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ABSTRACT

In North Carolina the most common procedure for enforcing civil orders for the payment of child support is a contempt proceeding. The distinctions between civil and criminal contempt include different purposes of the contempt proceedings, different procedures that must be followed, and different consequences of a finding of contempt. Criminal contempt punishes a parent for past wrongful failure to pay support as ordered when he was able to do so; civil contempt forces a parent who is able to pay support to comply with a child support order. Three issues must be considered as they relate to civil contempt. First, the court must determine the contemnor's ability to pay by considering the parent's property and financial condition, assets and liabilities, ability and opportunity to work, and present income compared with income at the time of the original order. Secondly, for a finding of civil contempt, the failure to comply with an order must be judged to be an act of willful behavior. Finally, the essential issues of the burden of producing evidence and the burden of proof in civil contempt proceedings must be clarified. (Ten guidelines are included for ensuring fair hearings and minimizing the possibility that contempt orders will be reversed on appeal.) (NB)

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THE USE of CONTEMPT to ENFORCE CHILD-SUPPORT ORDERS in NORTH CAROLINA

TRUDY ALLEN ENNIS and JANET MASON

Contributions to this ***Special Series*** of Institute of Government publications deal with a variety of subjects. They are written and produced on an occasional basis. Each issue is distributed to public officials whose work particularly concerns the subject being treated in this article.

THE USE of CONTEMPT to ENFORCE CHILD-SUPPORT ORDERS in NORTH CAROLINA

TRUDY ALLEN ENNIS and JANET MASON

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Graphic Design by Karen L. Wysocki

Introduction

North Carolina's court system maintains over 128,000 accounts for the payment of child support. Within a year, the parent ordered to pay support in half of these cases is in arrears for some period of time.[1] The most common means of enforcing civil orders for the payment of child support is a contempt proceeding.[2] That was true even when the enforcement of such orders depended on further court action initiated by the party entitled to receive the support. But since October 1983, an enforcement procedure has operated to bring delinquent cases automatically into court for contempt hearings. If a supporting party does not pay an arrearage in full within 21 days after a delinquency notice is sent—or within 30 days after he becomes delinquent if no notice is sent—he is ordered to appear in court to show cause why he should not be found in contempt.[3]

The large number of child-support cases and the amount of court time they consume suggest a special need for legal clarity and uniformity in enforcing child support orders. But the use of contempt to enforce the payment of child support can involve complex and frustrating issues: Should civil or criminal contempt be used? When does a parent have the "ability to pay" required by statute before the order can be enforced? What circumstances constitute a legal excuse for nonpayment? How should huge arrearages be handled? What should be done about a parent who purposely divests himself of the ability to pay or repeatedly pays on the day before the contempt hearing? What happens when the plaintiff or the defendant[4] fails to appear for the contempt hearing? What kind of evidence is required to establish contempt, and who has the burden of producing it?

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1. Franklin Freeman, Director of North Carolina's Administrative Office of the Courts, addressing the Child Support Study Committee of the North Carolina General Assembly, Raleigh, North Carolina, February 6, 1986.

2. A number of enforcement remedies other than contempt are available in civil child-support cases. *See* N.C. GEN. STAT. § 50-13.4(f) (1985 Supp.). *See also* Mason, *Child Support in North Carolina*, 50 POPULAR GOVERNMENT 26 (Summer 1984). Unlike other remedies, civil contempt is available as an enforcement tool even while the order for the payment of support is being appealed. N.C. GEN. STAT. § 50-13.4(f)(9) (1985 Supp.).

The payment of child support that is ordered in a criminal case is generally enforced through proceedings for revocation of probation.

3. N.C. GEN. STAT. § 50-13.9 (1984). Similar provisions to ensure the enforcement of criminal child support orders appear in G.S. 15A-1344.1 (1985 Supp.)

4. In this article, the parent alleged to be in contempt for nonpayment of child support will be called the defendant or the alleged contemnor. The custodial parent who is seeking to enforce a child-support order will be labeled the plaintiff or the movant.

Some of the issues involved in the use of contempt result from the nature of the proceeding itself. Criminal contempt is treated much like a crime, but it has also been described as *sui generis*.[5] Civil contempt is often labeled *sui generis* because it involves an odd mixture of both civil and criminal concepts.[6] When civil contempt is used to enforce a court order, a contemnor may be imprisoned even though he has committed no crime. "[A]ll true contempt derives from some offense to the law,"[7] but labeling contempt as *sui generis* does not eliminate an inherent distaste for imprisoning someone who has not committed a crime.

In order to justify the use of imprisonment for contempt, judges should strictly follow legal procedures and strictly apply the law. Judge Hedrick, current Chief Judge of the North Carolina Court of Appeals, commented on the temptation to do otherwise in civil contempt proceedings: "We are familiar with the popular conception among members of the bench and bar that a defendant can raise more money in jail in an hour than he can outside jail in a year, but we cannot substitute popular conception for evidence. . . ."[8] Consistency across economic and social lines is also essential if the contempt power is to be used equitably. According to the National Council of Juvenile and Family Court Judges, "Fathers who are financially able pay far less than they can afford and are frequently in non-compliance. Men with incomes of $30,000 to $59,000 per year are found not to comply as often as men with incomes under $10,000."[9]

When the action to establish or enforce a child support order is a civil action, the parent who violates the order may be found in either civil or indirect criminal contempt, as provided in G.S. Chapter 5A.[10] Civil contempt is used more frequently, perhaps because it is assumed to be more effective in achieving the ultimate goal of payment. The purpose of civil contempt is to coerce compliance with the court order. The purpose of criminal contempt is to punish the contemnor for having violated the order. Since the grounds and procedures for establishing the two types of contempt differ, it is critical that any contempt proceeding be classified as either civil or criminal.

This paper will note the distinctions between the two types of contempt and then focus on three issues as they relate to civil contempt: ability to pay, willful noncompliance, and evidentiary burdens. The last issue includes the burden of producing evidence as well as the ultimate burden of proof. The contempt statute outlines specific procedural distinctions between civil and criminal contempt and provides some guidance, in conjunction with case law, as to evidentiary burdens. Only case law provides guidance concerning what constitutes willful noncompliance and the ability to pay child support.

Distinctions Between Civil and Criminal Contempt

The distinctions between civil and criminal contempt include different purposes of the contempt proceedings, different procedures that must be followed, and different consequences of a finding of contempt. Criminal contempt is designed to punish the parent's past wrongful failure to pay support as ordered when he was able to do so, regardless of his present ability to pay support. A criminal contemnor may be committed to jail for up to 30 days, fined up to $500, or both. Appeal from a district court finding of criminal contempt is for a de novo hearing before a superior court judge. Civil contempt is designed to force a parent who is able to pay support to comply with a prior child support order. A civil contemnor may be imprisoned indefinitely—for as long as the contempt continues—but he must be released as soon as he ceases being in contempt. Appeal from a district court finding of civil contempt is to the Court of Appeals.

G.S. 5A-11(a) lists ten behaviors that constitute criminal contempt. Each of these is classified as either direct contempt—behavior that is committed in the presence of or near a presiding judicial official and is likely to interrupt or interfere with matters before the court—or indirect contempt. The procedures for finding these two kinds of criminal contempt differ. One of the grounds for a finding of indirect criminal contempt, G.S. 5A-11(a)(3), is particularly relevant to child-support cases and is the only type of criminal contempt that will be discussed here. It consists of "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive or instruction or its execution." On that basis, then, the willful disobedience of an order to pay child support is criminal contempt.

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5 Blue Jeans Corp v Amalgamated Clothing Workers, 275 N C 503, 508, 169 S.E.2d 867, 870 (1969)

6. Mauney v. Mauney, 268 N.C 254, 256-57, 150 S E.2d 391, 393 (1966).

7. R. GOLDFARB, THE CONTEMPT POWER 53 (1963).

8. Jones v. Jones, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983).

9. CHILD SUPPORT ENFORCEMENT JUDICIAL EDUCATION PROJECT, NATIONAL COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, PARENTS ARE RESPONSIBLE FOR THE SUPPORT OF THEIR CHILDREN (1985).

10. N.C. GEN. STAT. § 50-13.4(9) (1985 Supp).

G.S. 5A-21 defines civil contempt as the failure to comply with a court order, but it provides that being in civil contempt continues only as long as three conditions are met: (1) the order remains in force, (2) the purpose of the order may still be served by compliance with the order, and (3) the person to whom the order is directed is able to comply or to take reasonable measures that would enable him to comply with the order. A party may—for the same conduct—be in civil contempt, criminal contempt, or both.[11] Clearly, a parent's failure to pay court-ordered child support may often constitute both civil and criminal contempt. While the differences in procedures and outcomes for civil and criminal contempt require that the two types of proceedings be carefully distinguished, it is understandable that they are often confused in the child-support context.

A defendant may be found in civil contempt only for those failures to comply that exist at the time of the show-cause hearing. In *Hudson v. Hudson,*[12] the defendant paid the arrearage between the filing date and the date of the show-cause hearing. He was nevertheless found in contempt and sentenced to 30 days in jail, with the provision that he could purge himself by paying all support then due, continuing to make each payment on the due date, paying medical bills within 30 days, and paying $200 for the plaintiff's attorney fees within 30 days.[13] The Court of Appeals vacated the portion of the judgment that found the defendant in contempt, saying that the "purpose of a civil contempt proceeding such as is involved in this case is to force the defendant's compliance with the court's order. To hold the defendant in contempt after that very purpose has been achieved is ordinarily contrary to the concept of the proceeding."[14] The defendant was in full compliance on the date he was found to be in contempt, and his compliance with requirements to be met after that date was not before the court.[15] When a parent repeatedly accumulates arrearages but pays them just before the show-cause hearing, a finding of criminal contempt is the appropriate response. The 30-day "sentence" in *Hudson* suggests that the trial court was confusing civil and criminal contempt.

One writer on contempt in 1971 noted that a statute that describes contempt in a procedural, rather than theoretical, fashion could eliminate the confusion between civil and criminal contempt by providing "an *operational* definition rather than an abstract one."[16] In drafting G.S. Chapter 5A, which replaced Chapter 5 in 1978, the Criminal Code Commission dealt with both civil and criminal contempt, "since the two are inextricably bound together in Chapter 5."[17] One primary purpose in revising the contempt statutes was "to draw a sharp distinction between proceedings for criminal contempt and the proceedings for civil contempt. . . ."[18] The desired sharp distinction, which is reflected in most of Chapter 5A, is considerably blurred by one provision:

> A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case.[19]

The statute does not indicate whether the procedural requirements for a criminal contempt proceeding apply in this situation.

One writer has noted that "[t]he only significance of the civil-criminal classification is the appropriateness of the procedure to the sanction imposed."[20] If the punitive criminal contempt sanction is imposed in a proceeding that was initiated and conducted as a civil contempt proceeding, the procedures may well be inadequate to protect the contemnor's statutory and constitutional rights. Thus the North Carolina statute, by failing to require "a decision . . . at the initiation of the proceeding on the type of sanction sought to be imposed. . .,"[21] keeps alive

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11 *Id.* §§ 5A-12(d), -21(c) (1981).

12. Hudson v. Hudson, 31 N.C. App. 547, 230 S.E.2d 188 (1976).

13. *Id.* at 548-50, 230 S.E.2d at 188-89.

14. *Id.* at 551, 230 S.E 2d at 190

15. *Id.*

16 Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 247 (1971).

17 Official Commentary, N.C. GEN. STAT. Ch. 5A.

18 *Id.*, Art. 1. By an amendment concurrent with the passage of G.S. Chapter 5A (the contempt chapter), the sections of the General Statutes that provide for the use of contempt to enforce child support [G.S. 50-13.4(9)] and alimony requirements [G.S. 50-16.7(j)] were changed to clarify the distinction between civil and criminal contempt. "[T]he past willful disobedience of a support order is punishable as criminal contempt, and the continuing duty of a person presently able to comply with such order is enforceable by proceedings for civil contempt." Billings, *Contempt, Order in the Court Room and Mistrials*, 14 WAKE FOREST L. REV. 909, 920 (1978).

An alternative to the approach of sharply distinguishing civil and criminal contempt was followed in Wisconsin, which "abandon[ed] any attempt to distinguish or even to define civil and criminal contempt because . . . such a definition is an exercise in futility." R. Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 CIN. L. REV. 677, 687-88 (1981).

19. N.C. GEN. STAT. § 5A-23(g).

20 Martineau, *supra* note 18, at 688. *See also id.* at 706-07.

21. *Id.* at 695. *See also id.* at 706.

Table 1. Provisions of Contempt Statutes That Apply to Enforcement of Orders to Pay Child Support

	Indirect Criminal Contempt (G.S. Ch. 5A, Art. 1)	Civil Contempt (G.S. Ch. 5A, Art. 2)
Purpose	To punish.[1]	To coerce compliance with a court order.[2]
Grounds	Willful disobedience of a court order.[3]	Failure to comply with a court order if the person is able to comply or to take reasonable measures that would enable him to comply.[4]
When the Ground Must Exist	Any time since entry of the original order.	At the time of the hearing.
Initiating the Proceedings	Order to appear and show cause.[5] An order for arrest may be issued if there is probable cause to believe that the person will not obey the order.[6]	Order to appear and show cause or notice that the person will be held in contempt unless he appears and shows cause why he should not be held in contempt.[7]
Order and Findings	A finding of guilt must be based on evidence that supports the findings of fact beyond a reasonable doubt.[8]	The order finding the defendant in contempt must specify the actions by which he may purge himself.[9]
Testimony by Alleged Contemnor	The alleged contemnor may not be compelled to be a witness against himself.[10]	
Commitment to Jail	30-day maximum.[11] (Censure and up to $500 fine may also be imposed.) The judge may reduce the sentence at any time on the basis of the contemnor's actions and the ends of justice.[12]	As long as the civil contempt continues.[13] The person must be released when civil contempt ceases.[14]
Limits on Commitment	The sentence of a person found in both civil and criminal contempt may not exceed the longer of the two periods of incarceration.[15]	The jailer may, without further orders from the court, release a contemnor who has complied with the purge conditions.[16] In the alternative, the contemnor may make a motion for release, and the judge must decide whether to release him.[17]
Appeal	Hearing de novo before a superior court judge.[18]	To the Court of Appeals.[19]

1. Official Commentary, N.C. GEN. STAT. Ch. 5A, Art. 1.
2. *Id.* § 5A-21
3. *Id.* § 5A-11(a)(3).
4. *Id.* § 5A-21(a)
5. *Id.* § 5A-15(a).
6. *Id.* § 5A-16(b). The court must make a specific finding of probable cause to believe that the alleged contemnor will not obey the order to appear before it issues an order for his arrest. Mather v Mather, 70 N.C. App. 106, 110, 318 S.E.2d 548, 551 (1984).
7. N.C. GEN. STAT. § 5A-23(a). There is no provision for arresting an alleged civil contemnor to insure his appearance, and in Mather v. Mather the court notes that such a provision is available only in criminal proceedings. N.C. App. at 110, 318 S.E.2d at 550
8. N.C. GEN. STAT. § 5A-15(f).
9. *Id.* § 5A-23(e).
10. *Id.* § 5A-15(e)
11. *Id.* § 5A-12(a).
12. *Id.* § 5A-12(c).
13. *Id.* § 5A-21(b).
14. *Id.* § 5A-22(a).
15. *Id.* §§ 5A-12(d), -21(c).
16. *Id.* § 5A-22(a).
17. *Id.* § 5A-22(b).
18. *Id.* § 5A-17.
19. *Id.* § 5A-24.

one of the most troubling aspects of the civil-criminal distinction.

To protect the defendant's rights and guard against possible grounds for reversal, the extra due process requirements of a hearing for indirect criminal contempt should also be applied in civil contempt cases that result in a finding of criminal contempt:

(1) *Process for initiating the action.* Notice, which is allowed as an alternative to an order to appear for a civil contempt proceeding,[22] is inadequate for initiating a criminal contempt proceeding. For a proceeding for indirect criminal contempt, the alleged contemnor must be ordered to appear.[23] Again, the statute appears to allow a finding of indirect criminal contempt in a properly initiated proceeding for civil contempt. But it is better, if there is a chance that a finding of indirect criminal contempt will occur, to use an order instead of a notice to appear. The order should be worded to put the defendant on notice that he may be found in civil contempt or criminal contempt or both.

(2) *Alleged contemnor as a witness.* The person charged with criminal contempt may not be compelled to be a witness against himself.[24] Certainly an alleged contemnor in a civil contempt proceeding may also, in response to particular questions, claim his Fifth Amendment right not to incriminate himself.[25] But an alleged criminal contemnor cannot be compelled to take the stand to testify.

(3) *Standard of proof.* In order to hold a person in criminal contempt, the judge must make findings of fact that are established by the evidence beyond a reasonable doubt.[26]

(4) *Right to counsel.* Although the contempt statute makes no mention of counsel, and although there is no North Carolina case directly on point, an indigent alleged contemnor probably has a right to appointed counsel in a proceeding for indirect criminal contempt. In dicta, the North Carolina Supreme Court has stated, "[W]e recognize that criminal contempts are crimes, and accordingly, the accused is entitled to the benefits of all constitutional safeguards."[27] While counsel should be appointed for an indigent in an indirect criminal contempt proceeding if imprisonment is to be imposed, an indigent's right to appointed counsel in civil contempt proceedings is to be determined on a case-by-case basis.[28]

Appeal procedures also differ for district court findings of civil and criminal contempt. Appeal from a finding of civil contempt is to the Court of Appeals,[29] while appeal from a finding of criminal contempt is for a de novo hearing before a superior court judge.[30] Sometimes appellate courts appear to overlook that distinction,[31] but in *Michael v. Michael*[32] the Court of Appeals did not. The district court had found the appellant in criminal contempt for failing to make child-support and other court-ordered payments. The Court of Appeals dismissed the

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22. N.C. GEN. STAT. § 5A-23(a). In Gompers v. Bucks Stove & Range Co., 221 U.S. 418 (1911), the United States Supreme Court seemed to require that an alleged contemnor, by inspecting the contempt papers, be able to determine whether the proceeding is to be civil or criminal. "He should not be left in doubt as to whether relief or punishment was the object in view. He is not only entitled to be informed of the charge against him, but to know that it is a charge and not a suit." 221 U.S. at 446.

23. N.C. GEN. STAT. § 5A-15(a). The order to show cause must specify the acts alleged to constitute contempt and inform the alleged contemnor that he should be prepared to defend himself. O'Briant v. O'Briant, 313 N.C. 432, 440-41, 329 S.E.2d 370, 375-76 (1985).

24. N.C. GEN. STAT. § 5A-15(e)

25. "[T]he Fifth Amendment privilege against compulsory testimonial self-incrimination is ordinarily asserted in criminal proceedings, [but] its protection . . . extends to civil proceedings where a party may be subjected to imprisonment." Lowder v. Mills, Inc., 301 N.C. 561, 584, 273 S.E.2d 247, 260 (1981).

26. N.C. GEN. STAT. § 5A-15(f). The contempt statute does not address the standard of proof for civil contempt proceedings.

27. O'Briant v. O'Briant, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985) "[I]f the crime for which the defendant is charged carries a possible prison sentence of any length, the judge may not impose an active prison sentence on the defendant unless defendant has been afforded the opportunity to have counsel represent him." State v. Neely, 307 N.C. 247, 252, 297 S.E. 2d 389, 393 (1982). *See* Scott v. Illinois, 440 U.S. 367 (1979); Argersinger v. Hamlin, 407 U.S. 25 (1972).

28. "Since the nature of nonsupport civil contempt cases usually is not complex, due process does not require that counsel be automatically appointed for indigents . . . [Instead,] due process requires appointment of counsel for indigents in nonsupport civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness." Jolly v. Wright, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980) *But see* McClain v. Walker, 768 F.2d 1181 (10th Cir. 1985), *cert. denied*, 106 S.Ct. 805 (1986) (due process requires that court-appointed counsel be provided for indigent support-owing parent who faces incarceration in civil contempt proceeding for nonsupport).

29. N.C. GEN. STAT. § 5A-24

30. *Id.* § 5A-17. Generally, criminal cases that are appealed from district to superior court are tried before a jury in superior court. However, since the maximum penalty that can be imposed for criminal contempt is up to thirty days' imprisonment, a $500 fine, or both, contempt has been classified as a petty offense for which there is no constitutional right to a jury trial. *See* Blue Jeans Corp. v. Amalgamated Clothing Workers, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969); Bloom v. Illinois, 391 U.S. 194 (1968).

31. *See, e.g.*, Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984), *disc. rev. denied*, 311 N.C. 304, 317 S.E.2d 680 (1984); O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985).

32. Michael v. Michael, ___ N.C. App. ___, 336 S.E.2d 414 (1985).

appeal, holding that G.S. 5A-17 "vests exclusive jurisdiction in the superior court to hear appeals from orders in the district court holding a person in criminal contempt."[33]

Careful reading and application of the contempt statute can help avoid the pitfalls of confusing civil and criminal contempt. However, as recently as 1985 the Supreme Court acknowledged, as it had before the contempt statutes were rewritten, that the distinction between civil and criminal contempt might be "hazy at best."[34] In *O'Briant v. O'Briant*[35] the Court emphasized the need to determine whether the contempt is criminal or civil, since the purpose, procedure, punishment, and right of review differ according to the classification.[36] The opinion re-enforces the need to note carefully the statutory distinctions between the two types of contempt.

Issues in Civil Contempt

Assuming the existence of a valid court order and a failure to pay in accordance with the terms of the order, two issues are central in any civil contempt proceeding to enforce child-support requirements: (1) whether the alleged contemnor has the ability to pay, and (2) whether his nonpayment is willful. The requirements of willfulness and ability to pay are sometimes treated as synonymous, but they are not the same. Even though nonwillful failure to pay most often results from an inability to pay, factors other than inability to pay may render a failure to pay not willful. The proper allocation of the burdens of producing evidence and proving the essential elements of contempt is yet another issue. A search for guidance on any one of these issues can be frustrating. Few Supreme Court decisions address them at all. On the other hand, an enormous number of Court of Appeals decisions speak to ability to pay and willfulness, though not always consistently.[37] Very few Supreme Court or Court of Appeals cases address the critical issue of who has the burden of producing evidence and the burden of proof in a civil contempt proceeding.

Ability to Pay

In a civil contempt proceeding the judge must make findings of fact and conclusions of law.[38] The findings of fact are binding on appeal if supported by evidence in the record.[39] Findings of "ultimate" facts, such as the ability to pay, must be supported by evidentiary findings of fact.[40] Often such ultimate facts are also denominated as conclusions of law and appear in both sections of the court's order. The trial judge's findings and conclusions must in turn support the order entered[41]—for example, that the defendant is committed to jail until he purges himself of contempt by paying $500.

The alleged contemnor's ability to pay the amount ordered is usually the central issue in a civil contempt proceeding to enforce a child-support order. Nonpayment of the ordered amount is generally not difficult to prove, but the defendant's inability to pay will preclude a finding of civil contempt despite the nonpayment. A review of North Carolina appellate decisions indicates that most reversals of orders finding civil contempt for nonpayment of child support fall into two broad categories: (1) cases in which it is truly doubtful that the parent can pay, despite a specific trial court finding that he can—that is, the evidence does not support the findings; and (2) cases in which the parent may be able to pay, but the court order does not contain adequate specific findings—that is, the evidentiary findings do not support either the ultimate finding that the defendant is able to pay or the conclusion that he is in contempt. In the latter case, the record may well contain evidence from which sufficient findings could have been made.[42]

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33. *Id.* at ____, 336 S.E.2d at 415.

34. O'Briant v. O'Briant, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985) [citing Blue Jeans Corp. v. Amalgamated Clothing Workers of America, 275 N.C. 503, 169 S.E.2d 867 (1969)]. The confusion that surrounds the contempt power is longstanding and is not unique to North Carolina. "Few legal concepts have bedeviled courts, judges, lawyers and legal commentators more than contempt of court—in particular, the distinction between civil and criminal contempt." Martineau, *supra* note 18, at 677. For an historical explanation of the confusion, *see id.* at 678-84.

35. 313 N.C. 432, 329 S.E.2d 370.

36. *Id.* at 434, 329 S.E.2d at 372. [citing Luther v. Luther, 234 N.C. 429, 67 S.E.2d 345 (1951)].

37. Statutory changes may have affected the holdings of some cases that were decided before G.S. Chapter 5A became effective on July 1, 1978. In addition, in older cases the label "for contempt" is usually comparable with current criminal contempt, whereas "as for contempt" should be translated as civil contempt. A number of older rulings still provide useful guidance for conducting civil contempt hearings and preparing findings and orders that will withstand appellate review.

38. Quick v. Quick, 305 N.C. 446, 450, 290 S.E.2d 653, 657 (1982) (permanent alimony).

39. Green v. Green, 130 N.C. 578, 578, 41 S.E. 784, 785 (1902).

40. *Quick*, 305 N.C. at 451, 290 S.E.2d at 657.

41. *Id.*

42. In Lee v. Lee, ____ N.C. App. ____, 337 S.E.2d 690 (1985), the Court of Appeals pointed out that the trial court must determine what facts

Time at Which the Ability to Pay Must Exist. Perhaps the most troublesome issue relating to a defendant's ability to pay child support concerns whether that ability exists at the time of the finding of civil contempt. A finding that the defendant was able to pay at some other point since the original order was entered may be the basis for holding him in criminal contempt, but it will not support an order holding him in civil contempt. In *Mauney v. Mauney,*[43] the Supreme Court emphasized that in order to find civil contempt, the trial court must find not only that the defendant has not complied with a court order directing him to pay child support but also that he is currently able to comply. In *Self v. Self,*[44] the Court of Appeals held that a defendant could not be found in civil contempt even when the record showed that he was able to work, if there was no evidence or finding that work was available for him.[45] These holdings are consistent with a statement in the official commentary to G.S. 5A-21: a person in civil contempt "holds the keys to his own jail by virtue of his ability to comply." In order to incarcerate a person for civil contempt, on the rationale that he can release himself by complying with the order, it is essential that there be evidence and a finding that he *is* able to comply or to take reasonable measures to be able to comply.

Citing *Mauney,* in *Hodges v. Hodges*[46] the Court of Appeals reversed a contempt order because there had been no finding that on the day of the contempt hearing the defendant was able to comply or that he owned real or personal property that he could sell in order to pay the arrearage. The Court of Appeals said, "Our Supreme Court has held that a trial court's findings that a defendant was healthy and able-bodied, had been and was presently employed, had not been in ill-health or incapacitated, and had the ability to earn good wages, without finding that defendant presently had the means to comply, do not support confinement in jail for contempt."[47]

The mere fact that the defendant is able-bodied does not mean that he is able to pay child support.[48] Instead, as the Supreme Court has said, the trial court should take inventory of his capacities and property: "[F]ind what are his assets and liabilities and his ability to pay and work—an inventory of his financial condition."[49] A finding of present income—or ability to generate income—is critical. The trial court should not skirt that requirement by making only conclusory findings, such as that the defendant was able to pay when the original order was issued and the circumstances have not changed.

An ability to pay in the future, without a finding of present ability, is not sufficient to warrant imprisonment for civil contempt. In two cases,[50] the trial court committed defendants to jail and provided that they could purge themselves by paying a specified part of the arrearage. The defendants were given work release to enable them to continue to work to pay the amount. In both cases the Court of Appeals reversed, since the findings of fact related only to the defendants' ability to pay in the past and there were no findings of present ability to pay the specified part of the arrearage.

Ability to Pay Part of an Arrearage. Sometimes a defendant can pay some but not all of the amount owed under a court order. The Supreme Court has said that a finding of ability to pay part of an arrearage will not support an order jailing the contemnor and conditioning his release on payment of all of the money owed.[51]

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are established by the evidence, not just recapitulate testimony or recite what the evidence may tend to show. Thus, a finding that "'defendant represents to the court he is presently employed . . . and earns $5.10 per hour' [was] not a determination by the court of a fact established by the evidence." *Id.* at ____, 337 S.E.2d at 697.

43. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

44. Self v. Self, 55 N.C. App. 651, 286 S.E.2d 579 (1982).

45. *Id.* at 653-54, 286 S.E.2d at 581.

46. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983).

47. *Id.* at 553, 307 S.E.2d at 577. The official commentary to G.S. 5A-21 states that the statute "is intended to make clear, for example, that the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job." That statement seems to be the basis for at least one writer's conclusion that the stringent standard of present ability to comply that was outlined in Mauney v. Mauney has been relaxed. BURGWYN ET AL., LEGAL ASPECTS OF AND TACTICS USED IN THE NORTH CAROLINA CHILD SUPPORT ENFORCEMENT (IV-D) PROGRAM 39 (Rev. ed., N.C. Dept. of Human Resources, October 1980).

48. Green v. Green, 130 N.C. at 579, 41 S.E. at 785.

49. Vaughan v. Vaughan, 213 N.C. 189, 193, 195 S.E. 351, 353 (1938). It sometimes seems that it is impossible to make too many findings of fact, but in one unusual case very few findings were necessary. In Coleman v. Coleman, 74 N.C. App. 494, 328 S.E.2d 871 (1985), $200 a month in income from renting a house established the defendant's ability to pay $200 a month in child support and alimony *pendente lite* while he was in prison for shooting the plaintiff, even though the defendant had taken measures to make it appear that his brother legally owned the house.

50. Lee v. Lee, ____ N.C. App. ____, 337 S.E.2d 690 (1985). McMiller v. McMiller, 77 N.C. App. 808, 336 S.E.2d 134 (1985).

51. Green v. Green, 130 N.C. at 579, 41 S.E. at 786. A 1984 Court of Appeals decision stated that the same law still applies. In that case an order requiring the defendant's imprisonment for civil contempt until he paid a $10,590 arrearage could not be supported by a finding that he had the present ability to pay a portion of that sum. Brower v. Brower, 70 N.C. App. 131, 134, 318 S.E.2d 542, 544 (1984). *But see* Reece v. Reece, 58 N.C. App. 404, 293 S.E.2d 662 (1982), in which the Court of Appeals

When an order commits a defendant to jail until he complies with the order to make child-support payments, that vaguely worded commitment order may be construed to mean that he is to be jailed until he has paid the full amount owed. If the court's findings state that the defendant is able to pay only part of the arrearage, or if that is the only finding the evidence supports, that imprecise order of commitment to jail is error.[52] An order for commitment should specify the exact amount the contemnor must pay in order to purge himself of civil contempt. A simple statement that he is to be held until he complies is inadequate. But clearly, under a properly worded order, a contemnor may be jailed for civil contempt until he pays that portion of an arrearage that he is able to pay, even if that amount is substantially less than the full amount owed.

Consideration of Alleged Contemnor's Expenses. A defendant's claim of inability to pay is usually based on his assertion that his necessary expenses combined with the ordered child support exceed his income. The cost of supporting a second family may be asserted as part of the basis for being unable to comply with a child-support order. But the trial court is not bound by the defendant's characterization of particular expenses as necessary, and the acquisition of new obligations—even family-support obligations—does not necessarily relieve a parent of the duty to comply fully with a previous child-support order.

In *Beasley v. Beasley*[53] the defendant had incurred increased expenses because he had a second family and had bought a new home. The trial court found him in contempt for not complying with an order for increased child-support payments, when his only defense was that he could not afford to pay the higher amount. The Court of Appeals' decision affirming the contempt order was affirmed by the Supreme Court in a per curiam opinion. The Supreme Court noted the increase in the defendant's net income between the time he was ordered to pay $35 a week and the time he was ordered to pay $50 a week, and it approved the Court of Appeals' application of the law to those and other facts.[54] The Court of Appeals had said that the defendant's first family's needs could not be made subservient to the needs of his second family.[55] It also held that the trial court was not required to make specific findings as to whether the defendant's proven expenses were necessary, when it was evident that the trial judge had considered this question and concluded that not all of the listed expenses were necessary.[56] This conclusion was based on a finding that "the defendant's income and assets, *after consideration of his expenses,* is sufficient to enable the defendant to have paid" the ordered amount (emphasis added by the Court of Appeals).[57] Although the Supreme Court found the findings of fact sufficient to support a conclusion that the defendant's income and assets after expenses enabled him to comply, the Court of Appeals was more lenient in *Beasley* than in a number of its other decisions in regard to the degree of specificity required in the findings. The decision suggests, though, that the trial court has wide discretion in assessing the parties' asserted expenses.

Other issues related to "ability to pay" have been addressed by the Court of Appeals but not by the Supreme Court.

Deliberate Inability to Pay. How should attempts at deliberate pauperization be handled? Sometimes the alleged contemnor has intentionally created a situation in which it is impossible for him to pay the ordered amount of child support. Obviously, there is a legitimate concern that a parent not be allowed to make, with impunity, a willful decision not to support his child. If he is no longer able to comply or to take reasonable measures that would enable him to comply because he has intentionally acted to make himself unable to pay, his failure to pay support must be classified as criminal, not civil, contempt.

The problem that trial judges face in dealing with self-induced inability to comply with a child-support order is accentuated by the appellate courts' failure to distinguish clearly between civil and criminal contempt when they address the issue. A careful analysis of each case may reveal the distinction, but much confusion would be eliminated if the trial and appellate courts—in every contempt case—distinguished and identified the type of contempt being considered. Despite the frequent confusion, some general rules may be stated. Criminal contempt should be used to punish a contemnor who deliberately divests himself of the ability to comply with

affirmed an order that imprisoned the defendant until he paid a $4,292.20 arrearage, when the court found that he had earned between $11,000 and $24,000 a year since 1974 and had the present ability to pay part of the arrearage.

52. Green at 579, 41 S.E. at 786.

53. Beasley v. Beasley, 296 N.C. 580, 251 S.E.2d 433 (1979).

54. *Id.* at 580-81, 251 S.E.2d at 434.

55. Beasley v. Beasley, 37 N.C. App. 255, 257, 245 S.E.2d 820, 822 (1978).

56. *Id.* at 258, 245 S.E.2d at 822

57. *Id.*

a court order. A contemnor who attempts to escape payment by arranging his affairs so as to *appear* to be unable to comply but in fact can still take reasonable measures to be able to comply may be held in civil or criminal contempt, or both, for nonpayment.

Three Court of Appeals decisions illustrate the need to classify the contempt as civil or criminal when deliberate pauperization is an issue. The defendant in *Faught v. Faught*[58] appealed from a finding of contempt on the grounds that he could not be held in contempt because he was not financially able to comply. He admitted that he *had* been able to pay the monthly alimony payments originally ordered and had willfully not done so, creating a large arrearage.[59] A subsequent order directed him to make payments on the arrearage in addition to the ordered alimony payments. When he fell behind in both payments, the court found him to be in criminal contempt under G.S. 5A-11(a)(3).[60] The Court of Appeals affirmed, holding that he could be punished for criminal contempt even though he lacked a present ability to pay, because he had voluntarily assumed additional obligations and divested himself of assets and income.[61]

In *Williford v. Williford*[62] the defendant claimed that he was not able to comply with a support order because his income had declined and he had a second family. The decision is somewhat confusing because it does not indicate that either the district court or the Court of Appeals classified the proceeding as criminal or civil. The Court of Appeals' language suggests a finding of criminal contempt: "[A] defendant may not deliberately divest himself of his property and in effect pauperize himself for appearance at a hearing for contempt and thereby escape punishment because he is at that time unable to comply . . . ."[63] But the case may represent a situation in which the defendant could be found in either civil or criminal contempt, or both. Findings cited by the court include the fact that the defendant had voluntarily taken a job that paid $7,000 a year less than his previous job, had left that position to accept employment "for an unnamed concern for undisclosed compensation," and had remarried and had another child.[64] But the trial court had also found that he was making payments on his second wife's home, paying country club dues, and making truck and other loan payments.[65] Thus the Court of Appeals may actually have been indicating that the defendant was still able to comply, despite his attempt to appear otherwise.

In *Goodhouse v. DeFravio*,[66] a civil contempt case, the Court of Appeals clearly articulated the fact that the defendant had a present ability to comply with a child-support order, even though he had tried to divest himself of the appearance of being able to comply. The defendant had sold a $61,000 interest in a prospering company for only $10,000 and had made other highly questionable business decisions.[67] The court held that sufficient evidence supported the trial court's finding that the defendant could pay a child-support arrearage of $4,000, even though he had chosen to quit work and become a full-time student.[68] He had $2,500 in an IRA account, owned furniture and other assets worth $17,500, and held outstanding notes totaling $40,000.[69]

Ability to Pay Large Arrearages. Another issue the Court of Appeals has addressed is the sufficiency of findings about the ability to pay accumulated arrearages. Extremely large amounts of overdue support payments may accrue before they come to a court's attention in a contempt proceeding. Sometimes the court modifies the support order to provide for payments on the arrearage in addition to the regular support payments. As discussed earlier, the court may jail the contemnor for civil contempt and condition his release on payment of the portion of the arrearage that he is able to pay. An order to confine a defendant until he pays the entire arrearage must be supported by a finding that he is at present able to purge himself by paying the entire amount.[70] The Court of Appeals reversed such an order in *Jones v. Jones*,[71] in which it said:

> While the evidence tends to show that defendant was gainfully employed as a construction worker at an hourly wage of $5.75 and that he lives with his second wife who also is gainfully employed with an average take-home pay of approximately $406.00 per month and that the defendant and his wife reside in a trailer situated

58. Faught v. Faught, 67 N.C. App. 37, 312 S.E.2d 504 (1984), *disc. rev. denied*, 311 N.C. 304, 317 S.E.2d 680 (1984).

59. *Id.* at 45, 312 S.E.2d at 509.

60. *Id.* at 46, 312 S.E.2d at 509.

61. *Id.*

62. Williford v. Williford, 56 N.C. App. 610, 289 S.E.2d 907 (1982).

63. *Id.* at 612, 289 S.E.2d at 909 [quoting Bennett v. Bennett, 21 N.C. App. 390, 393, 204 S.E.2d 554, 556 (1974)].

64. *Id.* at 612, 289 S.E.2d at 908.

65. *Id.*

66. Goodhouse v. DeFravio, 57 N.C. App. 124, 290 S.E.2d 751 (1982).

67. *Id.* at 125, 290 S.E.2d at 752.

68. *Id.* at 128, 290 S.E.2d at 754.

69. *Id.*

70. Jones v. Jones, 62 N.C. App. 748, 749, 303 S.E.2d 583, 584 (1983).

71. *Id.*

on some "land" given to defendant by his present father-in-law and that the trailer is heavily mortgaged and that monthly payments are $250.00 and that the mortgage will be paid in six years and that defendant owns an automobile which is "broken," there is no evidence in this record that defendant actually possesses $6,540 [amount of the arrearage] or that he has "the present ability to take reasonable measures that would enable him to comply, with the order."[72]

The findings in *Monds v. Monds*[73] indicated that the defendant had transferred substantial holdings and made extensive attempts to appear to be a man without means. But the Court of Appeals affirmed an order committing him to jail until he paid an arrearage of $5,994.50. The record was replete with evidence of the defendant's financial maneuvering to masquerade the fact that he had assets and to create the impression that he was just a simple man who earned only $125 a week.[74] In fact, he was working for his son-in-law (who had previously been employed by him for the same wages), and he had sizable assets that would allow him to take reasonable measures to comply with the child-support order.[75]

In *Teachey v. Teachey*[76] the court said that jailing a defendant for civil contempt until he paid a $4,825 arrearage was not proper without a finding that he was able to pay that amount immediately or to take reasonable measures "such as borrowing the money, selling defendant's mountain property in Virginia, or liquidating other assets, in order to pay. . . ."[77] The holding in this case requires not only that the defendant have valuable assets but also that he be able to convert those assets into cash in order to pay the arrearage. The court provides no guidance regarding the suggestion that "borrowing the money" might constitute a reasonable measure to become able to pay support.

The defendant in *Gibson v. Gibson*[78] was uncooperative in producing evidence or giving testimony that would permit the court to determine his ability to pay, but the court affirmed the order finding him in civil contempt and imprisoning him until he paid the total arrearage of $1,405.64. The movant had presented evidence and then called the defendant to testify. The defendant claimed not to remember any of the figures involved in his financial situation, but the plaintiff's testimony was sufficient to establish that the defendant had received severance pay from his previous job, lived rent-free in an apartment with all utilities furnished, drove a company car (even for his personal use) and had sold his own car, had received an increase in salary when he took a new job, and owned $300 in stock.[79]

Appropriate Confinement and Requirements for Purging of Contempt. The confusion between civil and criminal contempt crops up again in the drafting of orders and wording of conditions of commitment to jail. In *Abernethy v. Abernethy*,[80] on the basis of a finding of present ability to comply with a support order, the district court ordered that the defendant "spend thirty days in jail for civil contempt of court" but allowed him several months to purge himself by paying the arrearage in installments before the commitment would be activated. When the period for "purging" had expired and the defendant still had not complied, the earlier commitment order was activated. On appeal, the defendant argued that the required finding of present ability to comply had not been made when the commitment was activated. The Court of Appeals held that, since he had not appealed from the original order finding him in contempt, the previous finding of ability to pay was *res judicata* on the issue of present ability to comply and the only issue before the court was whether he had complied with the earlier order to purge himself of contempt.[81] As one authority points out, since civil contempt continues only as long as the defendant is able to comply or to take reasonable measures to be able to comply, it is difficult to understand "how a finding of ability to comply at one time prevents a defendant from having the court determine whether the contempt 'continues' at a later time. Obviously, the court actually treated the matter as though it were a criminal contempt . . . ."[82] The definite 30-day commitment supports this interpretation.

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72. *Id.* at 749, 303 S.E.2d 584.
73. Monds v. Monds, 46 N.C. App. 301, 264 S.E.2d 750 (1980).
74. *Id.* at 302-04, 264 S.E.2d at 752.
75. *Id.*
76. Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980).
77. *Id.* at 335, 264 S.E.2d at 787-88.
78. Gibson v. Gibson, 24 N.C. App. 520, 211 S.E.2d 522 (1975).
79. *Id.* at 522-23, 211 S.E.2d at 523-24. The moving party does have a way to get records and compel attendance and testimony of the alleged contemnor. A subpoena will be issued on request in order to secure the testimony and documentary evidence of a witness. N.C. GEN. STAT. § 1A-1, Rule 45(a), (c). A person who, without adequate cause, disobeys the subpoena may be found in contempt of court. *Id.* § 1A-1, Rule 45(f). A finding that the alleged contemnor had not brought the ordered documents to court though he was able to do so was sufficient to find him in contempt for failure to bring them. Self v. Self, 55 N.C. App. at 654, 286 S.E.2d at 581-82.
80. Abernethy v. Abernethy, 64 N.C. App. 386, 307 S.E.2d 396 (1983).
81. *Id.* at 388, 307 S.E.2d at 397.
82. 2 R. LEE, NORTH CAROLINA FAMILY LAW § 156 (Supp. 1985)

Another issue in drafting civil contempt orders is whether the defendant's release from jail may be conditioned on his future compliance with a support order. In *Bennett v. B ett*[83] the Court of Appeals held that an order committing the defendant to jail until he purges himself of cor pt may not order the defendant to make child-support payments that accrue after the hearing date as a requirement for obtaining his release.

Summary. An order holding a parent in civil contempt for nonpayment of child support must include specific findings on his ability to pay and a conclusion that he is currently able to comply or to take reasonable measures to be able to comply with the original order. If the contempt order requires the parent to pay an arrearage as a condition of purging himself and obtaining release from jail, it must contain findings, supported by the evidence, that he is able to either pay or take reasonable measures to become able to pay that amount. He must have this ability on the day of the hearing. If the defendant's assets are the basis for finding that he is able to comply, there must be a finding that he is able to liquidate those assets in order to pay the support. The fact that the defendant is able to pay *part* of the arrearage is insufficient to support an order of incarceration until the entire amount is paid, but he may be jailed under a civil contempt order that allows him to purge himself by paying the portion of the arrearage that the court finds he is able to pay.

In determining ability to pay, the court should consider the parent's property and financial condition, including his assets and liabilities, his ability and opportunity to work, and his present income compared with his income at the time of the original order. Several factors that are often cited in contempt orders are insufficient, standing alone, to support a finding of ability to comply: the fact that the parent is able-bodied, that he is currently employed and in good health, or that he is able to earn good wages.

Guidelines for determining a parent's ability to pay child support are not very precise. The issue may pose real problems for the trial judge who must decide whether the parent truly cannot pay or is merely trying to shirk his child-support responsibilities. Still, it is clear that the appellate courts require specific and thorough findings, supported by the record, to support a conclusion that a parent has a present ability to pay when he is found in civil contempt.

83. Bennett v Bennett, 71 N.C. App. 424, 322 S.E.2d 439 (1984).

Willful Behavior

For a finding of civil contempt, the failure to comply with an order must be willful—in purposeful and deliberate violation of the law.[84] The court must make findings of fact regarding the contemnor's object and purpose in violating the order.[85] In *Jones v. Jones*[86] the Court of Appeals stated that, even though the requirement of willfulness had been deleted from the civil contempt statute, it must be retained by implication, because willfulness is the essence of any contempt.[87] In child-support cases, willfulness and ability to pay are often treated as the same issue, since a person does not act willfully if he has been unable to comply since the date the judgment was entered.[88] But while ability to pay may be viewed as a necessary precedent to a finding of willful nonpayment, willfulness may be an issue even when ability to pay is not in question. The Supreme Court and the Court of Appeals have dealt with willful noncompliance in several cases in which ability to pay was not an issue. Such cases often involve an analysis of the parent's good faith in not complying with the order.

Collateral Agreements. In *Smith v. Smith*,[89] the alleged contemnor defended by claiming that the moving party had violated a collateral agreement to allow the defendant to claim the child as a dependent for income tax purposes. The Supreme Court ruled that the trial court's order finding the defendant in contempt was not supported by sufficient findings of fact, because the trial court had not made a specific finding that he had willfully

84 Henderson v. Henderson, 307 N C. 401, 408-10, 298 S.E.2d 345, 350-51 (1983).

85 *Id.* Although Supreme Court decisions and many Court of Appeals decisions hold that a specific finding of willfulness and ability to pay is required, some Court of Appeals decisions hold that an inference of willfulness or ability to pay is sufficient where the record clearly indicates, without a finding, that such is the case *E.g.*, Medlin v. Medlin, 64 N.C App. 600, 307 S.E.2d 591 (1983), Daugherty v. Daugherty, 62 N.C. App. 318, 302 S E.2d 664 (1983).

86. Jones v. Jones, 52 N C. App. 104, 278 S.E.2d 260 (1981).

87. *Id.* at 109, 278 S.E 2d at 264. North Carolina's requirement of willfulness for a finding of civil contempt is not universal. "The same 'wilfulness' [that is required for criminal contempt] is not said to be required in civil contempt cases since the purpose of those cases is to give the opposing party the relief to which he is entitled, and the contemnor's state of mind is not, therefore, important." Dobbs, *supra* note 16, at 261 [citing McComb v. Jacksonville Paper Co , 336 U.S. 187 (1949)]. Even in criminal contempt cases, the nature of the willfulness or intent that is required is often unclear. *Id.* at 261-62.

88 Lamm v. Lamm, 229 N.C. 248, 250, 49 S.E.2d 403, 404 (1948).

89. Smith v. Smith, 247 N.C. 223, 100 S.E.2d 370 (1957).

disobeyed its order.[90] In *Forte v. Forte*[91] the Court of Appeals affirmed the district court's decision that the father's failure to pay child support was not willful when he had relied on the mother's statement that she would waive support payments if he relinquished his visitation rights. The defendant was still responsible for a $9,075 arrearage, but because his nonpayment was not willful, he could not be jailed for civil contempt. The court noted the rule in most jurisdictions that disobedience of "a court order that results from the advice or agreement of the complainant should not be punished at the complainant's behest."[92]

Credit for Other Expenditures. The issues of good faith and willfulness frequently arise when a parent makes expenditures on behalf of the child that are independent of the ordered child-support payments. Credit may be allowed for expenditures that do not conform to the child-support order, but only when injustice would result from denying it.[93] The trial court has wide discretion, depending on the facts of each case, in determining when to allow credit for other expenditures.[94] If the trial court makes the necessary finding of fact concerning whether the defendant's behavior was willful, the Court of Appeals generally affirms the decision.

In *Lynn v. Lynn*,[95] the Court of Appeals affirmed a district court order that allowed the father partial credit for installing a furnace—thus eliminating his arrearage and making him current in payments—but still found him in contempt for willfully violating the explicit terms of the support order. The opinion does not characterize the contempt as civil or criminal and the defendant was not jailed, but he was ordered to pay the plaintiff's attorney fees and to sell certain real estate in order to post a $5,000 performance bond. *Lynn* illustrates the principle that a defendant who unilaterally modifies a court order risks being found in contempt for violating the order.[96] The Court of Appeals said, "Since the court found that defendant had the ability to make the required payments but willfully failed to make them, these findings were sufficient in themselves to justify the court's conclusion as to contempt."[97]

The defendant in *Jones v. Jones*[98] unilaterally reduced the child-support amount as credit for expenses he incurred when the children visited him. The Court of Appeals affirmed the trial court's conclusion that he was not in contempt for failing to make child-support payments as previously ordered. The court reconciled this holding with *Lynn v. Lynn* by stating that the trial court could have found the defendant in willful contempt of court, but its failure to do so was not an abuse of discretion.[99]

Changed Circumstances. A parent who is subject to a civil order to pay child support has the right to file a motion seeking modification of the order if a change in circumstances—such as decreased income or increased expenses—affects his ability to pay the ordered amount. In *Smithwick v. Smithwick*[100] the Supreme Court said that the mere fact that the parent does not exercise that right, and instead falls into arrears under the original order, does not sustain a conclusion that his failure to pay was willful and contemptuous.[101] His ability to pay at the time of the hearing must be established. Sometimes the parent unilaterally reduces his payments because of a change in circumstances that he believes affects his legal obligation. In *Jarrell v. Jarrell*[102] the Supreme Court affirmed the trial court's conclusion that the alleged contemnor was not in willful contempt of court when he reduced

90. *Id.* at 225, 100 S.E.2d at 371-72.

91. Forte v. Forte, 65 N.C. App. 615, 309 S.E.2d 729 (1983).

92. *Id.* at 616, 309 S.E.2d at 730. The quoted reference to punishment in the context of a civil contempt case illustrates the ease with which the purposes of civil and criminal contempt are confused. It may also demonstrate that courts sometimes view imprisonment for civil contempt as embodying an element of punishment even though the primary purpose is coercive.

93. Goodson v. Goodson, 32 N.C. App. 76, 81, 231 S.E.2d 178, 182 (1977). In *Goodson*, after articulating the general equitable principle to be applied, the Court of Appeals set out the following guidelines for allowing credit for voluntary expenditures outside the scope of the support order:

a. There is no right "as a matter of law to credit for all expenditures which do not conform to the decree."

b. The delinquent parent is not "entitled to credit for obligations incurred prior to the time of the entry of the support order."

c. "The delinquent parent is not entitled as a matter of law to a deduction proportionate to the amount of time spent with the child."

d. "Credit is not likely to be appropriate for frivolous expenses or for expenses incurred in entertaining or feeding the child during visitation periods."

e. "Credit is more likely to be appropriate for expenses incurred with the consent or at the request of the parent with custody."

f. "Payments made under compulsion of circumstances are also more likely to merit credit for equitable reasons." *Id.* at 81, 231 S.E.2d at 182.

94. Jones v. Jones, 52 N.C. App. at 109, 278 S.E.2d at 263-64.

95. Lynn v. Lynn, 44 N.C. App. 148, 260 S.E.2d 682 (1979).

96. *Id.* at 152, 260 S.E.2d at 685.

97. *Id.*

98. Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981).

99. *Id.* at 109-12 278 S.E.2d at 263-65.

100. Smithwick v. Smithwick, 218 N.C. 502, 11 S.E.2d 455 (1940).

101. *Id.* at 504, 11 S.E.2d at 456 *See also* Graham v. Graham, 77 N.C. App. 422, 335 S.E 2d 210 (1985) (defendant's failure to move for a modification of the child support order is not evidence of willful contempt).

102. Jarrell v. Jarrell, 241 N.C. 73, 84 S.E.2d 328 (1954).

his child-support payments. The father had assumed in good faith that he was not required to pay support for one child who had married or for another child while that child was living with him.[103]

The trial court has broad discretion in determining whether subjective good faith is a sufficient excuse for nonpayment. The risk that a good-faith argument will be rejected is especially great if the issues of willfulness and ability to pay are not distinguished. In *Gates v. Gates*[104] the defendant unilaterally reduced payments because the mother had remarried and the child had reached the age of majority. The Court of Appeals affirmed the trial court's order holding the defendant in contempt, stating that he should have applied to the court for a modification of the support order.[105] The court declined to rule "as a matter of law that the trial court erred in finding the father in contempt"[106] and said that a distinction should be made between the facts in this case and cases in which credit may be allowed for out-of-pocket expenditures.[107] Unfortunately, it went on to support the conclusion that the father was in willful contempt by stating that "ability to pay and nonpayment are the only required factors."[108]

Occasionally an issue as to willfulness arises apart from either the parent's ability to pay or his good-faith nonpayment. For example, a defendant may not be held in contempt for nonpayment of child support when there is no evidence to show that either he or his attorney was ever notified of the order to pay support.[109]

Summary. An order holding a parent in civil contempt for nonpayment of child support must include specific findings on willfulness and a conclusion that the parent has acted willfully in not complying with the order. The fact that courts sometimes refer to the child-support order and a failure to pay under its terms as the only conditions for contempt reflects the temptation to equate the issues of willfulness and ability to pay.

A person's failure to comply is not willful unless he is able to comply. Therefore, ability to pay is the first consideration in determining whether a parent has acted willfully in failing to pay support. The fact that a parent whose circumstances have changed has not gone into court to seek a decrease in the amount he is ordered to pay does not, by itself, support a conclusion of willfulness.

Even if the ability to pay is not at issue, the court must find that nonpayment was willful. In some circumstances the parent may not be in contempt because he acted in good faith or in reliance on some agreement with or representation by the payee. The trial court has wide discretion to allow or disallow credit for expenditures other than those specified in the support order. The judge also has wide discretion in determining whether the parent's actions were willful in a particular factual setting, but findings and conclusions on willfulness must be set out in the order.

Burden of Producing Evidence and Burden of Proof

District courts routinely use civil contempt proceedings to enforce child-support orders, and child-support and related contempt proceedings take a great deal of district court time. Yet many of the cases that are appealed are remanded because of insufficient findings of fact on the issues of willfulness and ability to pay. Despite the judicial time spent on proceedings to enforce child-support obligations and the amount of traffic between judicial levels, there is surprisingly little legal authority to clarify the essential issues of the burden of producing evidence and the burden of proof in civil contempt proceedings.

At a show-cause hearing for civil contempt these burdens do not simply rest with the plaintiff (or movant), as they would in most other civil proceedings. The alleged contemnor comes into court under a previously adjudicated duty to pay a certain amount of child support. Before the hearing—before the show-cause order or notice may be issued—there must have been a finding of probable cause to believe that there is civil contempt. The civil contempt statute states that the alleged contemnor will be held in contempt unless he gives some justification for his failure to comply with the court's order.[110]

Since the issue of willfulness has traditionally been interwoven with the issue of ability to pay, the burdens

103. *Id.* at 74, 84 S.E.2d at 328-29.

104. Gates v. Gates, 69 N.C. App. 421, 317 S.E.2d 402 (1984), *aff'd*, 312 N.C. 620, 323 S.E.2d 920 (1985) (per curiam).

105. *Id.* at 428-29, 317 S.E.2d at 407 *But see* Smithwick v. Smithwick, 218 N.C. 503, 504, 11 S.E.2d 455, 456 (1940); Graham v. Graham, 77 N.C. App. 422, 335 S.E.2d 210 (1985).

106. Gates v. Gates, 69 N.C. App. at 429, 317 S.E.2d at 407.

107. *Id.*

108. *Id.* [citing Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1983)].

109. Hilton v. Howington, 63 N.C. App. 717, 720, 306 S.E.2d 196, 198 (1983), *disc. rev. denied*, 310 N.C. 152, 311 S.E.2d 291 (1984); *see also*, Hart Cotton Mills, Inc. v. Abrams, 231 N.C. 431, 57 S.E.2d 803 (1950).

110. N.C. GEN. STAT. § 5A-23(a).

of showing willfulness and ability to pay, or the lack thereof, have been treated in the same way.[111] Unfortunately, courts' allocation of the evidentiary burdens is often very difficult to discern. Ambiguous statements such as "there must be a finding of willfulness" or "there must be a finding on the issue of ability to pay" do not specify which party has the burden of producing evidence and which party has the burden of persuasion.

The civil contempt statute does not provide a complete answer. A person with an interest in enforcing the order may request a finding of civil contempt for failure to comply.[112] That person must provide a sworn statement or affidavit that enables the judicial official to find probable cause to believe that there is civil contempt.[113] In child-support cases, the moving party's presentation of a valid court order and a stipulation of the defendant's nonpayment and the amount of the arrearage satisfy that requirement. Then the defendant is either ordered to appear and show cause why he should not be held in civil contempt or given notice that he will be held in contempt unless he appears and shows cause why he should not be held in contempt.[114] The very concept of a "show cause" hearing suggests that the defendant then has some burden of showing either that he has in fact complied or that there is some legal excuse for his noncompliance.

The nature and extent of the alleged contemnor's burden is not clear. One writer notes that when the defendant appears at a show-cause hearing, there is a presumption against him on the issue of ability to pay.[115] In civil contempt proceedings, the original order for support is the basis for this presumption, since the question of ability to pay was adjudicated at the earlier hearing that established the amount of payments.[116] But the passage of time between the entry of the original order and the contempt proceeding justifies allowing the defendant to plead inability to comply; the "rational" connection between the original order and the parent's present ability to comply may have diminished or disappeared with changed circumstances.[117] The use of the term "presumption" in this analysis may be more confusing than helpful. But it does make sense to think of the existing order and the finding of probable cause as triggering a burden on the defendant to come forward with evidence in order to avoid a finding of contempt.

It is not clear how much evidence the defendant must present in order to rebut the inference—for want of a better term—of ability to pay and willful nonpayment. Is a mere claim of inability to pay the arrearage enough? Must he present some evidence, a preponderance of evidence, or clear and convincing evidence? Neither the civil contempt statute nor the cases provide a satisfactory answer.

One Court of Appeals decision involving child support, *Plott v. Plott*,[118] specifically addresses the issue of allocating burdens, but it speaks only of the burden of proof. In addition, the facts of the case are such that the Court of Appeals' statement about the burden of proof provides little general guidance. The mother in *Plott* had not complied with the court order to pay child support. She admitted the arrearage but did not explain her noncompliance. The Court of Appeals analyzed the contempt statute and concluded that she had not carried her burden of proof because she did not refute the motion's allegations.[119]

This recent case is one of very few North Carolina cases directly addressing the burden issues in regard to civil contempt, and the only one to do so in the child-support context. It is unfortunate, therefore, that the Court of Appeals included the following statement, which—if read out of context of the facts in *Plott*—could be misleading: "The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent."[120] The statement must be qualified by the fact that the contemnor in this case presented no excuse at all for nonpayment. *Plott* does not involve the more common factual situation in which the alleged contemnor pleads inability to pay or lack of willfulness and offers some evidence on one or both of those issues. The issue of allocating burdens is more difficult than *Plott* suggests when the

111. While North Carolina courts have not distinguished the burdens relating to willfulness and ability to pay, other courts and commentators have. "[T]he lack of ability to comply is usually treated as an affirmative defense, while the presence of intent or wilfulness is a part of the prosecution's prima facie case. [Footnote omitted.] This rule is often reflected more in practice and assumption than in clear statement, and it is not a universal one for there are cases that seem to require affirmative proof of ability to comply, at least in decrees ordering the payment of money. [Footnote omitted.]" Dobbs. *supra* note 16. at 266.

112. N.C. GEN. STAT. § 5A-23(f).

113. *Id.* § 5A-23(a).

114. *Id.*

115. Note, *The Coercive Function of Civil Contempt*. 33 U. CHI. L. REV. 120, 131 (1965).

116. *Id.* at 132.

117. *Id.*

118. Plott v. Plott. 74 N.C. App 82. 327 S.E.2d 273 (1985)

119. *Id.* at 85-86. 327 S.E.2d at 275.

120 *Id.* at 85. 327 S.E.2d at 275

alleged contemnor presents some justification for not paying.

Two Supreme Court cases that do not involve child support address burden-of-proof issues in contempt proceedings. In a zoning case, *Brevard v. Ritter*,[121] the defendant was alleged to be in contempt for violating an injunction that prohibited him from completing construction of a building and required him to remove offending structures. The trial court found that the plaintiff had failed to carry the burden of proving that the defendant had violated the injunction. The Court of Appeals reversed and remanded, finding that violation of the order was established by the parties' stipulations. The Supreme Court agreed and said:

> The stipulations . . . disclosed the defendant's failure to remove the offending structure. . . . "Stipulations duly made during the course of a trial constitute judicial admissions binding on the parties and dispensing with the necessity of proof. . . ." [Citations omitted.]
>
> The burden, therefore, was on the defendant Ritter to show compliance in order to purge himself of the contempt citation.[122]

Ritter is unlike most child-support cases in that the issue was whether the defendant had indeed failed to comply with the court's order, not whether his admitted noncompliance was willful or whether he was able to comply. Also, the burden the Court places on the defendant seems to oblige him to prove that purge conditions have been met, not that there never had been contempt. The stipulations were sufficient to establish noncompliance, and no excuse for noncompliance was in issue. Likewise, in *Hart Cotton Mills, Inc. v. Abrams*,[123] which involved violation of a restraining order against picketing, the Court was addressing purging of contempt: "The respondents having sought to purge themselves, the burden was on them to establish facts sufficient for that purpose."[124]

The Supreme Court has not articulated a clear rule for assigning the burdens of producing evidence or proof when civil contempt is being considered. But the Court's language in several opinions suggests that the alleged contemnor's burden is to come forward with some evidence to refute the allegations, not to satisfy an ultimate burden of persuasion. It may be helpful to look at what the Court has done in several cases in order to construct a tentative rule for assigning evidentiary burdens until more authoritative guidance becomes available.

In *Lamm v. Lamm*[125] the defendant alleged and offered testimony to show that he had not paid alimony pendente lite and counsel fees because he lacked the financial means to do so. The plaintiff's evidence related only to the defendant's failure to pay as ordered. The Supreme Court stated:

> Manifestly, one does not act willfully in failing to comply with a judgment if it has not been within his power to do so since the judgment was rendered. As no testimony was presented at the hearing upon the rule to show cause tending to negative the truth of the explanation made by defendant, or to establish as an affirmative fact that he possessed the means wherewith to comply with the order for alimony and counsel fees at any time after the entry of such order, the finding that the defendant willfully disobeyed the order of the court is not supported by the record, and the judgment committing him to imprisonment for contempt must be set aside.[126]

In *Berry v. Berry*[127] the defendant was ordered to show cause why he should not be held in contempt for nonpayment of alimony. The defendant claimed that he could not pay, but the trial court made no finding on his ability to pay and ordered him jailed until he complied with the original order. The Supreme Court said, "[T]here is no finding on the defendant's plea of disavowal [cite omitted]. Hence, [cite omitted] it would seem that the record is wanting in sufficiency to support a judgment for contempt or 'willful disobedience' of the court's order."[128]

In *Smithwick v. Smithwick*[129] the defendant admitted that he had not complied with the order to pay a sum certain for the necessary subsistence of his wife and child but said that his noncompliance was not willful because he was not able to pay. The trial court concluded that the defendant's behavior was willful and contemptuous on the basis of two findings of fact: (1) the order directing

121. Brevard v. Ritter, 285 N.C. 576, 206 S.E.2d 151 (1974).
122. *Id.* at 580-81, 206 S.E.2d at 154.
123. Hart Cotton Mills, Inc. v. Abrams, 231 N.C. 431, 57 S.E.2d 803 (1950).
124. *Id.* at 439, 57 S.E.2d at 809.
125. Lamm v. Lamm, 229 N.C. 248, 49 S.E.2d 403 (1948).
126. *Id.* at 250, 49 S.E.2d at 404.
127. Berry v. Berry, 215 N.C. 339, 1 S.E.2d 871 (1939).
128. *Id.* at 340, 1 S.E.2d at 872.
129. Smithwick v. Smithwick, 218 N.C. 503, 11 S.E.2d 455 (1940).

payment, and (2) the defendant's failure to comply with that order.[130] The Supreme Court said:

> Since the defendant in his reply alleges that his noncompliance was due to his being without funds and his inability to obtain funds, it became necessary before concluding that such noncompliance was willful and contemptuous for the court to find the facts upon which such conclusion was founded . . . .[131]

In *Mauney v. Mauney*[132] the defendant was found in contempt for nonpayment of alimony *pendente lite* and ordered to jail until he complied with the court's order. Even though the defendant's evidence tended to show that he was unable to comply, the court made no finding of fact on this issue. This case differs from the three previous cases in that the Supreme Court did not refer to the defendant's claim of inability but simply said, "The court entered judgment as for civil contempt, and the court must find not only failure to comply but that the defendant presently possesses *the means* to comply."[133] The case was remanded for further hearing and findings of fact.

The Supreme Court cases contain no statement as to which party has the burden of producing evidence or the burden of proof,[134] but they do suggest a procedure that is consistent with the Court's holdings. If the defendant claims and presents some evidence that he cannot pay or that his failure to pay is not willful, the court must make specific findings on the elements necessary to constitute contempt, including ability to pay and willful nonpayment. After the defendant has carried an initial burden of producing evidence to support his claim, the plaintiff then has the burden of establishing that the defendant is able to comply and that his failure to comply is willful. The ultimate burden of proof probably is on the party that initiates the contempt proceeding. But if the defendant does not come forward with some evidence to refute the allegation of contempt, that burden may be carried by the plaintiff's initial showing that resulted in the order or notice to show cause.[135]

Any statement about who has the burden of proof in an action to enforce child support should be qualified by information about what has already occurred in the proceeding and should distinguish between the burden of producing evidence and the ultimate burden of persuasion. It is only within the context of the entire civil contempt procedure that such a statement acquires real meaning.

Conclusion

Enforcing parents' duty to support their children and collecting court-ordered child support are primary social concerns. But each alleged contemnor must also be assured a fair hearing before being incarcerated for contempt. The contempt statute and North Carolina appellate decisions provide imperfect guidance for handling some of the troubling aspects of contempt. Sometimes procedures that are set out clearly in the statute become confused or are applied inconsistently in practice because of the failure to distinguish adequately between civil and criminal contempt.

The following basic guidelines are suggested as ways to ensure fair hearings and to minimize the possibility that contempt orders will be reversed on appeal:

1. Be sure throughout the proceeding, and particularly in an order finding a party in contempt, that the con-

130. *Id.* at 504, 11 S.E.2d at 456.

131. *Id.*

132. Mauney v. Mauney, 268 N.C. 254, 150 S.E.2d 391 (1966).

133. *Id.* at 258, 150 S.E.2d at 394.

134. Several sources make conclusory statements as to who bears the burden of proof in a contempt proceeding in North Carolina, but such statements provide scant help in determining how the burden of proof is allocated as a practical matter.

According to one source, "The husband, charged with contempt, has the burden of showing his inability and that his situation is in good faith and not due to calculated and deliberate choice. To sustain this burden, his testimony must be clear and convincing." 2 R. LEE, NORTH CAROLINA FAMILY LAW § 166 (1980) [quoting 2 W. NELSON, NELSON ON DIVORCE AND ANNULMENTS § 16.25 (1961)]. LEE presents no case or statutory authority as the basis for the statement, and the quoted section of NELSON cites no North Carolina authority.

Citing Henderson v. Henderson, 307 N.C. 401, 298 S.E.2d 345 (1985), a case in which the Supreme Court said that the findings of fact relating to ability to pay were not supported by evidence in the record, A.L.R. states that North Carolina places the burden of proof on the movant. Annot. 53 A.L.R. 605 (Supp. 1985). In Wade v. Wade, 63 N.C. App. 189, 303 S.E.2d 634 (1983), which involved an action for judgment on a sum certain, the Court of Appeals also cited *Henderson* as authority for placing the burden on the movant to show that the alleged contemnor's nonpayment was willful. The defendant in *Wade* admitted the arrearage but denied that he was able to pay.

135. Plott v. Plott, 74 N.C. App. 82, 327 S.E.2d 273 (1985), in which the Court of Appeals stated that the alleged contemnor has the burden of proof, tends to support this approach. "The court here had already found probable cause to believe that there was civil contempt based on the verified allegations in defendant's motion. Plaintiff offered no evidence except a stipulation as to the amount of the arrearage. This was clearly not sufficient to refute the motion's allegations. Since plaintiff failed to carry her burden, the court was warranted in finding her in contempt." *Id.* at 86, 327 S.E.2d at 275. *See supra* text accompanying notes 118-20.

tempt is clearly classified as civil or criminal. Ideally, the classification should be made in the initiating party's motion, and the order or notice to show cause should be consistent with that classification.

2. Strictly follow the statutory procedural requirements for the particular classification of contempt.

3. Remember that if the defendant has willfully failed to comply in the past, a finding of indirect criminal contempt is possible even if civil contempt is unavailable because he is no longer able to comply. The statute permits a finding of criminal contempt in a civil contempt hearing for the same conduct that is alleged to be civil contempt; it does not indicate what, if any, additional safeguards apply beyond "making the required findings."

4. In a proceeding for indirect criminal contempt—and in a civil contempt hearing that may result in a finding of criminal contempt—carefully follow the additional due process requirements of the criminal procedure:

—The proceeding must be initiated by issuance of an order to appear. (If a civil contempt hearing may result in a finding of criminal contempt, it is best to begin the proceeding with an order to appear that puts the defendant on notice that he may be found in civil or criminal contempt, or both.)

—The facts must be found beyond a reasonable doubt.

—The alleged contemnor may not be compelled to be a witness against himself.

—An indigent defendant almost certainly has a right to appointed counsel if he faces incarceration for criminal contempt.

5. Be sure that the contempt order includes specific findings of fact supported by the evidence, conclusions of law supported by the findings of fact, and a judgment supported by the conclusions of law. Each link is critical and should be carefully articulated and accurately labeled.

6. Use criminal, not civil, contempt if the parent has truly divested himself of the ability to comply or to take reasonable measures to be able to comply. If he has simply tried to hide his assets or make himself appear to be without the means to comply, he may be held in civil contempt if there are sufficient findings that he is at present able to pay or to take reasonable measures to be able to pay.

7. Until more authoritative guidance emerges, consider allocating the burdens in a civil contempt proceeding on the basis of the following approach suggested by the statute and Supreme Court language:

a. After probable cause has been found for civil contempt, the burden is on the alleged contemnor to produce evidence that he has paid, that he is unable to pay, or that his failure to pay was not willful.

b. After he produces such evidence, the burden shifts back to the moving party to prove the essential elements of civil contempt, including willfulness and ability to pay.

c. The ultimate burden of proof rests with the party who initates a civil contempt proceeding, but the initial showing of probable cause is sufficient to carry that burden if the alleged contemnor does not offer evidence.

8. For a finding of civil contempt, be sure that the order incarcerating the contemnor includes provisions by which he can purge himself. It should specify how much he is to pay—for example, "to be incarcerated until he purges himself by paying $1,000." It should not be a confusing statement such as "to be released when he complies with the order."

9. Remember that incarceration for criminal contempt is limited to 30 days, whereas the civil contemnor may be incarcerated for as long as his willful noncompliance continues. The purpose of criminal contempt is to punish for acts already accomplished; thus the law makes no provision for purging even though the statute allows the judge to reduce the sentence at any time if the criminal contemnor's conduct warrants such a reduction. Purging oneself of contempt is a concept that belongs exclusively to the civil contempt proceeding.

10. Be sure that appeals from orders finding criminal contempt are made to the superior court—not directly to the Court of Appeals, as in civil contempt cases.

THE LONG-STANDING FOCUS on contempt as the primary means of child-support enforcement may be shifting. Statutory changes to strengthen income withholding as a child-support enforcement remedy have been proposed.[136] Federal law requires that income withholding be made an automatic response to delinquency in certain cases.[137] It is likely, though, that district

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136 A committee substitute for Senate Bill 303 was passed by the Senate in the 1985 session of the General Assembly and is pending in the House for consideration in the 1986 session. The bill would make numerous statutory changes in regard to withholding of income and wages for the collection of child support

137 The federal Child Support Enforcement Amendments of 1984, Pub Law No. 98-378, include the following requirements regarding wage-withholding: (1) In cases handled by a IV-D child-support enforcement agency, the state must use a procedure that requires wages to be withheld whenever an arrearage accrues that is equal to the amount of support that is payable for one month. (2) All new or modified child-support orders issued in the state—whether the case is handled by a IV-D agency or not—must provide for wage-withholding when an arrearage occurs. States have an option as to whether to apply the withholding procedures to income

courts will continue to be called on often either to punish the nonpayment of child support through criminal contempt or to coerce the payment of support through civil contempt. Being clear about which of those remedies is sought and appropriate in each case is a good first step toward applying the contempt remedies efficiently and fairly. In some areas—such as the procedural requirements for finding criminal contempt in a civil contempt proceeding and the allocation of evidentiary burdens—uncertainty, if not confusion, will continue until the General Assembly or the appellate courts provide better guidance.

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other than wages. For regulations implementing the 1984 amendments, *see* 50 Fed. Reg. 19608 *et seq.*, May 9, 1985.

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