

CONTEMPT

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Contents

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|------|--|---|
| I. | Difference Between Criminal and Civil Contempt..... | 1 |
| II. | Criminal Contempt..... | 1 |
| III. | Civil Contempt | 4 |
| IV. | Not Use Criminal and Civil Contempt for the Same Act | 7 |
| V. | No Contempt for Invalid Order..... | 7 |
| VI. | Contempt by Juvenile | 8 |

- I. 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 only 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 to purge the contempt and be freed.

II. Criminal Contempt.

- A. Grounds for Contempt.** Criminal contempt may be imposed only for the grounds listed in G.S. 5A-11(a). The grounds for criminal contempt include (see the statute for the complete list):

- Disruption of court proceedings.
- Impairing the respect due a court during proceedings.
 - For examples of a lawyer's conduct rising to contempt see *In Re Nakell*, 104 N.C. App. 638, 651 (1991).
 - A spectator's refusal to stand at the call of court may be contempt. *State v. Randell*, 152 N.C. App. 469, 472-73 (2002).
- Disobedience of or resistance to or interference with a court order.
 - For criminal contempt, the court's order does not have to be in writing. *State v. Simon*, 185 N.C. App. 247, 252 (2007).
 - Failure to comply with an order cannot be contempt unless the defendant has the ability to comply. *Lamm v. Lamm*, 229 N.C. 248, 249-50 (1948).
 - 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 N.C. App. 356, 360-61 (1996).
 - Encouraging others to disobey a court order also is criminal contempt. *State v. Wall*, 49 N.C. App. 678, 680 (1980).
- Refusal to be sworn as a witness or to testify. Giving false testimony also is punishable as contempt. *Galyon v. Stutts*, 241 N.C. 120, 126-27 (1954).
- Willful or grossly negligent failure of an officer of the court to perform duties.
- Willful or grossly negligent failure to comply with court schedule or practice.
 - The failure to comply with court schedule has to result in "substantial interference with the business of the court" to be contempt. G.S. 5A-11(a)(7).
 - A tardy witness is not in contempt when there is no delay in the court's proceeding. *State v. Chriscoe*, 85 N.C. App. 155, 158 (1987).

- Communication with a juror to improperly influence deliberations.
- Refusal to comply with a condition of probation.

B. Direct and Indirect Contempt. Criminal contempt may be direct or indirect. The significance of the distinction is that direct criminal contempt may be punished summarily, but indirect contempt may not.

To be direct, criminal contempt has to be committed within sight or hearing of a judicial official, occur in or in immediate proximity to the room where proceedings are being held, and be likely to interrupt or interfere with the proceedings. G.S. 5A-13(a). Fighting outside the courthouse was direct criminal contempt when close enough to be heard through a window. *State v. Evans*, 193 N.C. App. 455, *1 (2008) (unpublished).

Due process allows a summary proceeding for contempt only when the contempt occurred within the personal view of the judge. *In re Oliver*, 333 U.S. 257, 275 (1948); *Brandt v. Gooding*, 636 F.3d 124, 134 (4th Cir. 2011).

All other criminal contempt is indirect. G.S. 5A-13(b).

C. Summary Proceeding. Direct criminal contempt may be punished summarily. G.S. 5A-14.

Due process allows a summary proceeding for contempt only when the contempt occurred within the personal view of the judge. *In re Oliver*, 333 U.S. 257, 275 (1948); *Brandt v. Gooding*, 636 F.3d 124, 134 (4th Cir. 2011).

The summary proceeding must take place “substantially contemporaneously” with the contempt. G.S. 5A-14(a).

- A hearing the next morning was substantially contemporaneous when the defendant had to be removed from a bond hearing for being disruptive. *State v. Johnson*, 52 N.C. App. 592, 596-97 (1981).
- 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 N.C. App. 638, 649 (1991).

Even in a summary proceeding, the defendant must be told the basis for the contempt and given an opportunity to respond. *State v. Randell*, 152 N.C. App. 469, 472 (2002); *Johnson*, 52 N.C. App. 592, 596 (1981).

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*, 636 F.3d 124, 135-36 (4th Cir. 2011).

The right to counsel for an indigent defendant is not applicable to a summary proceeding for contempt. *In re Williams*, 269 N.C. 68, 76 (1967).

D. Plenary Proceeding. A plenary proceeding must be used for indirect criminal contempt, and may be used for direct criminal contempt. G.S. 5A-15.

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 N.C. 432, 436 (1985); In re Board of Comm'rs, 4 N.C. App. 626, 630 (1969). 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 N.C. App. 144, 150-51 (2008).

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. G.S. 5A-16(b). A person arrested under this provision is entitled to bail. *Id.*

The judge conducting the plenary proceeding may appoint a district attorney or assistant DA to prosecute the case. G.S. 5A-15(g).

An indigent is entitled to appointment of counsel for a plenary proceeding. State v. Wall, 49 N.C. App. 678, 679 (1980).

- E. Willfulness and Warning.** To be criminal, the contempt must be willful, and, generally, the person must have been warned that the conduct was improper.

Willfulness means “done deliberately and purposefully in violation of the law, and without authority, justification or excuse.” State v. Chriscoe, 85 N.C. 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 N.C. App. 615, 616 (1983).

- A lawyer’s inadvertent failure to turn off cell phone, so that it rang in court, was not willful. State v. Phair, 193 N.C. App. 591, 594 (2008).
- 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. *Chriscoe*, 85 N.C. App. at 158.

G.S. 5A-12(b) provides that 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.” Behavior that is inherently unacceptable and disruptive, that everyone knows is contemptuous — such as standing and yelling at the judge or throwing an object — would be willfully contemptuous and thus would not require a warning before being punished. For all other behavior, a warning must be given before finding contempt.

- F. No Jury Trial.** There is no right to a jury trial for criminal contempt. Blue Jeans Corp. v. Amalgamated Clothing Workers, 275 N.C. 503, 511 (1969).
- G. Right Against Self Incrimination.** The right against self incrimination applies to a criminal contempt proceeding. G.S. 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 N.C. App. 779, 781 (1984).
- I. Standard and Burden of Proof.** Criminal contempt must be proved beyond a reasonable doubt. G.S. 5A-15(f); O'Briant v. O'Briant, 313 N.C. 432, 435 (1985);

State v. Key, 182 N.C. App. 624, 628 (2007). The issuance of a show cause order does not shift the burden of proof in a criminal contempt proceeding. State v. Coleman, 188 N.C. App. 144, 150 (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. G.S. 5A-12. The statute allows imprisonment for up to 90 days if the contempt is for failure to comply with a nontestimonial identification order. G.S. 5A-12(a)(2). The statute allows imprisonment for up to six months if the contempt is for failure to testify as a witness after being granted immunity. G.S. 5A-12(a)(1).

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, 635 (2007).

The award of attorney's fees is not appropriate as part of criminal contempt. United Artists Records, Inc., v. Eastern Tape Corporation, 18 N.C. App. 183, 187 (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 N.C. App. 98, 101-02 (1988).

A judge 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." G.S. 5A-12(c).

The imposition of consecutive sentences for multiple instances of criminal contempt is questionable. The 30-days' punishment allowed for criminal contempt is the same as the punishment for a Class 3 misdemeanor, and consecutive sentences are not allowed when all convictions are for Class 3 misdemeanors.

- 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 U.S. 688 (1993), based on the elements that actually led to the finding of contempt. State v. Gilley, 135 N.C. App. 519, 527 (1999).
- L. Appeal.** Appeal from a magistrate's or district judge'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. G.S. 5A-17.

There is no appeal from a determination of not guilty of criminal contempt. Patterson v. Phillips, 56 N.C. App. 454, 455-56 (1982).

III. 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. G.S. 5A-21. For civil

contempt, the order being disobeyed must be in writing and must have been filed with the clerk. *Onslow County v. Moore*, 129 N.C. App. 376, 388 (1998); *Hassell v. Hassell*, 149 N.C. App. 972, *2 (2002) (unpublished).

- B. Purge Provision.** Because the purpose of civil contempt is to force compliance with an order, 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. A purge provision is essential to a civil contempt order. G.S. 5A-22(a); *Bethea v. McDonald*, 70 N.C. App. 566, 570 (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.** G.S. 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.

First, an aggrieved party may file and serve a motion on the party alleged to be in contempt, without review by a judge.

Second, the sworn statement or affidavit may be taken to a judge to determine whether it establishes probable cause for contempt. If it does, the judge may either (i) issue a notice of hearing informing the defendant that the defendant will be held in contempt if the defendant does not appear, or (ii) issue a show cause order directing the defendant to appear and show cause why contempt should not be found

A judge also may initiate a notice of hearing or show cause order based on the judge’s own sworn statement or affidavit.

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. G.S. 5A-23; *M.G. Newell Co., Inc., v. Wyrick*, 91 N.C. App. 98, 101 (1988).

Because G.S. 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 is appropriate.

- E. Order for Arrest.** It is uncertain 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 G.S. 5A-16 based on an affidavit establishing that the person is not likely to appear for the criminal contempt proceeding.
- F. Indigent Right to Counsel.** An indigent defendant is entitled to have counsel appointed before being imprisoned for civil contempt. *McBride v. McBride*, 334 N.C. 124, 128-29 (1993). The right applies, however, only if the defendant is actually imprisoned. *King v. King*, 144 N.C. App. 391, 394 (2001).

- G. No Right to Jury Trial.** There is no right to a jury trial for civil contempt. The judge is the trier of fact. G.S. 5A-23(d).
- H. Self Incrimination.** A defendant in a civil contempt proceeding may assert the right against self incrimination and refuse to testify, but the judge may infer guilt based on the refusal to testify. *Davis v. Town of Stallings Bd. of Adjustment*, 141 N.C. App. 489, 495 (2000); *Hartsell v. Hartsell*, 99 N.C. App. 380, 387 (1990).
- I. Willfulness.** Civil contempt must be willful. G.S. 5A-21(a)(2a); *Sharpe v. Nobles*, 127 N.C. App. 705, 709 (1997).
- J. 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. G.S. 5A-21(a)(3); *Teachey v. Teachey*, 46 N.C. App. 332, 334 (1980).

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 N.C. App. 380, 385-86 (1990).

The present ability to pay may be based on the defendant's ability to take a job or borrow money. *Teachey*, 46 N.C. App. at 334-35. An order based on that premise must find that work is available, however. *Self v. Self*, 55 N.C. App. 651, 653 (1982).

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, 134 (1984).

- K. 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.
- L. Burden of Proof.** The burden of proof rests with the party who asserts that the other party is in contempt. If a judge has found probable cause and issued a notice to appear or show cause order, the burden shifts to the defendant. *Plott v. Plott*, 74 N.C. App. 82, 85 (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. G.S. 5A-23(a1); *Trivette v. Trivette*, 162 N.C. App. 55, 60-61 (2004).
- M. 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 N.C. App. 123, 126 (2003).
- N. Consent Judgments.** Generally contempt may not be used to enforce a consent judgment, but may be used to enforce a consent judgment in a domestic relations case, *Walters v. Walters*, 307 N.C. 381, 386 (1983), or 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 N.C. 67, 69-70 (1964); *Nohejl v. First Homes of Craven County, Inc.*, 120 N.C. App. 188, 190-91 (1995). The court may make the judgment its own by adopting and incorporating the parties' settlement agreement. *PCI Energy Servs. v. Wachs Tech. Servs., Inc.*, 122 N.C. App. 436, 439 (1996).

- O. Sanctions.** Imprisonment until the person complies with the order is the sanction for civil contempt.
- If the contempt is for something other than failure to pay money, or failure to pay child support, the imprisonment may continue indefinitely, without further hearing, until the person complies. G.S. 5A-21(b).
 - 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. G.S. 5A-21(b2).
 - If the contempt is for failure to comply with a nontestimonial identification order, the imprisonment is limited to 90 days total. G.S. 5A-21(b1).
 - The defendant must be released upon satisfying the condition for purging the contempt. G.S. 5A-22(a).

Generally the court may not award costs or damages to a private party in a civil contempt proceeding. *Green v. Crane*, 96 N.C. App. 654, 659 (1990). Costs may be awarded, however, 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 Servs. v. Wachs Tech. Servs., Inc.*, 122 N.C. App. 436, 442 (1996).

Generally attorney's fees may not be awarded in a civil contempt proceeding. *Baxley v. Jackson*, 179 N.C. App. 635, 640 (2006). Attorney's fees may be awarded, however, when a settlement agreement, adopted by the court as its own judgment, specifically provides for indemnification of the costs of enforcing the agreement, *Wachs Tech. Servs., Inc.*, 122 N.C. App. at 442, and in various domestic cases.

- P. Appeal.** Appeals of civil contempt are the same as appeals of other civil matters, i.e., appeal from district or superior court is to the Court of Appeals. G.S. 5A-24; *Hancock v. Hancock*, 122 N.C. App. 518, 522 (1996).

A civil contempt order for failing to comply with discovery affects a substantial right and is immediately appealable. *Benfield v. Benfield*, 89 N.C. App. 415, 418-19 (1988).

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 N.C. 561, 579-80 (1981); G.S. 1-294. There are exceptions for child support and custody cases.

- IV. Not Use Criminal and Civil Contempt for the Same Act.** A person may not be held in both civil and criminal contempt for the same act. G.S. 5A-12(d), -21(c).

- V. 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 N.C. 147, 152 (1952). If the initial judge 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 N.C. 230, 235 (1986).

- VI. Contempt by Juvenile.** Contempt by a juvenile is governed by Article 3 of G.S. Chapter 5A. The statute defines a juvenile as someone between six and sixteen years of age who has not been emancipated and has not been convicted of a crime in superior court.

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