

DEFENSES IN CHILD SUPPORT PROCEEDINGS

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Outline

- Right to counsel
- Scope of representation
- Defenses-examples
- Procedure for raising defenses
 - Rule 12(b)
 - Rule 60(b)

Right to Counsel

- G.S. 7A-451(a)(1) provides that an indigent is entitled to appointment of counsel in any case in which the person is likely to be imprisoned or fined \$500 or more. Thus, an indigent is entitled to counsel in a plenary proceeding for criminal contempt.

Right to Counsel

- An indigent defendant who is going to be jailed for civil contempt is presumed to be entitled to appointed counsel.
- “The private interest at stake in the present case [civil contempt for failure to pay child support] is, perhaps, the most fundamental interest protected by the Constitution of the United States – the interest in personal liberty.”

McBride v. McBride, 334 N.C. 124, 130 (1993)

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IDS POLICY

Scope of Representation Policy:

<http://www.ncids.org/RFP/StandardTermsConditions.pdf>

IDS Policy

- (4) Child Support Contempt and Other Contempt Cases:

If the contractor or public defender has identified a motion that, if successfully litigated, would constitute a defense in the contempt proceeding, such as a Rule 60 motion or a motion to challenge paternity, the contractor or public defender has an obligation to file such motion(s)...

IDS Policy

- (4) Child Support Contempt and Other Contempt Cases, con't...

The contractor or public defender shall also give the client limited advice and guidance on how the client can address other related matters, including recommending other motions such as motions to modify a child support obligation

DEFENSES

- Insufficient Evidence
- Lack of Subject Matter Jurisdiction
- Lack of Personal Jurisdiction
- Problems with the Pleadings
- Direct Payments to Obligee
- Bankruptcy
- Statute of Limitations

Subject Matter Jurisdiction

- Jurisdiction has been defined as the power to hear and to determine a legal controversy; to inquire into the facts, apply the law, and to render and enforce a judgment; the right to adjudicate concerning the subject matter in a given case.
- When a court has no authority to act, its acts are void, and may be treated as nullities anywhere, at any time, and for any purpose. *High v. Pearce*, 220 N.C. 266, 17 S.E. 2d 108 (1941).

Examples

- Another court has jurisdiction
 - *Lacarrubba v. Lacarrubba*, 202 N.C. App. 532, 688 S.E.2d 769 (2010)
- Failure to follow statute
 - *Durham County Department of Social Services and Margaret Thomas v Jimmie Williams*, 52 N.C. App. 112, 277 S.E.2d 865 (1981)
 - *Ross v. Ross*, 215 N.C. App. 546, 715 S.E.2d 859 (2011)

Personal Jurisdiction

□ Procedural Due Process

- Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent. Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of summons and complaint necessary to obtain personal jurisdiction over a defendant, and the rule is to be strictly enforced to insure that a defendant will receive actual notice of a claim against him." *Grimsley v. Nelson*, 342 N.C. 542, 467 S.E.2d 92 (1996)

Personal Jurisdiction

□ Procedural Due Process

- *Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013)
- *Hassell v. Wilson*, 301 N.C. 307, 272 S.E.2d 77 (1980)

Personal Jurisdiction

□ Substantive Due Process

- In order to satisfy the requirements of the Due Process Clause, the inquiry is whether the defendant has established certain minimum contacts with the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.
- The existence of personal jurisdiction depends upon a sufficient connection between the defendant and the forum state to make it fair to require defense of the action in the forum.

Personal Jurisdiction

- Relevant factors are: (1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties. *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990)
- *Hamilton v. Johnson*, 228 N.C. App. 372, 747 S.E.2d 158 (2013)
- *Miller v. Kite*, 313 N.C. 474, 329 S.E.2d 663 (1985)
- *Harris v. Harris*, 104 N.C. App. 574, 410 S.E.2d 527 (1991)

Problems with the Pleadings

- Order establishing paternity
 - *Ambrose v. Ambrose*, 140 N.C. App. 545, 536 S.E.2d 855 (2000)
 - *Durham County Department of Social Services and Margaret Thomas v. Jimmie Williams*, 52 N.C. App. 112, 277 S.E.2d 865 (1981)
- Order establishing child support obligation
 - *County of Durham v. Roberts*, 228 N.C. App. 567, 749 S.E.2d 110 (2013) (unpublished)
- Order to Show Cause
 - *Watkins v. Watkins*, 136 N.C. App. 844, 526 S.E.2d 485 (2000)

Direct Payments to Obligee

G.S. § 50-13.10

- “When a child support payment that is to be made to the State Child Support Collection and Disbursement Unit is not received by the Unit when due, the payment is not a past due child support payment for purposes of this section, and no arrearage accrues, if the payment is actually made to and received on time by the party entitled to receive it and that receipt is evidenced by a canceled check, money order, or contemporaneously executed and dated written receipt.”

Bankruptcy

- “The automatic stay resulting from the obligor’s filing of a bankruptcy proceeding under the federal Bankruptcy Code may prevent a state court from taking certain actions against the obligor or the obligor’s property to enforce a child support order.” Chapter 3, Child Support (North Carolina Trial Judges’ Bench Book)
- Under Chapter 7, there can be no collection from property that is part of the bankruptcy estate.
- Under Chapter 13, earnings are considered property of the bankruptcy estate. As a result, unlike in Chapter 7 bankruptcy, a creditor must get court permission (by filing a motion for relief from the stay) before initiating an action to collect child support from post-bankruptcy earnings.

Statute of Limitations

- G.S. § 1-47(1) applies to child support proceedings and may be raised as an affirmative defense when an action to collect child support arrearages is commenced more than 10 years after the accrual of the arrearages.
- The 10 year statute of limitations begins to run from the date each unpaid child support payment under a child support order becomes due, not from the date the child support order was entered. *Belcher v. Averette*, 136 N.C. App. 803, 526 S.E.2d 663 (2000)

Statute of Limitations-Beware

- Failure to plead the statute of limitations as an affirmative defense waives the defense. *Adkins v. Adkins*, 82 N.C. App. 289, 346 S.E.2d 220 (1986)
- If past-due child support arrearages are reduced to judgment, all the arrearages included in the judgment may be enforced within 10 years of the date of the judgment, even if some of the arrearages included in the judgment accrued more than 10 years before the date a child support enforcement proceeding based on the judgment was initiated. *Twaddell v. Anderson*, 136 N.C. App. 56, 523 S.E.2d 710 (1999)

ASSERTING A DEFENSE

Rule 12(b)

(b) How Presented. - Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required...

Rule 12(b) con't.

(b)except that the following defenses may at the option of the pleader be made by motion:

- (1) Lack of jurisdiction over the subject matter,
- (2) Lack of jurisdiction over the person,
- (3) Improper venue or division,
- (4) Insufficiency of process,
- (5) Insufficiency of service of process,
- (6) Failure to state a claim upon which relief can be granted,
- (7) Failure to join a necessary party.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Rule 12(b)

- A motion to dismiss for failure to state a claim upon which relief may be granted, under Rule 12(b)(6), can be made as late as trial upon the merits. *Bodie Island Beach Club Ass'n Inc. v. Wray*, 215 N.C. App. 283, 716 S.E.2d 67 (2011)
- But once there has been a trial, a party cannot raise for the first time on appeal the defense that the complaint fails to state a claim upon which relief can be granted. *Dale v. Lattimore*, 12 N.C. App. 348, 183 S.E.2d 417 (1971)

Rule 60(b)

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistake, inadvertence, surprise, or excusable neglect;
- (2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

Rule 60(b), con't.

(b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:....

- (4) The judgment is void;
- (5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
- (6) Any other reason justifying relief from the operation of the judgment.

Rule 60(b), con't.

- The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.
- A motion under this section does not affect the finality of a judgment or suspend its operation.

Panel Discussion

- Eric Halus, Attorney, Winston-Salem
- James P. Hoffman, Attorney, Salisbury
- Janet Wallace, Attorney, Greensboro
