Published by the Institute of Government, The University of North Carolina at Chapel Hill

No. 94/05
May 1994

Administration of Justice Memorandum

District Judges, Chief District Judges, Prosecutors, Superior Court Clerks, and Subscribers

McBride v. McBride: Implementing the Supreme Court's Decision Requiring Appointment of Counsel in Civil Contempt Proceedings

John L. Saxon

On July 2, 1993, the North Carolina Supreme Court handed down its decision in the case of *McBride v. McBride*.[1] The *McBride* decision overruled the precedent established by the 1983 decision in *Jolly v. Wright*[2] and held that indigent defendants may not be incarcerated in civil contempt proceedings in child support cases unless they have been provided a court-appointed attorney or have waived their right to legal representation.

Although the administrative and financial impact of the *McBride* decision may not have been as significant as first anticipated, the decision clearly has affected the way in which contempt proceedings in child support cases are handled by North Carolina's court system.

This memorandum provides a brief overview of the supreme court's decision in the *McBride* case. It also discusses the recommendations of a special review committee of the Administrative Office of the Courts and how trial courts can implement the supreme court's decision requiring the appointment of counsel for indigent defendants in civil contempt proceedings in child support cases.[3]

The Supreme Court's Decision

On January 12, 1989, Terry McBride signed a voluntary support agreement in which he agreed to pay $40.00 per week in child support for his minor child. The agreement was approved by a district court judge and entered as a court order for child support pursuant to Section 110-133 of the North Carolina General Statutes (hereinafter G.S.).

On June 7, 1991, Mr. McBride appeared before the Davidson County District Court in response to an order to show cause why he should not be held in contempt for failing to make the child support payments required by the 1989 child support order. Like most defendants in contempt proceedings involving nonsupport, McBride was not represented by an attorney at the June 7 hearing. The presiding judge did not make any inquiry regarding his indigency or his need for legal representation, and consequently did not appoint an attorney to defend McBride in the contempt proceeding.

The district court judge found that Mr. McBride owed $1,380.46 in past-due child support payments under the 1989 order, found him in civil contempt[4] based on his failure to pay the full amount of child support required by the 1989 child support order, and ordered that he be held in the county jail until he purged himself of contempt by paying the entire $1,380.46 arrearage. The district court's order, however, did not make any findings of fact with respect to whether McBride *willfully* failed to pay child support or whether he had the *present ability* to pay all or part of the past-due support.[5]

Mr. McBride remained in jail until July 2, 1991, when he gave notice of appeal, obtained a stay of execution of the June 7 order, and was released.

On appeal, counsel for McBride[6] argued that the district court erred in failing to make findings and a determination regarding his entitlement to court-appointed counsel as required by the supreme court's decision in *Jolly v. Wright*.[7] Under the *Jolly* decision, trial courts were required to appoint counsel for indigent defendants in civil contempt proceedings involving nonpayment of court-ordered child support *if* the court determined that legal representation was necessary for an adequate presentation of a defense or otherwise to ensure fundamental fairness. The court of appeals, however, held that the *Jolly* decision did not require the trial court to make explicit findings with respect to an indigent defendant's right to court-appointed counsel, or to make a determination of the issue if the defendant failed to request legal representation.[8] Instead, the appellate court concluded that, under the *Hodges* and *Daugherty* decisions,[9] due process is satisfied if the appellate court, rather than the trial court, engages in an after-the-fact *Jolly* analysis to determine whether a defendant is entitled to court-appointed counsel.[10] Finding no reversible error, the court of appeals affirmed the district court's order, vacated the stay of execution, and ordered that Mr. McBride be remanded to confinement in the county jail pursuant to the district court's order.

McBride, however, filed an appeal of right with the North Carolina Supreme Court alleging that the case raised a substantial question of constitutional law.[11] In the supreme court, McBride's attorney mounted a direct challenge to the *Jolly* decision, arguing that the due process rights of indigent defendants in civil contempt proceedings are violated by incarcerating them without providing them with legal representation. The supreme court agreed, overruling its prior decision in *Jolly v. Wright* and holding that the due process clause of the Fourteenth Amendment to the U.S. Constitution requires that, "absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages."[12]

Entitlement to Court-Appointed Counsel under *McBride*

The *McBride* decision relies heavily on the U.S. Supreme Court's decisions in *Lassiter v. Durham County Department of Social Services*[13] and *Matthews v. Eldridge*.[14]

In *Lassiter*, the U.S. Supreme Court emphasized that, in determining whether due process requires the appointment of counsel for an indigent defendant in a particular type of proceeding, the fundamental question is whether the proceeding involves the potential deprivation of personal liberty or freedom, not whether the proceeding is labeled "civil" or "criminal."[15] The *Lassiter* decision also suggested that, under the due process clause, there is a presumption that an indigent defendant is entitled to appointed counsel if the proceeding may result in deprivation of his or her personal liberty.

Applying the *Lassiter* presumption and the *Matthews v. Eldridge* analysis, the supreme court concluded in *McBride* that (1) civil contempt proceedings involve the potential deprivation of a defendant's liberty; (2) labeling contempt proceedings as "civil" rather than "criminal" is immaterial; and (3) although a defendant in a civil contempt proceeding can obtain his or her release from incarceration by complying with "purge" conditions, the risk of an erroneous deprivation of personal liberty is high because trial courts often fail to make required determinations regarding the present ability of defendants to comply with purge conditions in child support cases.[16]

Accordingly, the supreme court held that an indigent defendant may not be incarcerated for civil contempt for failure to pay court-ordered child support unless the court appoints an attorney to represent the defendant or the defendant waives his right to legal representation.[17]

The *McBride* decision constitutes a significant expansion of the right of indigent defendants to court-appointed counsel in civil contempt proceedings. However, it stops short of requiring that attorneys be appointed to represent all indigent defendants in all civil contempt proceedings in child support cases.

Under *McBride*, trial courts are directed to appoint counsel for defendants in civil contempt proceedings if the court determines (1) that the defendant may be incarcerated as a result of the proceeding; (2) that the defendant is unable to afford legal representation; and (3) that the defendant has not waived his right to legal representation. Each of these factors necessarily must be determined on a case-by-case basis by the trial court. Unfortunately, however, the *McBride* decision does not provide a great deal of practical guidance to trial courts with respect to how they should determine whether these circumstances exist in specific cases.

AOC's Response to the *McBride* Decision

Following the *McBride* decision, Jim Drennan, director of the Administrative Office of the Courts (AOC), appointed a special committee to review the implications of the decision for North Carolina's court system and to make recommendations regarding how the court system should implement the supreme court's decision. The committee was chaired by Judge Ken Titus of Durham, and consisted of district court judges, clerks of superior court, a public defender, AOC staff, and faculty from the Institute of Government.

Specifically, the AOC *McBride* committee was charged with (1) recommending criteria to be used by trial courts in determining whether defendants are likely to be incarcerated in civil contempt proceedings in child support

cases; (2) suggesting procedures for determining the entitlement of indigent defendants to appointed counsel in such cases; (3) considering alternative methods of providing legal representation to indigent defendants in these cases; and (4) determining when and how costs of court-appointed counsel for indigent defendants in these cases might be recovered by the state.

The committee's report was submitted to the AOC on November 3, 1993, and since that time many of the committee's recommendations have been implemented by the AOC and by district court judges throughout the state.

The committee's recommendations, which are discussed below, were intended to comply with the requirements of the *McBride* decision while at the same time avoiding unnecessary delay in the adjudication of contempt proceedings in child support cases, promoting the effective and efficient use of judicial and financial resources, and limiting appointment of counsel to those cases in which the defendant is likely to be incarcerated, wants legal representation, and is unable to retain an attorney at his own expense. In making its recommendations, the committee also emphasized that, based on the schedules, caseloads, personnel, resources, and needs in each county, trial courts should retain the flexibility and discretion to develop alternative or additional procedures relating to the appointment of counsel in civil contempt proceedings in child support cases. The committee's recommendations, therefore, are only suggested guidelines for dealing with the issues raised by the *McBride* decision.

Notifying Defendants of Their Right to Counsel in Contempt Proceedings

Although the *McBride* decision did not address the questions of *when* or *how* defendants should be advised of their right to counsel, the supreme court obviously intended that indigent defendants be given adequate notice of their right to counsel.[18] Therefore the *McBride* committee recommended that *every* defendant in a contempt proceeding in a child support case be advised that (1) he may be incarcerated if he is found in contempt, (2) he may retain counsel at his own expense, and (3) he will be entitled to court-appointed counsel if he is unable to afford a lawyer and if the court determines that he may be incarcerated as a result of the proceeding.[19]

First, the committee recommended that notice of the defendant's right to legal representation be included in all show cause orders served on defendants in civil contempt proceedings.[20] The committee also recommended that judges orally advise defendants in all contempt proceedings for nonsupport of their right to legal representation and the procedures for obtaining court-appointed counsel when each case is called for hearing.[21]

Procedures for Determining a Defendant's Right to Counsel under *McBride*

To determine whether a defendant has a right to court-appointed counsel, the *McBride* committee recommended that district court judges use a three-step process.

The committee suggested that the *first* determination by the court should be whether an unrepresented defendant is willing to waive his right to counsel. If the defendant is unwilling to waive his right to counsel, the *second* determination by the court should be the potential likelihood of the defendant's being incarcerated if he is found in contempt. If the defendant has not waived his right to counsel and the court determines that there is a significant possibility that the defendant will be incarcerated if he is found in contempt, the *third* determination by the court should be whether the defendant is indigent and unable to afford legal representation in connection with the proceeding.

Waiver of Counsel under McBride

The committee assumed that most defendants in contempt proceedings would waive their right to legal representation even if they face possible incarceration as a result of the proceeding. Therefore the committee suggested that, *prior* to determining whether a defendant is indigent and may be incarcerated as a result of the proceeding, judges determine whether the defendant is willing to waive his right to legal representation in connection with the contempt proceeding.[22] By addressing the issue of waiver first, judges may be able to avoid making time-consuming determinations regarding indigency and potential incarceration in the vast majority of contempt proceedings, which, in turn, should minimize delays and backlogs in the child support dockets of district courts.

Although *McBride* recognizes that an indigent defendant's right to court-appointed counsel may be waived,[23] the law requires that a defendant's waiver of legal representation must be *knowing* and *voluntary*.[24]

In order for the waiver of counsel to be made *knowingly*, a defendant must have been informed that he has a legal right to counsel. As noted above, the *McBride* committee suggested that written notice of the defendant's right to counsel be included in the show cause order that is served on the defendant. In addition, when each case is called for hearing, the judge should ask the defendant whether he is represented by an attorney, and if he is not, whether he wants a court-appointed attorney or is willing to waive legal representation. The judge also should advise the defendant of the consequences of the waiver, including the possibility that the defendant will be incarcerated if he is found in contempt.

Under G.S. 7A-457(a), the waiver of legal representation by an indigent defendant must be in writing and accompanied by findings on the record that the defendant acted with

full awareness of his rights and of the consequences of the waiver.[25] Therefore if the defendant in a contempt proceeding is willing to waive his right to legal representation, the judge should require the defendant to sign a written waiver of counsel (similar to AOC form CR-227). The waiver also should be signed by the judge and include findings by the court that the defendant was informed regarding the nature of the proceeding, his right to legal representation in the proceeding, and the consequences of the waiver.

If the defendant is not willing to waive counsel, the court should proceed to the second step of the assessment—the likelihood of the defendant's being incarcerated as a result of the proceeding.

Determining the Likelihood of Incarceration

Under G.S. 5A-21(b), a defendant who is found in civil contempt for failure to comply with a child support order "may be imprisoned as long as his civil contempt continues."

Under *McBride*, the trial court's failure to appoint counsel for an indigent defendant in a civil contempt proceeding involving nonsupport does not, in and of itself, violate the defendant's right to due process. Instead, the defendant's due process rights are violated only if the court *actually incarcerates* an indigent defendant for civil contempt without either appointing an attorney to represent the defendant or obtaining a waiver of the defendant's right to legal representation. Nonetheless, under the *McBride* decision, trial courts are required, at the *outset* of a civil contempt proceeding for nonsupport, to "assess the *likelihood* that the defendant *may be incarcerated* [emphasis added]" as a result of the hearing.[26]

Although the supreme court's opinion does not contain any specific guidelines for determining how, in a particular case, the trial court should assess the likelihood of the defendant's being incarcerated, the most obvious indicator is the probability of the defendant's being found in civil contempt.[27] Clearly, the court may not order the defendant incarcerated unless the defendant *willfully* failed to pay court-ordered child support *and* has the *present ability* to comply (or take reasonable measures to comply) with the child support order.[28]

Therefore one way to assess the likelihood of the defendant's incarceration in a civil contempt proceeding would be to preview the evidence to determine whether it is sufficient to support a finding of civil contempt. Obviously there is little likelihood that a defendant will be incarcerated for civil contempt, and therefore no need to appoint counsel, if there is insufficient evidence that the defendant (1) willfully failed to make court-ordered child support payments or (2) has the present ability to pay all or part of the accrued arrearages or to take other reasonable measures to comply with the order.

Nonetheless, the *McBride* committee recommended that, in determining the likelihood of a defendant's incarceration, judges *not consider* the sufficiency of the evidence relating to the willfulness of the defendant's failure to make child support payments as required by the order or his present ability to purge his contempt by paying all or part of the accrued arrearages. The committee reasoned that considering this evidence at the *outset* of the hearing in connection with the issue of appointment of counsel would require the court to engage in a time-consuming preview of the evidence in order to determine whether to appoint an attorney, and then to hear the same evidence again to determine whether to find the defendant in civil contempt, thereby raising questions about the presiding judge's impartiality in hearing the merits of the contempt matter, as well as consuming scarce judicial resources.

Instead, the committee suggested that the court should *assume* that the defendant willfully failed to pay support and that he has the present ability to comply with the order. If the court assumes that the defendant will be found in civil contempt, the judge's focus then would be whether, in this particular case, incarceration (or the threat of incarceration) is *necessary* to coerce the defendant's compliance with the underlying child support order. Although incarceration is always an *available* remedy in civil contempt proceedings—and is the most frequent means of coercing the defendant's compliance with an existing child support order—a judge may find a defendant in civil contempt and order him to purge himself of his contempt without ordering that he be incarcerated.[29]

In determining whether incarceration is a necessary and appropriate remedy in civil contempt proceedings in child support cases, judges might consider a number of factors, such as (1) whether the moving party is requesting that the defendant be incarcerated if he is found in contempt; (2) the number and frequency of prior show cause orders issued against the defendant; (3) the defendant's past history of compliance with the underlying child support order; (4) whether there are other enforcement remedies that can be used in lieu of, or in addition to, contempt; and (5) whether the defendant has been incarcerated in connection with prior contempt proceedings.[30]

Of course different judges may consider these factors quite differently. For example, one judge might decide that a defendant's alleged failure to pay child support warrants incarceration for civil contempt even if the amount of the arrearage is relatively small or no prior show cause orders have been issued against the defendant, while another judge might order incarceration only if a relatively large arrearage is owed, no other enforcement mechanisms are available, or a number of show cause orders have been issued against the defendant.

Ultimately, therefore, determining the likelihood of incarceration is an inherently subjective evaluation that must be left to the sound discretion of each district court judge on a case-by-case basis.[31]

Determining Indigency

If an unrepresented defendant in a contempt proceeding has not waived counsel and the court determines that there is a significant possibility that the defendant would be incarcerated if he is found in contempt, the *third*, and final, determination that the court must make is whether the defendant is indigent. By screening out cases in which the defendant has signed a waiver of legal representation or in which the court has determined that incarceration is not likely, courts should be able to minimize the time and paperwork that otherwise would be necessary to make indigency determinations for dozens or hundreds of defendants in nonsupport contempt proceedings.

G.S. 7A-450(a) defines an indigent person as "a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding. . . ." There is, however, no uniform, objective standard for determining *how indigent* a defendant must be in order to obtain court-appointed counsel in criminal or other proceedings.[32] Therefore the *McBride* committee did not recommend any guidelines or definitions of indigency with respect to entitlement to court-appointed counsel in contempt proceedings.

In determining indigency, judges should follow the rules set forth in the Regulations Relating to Appointment of Counsel for Indigent Defendants promulgated by the North Carolina State Bar.[33] In accordance with these rules, judges should require defendants who request court-appointed counsel in civil contempt proceedings to execute an Affidavit of Indigency similar to the form used in criminal cases (AOC-CR-226).[34] The chief district court judge, in consultation with the clerk of superior court, should determine who (e.g., the judge's secretary, magistrates, courtroom clerks, indigency screeners, or other court personnel) will be responsible for interviewing the defendant, completing the affidavit, verifying the financial information provided by the defendant, and acknowledging the defendant's execution of the affidavit.[35] However, the presiding judge should examine each defendant under oath to determine the truth of the statements made in the affidavit, and is responsible for determining whether, based on the affidavit and other evidence, the defendant is indigent.[36]

Orders Granting or Denying Requests for Court-Appointed Counsel

The court's determination granting or denying court-appointed counsel should be documented on an Order of Assignment or Denial of Counsel (AOC-CR-224) or by a written order that is signed by the presiding judge and included in the case file.[37] If the defendant's request for appointed counsel is denied, the order should contain findings that indicate the basis upon which the court determined that the defendant was not entitled to court-appointed counsel. If the request for court-appointed counsel is granted, the order should indicate the name of the attorney who will be appointed in the case, and, if the case is continued in order to allow the appointed attorney adequate time to prepare a defense, the date on which the case will be heard.

Providing Legal Representation to Indigent Defendants in Civil Contempt Proceedings

One of the most important issues raised by the *McBride* decision is the question of *who* will provide legal representation to indigent defendants in civil contempt proceedings in child support cases.

The *McBride* committee considered several methods of appointing counsel in these cases, including case-by-case appointments from existing district bar lists of attorneys who will accept appointments in criminal cases or other proceedings involving indigents, creation of a separate list of attorneys who are willing to represent indigent defendants in contempt proceedings involving nonsupport, appointment of local legal aid attorneys, appointment of public defenders, and contracting with one or more private attorneys to represent all indigent defendants in contempt proceedings involving failure to pay court-ordered child support.

The committee strongly discouraged the appointment of public defenders to represent indigent defendants in civil contempt proceedings in child support cases. Although Chapter 7A of the General Statutes does not specifically preclude the appointment of public defenders to represent indigents in noncriminal matters, the committee believed that assigning public defenders to represent indigent defendants in child support cases was inefficient and inappropriate for a number of reasons, including the public defenders' lack of time, staff, and resources to handle noncriminal matters, their lack of expertise in child support and family law matters, and the increased potential for scheduling conflicts and disruption of civil and criminal dockets.

Instead, the committee recommended the use of one or more "contract attorneys" in each county who would be retained on a fixed-fee basis to represent all indigent defendants in contempt proceedings involving nonsupport. Under the 1993 amendments to G.S. 7A-344(4), the Administrative Office of the Courts is authorized to contract with one or more attorneys to provide specialized representation on a full-time or part-time basis in civil cases in which a party is entitled to counsel.[38] The committee felt that, in most counties, contracting with one or more attorneys on a flat per-day

or per-case basis would reduce the overall cost of providing legal representation to indigent defendants in contempt proceedings in child support cases. Other possible advantages related to the use of contract attorneys were also identified, including promoting more effective representation of indigent defendants by specialized attorneys who are experienced and can gain some expertise in handling these cases; creating a working relationship between appointed counsel and IV–D attorneys that could facilitate the settlement or disposition of cases; and avoiding delays and conflicts in the calendaring and hearing of contempt proceedings.

So far, however, the AOC and district court judges have relied on case-by-case appointments of attorneys to represent indigent defendants in contempt proceedings.[39]

Payment of Court-Appointed Counsel in Civil Contempt Proceedings

The amount of the fee paid to court-appointed counsel in civil contempt proceedings is determined by the district court judge who hears the proceeding.[40] The cost of appointed counsel is borne by the state, and is paid by the AOC from funds appropriated by the General Assembly for legal representation of indigents.[41]

Considering the limited financial resources available to the AOC for paying court-appointed counsel in criminal, civil, and juvenile cases, and the potential increased demand for court-appointed counsel under *McBride*, one issue raised by *McBride* is whether the state can recover the cost of attorneys' fees paid on behalf of indigent defendants in civil contempt proceedings brought to enforce child support orders.[42] The *McBride* committee, however, concluded that existing law does *not* allow the state to recover the cost of court-appointed attorneys appointed to represent indigent defendants in civil contempt proceedings in child support cases.

Although the state is required to provide legal representation to indigent parties in certain types of cases, it is not required to bear the cost of court-appointed counsel when a defendant has the financial ability to reimburse the state for this expense.[43] Under G.S. 7A-455(a), if the court determines that a partially indigent person is financially able to pay a portion, but not all, of the value of legal services rendered for him by court-appointed counsel, the court may order the defendant to reimburse the state for a portion of the cost of providing him with legal representation. In addition, under G.S. 7A-455(b), the court is required to enter a judgment against an indigent defendant for the cost of court-appointed counsel.

These provisions, however, apply *only* in cases in which the defendant is "finally convicted."[44] Defendants are not "convicted" in civil contempt proceedings. Therefore the committee concluded that there is no statutory authority for the state to recover from indigent defendants the cost of court-appointed counsel in *civil* contempt proceedings.[45]

Implications of the *McBride* Decision

After *McBride*, there was a great deal of concern about the potential negative impact of the decision on the state treasury, on the court system, and on children whose parents are obligated to pay court-ordered support. It is probably too soon to assess the full impact of the decision; nonetheless, its consequences appear to be less serious than anticipated.

In North Carolina, approximately 70,000 orders to show cause are issued each year against defendants for failure to comply with their obligations under existing child support orders. One of the major concerns regarding the *McBride* decision was that courts would be required to appoint attorneys to represent defendants in a significant number of these cases, and that the cost to the state of providing free legal representation in these cases would deplete the already limited Indigent Representation Fund appropriated by the General Assembly. However, between July, 1993, and March, 1994, the AOC received fee applications for court-appointed counsel in only 607 cases involving civil contempt proceedings to enforce child support orders, and paid only $89,000 in attorneys' fees for appointed counsel in these cases. This indicates that judges are appointing attorneys to represent defendants in only a small fraction of civil contempt proceedings in child support cases. The reasons for this, however, are unclear and should be the subject of further analysis.

Court officials also were concerned about the potential impact of *McBride* on court dockets and judicial resources. There are approximately *a quarter of a million* child support cases in which absent parents are ordered to make child support payments through the office of the clerk of superior court. Because full payments are made in only half of these cases, child support agencies and the court system expend a significant amount of time and resources in enforcing the child support obligations of absent parents. Considering the large number of child support enforcement actions handled by the court system and the limited amount of judicial resources available to handle these cases, court administrators were concerned that the additional time and resources required to make determinations regarding appointment of counsel under *McBride* would result in significant delays and backlogs in court dockets. Clearly the *McBride* decision will require courts to spend additional time and resources to determine the entitlement of defendants to court-appointed counsel in civil contempt proceedings. It is not clear, however, whether the additional time demands resulting from the *McBride* decision have, in fact, caused significant delays or backlogs in the court system, or caused a shifting of

limited judicial resources to child support enforcement and away from other criminal, civil, and juvenile matters.

Another concern about *McBride* was that the decision would reduce the effectiveness of civil contempt as a remedy for enforcing child support orders and thereby reduce the amount of child support collected through the court system. To the extent that *McBride* causes significant delays and backlogs in child support enforcement caseloads in the courts, it may indeed result in some reduction in the amount of child support collections. However, the appointment of attorneys to represent indigent defendants in a handful of civil contempt proceedings appears unlikely to have any significant, direct impact on child support collections.[46]

Finally, there also may be some concern that it is unfair to appoint attorneys for indigent obligors in contempt proceedings in child support cases when the obligees in many non–IV–D child support cases are not represented by attorneys. There are, however, ways in which legal representation can be provided for obligees in child support enforcement actions. First, legal representation through the state or county child support enforcement (IV–D) agency is available, upon request and payment of a $10.00 application fee, to *any* obligee in *any* child support case, regardless of whether the obligee has received public assistance.[47] Second, some counties maintain lists of attorneys who are willing to represent persons to whom child support is owed in connection with "clerk's enforcement" proceedings under G.S. 50-13.9.[48]

The *McBride* decision, however, also may have a silver lining. One positive result of the decision may be the increased reliance on other available remedies, such as income withholding, to enforce child support orders.[49] The increased involvement of attorneys in contempt proceedings also may facilitate the settlement or disposition of child support enforcement proceedings. And the decision undoubtedly will require trial courts to follow more closely the requirements of G.S. 5A-21 in civil contempt proceedings.

Conclusion

The *McBride* case is a significant legal decision regarding the due process rights of defendants in civil contempt proceedings. In practice, however, it has not yet resulted in the appointment of counsel for indigent defendants in a significant number of contempt proceedings in child support cases. It also appears that the negative impact of the decision on North Carolina's court system has not been as serious as first anticipated, and that the primary effect of the decision may be to focus the attention of judges and policy makers on the more important question of how the state can most effectively enforce the obligations of absent parents to support their children.

Notes

1. McBride v. McBride, 334 N.C. 124, 431 S.E.2d 14 (1993). For another analysis of the *McBride* decision, *see* Kurt F. Hausler, *The Right to Appointment of Counsel for the Indigent Civil Contemnor Facing Incarceration for Failure to Pay Child Support*—McBride v. McBride, 16 CAMPBELL L. REV. 127 (1994).

2. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980).

3. Although *McBride* arose in the context of a civil contempt proceeding in a child support case, its reasoning probably applies to all civil contempt proceedings.

4. It often is difficult to determine whether contempt proceedings against defendants for failure to pay court-ordered child support are proceedings for civil contempt under G.S. 5A-21(a), for indirect criminal contempt under G.S. 5A-11(a)(3), or for both civil and criminal contempt [*see* G.S. 5A-12(d) and 5A-21(c)]. In order to eliminate this confusion and to ensure compliance with the procedural safeguards involved in criminal contempt proceedings, when a defendant is before the court for both criminal and civil contempt the better practice is to determine at the outset of the hearing whether the matter will be heard as criminal contempt or as civil contempt, to hold separate hearings and enter separate orders with respect to criminal and civil contempt, or, at a minimum, to follow the more stringent procedures that apply to hearings involving criminal contempt. For further discussion of criminal and civil contempt proceedings in child support cases, *see* TRUDY ALLEN ENNIS & JANET MASON, THE USE OF CONTEMPT TO ENFORCE CHILD-SUPPORT ORDERS IN NORTH CAROLINA (Special Series No. 1) (Chapel Hill, N.C.: Institute of Government, The University of North Carolina at Chapel Hill, 1986). *See also* Bishop v. Bishop, 90 N.C. App. 499, 369 S.E.2d 106 (1988).

In the *McBride* case, an order for arrest was issued against Mr. McBride when he failed to appear at a May 10, 1991 hearing in response to the show cause order. This suggests that the proceeding involved *criminal* contempt. G.S. 5A-16 and G.S. 15A-305 authorize the issuance of orders for arrest of persons who are charged with *criminal* contempt who may fail to appear for the hearing, persons who fail to appear as required in a show cause order issued in a *criminal* proceeding, or *criminal* defendants who fail to appear in a *criminal* proceeding after having been arrested and released before trial. There is no statutory authorization for the arrest of a person who is charged only with *civil* contempt in a *civil* action. If the June 7 hearing had been treated as a proceeding for *criminal* contempt, McBride would have been entitled to a court-appointed lawyer. *See* Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990). At the June 7 contempt hearing, however, the judge apparently treated the proceeding as one for civil contempt, and imposed a sanction—an indefinite period of incarceration with release dependent on the defendant's compliance with court-imposed purge conditions—that was clearly a remedy for civil, rather than criminal, contempt.

5. According to his brief on appeal, at the time of the hearing Mr. McBride was unemployed because of a shoulder injury and had no income.

6. Mr. McBride was represented on appeal by Central Carolina Legal Services, a nonprofit legal aid program that provides free legal assistance to indigents in civil matters.

7. Jolly v. Wright, 300 N.C. 83, 265 S.E.2d 135 (1980). McBride also argued that the incarceration of indigent defendants, like himself, for civil contempt without legal representation was a violation of his constitutional right to due process. The decision by the court of appeals, however, did not directly address this assignment of error.

8. McBride v. McBride, 108 N.C. App. 51, 422 S.E.2d 346 (1992).

9. Hodges v. Hodges, 64 N.C. App. 550, 307 S.E.2d 575 (1983); Daugherty v. Daugherty, 62 N.C. App. 318, 302 S.E.2d 664 (1983).

10. After stating that the appellate court could undertake the *Jolly* analysis if the trial court failed to do so, the court of appeals summarily affirmed the trial court's order without undertaking any analysis of the facts in Mr. McBride's case and without making any determination as to whether this particular case was "complex" enough to warrant appointment of counsel. This is particularly interesting since the record on appeal indicated that Mr. McBride may have been partially disabled and unemployed at the time of the hearing (or at the time he failed to pay child support) and, as noted in Judge Greene's concurring opinion, the trial court made no finding regarding his ability to comply with the order. This suggests at least a possibility that Mr. McBride would not have been found in contempt or incarcerated if he had been represented by an attorney at the June 7 contempt hearing.

11. McBride's petition for discretionary review of the decision of the court of appeals also was allowed by the supreme court on February 11, 1993.

12. McBride v. McBride, 334 N.C. 124, 131, 431 S.E.2d 14, 19 (1993).

13. Lassiter v. Durham County Dep't of Social Services, 452 U.S. 18 (1981).

14. Matthews v. Eldridge, 424 U.S. 319 (1976). The due process analysis established by the *Matthews* case involves a balancing of three factors: (1) the private interests at stake in a proceeding; (2) the government's interest; and (3) the risk that the procedures being used will lead to an erroneous decision.

15. The *Jolly* decision emphasized that, despite the possibility of incarceration, contempt proceedings under G.S. 5A-21 are *civil* in nature. Subsequent decisions by the supreme court and the court of appeals, however, established the right of indigent defendants to court-appointed counsel in *criminal* contempt proceedings for violations of child support orders. O'Briant v. O'Briant, 313 N.C. 432, 329 S.E.2d 370 (1985); Hammock v. Bencini, 98 N.C. App. 510, 391 S.E.2d 210 (1990).

16. McBride v. McBride, 334 N.C. 124, 130–31, 431 S.E.2D 14, 19 (1993). In support of its conclusion that "the failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent," the supreme court cited eight cases during the past ten years in which the trial court's incarceration of a defendant for civil contempt had been reversed by the court of appeals.

17. The supreme court noted that under the U.S. Supreme Court's decision in Scott v. Illinois, 440 U.S. 367, 373 (1979), "even in criminal prosecutions, an indigent defendant is not entitled to appointed counsel if the prosecution does not result in actual imprisonment." *McBride*, 334 N.C. at 127, 431 S.E.2d at 16. Under G.S. 7A-450(a)(1), however, an indigent defendant is entitled to appointment of counsel in "any case in which imprisonment . . . *is likely to be adjudged* [emphasis added]." Although the *McBride* decision does not discuss the applicability of this statute to civil contempt proceedings in child support cases, it does overrule the decision in *Jolly v. Wright* (which had held that G.S. 7A-450(a)(1) did not apply to civil contempt proceedings). *McBride*, 334 N.C. at 132, 431 S.E.2d at 19. In addition, the *McBride* decision specifically states that a trial court *must* appoint counsel for an indigent defendant if the court determines that the defendant *may be incarcerated* as a result of the proceeding.

18. In the *McBride* case, there is nothing in the record to indicate that Mr. McBride received any notice that he had the right to request court-appointed counsel in connection with the contempt proceeding, even though he was at least potentially entitled to court-appointed counsel under the *Jolly* and *Hammock* decisions. Although the *McBride* decision did not address specifically the issue of whether Mr. McBride waived his right to counsel, it seems clear that he could not have waived his rights knowingly or voluntarily without notice that he had some right to legal representation.

19. Because most defendants in contempt proceedings in child support cases are men, the masculine pronoun is used throughout this memorandum to refer to these defendants.

20. There is no general AOC form for show cause orders in child support cases. AOC form CV-602 (Order to Appear and Show Cause for Failure to Comply with Support Order and Order to Produce Records) was designed to be used only in those cases in which the clerk is initiating enforcement action under G.S. 50-13.9(d). This form does advise the defendant that he may be "committed to jail" if he is found in civil contempt, but does not advise the defendant that he has a right to be represented by a lawyer in connection with the proceeding.

21. The presiding judge also could provide notice to defendants, *en masse*, at the beginning of the docket call for each session at which contempt proceedings involving nonsupport will be heard.

22. The *McBride* decision dealt only with an *indigent* defendant's right to *court-appointed* counsel, as opposed to the right of a defendant to be represented at his own expense by an attorney in civil contempt proceedings. Nonetheless, judges should advise nonindigent defendants that they have a right to be represented by an attorney at their own expense and obtain a waiver of their right to legal representation if they choose to defend themselves without legal assistance in the contempt proceeding, just as they would in criminal misdemeanor cases.

23. McBride v. McBride, 334 N.C. 124, 132, 431 S.E.2d 14, 19 (1993).

24. *See* G.S. 7A-457.

25. The *McBride* decision does not expressly state that the provisions of G.S. 7A-450 through -459 apply to civil contempt proceedings. However, because *McBride* overruled the *Jolly* decision (which held that G.S. 7A-450 through -459 did not apply to civil contempt proceedings), and because G.S. 7A-451(a)(1) includes *any case* in which an indigent defendant may be incarcerated, judges should follow the provisions of G.S. 7A-450 through -459 with respect to the appointment of counsel for indigent defendants in civil contempt proceedings.

26. *McBride*, 334 N.C. at 132, 431 S.E.2d at 19. This language suggests that the court's determination with respect to an indigent defendant's potential loss of liberty in a civil contempt proceeding is similar to its determination regarding appointment of counsel in a criminal case "in which imprisonment . . . is *likely to be adjudged* [emphasis added]." G.S. 7A-451(a)(1).

Some district court judges might argue that, as long as the court complies with the requirements of G.S. 5A-21, there is little or no need to appoint attorneys to represent indigent defendants in contempt proceedings involving failure to pay child support because no defendant will be *illegally* or *erroneously* incarcerated as a result of the proceeding. In *McBride*, the supreme court obviously hoped that the appointment of counsel for indigent defendants would prevent the unjustified incarceration of defendants and increase the accuracy of civil contempt proceedings. However, due process requires the appointment of counsel for defendants who have willfully failed to pay child support and who have the present ability to pay all or part of the past-due support, as well as for those defendants who have a valid defense.

27. Moreover, even if the defendant is found in civil con-

tempt, it does not necessarily follow that he will be incarcerated as a result of the proceeding. If the court orders the incarceration of a defendant for civil contempt, the defendant nonetheless "holds the keys to the jail in his pocket" and can avoid incarceration by complying with the purge conditions set by the court. In addition, the court may find a defendant in civil contempt and order him to comply with the order, but decide not to order incarceration as a means of coercing his compliance.

28. G.S. 5A-21(a); Jones v. Jones, 52 N.C. App. 104, 278 S.E.2d 260 (1981); Teachey v. Teachey, 46 N.C. App. 332, 264 S.E.2d 786 (1980).

29. However, if an unrepresented, indigent defendant (who did not waive legal representation and who was found in civil contempt) failed to comply with the purge conditions imposed by the court, the court could not order his incarceration without bringing a new civil contempt proceeding based upon his continued noncompliance with the order and without providing the defendant with the opportunity to be represented by court-appointed counsel in connection with the new proceeding.

30. To some extent, consideration of these factors also requires the judge to preview the merits of the case, or at least to examine the prior history of the case and the allegations made in support of the motion for contempt.

31. Appellate review of such determinations is unlikely. If the judge errs on the side of appointing counsel, the defendant's right to counsel is not violated. If the judge incorrectly assesses the likelihood of incarceration and fails to appoint counsel, the *McBride* decision prevents the court from incarcerating the defendant as a result of the hearing and, if the defendant is not incarcerated, his due process rights have not been violated.

32. *See* State v. Wright, 281 N.C. 38, 187 S.E.2d 761 (1972) (emphasizing that the *actual availability* of *adequate* funds to pay for legal representation is required, and that the amount of equity in an automobile owned by defendant was therefore immaterial).

33. *See* G.S. 7A-459 (authorizing the State Bar Council to make rules regarding procedures for the determination of indigency and relating to the manner and method of assigning counsel for indigent defendants in counties that do not have public defenders).

34. If the court uses the AOC-CR-226 form, paragraph 2 of the Notice on side two of the form should be deleted because, as discussed below, defendants in *civil* contempt proceedings may not be required to reimburse the state for the cost of court-appointed counsel.

35. The committee, however, felt that it would be inappropriate for an attorney who might be appointed to represent the defendant to be involved in the indigency screening process.

36. G.S. 7A-452(c) may allow the clerk of superior court to make a determination of indigency and to appoint counsel for an indigent defendant if the presiding district court judge has authorized the clerk to do so in a particular case.

37. In cases in which appointment of counsel is denied and the court proceeds with the contempt hearing, the order disposing of the contempt matter also could include the court's findings regarding the defendant's entitlement to court-appointed counsel.

38. 1993 N.C. Sess. Laws ch. 561 § 79(a), effective July 1, 1993. Prior to enactment of the 1993 amendments, the AOC's authority to use contract attorneys was limited to juvenile cases. Under the 1993 amendments, approval of the contract by the chief district court judge is required with respect to cases in the district court division.

39. The procedures for assigning counsel vary somewhat from district to district. Most districts appear to make appointments on a rotating basis (case-by-case, day-by-day, or for a definite period of time) from a special list (separate from the misdemeanor, felony, and juvenile lists) of attorneys who have expressed a willingness to represent indigent defendants in contempt proceedings. In some counties, however, only one or two attorneys have volunteered to serve as appointed counsel in these cases. Under G.S. 7A-459, in counties that do not have public defenders, the North Carolina State Bar or district bar associations (subject to adoption and approval by the State Bar Council) are authorized to enact rules and to adopt plans relating to the "manner and method of assigning counsel" for indigent persons entitled to court-appointed counsel under Chapter 7A, and for ensuring the "reasonable allocation of responsibility for the representation of indigent persons among the licensed attorneys of this State." However, the rules adopted by the State Bar Council address the assignment of counsel in criminal cases only.

40. G.S. 7A-458. AOC form CR-225, Fee Application and Order of Payment, may be used in connection with payment of fees for court-appointed counsel in civil contempt proceedings involving nonsupport. However, the portion of the form relating to judgments against indigent defendants (Parts IV and V on side two) are inapplicable in civil contempt proceedings.

41. G.S. 7A-452(b).

42. The issue of requiring a defendant in a civil contempt proceeding to reimburse the state for the cost of the lawyer appointed to represent him is different from the issue of requiring the defendant to pay the attorneys' fees incurred by the obligee who initiates a contempt proceeding to enforce a child support order. Under G.S. 50-13.6, a defendant who has refused to provide adequate support may be ordered to pay the reasonable attorneys' fees of an interested party who brings an action or proceeding for child support and who has insufficient means to defray the expense of the action or proceeding. There is also authority for requiring a defendant to pay the opposing party's attorneys' fees as a condition of purging contempt in child support cases. Blair v. Blair, 8 N.C. App. 61, 173 S.E.2d 513 (1970).

43. Alexander v. Johnson, 742 F.2d 117 (4th Cir. 1984).

44. G.S. 7A-455(c).

45. G.S. 7A-455(c) may authorize the court to impose a judgment against an indigent defendant for the cost of court-appointed counsel if the defendant is found in *criminal* contempt, provided that the defendant has the financial ability to reimburse the state.

46. The *McBride* decision did not affect in any way the legal authority of the court to use civil contempt as a remedy to enforce child support orders or to require defendants in civil contempt proceedings to pay all or part of past-due child support payments as a condition of purging their contempt.

47. G.S. 110-130.1.

48. G.S. 50-13.9(e). The court generally requires defendants to pay the fees for these attorneys pursuant to G.S. 50-13.6.

49. Income withholding is an effective remedy for collecting child support on a timely and regular basis. However, income withholding is used in less than 20 percent of non-IV-D child support cases in North Carolina.

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