# WHERE NOW?
# APPEALING AN ORDER OF CONTEMPT

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## I. Preserving Issues for Appeal

### A. Overview:

As a general rule, issues must be preserved for appellate review. Appeals from criminal contempt orders are *de novo* to the superior court. Whereas, civil contempt orders are appealed to the Court of Appeals. Thus, preserving an issue is only relevant when civil contempt is the potential outcome in district court. But, since you may not always be sure whether the district court will be making a determination that the Defendant is in civil or criminal contempt, it is always safest to preserve issues in the event that (a) it is a civil contempt order, and (b) you decide to appeal. In addition, should you take the case to the superior court on an appeal of a criminal contempt, you should be conscious of preserving your issues during your superior court trial in case your client wants to appeal that judgment to the Court of Appeals. The following remarks regarding the preservation of issues, however, are directed specifically to the appeal of civil contempt and may not all apply if there is a trial for criminal contempt in superior court.

### B. Recordation of Hearing and Entry of Order:

1. **Recordation of Hearing.** Whenever possible, a hearing should be recorded when there is the potential of an appeal. You may file a motion for recordation if your child support court does not generally record hearings. (A sample motion is attached). However, the North Carolina Rules of Appellate Procedure, Rule 9(c)(1), provides for testimonial evidence, statements and events to be set out in the record on appeal in a narrative or question and answer format as an alternative. N.C. R. App. P. 9(c)(1) (2009). Obviously, this is a more cumbersome and potentially less accurate alternative. This also means that the trial attorney must keep very detailed notes to assist the appellate attorney.

2. **Entry of Order**. It is helpful, regardless of whether the hearing is recorded, to ask for specificity in the order, particularly as to whether the court is finding the Defendant in civil or criminal contempt. There is also no harm in

asking the court for its basis in determining that the Defendant is in contempt. This clarification may be helpful in making a decision whether or not to proceed with an appeal.

## C. The Applicable Law

1. **Appellate Rule 10(a)(1)** "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion. . . ." N.C. R. App. P. 10(a)(1) (2009).

2. **Evidence Rule 103:**

" **Effect of erroneous ruling**. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

**Objection**. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court;

**Offer of proof.** In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal."

N.C. Gen. Stat. § 8C-1, Rule 103(a)(2010).

## D. Plain error.

The plain error principle applies only to criminal cases. It means that an issue which was not preserved by objection at trial is deemed preserved by rule or law when the appellant contends the action amounts to plain error. N.C. R. App. P. 10(a)(4) (2009). This principle has not been expanded to civil appeals. *In re B.D.,* 174 N.C. App. 234, 620 S.E.2d 913 (2005). Thus, errors must be preserved in all civil cases, and failure to preserve even the most egregious error by proper objection or action at trial usually means that the issue is lost on appeal. The major exception to this is subject matter jurisdiction, which can be raised at any time. *In re J.D.S.,* 170 N.C. App. 244, 248, 612 S.E.2d 350, 353, *cert. denied,* 360 N.C. 64, 623 S.E.2d 584 (2004); N.C. R. App. P. 10(a)(2010).

## E. Application of the Rules of Law

1. **Motion *in limine.*** A Motion *in limine* does not preserve an issue for appeal if the evidence is not objected to at the time it is offered at trial, despite the N.C. Evidence Rule 103(a)(2). The North Carolina Court of Appeals ruled that the legislature overstepped its bounds in amending Rules 103(a)(2). Therefore, to the extent that its amendment conflicted with the Rules of Appellate Procedure it was unconstitutional. *State v. Tutt,* 171 N.C. App. 518, 615 S.E.2d 688 (2005). Later, the North Carolina Supreme Court agreed in *State v. Oglesby* that the legislature's amendment was unconstitutional. *State v. Oglesby,* 361 N.C. 550, 648 S.E.2d 819(2007). The Court of Appeals later applied this to the civil arena by stating that a ruling on a motion *in limine* "is 'merely preliminary' and not final" and that, in order to preserve the issue for appeal, a party must object to the evidence when offered or attempt to introduce it at trial. *Kor Xiong v. Marks,* 193 N.C. App. 644, 647, 668 S.E.2d 594, 597 (2008) (citation omitted).

2. **Evidentiary objections – be bold, be timely, be persistent, be specific:**

a) **Be bold** - Make an objection whenever you believe there has been an error of law. A ruling by the court overruling a proper objection to the admission of evidence is deemed excepted to by the party making the objection; a ruling by the court sustaining an objection to the admission of evidence, or excluding evidence offered by a party for any reason, is deemed excepted to by the party offering the evidence. N.C. Gen. Stat. § 1A-1, Rule 46(a)(2)(2010).

b) **Be timely –** You must make an objection right after the objectionable action occurs so that the effect can be remedied. *Stimpson Hosiery Mills, Inc. v. Pam Trading Corp.*, 98 N.C. App. 543, 392 S.E.2d 128 (1990). Generally, a failure to object to the admission of evidence at the time it is offered waives the objection. *Spencer v. Spencer*, 70 N.C. App. 159, 319 S.E.2d 636 (1984).

c) **Be persistent** – Civil Procedure Rule 46(a)(1): "[w]hen there is objection to the admission of evidence involving a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence involving the same line of questioning." N.C. Gen. Stat. § 1A-1, Rule 46(a)(1)(2010). However, the N.C. Supreme Court stated: "The rule does not modify the general

principle that the benefit of an objection, seasonably made, is lost if thereafter substantially the same evidence is admitted without *any* objection." *Duke Power Co. v. Winebarger,* 300 N.C. 57, 68, 265 S.E.2d 227, 233 (1980)(citation omitted). Therefore, it must be clear that there is a line objection to the line of questioning; a general objection will not suffice. *See Vanderwoort v. McKenzie,* 117 N.C. App. 152, 450 S.E.2d 491 (1994). In addition, your objection to a line of questioning of one witness may not be deemed to be an objection to a line of questioning of another witness about the same evidence, unless it is clear in the record that your line objection continued for this witness as well. If in doubt, object!

d) **Be specific –** You should make an objection regarding the exact ground for the error and all applicable grounds for the error. A general objection may not be sufficient to preserve the error, particularly if the specific objection is not apparent from the context and "fails to present the nature of the alleged error to the trial court." *State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985), *cert. denied*, 316 N.C. 380, 344 S.E.2d 1 (1986).

3. **Offer of Proof** – If the trial court's ruling on a motion or an objection precludes the party from offering evidence or raising a defense, the aggrieved party must submit an offer of proof, setting forth the substance of the excluded evidence.

a) If the significance of the evidence is not obvious from the record, or there is no way of determining what the attorney was precluded from asking, a specific offer of proof is required. *Joyce v. Joyce*, 180 N.C. App. 647, 652, 637 S.E.2d 908, 912(2006); *In re L.C.*, 181 N.C. App. 278, 638 S.E.2d 638 (2007), disc. rev. denied 361 N.C. 354, 646 S.E.2d 114(2007).

b) In order to preserve an argument related to the exclusion of evidence, the party must make an offer of proof to put the substance and significance of the evidence on the record. *Currence v. Hardin*, 296 N.C. 95, 249 S.E.2d 387(1978).

4. **Constitutionalize your argument whenever possible**. If you haven't preserved a constitutional argument, that argument cannot be raised for the first time on appeal, even if you have raised another issue for that error. "Constitutional error will not be considered for the first time on appeal." *State v. Chapman,* 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005). For example, if you are

raising an issue about adequate notice, it would be appropriate to raise the Defendant's right to due process under the U.S. and N.C. Constitutions.

# II. The Mechanics of Appealing an Order

## A. To Whom is the Appeal Directed?

1. **Civil Contempt**

a) "A person found in civil contempt may appeal in the manner provided for appeals in civil actions." N.C. Gen. Stat. § 5A-24 (2010).

b) A party has the right to appeal from any final judgment of a district court in a civil action directly to the Court of Appeals. N.C. Gen. Stat. § 7A-27(c)(2010).

2. **Criminal Contempt**

a) "A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." N.C. Gen. Stat. § 5A-17 (2010).

b) "Any defendant convicted in district court before the judge may appeal to the superior court for trial de novo." N.C. Gen. Stat. § 7A-290 (2010).

## B. Is the Order Appealable?

1. A judgment of civil or criminal contempt is appealable under the provisions cited above. However, an order that does not specifically state that the party is in contempt may not be appealable because it will be considered interlocutory. Also, a case in which there are pending matters that are not fully resolved are generally considered interlocutory and not appealable.

2. A party only has the right to appeal an interlocutory order from a civil action or proceeding to the Court of Appeals under certain circumstances: if the ruling "(1) Affects a substantial right , or (2) In effect determines the action and prevents a judgment from which appeal might be taken, or (3) Discontinues the action, or (4) Grants or refuses a new trial. . ." N.C. Gen. Stat. § 7A-27(d)(2010).

3. An order for civil contempt has been found to affect a substantial right, even when there were other issues pending. *Guerrier v. Guerrier,* 155 N.C. App. 154, 574 S.E.2d 69 (2002).

4. While discussing with your client whether or not to proceed with an appeal, s/he will usually look to you for guidance as to the merit of the appeal. Bear in mind your ethical responsibilities under Rule 3.1 of the Rules of Professional Conduct regarding meritorious claims and contentions. But, don't be timid about asserting a "good faith argument for an extension, modification or reversal of existing law," particularly if you've done a good job in preserving errors for review.

5. If in doubt regarding the timeliness or merit of your appeal, contact Wendy Sotolongo, Parent Representation Coordinator with the Indigent Defense Services, (919) 560-5987 or Wendy.C.Sotolongo@nccourts.org.

## C. When Must the Notice of Appeal be Filed?

1. **Civil Contempt.**

a) **Notice of Appeal**. The notice of appeal in a civil contempt action must be filed "(1) within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure; or (2) within thirty days after service upon the party of a copy of the judgment if service was not made within that three day period; provided that (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion. . . " N.C. R. App. P. Rule 3(c)(2009) (emphasis added). (See attached sample notice of appeal for civil contempt).

b) **Appeals by Indigents**. - A party who is appealing a judgment to the appellate division and is unable to pay the appeal costs due to poverty, must file an affidavit within 30 days after the entry of the judgment or order. N.C. Gen. Stat. § 1-288(2010) (See attached sample Petition and Affidavit to Appeal as an Indigent, as well as the accompanying Order) .

2. **Criminal Contempt.** "Within 10 days of entry of judgment, notice of appeal may be given orally in open court or in writing to the clerk. Within 10 days of entry of judgment, the defendant may withdraw his appeal and comply with the judgment. Upon expiration of the 10-day period, if an appeal has been entered and not withdrawn, the clerk must transfer the case to the appropriate

court." N.C. Gen. Stat. § 15A-1431(c)(2010)(emphasis added). (See attached sample notice of appeal for criminal contempt).

# III. Stay Pending Appeal

## A. Staying the Contempt Sanction for Criminal Contempt.

1. **Appeal Bond.** An appeal bond can be imposed by the district court upon the filing of a notice of appeal. ". . . The original bail shall stand pending appeal, unless the judge orders bail denied, increased, or reduced." N.C. Gen. Stat. § 71-290 (2010). Thus, the court has the option of setting an appeal bond or allowing the party to remain on recognizance for his future appearance to undergo the sentence which may be pronounced if the appeal fails or a different sentence is entered. The bail bond is to secure the Defendant's appearance, 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(2010).

2. The Defendant does not serve the contempt sentence while the appeal is pending. But, as a practical matter, the appeal bond may be such a high amount that the Defendant is unable to pay the bond and remains in jail. The bond can be revisited once it is transferred to superior court, through discussions with the district attorney and entry of a consent bond reduction, or a bond reduction hearing. N.C. Gen. Stat. § 15A-534(e)(2)(2010). If the bond is extraordinarily high, and completely unconscionable, a Writ of Habeus Corpus pursuant to N.C. Gen. Stat. § 17-3 *et seq.* could be attempted.

## B. Staying the Contempt Sanction for Civil Contempt

1. **Automatic Stay**. G.S. 1-289 authorizes the stay of a money judgment by assuring payment of any amount due upon appeal of the judgment. N.C. Gen. Stat. § 1-289 (2010). *See also,* N.C. Gen. Stat. § 1A-1, Rule 62(d)(2010). The appellate courts have construed orders for payment of child support to be money judgments under this statute. *Clark v. Cragg*, 171 N.C. App. 120, 126, 614 S.E.2d 356, 361 (2005).

2. **Motion for Stay**. "Notwithstanding the provisions of G.S. 1-294, an order for the payment of child support which has been appealed to the appellate division is enforceable in the trial court by proceedings for civil contempt during the pendency of the appeal. Upon motion of an aggrieved party, the court of the appellate division in which the appeal is pending may stay any order for civil

contempt entered for child support until the appeal is decided, if justice requires." N.C. Gen. Stat. § 50-3.4(f)(9)(2010). The Court of Appeals stated that this statute includes "any sanctions entered pursuant to an order of civil contempt." *Guerrier v. Guerrier*, 155 N.C. App. 154, 574 S.E2d 69 (2002). The trial court may require that the aggrieved party pay an appeal bond. *Clark v. Cragg*, 171 N.C. App. 120, 126, 614 S.E.2d 356, 360-61 (2005).

3. **Petition to Appeal as Indigent does not Stay**. If a party has filed a petition and affidavit to appeal as an indigent pursuant to G.S. 1-288, and an Order is entered allowing the party to appeal as an indigent, it only serves to dispense with the security for costs of the appeal. It does not operate to stay further proceedings from which the judgment was appealed. *Leach v. Jones*, 86 N.C. 404 (1882). Therefore, it will not substitute for the security deposit required pursuant to G.S. 1-289.

4. **Court of Appeals**. Application for temporary stay and writ of supersedeas may be made to the appellate court after it has been denied or vacated by the trial court, or when extraordinary circumstances make it impossible to obtain a stay by deposit of security. N.C. R. App. P. 8(a), 23 (2009).

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