Right to Counsel in Civil Contempt Proceeding for Violation of Custody Order

When a court is considering whether to hold a party in civil contempt for the failure to comply with provisions in a child custody order, must the court inform that parent that he has the right to a court-appointed attorney if he wants an attorney and is unable to afford one?

The court of appeals recently held that the answer to that question must be determined on a "case-by-case basis" with appointed counsel being required only "where assistance of counsel is necessary for the adequate presentation of the merits, or to otherwise insure fundamental fairness."

***Wilson v. Guinyard* (NC App June 20, 2017)**

Mother Ms. Wilson initiated civil contempt proceedings against father Mr. Guinyard for alleged violations of visitation provisions in custody order. Father lived in Charleston, South Carolina and mother lived in Durham, North Carolina. The custody order called for exchanges for visitation to be made at South of the Border on specified times on certain Fridays and Sundays. Mother alleged father was habitually late for these exchanges.

Two months before the contempt hearing, father signed a consent to the withdrawal of his counsel and one week before the hearing, he requested a continuance to retain new counsel. The trial court denied his request and proceeded with the contempt hearing. The trial court held father in civil contempt and provided he could purge the contempt by picking up and dropping the child off at the mother's home for the next three weekend visitations. The order specified that if father was more than 30 minutes late for any of these three exchanges, his next visitation would be forfeited and he would be jailed for 72 hours.**

On appeal, father argued the trial court erred in failing to inquire into his desire and eligibility for court appointed counsel, stating:

"The rule of this State is that "[w]here a defendant faces the potential of incarceration if held in contempt, the trial court must inquire into the defendant's desire for and ability to pay for counsel to represent him as to the contempt issues." *D'Alessandro v. D'Alessandro*, 235 NC App 458 (2014); *King v. King*, 144 NC App 391 (2001). He can waive his right to representation but the record must reflect that he was advised of his right and he must voluntarily waive it." *Id.*

The court of appeals rejected father's argument and held he had no right to counsel under the circumstances of this case. The court acknowledged that Due Process requires that "a defendant should be advised of his or her right to have appointed counsel where the defendant cannot afford counsel on his own, and 'where the litigant may lose his physical liberty if he loses the litigation'

[citations omitted].” However, the court held that it is up to the litigant facing contempt to show “(1) he is indigent, and (2) his liberty interest is at stake,” and explained that the determination of whether a liberty interest is at stake “is a determination made on a case-by-case basis.” Citing *Hodges v. Hodges*, 64 NC App 550 (1983), the court of appeals further explained that when a civil proceeding may result in imprisonment, “appointment of counsel for indigents is required only where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise insure fundamental fairness.” In this case, the court of appeals held appointment of counsel was not necessary because defendant had the ability to comply with the purge conditions as imposed and the case presented no “unusually complex issues of law or fact.” The court offers no additional guidance on what type of issues would be sufficiently complex to require the appointment of counsel.

What about *McBride v. McBride*?

The North Carolina Supreme Court held in *Jolly v. Jolly*, 300 NC 83 (1980), that Due Process does not require the appointment of counsel in civil contempt proceedings arising out of the nonpayment of child support as the impact on a respondent’s liberty interest is slight. Because a court is required to determine the respondent has the actual present ability to comply with any purge condition imposed in a civil contempt order, the respondent “holds the keys to the jail” in that he simply needs to comply with the court order to avoid imprisonment.

However, when the court revisited the issue in the case of *McBride v. McBride*, 334 NC 124 (1993), the North Carolina Supreme Court determined that the focus in *Jolly* was “misplaced,” at least in the context of civil contempt proceedings arising out of the nonpayment of child support. According to the court, “experience” showed that respondents in these civil contempt proceedings often are incarcerated without the trial court first determining they have the ability to pay the amount ordered as a purge. The court reasoned that because respondents do not “hold the keys to the jail” if they do not have the actual ability to pay the purge, assistance of counsel is necessary to insure that they do not go to jail unless they actually have the ability to pay.

The *McBride* court therefore held that “absent appointment of counsel, indigent contemnors may not be incarcerated for failure to pay child support.” The court instructed trial courts to “assess the likelihood of incarceration” at the outset of the contempt hearing and, if incarceration is likely, “inquire into the [respondent’s] desire for counsel and the ability to pay.”

Does *McBride* apply in custody cases?

While *McBride* spoke directly to concerns arising in child support enforcement cases, the court of appeals has applied the holding in *McBride* to vacate a civil contempt order arising out of the violation of a custody order. In *D’Alessandro v. D’Alessandro*, 235 NC App 458 (2014), the court of appeals broadly held that “when a defendant faces the potential of incarceration if held in contempt, the court must inquire into defendant’s desire for and ability to pay for counsel to

represent him as to the contempt issues." Because the trial court failed to conduct this inquiry in this case, the court of appeals "reversed both the contempt of the custody order and the contempt of the child support order." The court did not explicitly address the issue of whether *McBride* was limited to the child support enforcement proceedings.

However, in the recent *Wilson v. Guinyard* opinion, the court of appeals held that *McBride* applies "specifically to civil contempt proceedings for nonsupport" and adopted the standard in *Jolly* for determining whether appointed counsel is required in other types of civil contempt proceedings. Even though the court in *Wilson* cited the *D'Alessandro* case, the court nevertheless states that the holding in *McBride* has not been applied outside of the context of contempt for failure to pay child support.

So until the supreme court tells us otherwise, it appears that respondents facing civil contempt arising out of the failure to comply with the terms of a custody order are not entitled to court-appointed counsel, at least absent the existence of "unusually complex issues of law or fact." Be sure to read the comments posted below, especially the one from my colleague John Rubin. I agree with John that the court of appeals clearly was influenced in this case by the belief that father was not indigent, and I also have wondered why GS 7A-451 has not been applied to civil contempt cases by our appellate courts.

**According to *Reynolds v. Reynolds*, 356 NC 287 (2002), adopting dissent in court of appeals, 147 NC App 566 (2001), this contempt order appears to be criminal contempt rather than civil contempt. In *Reynolds*, the dissent from the court of appeals adopted by the supreme court explained that when the court imposes a specific period of incarceration that is "suspended" upon the contemnor's compliance with conditions, the order is more in the nature of criminal rather than civil contempt. In this case, the father was at risk for a 72-hour confinement until he completed the three visitation exchanges as ordered; it was in essence a 72-hour sentence suspended on the condition that he comply with the conditions of the next three visitations. Appointment of counsel always is required for indigent respondents in criminal contempt cases. GS 7A-451(a)(1); *State v. Wall*, 49 NC App 678 (1980). The issue of whether the contempt order in *Wilson* actually was an order for civil contempt was not addressed by the court.