

Legal Issues in Enforcement

April 2008

Question 1

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

Do you order blood tests?

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

Paternity as a Defense

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

Paternity as a Defense

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

Relief from Judgment

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

Relief from Judgment

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

Acknowledgment GS 110-132

- ▶ Can be rescinded within 60 days of execution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

Question #2

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

Enough for Contempt?

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

Question #2

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

Question #2(a)

- ▶ Would you find him in contempt anyway and hope for the best? ☺

Would you?

1. Yes
2. No
3. I will neither admit nor deny

Civil Contempt

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

Civil Contempt

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



Civil Contempt

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

Burden of Proof

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

Burden of Proof

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

Question #3

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

Can you issue order for arrest?

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

Question #3

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

Question #3a

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

Please make your selection...

1. Choice One
2. Choice Two

Question #3b

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

Does mom get the bond?

1. Yes
2. No
3. Maybe

Question #3b

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

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

Bonds to Secure Support

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

Question #4

- ▶ Defendant has child support arrears of \$25,000
- ▶ Last order established amount of arrears, ordered prospective support and ordered \$50 per month on arrears
- ▶ Defendant is in compliance with last order
- ▶ Defendant files motion asking you to “enjoin” obligor from asserting lien against a \$20,000 workers’ comp settlement she is about to receive
- ▶ Can you enjoin the assertion of the lien?

Can you enjoin lien?

1. Yes
2. No
3. No idea what you’re talking about

Liens Against Insurance Proceeds

- ▶ Answer probably no
- ▶ GS 58-3-185 allows claimant to assert lien against insurance proceeds by submitting written notification to company along with proof that beneficiary is “past due in meeting obligation”
 - Issue here is whether obligor is “past due”
- ▶ *See Byrd v. Byrd*, 129 NC App 818 (1998)
 - Trial court cannot apportion proceeds; lien attaches to all proceeds
- ▶ See Bench Book Child Support p. 3-196

Question #5

- ▶ 1997 NY order requires payment until child 21; interest on all late payments at 9%; late fee “penalties”
- ▶ Dad paid all until he moved to NC in 2000
- ▶ Paid no more since
- ▶ Child turned 21 in 2003
- ▶ 2008: Mom registers NY order in NC and requests enforcement
- ▶ Dad argues statute of limitations, asking you to deny registration and enforcement

Is statute a defense here?

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

Registration and Enforcement

- ▶ No problem with statute of limitation in this case; amount owed only since 2000
- ▶ 10 year statute of limitation applies
- ▶ Statute of limitation can be defense to registration under UIFSA
 - Apply NC 10-year statute or statute of issuing state, whichever is longer
 - GS 50C-6-604(b)
- ▶ See Bench Book Child Support p. 3-166

Question #5

- ▶ Dad also argues laches
- ▶ “She always has known my address; she should not have waited so long to try to collect.”
- ▶ Is laches a bar to registration and enforcement in this case?

Laches?

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

Laches as a Defense

- ▶ Answer is no (probably)
- ▶ Laches has not be recognized as a defense to enforcement of child support arrears in NC
 - See *Larsen v. Sedberry*, 54 NC App 166 (1981)(laches did not bar enforcement after 14 years)
 - *But cf Tepper v. Hoch*, 140 NC App 354 (2000)(obligor able to establish laches under Illinois law; NC court correct in vacating registration)

Question #5

- ▶ Defendant also argues that the interest and penalty provisions are not enforceable in NC.
- ▶ Are they?

Interest and penalties?

1. Yes
2. No
3. Uncertain

Interest and penalties

- ▶ Yes – the provisions of the NY order can be enforced in NC
- ▶ See GS 52C-6-604(a) – must apply the law of the issuing state with regard to nature, extent, amount and duration of support
 - See *Welsher v. Rager*, 127 NC App 521 (1997)(even if issuing state laws different than NC; addressing order for support until age 21)
- ▶ See also GS 52C-1-101(21)(definition of 'support order' includes "related costs and fees, interest, attorneys' fees and other relief."

Question 6

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

Contempt?

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

Question 6

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

Question 7

- ▶ Show cause order said "Appear and show cause regarding contempt"
- ▶ At hearing, defendant asks you to require plaintiff to "elect" civil or criminal contempt.
- ▶ Do you force plaintiff to elect?

Would you?

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

Question #7a

- ▶ Plaintiff elects civil
- ▶ At end of hearing, you want to find defendant in criminal contempt.
- ▶ Can you?

Can you find criminal?

1. Yes
2. No
3. Confused

Question #7

- ▶ Answer to both uncertain
 - Issue seems to be adequate notice
- ▶ But see GS 5A-23(g)
 - Before 2000: "A judge conducting hearing on civil contempt may find person in criminal contempt for same conduct."
 - After 2000: "Person found in civil contempt shall not be found in criminal contempt for same conduct."
