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The Distinction Between Civil and Criminal Contempt in North Carolina

Over the years, attempts to distinguish between civil and criminal contempt have resulted in a legal morass, perplexing lawyers, judges, and commentators. North Carolina courts traditionally have based the distinction on the purpose of the sanction. The contempt is classified as criminal when its purpose is to preserve the court's authority and punish disobedience of court orders, while sanctions for civil contempt are imposed to coerce compliance with an order and thus provide a remedy for an injured party.¹ This "purpose" test leads to confusion, however, because the categories inevitably overlap: often the same contemptuous act offends the authority of the court and causes injury to a party.² The distinction between civil and criminal contempt is important because criminal contempt cannot be imposed on a party who has not been afforded the procedural and evidentiary safeguards mandated for criminal defendants by the United States Constitution.³

In *Bishop v. Bishop*⁴ the North Carolina Court of Appeals modified the "purpose" test to create a bright-line rule that distinguishes between civil and criminal contempt based on the type of relief ordered by the court.⁵ When a contempt proceeding results in a definite prison sentence or a fine payable to the court, the purpose is punitive and thus constitutes criminal contempt. When the contempt order provides a means whereby the defendant can purge the contempt (usually compliance with the original order) and avoid or terminate imprisonment, however, the purpose is remedial and thus constitutes civil contempt.⁶ This Note examines the reasons for distinguishing between civil and criminal contempt and argues that a proper distinction must reflect the due process considerations implicit in the distinction itself. The Note concludes that the *Bishop* court's approaching the problem exclusively at the definitional level fails to provide the procedural framework needed to guide trial courts in their treatment of contemptuous behavior.

A 1986 consent judgment required Ronald Lynn Bishop to pay child support in the amount of \$350 per month to Rina Janey Bishop.⁷ In August of 1986, when the child support obligation commenced, Mr. Bishop was employed at a monthly rate of approximately \$2000.⁸ In August and September 1986 Mr.

1. See, e.g., *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985); *Mauney v. Mauney*, 268 N.C. 253, 256, 159 S.E.2d 391, 393 (1966); *Galyon v. Stutts*, 241 N.C. 120, 123, 84 S.E.2d 822, 825 (1954); *Dyer v. Dyer*, 213 N.C. 634, 635, 197 S.E. 157, 158 (1938); *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 4 N.C. App. 245, 247-48, 166 S.E.2d 698, 700, *aff'd*, 275 N.C. 503, 169 S.E.2d 867 (1969).

2. See *infra* note 74 and accompanying text.

3. See *Hicks ex rel. Feiock v. Feiock*, 108 S. Ct. 1423, 1429-30 (1988).

4. 90 N.C. App. 499, 369 S.E.2d 106 (1988).

5. *Id.* at 503-05, 369 S.E.2d at 108-10.

6. *Id.* at 505, 369 S.E.2d at 109.

7. *Id.* at 500, 369 S.E.2d at 106.

8. *Id.*

Bishop paid a total of \$60, leaving \$640 in arrears.⁹ The full \$350 payment was paid in October 1986, at which time Mr. Bishop voluntarily resigned from his job.¹⁰ He remained unemployed until March 1987, when he began working at a rate of \$4.25 per hour.¹¹ He made token payments of \$30 in April and June 1987.¹²

On plaintiff's motion, the court ordered defendant to "show cause why he should not be found in willful contempt."¹³ Defendant appeared at the June 1987 hearing without counsel, and plaintiff called him as her sole witness.¹⁴ Defendant admitted that the total arrearage of child support payments was \$2230.¹⁵ At the conclusion of the hearing the trial judge issued a written order stating that "the Defendant has had the ability to pay child support [and] that his failure to do so is willful contempt."¹⁶ Defendant was sentenced to twenty-nine days in the county jail but was offered the chance to purge himself from contempt and be released if he paid the entire arrearage of \$2,230.¹⁷ Defendant's mother paid this amount to the clerk of superior court to avoid defendant's incarceration.¹⁸

Defendant appealed to the North Carolina Court of Appeals, which reversed the trial court's contempt decree.¹⁹ Although both parties briefed the appeal on the assumption that the order was for *criminal* contempt, the court noted that the inclusion of a purge clause in the order left it ambiguous whether the order was for civil contempt, criminal contempt, or both.²⁰ To make this determination, the court relied heavily on a recent United States Supreme Court case, *Hicks ex rel. Feiock v. Feiock*.²¹ In *Hicks* the Court held that for purposes of determining the applicability of federal constitutional protections in state con-

9. Plaintiff-Appellee's Brief at 3, *Bishop* (No. 8718DC1140).

10. *Id.* Plaintiff alleged that defendant deliberately depressed his income by resigning gainful employment without another job available and subsequently taking a job at 25% of former earnings. *Id.* Defendant denied this allegation and pointed out that the judge made no finding of fact that the resignation was unjustified. Defendant-Appellant's Brief at 5.

11. *Bishop*, 90 N.C. App. at 500, 369 S.E.2d at 106. During his unemployment, the record reflects that he made full \$350 payments in December 1986 and January 1987. *Id.*

12. *Id.* Plaintiff calculated that from April to June defendant's gross income was approximately \$2,390. Plaintiff-Appellee's Brief at 3. Defendant testified that his rent during this time was \$150 per month and that he and his companion grew their own food. *See id.* Thus, defendant's net income during this period was approximately \$1,790 while his child support obligation during the same period totaled \$1,050.

13. *Bishop*, 90 N.C. App. at 500, 369 S.E.2d at 106.

14. Plaintiff-Appellee's Brief at 3.

15. *Bishop*, 90 N.C. App. at 500, 369 S.E.2d at 106. Neither the record nor defendant's brief reflects that defendant knew or was informed that he could not be compelled to testify against himself in either criminal or civil contempt proceedings. *See infra* notes 42-49 and 57-60 and accompanying text for a discussion of a defendant's rights in criminal and civil contempt proceedings.

16. *Bishop*, 90 N.C. App. at 500, 369 S.E.2d at 106-07.

17. *Id.* at 500-01, 369 S.E.2d at 106-07. The trial judge made no finding that defendant had the present ability to pay the full amount of this arrearage. Defendant-Appellant's Brief at 4-5. The judge did order that future child support payments be made to the clerk of superior court and authorized plaintiff to complete the paperwork to garnish defendant's wages to assist in collection. *Bishop*, 90 N.C. App. at 501, 369 S.E.2d at 107.

18. Defendant-Appellant's Brief at app. 2.

19. *Bishop*, 90 N.C. App. at 507, 369 S.E.2d at 110.

20. *Id.* at 502, 369 S.E.2d at 107.

21. 108 S. Ct. 1423 (1988).

tempt proceedings the distinction between civil and criminal contempt should be based solely on the nature of the relief imposed.²² In accordance with *Hicks*, the *Bishop* court formulated the following straightforward rules to distinguish civil from criminal contempt:

Civil Relief: If the relief is imprisonment, it is coercive and thus civil if the contemnor may avoid or terminate his imprisonment by performing some act required by the court (such as agreeing to comply with the original order). If the relief is monetary, it is likewise civil if the monies are either paid to the complainant or defendant can avoid payment to the court by performing an act required by the court.

Criminal Relief: If the relief is imprisonment, it is punitive and thus criminal if the sentence is limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court. If the relief is monetary, it is punitive if payable to the court rather than to the complainant.²³

The court commented that this "objective focus" on the nature of the relief ordered "allows the proper balance between the court's inherent power to protect its authority and the defendant's need for adequate procedural and evidentiary standards and effective appellate review."²⁴

Returning to the facts of the case, the court determined that the trial judge's order was for civil contempt because it included a purge clause allowing defendant to avoid imprisonment if he paid the total arrearages.²⁵ By statute in North Carolina, every order for civil contempt must include a specific finding of

22. *Id.* at 1429-30. In *Hicks* defendant was charged with nine counts of failure to make monthly child support payments. *Id.* at 1427. The District Attorney, prosecuting the case on behalf of plaintiff, invoked a California statute that imposes a mandatory presumption of ability to pay on defendants in contempt proceedings for nonpayment of child support obligations. *Id.* at 1427-28; see CAL. CIV. PROC. CODE § 1209.5 (West 1982). Defendant was unable to overcome this presumption and was found in contempt on five of the nine counts. *Hicks*, 108 S. Ct. at 1427. He was sentenced to 25 days in jail, but the sentence was suspended and defendant was placed on informal probation on the condition that he make monthly support payments of \$150 and an additional payment of \$50 per month on the arrearage. *Id.*

Defendant filed a writ of habeas corpus in the California Court of Appeal, which reversed his conviction. *Hicks ex rel. Feiock v. Feiock*, 180 Cal. App. 3d 649, 225 Cal. Rptr. 748 (1986), *vacated*, 108 S. Ct. 1423 (1988). The court determined that the contempt proceeding was "quasi-criminal" as a matter of state law and ruled that the statute employed at the contempt proceeding unconstitutionally shifted the burden of proof on an element of a criminal offense to the defendant. *Id.* at 654, 225 Cal. Rptr. at 751.

The United States Supreme Court granted certiorari. 107 S. Ct. 1367 (1987). Vacating the judgment of the state court, the Court held that for purposes of determining the applicability of federal constitutional protections, the characterization of a contempt proceeding as civil or criminal in nature is a question of federal law. *Hicks ex rel. Feiock v. Feiock*, 108 S. Ct. 1423, 1428 (1988). According to the Court, the contempt is criminal when the relief imposed is a definite term of imprisonment or a fine payable to the court, and the contempt is civil when the contemnor can purge the contempt with the performance of some affirmative act required by the court order. *Id.* at 1429-30. Because the trial court did not specify whether payment of the arrearages would purge defendant's determinate prison sentence, the Court remanded the case to the trial court. *Id.* at 1434.

23. *Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109.

24. *Id.* The court added that when civil and criminal relief are imposed for the same act, the court must "make all necessary findings for each class of relief and afford the defendant all procedural and evidentiary standards appropriate to criminal contempt proceedings." *Id.*

25. *Id.* at 506, 369 S.E.2d at 110.

fact that defendant had the present ability to comply with the purge clause.²⁶ Because the trial judge's order did not include a finding that defendant had the present ability to pay the total arrearages, the court reversed the trial court's adjudication of civil contempt.²⁷

North Carolina's attempts to distinguish between civil and criminal contempt are typical of those of other states.²⁸ In an early case, *Dyer v. Dyer*,²⁹ the North Carolina Supreme Court focused on the trial court's purpose for adjudging the defendant in contempt:

Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice. Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties.³⁰

After *Dyer*, North Carolina courts generally followed this purpose test.³¹ The supreme court endorsed the purpose test as recently as 1985, basically restating the *Dyer* formulation: "Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil."³²

In an attempt "to draw a sharp distinction between proceedings for criminal contempt and the proceedings for civil contempt,"³³ the North Carolina General Assembly in 1978 replaced Chapter 5,³⁴ the statutes dealing with contempt, with Chapter 5A.³⁵ Article 1 of the new chapter addresses criminal contempt and offers an exclusive list of ten behaviors that constitute criminal contempt.³⁶ The judge as trier of fact must determine that the contemptuous act

26. N.C. GEN. STAT. § 5A-21(a)(3) (1986); see *Jones v. Jones*, 62 N.C. App. 748, 749, 303 S.E.2d 582, 584 (1983); *infra* note 52 and accompanying text.

27. *Bishop*, 90 N.C. App. at 506-07, 369 S.E.2d at 110.

28. See generally 12 AM. JUR. 2D *Contempt* § 4 (1964) (surveying state courts' attempts to draw the distinction).

29. 213 N.C. 634, 197 S.E. 157 (1938).

30. *Id.* at 635, 197 S.E. at 158.

31. See, e.g., *North Carolina v. Carr*, 264 F. Supp. 75, 79 (W.D.N.C.), appeal dismissed, 386 F.2d 129 (4th Cir. 1967); *Mauney v. Mauney*, 268 N.C. 254, 256, 159 S.E.2d 391, 393 (1966); *Blue Jeans Corp. v. Amalgamated Clothing Workers*, 4 N.C. App. 245, 247, 166 S.E.2d 698, 700, *aff'd*, 275 N.C. 503, 169 S.E.2d 867 (1969).

32. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985).

33. N.C. GEN. STAT. ch. 5, art. 1 official commentary (1986).

34. N.C. GEN. STAT. §§ 5-1 to -9 (repealed 1978).

35. See N.C. GEN. STAT. §§ 5A-11 to -25 (1986 & Supp. 1988). The new statutes became effective July 1, 1978.

The contempt power does not stem from legislative mandate, but rather is recognized as an inherent judicial power in all North Carolina courts. See *Snow v. Hawkes*, 183 N.C. 365, 367, 111 S.E. 621, 622 (1922); *In re Brown*, 168 N.C. 417, 420, 84 S.E. 690, 692 (1915); *Ex parte McCown*, 139 N.C. 101, 104, 51 S.E. 957, 958-64 (1905). While the legislature may not abrogate these powers, North Carolina courts have recognized that they may be reasonably regulated. *In re Robinson*, 117 N.C. 367, 370, 23 S.E. 453, 454 (1895); *In re Oldham*, 89 N.C. 23, 25 (1883).

36. See N.C. GEN. STAT. § 5A-11(a) (1986). The ten behaviors are as follows:

(1) Willful behavior committed during the sitting of a court and directly tending to interrupt its proceedings.

was done willfully or was preceded by a warning from the court of the impropriety of the act.³⁷ Article 1 divides criminal contempt into two classes: direct and indirect. A judge may find in direct contempt any person who commits a disruptive or obstructive act in open court.³⁸ All other criminal contempts are classified as indirect³⁹ and require a plenary hearing before punishment can be imposed.⁴⁰ Plenary proceedings are initiated by an order of the court directing the person to appear and show cause why he should not be held in criminal contempt.⁴¹ Because criminal contempts are crimes, criminal contempt proceedings must afford the alleged contemnor all Bill of Rights procedures and due process protections associated with criminal trials.⁴² Section 5A-15 provides that the criminal contemnor must be afforded an unbiased judge,⁴³ a presumption of innocence until guilt is proven beyond a reasonable doubt,⁴⁴ a right

(2) Willful behavior committed during the sitting of a court in its immediate view and presence and directly tending to impair the respect due its authority.

(3) Willful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution.

(4) Willful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, willful refusal to answer any legal and proper question when the refusal is not legally justified.

(5) Willful publication of a report of the proceedings in a court that is grossly inaccurate and presents a clear and present danger of imminent and serious threat to the administration of justice, made with knowledge that it was false or with reckless disregard of whether it was false. No person, however, may be punished for publishing a truthful report of proceedings in a court.

(6) Willful or grossly negligent failure by an officer of the court to perform his duties in an official transaction.

(7) Willful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court.

(8) Willful refusal to testify or produce other information upon the order of a judge acting pursuant to Article 61 of Chapter 15A, Granting of Immunity to Witnesses.

(9) Willful communication with a juror in an improper attempt to influence his deliberations.

(10) Any other act or omission specified elsewhere in the General Statutes of North Carolina as grounds for criminal contempt.

Id.

37. *Id.* § 5A-12(b).

38. *Id.* § 5A-13(a) (direct contemptuous acts must be committed within the sight or hearing of a presiding judge and in, or in immediate proximity to, the courtroom when proceedings are being held); see Billings, *Contempt, Order in the Courtroom, Mistrials*, 14 WAKE FOREST L. REV. 909, 910 & n.1 (1978). When such conduct occurs, the judge summarily may charge and punish the contemnor. N.C. GEN. STAT. § 5A-14 (1986). Even though due process protections required in plenary proceedings need not be provided in summary proceedings, the North Carolina Supreme Court has determined that summary proceedings are constitutional. *In re Williams*, 269 N.C. 68, 76, 152 S.E.2d 317, 323-24, *cert. denied*, 388 U.S. 918 (1967).

39. N.C. GEN. STAT. § 5A-13(b) (1986).

40. *Id.* The presiding judge may, if he so chooses, offer a plenary hearing for direct criminal contempts as well. *Id.* § 5A-13(a).

41. *Id.* § 5A-15(a) (Supp. 1988). A copy of the order must be provided to the person charged. *Id.*

42. See, e.g., *North Carolina v. Carr*, 264 F. Supp. 75, 79 (W.D.N.C.), *appeal dismissed*, 386 F.2d 129 (4th Cir. 1967); *O'Briant v. O'Briant*, 313 N.C. 432, 435, 329 S.E.2d 370, 373 (1985).

43. N.C. GEN. STAT. § 5A-15(a) (Supp. 1988) ("If the criminal contempt is based upon acts before a judge which so involve him that his objectivity may reasonably be questioned, the order must be returned before a different judge.").

44. *Id.* § 5A-15(e).

against self-incrimination,⁴⁵ notice of the charges against her and an opportunity to be heard in her own behalf,⁴⁶ and time to prepare a defense.⁴⁷ Although not expressly provided in the statute, judicial decisions make clear that the criminal contemnor also is entitled to confront witnesses⁴⁸ and to be represented by appointed counsel if indigent.⁴⁹ The penalty for criminal contempt may be censure, imprisonment for up to thirty days, fines not exceeding \$500, or any combination of the three.⁵⁰

Article 2 of Chapter 5A defines civil contempt as a "[f]ailure to comply with an order of a court."⁵¹ The court may continue to hold the defendant in civil contempt as long as the order remains in force and the defendant is either currently able to comply with the order or is "able to take reasonable steps that would enable him to comply with the order."⁵² The alleged contemnor's failure to comply also must be willful.⁵³ Upon a finding of probable cause,⁵⁴ the court may initiate civil contempt proceedings either by notice or by a court order re-

45. *Id.*

46. *Id.* § 5A-15(a).

47. *Id.* (show cause order must specify a "reasonable time" for alleged contemnor to appear and defend herself).

In *Bloom v. Illinois* the United States Supreme Court determined that a jury trial must be provided to any criminal contemnor when the charge could result in a prison sentence of six months or more. 391 U.S. 194, 208-10 (1968). Because under North Carolina law the maximum prison sentence for criminal contempt is 30 days, there is no constitutional right to a jury trial in the state. See *Thompson v. Thompson*, 25 N.C. App. 79, 82, 212 S.E.2d 243, 244, *appeal dismissed*, 288 N.C. 120, 215 S.E.2d 606 (1975).

48. *Lowder v. Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981).

49. See, e.g., *Holt v. Virginia*, 381 U.S. 131, 136 (1965).

50. N.C. GEN. STAT. § 5A-12(a) (Supp. 1988). Because criminal contempt is a wrong against the state, all fines must be payable to the state. North Carolina courts cannot award private damages in a criminal contempt proceeding. See *In re Rhodes*, 65 N.C. 464, 465 (1871); *Glesner v. Dembrosky*, 73 N.C. App. 594, 599, 327 S.E.2d 60, 63 (1985). But see 17 AM. JUR. 2D *Contempt* § 113 (1964) (majority rule *contra*).

Appeal from a conviction for criminal contempt imposed by a superior court judge may be taken in the normal manner provided for appeals in criminal actions. N.C. GEN. STAT. § 5A-12 (1986). When the conviction is imposed by a district court judge, magistrate, or clerk, appeal is to a superior court judge for a hearing de novo. *Id.*; see *Michael v. Michael*, 77 N.C. App. 841, 843, 336 S.E.2d 414, 415 (1985).

51. N.C. GEN. STAT. § 5A-21(a) (1986).

52. *Id.* Reasonable measures might include liquidating assets, borrowing the money, or taking an available job. See *Teachey v. Teachey*, 46 N.C. App. 332, 335, 264 S.E.2d 786, 788-89 (1980) (reasonable measures would include "borrowing the money, selling defendant's mountain property in Virginia, or liquidating other assets"); N.C. GEN. STAT. § 5A-21 official commentary (1986) ("the person who does not have the money to make court-ordered payments but who could take a job which would enable him to make those payments, remains in contempt by not taking such a job"). But cf. *Self v. Self*, 55 N.C. App. 651, 653-54, 286 S.E.2d 579, 581 (1982) (evidence must show not only the ability to work but also that a job was available to him at the time).

In addition, the contempt continues only as long as the purpose of the order still may be served by compliance with the order. N.C. GEN. STAT. § 5A-21(a)(2) (1986). For example, a witness who refuses to testify at trial may be found in civil contempt and imprisoned until she agrees to testify. Her contempt should not continue beyond the end of the trial, however, since compliance would no longer serve the purpose of the order. See *Billings*, *supra* note 38, at 919.

53. See, e.g., *Jones v. Jones*, 52 N.C. App. 104, 111, 278 S.E.2d 260, 264 (1981) (element of willfulness is "retained by implication" in the new contempt statutes).

54. The probable cause may be based on a motion and sworn statement or affidavit of a person interested in the proceeding and must be given at least five days in advance unless good cause is shown. N.C. GEN. STAT. § 5A-23(a) (Supp. 1988); see, e.g., *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431, 434 (1988) (good cause shown to waive five-day notice requirement

quiring the alleged contemnor to appear and show cause.⁵⁵ The civil contempt statutes do not require that the due process protections available to criminal contemnors be incorporated into civil contempt proceedings.⁵⁶ Because imprisonment is available as a civil remedy, however, courts have extended to the civil contemnor some due process protections typically associated with criminal proceedings. A civil contemnor is entitled to the right against self-incrimination,⁵⁷ the right to confront witnesses,⁵⁸ the time to prepare a defense,⁵⁹ and the appointment of counsel for indigents when necessary to present the defendant's case or otherwise to ensure fundamental fairness.⁶⁰ A person found in civil contempt may be imprisoned as long as the contempt continues,⁶¹ but the judge must specify the action the contemnor can take to purge himself of the contempt.⁶² Because the civil contemnor must have the present ability to comply with this purge clause,⁶³ he is said to hold the key to his prison in his pocket.⁶⁴

Despite the North Carolina General Assembly's attempt to distinguish between the two types of contempt, the distinction remained consistently obscured by subsections 5A-12(d) and 5A-21(c), which indicate that both civil and criminal contempt can be found for the same conduct.⁶⁵ Neither subsection suggests that separate civil and criminal proceedings are necessary for each finding.⁶⁶

when defendant knew for months of particular charges against him and had ample time and opportunity to prepare his defense).

55. N.C. GEN. STAT. § 5A-23(a) (Supp. 1988). The availability of either notice or order to begin the proceeding is intended to make clear that a finding of civil contempt may be entered in the alleged contemnor's absence if he fails to appear, unless the court wants the alleged contemnor physically present so that he may be imprisoned immediately if he is found in contempt. Billings, *supra* note 38, at 917.

56. For a discussion of applicable due process protections of criminal contemnors, see *supra* notes 42-49 and accompanying text.

57. See, e.g., *Maness v. Meyers*, 419 U.S. 449, 464-65 (1975); *Allred v. Graves*, 261 N.C. 31, 34-35, 134 S.E.2d 186, 189-90 (1964); *Lowder v. Mills, Inc.*, 45 N.C. App. 348, 355, 263 S.E.2d 624, 628 (1980), *aff'd in part and rev'd in part on other grounds*, 301 N.C. 561, 273 S.E.2d 247 (1981).

58. See, e.g., *Lowder v. Mills, Inc.*, 301 N.C. 561, 583, 273 S.E.2d 247, 260 (1981).

59. See N.C. GEN. STAT. § 5A-23(a) (Supp. 1988) (requiring at least five days notice for defendant unless good cause is shown); see also *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 101, 370 S.E.2d 431, 434 (1988) (good cause shown when defendant knew the particular charges against him for months).

60. See *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 143 (1980); *Hodges v. Hodges*, 64 N.C. App. 550, 552, 307 S.E.2d 575, 577 (1983). Many states and several federal circuits hold that an indigent civil contemnor facing imprisonment automatically is entitled to appointed counsel. See, e.g., *Walker v. McClain*, 768 F.2d 1181, 1184-85 (10th Cir. 1986); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973); *Ottom v. Zaborac*, 525 P.2d 537, 538 (Alaska 1974); *McNabb v. Osmundson*, 315 N.W.2d 9, 11-14 (Iowa 1982); *Tetro v. Tetro*, 86 Wash. 2d 252, 254, 544 P.2d 17, 19 (1975); *Brotzman v. Brotzman*, 91 Wis. 2d 335, 336, 283 N.W.2d 600, 602 (1979); see also *Herrman & Donahue, Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M.L. REV. 276, 294 (1984) (arguing that indigents are by definition unable to comply with support orders but without appointed counsel may not be able to prove this inability).

61. N.C. GEN. STAT. § 5A-21(b) (1986).

62. *Id.* § 5A-23(e) (Supp. 1988); see *Bethea v. McDonald*, 70 N.C. App. 566, 570-71, 320 S.E.2d 690, 693 (1984) (an order for civil contempt that does not include a purge clause is defective and must be reversed on appeal).

63. See *supra* note 52 and accompanying text.

64. See, e.g., *State v. King*, 82 Wis. 2d 124, 130, 262 N.W.2d 80, 83 (1978).

65. N.C. GEN. STAT. §§ 5A-12(d), 5A-21(c) (1986).

66. See, e.g., *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 99-100, 370 S.E.2d 431, 433 (1988) (finding defendant in both civil and criminal contempt for the same conduct at a single hearing).

Therefore, despite the new statute's delininations, it remained impossible to determine whether the contempt was civil or criminal. That the contempt was found at civil proceedings or criminal proceedings offered no guidance on this issue, for criminal contempt could be found during the course of civil contempt proceedings, and *vice versa*.⁶⁷ Nevertheless, the court of appeals began to draw the distinction based on the statutory differences between the two types of contempt, including the nature of the procedures used in the proceeding,⁶⁸ the nature of the sanction imposed,⁶⁹ and the nature of the order commencing the proceedings.⁷⁰ In some cases the appellate court offered no reason at all for classifying the contempt as civil, presumably relying exclusively on the intent of the parties and the trial court.⁷¹

The various efforts at classifying civil and criminal contempt tend to obscure the purpose for drawing the distinction. The court in *Bishop* noted that "the purpose of the [criminal/civil] classification is simply to say that criminal type sentences should not be meted out where criminal type protections are not afforded and that coercive sentences shall not be meted out where there is nothing to coerce."⁷² To achieve this purpose, a proper distinction must incorporate the due process rights required for the criminal contempt defendant.

The purpose test as formulated in *Dyer* and *O'Briant v. O'Briant*⁷³ fails to encapsulate these due process considerations because punitive and coercive purposes overlap significantly in most contempt orders. Although one purpose of imprisoning a contemnor until he complies with the court order may be to coerce compliance with that order, the term of imprisonment also has the effect of punishing the contemnor for failure to comply with the order before contempt proceedings became necessary. Likewise, although the obvious purpose of imprisoning a contemnor for a definite term is punitive, the intended effect of the punishment is to coerce the contemnor to modify his behavior in the future. The coercive purpose for the prison sentence, however, does not change the fact that the sanction is criminal and the contemnor must be afforded due process protections before the sanction may be imposed.⁷⁴

Rather than attempting to ascertain the trial court's remedial or punitive

67. *Id.* at 100, 370 S.E.2d at 434 (finding the defendant in criminal contempt at a civil contempt proceeding).

68. *Betha v. McDonald*, 70 N.C. App. 566, 567, 320 S.E.2d 690, 691 (1984) (the court assumed that the contempt order was for civil contempt because it was determined in a civil proceeding).

69. *See Bennett v. Bennett*, 71 N.C. App. 424, 427, 322 S.E.2d 439, 441 (1984) ("The Court did not say whether it found the defendant in civil or criminal contempt. It punished the defendant as if he was in civil contempt.").

70. *See, e.g., Mather v. Mather*, 70 N.C. App. 106, 108-09, 318 S.E.2d 548, 550 (1984) (court assumed that a proceeding initiated by a motion alleging criminal contempt was for criminal contempt).

71. *See, e.g., Frank v. Glanville*, 45 N.C. App. 313, 314-16, 262 S.E.2d 677, 679 (1980).

72. *Bishop*, 90 N.C. App. 499, 503, 369 S.E.2d 106, 108 (1988) (quoting DOBBS, LAW OF REMEDIES § 2.9, at 97 (1973)).

73. *See Dyer*, 213 N.C. 634, 197 S.E. 157; *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985). For a discussion of the purpose test, see *supra* text accompanying notes 29-32.

74. *See Hicks ex rel. Feiock v. Feiock*, 108 S. Ct. 1423, 1431-32 (1988); *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418, 443 (1911).

motivations, the court in *Bishop* offered a bright-line rule: "when the sanction is punitive the contempt is criminal, and, conversely, when the sanction is coercive the contempt is civil."⁷⁵ Unfortunately this bright line distinction does not reflect the relevant due process considerations any better than did the old purpose test. To classify an act as criminal contempt because criminal sanctions are imposed states a mere tautology.⁷⁶ Under this reasoning, the due process protections that must be afforded the defendant at the contempt proceedings depend on what type of sanction the trial court imposes.⁷⁷ Because the North Carolina contempt statutes allow the judge to find criminal contempt in civil contempt proceedings,⁷⁸ and, likewise, civil contempt in criminal contempt proceedings,⁷⁹ the type of sanction to be imposed cannot be determined until the conclusion of the proceedings. At the conclusion of the proceedings, however, it is obviously too late to adjust the procedures to fit the sanction imposed.⁸⁰ Thus, the *Bishop* bright-line rule neither informs the trial court what procedures should be employed during the proceedings nor guarantees that criminal sanctions will be imposed only when criminal due process protections have been afforded.

The court in *Bishop* apparently failed to recognize the nature of the problem confronting it. The purpose of the civil/criminal distinction is to make certain that "criminal type sentences" are imposed only when "criminal type protections" are afforded to the alleged contemnor during the proceedings.⁸¹ The solution, then, is to develop a procedural scheme to guide the trial court's treatment of contempt that ensures this purpose will be achieved. The *Bishop* court, which approached the problem exclusively at the definitional level, offers no such scheme.⁸²

One solution to the problem, adopted in Wisconsin, is to limit the availability of criminal sanctions to contempt proceedings using criminal procedures.⁸³ In civil proceedings the court can impose only coercive sanctions. With this approach the character of the sanction imposed becomes irrelevant because the civil/criminal distinction turns on the need for procedural safeguards.⁸⁴ Accordingly, at a criminal contempt proceeding the court may impose either coercive or punitive relief.

Despite the practicality of the Wisconsin approach, the North Carolina General Assembly did not adopt this procedural arrangement when it enacted subsection 5A-23(g), which states:

75. *Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109.

76. See Note, *Contempt of Court: Some Considerations for Reform*, 1975 WIS. L. REV. 1117, 1121 (1985).

77. See Martineau, *Contempt of Court: Eliminating the Confusion Between Civil and Criminal Contempt*, 50 U. CIN. L. REV. 677, 684 (1981).

78. N.C. GEN. STAT. § 5A-23(g) (Supp. 1988).

79. *Id.* § 5A-12(d).

80. See Martineau, *supra* note 77, at 684.

81. *Bishop*, 90 N.C. App. at 503, 369 S.E.2d at 108.

82. See Note, *supra* note 76, at 1130 ("An approach purely at the definitional level is like a knife cutting water; it could only add to the confusion already prevalent in the law of contempt.").

83. See WIS. STAT. ANN. §§ 785.01 to -.03 (West 1988); see also Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 246 (1971) (recommending such an arrangement).

84. See Note, *supra* note 76, at 1131 n.94.

A judge conducting a hearing to determine if a person is in civil contempt may at that hearing, upon making the required findings, find the person in criminal contempt for the same conduct, regardless of whether imprisonment for civil contempt is proper in the case.⁸⁵

As the Official Commentary following this subsection explains, the statute allows a judge who has "begun a *civil contempt hearing* to continue and find the [defendant] in *criminal contempt*" if the facts support such a conclusion.⁸⁶ The judge may wait until the conclusion of the evidence before electing to impose civil or criminal sanctions, or both. This flexibility is particularly useful in civil nonsupport cases such as *Bishop*. Although the dominant purpose of such proceedings is to coerce compliance with the support order, the evidence sometimes indicates that the defendant has deliberately pauperized himself to avoid the support obligation.⁸⁷ In these instances the defendant does not have the present ability to pay and thus cannot be held in civil contempt.⁸⁸ Because the defendant had the ability to pay the support payments when ordered by the court and willfully failed to do so, however, the evidence does establish criminal contempt.⁸⁹ Subsection 5A-23(g) permits the judge to impose a criminal sanction in this situation without the need for a separate criminal proceeding on the same issue.⁹⁰

The problem with the North Carolina approach is that it allows the trial court to impose criminal sanctions without affording the defendant criminal constitutional safeguards. The apparent solution, recommended by several commentators, is to insist that the trial court apply the due process protections required in criminal contempt proceedings in any civil proceeding that may result in criminal sanctions.⁹¹ Although this solution would resolve the due process problem, it is inequitable for other reasons. If criminal procedures were used in contempt proceedings for nonsupport, the plaintiff necessarily would have to bear the burdens of production and persuasion on every issue.⁹² Moreover, the

85. N.C. GEN. STAT. § 5A-23(g) (1986).

86. *Id.* § 5A-23 official commentary (1986) (emphasis added).

87. *See, e.g.,* *Faught v. Faught*, 67 N.C. App. 37, 46, 312 S.E.2d 504, 509, *disc. rev. denied*, 311 N.C. 304, 317 S.E.2d 680 (1984); *Williford v. Williford*, 56 N.C. App. 610, 612, 289 S.E.2d 907, 909 (1982).

A similar situation arises when the defendant consistently pays the arrearage on the day before the contempt hearing. Because no support obligation remains to be coerced, the court cannot find the defendant in civil contempt. Because he willfully failed to comply with the obligation when it became due, however, a finding of criminal contempt would be appropriate. *See, e.g.,* *Hudson v. Hudson*, 31 N.C. App. 547, 551, 230 S.E.2d 188, 188-89 (1976) (payment between filing date and the hearing).

88. *See, e.g.,* *Faught*, 67 N.C. App. at 46, 312 S.E.2d at 509.

89. *Id.*

90. *See, e.g.,* *M.G. Newell Co. v. Wyrick*, 91 N.C. App. 98, 100, 370 S.E.2d 432, 434 (1988) (finding the defendant in criminal contempt at a purely civil contempt proceeding).

91. *See, e.g.,* *Dobbs*, *supra* note 83, at 246; *Ennis & Mason, The Use of Contempt to Enforce Child-Support Orders in North Carolina* 17, SPECIAL SERIES—UNIVERSITY OF N.C. INST. OF GOV'T (1986).

92. In criminal cases, the burdens of production and persuasion cannot be shifted to the defendant on any element of the offense because to do so would undercut the prosecution's burden to prove guilt beyond a reasonable doubt. *See, e.g.,* *Ulster County Court v. Allen*, 442 U.S. 140, 167 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 701-02 (1975).

plaintiff would have to prove each issue beyond a reasonable doubt rather than by the preponderance of the evidence standard applicable in civil cases. As Justice O'Connor forcefully argued in her dissent in *Hicks*, such an arrangement would turn a support order into "a worthless scrap of paper."

Contempt proceedings will often be useless if the parent seeking enforcement of valid support orders must prove that the obligor can comply with the court order. The custodial parent will typically lack access to the financial and employment records needed to sustain the burden imposed . . . , especially where the noncustodial parent is self-employed.⁹³

By contrast, when civil procedures are employed in civil contempt proceedings, the defendant bears the initial burden to come forward with some explanation for his nonpayment.⁹⁴ In *Plott v. Plott*⁹⁵ the North Carolina Court of Appeals held that defendants also bear the ultimate burden of proof on the issues of inability to pay and willfulness.⁹⁶

The *Bishop* case offered the court of appeals an ideal opportunity to develop procedures to lead trial courts in their attempts to provide defendants with the necessary due process protections while at the same time maintaining an efficient mechanism to enforce their support orders. Because the court failed to offer a solution, the general assembly should consider legislative action. One possible solution would be to bifurcate the nonsupport contempt proceeding into separate civil and criminal stages. The proceeding would begin by using civil procedures and progress to a determination whether a finding of civil contempt is appropriate. If in the opinion of the court the facts merited a consideration of criminal contempt then the proceeding would continue, thereafter using criminal procedures to afford the alleged contemnor full constitutional safeguards.⁹⁷ The details of such a proposal would have to be resolved before a critical analysis of its merits seriously could be undertaken.⁹⁸ The *Bishop* bright-line rule, by contrast, simplifies the civil/criminal distinction for the appellate courts and ap-

93. *Hicks ex rel. Feiock v. Feiock*, 108 S. Ct. 1423, 1436 (1988) (O'Connor, J., dissenting). For a discussion of *Hicks*, see *supra* note 22.

94. See *Ennis & Mason*, *supra* note 91, at 14-15; Note, *The Coercive Function of Civil Contempt*, 33 U. CHI. L. REV. 120, 131 (1965).

95. 74 N.C. App. 82, 327 S.E.2d 273 (1985).

96. *Id.* at 84, 327 S.E.2d at 274. "The statutes governing proceedings for civil contempt in child support cases clearly assign the burden of proof to the party alleged to be delinquent." *Id.* at 85-86, 327 S.E.2d at 275. This case may be misleading, however, for defendant offered no explanation for his failure to comply with the order. Whether the defendant must carry the burden of proof in the more typical situation in which the defendant offers some excuse and both sides contest its merits remains uncertain. See *Ennis & Mason*, *supra* note 91, at 13-17 (detailed discussion of the burdens of producing evidence and proof in civil contempt cases).

97. An obvious difficulty with this suggestion is the possibility that in attempting to defeat the civil contempt charge the defendant might offer evidence which would incriminate him later in the criminal stage of the proceeding. As noted at *supra* text accompanying note 57, however, the alleged contemnor may invoke the right against self-incrimination in a civil proceeding just as he can in a criminal proceeding. Nevertheless, the bifurcation well might increase the complexity of the legal issues involved and therefore require the appointment of counsel for indigent defendants in civil proceedings more often than was previously thought necessary. See *supra* note 60 and accompanying text.

98. One such detail will be the extent to which the parties will be precluded from relitigating in the criminal phase issues already decided in the civil phase.

pellate advocates, but fails to provide trial courts with the guidance essential to a satisfactory treatment of contemptuous behavior.

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