

POST-DISPOSITION ADVOCACY

2014 Child Support Enforcement: Representing Respondents
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IS IT OVER? WHAT DO I DO?

The hearing just ended. You're not sure what just happened because the judge never specifically said "contempt." The best option is to request clarification from the trial judge. Make sure everyone is clear about whether or not your client has actually been found in contempt. If so, find out whether the judge has found your client in criminal or civil contempt. That will make a difference for the next step in this process.

MY CLIENT WAS FOUND IN CIVIL/CRIMINAL CONTEMPT. NOW WHAT?

After your client has been found in contempt, your work is not over. If your client has concerns about the court's determination of contempt, you will want to discuss these options with your client:

- Post-trial motions; and/or
- Appeal to the appropriate court.

Your choice of options will depend upon whether your client has been found in civil or criminal contempt and whether your client was incarcerated. The right to appeal belongs to the client. Clients need to be informed of their rights and obligations, as well as any other advisable options, prior to making a decision to appeal. It's best to have preliminary conversations with your client about possible outcomes before the hearing and to discuss what the client wants to do if the outcome is not in his favor

I'M NOT SURE AN APPEAL IS THE BEST OPTION. WHAT POST-TRIAL MOTIONS CAN BE FILED?

Motion to determine if subject to release (civil contempt). N.C. Gen. Stat. § 5A-22(b).

A person who has been imprisoned for civil contempt may file a motion for the court to determine whether or not he should be released. The motion must be heard by the same judge who found him in civil contempt unless that judge is not available ("not available" is not defined by the statute). Then it can be heard by another judge of the same division in the same district court district.

Petition for Writ of Mandamus or Prohibition (civil contempt). N.C. R. App. P. 22.

The rules of appellate procedure provide a procedural mechanism to ask the appellate court to require the trial court to do something it is supposed to do – such as entering an order following a hearing or releasing a contemnor from incarceration if he has paid his purge payment. Mandamus is not available if a remedy has not first been sought in the trial court. Since a Petition for Writ of Mandamus is often a precursor to an appeal, contact the Office of Parent Representation for consultation and assistance.

Motion to amend findings (civil contempt). N.C. Gen. Stat. § 1A, Rule 52(b)

A party may file a motion within 10 days after the entry of judgment (that is, the date the written order is signed and filed with the clerk) for the court to amend its findings or make additional findings. The motion may be made with a motion for new trial pursuant to Rule 59.

Motion for new trial, motion to alter or amend judgment (civil contempt). N.C. Gen. Stat. § 1A, Rule 59.

A party may file a motion within 10 days after the entry of judgment requesting that the court grant a new trial. The motion must allege one of the specific grounds under the rule or previously recognized by law. Affidavits may be attached to the motion. A motion to alter or amend the judgment may also be filed within 10 days after entry of the judgment and must allege one of the specific grounds under the rule.

Relief from judgment/order (civil contempt). N.C. Gen. Stat. § 1A, Rule 60.

Clerical mistakes: A judge may correct clerical mistakes on her own initiative, or a party may make a motion to correct the mistakes. The Court of Appeals has narrowly defined "clerical mistakes."

Other reasons: A party may file a motion requesting that the court relieve a party from a final judgment for one of the reasons listed under Rule 60(b).

The motion must be made within one year for reasons 1-3 (including excusable neglect and fraud), and "within a reasonable time" for the others.

SHOULD I REVIEW THE ORDER?

Yes. Make sure the IV-D attorney is aware that you expect to have the opportunity to review the order before it is submitted to the judge for signature. This might be more logistically difficult when your client has been found in criminal contempt and incarcerated since the agency will need to submit the order to the judge quickly. Be considerate and make the best arrangements possible to review the order. You are looking to make sure the order accurately reflects what occurred at the hearing. Some of the things you will want to carefully review are:

- 1) Spelling of names, dates and file numbers - clerical mistakes can cause multiple problems in cases
- 2) Persons present – who was present and who was not
- 3) Specific findings to support contempt – As the party representing the contemnor, don't assist the court or the prevailing party by adding findings that were not specifically made by the court even if the evidence would support them. On the other hand, if the court allowed the prevailing party to draw up the order and a finding was included that you believe is contrary to the evidence, feel free to state your recollection regarding the evidence presented. It is ultimately the judge's responsibility to determine the facts.
- 4) Purge conditions (civil) - pay careful attention to purge conditions to be sure they accurately reflect the court's judgment
- 5) Fine and/or term of imprisonment (criminal) – make sure the fine and/or term of imprisonment accurately reflects the court's judgment
- 6) If the court has found your client in criminal contempt, the order should include the standard of beyond a reasonable doubt.

Why is this important? If your client appeals, the order will be the basis of the appeal for a civil contempt judgment. Even if your client does not appeal, an error in the judgment can have other collateral consequences for your client.

MY CLIENT WANTS TO APPEAL. WHAT DO I DO NOW?

Advising your client.

Your client must make the ultimate decision whether or not to appeal the court's ruling. It is no reflection on you whether or not the appeal is wise or meritorious. But you do have the obligation to provide your client with enough information to make a fully informed decision. You are also obligated to assist

your client in filing a notice of appeal. *For a quick summary of the steps to take for an appeal, refer to "My Client Wants to Appeal a Contempt Order. Now What Do I Do?"*

- Be sure your client is informed that a court-appointed attorney is not a free attorney. This applies to an appellate attorney the same as to a trial attorney.
- Be sure your client knows that you will not (or may not) represent her at the next stage. If it's a civil contempt, the appeal will be assigned to an appellate attorney through the Office of Parent Representation, Appellate Defender's Office. If it's a criminal contempt, the appeal will go to the Superior Court for a trial de novo and you will only be able to handle it if your county permits you to handle cases in superior court.
- Make sure your client understands that an appeal in the Court of Appeals is not a new trial and that it usually takes at least a year to be resolved. An appeal in the superior court will be a new trial. However, a superior court judge may not necessarily be more sympathetic.
- Be aware that, even if you disagree with your client's desire to appeal, you need to follow your client's wishes and assist him with filing the appeal if that is his desire.
- If you are not sure about how to advise a client about an appeal, please contact me or another attorney in the Office of Parent Representation for a consultation. Or send us an Appeal Notification Form (found on the IDS website) with specific questions you want us to answer.

Filing the notice of appeal

Is oral notice in open court enough? **No** for civil contempt. **Yes** for criminal contempt.

When do I need to file the written notice?

Civil contempt: within 30 days after entry of judgment if you or your client were served within 3 days of its entry, or 30 days after service if served more than 3 days after entry. N.C. Gen. Stat. § 5A-24; N.C. R. App. P. 3(c).

Criminal contempt: within 10 days after entry of judgment. N.C. Gen. Stat. § 5A-17; N.C. Gen. Stat. § 15A-1431(c).

What are the requirements for the written notice?

Civil contempt:

1. Document entitled, "Notice of Appeal"

2. Document addressed, "TO THE HONORABLE NORTH CAROLINA COURT OF APPEALS" under caption
3. All captioning the same as any other document filed in the case previously with the clerk of superior court, including county, file number and names of parties
4. Specify party(ies) taking appeal
5. Designate the specific judgment from which appeal taken, including the date of the entry of the judgment (not the date of the hearing) and as much specificity about the judgment as possible so it is clear. In other words, if the judgment simply says, "Order," use a more descriptive phrase. Whereas, if it says "Order of Civil Contempt," use that language to describe the order from which you are appealing. For example, "the final judgment of the Honorable So-and-So, District Court Judge, entered on XXX in the District Court of Such-and-Such County, which held defendant in contempt for failure to pay child support."
6. Include a request for court-appointed appellate counsel and that your client's financial situation has not changed since you were appointed (assuming this is correct information). Check to see if a new affidavit of indigency is required in your district as an attachment to the notice of appeal.
7. Signed by counsel of record (or by party if not represented by counsel). That means that if you represented the party during the hearing, you should sign the notice of appeal even if you don't think your client should appeal. Note: The party may sign in addition to trial counsel's signature, but is not required to sign in civil appeals (as opposed to 7B appeals).
8. Certificate of service attached indicating manner of service upon other party(ies) or its attorney of record
9. File notice and certificate of service with the clerk of superior court
10. Service of notice and certificate of service upon other party(ies) or its attorney of record

N.C. R. App. P. 3(a), (d) & (e).

See sample Notice of Appeal for Civil Contempt at the IDS website

www.ncids.org .

Criminal contempt:

There are no specific statutory requirements. However, if oral notice of appeal has not been given in open court, these are the steps that should be followed to make sure that the appeal of a criminal contempt order is perfected:

1. Document entitled, "Notice of Appeal to Superior Court"
2. All captioning the same as any other document filed in the case previously with the clerk of superior court, including county, file number and names of parties
3. Designate the date and type of judgment from which defendant is appealing

4. Include a request for court-appointed counsel to represent your client in superior court and inform the court that your client's financial situation has changed since you were originally appointed (assuming that information is correct). Check to see if a new affidavit of indigency is required in your district as an attachment to the notice of appeal. Most likely, this will not be required until the case is transferred to superior court.
5. Notice signed by counsel of record (or by party not represented by counsel). That means that if you represented the party during the hearing, you should sign the notice of appeal even if you don't think your client should appeal. Note: The party may sign in addition to trial counsel's signature, but is not required.
6. Certificate of service attached indicating manner of service upon the District Attorney and other party(ies) or its attorney of record
7. File notice and certificate of service with the clerk of superior court
8. Service of notice upon the District Attorney and other party(ies) or its attorney of record

See sample Notice of Appeal for Criminal Contempt at the IDS website www.ncids.org.

Is there anything else I need to do to follow-up on the notice of appeal?

Civil contempt:

Have you completed the Appeal Notification Form and sent it to the Office of Parent Representation? This alerts our office that a notice of appeal has been filed. It is found on the IDS website www.ncids.org (Click on "Parent Representation," click on "Child Support Enforcement," click on "Information for Counsel," click on "Forms").

Has the clerk prepared the Appellate Entries (AOC-CR-350) for signature by the judge? This is the form which finds the appellant indigent and assigns a transcriptionist (if the hearing was recorded). The clerks are generally not very familiar with the process for indigent appeals of civil matters. The Appellate Entries form they need to use is the same form used for criminal appeals. It's not a perfect fit, so the clerk has to adapt it for civil appeals. Refer them to the Office of Parent Representation if they need assistance.

Criminal contempt:

Has the clerk transferred the case to superior court? If the appeal has been entered and not withdrawn within 10 days of the entry of judgment, the clerk must transfer the case to superior court. N.C. Gen. Stat. § 15A-1431(c). The clerk will enter the case in the ACIS system and make a superior court

criminal file for the case which will include all the related papers from the criminal contempt matter.

Have you checked to see whether you will be permitted to represent your client in superior court or whether a new attorney will need to be appointed?

WILL MY MY CLIENT BE RELEASED ONCE I FILE THE NOTICE OF APPEAL, OR WILL S/HE HAVE TO REMAIN IN JAIL DURING THE ENTIRE TIME THE APPEAL IS PENDING?

Civil contempt:

Your client will not be released from jail simply because you filed the notice of appeal. THE COURT'S CONTEMPT JUDGMENT CAN STILL BE ENFORCED EVEN WHILE AN APPEAL IS PENDING. You must file a motion to stay the execution of the judgment in order for the court to consider releasing your client. See sample Motion to Stay Execution of Civil Contempt Judgment at the IDS website www.ncids.org (Click on "Parent Representation," click on "Child Support Enforcement," click on "Information for Counsel," click on "Forms"). The court may require that your client pay an appeal bond before release.

If the court denies the stay, or requires an appeal bond that exceeds the ability of your client to pay, an application for temporary stay and writ of supersedeas may be made to the North Carolina Court of Appeals. Contact the assigned appellate attorney or the Office of Parent Representation to file these documents.

Please note that even if your client was not incarcerated but was required to follow particular purge conditions by a certain date in order to avoid incarceration, she either must abide by those purge conditions or a motion to stay the execution of the judgment must be granted by the court. THE COURT'S CONTEMPT JUDGMENT CAN STILL BE ENFORCED EVEN WHILE AN APPEAL IS PENDING. The same option for a writ of supercedeas is available if the motion to stay is denied.

Criminal contempt:

Your client is entitled to a bail hearing within 24 hours of confinement. This must be held before a superior court judge. N.C. Gen. Stat. § 5A-17(b) (effective December 1, 2013) (see attachment, Session Law 2013-303). The judge has the option of setting an appeal bond or allowing your client to remain on recognizance for his future appearance. N.C. Gen. Stat. § 7A-290. The bail bond is to secure the defendant's appearance only, so the bond is forfeited to the local school board if the defendant fails to appear at trial. N.C. Gen. Stat. § 15A-531, 115C-452.

My hope is that the requirement of a bail hearing before a superior court judge will greatly reduce excessive appeal bonds. However, there is a provision for a district court judge to conduct the bail hearing if there has not been a hearing before a superior court judge within 24 hours. N.C. Gen. Stat. § 5A-17(c). In the event that the appeal bond is set so high that the defendant cannot pay, there are two options: (1) negotiate with the assistant district attorney to discuss entry of a consent appeal bond reduction; or (2) file an Application for Writ of Habeus Corpus pursuant to N.C. Gen. Stat. § 17-3 *et seq.*

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

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