject to the automatic stay as it applies to property of the bankruptcy estate but remains subject to the automatic stay under 11 U.S.C. § 362(a)(5) and, notwithstanding 11 U.S.C. § 362(b)(2)(B), is held by the debtor free and clear of the interest of a child support creditor to the extent that the child support claim is provided for in the debtor's Chapter 13 plan. [*See* 11 U.S.C. § 1327(c); *In re McGrahan*, 459 B.R. 869, 874 (B.A.P. 1st Cir. 2011) (upon confirmation, "a creditor's rights and interests are defined within the boundaries of the plan, and proceedings that are inconsistent with the confirmed plan are improper, even if they fall within an exception to the automatic stay").]
5. Relief from the stay.
   a. A North Carolina district court lacks jurisdiction to grant relief from the automatic stay. Only the federal bankruptcy court can grant relief from the automatic stay. [*See* 11 U.S.C. § 362(d); see Section XI.C.6, below, for state court's authority to determine applicability of the automatic stay to a state court proceeding.]
   b. An obligee may file a motion with the federal bankruptcy court seeking relief from the automatic stay. [*See* Fed. R. Bankr. P. 4001(a).]

c. A motion for relief from the automatic stay is automatically granted thirty days after the motion is filed unless the bankruptcy court, after hearing, orders that it be continued. [11 U.S.C § 362(e).]

d. A bankruptcy court generally will grant relief from the automatic stay to allow collection of child support obligations that accrue **after** an obligor files for bankruptcy.

e. An obligor generally may stipulate to relief from the automatic stay with respect to child support enforcement if it is approved by the bankruptcy court on the debtor's motion after notice to creditors. [Fed. R. Bankr. P. 4001(d).]

f. A nondebtor spouse's motion for relief from the automatic stay, filed in former husband's Chapter 13 proceeding, was granted as to the following obligations of the debtor spouse, allowing the nondebtor spouse to proceed on all of her state court remedies: ongoing child support pursuant to a separation agreement, past due prepetition child support as ordered in a state court contempt proceeding, and repayment of $8,000 that debtor took from son's account, all of which were found to be domestic support obligations. [*In re Miller*, 501 B.R. 266 (Bankr. E.D. Pa. 2013) (stay not lifted on the debtor's obligation in the separation agreement to cooperate in the sale of the marital residence).]

6. A state district court judge may determine whether a matter pending before the court is stayed by a party's bankruptcy.

a. If an obligor asserts the automatic stay as a defense in a child support enforcement proceeding in state court, the district court judge in the pending child support action may determine whether enforcement of the child support order violates the automatic stay, and the state court's decision regarding the applicability of the automatic stay is res judicata in the pending bankruptcy case. [*See In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999) (stating that the debtor confused jurisdiction to grant relief from the stay under 11 U.S.C. § 362(d), over which the bankruptcy court has exclusive jurisdiction, with jurisdiction to determine whether the stay applies in the first place, which a nonbankruptcy court may determine).]

b. In *In re Singleton*, 230 B.R. 533 (B.A.P. 6th Cir. 1999), the state court determined that the debtor's personal Chapter 13 bankruptcy did not stay the foreclosure sale of property owned by the debtor's corporation, a decision which the Bankruptcy Appellate Panel determined was within the jurisdiction of the state court.

D. Status, Priority, and Payment of Child Support Claims

1. Priority of domestic support obligations (DSOs).

a. An unsecured claim for a DSO, including one assigned to a government agency or owed directly to a governmental unit, is entitled to payment as a first priority claim. [11 U.S.C. § 507(a)(1); *In re Smith*, Case No. 07-01509-8-JRL (E.D.N.C. Sept. 13, 2007) (under § 507(a)(1), a DSO is elevated ahead of all administrative costs, including attorney fees).]

b. A divorce-related debt that does not qualify as a DSO is a general unsecured claim with no priority. [11 U.S.C. § 507(a) (no priority for § 523(a)(15) debt in the general priority provision). *See also In re Bornemann*, No. 07-cv-528-JPG, 2008 WL 818314

(S.D. Ill. Mar. 21, 2008) (noting that a debt that results from a property settlement is a general unsecured claim with no priority).]

c. Language in an incorporated separation agreement that specifically assigned certain marital debt to each party for payment and waived child support and spousal support was an equitable division of property and was not a DSO entitled to priority. [*In re Ludwig*, 502 B.R. 466 (Bankr. W.D. Va. 2013).]

2. Treatment of domestic support obligations (DSOs) in a Chapter 13 plan.

a. Prebankruptcy DSOs (arrearages).

i. With two exceptions, a Chapter 13 plan must provide for full payment of all claims entitled to priority under Section 507 of the Bankruptcy Code, which includes prebankruptcy DSOs. [11 U.S.C. § 507(a)(1); 11 U.S.C. § 1322(a)(2).] Full payment is required unless:

(a) The claim holder consents to different treatment [11 U.S.C. § 1322(a)(2).] or

(b) The unsecured claim for a DSO has been assigned to a government agency for collection purposes only and the debtor's plan commits all the debtor's disposable income to plan payments required for the five-year period allowed to complete the plan. [11 U.S.C. § 1322(a)(4); 11 U.S.C. § 507(a)(1)(B).]

ii. A Chapter 13 plan may provide for payment of secured or unsecured prebankruptcy child support arrearages through the bankruptcy trustee regardless of whether the claim is entitled to priority under 11 U.S.C. § 507(a).

iii. To the extent that an obligor's Chapter 13 plan provides for payment of pre-bankruptcy child support arrearages, an obligee may not take any action to enforce the arrearage against the obligor's income or property following confirmation of the Chapter 13 plan. [*See* 11 U.S.C. § 1327(c).]

b. Postbankruptcy DSOs (current support obligations).

i. In a Chapter 13 case, child support payments that become due after an obligor files for bankruptcy must be paid "outside" the obligor's Chapter 13 plan rather than through the bankruptcy trustee.

ii. An obligee, however, may object to confirmation of the obligor's Chapter 13 plan if the obligor's disposable income is insufficient to pay the obligor's current child support obligation plus the obligor's necessary living expenses and payments under the Chapter 13 plan. [*See* 11 U.S.C. § 1325(a)(6); *In re Dorf,* 219 B.R. 498 (Bankr. N.D. Ill. (1998) (debtor's Chapter 13 plan not feasible when, after paying for personal needs, funds were sufficient to pay only the prebankruptcy support arrearage, leaving nothing to make the postbankruptcy monthly spousal support obligation).]

c. Safeguards to ensure payment of pre- and postbankruptcy DSOs.

i. A Chapter 13 plan may not be confirmed if the debtor has not paid all DSOs that have accrued after the filing of the petition if the debtor is required to do so by a judicial or administrative order. [11 U.S.C. § 1325(a)(8).]

ii. A Chapter 13 plan may be dismissed if the debtor fails to pay any DSOs that have accrued after the filing of the petition. [11 U.S.C. § 1307(c)(11).]

iii. A court may refuse to grant a discharge if the debtor has failed to pay all pre-bankruptcy and postbankruptcy DSOs in accordance with a judicial or administrative order and, with respect to pre-bankruptcy DSOs, in accordance with the Chapter 13 plan. [11 U.S.C. § 1328(a).]

3. Jurisdiction to determine amount, status, and priority of a claim.

   a. If the obligor or trustee files an objection to the obligee's claim for child support, the bankruptcy court has jurisdiction to determine the amount, status, and priority of the claim. [*See* 11 U.S.C. § 502; FED. R. BANKR. P. 3007.]

   b. A prior decision by a state court determining the validity of a child support claim or the amount of child support arrearages owed by an obligor who files for bankruptcy is res judicata and may not be collaterally attacked by the obligor in the pending bankruptcy case. [*See In re Sullivan*, 122 B.R. 720 (Bankr. D. Minn. 1991) (res judicata precluded Chapter 7 debtor from contesting the existence, validity, and amount of debt arising from default judgment of $20,000 for unlawful battery); *see also In re Audre, Inc.,* 202 B.R. 490 (Bankr. S.D. Cal. 1996) (federal district court lacks jurisdiction to review final determinations of state court decisions), *aff'd*, 216 B.R. 19 (B.A.P. 9th Cir. 1997).]

   c. A bankruptcy court may abstain from determining the amount of a child support claim in the pending bankruptcy case and allow a state court to determine the amount of the arrearage. [28 U.S.C. § 1334(c). *See In re Kriss*, 217 B.R. 147 (Bankr. S.D.N.Y. 1998) (listing seven factors used to determine whether to remand matter to state court), and *In re Franklin,* 179 B.R. 913 (Bankr. E.D. Cal. 1995) (balancing twelve factors when considering discretionary abstention).]

E. Dischargeability of Domestic Support Obligations and Other Divorce-Related Claims

1. Nondischargeable debts under 11 U.S.C. § 523(a)(5) include:

   a. Debts for a DSO owed directly to a governmental unit; [11 U.S.C. § 101(14A)(A)(ii).]

   b. Debts for child support that have been voluntarily assigned to a nongovernmental entity or individual for the purpose of collection only; [11 U.S.C. § 101(14A)(D).]

   c. Debts owed to the debtor's child or to the parent, legal guardian, or responsible relative of the debtor's child; [11 U.S.C. § 101(14A)(A)(i).] and

   d. Debts that are in the nature of support established pursuant to provisions in a separation agreement or property settlement agreement. [11 U.S.C. §§ 101(14A)(B) and (C)(i). *See In re Crosby*, 229 B.R. 679 (Bankr. E.D. Va. 1998) (agreement to pay college expenses was in nature of additional "support," and thus was not dischargeable in bankruptcy); *In re Johnson,* 397 B.R. 289 (Bankr. M.D.N.C. 2008) (husband's agreement in a separation agreement to pay second deed of trust on marital residence was obligation in the nature of support for wife and child, was not dischargeable, and had to be paid in full under husband's Chapter 13 plan).]

2. Procedure and jurisdiction to determine the dischargeability of a claim.

   a. The debtor or any creditor may file an adversary proceeding in bankruptcy court at any time to determine the dischargeability of a child support claim. [FED. R. BANKR. P. 4007(a) and (b).]

b. If an adversary proceeding regarding the dischargeability of a child support claim has not been filed and decided by the bankruptcy court, a state court has concurrent jurisdiction with the federal bankruptcy court to determine the dischargeability of the support claim, and its decision regarding dischargeability is res judicata. [*See In re McGregor*, 233 B.R. 406 (Bankr. S.D. Ohio 1999) (finding that a state court has jurisdiction to decide that a debt is nondischargeable for the debtor's failure to list the creditor in its schedules); *see also In re Franklin,* 179 B.R. 913 (Bankr. E.D. Cal. 1995) (discussing "poorly understood" question regarding the concurrent jurisdiction of state and federal courts to determine whether particular debts are discharged in a bankruptcy case).]

c. A debtor has the right to remove a case involving the dischargeability of a child support claim from state court to the federal bankruptcy court. [28 U.S.C. § 1334(b) and 28 U.S.C. § 1452(a).]

3. Discharge in a Chapter 7 case commenced on or after Oct. 17, 2005.

a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 7 case. [11 U.S.C. § 523(a)(5); 2005 Saxon Bulletin.]

b. A divorce-related debt that is not a DSO is nondischargeable in a Chapter 7 case. [11 U.S.C. § 727(b); 11 U.S.C. § 523(a)(15); 2005 Saxon Bulletin.]

c. Thus, in Chapter 7 cases commenced on or after Oct. 17, 2005, distinctions between a DSO, governed by 11 U.S.C. § 523(a)(5), and other types of divorce-related debts, governed by 11 U.S.C. § 523(15), are immaterial, as both types of debts are nondischargeable. [*In re Johnson*, 397 B.R. 289 (Bankr. M.D.N.C. 2008) (citing *In re Douglas*, 369 B.R. 462 (Bankr. E.D. Ark. 2007)).]

4. Discharge in a Chapter 13 case commenced on or after Oct. 17, 2005.

a. A debt for a domestic support obligation (DSO) is nondischargeable in a Chapter 13 case. [11 U.S.C. § 523(a)(5); 11 U.S.C. § 1328(a)(2); *In re Hutchens*, 480 B.R. 374 (Bankr. M.D. Fla. 2012) (a Chapter 13 discharge has no impact on unpaid back child support and alimony arrearages and does not discharge those debts).]

b. A divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case. [11 U.S.C. § 1328(a)(2) (no exception for § 523(a)(15) debt); *In re Hutchens*, 480 B.R. 374, 386 (Bankr. M.D. Fla. 2012) (noting that "the law is now well-settled that a claim for a property settlement arising from divorce proceedings can . . . be discharged in a Chapter 13 case if a debtor makes all the required payments under a plan and receives a full compliance discharge under [11 U.S.C.] § 1328(a)."] Thus, a Chapter 13 debtor will be discharged from a § 523(a)(15) divorce-related debt that was not paid in full under the plan provided the debtor made all payments required by the Chapter 13 plan. A full compliance discharge does not mean that the creditor spouse's divorce-related debt that was not a DSO was paid in full. [*See In re Siegel*, 414 B.R. 79 (Bankr. E.D.N.C. 2009) (Chapter 13 debtor's obligation to indemnify and hold his former spouse harmless with respect to the parties' home equity line of credit debt was not a DSO entitled to priority; rather, the hold-harmless agreement was part of the parties' property settlement and, as such, was not a priority claim that had to be

paid in full).] A full compliance discharge means that the debtor spouse made all payments required under the plan and any balance due the creditor spouse after completion of the plan is discharged.

c. Since a divorce-related debt that is not a DSO is dischargeable in a Chapter 13 case under 11 U.S.C. § 1328(a), the end result is that a debtor who receives a discharge under 11 U.S.C. § 1328(a) may discharge a debt that cannot be discharged in a Chapter 7 case. Thus, whether a debt is determined to be a DSO or a divorce-related debt that is not a DSO is important in a Chapter 13 case.

d. EXCEPTION: A divorce-related debt that is not a DSO is not discharged in a Chapter 13 case when the debtor applies for and is granted a discharge pursuant to 11 U.S.C. § 1328(b), referred to sometimes as a hardship or best efforts discharge. [11 U.S.C. § 523(a).]

   i. In some cases, a debtor is unable to complete the payments required by a Chapter 13 plan. If the debtor's failure to complete all plan payments is due to circumstances for which the debtor should not justly be held accountable, unsecured creditors received at least the amount that they would have received in a Chapter 7 proceeding, and modification of the debtor's Chapter 13 plan is not practicable, the bankruptcy court may grant the debtor a discharge under 11 U.S.C. § 1328(b). [11 U.S.C. § 1328(b).]

   ii. The discharge the debtor receives pursuant to 11 U.S.C. § 1328(b) is more limited than a full compliance discharge under 11 U.S.C. § 1328(a) and does not discharge a divorce-related debt that does not qualify as a DSO. [*See* 11 U.S.C. § 1328(c) (a discharge under § 1328(b) does not discharge any debt specified in 11 U.S.C. § 523(a)); *In re Hutchens*, 480 B.R. 374, 386 n.11 (Bankr. M.D. Fla. 2012) (under a § 1328(b) discharge, "none of the debts incurred in the course of a divorce proceeding would be dischargeable, including a property division.").]

CHECKLIST

Findings for Initial Child Support

- ❑ 1. Personal jurisdiction
  - ❑ Notice or service of process
  - ❑ Relationship of defendant to the State (for due process, "minimum contacts")
- ❑ 2. Names and birth dates of all children covered by the order
- ❑ 3. Names and birth dates of both parties
- ❑ 4. Relationship of parties and relationship of each party to the child(ren)
  - ❑ If someone other than a parent is ordered to pay support, need findings to establish that the person has undertaken to pay support in a written agreement or that the person is a grandparent obligated to pay support pursuant to G.S. 50-13.4 for a grandchild born to a minor child
- ❑ 5. If parties have an unincorporated separation agreement addressing child support, see paragraph 17, below, for additional required findings
- ❑ 6. Present actual income of both parents
- ❑ 7. If imputing income rather than using actual present income to set support, see paragraph 18, below, for additional required findings
- ❑ 8. Custodial arrangement
- ❑ 9. For N.C. Child Support Guidelines cases, identify appropriate worksheet and attach completed child support worksheet to child support order
  - ❑ When income level exceeds the Guidelines and worksheets are not used, see paragraph 19, below, for additional required findings
  - ❑ When requested to deviate from the Guidelines, when deviating upon the court's own motion, or when evidence has been presented as to the factors in G.S. 50-13.4(c), even though no request for deviation was made, see paragraph 20, below, for additional required findings
- ❑ 10. Work-related child care expenses, if any
- ❑ 11. Health care premiums; portion attributable to child(ren) if family policy
- ❑ 12. Amount of support ordered to be paid
- ❑ 13. Date from which support is to be paid
  - ❑ Presumption is that support is payable from date action is filed
    - ❑ Payment from time after filing needs findings to support a deviation. See paragraph 20, below, for additional required findings

- ❏ If support is ordered for time before complaint was filed (retroactive support), see paragraph 21, below, for additional required findings

❏ 14. Manner of payment

- ❏ IV-D cases: payable only to the State Child Support Collection and Disbursement Unit
- ❏ Non-IV-D cases: payable to custodial parent, other person, or to the State Child Support Collection and Disbursement Unit
- ❏ Lump sum, periodic monthly payment, and/or transfer of property

❏ 15. Income withholding

- ❏ Must order withholding in all IV-D cases unless court finds that:
  - ❏ Obligor is unemployed; or
  - ❏ The amount of obligor's disposable income is unknown; or
  - ❏ Both parties agree to an alternative method of payment
- ❏ Must order income withholding in all non-IV-D cases unless court finds that:
  - ❏ Parties agree in writing to an alternative method; or
  - ❏ Considering obligor's employment history and record of meeting financial obligations in a timely manner, there is a reasonable and workable plan that ensures consistent and timely payments by an alternative method of payment; or
  - ❏ Good cause exists not to require withholding

❏ 16. Allocation of unreimbursed medical expenses

❏ 17. When parties have an unincorporated separation agreement regarding child support

- ❏ Amount provided for support in the agreement
- ❏ The needs of the child(ren) at the time of the hearing and all factors listed in G.S. 50-13.4(c) about which evidence is presented
  - ❏ G.S. 50-13.4(c) factors: the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case
- ❏ Considering the findings listed in the first two checkboxes under paragraph 17 above, a conclusion regarding whether party has rebutted presumption that amount provided in agreement is just and reasonable, by the greater weight of the evidence
- ❏ If presumption is not rebutted, support set in amount provided in agreement; finding that application of the Guidelines would be inappropriate
- ❏ If presumption rebutted, set initial support with all findings set out above for initial support
- ❏ No retroactive support can be set for time period when the parties had an unincorporated separation agreement unless there is a finding that expenses were incurred on behalf of a child by the parent seeking support due to an emergency

❏ 18. Imputing income

- ❏ Current actual income of parties
- ❏ Actions that cause parent's income to be lower than it should be

- ❑ Findings to support conclusion that parent has suppressed income in bad faith:
  - ❑ Deliberately depressing income to avoid family responsibilities
  - ❑ Acting in deliberate, careless, or reckless disregard of obligation to pay support
  - ❑ Acting with naïve indifference to the needs of the child(ren) for support
- ❑ Amount of income to be imputed
- ❑ Basis for amount imputed
  - ❑ Work history
  - ❑ Minimum wage if no work history
  - ❑ Ability to earn more income, to include prevailing job opportunities and earning levels in the community

❑ 19. High-Income Case

- ❑ Parent's combined income exceeds Guideline maximum ($25,000 per month or $300,000 per year)
- ❑ Reasonable needs of the child, considering the income and expenses of the parents and the accustomed standard of living of the family
  - ❑ List of child-related expenses
- ❑ Parents' relative ability to provide support
  - ❑ List of income and reasonable expenses
- ❑ Amount of support ordered

❑ 20. Deviating from the Guidelines

- ❑ Guideline amount of support
- ❑ Child's reasonable needs and ability of each parent to provide support
  - ❑ Findings regarding the reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case
- ❑ Reason why the Guideline amount of support would not meet or would exceed the reasonable needs of the child, or reason why the application of the Guidelines would be otherwise inappropriate or unjust
- ❑ Basis for the amount ordered
- ❑ If deny request to deviate, still make findings required above and explain why deviation is denied

❑ 21. Retroactive support (support for time before child support complaint was filed)

- ❑ Ordered as reimbursement to custodial parent for expenses incurred on behalf of child for up to three years before complaint filed
- ❑ Amount determined by Guidelines (requires all findings set out in initial support order set out above) or based on parent's fair share of actual expenditures relating to the child during the time period for which support is sought
- ❑ If amount based on actual expenditures, findings need to show expenses incurred by person seeking support, that expenses were reasonably necessary, that plaintiff paid defendant's share

of the expenses, and that defendant had the ability to pay his or her fair share during time period in the past when expenses were incurred, as opposed to when matter heard

- ❑ If award based on Guidelines, need findings to apply Guidelines based on information at beginning of period for which support is sought
- ❑ If reimbursement is denied, order must explain why no reimbursement

❑ 22. If terminating support, effective date or date obligation ends

CHECKLIST

Findings for Modification of Support

- ❏ 1. Personal and subject matter jurisdiction
  - ❏ If it is a support order of another state or a foreign support order (*see* G.S. 52C-1-101(21)), UIFSA (G.S. Chapter 52C) grounds for modification jurisdiction and facts to show due process requirements are met ("minimum contacts")
  - ❏ If it is an order entered by N.C. court, need to show basis for North Carolina's jurisdiction to modify the order pursuant to UIFSA
  - ❏ Notice or service of process
- ❏ 2. Retroactive increase in support (modification of obligation for time period prior to filing of motion to modify)
  - ❏ Requires emergency situation,
  - ❏ Findings to support the amount of retroactive support, and
  - ❏ Findings as to parent's ability to pay
- ❏ 3. Prospective modification of support (from date of filing forward in time)—must conclude there has been a substantial change in circumstances since entry of the last support order (or, if incorporated separation agreement, substantial change in circumstances since date of incorporation)
  - ❏ Support order is more than three years old and there is a 15 percent disparity between support ordered and current Guideline support;
  - ❏ Substantial involuntary decrease in the income of one or both of the parties;
  - ❏ Substantial change in the needs of the child(en); or
  - ❏ Significant change in visitation or custody
- ❏ 4. If court finds substantial change in circumstances, new order must be entered with same findings as those required in setting an initial order for support. See Checklist: Findings for Initial Child Support, above

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CHECKLIST

Findings for Attorney Fees

- ❑ 1. Fees awarded
  - ❑ Party seeking fees is an interested party acting in good faith
  - ❑ Party has insufficient means to defray expenses of suit
  - ❑ In support only case, additional finding that obligor refused to provide adequate support
  - ❑ Reasonableness of fees, including
    - ❑ Nature and scope of services rendered
    - ❑ Attorney's skill and time required
    - ❑ Attorney's hourly rate
    - ❑ Reasonableness of that rate compared to other lawyers in community
  - ❑ If child support claim combined with other claims for which fees not statutorily authorized (equitable distribution, termination of parental rights), fees awarded attributed only to claims for which fees authorized by statute
- ❑ 2. Fees denied
  - ❑ Findings as to reason(s) for denial

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