

Civil Contempt and "Springing" Orders for Arrest

The following post was written by Daniel Spiegel, a North Carolina Assistant Appellate Defender. It addresses the legality of a purge condition frequently imposed in civil contempt orders entered in child support enforcement proceedings across North Carolina.

This is a very important topic. Please share your thoughts and reactions.

MEMORANDUM ON THE UNLAWFULNESS OF "SPRINGING" ORDERS FOR ARREST UPON FUTURE NONPAYMENT OF PURGE PAYMENTS IN CHILD SUPPORT CIVIL CONTEMPT PROCEEDINGS WITHOUT CONTEMPORANEOUS INQUIRY INTO ABILITY TO PAY

In child support proceedings throughout North Carolina, it is a practice in some counties to include in civil contempt orders a provision calling for the immediate issuance of an order for arrest upon future nonpayment of a "purge payment." After a contested hearing or with the agreement of the parties, a civil contempt order is entered assigning a schedule of "purge payments" that must be satisfied to avoid future incarceration. Under the terms of the order, any failure to make a "purge payment" automatically results in an order for arrest being issued pursuant to "continuing civil contempt." However, as shown below, such a provision calling for "springing" orders for arrest in the civil contempt context is unlawful.[\[1\]](#) [\[2\]](#)

Analysis

North Carolina's civil contempt statutes "require that a person have the present ability to comply with the conditions for purging the contempt before that person may be imprisoned for civil contempt." *McMiller v. McMiller*, 77 N.C. App. 808, 809, 336 S.E.2d 134, 135 (1985); see also *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980) (defendant in a civil contempt action will be fined or incarcerated only after a determination is made that defendant is capable of complying with the order of the court). For this reason, courts have repeatedly described those incarcerated for civil contempt as "holding the keys to their own jail." See *McBride v. McBride*, 334 N.C. 124, 128, 431 S.E.2d 14, 17 (1993); see also *Turner v. Rogers*, 564 U.S. 431, 442, 180 L. Ed. 2d 452, 462 (2011). In issuing an order calling for the automatic issuance of an order for arrest upon future nonpayment of a "purge payment," the court unlawfully dispenses with a contemporaneous finding that defendant is, at the time of nonpayment, in fact able to make payment and thus able to obtain freedom.

In *Tigani v. Tigani*, ___ N.C. App. ___, 805 S.E.2d 546 (2017), the North Carolina Court of Appeals reversed a civil contempt order because the record did not contain support for the proposition that the defendant had the present ability to comply with an order to pay attorneys' fees. Defendant was given a "suspended sentence" on July 25, 2016, ordering that he make payment by August 15, 2016, or be incarcerated for civil contempt. The plaintiff submitted bank statements purporting

to show that the defendant had the ability to pay. However, the bank statements covered a period between November 2015 and March 2016. Our Court of Appeals held that these “records did not reflect defendant’s financial circumstances on 25 July 2016, which is the relevant time for purposes of determining defendant’s *present* ability to pay.” *Id.* (emphasis in original) Holding that the contempt order was unsupported by record evidence, the Court reversed. *Tigani* demonstrates that evidence showing ability to pay on a particular date is not adequate to show ability to pay after some months have passed. The inquiry into ability to pay must be contemporaneous with the order finding the defendant in contempt. *Id.* (“in order to address the requirement of willfulness, ‘the trial court must make findings as to the ability of the [contemnor] to comply with the court order during the period when in default.’ . . . Second, once the trial court has found that the party had the means to comply with the prior order and deliberately refused to do so, ‘the court may commit such [party] to jail[.] . . . At that point, however, . . . the court must find that the party has the present ability to pay the total outstanding amount” (quoting *Clark v. Gragg*, 171 N.C. App. 120, 122-23, 614 S.E.2d 356, 358-59 (2005)).

N.C. Gen. Stat. § 5A-21 clearly states that failure to comply with a court order is only a “continuing civil contempt [where] noncompliance by the person to whom the order is directed is willful. . . and the person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable the person to comply with the order.” This Court cannot make a future determination of what constitutes a continuing civil contempt because this Court cannot possibly know whether a future failure to make a “purge payment” is willful or whether the individual is simply unable to comply with the order for some unforeseen reason. *See Bearden v. Georgia*, 461 U.S. 660, 672-673, 76 L. Ed. 2d 221, 233 (1983) (it is contrary to the fundamental fairness guaranteed by the Fourteenth Amendment for an individual to be incarcerated due to an inability to make payment for reasons outside of the individual’s control); *see also Turner v. Rogers*, 564 U.S. 431, 445, 180 L. Ed. 2d 452, 464 (the threatened loss of liberty in civil contempt proceedings “demands” Due Process protection; “[g]iven the importance of the interest at stake, it is obviously important to ensure accurate decisionmaking in respect to the key ‘ability to pay’ question”).

There is no statutory authority for this Court to call for the issuance of an order for arrest upon future nonpayment of a purge payment. An order for arrest under the Criminal Procedure Act can only be issued under certain circumstances, including failure to appear in a criminal proceeding, violation of the conditions of probation, or to secure an alleged contemnor’s appearance for a criminal contempt proceeding. N.C. Gen. Stat. § 15A-305(b)(2), (4), (8) & (9). Chapter 5A references arrest as a means to assure the alleged contemnor’s presence for proceedings when a person has been charged with direct or indirect criminal contempt, as permitted under § 15A-305(b)(9).^[3] But there is no provision in the civil contempt statutes authorizing the issuance of an order for arrest upon future noncompliance with purge requirements, such as in a criminal probation violation.

N.C. Gen. Stat. § 5A-23 clearly sets forth the “proceedings for civil contempt.” The proper

procedure calls for a motion directing the alleged contemnor to appear at a specified reasonable time and show cause why he should not be held in civil contempt. There is no authority to arrest an individual prior to providing the individual with an opportunity to show cause why the nonpayment was not willful.

In conclusion, the practice of calling for “springing” orders for arrest upon future nonpayment of purge payments is not lawful. Instead, courts should substitute a provision calling for the issuance of a show cause motion upon nonpayment providing the Defendant with an opportunity to be heard on the question of willfulness.

[1]A provision calling for an order for arrest to be issued upon nonpayment of a future regular child support obligation is also unlawful. *See Bennett v. Bennett*, 71 N.C. App. 424, 322 S.E.2d 439 (1984) (error for court to require defendant to make child support payments that accrued after his incarceration in order to obtain his release).

[2]To clarify, the analysis set forth in this memorandum may not apply where the trial court makes clear findings upon entry of a civil contempt order that the defendant is presently able to pay the sum total of all purge payments ordered. *See Abernethy v. Abernethy*, 64 N.C. App. 386, 307 S.E.2d 396 (1983). In such a case, it is within the defendant’s power to pay the entire amount at the time the order is entered, and any delay in payment may fairly be deemed a willful violation. However, absent express findings that the defendant has the present ability to pay the sum total of all purge payments, a trial court cannot predetermine that a future failure to make a purge payment constitutes a willful violation of a court order.

[3]See N.C. Gen. Stat. § 5A-16 (requiring, in the context of plenary proceedings for criminal contempt, a finding of probable cause to believe the person ordered to appear will not appear, based on sworn statement or affidavit, before an order for arrest can be issued).