

## Contempt: Establishing Ability to Pay

In my last post, [No Default Judgment in Contempt](#), I wrote about the requirement that all contempt orders contain the conclusion that respondent acted willfully when committing the act that is the basis for contempt. Of course, that conclusion must be supported by findings of fact, which in turn must be based on evidence.

So what findings are sufficient to support the required conclusion when contempt is based on the failure to pay money, such as child support?

### Ability to Pay

When contempt is based on the failure to pay, willfulness must be established by evidence that the respondent has or had the ability to pay all or some portion of the amount owing and deliberately failed to do so. *Mauney v. Mauney*, 268 NC 254 (1966). Ability to pay is established by showing either that respondent has income or cash sufficient to pay or that there are steps respondent can take that would allow him/her to pay some or all of the amount owing. *Jones v. Jones*, 62 NC App 748 (1983).

### Ability to Pay When?

Criminal contempt is to punish past conduct. So to support an adjudication of criminal contempt for failure to pay support, the court must conclude respondent had the ability to pay when the payment became due or at some time thereafter. *Mauney*, *id.* Because the purpose of criminal contempt is to punish past behavior, a person can be held in criminal contempt even if that person has fully complied with the order by the time of the contempt hearing. [Reynolds v. Reynolds, 147 NC App 566 \(2001\)\(dissent adopted by 356 NC 287 \(2002\)\)](#).

On the other hand, civil contempt is to force compliance with the court order. Therefore, to support an adjudication of civil contempt for failure to pay, the court must conclude respondent has the present ability to pay at the time of the hearing. *Mauney*, *id.* Because the only purpose of civil contempt is to force compliance, a respondent cannot be held in civil contempt if respondent has fully complied with the order to pay by the time of the contempt hearing. [Ruth v. Ruth, 158 NC App 123 \(2003\)](#). A civil contempt order also must find respondent has the present ability to comply with the purge condition that is imposed as a result of the contempt adjudication. A respondent must actually “hold the keys to the jail” at the time (s)he is incarcerated for civil contempt. [Shippen v. Shippen, 204 NC 188 \(2010\)](#); *Jolly v. Wright*, 300 NC 83 (1980).

### Able-bodied, under no disability, enough?

*Mauney* and other opinions established the rule that when a contempt charge is based on the

failure to pay, the court must make an investigation into the current financial status of respondent to determine if (s)he has the present ability to pay the amounts set by order of the court. *Moore v. Moore*, 35 NC App 748 (1978). The trial court in *Mauney* supported contempt with these findings:

[T]he defendant 'is a healthy, able bodied man, 55 years old, presently employed ...and has been so employed for many months; that he owns a Thunderbird automobile; he has not been in ill health or incapacitated since the date of [the] order...; the defendant has the ability to earn good wages in that he is a trained and able salesman, and is experienced in the restaurant business; and has been continuously employed since the order.

*Mauney*, 268 NC at 266.

The Supreme Court held these findings insufficient, stating:

The finding of facts in this case is not a sufficient basis for the conclusion that defendant's conduct was willful and deliberate. [Citing [Vaughan v. Vaughan, 213 N.C. 1989](#)], **the court below should take an inventory of the property of the plaintiff; find what are his assets and liabilities and his ability to pay and work -an inventory of his financial condition.'**

*Mauney*, 268 NC at 268.

See also [Clark v. Gragg, 171 NC App 120 \(2005\)](#) ("able-bodied, 32 year old with tenth grade education and work experience" insufficient), and *Hodges v. Hodges*, 64 NC App 550 (1983) ("able-bodied" and "was capable of and had the means or should have had the means" to make payments insufficient).

### **Must respondent have cash on hand?**

Ability to pay can be shown by evidence that respondent has sufficient cash or income to pay. *McMiller v. McMiller*, 77 NC App 808 (1985). See also *Ahern v. Ahern*, 63 NC App 728 (1983) (income can be established by showing how much respondent spends). Or, ability to pay can be shown by evidence that there are reasonable steps respondent can take that would enable him/her to pay but respondent is deliberately failing to take those steps. *Adkins v. Adkins*, 82 NC App 289 (1986) (reasonable steps include liquidating assets); *McMiller*, *id.* (same).

While deliberately and in bad faith failing to look for work or accept employment will support contempt, *Frank v. Glanville*, 45 NC App 313 (1980), a court cannot base contempt on failure to work unless there is evidence that jobs actually are available. *Self v. Self*, 55 NC App 651 (1982).

### **Right to Appointed Counsel**

The law regarding the need for evidence of actual ability to pay before a person can be held in

contempt for failure to pay child support is not new. However, parents are incarcerated on a regular basis in this State and throughout the country based on court orders entered without appropriate findings and conclusions.

Recognizing this as a problem, the North Carolina Supreme Court held in *McBride v. McBride*, 334 NC 124 (1993), that respondents in contempt cases have the right to court-appointed counsel if indigent and if there is a likelihood of incarceration. In overturning previous precedent to the contrary, the court held:

An examination of civil contempt cases ... indicates that the failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent... Despite the statutory requirements, experience ... has shown that trial courts do at times order the imprisonment of an unrepresented civil contemnor in a nonsupport case without determining whether he is able to pay...

*McBride*, 334 NC at 131 and n.4.

Unfortunately, appellate cases continue to show a problem in the trial courts. While appointed counsel should help, it is everyone's responsibility to ensure parents are not jailed simply because they fail to pay support.