

Contempt in Child Support and Custody Cases

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Custody Orders

GS 50-13.3. Enforcement of order for custody.

“(a) An 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, as provided in Chapter 5A, Contempt, of the General Statutes.**”



Some Tools to Enforce Child Support Obligations

****Wage Withholding

Judgment/Execution

Liens/Execution

License Revocation

Tax Intercepts

Transfer of Property

Most Commonly
Used
Enforcement
Tool.....

Contempt



Contempt
authority is
statutory

NC Gen. Stat.
Chapter 5A

Criminal Contempt

Civil Contempt

Contempt by Juveniles

Two Categories of Child Support Cases

- Private party cases
- Cases involving the Child Support Enforcement Agency
 - “IV-D cases”



- The law and procedure for contempt is the same in both categories of cases

CRIMINAL

To *punish* for an act
already committed

G.S. 5A-11 to 5A-17

CIVIL

To *coerce* compliance
with court order

G.S. 5A-21 to 5A-26

Criminal vs. Civil Contempt

- Different purposes
- Different legal basis, grounds, elements
- Different legal procedure
- Different burden of proof
- Different legal rights
- Different sanctions
- Different appellate procedure

CRIMINAL

To *punish* for an act
already committed

G.S. 5A-11 to 5A-17



Criminal contempt - Grounds

- (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 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 lawful report of proceedings in a court.
- (6) Willful or gross negligence by an officer of the court to perform his duties in an official transaction.
- (7) Willful or gross negligence to comply with the rules 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. ... "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.

G.S. 5A-11(a)

Criminal contempt - Grounds

- (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

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

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.
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G.S. 5A-11

Plenary Criminal Proceedings

Initiated by Show Cause order

Motion, affidavit, probable cause
not required

Adequate notice

Copy of show cause must be
“furnished” to alleged contemnor

- Basis of alleged contempt
- Date, time, place of hearing

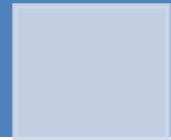
- Service under Rules 4 or 5?

But there is
GS 50-13.9(d)

[In a child support case], **[u]pon affidavit of an obligee, the 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.** The order shall require 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, and shall order the obligor to bring to the hearing records and information relating to the obligor's employment, the obligor's licensing privileges, and the amount and sources of the obligor's disposable income.

GS 50-13.9(d)

The order may be signed by the clerk or a district court judge and shall be served on the obligor pursuant to G.S. 1A-1, **Rule 4**, Rules of Civil Procedure.



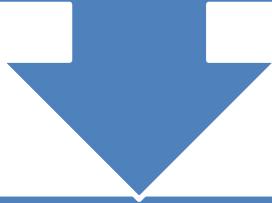
AOC CV-602

When show cause issued for plenary criminal contempt...

- An order for arrest can issue if court finds probable cause to believe (based on testimony) the alleged contemnor will not show for hearing
 - GS 5A-16(b)

GS 5A-16(b)

Person arrested pursuant to this statute is entitled to consideration of pre-trial release and bail.



Any bond posted is an appearance bond

Bond is returned to respondent upon appearance

Forfeited bond is payable to the schools

Plenary Criminal Proceedings

- Right to counsel
- Right against self-incrimination
- No right to jury trial
- Court may be represented by prosecutor
- Proof beyond reasonable doubt
- No burden shifting as result of show cause
 - Moving party goes first in evidentiary hearing

Criminal contempt - Punishment

- Imprisonment up to 30 days; 180 days in child support
- Censure; and/or
- Fine up to \$500

Suspended sentences allowed with conditions.

-State v. Key (2007)

If appealed, bail hearing required.

-5A-17

Judge can withdraw or reduce a sentence any time “if warranted by the conduct of the contemnor and the ends of justice.”

-5A-12(c)

CIVIL

To *coerce* compliance
with court order

G.S. 5A-21 to 5A-26



Civil contempt

- Only purpose is to coerce compliance with a court order after court concludes party has the present ability to comply with the order

Civil contempt defintion

Failure to comply with an order of a court *if*

- (1)The order remains in force;**
- (2)The purpose of the order is served by compliance;**
- (3)Noncompliance by the person to whom the order is directed is willful; *and***
- (4)The person to whom the order is directed is able to comply *or* is able to take reasonable measures to comply.**

G.S. 5A-21(a)

Civil contempt – The Remedy

- Imprisonment
 - Until complies with purge condition(s)
 - For child support – indefinite
 - For non-monetary orders – indefinite
 - For other monetary orders – indefinite
 - But re-commitment required at 90 days with de novo hearing.*
 - One year maximum.*



Civil Contempt Procedure

- Civil initiated either by:
 - Motion filed by a party.
 - GS 5A-23(a1)
 - Show cause order from court.
 - GS 5A-23
 - **No authority to issue order for arrest for failing to show up**
- If initiated by motion, moving party has burden of going forward at hearing
- If initiated by show cause order, respondent obligor has burden of going forward at hearing.



Civil Contempt Procedure

Show cause cannot issue unless judicial official determines, based on verified motion and sworn statement, there is probable cause to believe obligor is in civil contempt.

- Probable cause requires trustworthy information sufficient to warrant a prudent man in believing obligor is in civil contempt.

• *Young v. Mastrom, Inc.*,
149 NC App 483 (2002)

Watson v. Watson, 187 NC App 55 (2007)

- Only “sentence” for civil contempt is incarceration until compliance.
- Yet “a civil contempt proceeding does not command the procedural and evidentiary safeguards that are required by criminal contempt proceedings.”
- Why??

Civil contempt

- Contemnor must 'hold the keys to the jail'
- Because he/she can walk out of the jail at any time, there is no right to counsel or other safeguards required in criminal cases where liberty is in jeopardy
 - *Turner v. Rogers*, 564 US 431 (2011)
 - *Wilson v. Guinyard*, 810 NC App 700 (2017)
 - **But see *McBride v. McBride***, 334 NC 124 (1993)

Civil Contempt

- Order of civil contempt must contain findings of fact supported by evidence in the record establishing defendant has the present ability to comply with the order
 - *See Durham DSS ex rel Alston v. Hodges, 257 NC App 288 (2018)*
- There is no contempt by default
 - <http://civil.sog.unc.edu/no-default-judgment-in-contempt/>
 - <https://civil.sog.unc.edu/contempt-establishing-ability-to-pay/>
 - *Tigani v. Tigani, 256 NC App 154 (2017)*

Is this
enough to
support
contempt?

Defendant was
ordered to pay child
support

Defendant has not
paid

A large orange circle is positioned on the left side of the slide, covering approximately one-third of the vertical space. It is centered horizontally and has a smooth, rounded edge.

What about
this?

- Defendant has not paid and he:
 - Is healthy and able-bodied
 - Is presently employed
 - Owns a car
 - No ill health or incapacity since entry of order
 - Has ability to earn good wages as a salesman
 - Is experienced in the restaurant business
 - Never requested modification of order



No – findings insufficient to establish defendant's ability to pay at any time during the period in which he was in arrears.

*Mauney v.
Mauney,
268 NC 254
(1966)*



Court should “take an inventory of the property of the defendant; find what are his assets and liabilities and his ability to pay and work – an inventory of his financial position.”

What about...

- Alleged contemnor has not paid and:
 - Is an able-bodied 32-year-old
 - Attended high school up to 10th grade
 - Has work experience in the furniture industry but prefers to work outside jobs
 - Worked full time for 8 months last year as a brick mason

Clark v. Gragg, 171 NC App 120 (2005)

- Findings insufficient to show defendant's noncompliance was willful.
 - *See also County of Durham v. Burnette*, 262 NC App 17 (2018)(need evidence of income, assets, liabilities and reasonable subsistence needs)
- To support conclusion of willful noncompliance, must establish ability to pay "during the time he was in default".
- In addition, court must find present ability to comply with purge.
 - Order must show contemnor "**holds the keys to the jail**".

Remedy for civil contempt

GS 5A-21

Person found in civil contempt “may be imprisoned as long as the civil contempt continues.”

- Indefinite incarceration:
 - Purge that does not require payment of money
 - Purge that requires payment of money for child support
 - GS 5A-21(b)
- Required review after 90 days:
 - Purge that requires payment of money for something other than child support
 - GS 5A-21(b2)
 - See *McKenzie v. McKenzie*, 275 NC App 126 (2020)

Imprisonment is the only remedy

- **Short ‘stays’ of incarceration are permissible but not suspended sentences**
 - See *Blanchard v. Blanchard*, 279 NC App 280(2021)(10-day stay upheld)
 - See *Gordon v. Gordon*, 233 NC App 477 (2014)(60-day stay okay where evidence showed ability to pay purge in 60 days)
 - *Watson v. Watson*, 187 NC App 55 (2007)(90-day stay okay where evidence showed party had property that could be sold)

Contempt order must provide “purge”

- Must specify how and when contempt will be lifted
 - *Kolczak v. Johnson*, 260 NC App 208 (2018)(civil contempt vacated for lack of a purge)
- Indefinite civil contempt is not allowed
 - *Wellons v. White*, 229 NC App 164 (2013)
 - *Spears v. Spears*, 245 NC App 260 (2016)

GS 50-13.3. Enforcement of order for custody.

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CUSTODY ORDERS

CIVIL OR CRIMINAL CONTEMPT?

- ▶ Mother is hiding child from father and refusing to turn over custody to father as provided in custody order.
- ▶ Mother failed to give father right of first refusal when she needed a sitter for the child in violation of custody order and allowed her new husband to be around the child in violation of the order.
 - ▶ *Kolczak v. Johnson*, 260 NC App 208 (2018)
- ▶ Teenage child refuses to return to mother's home when custody order grants mother primary physical custody
 - ▶ *McKinney*, 253 NC App 473 (2017)
 - ▶ *Grisson v. Cohen*, 261 NC App 576 (2018)

Civil contempt

- Cannot be held in contempt for conduct not specifically and clearly prohibited by order
 - *Williams v. Chaney*, 250 NC App 476 (2016)
 - *McKinney*, 253 NC App 473 (2017)
 - *Scott v. Scott*, 157 NC App 382 (2003)
 - *Hancock v. Hancock*, 122 NC App 518 (1996)
 - *Grissom v. Cohen*, 261 NC App 576 (2018)
- Purge must be specific and clear
 - *Wellons v. White*, 229 NC App 164 (2013)
 - “Fully comply” with order not appropriate
 - *Scott*
 - “Don’t interfere with mother’s custody” was not appropriate