

ADVOCACY ISSUES IN CONTEMPT CASES

2014 Child Support Enforcement: Representing Respondents
Joyce L. Terres, Assistant Appellate Defender, Office of Parent Representation
123 W. Main Street, Suite 308, Durham, NC 27701
(919) 354-7230
Joyce.L.Terres@nccourts.org
www.ncids.org

INTRODUCTION

The child support system is set up to obtain the most child support possible for children. It's a bean counting system, not a human service system. There is very little concern about the individual circumstances of the non-custodial parents or why they do not have custody of their children. The only concern is if they are paying and how much they are paying. The deck is stacked against non-custodial parents who are economically and educationally disadvantaged. Child support enforcement court often functions based on what is expedient rather than on what the law requires. It is important that you remind the court and/or opposing counsel about the need to follow the law. Your clients may also want you to go along with "the same old same old." They may be motivated by fear of more adverse consequences if they do not concede. But often they have not been fully informed of all of the options and collateral consequences down the line. Being an advocate for your client involves knowing the law that applies to this area so that you can fully advise your client about his options and all of the consequences. Your client cannot make good choices without good information.

CONTEMPT CHECKLIST

This checklist is a guide to help you think through your case strategy after you have been appointed to represent a respondent in a contempt proceeding. This checklist is not exhaustive. It is important to be familiar with the relevant law and the rules of your court. This checklist focuses primarily on child support contempt proceedings. Some issues may vary for other types of contempt proceedings. For example, the clerk can sign an OSC for a IV-D contempt proceeding, but cannot for other contempt proceedings. (See G.S. §§ 5A-23 & 50-13.9(d)).

Defects in Contempt Process

Was an affidavit prepared showing probable cause for the issuance of the OSC?

Was the affidavit properly verified?

Was the affidavit and OSC properly served?

Was there sufficient notice of the hearing date?

Did the OSC put obligor on notice that either criminal contempt OR civil contempt would be pursued?

Discovery

Have you reviewed the court file?

Do you have a printout of client's payment record?

Is it a public assistance or a non-public assistance case? What amount of the arrears are for past paid public assistance vs. non-public assistance?

Have you requested information from the IV-D agent to provide documentation for any issues?

Is formal discovery a viable option in an unusual case? (e.g., interrogatories, request for admissions, deposition). Contact the Parent Representation Office for advice.

Client Communication/Preparation

Has the living situation of the child that is the subject of the child support order changed since the last order?

Is client currently employed? Has client's job changed since prior order entered? (Obtain documentation)

If not employed, is client receiving unemployment benefits? (Obtain documentation)

Does client have a mental, physical or developmental disability? (Obtain documentation)

Is client receiving active treatment for disability? (Obtain documentation)

Is client receiving or eligible to receive disability or other public assistance benefits (SSI, SSA, VA, WorkFirst, etc.)? (Obtain documentation)

Is client actively looking for employment? (Obtain documentation of search: letters on business letterhead, print-out of confirmation from on-line applications, completed search list with dates and signatures, etc.)

Has client been jailed or incarcerated since the last order? (Obtain documentation)

Have you advised your client of the possible hearing outcomes, including jail?

Have you advised your client of possible options after hearing, including appeal?

Trial Preparation/Negotiation

Have you issued subpoenas for production of documents or for any individuals necessary to present testimony in your case?

Can you negotiate a solution that will avoid a finding of contempt? Are there any solutions to satisfy both parties and the court?

Motions

Have you considered whether it is reasonable and appropriate to file any other motions that address issues giving rise to the contempt (e.g., motions to set aside paternity, adjust arrears, or modify child support obligation)?

Contempt Hearing

Is recordation available for the hearing (if potential for appeal to the Court of Appeals)?

Did you argue any pre-trial motions filed (e.g., motions regarding defects in service or the pleadings)? Are they on the record?

Did you clarify whether IV-D was proceeding on civil contempt or criminal contempt?

Did you argue that a criminal contempt proceeding should be prosecuted by the district attorney? (See G.S. 5A-15(g))

Did you present your client's testimony and evidence to overcome the presumption that IV-D met the grounds for civil contempt by issuing the OSC? (Civil Contempt – G.S. 5A-23)

Were the Rules of Evidence followed?

Did you object to inadmissible testimony (including testimony by the IV-D attorney)? (See G.S. 8C-1, Rule 103(a)(1))

Did you make an offer of proof if the judge excluded evidence offered? (See G.S. 8C-1, Rule 103(a)(2))

Did you make a motion to dismiss at the end of IV-D's presentation of its case if it did not prove the elements of criminal contempt? (Criminal Contempt -- See G.S. 5A-11)

If the motion to dismiss was denied, did you present your client's testimony and/or other evidence to show that he/she did not fail to comply or that any failure to comply was not willful? (Criminal Contempt)

Did you make a motion to dismiss at the end of the evidence that IV-D did not prove the elements of criminal contempt beyond a reasonable doubt? (Criminal Contempt)

Did you make an argument at the end of all the evidence that IV-D did not prove the elements of civil contempt after the *prima facie* case was rebutted by your presentation of evidence? (Civil Contempt)

Does your client want to appeal? See **My Client Wants to Appeal** on the IDS website www.ncids.org

Please do not hesitate to contact us if you want to consult with us about your case. We are here to help!

Office of Parent Representation: (919) 354-7230

Wendy Sotolongo, Parent Representation Coordinator

Wendy.C.Sotolongo@nccourts.org

Joyce Terres, Assistant Appellate Defender

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