

Contempt Discussion Scenarios

District Court Judges Fall Conference 2019

1. You are presiding over a hearing on contempt initiated by a show cause order. Respondent does not appear for the hearing.

- a. Do you have authority to issue an order for arrest?

G.S. 5A-16(b) and G.S. 15A-305 authorize an order for arrest when “based on information provided by sworn statement or affidavit, a judicial official determines the respondent will not appear” at a plenary proceeding for criminal contempt.

There is no authority to issue an order for arrest in a civil contempt proceeding, probably because you can proceed with the hearing even if respondent is not present. If the court concludes after a hearing that the respondent is in civil contempt and sets a purge condition, the court then enters a commitment order to have respondent jailed until compliance with the purge. See AOC form CV-110.

- b. Can you proceed with the hearing without respondent?

Yes for civil contempt but no for criminal contempt. See *Tigani v. Tigani*, 805 S.E.2d 546 (2017)(trial court held civil contempt hearing without respondent).

2. Assume you proceed with a civil contempt hearing and the moving party presents evidence showing respondent has not complied with the court order but offers no other evidence. Can you enter an order of civil contempt?

No. See *Tigani v. Tigani*, 805 S.E.2d 546 (2017). A court cannot enter order of contempt without evidence in the record to support findings on all elements of contempt, including respondent’s present ability to comply with the order. See also GS 5A-23(a)(at the conclusion of the hearing, the judge must enter an order finding facts constituting contempt).

- a. What if alleged contempt is failure to pay child support, and moving party testified respondent is able-bodied, not incapacitated and presently employed. Can you hold respondent in civil contempt?

Not enough to support contempt. See *Mauney v. Mauney*, 268 NC 254 (1966) (need inventory of respondent’s actual financial circumstances) and *Durham*

***County v. Burnette*, 821 S.E.2d 840 (2018)(need inventory of financial situation and must take into account respondent’s subsistence needs)**

3. Assume respondent appears in response to the order to show cause.

a. Which party presents evidence first?

Criminal contempt: moving party has burden of proof and respondent cannot be compelled to testify.

Civil contempt:

If initiated by motion with no order to show cause, moving party has burden of proof and goes forward first. GS 5A-23(a1).

If initiated by a show cause, respondent presents evidence first because no show cause can issue without a finding by the court that the moving party has presented sufficient evidence to support a finding of probable cause to believe respondent is in contempt.

b. If moving party does not specify whether case is civil or criminal contempt before the hearing begins, can you enter order for either criminal or civil contempt at the end of the hearing?

Probably. See Official Comment to GS 5A-23(g)(stating that the statute ‘permits, in essence, consolidated hearings for both civil and criminal contempt’ and *State v. Revels*, 793 S.E.2d 744 (2016)(no error to try both at same time). Caution: Criminal contempt only proper if a show cause order was issued, the show cause gave respondent adequate notice of the charges, defendant’s criminal constitutional rights were protected during the hearing (meaning right to counsel and right against self-incrimination), and facts are found beyond a reasonable doubt.

4. Assume this is civil contempt and respondent presents evidence first. Respondent attempts to show an inability to pay but you do not find the evidence credible. Can you hold respondent in civil contempt?

Not unless moving party can establish ability to pay. See *Durham County v. Burnette*, 821 S.E.2d 840 (2018)(respondent’s failure to prove lack of ability to pay does not establish ability to pay).

5. Assume you find respondent in civil contempt for the failure to pay monthly child support as directed by a court order. The order requires respondent to pay \$500 per month and respondent is \$5000 in arrears. Can you order respondent incarcerated with incarceration ‘stayed’ as long as respondent makes the required \$500 per month payment and pays an additional \$50 per month until the arrears are paid in full?

No. Short ‘stays’ of incarceration are okay if evidence supports reason (for example, evidence shows respondent will have ability to pay on a date in the near future or that respondent can sell an asset to be able to pay). See *Gordon v. Gordon*, 233 NC App 477 (2014)(60 days) and *Abernathy*, 64 NC App 386 (1983)(4 months). But indefinite “fully comply” with order is not okay. *Wellons v. White*, 229 NC App 164 (2013)(purge too vague; indefinite time period prohibited because respondent cannot determine when he/she will be ‘purged’ of contempt).

In addition, contempt order cannot require immediate incarceration in the future without a new hearing to determine ability to comply. See *Unger v. Unger*, NC App (October 15, 2019).

6. Assume you hold parent in criminal contempt for failing to comply with terms of a custody order. Can you award attorney fees to the moving party?

Attorney fees are not allowed in criminal or civil contempt unless authorized by statute. Attorney fees are authorized by statute for the enforcement of child custody, child support, PSS and alimony. (the court of appeals also has held attorney fees are allowed for enforcement of an equitable distribution order by contempt). None of the cases addressing fees in these cases distinguish criminal from civil contempt, but most appeals involve civil contempt because appeals of criminal contempt go to superior court. The statutes provide that custody, child support, PSS and alimony all can be enforced by both civil and criminal contempt. Without discussion, the appellate courts have upheld the award of attorney fees for criminal contempt in *Reynolds v. Reynolds*, 356 NC 287 (2002), adopting dissent, 147 NC App 566 (2001)(affirming order for attorney fees as part of suspended sentence for criminal contempt in custody and support action); and *Lafell v. Lafell*, 177 NC App 811 (2006), *unpublished* (fees allowed for criminal contempt in custody case)

7. Dad filed contempt motion against Mom alleging Mom willfully didn’t comply with court order that gives him Spring Break with the child. An Order to Show Cause was issued on Dad’s verified Motion. The Order provides that Dad is supposed to have spring break but mom kept the child with her the entire break. Spring break was 6 weeks ago. At the beginning of the contempt hearing dad says he is seeking civil contempt. What do you do?

Civil contempt is probably not appropriate. See *McKinney v. McKinney*, 799 S.E.2d 280 (2017)(court stated criminal contempt is more appropriate remedy). A court also can use enforcement orders other than contempt to address visitation issues. See *Grissom v. Cohen*, 821 S.E.2d 454 (2018). For a more extended discussion of this option, see blog post On the Civil Side, “Enforcing custody orders: civil contempt is not always the appropriate remedy,” posted November 1, 2018.