

THE CLERK'S AUTHORITY TO USE CONTEMPT

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N.C. Gen. Stat. § 7A-103: "The clerk of superior court is authorized to:

...

(7) Preserve order in this court, punish criminal contempts, and hold persons in civil contempt; subject to the limitations contained in Chapter 5A of the General Statutes of North Carolina."

1. Difference between criminal and civil contempt

Criminal contempt is used to punish a person for violating a court order or displaying disrespect for the court. Criminal contempt punishes conduct that has already occurred, by imposition of a fine or imprisonment for a set term. Civil contempt, by contrast, is used to compel compliance with a court order. Civil contempt is used to affect ongoing conduct, and the only means of enforcing civil contempt is to imprison the offender until the offender complies with the court order. Civil contempt must always provide a means for the person is to purge the contempt and be freed.

2. Criminal contempt

- a. Grounds for contempt — Criminal contempt may be imposed only for the grounds listed in GS 5A-11(a). The grounds for criminal contempt include (see the statute for the complete list):
 - i. Disruption of court proceedings.
 - ii. Impairing the respect due a court during proceedings.
 1. For an example of a lawyer's conduct rising to contempt see *In re Nakell*, 104 NC App 638 (1991).
 2. A spectator's refusal to stand at the call of court may be contempt. *State v. Randall*, 152 NC App 469 (2002).
 - iii. Disobedience of or resistance to or interference with a court order.
 1. The court's order does not have to be in writing. *State v. Simon*, 185 NC App 247 (2007).
 2. Failure to comply with an order cannot be contempt unless the defendant has the ability to comply. *Lamm v. Lamm*, 229 NC 248 (1948).
 3. Disobedience of a court order can be either criminal or civil contempt, but interference with an order is only criminal, not civil. *Atassi v. Atassi*, 122 NC App 356 (1996).
 4. Encouraging others to disobey a court order is criminal contempt. *State v. Wall*, 49 NC App 678 (1980);

- iv. Refusal to be sworn as a witness or to testify. Giving false testimony also is punishable as contempt. *Galyon v. Stutts*, 241 NC 120 (1954).
 - v. Willful or grossly negligent failure of an officer of the court to perform duties.
 - vi. Willful or grossly negligent failure to comply with court schedule or practice.
 - 1. The failure to comply with court schedule has to result in “substantial interference with the business of the court” to be contempt. GS 5A-11(a)(7).
 - 2. A tardy witness is not in contempt when there is no delay in the court’s proceeding. *State v. Chriscoe*, 85 NC App 155 (1987).
- b. Direct and indirect contempt — Criminal contempt may be direct or indirect.
- i. To be direct, criminal contempt has to be committed within sight or hearing of the clerk, occur in or in immediate proximity to the room where proceedings are being held, and be likely to interrupt or interfere with the proceedings. GS 5A-13(a).
 - 1. Fighting outside the courthouse was direct criminal contempt when close enough to be heard through a window. *State v. Evans*, 193 NC App 455 (2008) (unpublished).
 - 2. Due process allows a summary proceeding for contempt only when the contempt occurred within the personal view of the judge. *In re Oliver*, 333 US 257 (1948); *Brandt v. Gooding*, 636 F3d 124 (4th Cir 2011).
 - ii. All other criminal contempt is indirect. GS 5A-13(b).
- c. Summary proceeding — Direct criminal contempt may be punished summarily. GS 5A-14.
- i. Due process allows a summary proceeding for contempt only when the contempt occurred within the personal view of the judge. *In re Oliver*, 333 US 257 (1948); *Brandt v. Gooding*, 636 F3d 124 (4th Cir 2011).
 - ii. The summary proceeding must take place “substantially contemporaneously” with the contempt. GS 5A-14(a).
 - 1. A hearing the next morning was substantially contemporaneously when the defendant had to be removed from a bond hearing for being disruptive. *State v. Johnson*, 52 NC App 592 (1981).
 - 2. A summary hearing two days later was permissible when done to allow the lawyer time to respond to the judge’s basis for holding him in contempt. *In re Nakell*, 104 NC App. 638 (1991).
 - iii. Even in a summary proceeding, the defendant must be told the basis for the contempt and given an opportunity to respond. *State v. Randall*, 152 NC App 469 (2002); *State v. Johnson*, 52 NC App 591 (1981).
 - iv. The right to counsel for an indigent defendant is not applicable to a summary proceeding for contempt. *In re Williams*, 269 NC 68, (1967).

- d. Plenary proceeding — A plenary proceeding must be used for indirect criminal contempt, and may be used for direct criminal contempt. GS 5A-15.
 - i. A plenary proceeding is commenced by issuance of a show cause order. The order must give adequate notice of the acts considered to be contemptuous. *O'Briant v. O'Briant*, 313 NC 432 (1985); *In re Board of Comm'rs*, 4 NC App 626 (1969).
 - ii. For the defendant to receive adequate notice of the charge, due process requires that the criminal contempt be initiated by the court and not by a private party. *Brandt v. Gooding*, 646 F3d 124 (4th Cir 2011).
 - iii. Contempt may not be found for acts committed after the show cause order was issued because the order would not have included the required notice. *State v. Coleman*, 188 NC App 144 (2008).
 - iv. An order for arrest may be issued upon a finding of probable cause, supported by sworn affidavit, that the person will not appear in response to the show cause order. GS 5A-16(b). A person arrested under this provision is entitled to bail. *Id.*
 - v. The judicial official conducting the plenary proceeding may appoint a district attorney or assistant DA to prosecute the case. GS 5A-15(g).
 - vi. An indigent is entitled to appointment of counsel for a plenary criminal contempt proceeding. *State v. Wall*, 49 NC App 678 (1980).

- e. Willfulness and warning — To be criminal, the contempt must be willfully contemptuous or the person must have been warned that the conduct was improper.
 - i. No punishment may be imposed for criminal contempt unless the act was “willfully contemptuous” or the person was given “a clear warning by the court that the conduct is improper.” GS 5A-12(b). Behavior that is inherently unacceptable and disruptive, such as standing and yelling at the judge or throwing an object, would be willfully contemptuous and not require a warning before being punished.
 - ii. Willfulness means “done deliberately and purposefully in violation of the law, and without authority, justification, or excuse.” *State v. Chriscoe*, 85 NC App 155, 158 (1987). It means “more than deliberation or conscious choice; it also imports a bad faith disregard for authority and the law.” *Forte v. Forte*, 65 NC App 615, 616 (1983).
 - 1. A lawyer’s inadvertent failure to turn off cell phone, allowing it to ring in court, was not willful. *State v. Phair*, 193 NC App 591 (2008).
 - 2. A witness’ hour-late arrival at court was not willful because she was trying to locate her mother and determine the mother’s condition after the mother failed to answer the telephone. *State v. Chriscoe*, 85 NC App 155 (1987).

- f. No jury trial — There is no right to a jury trial for criminal contempt. *Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers*, 275 NC 503 (1969).

- g. Right against self incrimination — The right against self incrimination applies to a criminal contempt proceeding. GS 5A-15(e).
- h. 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 NC App 779 (1984).
- i. Standard and burden of proof — Criminal contempt must be proved beyond a reasonable doubt. GS 5A-15(f); *O'Briant v. O'Briant*, 313 NC 432 (1985); *State v. Key*, 182 NC App 624 (2007). The issuance of a show cause order does not shift the burden of proof in a criminal contempt proceeding. *State v. Coleman* 188 NC App 144 (2008).
- j. Punishment — 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. GS 5A-12.
 - i. 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 NC App 624 (2007).
 - ii. The award of attorney's fees is not appropriate as part of criminal contempt. *United Artists Records, Inc., v. Eastern Tape Corporation*, 18 NC App 183 (1973). Nor may the payment of attorney's fees be made a condition of a suspended sentence for criminal contempt. *M.G. Newell Company, Inc., v. Wyrick*, 91 NC App 98 (1988). It may be, though, that the court may order a partially indigent defendant to reimburse the cost of appointed counsel pursuant to GS 7A-455 and -455.1.
 - iii. A judicial official who imposes a sentence for criminal contempt may withdraw the censure or terminate the imprisonment or reduce the time to be served or remit or reduce the fine at any time "if warranted by the conduct of the contemnor and the ends of justice." GS 5A-12(c). If, however, a sentence for criminal contempt provides that the person is to be released upon payment of a sum of money or satisfaction of some other condition, it is civil contempt rather than criminal.
- k. 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 US 688 (1993), based on the elements that actually led to the finding of contempt. *State v. Gilley*, 135 NC App 519 (1999).
- l. Appeal — Appeal from a magistrate's, district judge's or clerk's decision on criminal contempt is to superior court for a trial *de novo*. Appeal from a superior court decision on criminal contempt is to the Court of Appeals. GS 5A-17.

- i. There is no appeal from a determination of not guilty of criminal contempt. *Patterson v. Phillips*, 56 NC App 454 (1982).

3. Civil contempt

- a. Grounds for contempt — Civil contempt may be used only for a person's failure to obey a court order. The order must still be in force; the person must have the ability to comply; and the refusal to comply must be willful. GS 5A-21.
- b. Purge provision — Because the purpose of civil contempt is to force compliance with an order, the civil 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. A purge provision is essential to a civil contempt order. *Bethea v. McDonald*, 70 NC App 566 (1984).
- c. Direct and indirect contempt — The distinction between direct and indirect contempt is irrelevant for civil contempt, because all civil contempt requires the same kind of proceeding with proper notice and a hearing. There is no summary proceeding for civil contempt.
- d. Initiation of proceeding — GS 5A-23 provides that a civil contempt proceeding may be initiated in one of several ways. In each instance the action must be supported by a sworn statement or affidavit explaining the basis for contempt.
 - i. An aggrieved party may file and serve a motion on the party alleged to be in contempt, without review by a judicial official.
 - ii. The sworn statement or affidavit may be taken to a judicial official to determine whether it establishes probable cause for contempt. If it does, the judicial official may either:
 - 1. Issue a notice of hearing informing the defendant that the defendant will be held in contempt if the defendant does not appear.
 - 2. Issue a show cause order directing the defendant to appear and show cause why contempt should not be found.
 - iii. A judicial official may initiate a notice of hearing or show cause order based on the official's own sworn statement or affidavit.
 - iv. However the contempt is initiated, the motion or notice or order must be served at least five days before the hearing, but the time may be shortened for good cause. GS 5A-23; *M.G. Newell Company, Inc., v. Wyrick*, 91 NC App 98 (1988).
 - v. Because GS 5A-23 does not specify the manner of service of a motion for contempt or a show cause order or notice under that statute, service under Rule 5 of the Rules of Civil Procedure would seem to be appropriate.
- e. Contempt for failure to pay child support — GS 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.

- i. 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 GS 50-13.9(d).
 - ii. Under GS 50-13.9(d) the clerk of court or a district judge initiates the contempt proceeding upon an affidavit from the person to whom the child support payment is owed.
 1. The show cause order issued under GS 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.
 2. 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.
 3. The order issued under GS 50-13.9(d) has to be served according to Rule 4 of the Rules of Civil Procedure.
 - iii. 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 (see below).
 - iv. For a much more detailed discussion of this subject, see "Using Contempt to Enforce Child Support Orders" by John Saxon, School of Government, Special Series No. 17 (February 2004).
- f. Order for arrest — It is questionable whether an order for arrest may be used to bring a person to court for civil contempt. If a defendant does not appear at a hearing for civil contempt, however, that person then will be in criminal contempt for disobeying the order to appear and an order for arrest may be issued pursuant to GS 5A-16 based on an affidavit establishing that the person is not likely to appear for the criminal contempt proceeding.
- g. Indigent right to counsel — Under the Due Process Clause an indigent defendant is entitled to have counsel appointed before being imprisoned for civil contempt. *McBride v. McBride*, 334 NC 124 (1993). The right applies, however, only if the defendant is actually imprisoned. *King v. King*, 144 NC App. 391 (2001). *But see Turner v. Rogers*, 131 S.Ct. 2507 (2011), holding that due process does not require appointment of counsel for an indigent in a child support hearing when the party seeking contempt is not represented by counsel and there are alternative procedural safeguards for the defendant such as notice of the importance of ability to pay, a fair opportunity to present and dispute relevant information, and a court finding of an ability to pay.
- h. No right to jury trial — There is no right to a jury trial for civil contempt. The judge is the trier of fact. GS 5A-23(d).
- i. Self incrimination — A defendant in a civil contempt proceeding may assert the right against self incrimination and refuse to testify, but the judicial official may infer guilt based on the refusal to testify. *Davis v. Town of Stallings Bd.*

of Adjustment, 141 NC App 489 (2000); *Hartsell v. Hartsell*, 99 NC App 380(1990).

- j. Willfulness — Civil contempt must be willful. GS 5A-21(a)(2a); *Sharpe v. Nobles*, 127 NC App 705 (1997).
- k. Present ability to comply — A person may not be punished for civil contempt unless the person has the present ability to comply with the court order. GS 5A-21(a)(3); *Teachey v. Teachey*, 46 NC App 332 (1980).
 - i. Even if a defendant does not have the present ability to pay money owed under a court order, the defendant may be held in contempt if the person has assets that may be liquidated for that purpose. *Hartsell v. Hartsell*, 99 NC App 380 (1990).
 - ii. The present ability to pay may be based on the defendant's ability to take a job or borrow money. *Teachey v. Teachey*, 46 NC App. 332 (1980). An order based on that premise must find that work is available, however. *Self v. Self*, 55 NC App 651 (1982).
 - iii. 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 NC App 131 (1984).
- l. Standard of proof — Although there does not appear to be any case law specifying the standard of proof for civil contempt, in the absence of any other specified standard the standard for a civil matter is preponderance of the evidence.
- m. Burden of proof — The burden of proof rests with the party who asserts that the other party is in contempt. If a judicial official has found probable cause and issued a notice to appear or show cause order, the burden shifts to the defendant. *Plott v. Plott*, 74 NC App 82 (1985). If the contempt proceeding simply began with a motion, however, and there was no finding of probable cause, the burden remains with the party who initiated the proceeding. GS 5A-23(a1); *Trivette v. Trivette*, 162 NC App 55 (2004).
- n. Person already in compliance — Civil contempt may not be used if the person has complied with the order by the time of the hearing. *Ruth v. Ruth*, 158 NC App 123 (2003).
- o. Consent judgments — Generally contempt may not be used to enforce a consent judgment, but there are important exceptions.
 - i. Contempt may be used to enforce a consent judgment in a domestic relations case. *Walters v. Walters*, 307 NC 381 (1983).
 - ii. A consent judgment may be enforced by contempt when the consent judgment is based on the court's own determination of facts and conclusions of law rather than the court simply approving the parties' agreement. *Bunn v. Bunn*, 262 NC 67 (1964); *Nohejl v. First Homes of Craven County, Inc.*, 120 NC App 188 (1995). The court may make the judgment its own by adopting and incorporating the parties'

settlement agreement. *PCI Energy Services v. Wachs Technical Services*, 122 NC App 436 (1996).

- p. Sanctions — Imprisonment until the person complies with the order is the only sanction for civil contempt.
- i. If the contempt is for failure to pay child support, or for something other than failure to pay money, the imprisonment may continue indefinitely, without further hearing, until the person complies. GS 5A-21(b).
 - ii. If the contempt is for failure to pay something other than child support, the imprisonment may not last longer than 90 days. At the end of that time a new hearing must be held to determine that the person still has the ability to pay, and the person may be imprisoned for another 90 days. That process may be repeated until the person has served a year. GS 5A-21(b2).
 - iii. The defendant must be released upon satisfying the condition for purging the contempt. GS 5A-22(a).
 - iv. Generally the court may not award costs or damages to a private party in a civil contempt proceeding. *Green v. Crane*, 96 NC App 654 (1990).
 1. Costs may be awarded when the settlement agreement being enforced by the court, having been adopted by the court as its own judgment, specifically provides for award of the costs of enforcement. *PCI Energy Services v. Wach Technical Services, Inc.*, 122 NC App 436 (1996).
 - v. Generally attorney's fees may not be awarded in a civil contempt proceeding. *Baxley v. Jackson*, 179 NC App 635 (2006). There are exceptions, however:
 1. Attorney's fees may be awarded in a contempt proceeding for child support. *Smith v. Smith*, 121 NC App 334 (1996); *Blair v. Blair*, 8 NC App 61 (1970).
 2. Attorney's fees may be awarded when the contempt is to enforce an equitable distribution order. *Hartsell v. Hartsell*, 99 NC App 380 (1990).
 3. Attorney's fees are allowed for failure to pay alimony, *Steg v. Steg*, 148 NC App 717 (2002) (unpublished), or temporary alimony, *Shumaker v. Shumaker*, 137 NC App 72 (2000).
 4. Attorney's fees are allowed in contempt proceedings for child support because the underlying child support statute itself allows attorney's fees. See *Smith v. Smith*, 121 NC App 334 (1996). Applying the same reasoning, the award of attorney's fees should be available in contempt proceedings related to child custody as well since the child custody statute allows attorney's fees. A case assuming that attorney's fees are available in contempt proceedings for child custody is *Ruth v. Ruth*, 158 NC App 123 (2003).
 5. Attorney's fees may be awarded when a settlement agreement, adopted by the court as its own judgment, specifically provides for indemnification of the costs of

enforcing the agreement. *PCI Energy Services v. Wach Technical Services, Inc.*, 122 NC App 436 (1996).

- q. Appeal from clerk — Appeals of civil contempt are the same as appeals of other civil matters. GS 5A-24. Thus, pursuant to GS 1-301.1, appeals from the clerk would be to superior court for a hearing *de novo*.
- r. Appeal from superior court — Appeals of civil contempt are the same as for appeals of other civil matters. GS 5A-12. Thus, appeals from superior court are to the Court of Appeals. *Hancock v. Hancock*, 122 NC App 518 (1996).
 - i. A civil contempt order for failing to comply with discovery affects a substantial right and is immediately appealable. *Benfield v. Benfield*, 89 NC App 415 (1988).
 - ii. A civil contempt order for failure to comply with child support and equitable distribution orders affects a substantial right and is immediately appealable. *Guerrier v. Guerrier*, 155 NC App 154 (2002).
 - iii. Notice of appeal removes jurisdiction of the trial court to enforce the contempt order until the appeal is decided or it is determined that there is no right of immediate appeal. *Lowder v. All Star Mills, Inc.*, 301 NC 561 (1981); GS 1-294.
 - iv. By statute, appeal does not stay enforcement of contempt in cases of child support (GS 50-13.4(f)(9)), child custody (GS 50-13.3) and alimony (GS 50-16.7(j)). *Guerrier v. Guerrier*, 155 NC App 154 (2002).
- 4. Criminal and civil contempt for the same act — A person may not be held in both civil and criminal contempt for the same act. GS 5A-12(d), -21(c).
- 5. No contempt for invalid order — If the court which entered the original order did not have jurisdiction to do so, the order is void *ab initio* and no one may be held in contempt for violating it. *Corey v. Hardison*, 236 NC 147 (1952). If the initial judicial official had jurisdiction but entered an incorrect order, the order is merely voidable and remains in effect, and can be enforced through contempt, until it has been voided by a direct challenge to its validity. *State v. Sams*, 317 NC 230 (1986).
- 6. Violation of domestic violence order — GS 50B-4(a) provides that contempt may be used for violation of a domestic violence order, but does not say whether the violation is to be treated as civil or criminal contempt. Because civil contempt is used to compel compliance with a court order, and criminal contempt is to punish disobedience, the contempt would seem to have to be criminal.
 - a. The party protected by the domestic violence 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.
 - b. The clerk is to schedule and issue a notice for a show cause hearing at the earliest date allowed under the civil contempt statute, GS 5A-23, which generally requires five days' notice.
 - c. If the clerk is not available and there is a danger of acts of domestic violence, the magistrate may issue the show cause order.

- d. The clerk or magistrate who issues the order is responsible for seeing that it is served by law enforcement.
7. Contempt by juvenile — This paper does not address contempt by a juvenile which is governed by Article 3 of GS Chapter 5A. 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. GS 5A-31(a).

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