UNC SCHOOL OF GOVERNMENT

2016 Child Support Enforcement Training

January 22, 2016 / Chapel Hill, NC

ELECTRONIC PROGRAM MATERIALS*

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UNC SCHOOL OF GOVERNMENT

2016 CHILD SUPPORT ENFORCEMENT: REPRESENTING RESPONDENTS

Friday, January 22, 2016
UNC School of Government, Chapel Hill, NC

Cosponsored by the UNC-Chapel Hill School of Government
& Office of Indigent Defense Services

AGENDA

8:00—8:45am	Check-in
8:45—9:00	Welcome and Announcements Austine Long, Program Attorney, UNC School of Government
9:00—9:45	**Issues in Civil Contempt [45 min]** Cheryl Howell, Professor, UNC School of Government
9:45—10:30	**Dispositions in Criminal Contempt [45 min]** James Markham, Associate Professor, UNC School of Government
10:30—10:45	*Break*
10:45—12:00	**Defenses [75 min]** *Presentation (30 min)* Wendy Sotolongo, Parent Representation Coordinator Office of Parent Representation, Durham, NC *Panel (30 min)* Janet Wallace, Attorney, Greensboro, NC James P. Hoffman, Attorney, Salisbury, NC Eric Halus, Attorney, Winston Salem, NC *Q&A (15 min)*
12:00—12:45	*Lunch (provided in the building)*
12:45—1:45	**Disestablishment [60 min]** Joyce Terres, Assistant Appellate Defender Office of Parent Representation, Durham, NC
1:45—2:30	**Advocacy in Contempt Cases [45 min]** Andrew Jones, Assistant Public Defender, Carteret County, NC
2:30—2:45	*Break*
2:45—3:15	**Post Disposition Advocacy [30 min]** Jeff Hutchins, Attorney, Winston Salem, NC
3:15—4:15	**Ethical Considerations in Child Support Contempt Cases [60 min]** Carmen Bannon, Deputy Counsel, NC State Bar, Raleigh, NC

CLE Hours: 6.0
(includes 1 hour ethics)

Chapter 5A.

Contempt.

Article 1.

Criminal Contempt.

§§ 5A-1 through 5A-10. Reserved for future codification purposes.

§ 5A-11. Criminal contempt.

(a) Except as provided in subsection (b), each of the following is criminal contempt:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(9a) Willful refusal by a defendant to comply with a condition of probation.

(9b) Willful refusal to accept post-release supervision or to comply with the terms of post-release supervision by a prisoner whose offense requiring post-release supervision is a reportable conviction subject to the registration requirement of Article 27A of Chapter 14 of the General Statutes. For purposes of this subdivision, "willful refusal to accept post-release supervision or to comply with the terms of post-release supervision" includes, but is not limited to, knowingly violating the terms of post-release supervision in order to be returned to prison to serve out the remainder of the supervisee's sentence.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

The grounds for criminal contempt specified here are exclusive, regardless of any other grounds for criminal contempt which existed at common law.

(b) No person may be held in contempt under this section on the basis of the content of any broadcast, publication, or other communication unless it presents a clear and present danger of an imminent and serious threat to the administration of criminal justice.

(c) This section is subject to the provisions of G.S. 7A-276.1, Court orders prohibiting publication or broadcast of reports of open court proceedings or reports of public records banned. (1977, c. 711, s. 3; 1994, Ex. Sess., c. 19, s. 1; 2011-307, s. 6.)

§ 5A-12. Punishment; circumstances for fine or imprisonment; reduction of punishment; other measures.

(a) A person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three, except that:

(1) A person who commits a contempt described in G.S. 5A-11(8) is subject to censure, imprisonment not to exceed 6 months, fine not to exceed five hundred dollars ($500.00), or any combination of the three;

(2) A person who has not been arrested who fails to comply with a nontestimonial identification order, issued pursuant to Article 14 of Chapter 15A of the General Statutes is subject to censure, imprisonment not to exceed 90 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three; and

(3) A person who commits criminal contempt by failing to comply with an order to pay child support is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three. However, a sentence of imprisonment up to 120 days may be imposed for a single act of 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.

(b) Except for contempt under G.S. 5A-11(5) or 5A-11(9), fine or imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless:

(1) The act or omission was willfully contemptuous; or

(2) The act or omission was preceded by a clear warning by the court that the conduct is improper.

(c) The judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice.

(d) A person held in criminal contempt under this Article shall not, for the same conduct, be found in civil contempt under Article 2 of this Chapter, Civil Contempt.

(e) A person held in criminal contempt under G.S. 5A-11(9) may nevertheless, for the same conduct, be found guilty of a violation of G.S. 14-225.1, but he must be given credit for any imprisonment resulting from the contempt. (1977, c. 711, s. 3; 1985 (Reg. Sess., 1986), c. 843, s. 1; 1987 (Reg. Sess., 1988), c. 1040, ss. 2, 4; 1989 (Reg. Sess., 1990), c. 1039, s. 4; 1991, c. 686, s. 3; 1999-361, s. 3; 2009-335, s. 1.)

§ 5A-13. Direct and indirect criminal contempt; proceedings required.

(a) Criminal contempt is direct criminal contempt when the act:

(1) Is committed within the sight or hearing of a presiding judicial official; and

(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and

(3) Is likely to interrupt or interfere with matters then before the court.

The presiding judicial official may punish summarily for direct criminal contempt according to the requirements of G.S. 5A-14 or may defer adjudication and sentencing as provided in G.S.

5A-15. If proceedings for direct criminal contempt are deferred, the judicial official must, immediately following the conduct, inform the person of his intention to institute contempt proceedings.

(b) Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15. (1977, c. 711, s. 3.)

§ 5A-14. Summary proceedings for contempt.

(a) The presiding judicial official may summarily impose measures in response to direct criminal contempt when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt.

(b) Before imposing measures under this section, the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt. (1977, c. 711, s. 3.)

§ 5A-15. Plenary proceedings for contempt.

(a) When a judicial official chooses not to proceed summarily against a person charged with direct criminal contempt or when he may not proceed summarily, he may proceed by an order directing the person to appear before a judge at a reasonable time specified in the order and show cause why he should not be held in contempt of court. A copy of the order must be furnished to the person charged. If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.

(b) Proceedings under this section are before a district court judge unless a court superior to the district court issued the order, in which case the proceedings are before that court. Venue lies throughout the district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be, where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judge is the trier of facts at the show cause hearing.

(e) The person charged with contempt may not be compelled to be a witness against himself in the hearing.

(f) At the conclusion of the hearing, the judge must enter a finding of guilty or not guilty. If the person is found to be in contempt, the judge must make findings of fact and enter judgment. The facts must be established beyond a reasonable doubt.

(g) The judge presiding over the hearing may appoint a prosecutor or, in the event of an apparent conflict of interest, some other member of the bar to represent the court in hearings for criminal contempt. (1977, c. 711, s. 3; 1987 (Reg. Sess., 1988), c. 1037, s. 44.)

§ 5A-16. Custody of person charged with criminal contempt.

(a) A judicial official may orally order that a person he is charging with direct criminal contempt be taken into custody and restrained to the extent necessary to assure his presence for summary proceedings or notice of plenary proceedings.

(b) If a judicial official who initiates plenary proceedings for contempt under G.S. 5A-15 finds, based on sworn statement or affidavit, probable cause to believe the person ordered to appear will not appear in response to the order, he may issue an order for arrest of the person, pursuant to G.S. 15A-305. A person arrested under this subsection is entitled to release under the provisions of Article 26, Bail, of Chapter 15A of the General Statutes. (1977, c. 711, s. 3.)

§ 5A-17. Appeals; bail proceedings.

(a) A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge.

(b) Upon appeal in a case where the judicial official imposes confinement, a bail hearing shall be held within a reasonable time period after imposition of the confinement. The judicial official holding the bail hearing shall be:

(1) A district court judge if the confinement is imposed by a clerk or magistrate.

(2) A superior court judge if the confinement is imposed by a district court judge.

(3) A superior court judge other than the superior court judge that imposed the confinement.

(c) A person found in contempt and who has given notice of appeal may be retained in custody not more than 24 hours from the time of imposition of confinement without a bail determination being made by a judicial official as designated under subdivisions (1) through (3) of subsection (b) of this section. If a designated judicial official has not acted within 24 hours of the imposition of confinement, any judicial official shall act under the provisions of subsection (b) of this section and hold the bail hearing. (1977, c. 711, s. 3; 2013-303, s. 1.)

§ 5A-18. Reserved for future codification purposes.

§ 5A-19. Reserved for future codification purposes.

§ 5A-20. Reserved for future codification purposes.

Article 2.

Civil Contempt.

§ 5A-21. Civil contempt; imprisonment to compel compliance.

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.

(b) A person who is found in civil contempt may be imprisoned as long as the civil contempt continues, subject to the limitations provided in subsections (b1) and (b2) of this section. Notwithstanding subsection (b2) of this section, if a person is found in civil contempt for failure to pay child support or failure to comply with a court order to perform an act that does not require the payment of a monetary judgment, the person may be imprisoned as long as the civil contempt continues without further hearing.

(b1) A person who is found in civil contempt, but was not arrested, for failure to comply with a nontestimonial identification order issued pursuant to Article 14, Nontestimonial Identification Order, of Chapter 15A of the General Statutes may not be imprisoned more than 90 days unless the person is arrested on probable cause.

(b2) The period of imprisonment for a person found in civil contempt shall not exceed 90 days for the same act of disobedience or refusal to comply with an order of the court. A person who has not purged himself or herself of the contempt within the period of imprisonment imposed by the court under this subsection may be recommitted for one or more successive

periods of imprisonment, each not to exceed 90 days. However, the total period of imprisonment for the same act of disobedience or refusal to comply with the order of the court shall not exceed 12 months, including both the initial period of imprisonment imposed under this section and any additional period of imprisonment imposed under this subsection. Before the court may recommit a person to any additional period of imprisonment under this subsection, the court shall conduct a hearing de novo. The court must enter a finding for or against the alleged contemnor on each of the elements of G.S. 5A-21(a), and must find that all of elements of G.S. 5A-21(a) continue to exist before the person can be recommitted. For purposes of this subsection, a person's failure or refusal to purge himself or herself of contempt shall not be deemed a separate or additional act of disobedience, failure, or refusal to comply with an order of the court.

(c) A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, s. 1; 1999-361, s. 1.)

§ 5A-22. Release when civil contempt no longer continues.

(a) A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without a further order from the court.

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

§ 5A-23. Proceedings for civil contempt.

(a) Proceedings for civil contempt are by motion pursuant to G.S. 5A-23(a1), by the order of a judicial official directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt, or by the notice of a judicial official that the alleged contemnor will be held in contempt unless he appears at a specified reasonable time and shows cause why he should not be held in contempt. The order or notice must be given at least five days in advance of the hearing unless good cause is shown. The order or notice may be issued on the motion and sworn statement or affidavit of one with an interest in enforcing the order, including a judge, and a finding by the judicial official of probable cause to believe there is civil contempt.

(a1) Proceedings for civil contempt may be initiated by motion of an aggrieved party giving notice to the alleged contemnor to appear before the court for a hearing on whether the alleged contemnor should be held in civil contempt. A copy of the motion and notice must be served on the alleged contemnor at least five days in advance of the hearing unless good cause is shown. The motion must include a sworn statement or affidavit by the aggrieved party setting forth the reasons why the alleged contemnor should be held in civil contempt. The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party.

(b) Except when the General Statutes specifically provide for the exercise of contempt power by the clerk of superior court, proceedings under this section are before a district court judge, unless a court superior to the district court issued the order in which case the proceedings are before that court. When the proceedings are before a superior court, venue is in

the superior court district or set of districts as defined in G.S. 7A-41.1 of the court which issued the order. Otherwise, venue is in the county where the order was issued.

(c) The person ordered to show cause may move to dismiss the order.

(d) The judicial official is the trier of facts at the show cause hearing.

(e) 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 which the contemnor must take to purge himself or herself of the contempt.

(f) A person with an interest in enforcing the order may present the case for a finding of civil contempt for failure to comply with an order.

(g) A person who is found in civil contempt under this Article shall not, for the same conduct, be found in criminal contempt under Article 1 of this Chapter. (1977, c. 711, s. 3; 1979, 2nd Sess., c. 1080, ss. 2-4; 1987 (Reg. Sess., 1988), c. 1037, s. 46; 1999-361, ss. 2, 4, 5; 2000-140, s. 35.)

§ 5A-24. Appeals.

A person found in civil contempt may appeal in the manner provided for appeals in civil actions. (1977, c. 711, s. 3.)

§ 5A-25. Proceedings as for contempt and civil contempt.

Whenever the laws of North Carolina call for proceedings as for contempt, the proceedings are those for civil contempt set out in this Article. (1977, c. 711, s. 3.)

§ 5A-26. Reserved for future codification purposes.

§ 5A-27. Reserved for future codification purposes.

§ 5A-28. Reserved for future codification purposes.

§ 5A-29. Reserved for future codification purposes.

§ 5A-30. Reserved for future codification purposes.

Article 3.

Contempt by Juveniles.

§ 5A-31. Contempt by a juvenile.

(a) Each of the following, when done by an unemancipated minor who (i) is at least six years of age, (ii) is not yet 16 years of age, and (iii) has not been convicted of any crime in superior court, is contempt by a juvenile:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(6) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A of the General Statutes, Granting of Immunity to Witnesses.

(7) Willful communication with a juror in an improper attempt to influence the juror's deliberations.

(8) Any other act or omission specified in another Chapter of the General Statutes as grounds for criminal contempt.

(b) Contempt by a juvenile is direct contempt by a juvenile when each of the following conditions is met:

(1) The act is committed within the sight or hearing of a presiding judicial official.

(2) The act is committed in, or in the immediate proximity to, the room where proceedings are being held before the court.

(3) The act is likely to interrupt or interfere with matters then before the court.

(c) Contempt by a juvenile that is not direct contempt by a juvenile is indirect contempt by a juvenile. (2007-168, s. 1.)

§ 5A-32. Direct contempt by a juvenile.

(a) A presiding judicial official may summarily impose measures in response to direct contempt by a juvenile when necessary to restore order or maintain the dignity and authority of the court and when the measures are imposed substantially contemporaneously with the contempt. Before imposing measures summarily, the judicial official shall do all of the following:

(1) Give the juvenile summary notice of the contempt allegation and a summary opportunity to respond.

(2) Appoint an attorney to represent the juvenile and allow time for the juvenile and attorney to confer.

(3) Find facts supporting the summary imposition of measures in response to contempt by a juvenile. The facts shall be established beyond a reasonable doubt.

(b) When a judicial official chooses not to proceed summarily, the official may enter an order appointing counsel for the juvenile and directing the juvenile to appear before a judge in a juvenile proceeding at a reasonable time specified in the order and show cause why the juvenile should not be held in contempt. A copy of the order shall be furnished to the juvenile and to the juvenile's attorney. If the direct contempt by a juvenile is based on acts before a judge that so involve the judge that the judge's objectivity may reasonably be questioned, the order shall be returned before a different judge presiding in juvenile court.

(c) After a determination is made pursuant to subsection (a) or (b) of this section that a juvenile has committed direct contempt, the court may order any or all of the following:

(1) That the juvenile be detained in a juvenile detention facility for up to five days.

(2) That the juvenile perform up to 30 hours of supervised community service as arranged by a juvenile court counselor.

(3) That the juvenile be required to undergo any evaluation necessary for the court to determine the needs of the juvenile.

The court shall not impose any of these sanctions without finding first that the juvenile's act or omission was willfully contemptuous or that the act or omission was preceded by a clear warning by the court that the conduct is improper.

(d) A judicial official who finds a juvenile in direct contempt may at any time terminate or reduce a sanction of detention or eliminate or reduce the number of hours of community service ordered if warranted by the juvenile's conduct and the ends of justice.

(e) A judicial official may orally order that a juvenile the official is charging with direct contempt be taken into custody and restrained to the extent necessary to assure the juvenile's presence for summary proceedings or notice of plenary proceedings.

(f) The clerk shall place a copy of any order or other paper issued pursuant to this section in the juvenile's juvenile file, if one exists, or in a new juvenile file.

(g) Appeal from an order finding a juvenile in direct contempt is to the Court of Appeals. (2007-168, s. 1.)

§ 5A-33. Indirect contempt by a juvenile.

Indirect contempt by a juvenile may be adjudged and sanctioned only pursuant to the procedures in Subchapter II of Chapter 7B of the General Statutes. (2007-168, s. 1.)

§ 5A-34. When minor can be in contempt.

(a) No act or omission by a minor younger than six years of age constitutes contempt.

(b) The provisions of Article 1 and Article 2 of this Chapter apply to acts or omissions by a minor who:

(1) Is 16 years of age or older;

(2) Is married or otherwise emancipated; or

(3) Before the act or omission, was convicted in superior court of any criminal offense. (2007-168, s. 1.)

UNC SCHOOL OF GOVERNMENT

ONLINE RESOURCES FOR INDIGENT DEFENDERS

ORGANIZATIONS

NC Office of Indigent Defense Services
http://www.ncids.org/

UNC School of Government
http://www.sog.unc.edu/

Indigent Defense Education at the UNC School of Government
https://www.sog.unc.edu/resources/microsites/indigent-defense-education

TRAINING

Calendar of Live Training Events
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/calendar-live-events

Online Training
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/online-training-cles

MANUALS

Orientation Manual for Assistant Public Defenders
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/orientation-manual-assistant-public-defenders-introduction

Indigent Defense Manual Series (collection of reference manuals addressing law and practice in areas in which indigent defendants and respondents are entitled to representation of counsel at state expense)
http://defendermanuals.sog.unc.edu/

UPDATES

On the Civil Side Blog
http://civil.sog.unc.edu/

NC Criminal Law Blog
https://www.sog.unc.edu/resources/microsites/criminal-law-north-carolina/criminal-law-blog

Criminal Law in North Carolina Listserv (to receive summaries of criminal cases as well as alerts regarding new NC criminal legislation)
http://www.sog.unc.edu/crimlawlistserv

TOOLS and RESOURCES

Collateral Consequences Assessment Tool (centralizes collateral consequences imposed under NC law and helps defenders advise clients about the impact of a criminal conviction)
http://ccat.sog.unc.edu/

Motions, Forms, and Briefs Bank
https://www.sog.unc.edu/resources/microsites/indigent-defense-education/motions-forms-and-briefs

Training and Reference Materials Index (includes manuscripts and materials from past trainings co-sponsored by IDS and SOG)
http://www.ncids.org/Defender%20Training/Training%20Index.htm

This section is taken from the District Court Judges' Benchbook

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 https://sog.adobeconnect.com/p30019876/*.

3. Importance of distinction. Distinguishing between civil and criminal contempt is important because whether the proceeding is for civil or criminal contempt 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 Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004.]

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); *see also Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988) (civil contempt is remedial in nature, whose 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, 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).]

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) District court orders adjudicating criminal contempt are appealable to the superior court for hearing de novo. [G.S. § 5A-17] 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 24 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 24 hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. § 5A-17(b), (c), *added by* 2013 N.C. Sess. Laws 303, § 1, effective December 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. Ch. 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 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).]

9. For more on contempt, *see* Bench Book, Vol. 2, *Contempt*, Chapter 4.

B. Civil contempt.

1. Generally.

a) Failure to comply with a child support order may be a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by the obligor's compliance with the order;

(3) The obligor's failure to comply with the order is willful; and

(4) The obligor has the present ability to comply with the order (in whole or in part) or take reasonable measures that would enable him or her to comply with the order (in whole or in part). [G.S. § 5A-21(a); *Jones v. Jones*, 52 N.C.App. 104, 278 S.E.2d 260 (1981).]

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 or she 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. What orders are enforceable by contempt.

a) All civil child support orders, including registered foreign child support orders [*Ugochukwu v. Ugochukwu*, 176 N.C.App. 741, 627 S.E.2d 625 (2006)];

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*, __ N.C.App. __, 745 S.E.2d 910 (2013) and *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 both, defendants 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), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (in domestic relations action, a consent judgment adopted by the court may be enforced by civil contempt)];

c) Voluntary separation agreements approved under G.S. § 110-132; and

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).]

e) Foreign support orders registered and confirmed in North Carolina. [*Marshall v. Marshall,* __ N.C.App. __, 757 S.E.2d 319 (2014).]

3. Actions that can be 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,* __ N.C.App. __, 745 S.E.2d 910 (2013) (defendant in civil contempt of consent order that required him to pay 90% of children's college expenses "as long as they diligently applied themselves to the pursuit of education"); *Young v. Young,* __ N.C.App. __, 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 basis for contempt); *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) (ex-husband in civil contempt for noncompliance with consent order in which he agreed to pay all college expenses of parties' daughter); *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 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, no order was "in force" when the contempt order was entered. [*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 11/19/01 not an enforceable order until it was entered on 5/13/02); *County of Durham ex rel. Willis v. Roberts*, __N.C.App. ___, 749 S.E.2d 110 (2013) (**unpublished**), *citing Carland* (2012 contempt order, based on defendant's failure to pay $110/month toward child support arrears 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 arrears 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 arrears 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 or she owes and, despite his or her present ability to do so, stubbornly, recalcitrantly, deliberately, willfully, or intentionally refuses to pay support to the extent he or she is able to do so. [*See* G.S. § 5A-21(a)]

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, *review denied,* 360 N.C. 60, 621 S.E.2d 175 (2005) (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

arrears; a money judgment for a liquidated sum of child support arrears that does not require periodic payments in a specific amount nor set any deadlines or ongoing monthly dates for arrears 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 arrears that provides for periodic payments is enforceable by contempt).]

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 of this Part, page 263, on income withholding, section V of this Part, page 286, on judgment and execution, and section VI of this Part, page 291, 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, 548 S.E.2d 565 (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, *review denied,* 360 N.C. 60, 621 S.E.2d 175 (2005) (judgment for liquidated sum of support arrears with no provision for periodic payment not enforceable by contempt) (discussed at section 4.b above). The trial court set off, apparently as a matter of right, the amount of support arrears 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:

(1) Decide in its discretion and as a matter of equity whether set-off was appropriate;

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

(3) 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. Civil contempt proceedings may be initiated in a child support action by:

a) The obligee or another person interested in enforcing a child support order, including a judge, filing 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 serving 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 the 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 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 request a judicial official to 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*, __ N.C.App. __, 730 S.E.2d 203 (2012).] *But see* G.S. § 50-13.9(a) specifically authorizing clerk to issue show cause orders in proceeding 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)]

(1) 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 of this Part, page 306.]

(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 a judicial official's knowledge and of which he has reasonably trustworthy information that 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, 560 S.E.2d 596 (2002) (contempt action brought for failure to comply with order directing payment of money).]

(2) 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)]

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

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

(3) 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)]

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

(2) However, G.S. § 50-13.9(d) provides that an order to appear and show cause issued pursuant to that statute should be served in accordance with G.S. § 1A-1, Rule 4.

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 he or 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 G.S. § 5A-16(b)).]

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

(1) 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).]

(2) 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 at hearing as to any assets or liabilities of defendant, any inventory of his property, his present ability to work, nor even his present salary); *Lamm v. Lamm*, 229 N.C. 248, 49 S.E.2d 403 (1948) (no evidence at hearing to rebut defendant's assertion that he lacked ability to comply with alimony order so judgment of contempt set aside).]

(3) 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), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (stating that a defendant who refuses to present evidence that he was not in contempt does so at his own peril); *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 by an aggrieved party 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) ORDER TO APPEAR AND SHOW CAUSE FOR FAILURE TO COMPLY WITH SUPPORT ORDER AND ORDER TO PRODUCE RECORDS AND LICENSES (AOC-CV-602) 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.

(1) 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 he or she may be incarcerated if found in civil contempt, that he or she has the right to be represented by retained counsel, and that he or 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).]

(2) An alleged contemnor may waive his or 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).]

(3) 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 (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she 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 he is indigent and that his liberty interest is at stake); *Young v. Young*, __ N.C.App. __, 736 S.E.2d 538 (2012), *citing Turner* 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 v. Rogers*, __ U.S. __, 131 S.Ct. 2507 (2011) (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 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*, __ N.C.App. __, 762 S.E.2d 329 (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 reversed "to the extent that they held defendant in contempt of the custody order and the child support order."

(1) 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)]

(2) An alleged contemnor is indigent if he or she 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 or her in the contempt hearing. [*See* G.S. § 7A-452; *see also* G.S. § 7A-450(a) for definition of an indigent person.]

(3) 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.

(4) 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)]

c) An indigent obligor may not be incarcerated for civil contempt in a child support action unless he or 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), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C.App. 615, 406 S.E.2d 656 (1991) (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).]

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 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*, __ N.C.App. __, 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) (citations omitted) (all 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 he or she voluntarily takes on additional financial obligations or divests him or 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).]

e) Father's noncompliance with consent order, requiring him to pay 90% 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,* __ N.C.App. __, 745 S.E.2d 910 (2013).]

13. Present ability to comply.

a) Generally.

(1) 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).]

(2) "Reasonable measures" may well include liquidating equity in encumbered assets. [*Adkins v. Adkins,* 82 N.C.App. 289, 346 S.E.2d 220 (1986).]

(3) The majority of cases have held that to satisfy the "present ability" test, 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 $4320 in readily available cash); *cf. Barker v. Barker,* __ N.C.App. __, 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).]

(4) 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 County obo Eggleston v. Willingham*, 199 N.C.App. 755, 687 S.E.2d 541 (2009) (**unpublished**).]

(5) 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").]

(6) Amounts not considered as income in the original child support calculation may not be considered in a related contempt

proceeding. [*See County of Durham ex rel. Wood v. Orr*, __ N.C.App. __, 749 S.E.2d 113 (2013) (**unpublished**) (because Supplemental Security Income 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).]

(7) 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. [*See* John Saxon, "Using Contempt to Enforce Child Support Orders," Special Series No. 17, School of Government, February 2004 (noting this in the context of child support).]

(1) 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 take reasonable measures that would enable him or her 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, 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) (to find willfulness, must establish 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), *superseded by statute on other grounds as stated in Craig v. Craig*, 103 N.C.App. 615, 406 S.E.2d 656 (1991) (to find failure to pay support willful, there must be particular findings of the ability to pay during the period of delinquency).]

(2) 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 should pay the whole amount); *see also Brower v. Brower*, 70 N.C.App. 131, 318 S.E.2d 542 (1984) (order that required defendant's imprisonment until he paid entire arrearage vacated when supported only by finding that defendant has present ability to pay a portion of that amount).] Note, however, that ability to pay part of arrearage is sufficient to support incarceration until that part

is paid. [*But see Clark v. Gragg*, 171 N.C.App. 120, 614 S.E.2d 356 (2005) (court's finding that "the Plaintiff has the present ability to comply *with at least a portion* of the Orders of this Court" 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).]

(3) 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).]

(4) 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 his or 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 the 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 with tenth grade education, whose work experience included running a Tenon machine in the furniture industry, insufficient); *Hodges v. Hodges*, 64 N.C.App. 550, 307 S.E.2d 575 (1983) (finding that defendant 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 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 conduct not willful).]

(5) 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 if he could take a job that would enable him to make payments but does not do so).]

(6) 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 obligor 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 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:

(1) 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

(2) Has the present means to comply with the purge conditions set out in the order. [*Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010), *quoting McMiller v. McMiller*, 77 N.C.App. 808, 336 S.E.2d 134 (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"); *Bishop v. Bishop*, 90 N.C.App. 499, 369 S.E.2d 106 (1988) (contempt reversed when no findings 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 possesses means to comply).]

(3) 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, 204 S.E.2d 554 (1974) (affirming contempt in child support context, noting that a defendant may not deliberately divest himself of property and in effect pauperize himself for appearance at a contempt hearing to escape punishment

because he is at that time unable to comply with the support order).]

d) Full payment of arrearage by hearing is defense.

(1) 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 or she 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),, *rev'd on other grounds per curiam for reasons stated in dissenting opinion,* 356 N.C. 287, 569 S.E.2d 645 (2002) (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); *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 the defendant brought the 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 served precluded 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.

(1) 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 the State of Washington 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 that father waited to have his motion to dismiss heard until after the children had reached the age of majority, which, if granted, would have precluded wife from seeking arrears 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 criminal contempt.

b) Findings.

(1) 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 himself of the contempt. [G.S. § 5A-23(e)]

(2) 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).]

(3) 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, 713 S.E.2d 489 (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" 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), *review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008), *citing Adkins* (a general finding of present ability to comply with a support order was held to be sufficient when there is evidence in the record regarding defendant's assets); *Shippen v. Shippen*, 204 N.C.App. 188, 693 S.E.2d 240 (2010) (finding that "[d]efendant has the ability to comply or take reasonable efforts to do so" while making no finding that defendant had the present ability to pay the arrearage and purge himself of contempt, 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), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991) (although specific findings as to contemnor's present ability to comply are preferable, a general finding of present ability to comply is sufficient); *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, 307 S.E.2d 591 (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, preferable, but finding that obligor "has sufficient assets to pay alimony as ordered" 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.

(1) 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).]

(2) 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.

(1) If the court incarcerates an obligor for civil contempt, the court's order must clearly specify the conditions under which the obligor may purge himself or 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).]

(2) The conditions under which an obligor may purge himself or herself of contempt must be conditions that he or she has the **actual, present ability** to meet, so that the obligor "holds the keys to his own jail by virtue of his ability to comply." [*See Jolly v.*

Wright, 300 N.C. 83, 265 S.E.2d 135 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993); *see also* Official Comment to G.S. § 5A-21]

(3) A court is authorized to allow a defendant to purge himself 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 the order).]

(4) A court may not incarcerate an obligor for civil contempt and condition his or her 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 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 arrears 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) (where no evidence in record that defendant actually possessed arrearage amount or could take reasonable measures that would enable him to comply, contempt reversed).]

(5) 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 him or 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 he or she may be entitled that are within his or her present ability and which would enable him or her to comply with the order. [*See Frank v. Glanville*, 45 N.C.App. 313, 262 S.E.2d 677 (1980) (concurring in commentary to G.S. § 5A-21 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).]

(6) A finding that the obligor has the present ability to purge himself 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).]

(7) 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] [*Cf. Tyll v. Berry,* __ N.C.App. __, 758 S.E.2d 411, *review denied,* __ N.C. _, _S.E.2d __, *appeal dismissed,* __N.C. _, __S.E.2d __ (2014) (fine payable to the moving party for defendant's violation of a Chapter 50C order upheld; a fine is a "statutorily permitted" sanction for civil contempt proceedings).]

b) 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 (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 to comply with other provisions of child support orders that do not involve the payment of a money judgment.

c) 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. [*See* G.S. § 5A-21(b)]

d) The court of appeals does not seem to prohibit orders providing that the obligor be incarcerated at some future time if he or she fails to purge himself or herself 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); and *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 his civil contempt no longer continues. The civil contempt order must specify how the person may purge himself of

the contempt. Upon finding compliance with the specifications, the sheriff or other officer having custody may release the person without 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.

(1) 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 his release. [G.S. § 5A-22(b)]

(2) 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 that court authorized to award attorney fees when father failed to do so); *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 postseparation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes v. Eakes,* 194 N.C.App. 303, 669 S.E.2d 891 (2008), *citing Blair* (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.

(1) Before any award of attorney fees, including 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) (citation omitted); *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).]

(2) Note, however, 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*, __ N.C.App. __, 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 attorneys' 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 is 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 but award of attorney fees under G.S. § 50-13.6 proper).]

18. Appeal of a civil contempt order.

a) To whom directed.

(1) 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 30 days after the order is entered. [*See* G.S. § 5A-24 and G.S. § 7A-27(c)]

(2) A motion to stay an obligor's incarceration under a civil contempt order must be directed initially to the district court. [*See* N.C. R. APP. P. 8(a)]

b) Contempt order as interlocutory.

(1) 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).]

(2) 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*; *Guerrier v. Guerrier*, 155 N.C.App. 154, 574 S.E.2d 69 (2002) (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**), *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) (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); *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, distinguishing *Guerrier* on the basis that the court in *Anderson* took under advisement the sanctions to be imposed for the mother's contempt); *Moore v. Moore*, __ N.C.App. __, 741 S.E.2d 513 (2013) (**unpublished**) (citations omitted) (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.

(1) 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 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 County,* 139 N.C.App. 53, 532 S.E.2d 594 (2000).]

(2) 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) The general rule is that notice of appeal divests the trial court of jurisdiction from proceeding "upon the judgment appealed from, or upon the matter embraced therein." [G.S. § 1-294; *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 jurisdiction of the trial court is divested from the date that notice of appeal was given); *Guerrier v. Guerrier,* 155 N.C.App. 154, 574 S.E.2d 69 (2002) (appeal of an order finding father in contempt of an ED judgment for removing funds from childrens' investment accounts precluded the trial court from entering further orders in the matter, such as entering judgment for the amount of the funds removed or removing the father from acting 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 equitable distribution order remains enforceable pending appeal).]

b) Notwithstanding G.S. § 1-294, a child support order may be enforced through civil contempt pending an appeal of the order. [G.S. § 50-13.4(f)(9)] 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) The appellate court may, upon motion of the obligor, stay the civil contempt order pending appeal if justice requires. [*See* 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* Part 2 of this Chapter, section I.I.7.For a discussion of contempt when appeal of an order is pending, *see Contempt,* 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); G.S. § 5A-12(a)(3), *amended by* 2009 N.C. Sess. Laws 335, § 1, effective December 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,* Bench Book, Vol. 2, Chapter 4.

2. Direct vs. indirect criminal contempt.

a) The distinction between direct and indirect criminal contempt is important because summary proceedings are available only for direct criminal contempt.

(1) 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.

(2) Because proceedings for direct criminal contempt may be plenary or summary, direct contempt mislabeled as indirect has been found not to warrant reversal. [*See Adams Creek Associates v. Davis,* 186 N.C.App. 512, 652 S.E.2d 677 (2007), *review denied, appeal dismissed, stay dissolved,* 362 N.C. 354, 662 S.E.2d 900, 901 (2008) (incorrectly identifying contempt as indirect when it was direct not reversible error).]

b) 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.]

c) 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. [*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 he or 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 verified motion or affidavit filed pursuant to a civil contempt proceeding under G.S. § 5A-23 may provide a proper basis for the issuance of a show cause order for criminal contempt under G.S. § 5A-15(a). [*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 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 or herself. [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 G.S. § 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. [*See 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 pre-trial 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 he or she appears for the contempt hearing and the obligor agrees to apply it toward the child support arrearage, or 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.

(1) 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 or she may be incarcerated if found in criminal contempt, that he or she has the right to be represented by

retained counsel, and that he or she may be entitled to court-appointed counsel if unable to afford an attorney.

(2) An alleged contemnor may waive his or 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 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).]

(3) 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 (a) he or she is indigent, **and** (b) there is a significant likelihood that he or she will actually be incarcerated as a result of the hearing. [G.S. § 7A-451(a) (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 likely to be adjudged and includes citations for criminal contempt for failure to comply with civil child support orders).]

(1) 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)]

(2) An alleged contemnor is indigent if he or she 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 or her in the contempt hearing. [*See* G.S. 7A-452; *see also* G.S. § 7A-450(a) for definition of an indigent person.]

(3) 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 he or 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 or she 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 its execution).]

(1) 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 his or 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 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 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, *review denied*, 311 N.C. 304, 317 S.E.2d 680 (1984) (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).]

(2) 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 or she cannot be held in civil contempt. [*See 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) (trial court concluding that father's payment of arrearages after contempt motion filed eliminated option of civil, but not criminal, contempt).]

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 is 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* 2009 N.C. Sess. Laws 335, § 1, effective December 1, 2009, and applicable to offenses committed on or after that date.]

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* 2009 N.C. Sess. Laws 335, § 1, effective December 1, 2009, and applicable to offenses committed on or after that date.]

(1) 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)]

(2) 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).]

(3) 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 him or her to be released from jail upon **purging** the contempt (usually by paying all or part of the child support arrearages he or she owes) as in the case of civil contempt. Purge conditions are imposed in civil, not criminal, contempt proceedings.

(4) A court, however, may find an obligor in criminal contempt for willfully failing to pay court-ordered child support; sentence him or her 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 or her court-ordered child support obligation as it becomes due as one of the conditions of the obligor's 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), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002) (defendant also required to post a cash bond or security to guarantee timely payment of future cash child support as well as other conditions).]

(5) **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), *rev'd per curiam for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002) (where court imposed a determinate thirty-day term, suspended upon certain conditions, i.e., that obligor pay counsel fees and interest upon delinquent child support payments, and that defendant post a cash bond as well as make each child support payment when due, order was for criminal contempt); *Hicks obo 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. Contempt after appeal of child support order.

a) Notwithstanding G.S. § 1-294, a child support order may be enforced through criminal contempt pending an appeal of the order. [*See* G.S. § 50-13.4(f)(9)]

b) An obligor who is found in criminal contempt by a judicial official inferior to a superior court judge may appeal to the superior court for trial de novo. [G.S. § 5A-17; *see Jones v. Jones*, 121 N.C.App. 529, 466 S.E.2d 344 (1996); *Michael v. Michael*, 77 N.C.App. 841, 336 S.E.2d 414 (1985), *review denied*, 316 N.C. 195, 341 S.E.2d 577 (1986).]

c) District court orders adjudicating criminal contempt are appealable to the superior court for hearing de novo. [G.S. § 5A-17(a)] 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 24 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 24 hours of the imposition of confinement, any judicial official shall hold a bail hearing. [G.S. § 5A-17(b), (c), *added by* 2013 N.C. Sess. Laws 303, § 1, effective December 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)]

b) In IV-D cases the clerk maintains all official records in the case. [G.S. § 50-13.9(b1)]

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 or subjected to income withholding, or both. [G.S. § 50-13.9(d)] *See* VII.B.9 on page 304.

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* III.A.2 and III.A.6.(b) 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 may be enforced in the same manner as other contracts. [*See Herring v. Herring*, __ N.C.App. __, _752 S.E.2d 190 (2013), *citing Gilmore*; *v. Garner*, 157 N.C.App. 664, 580 S.E.2d 15 (2003)

No Default Judgment in Contempt

Even when contempt is based upon the failure to pay child support, the contempt order must contain the conclusion of law that respondent willfully violated the court order. That conclusion must be supported by findings of fact showing respondent actually has/had the ability to comply or to take reasonable steps to comply and deliberately failed to do so. Those findings of fact must be based on evidence.

In other words, a contempt order cannot be entered by default - a court cannot assume a respondent has the ability to comply simply because the respondent fails to prove he/she does not have the ability to comply.

Civil Contempt

A civil contempt proceeding can be initiated in one of three ways:

- Pursuant to GS 5A-23(a1), by filing a verified motion, or a motion along with an affidavit, and a notice of hearing on the contempt motion; or
- Pursuant to GS 5A-23(a), by filing a verified motion, or a motion along with an affidavit, that includes a request for a show cause order;
- And for child support contempt only, pursuant to GS 50-13.9(d), by filing an affidavit and asking a judge or a clerk to issue a show cause order.

In all three situations, the court can hold the respondent in civil contempt only if the court concludes:

- The order being violated remains in force;
- The purpose of the order may still be served with the respondent's compliance with the order;
- The respondent's failure to comply with order is **willful**; and
- The respondent **has the present ability to comply** with the order in whole or in part or take reasonable steps that would enable him/her to comply in whole or in part.

GS 5A- 21(a).

Since the purpose of civil contempt is to force compliance, the only remedy is imprisonment until the respondent complies with the order. GS 5A-21. The court must ensure the respondent "holds the keys to the jail" by ordering a purge that respondent has the actual present ability to perform. *Jolly v. Wright*, 300 NC 83 (1980)(respondent must have the actual present ability to purge himself of contempt at the time he is jailed).

Who Issues the Show Cause in Civil Contempt?

For civil contempt actions pursuant to GS 5A-23(a), only a judge can issue the show cause order. *Moss v. Moss*, 222 NC App 75 (2012). In child support cases, GS 50-13.9(d) allows the show cause to be issued either by a judge or by a clerk of court.

When Can a Show Cause Order be Issued?

No show cause should be issued unless there are facts in the verified motion or affidavit that will support the conclusions required for contempt. This is because the show cause is issued only upon a finding of **probable cause** to believe obligor is in contempt. GS 5A-23(a). This means that in addition to alleging respondent has failed to comply with an order, the motion/affidavit also must contain credible allegations that provide a reasonable ground for believing the respondent is willfully failing to comply with the order. *Young v. Mastrom, Inc.*, 149 NC App 483 (2002).

'Burden of Proof'

When contempt is initiated pursuant to GS 5A-23(a1) by motion and notice of hearing, the moving party has the burden of going forward with evidence at the contempt hearing to establish the factual basis for contempt. GS 5A-23(a1).

When contempt is initiated by a verified motion or affidavit and the issuance of a show cause order, either pursuant to GS 5A-23(a) or GS 50-13.9(d), the burden of going forward with evidence at the hearing is upon respondent. *Shumaker v. Shumaker*, 137 NC App 72 (2000). However, this is only because a judge or clerk previously determined – based on specific factual allegations in the verified motion or affidavit – there is probable cause to believe respondent is in contempt.

Despite this shifting of the burden of proof, no contempt order can be entered without sufficient evidence to support the conclusion that respondent acted willfully and has the present ability to comply with the purge ordered by the court. *Henderson v. Henderson*, 307 NC 401 (1983); *Lamm v. Lamm*, 229 NC 248 (1948). While appellate courts have stated that a respondent who fails to make an effort to show a lack of ability to comply "does so at his own peril", *Hartsell v. Hartsell*, 90 NC App 380 (199), it is clear there can be no default contempt order.

Criminal Contempt

There is only one way to initiate an indirect criminal contempt proceeding. GS 5A-15(a) provides that a judicial official – either a clerk or a judge – initiates the proceeding by issuing a show cause order. The statute does not require a verified motion or affidavit, but the show cause order must contain adequate information to put respondent on notice of the allegations forming the basis for the charge. *O'Briant v. O'Briant*, 313 NC 432 (1985).

The purpose of criminal contempt is to punish, so the focus is on the past behavior of respondent. So for example, if contempt is based on the failure to pay child support, criminal contempt must be based on the conclusion – adequately supported by factual findings that are adequately supported by evidence – respondent willfully failed to pay at some point in the past. In criminal proceedings, despite the fact that the action is initiated by a show cause order, the burden of presenting evidence at trial always remains with the moving party and the court must find willful disobedience beyond a reasonable doubt. GS 5A-15(f).

As the goal of criminal contempt is to punish rather than force compliance, the court has the option of ordering imprisonment, a fine, or censure. GS 5A-12. None of these require the court to conclude respondent has the present ability to comply **at the time the contempt order is entered**, as is required with a purge in civil contempt.

Ability to Pay

So what evidence is sufficient to show actual ability to comply? That's the topic of my next blog. Stay tuned.

Contempt: Establishing Ability to Pay

In my last post, No Default Judgment in Contempt**,** I wrote about the requirement that all contempt orders contain the conclusion that respondent acted willfully when committing the act that is the basis for contempt. Of course, that conclusion must be supported by findings of fact, which in turn must be based on evidence.

So what findings are sufficient to support the required conclusion when contempt is based on the failure to pay money, such as child support?

Ability to Pay

When contempt is based on the failure to pay, willfulness must be established by evidence that the respondent has or had the ability to pay all or some portion of the amount owing and deliberately failed to do so. *Mauney v. Mauney*, 268 NC 254 (1966). Ability to pay is established by showing either that respondent has income or cash sufficient to pay or that there are steps respondent can take that would allow him/her to pay some or all of the amount owing. *Jones v. Jones*, 62 NC App 748 (1983).

Ability to Pay When?

Criminal contempt is to punish past conduct. So to support an adjudication of criminal contempt for failure to pay support, the court must conclude respondent had the ability to pay when the payment became due or at some time thereafter. *Mauney, id.* Because the purpose of criminal contempt is to punish past behavior, a person can be held in criminal contempt even if that person has fully complied with the order by the time of the contempt hearing. *Reynolds v. Reynolds*, 147 NC App 566 (2001)(dissent adopted by 356 NC 287 (2002)).

On the other hand, civil contempt is to force compliance with the court order. Therefore, to support an adjudication of civil contempt for failure to pay, the court must conclude respondent has the present ability to pay at the time of the hearing. *Mauney, id.* Because the only purpose of civil contempt it to force compliance, a respondent cannot be held in civil contempt if respondent has fully complied with the order to pay by the time of the contempt hearing. *Ruth v. Ruth*, 158 NC App 123 (2003). A civil contempt order also must find respondent has the present ability to comply with the purge condition that is imposed as a result of the contempt adjudication. A respondent must actually "hold the keys to the jail" at the time (s)he is incarcerated for civil contempt. *Shippen v. Shippen*, 204 NC 188 (2010); *Jolly v. Wright*, 300 NC 83 (1980).

Able-bodied, under no disability, enough?

Mauney and other opinions established the rule that when a contempt charge is based on the failure to pay, the court must make an investigation into the current financial status of respondent to determine if (s)he has the present ability to pay the amounts set by order of the court. *Moore v.*

Moore, 35 NC App 748 (1978). The trial court in *Mauney* supported contempt with these findings:

> [T]he defendant 'is a healthy, able bodied man, 55 years old, presently employed …and has been so employed for many months; that he owns a Thunderbird automobile; he has not been in ill health or incapacitated since the date of [the] order…; the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the order.

Mauney, 268 NC at 266.

The Supreme Court held these findings insufficient, stating:

> The finding of facts in this case is not a sufficient basis for the conclusion that defendant's conduct was willful and deliberate. [Citing *Vaughan v. Vaughan*, 213 N.C. 1989], **the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work -an inventory of his financial condition.'**

Mauney, 268 NC at 268.

See also Clark v. Gragg, 171 NC App 120 (2005)("able-bodied, 32 year old with tenth grade education and work experience" insufficient), and *Hodges v. Hodges*, 64 NC App 550 (1983)("able-bodied" and "was capable of and had the means or should have had the means" to make payments insufficient).

Must respondent have cash on hand?

Ability to pay can be shown by evidence that respondent has sufficient cash or income to pay. *McMiller v. McMiller*, 77 NC App 808 (1985). *See also Ahern v. Ahern*, 63 NC App 728 (1983) (income can be established by showing how much respondent spends). Or, ability to pay can be shown by evidence that there are reasonable steps respondent can take that would enable him/her to pay but respondent is deliberately failing to take those steps. *Adkins v. Adkins*, 82 NC App 289 (1986)(reasonable steps include liquidating assets); *McMiller*, *id.* (same).

While deliberately and in bad faith failing to look for work or accept employment will support contempt, *Frank v. Glanville*, 45 NC App 313 (1980), a court cannot base contempt on failure to work unless there is evidence that jobs actually are available. *Self v. Self*, 55 NC App 651 (1982).

Right to Appointed Counsel

In *McBride v. McBride*, 334 NC 124 (1993), the Supreme Court held that respondents in contempt cases have the right to court-appointed counsel if indigent and if there is a likelihood of incarceration. In overturning previous precedent to the contrary, the court held:

> An examination of civil contempt cases … indicates that the failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent… Despite the statutory requirements, experience … has shown that trial courts do at times order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay… .

McBride, 334 NC at 131 and n.4.

Unfortunately, appellate cases continue to show a problem in the trial courts. While appointed counsel should help, it is everyone's responsibility to ensure parents are not jailed simply because they fail to pay support.

UNC SCHOOL OF GOVERNMENT

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Contempt

Michael Crowell

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Michael Crowell is a professor of public law and government at the School of Government specializing in the law of judicial administration.

The Difference between Criminal and Civil Contempt

Criminal and civil contempt have different purposes, require different procedures, and result in different sanctions. Criminal contempt is used to punish a person for violating a court order or interrupting or expressing disrespect for the court. Civil contempt, on the other hand, is intended to make someone obey a court order. The purpose of criminal contempt is punishment; the purpose of civil contempt is compliance. Criminal contempt punishes behavior that already has occurred. Civil contempt tries to affect ongoing behavior.

> A major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised. Where the primary purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. Where the primary purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil. Blue Jeans Corp. v. Amalgamated Clothing Workers of Am., AFL-CIO, 275 N.C. 503, 507–8 (1969) (quoting 17 Am. Jur. 2d *Contempt* § 4).
>
> Criminal contempt is generally applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve the rights of private parties and to compel obedience to orders and decrees made for the benefit of such parties. O'Briant v. O'Briant, 313 N.C. 432, 434 (1985).

Civil and Criminal Contempt for the Same Act

Both N.C. Gen. Stat. (hereinafter G.S.) 5A-12(d) and 5A-21(c) specify that a person may not be held in both civil and criminal contempt for the same conduct. That provision was added to the statute in 1999 and negates previous case law such as *Lowder v. All Star Mills, Inc.*, 301 N.C. 561 (1981), which had said that both civil and criminal punishment were available in some instances. Sometimes a defendant's conduct may warrant either civil or criminal contempt and the hearing may proceed on the premise that both possibilities are in play. At the end, though, the judge has to choose one or the other. If the choice is criminal contempt, it is essential to confirm that the standard for a criminal conviction has been met and the particular rights of the defendant associated with a criminal proceeding have been satisfied.

No Contempt Based on Invalid Order

If the court that entered the original order did not have authority to do so, the order is a nullity and can be ignored and no one can be held in contempt for violating it. Corey v. Hardison, 236 N.C. 147 (1952). The critical issue is whether the first judge had jurisdiction to enter the order. If not, the order is considered void ab initio and a later judge may ignore it without violating the rule against one trial judge overruling another. If the first judge had jurisdiction, even though the order may be incorrect as a matter of law, the order is merely voidable and remains in effect, and must be honored by the second judge, until it has been voided by a direct challenge to its validity. State v. Sams, 317 N.C. 230 (1986).

Criminal Contempt

The Grounds for Criminal Contempt

Criminal contempt may be imposed only for one of the grounds specified in G.S. 5A-11(a), which are:

1. Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.
2. Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.
3. Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.
4. Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.
5. Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.
6. Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.
7. Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.
8. Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.
9. Willful communication with a juror in an improper attempt to influence his deliberations.

9a. Willful refusal by a defendant to comply with a condition of probation.

10. Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

Explanation of the Most Common Grounds for Criminal Contempt

GS 5A-11(a)(1): Interruption of Court Proceedings

The statute allows criminal contempt for willful behavior committed during the sitting of the court "directly tending to interrupt its proceedings." For instance, in *In re Paul*, 84 N.C. App. 491 (1987), a lawyer was held in criminal contempt and sentenced to thirty days in jail for coaching a spectator to attempt to disrupt the trial by standing up and yelling out a protest. The spectator would have been in contempt as well, of course. (The lawyer's actions took place outside the court, before the trial, and thus were handled as indirect contempt. The spectator would have been guilty of direct contempt because his actions occurred in the court's presence. The difference between direct and indirect criminal contempt is discussed below.)

GS 5A-11(a)(2): Disrespect for the Court

Criminal contempt includes willful behavior occurring in the court's "immediate view and presence" and "directly tending to impair the respect due its authority." This provision covers the lawyer or witness or spectator who curses the judge, yells in the courtroom, will not stop talking or otherwise is offensive and disrespectful to the judge. An example is *In re Nakell*, 104 N.C. App. 638 (1991), in which the lawyer was held in criminal contempt and imprisoned for ten

days and fined $500 for repeatedly interrupting the judge, refusing to stop talking, failing to sit down, and encouraging his client to be disruptive. *Also see* State v. Johnson, 52 N.C. App. 592 (1981) (defendant in bond hearing argued with judge, refused to sit down and be quiet, prompting spectators to start chanting, "Let him speak"); State v. Wheeler, 174 N.C. App. 367, 2005 WL 2850891 (2005) (unpublished) (defendant in probable cause hearing before magistrate asked magistrate whether the magistrate wanted defendant to "kiss his ass," and in response to threat of contempt said, "I don't give a damn, give me ninety days.").

A spectator's refusal to stand at the bailiff's call for all to rise constitutes disrespect, which may be punished as criminal contempt:

> Courtroom decorum and function depends upon the respect shown by its officers and those in attendance. Unexcused refusals to stand creates a rift in that respect and interrupts the normal proceedings of the court. State v. Randall, 152 N.C. App. 469, 473 (2002). (The contempt conviction was reversed, however, for the failure to give the defendant an opportunity to explain his refusal to stand.)

Note that the statute requires that contempt "directly tending to impair the respect due [the court's] authority" must occur during the sitting of the court and in the court's "immediate view and presence." Consequently, such behavior will be direct criminal contempt and may be punished summarily by the judge, as discussed below. Standing outside the courthouse and arguing so as to be heard in the courtroom through the window has been considered criminal contempt within the presence of the court. State v. Evans, 193 N.C. App. 455, 2008 WL 4635437 (2008) (unpublished).

GS 5A-11(a)(3): Disobedience of Court's Order

Willful disobedience of, or resistance to or interference with, the court's "lawful process, order, directive, or instruction or its execution" is criminal contempt. Examples include refusal to comply with a court order requiring delivery of court documents to a receiver, Lowder v. All Star Mills, Inc., 301 N.C. 561 (1981); refusing to comply with an order to have blood tested, State v. Mauney, 106 N.C. App. 26 (1992); failing to comply with an order to pay alimony, Faught v. Faught, 67 N.C. App. 37 (1984); and encouraging a witness to disobey a subpoena, State v. Wall, 49 N.C. App. 678 (1980). In *State v. Pierce*, 134 N.C. App. 149 (1999), a juror in a drunk driving case was found in contempt for disobeying the court's instructions when he called individuals outside the court to research the reliability of the breathalyzer.

Note that the statute provides for contempt for "interference with" a court order, in addition to disobedience. This wording makes criminal contempt broader than civil and allows punishment when a person acts to thwart a court order but is not personally disobeying the order. Atassi v. Atassi, 122 N.C. App. 356 (1996).

For criminal contempt, the court's "order, directive, or instruction" need not be in writing. In *State v. Simon*, 185 N.C. App. 247 (2007), the defendant was found in contempt for disobeying an oral directive from the judge not to call or fax papers to the judges' office, nor to visit the judges' office, without permission. The appellate court said, however, that the better practice is for such an order to be in writing. The court also distinguished the wording of the criminal contempt statute from the civil contempt statute, suggesting that the imposition of civil contempt for disobedience of a court order does require the order to be in writing.

The judge must find that the defendant indeed had the ability to comply with the order, otherwise the failure cannot be willful. Lamm v. Lamm, 229 N.C. 248 (1948).

GS 5A-11(a)(4): Refusal to Be Sworn or to Answer Questions
Testimony that is obviously false or evasive is the equivalent of refusing to testify and may be punished as contempt. Galyon v. Stutts, 241 N.C. 120 (1954); *In re* Edison, 15 N.C. App. 354 (1972). Note, however, that the use of contempt may preclude a later prosecution for perjury because of double jeopardy (see the discussion of double jeopardy below).

GS 5A-11(a)(7): Failure to Comply with Schedule or Practices of the Court
The statute allows criminal contempt for willful or grossly negligent "failure to comply with schedules and practices of the court" when it results in "substantial interference with the business of the court." The failure of an attorney to appear at a probation violation hearing was criminal contempt in *State v. Key*, 182 N.C. App. 624 (2007). The lawyer argued that he was entitled to withdraw and not appear because he had not been paid by his client, but his withdrawal had not been approved by the court.

Contempt for failure to comply with the court's practices occurs when parties who have agreed to settle a case then fail to execute the necessary settlement papers as required by a local rule on calendaring and settlement of cases. Lomax v. Shaw, 101 N.C. App. 560 (1991).

To establish that the failure to appear had caused substantial interference with the business of the court, the court in *Key,* 182 N.C. App. at 624, that had the lawyer appeared the matter could have been resolved in about five minutes but that his absence required the clerk to make nine separate telephone calls; that the case had to be continued until the next day; and that an out-of-county probation officer had to return the next day. By contrast, in *State v. Chriscoe*, 85 N.C. App. 155 (1987), the criminal contempt conviction was reversed in part because there was no evidence that the tardiness of the witness had interfered with the court's business; in fact, the trial had proceeded without delay in her absence. (Moreover, she had not clearly been ordered to be present at the start of court and her delay was not willful.)

Even though a party's required appearance usually can be satisfied by the lawyer's presence, the party may be held in contempt when the order directs the party to appear personally. Cox v. Cox, 92 N.C. App. 702 (1989).

Direct vs. Indirect Contempt
Criminal contempt may be direct or indirect, a distinction not relevant to civil contempt. Direct criminal contempt is behavior that occurs in the court's presence. Criminal contempt is indirect when it occurs outside the sight or hearing or immediate proximity of the court. Direct criminal contempt may be punished summarily on the spot by the judge in front of whom the behavior occurs, while indirect contempt requires issuance of a show cause order and a hearing. (The AOC form for summary criminal contempt is AOC-CR-390; the form for a show cause order for a plenary proceeding for criminal contempt is AOC-CR-219.) The reason that direct contempt may be punished summarily is that the judge has witnessed the contempt and needs no testimony or other evidence to know what occurred.

Purusant to G.S. 5A-13(a) contempt is direct when the act is (1) committed "within the sight or hearing of a presiding judicial official," (2) "committed in, or in immediate proximity to, the room where proceedings are being held before the court," and (3) "likely to interrupt or interfere with matters then before the court." All three elements are necessary for the contempt to be direct and for the judge to be entitled to punish summarily.

Two cases cited earlier illustrate the difference between direct and indirect contempt. In *In re Nakell* the lawyer was guilty of direct criminal contempt for arguing with the judge and failing

to be quiet and sit down. In *In re* Paul, the lawyer's criminal contempt was indirect because his act of coaching and encouraging a spectator to disrupt the court proceeding took place before the trial and well away from the courtroom. *Also see State v. Wall*, 49 N.C. App. 678 (1980) (indirect criminal contempt for defendant to attempt to persuade a witness not to appear).

The defendant's contempt was considered direct when his arguing and fighting took place outside the courthouse but he was close enough to be heard through the window. *State v. Evans*, 193 N.C. App. 455, 2008 WL 4635437 (2008) (unpublished).

[In *State v. Jackson*, ___ N.C. App. ___, 752 S.E.2d 257 (2013) (unpublished), the court held that defendant's use of a racial slur in the courtroom was direct contempt because it was in open court while the judge was present even though the judge did not actually hear it. This decision seems contrary to the reason for allowing a summary proceeding for direct contempt, which is that the judge has witnessed the contemptuous act and does not need to hear witnesses. In any event, *State v. Jackson* is an unpublished opinion, meaning it is not considered controlling legal authority under Rule 30(e)(3) of the North Carolina Rules of Appellate Practice.]

The cases sometimes have treated failure to appear as direct contempt and sometimes as indirect. In *State v. Verbal*, 41 N.C. App. 306 (1979), the Court of Appeals said it was not clear whether direct or indirect contempt applied to a lawyer returning eighteen minutes late from a court recess. Later, however, in *Cox v. Cox*, 92 N.C. App. 702 (1989), the court specifically decided that a party's failure to appear in response to a show cause order was indirect contempt because the court had no direct knowledge of facts to establish that the failure to appear was willful. The latter decision seems correct. A summary proceeding is allowed only because the judge has witnessed the contempt and needs no further evidence. If witnesses are needed to explain why the person failed to show or was late, then a plenary proceeding is required.

Willfulness

G.S. 5A-11(a) specifies that an act must be willful to constitute criminal contempt (though "grossly negligent failure" also is sufficient for contempt for failing to comply with the court's schedule and practices or an officer failing to perform a duty).

> "Willfulness" in this statute means an act "done deliberately and purposefully in violation of law, and without authority, justification, or excuse." State v. Chriscoe, 85 N.C. App. 155, 158 (1987). The term has also been defined as "more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law." Forte v. Forte, 65 N.C. App. 615, 616 (1983). State v. Phair, 193 N.C. App. 591, 594 (2008).

In *Phair* the court decided that a lawyer could not be held in contempt just because her cell phone rang in court, despite posted warnings to turn phones off. The court considered the lawyer's failure to turn off the phone "certainly irresponsible," but the inaction did not amount to willfulness.

A lawyer's shouting at the judge and refusing to stop talking and sit down was considered willful in *In re Brown*, 181 N.C. App. 148, 2007 WL 3778 (2007) (unpublished), even though he contended his actions to have testimony preserved in the record only "represented zealous advocacy for his client."

Willfulness to interfere with the court proceeding was inferred in *State v. Evans,* 193 N.C. App. 455, 2008 WL 4635437 (2008) unpublished), based on defendant's arguing and fighting outside but near the window to the courthouse because defendant "was familiar with the

criminal court system and should have known the importance of maintaining a level of decorum in and around the courthouse." Thus, he "should have known that the loud yelling of profanity outside of the courtroom and directly outside the judge's chambers would likely interrupt court proceedings. . . ."

A witness's hour-late arrival in court did not amount to willfulness because she was trying to locate her mother and determine her condition after her mother failed to answer her telephone. *Chriscoe*, 85 N.C. App. at 155.

As mentioned above, when the criminal contempt is for failure to comply with a court order the judge must find that the defendant had the ability to comply; without such a finding the failure cannot be willful. Lamm v. Lamm, 229 N.C. 248 (1948).

Need for Warning

The statute on sentencing for criminal contempt, G.S. 5A-12(b)(2), states that no punishment may be imposed for criminal contempt unless the person was given "a clear warning by the court that the conduct is improper" or the act was "willfully contemptuous."

Some kinds of conduct would seem certain to be willfully contemptuous and not require a warning. A spectator who jumps up, screams at the judge and takes a wastebasket and tosses it across the courtroom, for example, would be in contempt even though the judge never warned the person not to do those things. On the other hand, explicit warnings will be needed for behavior that is not as inherently unacceptable. Thus, if the court wishes to control the kind of clothing worn by parties, witnesses, and spectators, or wants to punish those who allow their cell phones to ring in the courtroom, notices should be posted or an announcement made to provide the necessary warning.

Summary Proceeding for Direct Contempt

The contempt statutes provide that a summary proceeding is available only for direct contempt, that is, contempt committed in the presence of the judge. Due process, too, allows a summary proceeding only when the contempt occurred within the personal view of the judge. *In re* Oliver, 333 U.S. 257 (1948); Brandt v. Gooding, 636 F.3d 124 (4th Cir. 2011).

Even in a summary proceeding the defendant must be given notice of the basis for the contempt and an opportunity to respond. The form used for a summary proceeding for direct criminal contempt, AOC-CR-390, states that an opportunity was given. The notice may be given orally by the judge. State v. Johnson, 52 N.C. App. 592 (1981). As stated in the Official Commentary to G.S. 5A-14, the proceeding is not meant to be a full-blown hearing:

> This was intended not to provide for a hearing, or anything approaching that, in summary contempt proceedings, but merely to assure that the alleged contemnor had an opportunity to point out instances of gross mistake about who committed the contemptuous act or matters of that sort.

In *State v. Randell*, 152 N.C. App. 469 (2002), the contempt conviction of a spectator for refusing to stand at the call of the bailiff was reversed because the judge gave him no chance to explain.

In *State v. Verbal*, 41 N.C. App. 306 (1979), a lawyer's contempt for returning eighteen minutes late from a recess was reversed for the judge's failure to allow him to respond. (Note that although *State v. Verbal* left open the question of whether the failure to appear was direct or indirect contempt, the court held later in *Cox v. Cox*, 92 N.C. App. 702 (1989) that it should be treated as indirect contempt.)

A summary proceeding is required by G.S. 5A-14(a) to take place "substantially contemporaneously" with the contempt. Although typically that means the proceeding should occur right after the contempt, circumstances may allow a delay. Whether the delay is allowable depends on the defendant's notice or knowledge of the misconduct being charged, the nature of the misconduct and other circumstances that affect the right to a fair and timely hearing. *Johnson*, 52 N.C. App. at 592. In *Johnson*, the defendant was removed from a bond hearing for being disruptive and the summary contempt proceeding held the next morning was considered substantially contemporaneous. In *In re Nakell*, 104 N.C. App. 638 (1991), a proceeding two days after the lawyer's contemptuous acts was considered substantially contemporaneous when the judge notified the lawyer immediately of the basis for the charge. The stated purpose of the delay was to give the lawyer time to respond; the appellate court treated it as a continuance.

Under G.S. 5A-16(a) the judge may order the person charged with direct criminal contempt to be taken into custody and restrained to the extent necessary to assure the person's presence at the summary proceeding.

An indigent's right to counsel, which applies when there is a plenary proceeding for contempt, is not applicable to a summary proceeding. *In re* Williams, 269 N.C. 68, *cert. denied*, 388 U.S. 918 (1967).

A direct contempt need not be handled summarily. The judge may choose instead to use the plenary proceeding under G.S. 5A-15.

Plenary Proceeding

When the contempt does not occur in front of the judge and thus is indirect criminal contempt, or the judge chooses not to act summarily on a direct contempt, a plenary proceeding meeting the requirements of G.S. 5A-15 must be followed.

The basics of a plenary proceeding include:

- *Order to show cause*. The plenary proceeding is commenced by the judge's issuance of an order to the person being charged to show cause why the person should not be held in contempt. The form for the show cause order is AOC-CR-219. The order must give adequate notice of the acts considered to be contemptuous. O'Briant v. O'Briant, 313 N.C. 432 (1985) (insufficient notice when order said only that hearing was to dispose of "all pending motions"); *In re* Board of Commissioners, 4 N.C. App. 626 (1969) (insufficient notice to county commissioner when order said to show cause for failure to provide "adequate office space" to the clerk of court); Ingle v. Ingle, 18 N.C. App. 455 (1973) (insufficient notice when it only directs person to appear "to testify"). Contempt may not be found for acts that occurred after the show cause order was entered because the order would not include the required notice. State v. Coleman, 188 N.C. App. 144 (2008).
- *Order for arrest*. G.S. 5A-16(b) provides that a judicial official who initiates a plenary proceeding for criminal contempt may issue an order for arrest upon a finding of probable cause that the person will not appear in response to the show cause order. The finding or probable cause has to be based on a sworn statement of affidavit. A person arrested is entitled to bail.
- *Venue*. G.S. 5A-15(b) provides that the proceeding may be held anywhere in the district.
- *Appointment of prosecutor.* G.S. 5A-15(g) authorizes the judge conducting the plenary hearing to appoint a district attorney or assistant DA to prosecute the contempt or, if there is an apparent conflict of interest, some other lawyer.

- *Right to counsel*. G.S. 7A-451(a)(1) provides that an indigent is entitled to appointment of counsel in any case in which the person is likely to be imprisoned or fined $500 or more. Thus, an indigent is entitled to counsel in a plenary proceeding for criminal contempt. State v. Wall, 49 N.C. App. 678 (1980).
- *Right against self-incrimination*. G.S. 5A-15(e) specifies that the right against self-incrimination applies to a plenary hearing for criminal contempt.

Criminal Contempt Cannot Be Initiated by a Private Party

For the defendant to receive adequate notice of the charge, due process requires that criminal contempt be initiated by the court and not by a private party. Brandt v. Gooding, 636 F.3d 124 (4th Cir. 2011). Thus, the court may not consider criminal contempt when a private party has initiated a civil contempt proceeding under G.S. 5A-23 by simply filing a motion and serving it on the other party (see below), even though the basis for the motion may be disobedience of a court order, which could be either civil or criminal contempt. When the court issues a show cause order in response to the party's motion it may be that the show cause order can serve as adequate due process notice of criminal contempt if the show cause specifically states that the proceeding is to consider both civil and criminal contempt.

Contempt for Violation of Domestic Violence Protective Order

G.S. 50B-4(a) provides that contempt may be used for violation of a domestic violence protective order, but does not say whether the violation is to be treated as civil or criminal contempt. Although the statute refers to the procedure for initiating civil contempt under G.S. 5A-23, it would seem that most violations of a domestic violence protective order would warrant criminal contempt rather than civil—the purpose is to punish the person for a past violation of the order, not to imprison them until they comply. The AOC forms (AOC-CV-307, -308, -309) are numbered as civil forms, but they include options for either criminal or civil contempt.

The domestic violence statute, G.S. 50B-4(a), says the party protected by the order may proceed pro se using a form provided by the clerk or by a magistrate authorized by the chief district judge to hear domestic violence matters. The form is AOC-CV-307. The clerk is to schedule and issue a notice for a show cause hearing at the earliest possible date allowed under the civil contempt statute, G.S. 5A-23, which generally requires five days' notice. If the clerk is not available and there is a danger of domestic violence, the magistrate may issue the show cause order. The clerk or magistrate who issues the order is responsible for seeing that it is served by law enforcement.

No Right to Jury Trial

In *Bloom v. Illinois*, 391 U.S. 194 (1968), the United States Supreme Court held that criminal contempt is a crime in the ordinary sense of the term and that "serious" criminal contempts, that is, contempts with punishment of imprisonment for more than six months or a fine of more than $500, are subject to the constitutional requirement of a jury trial. Because the maximum punishment for criminal contempt in North Carolina is thirty days' imprisonment, a $500 fine, or both, the North Carolina Supreme Court held in *Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers*, 275 N.C. 503 (1969), that the right to jury trial does not apply under either the federal or state constitution. Since that decision the criminal contempt punishment statute, G.S. 5A-12, has been amended to allow imprisonment for up to six months for refusing to testify after being granted immunity. Because the maximum punishment still is not more than six months, however, the right to jury trial would not apply.

Recusal

G.S. 15A-15(a), the statute on plenary proceedings for criminal contempt, includes this admonition about the show cause hearing: "If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge." There is no comparable statutory provision for summary proceedings for direct criminal contempt. Nevertheless, there may be times when the events leading up to the summary proceeding show an ongoing conflict between the judge and the defendant and suggest personal feelings on the part of the judge that warrant recusal. When any such question arises, the better practice is to recuse.

> Precedent decrees that a judge should recuse himself in contempt proceedings where they involve personal feelings which do not make for an impartial and calm judicial consideration and conclusion in the matter. Snyker's Case, 301 Pa. 276, 152 A. 33, 76 A.L.R. 666, 30 Am. Jur. 786. And it has been declared the better practice in recusations for prejudice to call upon some other judge whose rulings have not been ignored or disregarded, especially in cases of indirect or constructive contempt. Ponder v. Davis, 233 N.C. 699, 704 (1951).

As a general matter the judge who has initiated the contempt proceeding should decide whether to recuse and need not refer the issue of disqualification to another judge. When a party moves to disqualify the judge and provides sufficient support to require findings of fact, however, the decision on recusal should be referred to another judge. Bank v. Gillespie, 291 N.C. 303 (1976). The judge whose bias is in question then may respond to the allegations by affidavit or by testimony.

Burden of Proof and Standard of Proof

G.S. 5A-15(f) provides that in a plenary proceeding guilt of criminal contempt must be established beyond a reasonable doubt. Moreover, because criminal contempt, whether direct or indirect, is a crime, the constitutional safeguards applicable to all crimes apply. O'Briant v. O'Briant, 313 N.C. 432 (1985); State v. Key, 182 N.C. App. 624, 628 (2007) ("On a hearing for criminal contempt, the State must prove all of the requisite elements under the applicable statute, beyond a reasonable doubt."). Therefore, the standard of proof beyond a reasonable doubt applies regardless of whether the proceeding is summary or plenary.

The issuance of a show cause order does not shift the burden of proof in a criminal contempt proceeding. "To the contrary, a show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State." State v. Coleman, 188 N.C. App. 144, 150 (2008). The defendant's admission of facts may be used to establish those facts. State v. Simon, 185 N.C. App. 247 (2007).

Sanctions

Although generally the punishment for criminal contempt is censure, imprisonment for up to 30 days, a fine of not more than $500, or any combination of those three (G.S. 5A-12), the imprisonment may be for up to six months for failure to testify as a witness after being granted immunity; for up to 90 days for failure to comply with a nontestimonial identification order; and for up to 120 days (which must be suspended) for failure to pay child support.

Imprisonment for criminal contempt differs from imprisonment for civil contempt in that it is for a set time whereas imprisonment for civil contempt is open-ended and continues until the person complies with the court's order. Still, G.S. 5A-12(c) empowers a judge who imposes the sentence for criminal contempt to withdraw the censure, or terminate the imprisonment or reduce the time, or remit or reduce the fine at any time "if warranted by the conduct of the contemnor and the ends of justice." In considering such a reduction, the court should keep in mind that the purpose of criminal contempt is punishment. If the judge wants to imprison someone until the person complies with an order, civil contempt is the proper route. When a sentence for "criminal" contempt includes a set term of imprisonment but also provides for the person to be released upon payment of a sum of money or satisfaction of some other condition, it is really civil contempt. Bishop v. Bishop, 90 N.C. App. 499 (1988).

A sentence for criminal contempt may be suspended with conditions and the defendant placed on probation. Any special condition of probation must be reasonably related to the defendant's rehabilitation. *See* State v. Key, 182 N.C. App. 624 (2007).

The award of attorneys' fees is not appropriate as part of criminal contempt. United Artists Records, Inc., v. Eastern Tape Corp., 18 N.C. App. 183 (1973). Nor may the payment of attorneys' fees be made a condition of a suspended sentence for criminal contempt. M.G. Newell Co., Inc., v. Wyrick, 91 N.C. App. 98 (1988).

Under GS 7A-304(a) costs are to be assessed in "every criminal case in the superior or district court, wherein the defendant is convicted." Although criminal contempt is not considered a criminal "conviction" for some purposes—it does not count as a prior conviction for sentencing, for example—it likely is sufficiently criminal in nature that costs may be assessed. The attorney appointment fee assessed under GS 7A-455.1 would be included in the costs because that fee was determined to be part of court costs by *State v. Webb*, 359 N.C. 92 (2004).

Although there is no case law on the issue, judges sometimes impose consecutive sentences for multiple instances of criminal contempt. For an example of three consecutive thirty-day sentences for a string of obscenities, in a case resolved on other grounds, see *State v. James*, 159 N.C. App. 229 (2003) (unpublished). An argument that consecutive sentences are not appropriate is that the thirty days' punishment allowed for criminal contempt is the same as the punishment for a Class 3 misdemeanor and the sentencing statutes do not allow consecutive sentences when all convictions are for Class 3 misdemeanors.

Although contempt proceedings are for punitive purposes and are criminal in nature, a contempt conviction does not count as a prior conviction under state sentencing law. State v. Reaves, 142 N.C. App. 629 (2001).

Corporation Held in Contempt

A corporation may be held in criminal contempt; an officer of the corporation may be ordered to pay a fine and be imprisoned if the officer knew of the court order and had responsibility and authority to bring the corporation into compliance. State *ex rel.* Grimsley v. West Lake Development, Inc., 71 N.C. App. 779 (1984).

Double Jeopardy

A defendant may not be prosecuted for a criminal offense following a finding of criminal contempt when the contempt was based on violation of an order that prohibited the same acts that constitute the criminal offense. The test as to whether it is the same offense is the "same elements" test from the majority opinion in *United States v. Dixon*, 509 U.S. 688 (1993), based

on the elements that actually led to the finding of contempt. State v. Gilley, 135 N.C. App. 519 (1999); *also see* State v. Dye, 139 N.C. App. 148 (2000). In district court the double jeopardy issue may arise, for example, when the defendant is being prosecuted for domestic violence after having been held in contempt for violation of a domestic violation prevention order. In superior court the issue may arise when a witness testifies falsely; holding the witness in criminal contempt likely will preclude a prosecution for perjury.

A contempt conviction does not count as a prior conviction under state sentencing law, however. State v. Reaves, 142 N.C. App. 629 (2001).

Appeal

G.S. 15A-17 provides that appeal of a conviction of criminal contempt is the same as for appeals of any other criminal action, with the exception that appeal from any judicial official below a superior court judge is to the superior court. Thus, appeal from a magistrate's decision on criminal contempt is to superior court, not to district court. And appeal from a district judge's determination of criminal contempt also would be to superior court. The appeal is for a hearing de novo. Appeal from superior court is to the Court of Appeals.

Because G.S. 5A-17 provides that appeal of criminal contempt is the same as appeal of a criminal conviction, the provisions of G.S. 15A-1451 concerning stay of the sentence pending appeal would apply. Under G.S. 15A-1451 the defendant's notice of appeal automatically stays payment of a fine and costs but does not stay confinement until conditions of release have been determined under the bail statutes. Under G.S. 5A-17 the bail hearing for someone confined for criminal contempt must be held within a reasonable time after imposition of the confinement and the person may not be confined for more than 24 hours without a bail hearing. When a magistrate or clerk orders jail for criminal contempt, the bail hearing is to be by a district judge. When a district judge orders jail for criminal contempt, the bail hearing is to be by a superior court judge. And when a superior court judge orders jail, the bail hearing is to be by a different superior court judge. If the proper official has not acted within 24 hours of the confinement, any other judicial official may hold the bail hearing.

As with other criminal matters, there is no appeal from a determination of not guilty of criminal contempt. Patterson v. Phillips, 56 N.C. App. 454 (1982).

Civil Contempt

Nature and Purpose of Civil Contempt

Civil contempt is not punishment; it is a means to force compliance with a court order.

> The purpose of civil contempt is not to punish; rather, its purpose is to use the court's power to impose fines or imprisonment as a method of coercing the defendant to comply with an order of the court. Jolly v. Wright, 300 N.C. 83, 92 (1980).

Because the purpose of civil contempt is compliance, the contempt order must always include an "out" for the person who is being held in contempt, a means to clear the contempt and avoid imprisonment. If, for example, the defendant is being held in contempt for failing to transfer a deed to the other party as previously ordered by the court, the contempt order should say that the defendant is being imprisoned until the deed is signed over and will be released as soon as

the defendant complies. It is an essential feature of civil contempt that the defendant always be given a means to purge the contempt and avoid the sanction. If there is no way to purge the contempt, then the defendant is being punished for criminal contempt rather than civil contempt. As stated in G.S. 5A-22(a):

> A person imprisoned for civil contempt must be released when his civil contempt no longer continues. The order of the court holding a person in contempt must specify how the person may purge himself of the contempt.

A civil contempt order which has no purge provision will be of no effect:

> Furthermore, the contempt order must be vacated because it fails to specify as required by G.S. 5A-22(a) how the defendant might purge herself of contempt. The purpose of civil contempt is not to punish, but to coerce the defendant to comply with the order. Jolly v. Wright, 300 N.C. 83 (1980). Thus the purging provision is essential to the order. Bethea v. McDonald, 70 N.C. App. 566, 570 (1984).

Need for a Written Order

In *State v. Simon*, 185 N.C. App. 247 (2007), the court held that an order did not have to be in writing for the defendant to be held in criminal contempt for its violation, but noted that the civil contempt statute is different and suggested civil contempt can be based only on a written order, citing *Onslow County v. Moore*, 129 N.C. App. 376 (1998). A later decision, *Hassell v. Hassell*, 149 N.C. App. 972 (2002) (unpublished), says that an order must be in writing, signed by the judge and filed with the clerk to be "entered" and to be the basis for civil contempt.

No Distinction between Direct and Indirect Civil Contempt

The distinction between direct and indirect contempt, so important to criminal contempt, is irrelevant to civil contempt. There is only one kind of proceeding for civil contempt and it matters not whether the contempt occurred before the judge. In essence, all civil contempt is indirect and requires a notice and hearing as described below.

Notice of Civil Contempt Proceeding

Commencement of the Proceeding

A proceeding for civil contempt may be initiated several different ways as provided in G.S. 5A-23. First, an aggrieved party may simply file and serve a motion with the appropriate notice to the party alleged to be in contempt. The motion has to be accompanied by a sworn statement or affidavit explaining the basis for contempt, but no judicial official has to review the documents before the notice is sent out.

A second option is for the complaining party to take the sworn statement or affidavit to a judge, have the judge review it and find probable cause to believe that contempt has occurred. The judge then has two choices, to either issue a notice of hearing or a show cause order. A court-issued notice of hearing informs the defendant that the hearing is being held and that the defendant will be held in contempt unless the defendant appears, but it does not specifically order the person to come to court. The show cause order does just that; it orders the defendant to appear and show cause why contempt should not be found.

As a final possibility, the notice or show cause order does not have to be initiated by a party; it may be initiated by a judge filing a sworn statement or affidavit.

Often the motion prepared by the complaining party is ambiguous as to whether the party is seeking civil or criminal contempt. If the motion is made pursuant to G.S. 5A-23, it is supposed to be for civil contempt, not criminal, and that is what the party's motion and the court's show cause order should say. If, even though the matter was brought to the court's attention by a private party, the court is contemplating criminal contempt, the show cause order must say so, because due process requires that a proceeding for criminal contempt be initiated by the court, not by a private litigant. Brandt v. Gooding, 646 F.3d 124 (4th Cir. 2011). In other words, if the private party is initiating the process by simply filing and serving a motion, it can only be for civil contempt and the court cannot consider criminal contempt. If the private party has sought and the court is ready to issue a show cause order, it may be that the show cause order can satisfy the due process requirement for criminal contempt, but to do so it must state clearly that the defendant might be held in criminal contempt; there should be no ambiguity about what the defendant is facing. Additionally, a defendant in a criminal contempt proceeding has rights that do not apply in civil contempt, and the punishment that may be applied is different. It is important, therefore, for the judge who signs the show cause order or who hears the matter to be clear as to which form of contempt is at issue, so as to avoid error in the proceeding.

Waiver of Need for Affidavit

Although under each of the several procedures for initiating a civil contempt hearing the notice or order is supposed to be based on a sworn statement or affidavit, the defendant waives that requirement by appearing in court to answer the charges. Lowder v. All Star Mills, Inc., 301 N.C. 561, 583 (1981). A defendant should be able to make a limited appearance to contest the sufficiency of the notice.

Service of Notice

Whichever way the contempt proceeding is begun, G.S. 5A-23 requires that the motion or notice or order be served on the defendant at least five days before the hearing. The contempt is invalid if no notice or show cause order is issued. Watkins v. Watkins, 136 N.C. App. 844 (2000). In the case of *In re Ammons*, 344 N.C. 195 (1996), a judge was censured for, among other things, issuing an arrest order in a civil contempt proceeding without notice and an opportunity to be heard.

The statute allows the five-day notice to be shortened for good cause. The actual notice the defendant has received and the time the defendant has had to prepare are factors to be considered in determining whether notice of less than five days was sufficient.

> Thus, the judge was authorized to shorten the notice period [to five hours] for good cause, which he found upon undisputed facts to the effect that defendant had known for several months of the particular charges pending against him, had had ample opportunity to prepare and meet them, and all the witnesses, some of whom had been in court on earlier occasions, were present, along with the parties. M.G. Newell Co., Inc., v. Wyrick, 91 N.C. App. 98, 101 (1988).

Contempt for Failure to Pay Child Support

G.S. 50-13.4(f)(9) provides that an order or judgment for periodic payment of child support may be enforced through civil contempt, and that disobedience of such an order may be punished pursuant to criminal contempt.

The civil contempt proceeding may be initiated in the same manner as any other civil contempt proceeding as described above, or it may be initiated pursuant to G.S. 50-13.9(d). The AOC forms for contempt for failure to pay child support under G.S. 50-13.4 are AOC-CV-601 (motion for show cause order) and -602 (show cause order). Although the forms are designated as civil forms they include options for either civil or criminal contempt. The form for commitment of the violator, AOC-CV-603, is written as commitment for civil contempt.

Under G.S. 50-13.9(d) the clerk of court or a district court judge initiates the contempt proceeding upon an affidavit from the person to whom the child support payment is owed or, in the case of IV-D payments, the IV-D agent.

The show cause order issued under G.S. 50-13.9(d) directs the person obligated to pay child support to appear and show why that person should not be subjected to income withholding or held in contempt or both. The order also directs the person to bring to the hearing records and information related to the person's employment and amount of disposable income. The order has to be served according to Rule 4 of the Rules of Civil Procedure.

In most child support cases there is no question that the obligor has failed to make the child support payments; the issue for the court usually is whether the failure is willful and whether the person has the present ability to pay.

For a more detailed discussion of contempt and child support, see "Using Contempt to Enforce Child Support Orders," by John Saxon, School of Government, Special Series No. 17 (February 2004).

Contempt for Violation of Domestic Violence Protective Order

As discussed above under Criminal Contempt, G.S. 50B-4(a) provides for the use of contempt for violation of a domestic violence protective order but does not specify whether it is civil or criminal contempt. As discussed above, it would seem that in most instances the proper course would be criminal rather than civil contempt. The forms provided by the AOC are numbered as civil forms but are written with options for either criminal or civil contempt.

Order for Arrest

As discussed above, G.S. 5A-16 states that a judge may issue an order for arrest for a defendant charged with criminal contempt, if it appears unlikely the person will appear. The statute on orders for arrest, G.S. 15A-305, likewise specifies in subdivision (b)(9) that an order for arrest may be issued as authorized by G.S. 5A-16. The civil contempt statutes have no provision comparable to G.S. 5A-16 about orders for arrest. There is no specific authority, therefore, for the court to issue an order for arrest for a person to appear for a civil contempt hearing.

To complicate matters, the statute on orders for arrest says in G.S. 15A-305(b)(7) that an order for arrest may be used in any situation in which the "common-law writ of capias has heretofore been issuable." Capias, also known as a "bench warrant," may have been used at some stage in a civil contempt proceeding in the days before Chapter 15A, but there is no good case law on the subject to serve as a reference.

The order for arrest issue creates difficulty only with respect to the initial hearing on civil contempt. If the defendant fails to show for the civil contempt hearing, the defendant then is in criminal contempt for disobeying the court's notice to appear or show cause order, and an order for arrest clearly could be issued then to have the person taken into custody to appear in the criminal contempt proceeding. Or the capias justification may apply at that point.

Recusal

As discussed above, the statute on plenary proceedings for indirect criminal contempt admonishes the judge issuing the show cause order to have it returned before another judge if the contempt "is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned." There is no comparable statutory provision for direct criminal contempt nor for civil contempt. Nevertheless, as already suggested, there will be times when the history leading up to the contempt hearing implies the presence of personal feelings on the part of the judge that warrant recusal. The better practice is to recuse when there is a question.

Right to Counsel

The United States Supreme Court has held that due process does not always require the appointment of counsel for an indigent in civil contempt proceedings where incarceration is threatened, but North Carolina case law seems to always require counsel in those situations. In *Turner v. Rogers*, 564 U.S. ___, 131 S.Ct. 2507 (2011), a civil contempt proceeding in a child support case in South Carolina was initiated by one parent, unrepresented, against the other parent. The Supreme Court said appointment of counsel was not required because the complaining parent was unrepresented and the state had procedural safeguards to protect the defendant's interests, including notice to defendant of the importance of the ability to pay to the issue of contempt plus a fair opportunity to present evidence and to dispute relevant information. The defendant ended up serving a year for contempt, the maximum allowed under South Carolina law if the defendant failed to purge the contempt.

Before *Turner v. Rogers* the North Carolina appellate courts had held that the appointment of counsel in civil contempt cases depends on the likelihood of the person being imprisoned. An indigent defendant who is going to be jailed for civil contempt is presumed to be entitled to appointed counsel.

> The private interest at stake in the present case [civil contempt for failure to pay child support] is, perhaps, the most fundamental interest protected by the Constitution of the United States—the interest in personal liberty. A defendant who is found in civil contempt and incarcerated for nonsupport does not 'hold the keys to the jail' if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages. McBride v. McBride, 334 N.C. 124, 130 (1993).

When faced with a potentially indigent defendant who might be jailed for civil contempt, the North Carolina Court of Appeals has said that the trial court is supposed to (1) determine how likely it is the defendant will be jailed, (2) if jail is likely, ask whether the defendant wants a lawyer and determine the ability to pay, and (3) if the defendant wants a lawyer but is indigent, appoint counsel. King v. King, 144 N.C. App. 391, 394 (2001). In the end, though, the right to counsel applies only if the defendant actually is jailed. Even though the indigent defendant faces the possibility of incarceration, if the court finally decides not to impose jail time then it does not matter that no lawyer was appointed. *Id.*

In *D'Alessandro v. D'Alessandro*, ___ N.C. App. ___, 762 S.E.2d 329 (2014), decided several years after *Turner v. Rogers*, the North Carolina Court of Appeals cited *McBride* and did not mention *Turner v. Rogers* in deciding that counsel had to be appointed for an indigent defendant

in a contempt proceeding for failure to pay child support. Thus, a trial court should continue to follow the directions in *McBride* and *King* until and unless the North Carolina appellate courts reassess their holdings in light of the United States Supreme Court's decision.

No Right to Jury Trial

It does not appear that a defendant is entitled to a jury trial for civil contempt, but there is no appellate decision which explicitly says so. Although the annotations in the General Statutes list *In re Gorham*, 129 N.C. 481 (1901), as holding that there is no right to a jury trial for civil contempt, the punishment rendered in that case actually looks more like criminal contempt than civil. No later cases seem to have addressed the issue, though any number of sources assume there is no jury trial for civil contempt.

As discussed above, the constitutional right to a jury trial would apply to criminal contempt as to any other criminal proceeding if the permissible punishment exceeded six months' imprisonment, but most criminal contempt is capped at 30 days' imprisonment and, therefore, there is no right to a jury. Regardless of the law about criminal contempt, civil contempt is a civil proceeding, not criminal, and the purpose is not punishment but forcing compliance with a court order. The limits on imprisonment for civil contempt are discussed below. While some acts of contempt allow indefinite incarceration, most instances of failure to pay money — with the notable exception of child support — are limited to 90 days, subject to renewal if the person still refuses to pay. It is important to remember, though, that in all cases the imprisonment is only until the defendant complies. Thus, unlike criminal contempt which requires the full sentence of imprisonment to be served, incarceration for civil contempt always is subject to the defendant being released earlier by purging the contempt.

Willfulness and the Standard of Proof

The civil contempt statute specifies in G.S. 5A-21(a)(2a) that contempt requires that the "noncompliance by the person to whom the order is directed is willful." Before that language was added, the courts already had mandated a finding of willfulness:

> Although the statutes governing civil contempt do not expressly require willful conduct . . ., case law has interpreted the statutes to require an element of willfulness. (citation omitted) In the context of a failure to comply with a court order, the evidence must show that the person was guilty of "knowledge and stubborn resistance" in order to support a finding of willful disobedience. Sharpe v. Nobles, 127 N.C. App. 705, 709 (1997).

Surprisingly, there does not seem to be any case law about the standard of proof for civil contempt. With no other standard defined, the fallback as in any civil case is preponderance of the evidence.

Burden of Proof

The burden of proof in civil contempt lies with the party who is asserting that the other person is in contempt. However, once a judge has found that probable cause exists for finding contempt and has issued a show cause order, the burden shifts to the defendant to show why contempt should not be found.

Recall that contempt can be initiated by the judge or by a party who claims that the other side is in contempt. The private party may either file a motion and serve notice of the contempt

hearing or may go to a judge and request a show cause order. When the private party initiates the contempt by simply filing a motion and serving notice and there has been no judicial finding of probable cause, G.S. 5A-23(a1) specifies that the complainer has the burden of proof: "The burden of proof in a hearing pursuant to this subsection shall be on the aggrieved party." Because there has not yet been a finding of probable cause, the burden may not be shifted to the defendant in that circumstance. Trivette v. Trivette, 162 N.C. App. 55 (2004). More typically, though, the complaining party goes to a judge and makes a sufficient showing for issuance of a show cause order. When the judge has found probable cause, the burden then shifts to the defendant to show why contempt is not appropriate. Plott v. Plott, 74 N.C. App. 82 (1985).

The contempt proceeding also may be initiated by the judge. Under G.S. 5A-23(a) the judge is supposed to provide a sworn statement or affidavit and there is supposed to be a finding of probable cause. The result is a show cause order, just as if the contempt was initiated by a private party providing an affidavit or sworn statement. If that has happened, the burden would be on the defendant to show why contempt is not appropriate.

Regardless of who has the burden of proof, the order holding the defendant in contempt has to include findings of fact which show that evidence has been introduced to support the conclusion that the defendant has the ability to comply and has acted willfully in refusing to do so. It is not enough for the order to just state that the defendant failed to show why contempt was not appropriate.

Ability to Purge the Contempt, Present Ability to Comply

The purpose of civil contempt is not punishment; it is to obtain compliance with a court order. It follows, therefore, that the civil contempt order must specify the means by which the defendant can be in compliance and purge the contempt. This requirement has been codified in G.S. 5A-22: "The order of the court holding a person in civil contempt must specify how the person may purge himself of the contempt." The purge provision is essential to the civil contempt order and without it the order must be vacated. Bethea v. McDonald, 70 N.C. App. 566 (1984).

It also follows logically from the purpose of civil contempt that the contempt order must include a finding that the defendant has the present ability to comply with the order. Teachey v. Teachey, 46 N.C. App. 332 (1980). If the person cannot comply, there is no contempt. Criminal contempt requires a finding that the defendant had the ability to comply sometime in the past and willfully chose not to do so, but what happened earlier is irrelevant to civil contempt.

Although it is preferable that the contempt order include specific findings about the defendant's ability to comply, a finding that says only that the defendant has "present means to comply" is "minimally sufficient" for the appellate courts. Adkins v. Adkins, 82 N.C. App. 289, 292 (1986).

Civil contempt often is for failure to pay money owed to another party. The court does not need to find that the defendant has the money on hand; it is sufficient that defendant has assets that can be liquidated. In *Hartsell v. Hartsell*, 99 N.C. App. 380, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991), for example, the defendant's home equity of $60,000 was enough to establish the ability to pay $30,000. Likewise, in *Adkins v. Adkins*, 82 N.C. App. 289 (1986), the defendant's ownership of three automobiles and three trucks in his business showed he could pay.

The present ability to pay also may be based on the defendant's ability to take a job or borrow money. Teachey v. Teachey, 46 N.C. App. 332 (1980). If the defendant does not have a job and testifies that no work is available, however, the court must find that work is available rather than just saying that the defendant can get a job. Self v. Self, 55 N.C. App. 651 (1982).

Although an order should state that the defendant "has" the present ability to comply, an order using "had" will be upheld when the findings otherwise show that the court was determining the defendant's present ability. Gordon v. Gordon, ___ N.C. App. ___, 757 S.E. 2d 351 (2014).

A defendant may be held in contempt if the defendant can pay a portion of the money owed, but the contempt order can require payment only of that portion. Brower v. Brower, 70 N.C. App. 131 (1984).

As would seem obvious, a judge cannot hold a defendant in civil contempt after finding as a fact that defendant is not able to pay the amount due. Carter v. Hill, 186 N.C. App. 464 (2007).

No Contempt if Person Has Complied by Time of Hearing

Civil contempt is used to compel a person to comply with a court order. If by the time of the hearing the person has already paid the money owed or taken whatever other action was required, there can be no finding of civil contempt, even though the compliance took place after the show cause order was entered and served. Ruth v. Ruth, 158 N.C. App. 123 (2003).

As a matter of logic, civil contempt would not seem appropriate when the order being violated is an order to *not* do something, such as an order to not contact someone. If the defendant violated the order and contacted the person, the violation would be complete and finished by the time of the contempt hearing. In that situation there is no logical purge for civil contempt—there's nothing the defendant can do now to erase the violation; it is already over. Therefore, criminal contempt for the past violation would seem to be the only appropriate remedy.

At least one unpublished court of appeals opinion ignores this logic and approves the use of civil contempt in such a situation. In *Helms v. Landry*, 198 N.C. App. 405, 2009 WL 2177320 (2009) (unpublished), the defendant parent was held in civil contempt for failing to return the child on time from a visit two months earlier, violating the custody order in effect at the time. The trial judge found the defendant in civil contempt, committed the defendant to 30 days in jail, suspended the thirty days, and imposed a purge condition that the defendant comply with the original custody order. That sounds like criminal contempt, but the court of appeals treated it as civil and rejected the argument that civil contempt is not appropriate when the violation is already concluded by the time of the hearing. It is an unpublished opinion.

No Right against Self-Incrimination

The right against self-incrimination does not apply to civil contempt proceedings, and a defendant who refuses to present evidence in response to a show cause order does so at that person's own peril. Hartsell v. Hartsell, 99 N.C. App. 380, *appeal dismissed*, 327 N.C. 482 (1990), *affirmed*, 328 N.C. 729 (1991). By contrast, G.S. 5A-15(e) says that a person charged with criminal contempt cannot be called as a witness against the person's own interest. It is important to remember, then, that if the proceeding began with the possibility of both criminal and civil contempt, and the defendant is required to testify, the court may punish only for civil contempt.

Contempt against a State Agency

A state agency may not be held in civil contempt. Sovereign immunity applies and the state has not consented to being held for contempt. North Carolina Department of Transportation v. Davenport, 334 N.C. 428 (1993). In *Davenport* the agency was ordered to reinstate a fired employee to the same position. When DOT put him in a different job he sought contempt, but the Supreme Court said it was not available.

Sanctions

The only sanction the court may impose for civil contempt is imprisonment until the defendant complies with the court order. Because the only purpose of civil contempt is to compel compliance, a punitive sanction such as a fine or a set term of imprisonment would not be appropriate.

G.S. 5A-21 spells out the length of imprisonment that may be imposed for civil contempt. Although subsection (b) says that the defendant "may be imprisoned as long as the civil contempt continues," the remainder of the statute modifies that rule. The imprisonment indeed may continue indefinitely if the contempt is for something other than paying money or if the contempt is for failure to pay child support. If the contempt is for failure to pay something other than child support, the imprisonment is for up to ninety days, keeping in mind that the defendant may go free at any time upon complying with the order and purging the contempt. If the person has not purged the contempt in ninety days, the court must conduct a new hearing and then, if it finds that the defendant still has the ability to pay, order incarceration for up to ninety more days. That process may be repeated until a full one year has been served. At that point, civil contempt is no longer available for the failure to pay.

If the civil contempt is for failure to comply with a nontestimonial identification order, G.S. 5A-21(b1) limits the imprisonment to ninety days total. At the end of that time, the person must be released or arrested for the offense to which the order is related.

[A 2014 Court of Appeals decision, *Tyll v. Berry*, ___ N.C. App. ___, 758 S.E.2d 411 (2014), approved the payment of a fine to the complaining party as a sanction for civil contempt for violating a Chapter 50C civil no-contact order, contrary to what was thought to be the law on contempt. In 2015 the General Assembly stepped in, effectively negating the *Tyll v. Berry* decision, by enacting Session Law 2015-210 which amended G.S. 5A-21(d) to state specifically that the court may not impose a fine as a sanction for civil contempt. The statute applies to all civil contempt orders entered October 1, 2015, or later.]

Award of Damages and Costs

The general rule is that a court may not award costs or damages to a private party in a civil contempt proceeding. Green v. Crane, 96 N.C. App. 654 (1990). North Carolina is in the minority on this issue, with most other jurisdictions allowing compensatory damages to the plaintiff. *See* Atassi v. Atassi, 122 N.C. App. 356 (1996); 85 A.L.R.3d 895. The plaintiff does not get costs either. Thus, for example, the court may not order the defendant to pay the cost of the other side's expert certified public accountant. Watson v. Watson, 187 N.C. App. 55 (2007). Costs may be awarded, though, when the settlement agreement being enforced by the court through civil contempt (having been adopted by the court as its own judgment) specifically provides for the award of the costs of enforcement. PCI Energy Services v. Wachs Tech. Services, Inc., 122 N.C. App. 436 (1996).

In *Tyll v. Berry*, discussed above in the section on "Sanctions," the Court of Appeals approved a trial court order that the defendant pay the complaining party a "fine" for violating a civil no-contact order. Although the sanction was designated a fine — which seems contrary to the generally accepted law that incarceration is the only sanction for civil contempt — it was to be paid to the complaining party, not to the court. In essence, then, it appears to be the award of damages to a private party. Several aspects of the opinion in *Tyll v. Berry* seem to contradict previous decisions and it is not clear yet what effect it will have.

Award of Attorneys' Fees

In general attorneys' fees are not available in a contempt proceeding, and the court's inherent authority to issue sanctions for failure to obey its orders does not include an award of attorneys' fees. Baxley v. Jackson, 179 N.C. App. 635 (2006). There are notable exceptions, however.

First, attorneys' fees can be included in an award of costs if the court is enforcing a settlement agreement which has been adopted by the court as its own judgment, and that agreement provides for indemnification of the costs of enforcing the agreement. PCI Energy Services v. Wachs Tech. Services, Inc., 122 N.C. App. 436 (1996).

More importantly for district court, attorneys' fees may be awarded in a contempt proceeding for child support. Blair v. Blair, 8 N.C. App. 61 (1970). For attorneys' fees to be awarded, however, the court must find under G.S. 50-13.6 that the party was acting in good faith and had insufficient means to defray the expenses of the suit. Wiggins v. Bright, 198 N.C. App. 692 (2009); Brownstead v. Brownstead, ___ N.C. App. ___, 757 S.E.2d 524 (2014) (unpublished). Attorneys' fees also may be awarded, without the finding required by G.S. 50-13.6, when the contempt is to enforce an equitable distribution order. Hartsell v. Hartsell, 99 N.C. App. 380 (1990). Attorneys' fees also have been allowed in contempt for failure to pay alimony. Shumaker v. Shumaker, 137 N.C. App. 72 (2000).

Appeal

G.S. 5A-24 provides that appeals of civil contempt are the same as appeals of other civil matters. Thus, appeal of civil contempt from either district or superior court is to the Court of Appeals. Hancock v. Hancock, 122 N.C. App. 518 (1996).

Trial Court Jurisdiction after Appeal

A civil contempt order imposing sanctions for failing to comply with discovery is immediately appealable. Although the contempt order is interlocutory, it affects a substantial right and thus may be heard on appeal. Benfield v. Benfield, 89 N.C. App. 415 (1988). In a case involving contempt for noncompliance with child support and equitable distribution orders the Court of Appeals said that immediate appeal applies to all contempt orders: "The appeal of any contempt order, however, affects a substantial right and is therefore immediately appealable." Guerrier v. Guerrier, 155 N.C. App. 154 (2002). The court cites *Willis v. Power Co.*, 291 N.C. 19 (1976), but *Willis* does not go so far; it addresses only contempt for failing to comply with discovery. The dissent in *Guerrier* argues that the contempt order sometimes may affect a substantial right and sometimes may not and that a blanket rule is not possible. The broad statement by the majority in *Guerrier* might be considered dictum, and one should not assume that all contempt orders are immediately appealable.

If a contempt order has been appealed, the giving of notice of appeal removes the case from the trial court's jurisdiction, meaning that the court may not enforce the contempt sanctions until the appeal is decided or it is determined that there is no right to immediate appeal. Lowder v. All Star Mills, Inc., 301 N.C. 561 (1981); also see G.S. 1-294 ("When an appeal is perfected . . . it stays all proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein . . . .").

By statute, however, appeal does not stay enforcement of contempt in cases of child support (G.S. 50-13.4(f)(9)), custody (G.S. 50-13.3), and alimony (G.S. 50-16.7(j)). Guerrier v. Guerrier, 155 N.C. App. 154 (2002).

Contempt to Enforce a Consent Judgment

Although the general rule is that civil contempt may not be used to enforce a consent judgment, the exceptions almost swallow the rule. The reasoning behind the rule is that a consent judgment is a contract and should be enforced by the same means as other contracts, not by contempt.

One exception is a consent judgment in a domestic relations case. There, the private contract is considered superseded by the court's adoption of the agreement as its own determination of the parties' rights. Henderson v. Henderson, 307 N.C. 401 (1983).

For other kinds of consent judgments the issue is whether the court has made its own determination of facts and conclusions of law rather than simply approving the agreement of the parties. If the court has made its own determinations, the consent judgment may be enforced by contempt just like any other judgment. An example of a consent judgment that was not enforceable because it only recites the parties' agreement is *Crane v. Green*, 114 N.C. App. 105 (1994), where the judgment included no findings of fact or conclusions of law, it merely recited that it was being entered pursuant to the parties' agreement. On the other hand, in *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188 (1995), the agreement was enforceable by contempt because the consent order entered by the judge included findings of fact and conclusions of law. The findings and conclusions need not be created anew by the judge. In *PCI Energy Services v. Wachs Technical Services*, 122 N.C. App. 436 (1996), the court "adopted" and "incorporated" the parties' settlement agreement into a document which recited that it was an enforceable judgment of the court. That, in addition to the judge being familiar with the facts because he had entered a preliminary injunction in the case, was sufficient to make the agreement a court-ordered judgment subject to contempt.

Contempt By Juvenile

Article 3 of General Statutes Chapter 5A provides slightly modified procedures for contempt by a juvenile. For purposes of the contempt statute, a juvenile is someone between six and sixteen years of age who has not been emancipated and has not been convicted of a crime in superior court. G.S. 5A-31(a).

The acts which may constitute contempt by a juvenile are listed in G.S. 5A-31(a) and are the same as the acts listed in G.S. 5A-11(a) for criminal contempt.

The court may use the contempt authority against a juvenile only for direct contempt; that is, contempt that occurs in the court's presence and is likely to interrupt or interfere with matters before the court. G.S. 5A-31(b). Indirect contempt has to be handled according to the procedures in General Statutes Chapter 7B for adjudication of a juvenile as undisciplined or delinquent. G.S. 5A-33.

Direct contempt by a juvenile may be handled in a summary proceeding, but the court must appoint a lawyer to represent the juvenile and must give the lawyer and juvenile time to confer. G.S. 5A-32(a). If the court chooses not to use a summary proceeding, the judge must enter a show cause order which also appoints a lawyer to represent the juvenile. G.S. 5A-32(b). The court may order the juvenile detained as necessary to assure the juvenile's presence for the summary proceeding or to receive notice of a plenary proceeding. The order may be oral. G.S. 5A-32(e).

Sanctions may not be imposed unless the court finds that the contempt was willfully contemptuous or that the juvenile was first warned that the conduct was improper. G.S. 5A-32(c). The facts must be proved beyond a reasonable doubt. G.S. 5A-32(a)(3).

The sanctions that the court may impose for contempt by a juvenile include any or all of the following:

- Detention in a juvenile detention facility for up to five days.
- Up to thirty hours of supervised community service.
- Evaluation to determine the needs of the juvenile.

The judge may terminate or reduce the sanctions at any time if warranted by the juvenile's conduct. G.S. 5A-32(d).

Appeal of juvenile contempt is to the Court of Appeals. G.S. 5A-32(g).

Disestablishment of Paternity

2016 Child Support Enforcement: Representing Respondents
Joyce L. Terres, Assistant Appellate Defender, Office of Parent Representation
123 W. Main Street, Suite 308, Durham, NC 27701
(919) 354-7230
Joyce.L.Terres@nccourts.org
www.ncids.org

Legal avenues have always existed to set aside paternity orders under rare circumstances. Statutory changes, effective January 2012, were expected to make disestablishment of paternity less difficult to achieve. The reality may be totally different.

Let's assume you have been appointed to represent a defendant in a child support case who was served with an order to show cause for failure to comply with a child support order. He tells you that he is pretty sure he is not the father of the child. Where do you begin?

1. Ask your client lots of questions.

A list of sample questions is attached as a starting point. *Attachment 1.* Some of the later questions may be unnecessary if you receive affirmative answers to some of the earlier questions. You might want to tweak this list to add other questions of your own or to word them in a different way. But these will provide a basic outline for the information you need in order to determine whether it is feasible to move forward with a motion for disestablishment.

2. Research the court file.

Your client may not remember all of the details regarding dates or events. Even if he thinks he remembers what happened, you will need to check the court file to verify his claims. Research the court file to determine how paternity was established, when it was established, and what documentation is in the file to support the method of establishment. Make copies of the relevant documents.

- *Affidavit of Parentage*

The Affidavit of Parentage (AOC-CV-604) contains the father's acknowledgement and the mother' affirmation executed before a notary. Very often this is executed at the hospital. This document is an "admission of paternity and shall have the same legal effect as a judgment of paternity for the purpose of establishing a child support obligation[.]" N.C. Gen. Stat. § 110-132(a). *See also* N.C. Gen. Stat. § 130A-101(f). An affidavit of parentage may be rescinded "within the earlier of (1) 60 days of the date the document is executed, or (2) the date of entry of an order establishing paternity or an order for payment of child support." *Id.*

- This document must contain the social security number of both parents. N.C. Gen. Stat. § 110-132(a3).
- This document may be executed by minor parents. *Id.*
- The parents must receive oral and written notice of the legal consequences and responsibilities arising from the signing of this document and any alternatives to its execution. *Id.*

When paternity has been voluntarily established by affidavit of parentage, only a child support action will be initiated by the child support enforcement agency. A Summons will be issued by a judge or the Clerk of Superior Court requiring the father to show cause as to why the court should not enter an order for the support of the child by periodic payments. N.C. Gen. Stat. § 110-132(b).

➢ *Order of Paternity*

When paternity has not been voluntarily established and there is no presumption of paternity, child support enforcement will file a civil action to determine parentage of a child born out-of-wedlock. Pursuant to N.C. Gen. Stat. § 49-16, a civil action to establish paternity may be initiated by:

- The mother, putative father, child, or the personal representative of the mother or child; or
- The director of social services in the county where either the mother, putative father, or child resides or is found, when the mother or child is likely to become a recipient of public assistance.

N.C. Gen. Stat. § 49-16.

The civil complaint may include a claim for paternity only or a claim for both paternity and child support. The civil complaint must be accompanied by a civil summons that is served on the defendant pursuant to Rule 4 of the Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 4. Often a notice of hearing is served simultaneously. A civil complaint cannot be served upon an un-emancipated minor defendant, unless a guardian ad litem has been appointed. N.C. Gen. Stat. § 1A-1, Rule 17(b)(2).

After service of the civil complaint upon the defendant, the order for paternity may have been entered by *default* if he did not appear. *See* N.C. Gen. Stat. § 1A-1, Rule 55.

If the defendant appeared in court, he either *admitted* or *denied* paternity.

- If he *admitted* paternity, an order for paternity was entered and, if a claim for child support was also made, the court proceeded to address the child support issue.
- If he *denied* paternity, paternity testing was ordered. An order for paternity would only have been entered after the results of paternity testing were returned and there was an opportunity for the defendant to be heard.

Paternity testing is required in any contested civil case if the child is more than three years old. N.C. Gen. Stat. § 49-14(d). If no objections are filed to the testing procedures or results, the results are admissible without proof of authenticity or accuracy. N.C. Gen. Stat. § 8-50.1(b1).

➢ *Presumed Legal Father*

If the father is a presumptive legal father, the child support action alone will be pursued by the child support enforcement agency through a civil action. It should be apparent from the civil complaint for child support why an action for paternity was not pursued when the father is a presumptive legal father. The complaint should indicate that the child was conceived

and/or born during the marriage, that the child was adopted by the father, or that the child was legitimated by the father. After service of the civil complaint upon the father, the order for support may have been entered after his appearance in court or by default if he did not appear.

3. Review the paternity disestablishment (set aside) statutes.

Our legislature added three statutes specific to disestablishment of paternity effective January 1, 2012: 1) Motion to set aside a determination of paternity in an affidavit of parentage (N.C. Gen. Stat. § 110-13(a2)); 2) Motion to set aside a determination of paternity in a civil order (N.C. Gen. Stat. § 49-14(h)); and 3) Motion or claim for relief from a child support order (N.C. Gen. Stat. 50-13.13). Review each one carefully to determine which is the most applicable to your client's situation.

- *Motion to set aside a determination of paternity in an affidavit of parentage*

Section 110-132(a2) of the North Carolina General Statutes reads as follows:

> Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an affidavit of parentage may be set aside by a trial court after 60 days have elapsed if each of the following applies:
>
> (1) The affidavit of parentage was entered as the result of fraud, duress, mutual mistake, or excusable neglect.
>
> (2) Genetic tests establish that the putative father is not the biological father of the child.
>
> The burden of proof in any motion to set aside an affidavit of parentage after 60 days allowed for rescission shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the affidavit of parentage was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the affidavit of parentage. Nothing in this subsection shall be construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage.
>
> N.C. Gen. Stat. § 110-132(a2).

There is an AOC form motion and notice of hearing to set aside an affidavit of parentage that coincides with the requirements of this statute, or you may prepare your own motion. AOC-CV-670. Here is a list of the statutory requirements broken down:

- A proper motion to set aside an affidavit of parentage must make allegations to support fraud, duress, mutual mistake, or excusable neglect;
- The court shall order the mother, child and putative father to submit to genetic paternity testing upon filing of a proper motion;
- The movant has the burden of proof (no standard of proof is specified);
- If the genetic paternity testing shows the putative father is not the father and the affidavit of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect the court may set aside the affidavit of parentage (i.e., at the court's discretion);
- This statute is not applicable to a presumed legal father.

➢ *Motion to set aside an order of paternity in a civil order*

Section 49-14(h) of the North Carolina General Statutes reads as follows:

> Notwithstanding the time limitations of G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an order of paternity may be set aside by a trial court if each of the following applies:
>
> (1) The paternity order was entered as the result of fraud, duress, mutual mistake, or excusable neglect.
>
> (2) Genetic tests establish the putative father is not the biological father of the child.
>
> The burden of proof in any motion to set aside an order of paternity shall be on the moving party. Upon proper motion alleging fraud, duress, mutual mistake, or excusable neglect, the court shall order the child's mother, the child whose parentage is at issue, and the putative father to submit to genetic paternity testing pursuant to G.S. 8-50.1(b1). If the court determines, as a result of genetic testing, the putative father is not the biological father of the child and the order of paternity was entered as a result of fraud, duress, mutual mistake, or excusable neglect, the court may set aside the order of paternity. Nothing in this subsection shall be

> construed to affect the presumption of legitimacy where a child is born to a mother and the putative father during the course of a marriage.

N.C. Gen. Stat. § 49-14(h).

There is an AOC form motion and notice of hearing to set aside an order of paternity that coincides with the requirements of this statute, or you may prepare your own motion. AOC-CV-670. This motion is the same motion as the one that is used to set aside an affidavit of parentage. Note that the wording of both statutes is identical.

- *Motion or claim for relief from a child support order*

Section 50-13.13 of the North Carolina General Statutes reads as follows:

> (a) Notwithstanding G.S. 1A-1, Rule 60 of the North Carolina Rules of Civil Procedure, or any other provision of law, an individual who, as the father of a child, is required to pay child support under an order that was entered by a North Carolina court pursuant to Chapter 49, 50, 52C, or 110 of the General Statutes, or under an agreement between the parties pursuant to G.S. 52-10.1 or otherwise, and that is subject to modification by a North Carolina court under applicable law may file a motion or claim seeking relief from a child support order as provided in this section.
>
> (b) A motion or claim for relief under this section shall be filed as a motion or claim in the cause in the pending child support action, or as an independent civil action, and shall be filed within one year of the date the moving party knew or reasonably should have known that he was not the father of the child. The motion or claim shall be verified by the moving party and shall state all of the following:
>
> (1) The basis, with particularity, on which the moving party believes that he is not the child's father.
>
> (2) The moving party has not acknowledged paternity of the child or acknowledged paternity without knowing that he was not the child's biological father.
>
> (3) The moving party has not adopted the child, has not legitimated the child pursuant to G.S. 49-10, 49-12, or 49-12.1, or is not the child's legal father pursuant to G.S. 49A-1.
>
> (4) The moving party did not act to prevent the child's biological father from asserting his paternal rights regarding the child.
>
> (c) The court may appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17, to represent the interest of the child in connection with a proceeding under this section.
>
> (d) Notwithstanding G.S. 8-50.1(b1), the court shall, upon motion or claim of a party in a proceeding under this section, order the moving party, the child's mother, and the child to submit to genetic paternity testing if the court finds that there is good

cause to believe that the moving party is not the child's father and that the moving party may be entitled to relief under this section. If genetic paternity testing is ordered, the provisions of G.S. 8-50.1(b1) shall govern the admissibility and weight of the genetic test results. The moving party shall pay the costs of genetic testing. If a party fails to comply with an order for genetic testing without good cause, the court may hold the party in civil or criminal contempt or impose appropriate sanctions under G.S. 1A-1, Rule 37, of the North Carolina Rules of Civil Procedure, or both. Nothing in this subsection shall be construed to require additional genetic paternity testing if paternity has been set aside pursuant to G.S. 49-14 or G.S. 110-132.

(e) The moving party's child support obligation shall be suspended while the motion or claim is pending before the court if the support is being paid on behalf of the child to the State, or any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case as defined in G.S. 110-129(7).

The moving party's child support obligation shall not be suspended while the motion or claim is pending before the court if the support is being paid to the mother of the child.

(f) The court may grant relief from a child support order under this section if paternity has been set aside pursuant to G.S. 49-14 or G.S. 110-132, or if the moving party proves by clear and convincing evidence, and the court, sitting without a jury, finds both of the following:

(1) The results of a valid genetic test establish that the moving party is not the child's biological father.

(2) The moving party either (i) has not acknowledged paternity of the child or (ii) acknowledged paternity without knowing that he was not the child's biological father. For purposes of this section, 'acknowledging paternity' means that the moving party has done any of the following:

a. Publicly acknowledged the child as his own and supported the child while married to the child's mother.

b. Acknowledged paternity in a sworn written statement, including an affidavit of parentage executed under G.S. 110-132(a) or G.S. 130A-101(f).

c. Executed a consent order, a voluntary support agreement under G.S. 110-132 or G.S. 110-133, or any other legal agreement to pay child support as the child's father.

d. Admitted paternity in open court or in any pleading.

(g) If the court determines that the moving party has not satisfied the requirements of this section, the court shall deny the motion or claim, and all orders regarding the child's paternity, support, or custody shall remain enforceable and in effect until modified as otherwise provided by law. If the court finds that the moving party did not act in good faith in filing a motion or claim pursuant to this section, the court

> shall award reasonable attorneys' fees to the prevailing party. The court shall make findings of fact and conclusions of law to support its award of attorneys' fees under this subsection.
>
> (h) If the court determines that the moving party has satisfied the requirements of this section, the court shall enter an order, including written findings of fact and conclusions of law, terminating the moving party's child support obligation regarding the child. The court may tax as costs to the mother of the child the expenses of genetic testing.
>
> Any unpaid support due prior to the filing of the motion or claim is due and owing. If the court finds that the mother of the child used fraud, duress, or misrepresentation, resulting in the belief on the part of the moving party that he was the father of the child, the court may order the mother of the child to reimburse any child support amounts paid and received by the mother after the filing of the motion or claim. The moving party has no right to reimbursement of past child support paid on behalf of the child to the State, or any other assignee of child support, where the child is in the custody of the State or other assignee, or where the moving party is an obligor in a IV-D case as defined in G.S. 110-129(7).
>
> If the child was born in North Carolina and the moving party is named as the father on the child's birth certificate, the court shall order the clerk of superior court to notify the State Registrar of the court's order pursuant to G.S. 130A-118(b)(2). If relief is granted under this subsection, a party may, to the extent otherwise provided by law, apply for modification of or relief from any judgment or order involving the moving party's paternity of the child.
>
> (i) Any servicemember who is deployed on military orders, and is subject to the protections of the Servicemembers Civil Relief Act, shall have the period for filing a motion pursuant to subsection (b) of this section tolled during the servicemember's deployment. If the period remaining allowed for the filing of the motion following the servicemember's redeployment is less than 30 days, then the servicemember shall have 30 days for filing the motion.

N.C. Gen. Stat. § 50-13.13. Whew!

There is an AOC form motion and notice of hearing for relief from child support obligation due to disestablishment of paternity pursuant to N.C. Gen. Stat. § 50-13.13, or you may prepare your own motion. AOC-CV-671.

The requirements for a motion or action pursuant to section 50-13.13 are:

- It must be filed within one year of the date the party knew or reasonably should have known that he was not the father of the child;

- It must be verified by the moving party;
- It must state the basis, with particularity, on which he believes he is not the child's father;
- It must state that he has not acknowledged paternity of the child, or he acknowledged paternity without knowing that he was not the child's biological father;
- It must state that he has not adopted the child, has not legitimated the child pursuant to specific enumerated statutes, and is not the child's legal father through artificial insemination;
- It must state he did not act to prevent the biological father from asserting his paternal rights.

The court may appoint a guardian ad litem to represent the interest of the child. The moving party pays the costs of the genetic testing, if it is ordered. The child support obligation is suspended while the motion or claim is pending, if support is paid on behalf of the child to the State. N.C. Gen. Stat. § 50-13.13 (c)-(e).

4. Carefully prepare the appropriate motion or claim.

Although the AOC form motions provide a good outline, they may not provide enough space to meet the requirements of the statutes. Feel free to either file your own motion or to include attachments.

- *Preparing a motion to set aside paternity pursuant to N.C. Gen. Stat. 110-132(a2) or N.C. Gen. Stat. 49-14(h)*

There is no case law that has addressed these statutes to provide us with guidance regarding the way in which a motion should be filed or in what manner a hearing should be conducted. It appears that the request for a paternity test is only dependent upon the filing of a "proper motion." If so, that means that a well-written motion is critical.

In order to prepare an effective motion to set aside paternity for your client, you must first know whether there was an order of paternity or an

affidavit of paternity, the date on which that occurred, and a copy of that document to attach to the motion.

Second, you must know the reason upon which your motion should be based: fraud, duress, mutual mistake, or excusable neglect. Some of these reasons are also bases for granting motions under Rule 60(b) of the Rules of Civil Procedure. Appellate cases defining these reasons in that context are helpful for providing an understanding of the proof required. The following definitions merely brush the surface, and will help you begin your own research:

- Fraud – To assert fraud, the defendant "must present evidence tending to show (1) a false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) which was relied upon and which resulted in damages to the injured party." *Pleasant Valley Promenade v. Lechmere, Inc.*, 120 N.C. App. 650, 663 (1995). The reliance must be reasonable. *State Properties, LLC v. Ray*, 155 N.C. App. 65, 72 (2002), *disc. review denied*, 356 N.C. 694 (2003).
- Duress – "Duress is the result of coercion." *Link v. Link*, 278 N.C. 181, 191 (1971). "Duress exists where one, by the unlawful act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will." *Id.*
- Mutual mistake: The mistake must be "common to both parties and because of it each has done what neither intended." *Stevenson v. Stevenson*, 100 N.C. App. 750, 752 (1990).
- Excusable neglect: "While there is no clear dividing line as to what falls within the confines of excusable neglect as grounds for the setting aside of a judgment, what constitutes excusable neglect depends upon what, under all the surrounding circumstances, may be reasonably expected of a party in paying proper attention to his case." *Thomas M. McInnis & Associates, Inc. v. Hall*, 318 N.C. 421, 425 (1986).

In general, to assert one of these reasons as a basis for setting aside the affidavit or order, it will be necessary to make specific allegations to satisfy the required elements.

Third, you must include the name and birthdate of the child. And fourth, you must indicate whether or not your client is under an order to pay child support.

- *Preparing a motion or claim for relief from a child support order pursuant to N.C. Gen. Stat. § 50-13.13*

A well-written motion or claim for relief from a child support order is just as important as preparing a motion to set aside paternity. The statute states that the court shall order paternity testing "*if* the court finds that there is good cause to believe that the moving party is not the child's father and that the moving party may be entitled to relief under this section." N.C. Gen. Stat. § 50-13.13(d) (emphasis added). There is some guidance regarding this statute from an unpublished case, *Guilford County v. Sutton*, COA13-310, 753 S.E.2d 397 (N.C. Ct. App. November 5, 2013) (**unpublished**). In *Sutton*, the Court of Appeals affirmed the trial court's determination that the defendant did not show good cause to believe that he was not the father of the child in order to permit the trial court to order paternity testing. *Id.*, slip op. at 6.

Two of the most important requirements in the statute are:

- The motion or claim for relief must be *verified* by the moving party (not the attorney). N.C. Gen. Stat. § 50-13.13(b).
- The motion or claim for relief from a child support order must state "[t]he basis, with *particularity*, on which the moving party believes that he is not the child's father." N.C. Gen. Stat. § 50-13.13(b)(1) (emphasis added). "Particularity" means that the pleading should include sufficient detail to show the court that there is good cause to believe your client is not the father of the child. When preparing your motion, you must consider and address the information you glean

from your client. Do not neglect to address any "bad facts" that will be brought forward by the child support enforcement agency.

5. Prepare for the hearing

- *Obtaining an order for a paternity test: the first hurdle*

Because there is little case law guidance for a paternity disestablishment proceeding, the way in which the hearing is conducted varies across the State of North Carolina. The statutes all indicate that the first step is for the court merely to consider whether or not the allegations are sufficient for the court to order paternity testing. This is not a hearing on the merits to *prove* whether or not your client is the father. This is akin to a probable cause hearing. Be prepared for whatever the judges in your jurisdiction may require. If your judge will expect you to provide evidence, you need to prepare your client to testify, subpoena any additional necessary witnesses, and obtain necessary documents.

Remind your client that, if the court orders paternity testing, he may have to advance the cost. N.C. Gen. Stat. § 50-13.13 requires the court to order the moving party to pay the costs of testing. The other statutes are silent as to who is required to pay, although each makes reference to N.C. Gen. Stat. § 8-50.1 which also requires the moving party to pay for the testing. Despite the wording of these statutes, many jurisdictions order the child support enforcement agency to advance the costs for paternity testing (even for disestablishment proceedings) and allow defendants to reimburse if found to be the father. Your ability to convince the court to order the agency to advance the costs may depend upon the egregiousness of your factual allegations.

- *After the paternity test: the second hurdle*

If the court orders a paternity test, it is likely that your worries are over. Either your client will be found to be the father and the child support order continues, or he is found not to be the father and the child support enforcement agency will assist in terminating the child support order. In the unlikely event that there is still resistance, you will need to prepare for a

hearing on the merits of the issue based on all of the evidence that supports your motion plus the paternity test results. Refer to N.C. Gen. Stat. § 8-50.1 for guidance in the admission of the paternity testing results.

6. What if my client wants to appeal an adverse decision?

If you are court-appointed to represent your client, you must inform your client that he is not entitled to court-appointed representation for the appeal of a paternity disestablishment proceeding. It is best to explain that to your client from the beginning. If he wishes to appeal, you should explain to the client his right to appeal and that he may represent himself or hire an attorney to represent him on the appeal.

Please do not hesitate to contact us if you want to consult with us about your disestablishment proceeding. We will do our best to assist you!

Office of Parent Representation: (919) 354-7230
Wendy Sotolongo, Parent Representation Coordinator
Wendy.C.Sotolongo@nccourts.org

Joyce Terres, Assistant Appellate Defender
Joyce.L.Terres@nccourts.org

Attachment 1:

Questions to Ask a Client Who Tells You He's Not the Dad

2014 Child Support Enforcement: Representing Respondents
Joyce L. Terres, Assistant Appellate Defender, Office of Parent Representation
123 W. Main Street, Suite 308, Durham, NC 27701
(919) 354-7230
Joyce.L.Terres@nccourts.org
www.ncids.org

1. How old is the child?
2. What is the child's date of birth?
3. Was the child born full-term or was the child born prematurely?
4. Where was the child born (City, State, Country)?
5. What type of relationship do you have with the child right now?
6. How old were you when the child was born?
7. Is your name listed on the child's birth certificate as the father?
8. Did you adopt the child? If so, when?
9. Were you married to the mother when the child was born?
    a. How long were you married before the child was born?
    b. Were you separated at the time of the child's birth? How long before the birth did you separate?
    c. Were you out of the home for any reason before the child's birth (e.g., military deployment, job contract out-of-state, hospitalization, incarceration)? For what period before the child's birth were you out of the home?
    d. Have you told people the child is yours?
    e. Is there a divorce decree, child custody order, or visitation order that says you're the father of the child?
    f. Were you served with the civil complaint for child support?

g. Did you go to court?

h. If you didn't go to court, explain why you didn't go.

10. Did you marry the mother after the child was born?

    a. Did you tell people you were the child's father before you got married?

    b. Did you marry the mother so the child's parents would be married?

    c. Have you told people you are a family and the child is your child?

    d. Is there a divorce decree, child custody order, or visitation order that says you're the father of the child?

    e. Were you served with the civil complaint for child support?

    f. Did you go to court?

    g. If you didn't go to court, explain why you didn't go.

11. Did you file a petition to legitimate the child?

    a. When did you file the petition to legitimate?

    b. Did you admit that you were the father of the child in the petition to legitimate?

    c. Was the petition granted?

    d. Were you served with the civil complaint for child support?

    e. Did you go to court?

    f. If you didn't go to court, explain why you didn't go.

12. Did you ever admit to a child support worker that you were the father of the child?

13. Do you remember signing an Affidavit of Parentage?

    a. Where were you when you signed the Affidavit?

b. Who was with you when you signed the Affidavit?
c. Did you sign the Affidavit by your own free will? If not, describe what caused you to sign the Affidavit.

14. Was an Order of Paternity entered?
    a. Were you served with a civil complaint for paternity and child support?
    b. Did you go to court?
    c. Did you admit that you were the father in court?
    d. Did you request a paternity test?
    e. Did you submit to a paternity test? If so, what were the results?
    f. If you didn't go to court, explain why you didn't go.
    g. Did you receive a copy of the Order of Paternity?
15. When did you meet the mother?
16. When did you first have sexual relations with the mother?
17. Did you have ongoing sexual relations with the mother before the child was born?
18. Are there any medical reasons why you believe you could not be the father of this child (e.g., vasectomy, impotence)
19. Has the mother ever told you that you are not the father of the child?
    a. When did she tell you?
    b. How many times has she told you?
    c. Did she ever mention that in a letter, email or text? If so, do you still have a copy?
20. What type of relationship do you have now with the mother?

21. Is the mother in agreement with a motion to set aside paternity of the child?
22. Why do you believe you are not the father of the child?
23. When did you first become aware that you were not the father of the child?
24. Has anyone else claimed to be the father of the child?
25. Has paternity testing ever shown that anyone else is the father of the child?
26. Is there anyone that you believe is the father of the child?
27. Have you ever tried to stop the biological father of the child from claiming he was the father
28. Are you currently in the military?
29. Were you deployed on military orders when any orders were entered or after learning that you were not the father of the child?
30. Do you have any court documents or written materials to support any of your answers above?

CHILD SUPPORT

1/11/2016 9:06:22 AM

AMOUNT OWED

- If there is a disagreement over the amount owed the Court will need to see ALL documentation to show that the amount is wrong.
- If there is an issue regarding the enforcement of an Order from a different State client will have to deal with resolving that issue in that different State.
- INCARCERATION. The court will require a BOOKING REPORT from client's place of incarceration and a MOTION to obtain credit for the time you spent incarcerated against client's child support obligation.

I CAN WORK, BUT I CAN NOT FIND A JOB

- The Court will require documentation of your job search efforts including each and every contact that you make. Keep a log showing the date, time, organization, contact person, telephone number, and reason for the contact.
- If there is Vocational Rehabilitation available, the Court will need a letter from the Vocational Rehabilitation Organization advising the court when you entered the program, your progress, and a proposed end date.
- If you are seeking additional education, the Court will need a letter from the educational institution stating the begin date, progress, report cards, and projected graduation

I CAN NOT WORK DUE TO PHYSICAL / MENTAL / MEDICATION ISSUES

- The Court will require that you fully document your condition with a letter from your treating medical DOCTOR. The letter should state that you CAN NOT work, the disability you are suffering from, and your prognosis.
- If you are seeking disability, the Court will also require a letter from your disability ATTORNEY stating when the process began, where you are in the process, and a projected end date.
- If you are not working with a disability attorney you must provide the documents from SOCIAL SECURITY which show the status of the disability claim as referenced above.
- If you are working with the VA you must provide the documents which show the status of the disability claim as referenced above.
- If you are NOT ALLOWED to work due to immigration status, please let us know.

Generally speaking, an attorney in Child Support Court can assist with providing documentation to the Court in order to obtain a short period of time in order to find employment or have medical issues resolved. Please understand that without a finding of significant disability, there is a strong likelihood that you will have to pay child support or be found in contempt and jailed for non-payment.

PAY AS MUCH AS POSSIBLE DIRECTLY TO CHILD SUPPORT IN RALEIGH WELL IN ADVANCE OF YOUR COURT DATE.

Today's Date
Next Child Support Court Date
Date File Opened _____
Date Interview
SSN _
Driver's License # Child support suspension
Driver's License Revoked by Child Support Enforcement?
Full Name
Alias ____
Age __
Sex ___
Race _____
Height _____
Weight _____
Place of Birth

ADDRESS
Phone _____
Phone _____
Phone _____

PHYSICAL OR MENTAL PROBLEMS AND MEDICATIONS
DISABILITY ATTORNEY?
VOCATIONAL TRAINING?

WORKING
Employer _____
Withholding Child Support _____
Unemployment Being Paid _____
How Much? _____
Withholding? _____

FAMILY
Married: single
Living with children that are subject of support order?
Other children? (Names and ages)

Are other children under separate support Order? If so, from where? File Numbers?
_____
Any over 18 AND have graduated High School / GED or emancipated?

INCARCERATED
Received credit for time incarcerated?
Where incarcerated?
How long? INCARCERATED FOR CHILD SUPPORT ONLY?

Date

Andrew D. Jones
Street Address
Town, North Carolina Zip

ATTORNEY CLIENT PRIVILEGED

Re: Carteret County File No. 00-CVD-0000 Child Support v. Client - Child Support

Dear Drew:

Please find enclosed a copy of your most recent Continuance Order providing you with your new court date.

In order to put you in the best position possible prior to the next court date, please do the following:

- PAY AT LEAST SOME MONEY TO CHILD SUPPORT EVERY MONTH. This will show effort, and as we have a strong equitable argument, but a weaker legal argument, it will help you stay out of jail.
- Document your search for employment (Job Packet)
- Bring in a doctor's note stating whether you are currently able to work
- Bring in a letter from an attorney regarding your Social Security Disability claim.
- Keep a notebook organized and bring in for each appointment and court date.
- Call me a week prior to your court date to update me on your status
- Bring as much money as you can to your next court date.
- Check into my office at 9:00 am on your court date.

Our defense in this case based upon your inability to work We will need to provide the court evidence of both your Social Security Disability claim, as well as your medical condition. I look forward to working with you.

Sincerely yours,

Andrew D. Jones
Assistant Public Defender
Enclosure: Continuance Order

229 N.C.App. 494
Court of Appeals of North Carolina.

Robin E. DAVIS, Plaintiff.
v.
Charles D. DAVIS, III, Defendant.

No. COA13–113. | Sept. 17, 2013.

Synopsis
Background: After the parties divorced, mother filed a motion to clarify the child custody order and to suspend visitation, and father filed a motion to modify custody and to hold mother in contempt of court. The District Court, Union City, Stephen V. Higdon, J., denied father's motion to change custody, denied father's motion for contempt, clarified the child custody order, and ordered father to attend anger management counseling. Father appealed.

Holdings: The Court of Appeals, Stroud, J., held that:

[1] the trial court's post-divorce findings of fact and conclusions of law were insufficient to support the court's order requiring father to attend anger management counseling and its modifications of visitation, and

[2] evidence supported the trial court's finding that mother's failure to comply with the parties' child custody order was justified under the circumstances, and thus mother could not be held in contempt of court for violating the order.

Vacated in part; affirmed in part.

West Headnotes (13)

[1] **Child Custody**
Discretion
Child Custody
Credibility of witnesses

The presiding judge, who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with broad discretion in cases concerning the custody of children.

Cases that cite this headnote

[2] **Child Custody**
Questions of Fact and Findings of Court

On review of a trial court's order in a child custody matter, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence.

Cases that cite this headnote

[3] **Child Custody**
Questions of Fact and Findings of Court

Should the Court of Appeals conclude that there is substantial evidence in the record to support the trial court's findings of fact in a child custody case, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.

Cases that cite this headnote

[4] **Child Custody**
Modification

If the Court of Appeals determines that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor children and that modification was in the children's best interests, the Court will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

1 Cases that cite this headnote

[5] **Child Custody**
Visitation

The trial court's post-divorce findings of fact and conclusions of law were insufficient to support the court's order requiring father to attend anger management counseling and its modifications of visitation, in child custody modification proceeding; the court did not find that father's "inappropriate discipline" of his daughter rose to the level of a substantial change in circumstances affecting the welfare of the children. West's N.C.G.S.A. § 50–13.7.

1 Cases that cite this headnote

[6] **Child Custody**
Weight and Sufficiency

Conclusory statements regarding parental behavior and bare observations of plaintiff's or defendant's actions are by themselves insufficient to support the modification of an existing custody order.

Cases that cite this headnote

[7] **Child Custody**
Welfare of child and material change in circumstances

In a child custody modification proceeding trial courts should pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests.

1 Cases that cite this headnote

[8] **Child Custody**
Materiality of change

The trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing child custody order.

2 Cases that cite this headnote

[9] **Child Custody**
Welfare of child and material change in circumstances

Before a trial court may modify an existing custody order the trial court must determine that a substantial change of circumstances has occurred and that the change has affected the children's welfare.

3 Cases that cite this headnote

[10] **Child Custody**
Excuses and defenses

Evidence supported the trial court's finding that mother's failure to comply with the parties' child custody order was justified under the circumstances, and thus mother could not be held in contempt of court for violating the order; father "manhandled" daughter and physically disciplined her in "an inappropriate manner," mother took daughter to see a physician the next day after she complained of soreness in her back and she had a bruise on her neck, mother feared for the safety of her children, as there had been past instances of domestic violence between father and mother, father dismissed concerns expressed by mother and the children regarding the incident with daughter, and mother sought to resolve the matter by negotiations between the parties attorneys and later filed a motion to modify child custody. West's N.C.G.S.A. § 50–13.3(a).

1 Cases that cite this headnote

[11] **Contempt**
Disobedience to Mandate, Order, or Judgment

Willful disobedience is disobedience which imports knowledge and a stubborn resistance and which imports a bad faith disregard for authority and the law.

Cases that cite this headnote

[12] **Contempt**
Review

In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment.

Cases that cite this headnote

[13] **Contempt**
Nature and Elements of Contempt

A party does not act willfully or with a bad faith disregard for authority and the law when their actions are justified.

Cases that cite this headnote

****596** Appeal by defendant from Order entered 13 May 2012 by Judge Stephen V. Higdon in District Court, Union County. Heard in the Court of Appeals 15 August 2013.

Attorneys and Law Firms

Stepp Lehnhardt Law Group, P.C. by Donna B. Stepp, Monroe and Mallory A. Willink, for plaintiff-appellee.

Krusch & Sellers, P.A., Charlotte by Rebecca K. Watts, for defendant-appellant.

Opinion

STROUD, Judge.

***494** Charles D. Davis, III ("defendant") appeals from an order granting two motions in the cause brought by plaintiff Robin E. Davis ("plaintiff"), denying his motion to modify custody, and denying his motion to hold plaintiff in contempt of court. For the following reasons, we vacate in part and affirm in part.

***495 I. Background**

Plaintiff and defendant were married 12 December 1993, separated 13 August 2001, and divorced sometime in 2003.[1] The couple had two children—Mary, born 6 July 1995, and Sarah, born 29 November 1996.[2] After protracted custody litigation following the parties' separation, on 20 October 2003 Judge Lisa Thacker of the Union County District Court entered an order providing for joint legal custody of Mary and Sarah ("the 2003 order"). Plaintiff was granted primary custody of the children, and defendant was granted visitation on alternate weekends. Holidays, birthdays, and summers were split evenly. A special provision was added to accommodate defendant's National Guard schedule, providing for make-up visitation whenever drill weekends fell during defendant's regularly-scheduled visitation. Since the entry of the 2003 order, the parties have been embroiled in continual litigation over custody of their two daughters.

Their latest dispute, the subject of this appeal, was precipitated by an altercation between defendant and daughter Mary on 18 January 2009. On that evening, Mary and Sarah were at defendant's house during their regularly-scheduled weekend visitation. Defendant and Mary got into a heated argument when Defendant informed Mary that they had an additional day of visitation that weekend, but Mary believed that she and Sarah were supposed to return to Plaintiff's home that day. Mary demanded that defendant "show me the order" to prove that he had the additional day of visitation, and defendant physically disciplined Mary "in an inappropriate manner"—as described in further detail below.

As a result of the incident, a report was filed with the Union County Department of Social Services (DSS), and

plaintiff, concerned for the safety of her daughters, unilaterally and without benefit of any court order cut off defendant's weekend visitation. Her concerns were amplified by past allegations of domestic violence involving plaintiff and defendant, as well as a separate domestic ****597** violence incident involving defendant and another previous wife. Plaintiff demanded defendant obtain anger management counseling before she would agree to resume defendant's visitation. In the meantime, plaintiff permitted her daughters to visit their father only on the condition that other family members were present.

***496** In February, March, and April of 2009, several e-mails and letters were exchanged between the parties and their respective attorneys, apparently in an attempt to resolve the issue out of court, but neither party took any formal legal action. Plaintiff never pressed charges against defendant for assaulting Mary, never sought a domestic violence protective order under or moved for temporary custody under N.C. Gen.Stat. §§ 50B–3(a) (4) or 50–13.5(d)(2), (3) (2009) in response to the January incident. On 17 April 2009, DSS concluded its investigation, finding that any claims of child abuse arising from the incident were unsubstantiated.

On 8 May 2009 plaintiff filed a motion in the cause, asking the court to order defendant to attend anger management counseling as a result of the January incident and to formally suspend his visitation until further notice. On the same day, she filed what was styled as a "motion in the cause for modification/clarification of a prior custody order." Her motion asked the court to clarify certain "ambiguities" in the holiday and birthday provisions of the 2003 order and provide more guidance on how to schedule make-up visitation when defendant was away on drill weekend. Plaintiff alleged the parties' disagreements in interpreting the order had risen to the level of "a substantial and material change in circumstances affecting the best interest and general welfare of the minor children."

On 3 June 2009 defendant responded with a motion to modify custody, arguing he should be awarded primary custody because plaintiff had suspended his visitation in violation of the 2003 order, made false claims of abuse, and actively "instill[ed] alienation of the minor children from the Defendant/Father." Defendant amended this motion on 17 August 2009, but made nearly identical claims. The next day, 18 August 2009, defendant filed a motion to hold plaintiff in contempt for denying defendant's visitation in violation of the 2003 order. The district court entered a show cause order the same day, ordering plaintiff's appearance in court. At that time, it had been eight months since defendant had had any of his court-ordered visitation with his daughters.

These matters were first set for hearing on 22 September 2009 and then continued to 21 October 2009. On 19 May 2010, the trial court granted a motion for peremptory setting for 21 May 2010, which the parties had consented to because "certain witnesses live outside of the State of North Carolina and need to make work and travel arrangements in advance. In addition, this matter has been continued several times and Defendant and the minor children in this matter are in need of a resolution as soon as possible." The record does not reveal why ***497** the peremptory setting for 21 May 2010 did not result in a hearing,[3] but it did not, and nearly a year later, on 30 March 2011, defendant filed a Motion for Change of Venue,[4] asking that the case be transferred to Mecklenburg County due to his inability to have a hearing in Union County, alleging that

> ****598** 7. This matter has been scheduled by this Court at least five (5) times. The latest setting was for Monday, March 21, 2011. Over the objection of the Defendant/Father, this Court granted another motion to continue this matter filed by the Plaintiff/Mother. The basis of the request was so the Plaintiff/Mother could take the minor child to a pageant.[[[5]
>
> 8. Defendant/Father contends that he cannot get a hearing, let alone a fair hearing before this tribunal, and therefore respectfully requests this Court to transfer the venue of this matter out of Union County to Mecklenburg County.
>
> 9. Otherwise, the Defendant/Father will continue to have no visitation with the minor children and the poisonous ways of the Plaintiff/Mother will forever preclude a reconciliation with the minor children.

The long-awaited hearing finally started on 8 August 2011: 2 years, 6 months, and 21 days after the incident for which plaintiff unilaterally stopped defendant's visitation. Three days of hearing were held in ***498** August and the final day was on 20 September 2011. On 11 August 2011, defendant voluntarily dismissed his motion for change of venue.

Eight months after the conclusion of the hearing, or 3 years, 3 months, and 22 days after the incident, on 10 May 2012, the trial court finally entered an order disposing of the parties' various motions.[6] The trial court denied defendant's motion to modify custody; denied defendant's motion for contempt; appended several "clarifications" to the 2003 order's visitation provisions; and ordered defendant to attend anger management counseling. Defendant filed written notice of appeal on 4

June 2012.

II. Analysis

On appeal, defendant argues that (1) the trial court abused its discretion by modifying the 2003 order and ordering defendant to attend anger management counseling without expressly finding a substantial change in circumstances that affected the children's welfare; and (2) the trial court erred in failing to find plaintiff in contempt for her violations of the custody order. Because the trial court's findings are insufficient to support its modification of the custody order, we vacate those modifications. We affirm the trial court's denial of defendant's motion for contempt.

A. Standard of Review

[1] [2] [3] [4] "[T]he presiding judge, who has the unique opportunity of seeing and hearing the parties, witnesses and evidence at trial, is vested with *broad* discretion in cases concerning the custody of children." *In re Custody of Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982) (citations omitted). On review of a trial court's order in such matters,

> the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.... [S]hould we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.... [T]his Court must [then] determine if ***499** the trial court's factual findings support its conclusions of law ... If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child[ren] and that modification was in the ****599** [children's] best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474–75, 586 S.E.2d 250, 253–54 (2003) (citations and quotation marks omitted).

B. Modifying the 2003 Custody Order

[5] This Court has consistently held that "the trial court commit[s] reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child." *Hibshman v. Hibshman*, 212 N.C.App. 113, 121, 710 S.E.2d 438, 443 (2011) (citation, quotation marks, and ellipses omitted); *see also* N.C. Gen.Stat. § 50–13.7(a) (2011) (providing that "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause *and a showing of changed circumstances* by either party or anyone interested." (emphasis added)). The term "custody" includes visitation as well. *Clark v. Clark*, 294 N.C. 554, 576, 243 S.E.2d 129, 142 (1978); N.C. Gen.Stat. § 50–13.1(a) ("Unless a contrary intent is clear, the word custody shall be deemed to include custody or visitation or both.").

[6] [7] [8] "Conclusory statements regarding parental behavior" and "bare observations of plaintiff's or defendant's actions" are by themselves insufficient to support the modification of an existing custody order. *Garrett v. Garrett*, 121 N.C.App. 192, 196–97, 464 S.E.2d 716, 719 (1995), *disapproved on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998). Instead, trial courts should "pay particular attention in explaining whether any change in circumstances can be deemed substantial, whether that change affected the welfare of the minor child, and, finally, why modification is in the child's best interests." *Shipman*, 357 N.C. at 481, 586 S.E.2d at 257. "It is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. The trial court is required to make specific findings of fact with respect to factors listed in the statute." *Greer v. Greer*, 101 N.C.App. 351, 355, 399 S.E.2d 399, 402 (1991) (citations omitted). Moreover, "[t]he trial court cannot, on the one hand, conclude there was not a substantial change of circumstances and, at the same time, change the existing order." *Lewis v. Lewis*, 181 N.C.App. 114, 119, 638 S.E.2d 628, 631 (2007).

***500** Our Supreme Court has explained why it is essential for trial courts to include a specific finding of a substantial change in circumstances affecting the welfare

of the child prior to modifying a custody order:

> A decree of custody is entitled to such stability as would end the vicious litigation so often accompanying such contests, unless it be found that some change of circumstances has occurred affecting the welfare of the child so as to require modification of the order. To hold otherwise would invite constant litigation by a dissatisfied party so as to keep the involved child constantly torn between parents and in a resulting state of turmoil and insecurity. This in itself would destroy the paramount aim of the court, that is, that the welfare of the child be promoted and subserved.

Shepherd v. Shepherd, 273 N.C. 71, 75, 159 S.E.2d 357, 361 (1968). Requiring this specific finding also ensures the modification is truly "necessary to make [a custody order] conform to changed conditions when they occur." *Stanback v. Stanback*, 266 N.C. 72, 76, 145 S.E.2d 332, 335 (1965). Finally, "[s]uch findings are required in order for the appellate court to determine whether the trial court gave 'due regard' to the factors" expressly listed in N.C. Gen.Stat. § 50–13.7. *Greer*, 101 N.C.App. at 355, 399 S.E.2d at 402.

In the case at bar, the trial court made the following findings of fact in its 10 May 2012 order:

> 14. The Defendant failed to prove a substantial change in circumstances requiring the modification of the custody Order and as such, his Motion to Modify the same is hereby denied.
>
> 15. During the week of January 2009, the two minor children were having their scheduled weekend visitation with the Defendant, per the court Order under which the parties were operating.
>
> ****600** 16. The Defendant expressed to the minor child [Mary] his interest in her and her sister remaining with him for an extra day, as the next day was a school holiday.
>
> 17. The minor child [Mary] expressed doubts to the Defendant that such an arrangement was in compliance with the Court Order and demanded to see where in the Court Order it allowed for such an extension of visitation.
>
> ***501** 18. An argument ensued, during which [Mary] raised her voice and was disrespectful to both the Defendant and [his present wife].
>
> 19. In response to this, the Defendant lost his temper. The Defendant picked up [Mary] by the collar of her jacket and subsequently physically disciplined her in an inappropriate manner.
>
> 20. The Defendant physically manhandled [Mary] in an inappropriate fashion, given their relative size, strength, and age.
>
> 21. [Mary] had never seen Defendant exhibit a loss of temper in this fashion prior to this incident.
>
> 22. The Plaintiff took [Mary] to a doctor the next day because she was complaining of soreness and had a bruise on her neck as a result of the incident with the Defendant.
>
> 23. The best interests of the minor children would be served by the Defendant obtaining an anger management assessment.
>
> 24. The Defendant does not pose an immediate threat to the minor children and as such, the court-ordered visitation between the Defendant and the children should resume with the conditions outlined herein below.

The trial court also made a sole conclusion of law relevant to custody modification: "5. The Defendant's Motion to Modify Custody is hereby denied."

The order only twice mentioned a "substantial and material change of circumstances affecting the best interest and general welfare of the minor children": one was expressly limited to the trial court's disposition of a child support issue that is not challenged on appeal, and the other was in finding that defendant *failed* to prove a substantial change of circumstances sufficient for the court to grant his motion to modify custody.

Based on these factual findings and its conclusion of law, the trial court (1) ordered defendant to obtain an anger management assessment, follow through with any recommended treatment, and furnish documentation of the assessment and any treatments to plaintiff's counsel; (2) ordered the immediate resumption of defendant's visitation with his children, but limited it to "weekend daytime visits for several ***502** weeks;" (3) appended several "clarifications" to the 2003 order's provisions covering Easter, spring break, birthday visits, and scheduling conflicts related to defendant's drill weekends;

(4) added a requirement that plaintiff and the children must have telephone access to each other at all times in all future visits with defendant; and (5) prohibited defendant from physically disciplining his children in the future.

[9] None of the trial court's modifications of the 2003 order were supported by a finding of a substantial change in circumstances that affected the welfare of the children. Our case law is clear that before a trial court may modify an existing custody order the trial court must determine that a substantial change of circumstances has occurred and that the change has affected the children's welfare. *See Shipman,* 357 N.C. at 474, 586 S.E.2d at 253 ("If the trial court concludes ... that a substantial change has not occurred ... the court's examination ends, and no modification can be ordered.").

Yet, plaintiff insists that (1) the trial court had the authority to order defendant to seek anger management treatment under Chapter 50B; (2) the trial court acted within the broad discretion granted to it to require a party to submit to a mental health evaluation; (3) the trial court has authority to "clarify" any "ambiguities" in an existing custody order that cause conflict among the parties, and that the trial court did not modify, but merely clarified, the 2003 order; and (4) the trial court is not required to expressly include a finding of a substantial change in circumstances affecting the welfare of the children when such a change can be inferred ****601** from the trial court's findings of fact. None of these arguments have merit.

First, plaintiff's argument about the trial court's authority under Chapter 50B is easily dismissed. Plaintiff never filed any pleadings under Chapter 50B. Whether the trial court *would have* had the authority *if* it had been considering a 50B action is entirely irrelevant to the issue of whether the trial court can do so under a motion in the cause in a Chapter 50 custody action.

Second, plaintiff cites our recent opinion in *Maxwell v. Maxwell,* 212 N.C.App. 614, 713 S.E.2d 489 (2011) for the sweeping proposition that "The trial court has broad discretion in child custody proceedings to require a party to submit to a mental health evaluation." Her recitation of the proposition is not incorrect; it is simply incomplete. The trial court has the discretion to require a party to submit to a mental health evaluation, or anger management, only if there is a legal basis for this requirement. In *Maxwell,* this Court indeed held that the trial court did ***503** not abuse its discretion by ordering the father to obtain a mental health evaluation before resuming visitation with his children. *See id.* at 620–22, 713 S.E.2d at 494. But the trial court's modification of the existing custody order was supported by its express finding that the father had committed acts of domestic violence against the mother and that the abusive behavior constituted "a substantial change in circumstances affecting the Minor Children."[7]

In support of her third argument, plaintiff relies on this Court's statement that a "trial court is not constrained to using 'certain and specific 'buzz' words or phrases in its order.' " *Karger v. Wood,* 174 N.C.App. 703, 709, 622 S.E.2d 197, 202 (2005) (quoting *Carlton v. Carlton,* 145 N.C.App. 252, 262, 549 S.E.2d 916, 923 (Tyson, J., dissenting), *rev'd per curiam per dissent,* 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied,* 536 U.S. 944, 122 S.Ct. 2630, 153 L.Ed.2d 811 (2002)). She argues that the trial court was therefore not required to find a substantial change of circumstances to support its modification of visitation or its order requiring defendant to attend anger management assessment and treatment.

A finding of a substantial change in circumstances affecting the interests of the child is not just a "buzz word"—it is a legal requirement for modification of custody, and even if the "magic words" are not used, the factual findings must still make the substantial change of circumstances and its effect upon the children clear. The findings in this order do no such thing. The findings in this order simply express that the parties have many disagreements regarding many issues, including visitation, and they have done so for many years, and that, unfortunately, is a circumstance which is far from changed.

The case at bar is easily distinguished from both *Karger* and *Carlton.* In the latter two cases, the trial court expressly concluded there was a substantial change in circumstances to justify modifying the existing custody order, but simply failed to make a specific conclusion of law as to whether that change affected the welfare of the child. *See Karger,* 174 N.C.App. at 708, 622 S.E.2d at 201; ***504** *Carlton,* 145 N.C.App. at 255, 549 S.E.2d at 919. In each case, the reviewing court held that the "nexus" between a substantial change in circumstances and an effect on the children involved was actually stated in, *see Karger,* 174 N.C.App. at 709–10, 622 S.E.2d at 202, or was plainly evident from, *see Carlton,* 145 N.C.App. at 263, 549 S.E.2d at 923–24, other parts of the order.

Here, on the other hand, the trial court did not conclude that there was a substantial change in circumstances, let alone that those changes affected the welfare of the children. Actually, the trial court found just the opposite as to defendant's motion and was silent ****602** as to plaintiff's motion. Moreover, it is not "self-evident" that a

single incident where a father disciplines his child "in an inappropriate manner" constitutes a substantial change in circumstances affecting the welfare of his children, especially when the trial court also finds defendant "does not pose an immediate threat to the minor children" and orders visitation to resume immediately. *See Shipman*, 357 N.C. at 478, 586 S.E.2d at 256. This is not a case in which defendant was accused of a pattern of inappropriate discipline; plaintiff's allegation, and the court's finding, was of an isolated incident. In fact, the trial court found that "[Mary] had never seen Defendant exhibit a loss of temper in this fashion prior to this incident." Nor is it "self-evident" that conflicts over custody and visitation schedules constitute a substantial change in circumstances.

In order to require defendant to attend anger management treatment and modify the visitation schedule, the trial court had to conclude that there was a substantial change of circumstances affecting the welfare of the children. *Jones v. Patience*, 121 N.C.App. 434, 443, 466 S.E.2d 720, 725, ("[A]ssuming custody of the child has been adjudicated by the trial court, and in the absence of any pending motion in the cause [to modify custody], we do not believe court-ordered counseling for defendant or the child is supportable under Rule 35 or in the exercise of the trial court's inherent authority."), *app. dismissed and disc. rev. denied*, 343 N.C. 307, 471 S.E.2d 72 (1996); *Shipman*, 357 N.C. at 473–74, 586 S.E.2d at 253; N.C. Gen.Stat. § 50–13.7(a). It did not do so here.

Finally, plaintiff argues that the trial court was not required to make the findings necessary to support a modification because the changes to the visitation schedule here were mere "clarifications" rather than modifications. Plaintiff simply misstates the law when she claims trial courts may "clarify" orders without finding a substantial change in circumstances affecting the welfare of the children. The controlling authority is to the contrary: to justify any changes to an existing custody order, beyond those fixing mere clerical errors, *see* N.C. Gen.Stat. § 1A–1, Rule 60, North Carolina courts have required a showing of a substantial ***505** change in circumstances affecting the welfare of the children, *see, e.g., Hibshman*, 212 N.C.App. at 124, 710 S.E.2d at 445("*There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified.*" (citation omitted)). To depart from this rule—that is, to allow parties to seek "clarification" from a court any time a custody order could be clearer or any time the parties disagree over its interpretation—would undermine the very purpose of the "changed circumstances" requirement: checking the tendency towards continuous, acrimonious litigation and providing stability for the minor children caught in the middle of such disputes. *See id.* at 123, 710 S.E.2d at 444.[8]

The trial court's changes also may not be properly characterized as corrections to "clerical mistakes" as contemplated by Rule 60 of the North Carolina Rules of Civil Procedure. With the possible exception of the changes to the Easter/Spring Break provision, none of the changes were needed as a result of an "oversight or omission" on the part of the original trial court that entered the 2003 order, *see* N.C. Gen.Stat. § 1A–1, Rule 60, and each change affects substantive rights and "alters the effect of the original order," *Pratt v. Staton*, 147 N.C.App. 771, 774, 556 S.E.2d 621, 624 (2001) (citation and quotation marks omitted).

As to the Easter/Spring Break provision, plaintiff did not provide any evidence, and the trial court did not find, that this provision would actually conflict in 2012, 2013, or 2014—the years that were remaining at the time of the hearing until both children are eighteen. The existence of a conflict would depend upon the children's actual school holiday schedules, and we have no evidence of those schedules in the record. Plaintiff simply ****603** testified that they could sometimes conflict. Additionally, plaintiff did not move for relief under Rule 60 or argue at the hearing that these changes were needed to correct "mere clerical errors."

The trial court did not find that defendant's "inappropriate [ ] discipline[ ]" of his daughter rose to the level of a substantial change in circumstances affecting the welfare of the children.[9] The trial court also ***506** did not find that the scheduling disputes constitute a substantial change of circumstances. Therefore, the findings of fact and conclusions of law are insufficient to support its requirement that defendant obtain anger management counseling and its modifications of visitation. Accordingly, we vacate those portions of the trial court's order modifying visitation and ordering defendant to attend anger management classes and we reinstate the visitation schedule set out in the 2003 custody order.[10]

C. Defendant's Motion for Contempt

[10] In its 10 May 2012 order, the trial court made these further findings of fact:

> 13. The Plaintiff is not in willful contempt of court for her failure to comply with the [2003] visitation Order. The Plaintiff's failure to comply with said Order was justified under the circumstances.

....

25. Defendant/Father has not had his regular scheduled visitation since January 18, 2009.

Based upon these findings and the findings of fact detailed in the previous section, the trial court denied defendant's motion for contempt. On appeal, defendant principally argues that plaintiff's actions—suspending defendant's visitation over his objections and without any authority from a court—were not "justified" and thus constituted willful noncompliance with the 2003 order. Although there is some merit in this argument, we nevertheless affirm the trial court's denial of defendant's motion for contempt.

Under North Carolina law, "[a]n order providing for the custody of a minor child is enforceable by proceedings for civil contempt, and its disobedience may be punished by proceedings for criminal contempt...." N.C. Gen.Stat. § 50–13.3(a). "The line of demarcation between civil and criminal contempts is hazy at best," *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, 275 N.C. 503, 507, 169 S.E.2d 867, 869 (1969), ***507** but in either case "a failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful," *Mauney v. Mauney*, 268 N.C. 254, 257, 150 S.E.2d 391, 393 (1966); *see also* N.C. Gen.Stat. § 5A–11(a)(3) (2011) (defining criminal contempt as, *inter alia*, the "*Willful* disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." (emphasis added)); N.C. Gen.Stat. § 5A–21(a)(2a) (2011) (noting a "[f]ailure to comply with an order of a court" is "a continuing civil contempt" only when "[t]he noncompliance by the person to whom the order is directed is *willful* " (emphasis added)).[11]

[11] Willful disobedience is "disobedience which imports knowledge and a stubborn **604 resistance" and which "imports a bad faith disregard for authority and the law." *Hancock v. Hancock*, 122 N.C.App. 518, 523, 471 S.E.2d 415, 418 (1996) (citations and quotation marks omitted). "Willful [ness] [may also be] defined as the wrongful doing of an act without justification or excuse." *State v. Ramos*, 363 N.C. 352, 355, 678 S.E.2d 224, 226 (2009) (citation and quotation marks omitted).

Defendant argues the trial court's position—that plaintiff's failure to comply with the 2003 order was not willful because it was "justified under the circumstances"—is internally inconsistent: if the trial court found defendant "does not pose an immediate threat to the minor children" and did not condition the resumption of his visitation on obtaining an anger management assessment, then how could plaintiff be "justified" in unilaterally imposing that same condition on defendant for over two years, until the case was actually heard (and apparently for 8 more months after, while awaiting the trial court's ruling)?

Defendant's argument is strengthened by the fact that plaintiff opted to pursue self-help in this matter. North Carolina law provides concerned parents with ample means to address incidents like the one that occurred in January 2009 through fair and orderly procedures that are designed to deal with the problem promptly and not to separate a parent from his children for an extended period of time without sufficient reason to do. *See, e.g.*, N.C. Gen.Stat. § 50–13.5(d)(3) (allowing for entry of an ex parte order that changes custody where there is "a substantial risk of bodily injury" to the child), N.C. Gen.Stat. §§ 50B–2, 50B–3(a)(4) ***508** (granting authority for courts to " [a]ward temporary custody of minor children and establish temporary visitation rights" *ex parte* where a court "finds that an act of domestic violence has occurred"). Yet plaintiff chose to ignore these procedures: at no time did she press charges against defendant for assault, seek a domestic violence protective order for the safety of her minor children or move for an ex parte order temporarily altering custody under N.C. Gen.Stat. § 50–13.5(d)(2) and (3). She "simply decided that she would allow Defendant to see the children but not have his scheduled visitation until he complied with her requests because she decided that obtaining anger management counseling should be prerequisite for him continuing to exercise visitation."

In a remarkably similar case, this Court affirmed a trial court's decision to hold a mother in contempt for unilaterally suspending a father's court-ordered visitation. In *Lee v. Lee*, 37 N.C.App. 371, 246 S.E.2d 49 (1978), the mother claimed the father "was in no condition to take care of" the child because the father was on medical disability for anxiety and had a chronically "dirty and unkempt" apartment, and because the mother had one disturbing incident where she brought the child for visitation and found the father's apartment "in a state of disarray, and the [father] looked disheveled, had bloodshot eyes, slurred speech and alcohol on his breath" and was "depressed, upset and crying." *Id.* at 373–74, 246 S.E.2d at 50–51. Taking matters into her own hands, the mother suspended the father's visitation and only allowed her daughter to visit the father "for a few hours at a time and not overnight," during which she "waited in her car for the child." *Id.* at 373, 246 S.E.2d at 50. Despite the mother's concerns, the trial court held her in contempt for violating the parties' custody order. *Id.* at 374, 246 S.E.2d at 51. Affirming this decision on appeal, this Court

concluded:

> A review of the record on appeal indicates that the [mother's] own testimony was that, since September of 1976, she had not complied with the order of 3 September 1975. She made no attempt to petition the court for a modification of the 1975 order so as to require the [father] to keep his premises clean and refrain from the use of alcohol or drugs when exercising visitation rights. Instead, she chose to continue to ignore the 1975 order with regard to the [father's] visitation rights. This violation of the 1975 order was not justified.

Id. at 375, 246 S.E.2d at 51 (citation omitted).

[12] Nevertheless, "[i]t is not the role of this Court to substitute its judgment for that of the trial court." ***509 **605** *Scott v. Scott,* 157 N.C.App. 382, 388, 579 S.E.2d 431, 435 (2003). "In contempt proceedings the judge's findings of fact are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency to warrant the judgment." *Clark,* 294 N.C. at 571, 243 S.E.2d at 139 (citations omitted).

Here, there was competent evidence presented at trial to support the trial court's finding that "[t]he Plaintiff's failure to comply with [the 2003 order] was justified under the circumstances." Defendant "manhandled" Mary and "physically disciplined her in an inappropriate manner" during the girls' visitation at his home on 18 January 2009. The girls returned to plaintiff's home later that night visibly shaken and upset, and plaintiff took Mary to the doctor the next day because Mary was complaining of soreness in her back and a bruise on her neck. DSS officials were asked to intervene based upon a report that defendant had inappropriately disciplined Mary. Nevertheless, after speaking with defendant and informing him that such forms of discipline were inappropriate, DSS ultimately decided that claims of child abuse were unsubstantiated and that the children were not in immediate danger of serious harm.

Despite DSS's investigation and failure to substantiate abuse, plaintiff testified she still feared for the safety of her daughters, and her fears were amplified by past allegations of domestic violence involving defendant. Mary and Sarah both testified they did not feel safe attending regularly-scheduled visitation with defendant until he acknowledged the January 2009 incident and sought an anger management assessment, in part because Plaintiff had also informed them about "things that happened when [they] were younger.[12] Plaintiff, in several e-mails and letters exchanged with defendant and among the parties' attorneys, made it clear that she would allow defendant's visitation to resume as soon as defendant sought professional help for what she perceived to be a pattern of anger issues,[13] but defendant refused to apologize for ***510** or acknowledge the January 2009 incident, exacerbating the uneasiness felt by plaintiff and her daughters. Defendant largely ignored plaintiff's communications on this point and dismissed his daughters' concerns about the January incident. Additionally, there was some evidence that plaintiff attempted to arrange or at least agreed to non-regularly-scheduled visitation at school and sporting events.

Even though the trial court ultimately concluded that defendant was not a threat to his daughters, it is not entirely inconsistent for the trial court to consider plaintiff's fears and actions justified under the circumstances. The trial court's finding that plaintiff's actions were "justified under the circumstances" is adequate to support its denial of defendant's motion for contempt. Moreover, unlike the mother in *Lee*, plaintiff did eventually move to modify custody and require defendant to attend anger management treatment.

[13] Here, the parties first sought to resolve the matter by negotiations through their attorneys and by waiting for the results of the DSS investigation, and when these efforts failed, plaintiff did seek modification of the custody order; the ensuing delay in disposition of the motions, with the continuing denial of visitation during this time, cannot be attributed solely to plaintiff. A party does not act willfully or with "a bad faith disregard for authority and the law" when their actions are justified. *See Hancock,* 122 N.C.App. at 523, 471 S.E.2d at 418; *Ramos,* 363 N.C. at 355, 678 S.E.2d at 226. The trial ****606** court may have been reluctant to hold plaintiff in contempt for acting on what it considered justifiable concerns for her children's safety.

Even if the evidence could have supported a contrary finding—and certainly it could have—there was at least some evidence to support the trial court's finding that plaintiff's actions were "justified under the circumstances." As there is sufficient evidence to support the trial court's finding as to contempt, *see Clark,* 294 N.C. at 571, 243 S.E.2d at 139, we must affirm the trial court's denial of defendant's motion for contempt.

In affirming the trial court's findings on contempt we do not mean to condone unilateral denial of visitation or other refusal to comply with a court order. As mentioned above, the law provides a parent in the midst of a custody dispute with a variety of options to resolve concerns over the safety of their children that do not involve consciously disregarding a court order. *See, e.g.*, N.C. Gen.Stat. § 50B–3(a)(4), N.C. Gen.Stat. § 50–13.5(d)(2)–(3). Self-help is not one of them. The damage caused by plaintiff's unilateral decision to stop defendant's court-ordered visitation was only exacerbated by the inexplicable three year delay in resolution ***511** of these issues. We cannot fully discern from the record before us who is to blame for this inordinate delay, at least beyond the first few months, but the fault for at least a substantial portion of this delay seems to fall upon the trial court, given the allegations of defendant's motion for change of venue and plaintiff's response to the motion. We hope that there is another explanation which is not revealed by the record before us.

III. Conclusion

For the reasons discussed above, the trial court erred in modifying the 2003 order without finding a substantial change in circumstances affecting the welfare of the children and we vacate those provisions of the 2012 order modifying the prior custody and visitation arrangement and ordering defendant to attend an anger management assessment. Because the trial court's findings of fact as to contempt are supported by competent evidence, and because those findings are adequate to support its conclusion of law, we affirm the trial court's denial of defendant's motion to hold plaintiff in contempt.

VACATED IN PART and AFFIRMED IN PART.

Judges CALABRIA and DAVIS concur.

All Citations

229 N.C.App. 494, 748 S.E.2d 594

Footnotes

1 The exact date of the parties' divorce is not clear from the record.

2 To protect the privacy of the children to the extent possible, and for ease of reading, we will refer to them by pseudonym.

3 The purpose of peremptory setting is "to permit just and prompt consideration and determination" of cases that might otherwise be inappropriately delayed. Gen. R. Prac.Super. and Dist. Ct. 1, 2010 Ann. R. N.C.; *see Willoughby v. Kenneth W. Wilkins, M.D., P. A.,* 65 N.C.App. 626, 642, 310 S.E.2d 90, 100 (1983) (connecting the use of peremptory settings with this philosophy of the general rules of practice), *disc. rev. denied,* 310 N.C. 631, 631, 315 S.E.2d 697, 697–98 (1984). It is unclear why the peremptory setting here failed to result in prompt consideration and determination even after the district court decided that there was good reason to peremptorily set this case. *See* Union Cty. Local R. 3.13 ("Requests for peremptory settings will be granted at the discretion of the assigned judge but only for good cause.").

4 Although the issue raised by this motion is not a subject of this appeal, and we make no comment upon the legal sufficiency of the motion, we mention it only because it sheds some light upon the reasons for the protracted delay in the hearing of the pending motions.

5 In all fairness, we will quote plaintiff's response to this allegation verbatim: "The Plaintiff admits that she filed a Request to Continue as the parties' daughter was selected for Charleston Fashion Week (a regional fashion event) as a *model* for emerging designers—not a *pageant,* The parties' daughter has been involved in modeling for many years and had competed for and prepared for this event since October 2010 when the March court date had not even been set, and that the Court granted said Request; the remaining allegations are denied." (emphasis in original).

6 Plaintiff also filed a motion for judicial assistance on 4 June 2009 and a motion in the cause for modification of child support on 26 May 2010. While the trial court addressed the parties' child support disputes in its 10 May 2012 order, appellant does not challenge the trial court's disposition of these motions on appeal.

7 Although we did not mention this finding in our opinion in *Maxwell,* we take judicial notice that the finding was in the trial court's order. "[O]ur appellate courts may take judicial notice of their own records...." *Four Seasons Homeowners Ass'n, Inc. v. Sellers,* 72 N.C.App. 189, 190, 323 S.E.2d 735, 737 (1984). This omission was likely due to the fact that the issue was not relevant on appeal: the appellant there was challenging the mental health evaluation on grounds that it was ordered "without a proper motion or sufficient notice pursuant to N.C. Gen.Stat. § 1A–1, Rule 35;" *not* on grounds that it was ordered with insufficient findings to justify a custody modification. *Maxwell,* 212 N.C.App. at 620, 713 S.E.2d at 493.

8 If the scheduling disputes were so difficult to resolve that they were affecting the welfare of the children, this would seem to be an appropriate case for appointment of a parenting coordinator. *See* N.C. Gen.Stat. § 50–91 (2011) (authorizing the trial court to appoint a parenting coordinator at any time during child custody proceedings either with the consent of the parties or without their consent after making the required findings).

9 On the contrary, the trial court found that "Defendant does not pose an immediate threat to the minor children." Indeed, in her motion requesting that the trial court order defendant to attend anger management classes, plaintiff did not even argue that the January incident constituted a substantial change of circumstances.

10 With respect to the "phase in" of defendant's visitation for "several weeks," plaintiff further argues that defendant's objection to this change is now moot because the phase-in period has already passed. Although not perfectly clear from the record, it does appear that this issue is now moot. *See Robinson v. Robinson,* 210 N.C.App. 319, 335–36, 707 S.E.2d 785, 797 (2011) (holding that the visitation provisions of a custody order are moot because the child reached the age of majority). In any event, we need not address it because we have vacated the trial court's modifications to the prior custody order and we think this issue is unlikely to recur.

11 Although defendant's argument on appeal focuses exclusively on civil contempt, the motion itself requested an order holding plaintiff "in civil and/or criminal contempt" of court. Regardless, because the trial court denied defendant's motion on grounds that plaintiff's disobedience was not willful, and because a lack of willfulness is dispositive of the issue under either standard, we need not decide whether plaintiff's disobedience is properly addressed under a criminal or civil contempt standard in this case.

12 In addition to informing the children of the prior allegations of domestic violence, plaintiff also took it upon herself to inform the children about counseling options available for anger management, according to their testimony, as well as informing them of details of the 2003 court order. Indeed, it is sadly ironic that the argument between defendant and Mary arose during a weekend visit when she demanded that defendant "show me proof" that the 2003 court order provided for an additional day of visitation on that particular weekend. Plaintiff had previously shown the children the 2003 court order and they wanted to make sure that defendant was following it—yet another irony, given plaintiff's own failure to follow the order's provisions for visitation.

13 The trial court did not find that defendant had a "pattern of anger issues": this is simply plaintiff's evidence.

KeyCite Yellow Flag - Negative Treatment
† **Distinguished by** Moore v. Moore, N.C.App., April 4, 1978

268 N.C. 254
Supreme Court of North Carolina.

Dolly T. MAUNEY
v.
David Jennings MAUNEY.

No. 203. | Oct. 12, 1966.

Action for permanent alimony, counsel fees and alimony pendente lite. The Superior Court, Gaston County, Harry C. Martin, Special Judge, entered an order directing husband to make certain payments into the office of the clerk of court for use and benefit of plaintiff, and further directing that defendant be arrested and confined in county jail without bond until such time as he complied with orders of the court, and defendant appealed. The Supreme Court, Branch, J., held that finding of facts that defendant had ability to earn good wages, had been continuously employed as of a certain date, and had not made any motion to modify or reduce support payments which had not been paid was not a sufficient basis for conclusion that defendant's conduct in not making the payments was willful and deliberate, and was not a sufficient basis for judgment directing defendant's arrest and confinement without bond until he complied with orders of the court, but before entry of such a judgment, a finding was necessary not only as to failure to comply, but as to defendant's possession of the means to comply.

Error and remanded.

West Headnotes (3)

[1] **Contempt**
Findings

In contempt proceedings the facts upon which the contempt is based must be found and filed, especially facts concerning purpose and object of the contemnor, and the judgment must be founded on such findings.

6 Cases that cite this headnote

[2] **Contempt**
Disobedience to Mandate, Order, or Judgment

A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is willful, which imports knowledge and a stubborn resistance.

31 Cases that cite this headnote

[3] **Divorce**
Findings and verdict

Finding of facts that defendant in a divorce action had ability to earn good wages, had been continuously employed as of a certain date, and had not made any motion to modify or reduce support payments which had not been paid was not a sufficient basis for conclusion that defendant's conduct in not making the payments was willful and deliberate, and was not a sufficient basis for judgment directing defendant's arrest and confinement without bond until he complied with orders of the court, but before entry of such a judgment, a finding was necessary not only as to failure to comply, but as to defendant's possession of the means to comply. G.S. §§ 5-1, 5-8.

38 Cases that cite this headnote

***266 **392** This action was instituted by plaintiff against the defendant, her husband, on 7 October 1963 for permanent alimony, counsel fees and alimony Pendente lite. Motion for alimony Pendente lite was heard by his Honor Harry L. Riddle, Jr., on 22 January 1964, and on said date order was entered requiring defendant to pay alimony Pendente lite and attorney's fees. On 30 September 1964 plaintiff filed motion alleging defendant was in arrears in his payments of alimony Pendente lite. A

hearing was held before his Honor James F. Latham on 5 October 1964, and he entered an order adjudging that the defendant was not in contempt and requiring defendant to appear before the court during the first non-jury civil session of the Superior Court of Gaston County in January 1965, to show the amount of his income and payments, if any, that he had made in compliance with the former order. Defendant did not appear and on 15 March 1966 was served with order to appear before the court on 5 April 1966 to show cause, if any, why he should not be punished as for contempt. Defendant failed to appear on 5 April 1966 and his Honor, Harry C. Martin, heard the plaintiff's evidence and entered judgment on that date. On the next day defendant appeared and his Honor Harry C. Martin allowed the defendant to present evidence. Whereupon, Judge Martin found that the defendant 'is a healthy, able bodied man, 55 years old, presently employed in the leasing of golf carts and has been so employed for many months; that he owns and is the operator of a Thunderbird automobile; that he has not been in ill health or incapacitated since the date of Judge Latham's order entered on the 5th day of October, 1964; that the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the 5th day of October, 1964; that since October 5, 1964, the defendant has not made any motion to modify or reduce the support payments.' Upon these findings it ***267** was ordered that the defendant pay into the office of the Clerk of Superior Court $3,000 for the use and benefit of the plaintiff, the sum of $250 attorney's fees, and that the defendant be arrested and confined in the Gaston County jail without until such ****393** time as he complied with the orders of the court.

The defendant offered evidence tending to show that he was unable to make payments pursuant to the orders of the court. The court did not find as a fact that defendant had at any time during the period in which he was in arrearage been able to make said payments.

From the judgment entered, defendant appealed.

Attorneys and Law Firms

Robert H. Forbes, Gastonia, for plaintiff, appellee.

Frank P. Cooke, Yastonia, and Childers & Fowler, Mt. Holly, for defendant, appellant.

Opinion

BRANCH, Justice.

Civil contempt and criminal contempt are distinguishable. 'It is essential to the due administration of justice in this field of the law that the fundamental distinction between a proceeding for contempt under G.S. s 5-1 and a proceeding as for contempt under G.S. s 5-8 be recognized and enforced. The importance of the distinction lies in differences in the procedure, the punishment, and the right of review established by law for the two proceedings.' Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345.

The case of Dyer v. Dyer, 213 N.C. 634, 197 S.E. 157, held: 'Criminal contempt is a form applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. * * * Civil contempt is a term applied where the proceeding is had 'to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties.' * * * Resort to this proceeding is common to enforce orders in the equity jurisdiction of the court, orders for the payment of alimony, and in like matters. In North Carolina, such proceeding is authorized by statute, C.S. 985 (now G.S. s 5-8).'

[1] In reaching decision in this case we need only consider the question, Did the trial court make the necessary findings of fact to support the judgment of imprisonment entered?

'A contempt proceeding is Sui generis. It is criminal in its nature, and (in) that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may be resorted to in civil or criminal action. * * * In contempt proceedings, the fact upon which the contempt is based must be found and filed, especially the facts concerning the purpose and object of the contemnor, ***268** and the judgment must be founded on these findings.' In re Hege, 205 N.C. 625, 172 S.E. 345.

[2] A failure to obey an order of a court cannot be punished by contempt proceedings unless the disobedience is wilful, which imports knowledge and a stubborn resistance. 'Manifestly, 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.' Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403.

Hence, this Court has required the trial courts to find as a fact that the defendant possessed the means to comply with orders of the court during the period when he was in default.

Parker, J. (now C.J.), speaking for the Court in the case of Yow v. Yow, 243 N.C. 79, 89 S.E.2d 867, said: 'The

lower court has not found as a fact that the defendant possessed the means to comply with the orders for payment of subsistence Pendente lite at any time during the period when he was in default in such payments. Therefore, the finding, that the defendant's failure to make the payments of subsistence was deliberate and wilful, is not supported by the record, and the decree committing him to imprisonment for contempt must be set aside.' (Citing cases.)

****394** In Green v. Green, 130 N.C. 578, 41 S.E. 784, it was held that in proceedings for contempt the facts found by the judge are not reviewable by this Court except for the purpose of passing upon their sufficiency to warrant the judgment. Where the trial judge finds that the party was a healthy and able-bodied man for his age, and further found that he could pay at least a portion of the alimony, it was error to imprison him until he should pay the whole amount.

In the case of Vaughan v. Vaughan, 213 N.C. 189, 195 S.E. 351, this Court further stressed the necessity of finding as a fact that the plaintiff possessed the means to comply with the orders for payment. Here plaintiff had been ordered to make certain monthly payments for the support of his wife and child. Upon the hearing of an order directing plaintiff to show cause why he should not be held in contempt for failure to comply with the prior order, the trial judge found only that plaintiff was 'in contempt of Court because of his willful failure and neglect to comply * * *.' This Court found error and remanded, holding that 'the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work-an inventory of his financial condition.' The Court has reaffirmed this position as recently as Gorrell v. Gorrell, 264 N.C. 403, 141 S.E.2d 794.

[3] The finding of facts by the trial court in the instant case is not sufficient basis for the conclusion that defendant's conduct was wilful ***269** and deliberate, nor for the founding of the judgment entered.

The court entered judgment as for civil contempt, and the court must find not only failure to comply but that the defendant presently possesses The means to comply. The judgment committing the defendant to imprisonment for contempt is not supported by the record and must be set aside.

This case is remanded for further hearing and findings of fact.

Error and remanded.

All Citations

268 N.C. 254, 150 S.E.2d 391

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188 N.C.App. 144
Court of Appeals of North Carolina.

STATE of North Carolina, Plaintiff
v.
Billie Jo COLEMAN, Defendant.

No. COA07-15. | Jan. 15, 2008.

Synopsis
Background: In context of civil suit against defendant, State moved for show cause order based on defendant's alleged violation of temporary restraining order. The Superior Court, Guilford County, Vance Bradford Long, J., entered two separate show cause orders, and then subsequently held defendant in indirect criminal contempt. Defendant appealed.

[Holding:] The Court of Appeals, Stroud, J., held that convictions for indirect criminal contempt could not be based solely on acts that occurred subsequent to issuance of show cause orders.

Vacated.

West Headnotes (7)

[1] **Contempt**
Notice or Other Process; Attachment

Convictions for indirect criminal contempt could not be based solely on acts that occurred subsequent to issuance of show cause orders. West's N.C.G.S.A. § 5A-15(f).

2 Cases that cite this headnote

[2] **Contempt**
Nature and Form of Remedy

Criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards.

Cases that cite this headnote

[3] **Constitutional Law**
Rights to Notice, Hearing, and Defense, in General
Constitutional Law
Degree of Proof; Reasonable Doubt

Notice and a hearing at which the State bears the burden of proving the alleged criminal acts beyond a reasonable doubt is the bedrock of constitutional due process. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[4] **Indictment and Information**
Enabling Accused to Prepare for Trial

For notice of a crime charged to be constitutionally sufficient, it must afford the defendant the opportunity to prepare an adequate defense.

Cases that cite this headnote

[5] **Contempt**
Notice or Other Process; Attachment
Contempt
Weight and Sufficiency

A show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State. West's N.C.G.S.A. § 5A-15(a).

Cases that cite this headnote

[6] **Indictment and Information**
Time of Offense

A person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed other crimes and offenses.

Cases that cite this headnote

[7] **Criminal Law**
Questions of Fact and Findings

An appellate court is not at liberty to make findings of fact for the trial court.

5 Cases that cite this headnote

****451** Appeal by defendant from orders entered 25 May 2006 and 31 May 2006 by Judge Vance Bradford Long in Guilford County Superior Court. Heard in the Court of Appeals 10 September 2007.

Attorneys and Law Firms

Attorney General Roy A. Cooper, III, by Assistant Attorney General M. Lynne Weaver, for the State.

Robert W. Ewing, Winston-Salem, for defendant-appellant.

Opinion

STROUD, Judge.

***145** Defendant Billie Jo Coleman appeals from orders entered 26 May 2006 and 31 May 2006 finding her in indirect criminal contempt.[1] Defendant contends that the trial court erred because it found no facts to support a conclusion that she should be found in contempt of court. We agree. For the reasons which follow, we conclude that the ***146** trial court erred when it entered its orders finding defendant in indirect criminal contempt and therefore vacate those orders.

I. Background

In or about 2003, defendant had a romantic relationship with an employee of Asbury Automotive North Carolina, L.L.C., an automobile retailer operating dealerships under the name of Crown ("Asbury" or "Crown"). After the romantic relationship ended, defendant began to make numerous unwanted phone calls to the employees and officers of plaintiff. Plaintiff filed a verified complaint against defendant on 7 February 2006. The complaint alleged that defendant's phone calls were disruptive, interfered with plaintiff's business, and caused plaintiff's employees to fear for their safety. The complaint sought injunctive relief and damages for trespass to chattels. Also on 7 February 2006, plaintiff moved for a temporary restraining order (TRO) to forbid defendant from having any contact with, *inter alia*, plaintiff's employees. The trial court entered a TRO on 7 February 2006, enjoining plaintiff from:

> a. having any contact whatsoever with any employee of Plaintiff, which includes all employees of automobile dealerships operating under the "Crown" name, including but not limited to contact by telephone, cellular telephone, facsimile transmittal, email, voice mail, or regular mail;
>
> b. having any contact whatsoever with any customer, manufacturer, or other business associate of Plaintiff concerning Defendant's relationship with and opinion of Matthew Perry, including by [sic] not limited to contact by telephone, cellular telephone, facsimile transmittal, email, voice mail, or regular mail[.]

On 15 February 2006, plaintiff moved for a show cause order, attaching transcriptions of defendant's voice messages to plaintiff's employees left on 12 February 2006 (three messages) and 13 February 2006. The motion prayed that defendant be held in criminal ****452** contempt for willful refusal to comply with the TRO.

The trial court commenced a hearing on the show cause motion straightaway. The trial court entered a show cause order[2] during the hearing, but delayed ruling on criminal contempt, extending the TRO by order entered 24 February 2006, and continuing the show cause ***147** hearing by a second order entered on 24 February 2006 to give defendant an opportunity to find legal counsel for the

underlying civil lawsuit. In the continuance order, the trial court also found defendant indigent and appointed counsel for the purpose of her defense in the show cause hearing.

On 14 March 2006, plaintiff moved for a second show cause order, alleging that plaintiff's employees had received "literally hundreds" of hang-up calls and text messages very similar in content to the voice messages attached to the first show cause motion. The trial court again commenced a hearing on the show cause motion straightaway. The trial court entered a show cause order immediately following the hearing, with the same operative language as the 15 February 2006 show cause order. Proceedings were then delayed pending a psychiatric evaluation of defendant, in which she was found competent to stand trial.

On 22 May 2006, a hearing on the two show cause orders was held in Guilford County Superior Court before Judge Vance Bradford Long. Plaintiff presented evidence in the form of audio recordings, transcripts of cell phone text messages and witness testimony to show contact initiated by defendant. Defendant, represented by counsel, relied on a defense of irresistible impulse, a defense which she conceded has not previously been recognized in North Carolina.

At the close of the hearing, the trial court executed an order in each criminal file, but these orders contained no findings of fact or conclusions of law. The order in File No. 06 CRS 24257, regarding the show cause order issued on 7 [sic] February 2006, stated that "**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED** that the defendant is found in ***IN-DIRECT CRIMINAL CONTEMPT*** and shall serve ***30 days*** in the Guilford County Jail with credit for 32 days." (Emphasis in original.) The order in File No. 06 CRS 24258, regarding the show cause order issued on 15 [sic] March 2006, stated that "**IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED** that the defendant is found in ***IN-DIRECT CRIMINAL CONTEMPT*** and shall serve ***30 days at the expiration of 06CRS 24257*** in the Guilford County Jail. No credit shall be assessed." (Emphasis in original.)

In an order entered 31 May 2006, with the civil case caption and file number, the trial court made findings of fact beyond a reasonable doubt, including:

> ***148** 9. ... that *subsequent* to the issuance and service of the February 15, 2006 show-cause order, the Defendant did telephone Mr. Michael Kearney, President of Asbury Automotive North Carolina, leaving a lengthy message on Mr. Kearney's voice mail concerning Mr. Matthew Perry, an employee of Asbury Automotive.
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> ....
>
> 12. That *subsequent* to the issuance of the March 14th show-cause order, the Defendant telephoned the Charlottesville, Virginia, BMW dealership owned by Asbury Automotive, where Mr. Perry is now employed and spoke with a lot attendant who was answering the telephone on this occasion. The Defendant informed the lot attendant that if he did not change his attitude, she would come to Virginia or that she could have his legs broken.
>
> (Emphasis added.)

On the basis of these findings, the trial court found that defendant had violated the TRO and accordingly found defendant in indirect criminal contempt. Defendant appeals.

II. Standard of Review

In contempt proceedings, the trial judge must make findings of fact beyond a reasonable doubt, and enter a written order. ****453** N.C. Gen.Stat. § 5A-15(f) (2005). On appellate review of a contempt order, "the trial judge's findings of fact are conclusive ... when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." *O'Briant v. O'Briant*, 313 N.C. 432, 436-37, 329 S.E.2d 370, 374 (1985).

III. Analysis

[1] On appeal, defendant contends that the contempt orders should be vacated because she did not receive sufficient notice of the allegedly contemptuous actions. She argues, in effect, that evidence of acts which occurred after the show cause order are not competent as a matter of law, and that since the trial court's findings of fact are based only on actions which occurred after each show cause order, those findings should be set aside. She further contends that because there were no findings other than findings based on evidence of acts occurring after the issuance of each show cause order, the trial court's findings of fact do not support its conclusion that ***149** she violated orders of the court and thereby should be found in criminal contempt.

The State responds that defendant received sufficient notice to be heard and defend against the charges. The State also argues that the record contains sufficient evidence to support the trial court's conclusion that defendant violated the terms of the TRO, on the grounds that evidence of events which occur after a show cause order is sufficient to support an adjudication of criminal contempt.

[2] [3] [4] "[C]riminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards." *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373 (vacating a contempt judgment for insufficient notice when the show cause order was not clear about the acts which were deemed contemptuous). Notice and a hearing at which the State bears the burden of proving the alleged criminal acts beyond a reasonable doubt is the bedrock of constitutional due process. *Id.*; *In re B.E.*, 186N.C.App. 656, ----, 652 S.E.2d 344, ---- (2007); *State v. Simon*, 185N.C.App. 247, ----, 648 S.E.2d 853, 858 (2007). For notice to be constitutionally sufficient, it must afford the defendant the opportunity to prepare an adequate defense. *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373; *State v. Glynn*, 178 N.C.App. 689, 694-95, 632 S.E.2d 551, 555, *disc. review denied and appeal dismissed*, 360 N.C. 651, 637 S.E.2d 180 (2006). For indirect criminal contempt[3] proceedings in which a trial court is not allowed to proceed summarily, a show cause order is analogous to a criminal indictment and is the means by which the defendant is afforded the constitutional safeguard of notice. N.C. Gen.Stat. § 5A-15(a) (2005); *O'Briant*, 313 N.C. at 439-40, 329 S.E.2d at 375-76.

[5] We note first that a 'show cause order,' in a criminal contempt proceeding is something of a misnomer. A show cause order in a *civil* contempt proceeding which is based on a sworn affidavit and a finding of probable cause by a judicial official *shifts the burden of proof* ***150** to the defendant to show why he should not be held in contempt. N.C. Gen.Stat. § 5A-23(a) (2005); *Shumaker v. Shumaker*, 137 N.C.App. 72, 76, 527 S.E.2d 55, 57 (2000); *but see* N.C. Gen.Stat. § 5A-23(a1) (placing the burden of proof on the movant in motions for contempt filed pursuant to N.C. Gen.Stat. § 5A-23(a1)); *State v. Salter*, 29 N.C.App. 372, 374, 224 S.E.2d 247, 249 (1976) ("In hearings to show cause why an injunction ought not to be continued pending final hearing on the merits, the burden of proof is on the [plaintiff], even though traditionally the notice order directs the defendant to show cause why the injunction should not be continued."). To the contrary, a show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be ****454** borne by the State. *Simon*, 185 N.C.App. at ----, 648 S.E.2d at 858.

[6] In correlating the notice requirement with the burden of proof, we agree that "[i]t is an elementary proposition of law, both sound and humane, that a person may not be convicted of the crime charged upon a certain date by showing that upon other dates, previous or subsequent, he committed *other crimes* and offenses." *State v. Reineke*, 89 Ohio St. 390, 106 N.E. 52 (1914) (emphasis added) (noting that this rule does not exclude evidence of subsequent bad acts for the purpose of showing intent or a common plan); *compare State v. Price*, 310 N.C. 596, 599, 313 S.E.2d 556, 559 (1984) ("The State may prove that an offense charged was committed on some date other than the time named in the bill of indictment.... A variance as to time, however, becomes material and of the essence when it deprives a defendant of an opportunity to adequately present his defense."). While this proposition is apparently so elementary that we found no cases in support of it in North Carolina, we conclude that it is implicit in our cases requiring notice, hearing, and proof beyond a reasonable doubt as constitutional safeguards. *See, e.g.*, *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373; *In re B.E.*, 186N.C.App. 656, ----, 652 S.E.2d 344, ---- (2007); *State v. Simon*, 185N.C.App. 247, ----, 648 S.E.2d 853, 858 (2007).

In its order entered 31 May 2006, the trial court found the following beyond a reasonable doubt:

> 9. ... that *subsequent* to the issuance and service of the February 15, 2006 show-cause order, the Defendant did telephone Mr. Michael Kearney, President of Asbury Automotive North Carolina, leaving a lengthy message on Mr. Kearney's voice mail ***151** concerning Mr. Matthew Perry, an employee of Asbury Automotive.
>
> ....
>
> 12. That *subsequent* to the issuance of the March 14th show-cause order, the Defendant telephoned the Charlottesville, Virginia, BMW dealership owned by Asbury Automotive, where Mr. Perry is now employed and spoke with a lot attendant who was answering the telephone on this occasion. The Defendant informed the lot attendant that if he did not change his attitude, she would come to Virginia or that she could have his legs broken.
>
> (Emphasis added.)

The trial court made no other findings of acts which it deemed contemptuous, and adjudged defendant to be in

indirect criminal contempt based on these acts alone. The trial court made no findings regarding the acts alleged in the motions for contempt which led to the issuance of each show cause orders but *only* regarding events which occurred after the issuance of the show cause order.

IV. Conclusion

[7] A defendant's constitutional right to notice and a hearing at which the State bears the burden of proving the alleged contemptuous acts beyond a reasonable doubt[4] compels us to hold that findings of fact based solely on acts which occurred after the issuance of the show cause order are insufficient to adjudge the defendant in criminal contempt. Although we recognize that the record in the case *sub judice* is replete with evidence that the defendant did commit the acts as alleged in each show cause motion, the trial court must make the findings of fact beyond a reasonable doubt as to whether the defendant committed these acts. N.C. Gen.Stat. § 5A-15. The findings of fact were not challenged on appeal, and we are not at liberty to make findings of fact for the trial court, *In re Estate of Lunsford*, 160 N.C.App. 125, 132, 585 S.E.2d 245, 250 (2003) ("It is not the role of this Court to consider what the trial court could have found or to make our own findings based on our review of the record."), *rvs'd on other grounds*, 359 N.C. 382, 610 S.E.2d 366 (2005), and we find no precedent or legal authority permitting us to remand for additional findings of fact by ***152** the trial court in an indirect criminal contempt matter. "Instead, our review is limited to determining whether the court's actual findings of ****455** fact support the conclusion that it reached." 160 N.C.App. at 132, 585 S.E.2d at 250.

We therefore must conclude that the trial court erred when it entered its orders finding defendant in indirect criminal contempt based solely upon acts which occurred after the issuance of the show cause orders. Accordingly, we vacate the criminal contempt orders entered by the trial court.

VACATED.

Chief Judge MARTIN and Judge ARROWOOD concur.

All Citations

188 N.C.App. 144, 655 S.E.2d 450

Footnotes

1 We note that this case arose in the course of a civil action, Guilford County No. 06 CVS 3527, but upon the filing of each contempt motion by the plaintiff in the civil action, the trial court established separate criminal file numbers for the two contempt actions. Defendant captioned her notice of appeal with only the civil case number, then mentioned only the criminal contempt orders in the notice of appeal. N.C.R.App. P. 3(d). We also note that the trial courts executed and entered an order bearing the civil case caption and file number on 31 May 2006, which contains findings of fact, conclusions of law, and decretal provisions. The trial court also executed two orders on the date of the hearing, 22 May 2006, both entered on 25 May 2006, each with the criminal caption and file number, which contain no findings of fact or conclusions of law but only order that the defendant was found in indirect criminal contempt and state the sentence imposed. In fact, the sentences imposed in the two previously executed orders in the criminal file numbers differ from the sentence imposed in the 31 May 2006 order in the civil file number, apparently upon defendant's request.

However, because defendant's notice of appeal was sufficiently clear to give notice to the State and to this Court exactly what was being appealed, and because any confusion as to the file numbers and captions upon the various orders was not created by defendant, we use our discretionary power under N.C.R.App. P. 2 to review this case on its merits in order to prevent manifest injustice to defendant.

2 Defendant was ordered to "show cause why she should not be held in criminal contempt of this Court for her failure to comply with the requirements of the Order granting Temporary Restraining Order date February 7, 2006."

3 Direct criminal contempt:

(1) Is committed within the sight or hearing of a presiding judicial official; and
(2) Is committed in, or in immediate proximity to, the room where proceedings are being held before the court; and
(3) Is likely to interrupt or interfere with matters then before the court.

....

Any criminal contempt other than direct criminal contempt is indirect criminal contempt....

N.C. Gen.Stat. § 5A-13 (2005).

4 We note that our holding does not, as the State contends, bar a party "from putting on *any* evidence of contempt that occurred after the issuance of a show cause order." (Emphasis added.)