

Legal Lines

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PRESIDENT'S MESSAGE

by Terry J. McLaughlin

As always in these difficult times, I'd like to begin by sending my best wishes that all of you and your families are safe and healthy, and remain that way, through the upcoming holidays.

I also want to take a moment to thank my editor, Ellyn Lazar, who makes sense of what I am trying say each month.

As the holidays approach, please remember to take care of yourselves mentally, physically and emotionally. We are part of a very stressful profession that is adversarial by design. We all spend our days taking care of and/or protecting others. Just remember, you can't take care of everybody else if you don't take care of yourself.

I again want to thank everyone that has suggested, planned, presented or participated in one of our virtual events over the last month.

The C.A.R.E. committee is busy planning several programming opportunities and events for the new year. Please stay tuned.

Our December First Monday education program, The Return of the Jury Trial, was remarkably informative and extremely well attended. We had approximately 240 attendees at one point. Thank you to Judge Hillman, Judge Wrenn, Judge Kenton-Walker and Judge Despotopulos for planning and presenting. I also want to thank the Federal Bar Association for co-hosting the event.

The January edition of the First Monday educational series is going to be a presentation on Trials and Hearings by Zoom, something we can all use right now. The presentation will be on January 4th at 1 p.m. Once again, we have an awesome panel of presenters, including Judge Bailey of the Probate and Family Court, Judge D'Angelo of the District Court, Judge Hillman of the Federal Court and Judge Ritter of the Superior Court. Please participate if you have the chance. These are meaningful programs that pack a lot of useful information into a short period of time, and I have no doubt that this one will provide a lot of timely and useful suggestions as we continue these days of remote practice. If you cannot attend, the program will be recorded and uploaded on to the Association's website.

The Young Lawyers hosted their second event of the year on Wednesday, December 16th, which was Holiday Trivia. Thank you to Paige Barton and Liz Halloran for organizing and running the event. The event was a fun night and a great opportunity to see people outside of work. Congratulations to Judi Young for winning Holiday Movie Trivia and Janet Raheb for winning the general Trivia category. Notably, Geoff Spofford came in last in both.

This is another reminder that the Discovering Justice after-school Mock Trial and Mock Appellate Program has reached out to the WCBA and invited us to participate in their Mentor Program in Spring, 2021. Some of us participated in the fall Mock Trial the week of December 14th. The kids were outstanding. The middle school kids were extremely well prepared and did a wonderful job presenting their cases. There were opening statements, direct examinations, cross-examinations and closings. Judge Sorokin of the Federal Court oversaw the proceeding. We have had a number of people volunteer so far, but could use more. Discovering Justice is asking the WCBA to mentor three middle school teams from the Worcester County area. The program is intensive, so we are hoping to fill three mentor teams with multiple people on them. Please reach out to Geoff Spofford, or to me, if you are interested.

Our new website launched over the weekend of November 21st and 22nd. It is working well now, however the transfer has been a lot of work and has not been without a few glitches. Please continue to be patient, we are almost there. Equally important, please join me in thanking Sandra DiLuzio, Candice Staples and Rob White for all of their efforts to make this happen.

As you have heard from me before and will continue to hear, please reach out, be active and get involved. We continue to weather the current storm together as a community, and I continue to be confident that we will emerge stronger for it.

I hope that everyone has a happy, healthy and safe holiday break.

Submitted on Behalf of the Worcester County Bar Association – Family Law Section
Case Summary: Dep't of Revenue v. Grullon, 485 Mass. 129 (2020)
By Kevin J. Powers¹

I. Issue

Under the Fourteenth Amendment Due Process Clause, does the Probate and Family Court abuse its discretion in holding a noncustodial child support payor in civil contempt:

1. Without the Probate and Family Court providing the procedural safeguards of Turner v. Rogers, 564 U.S. 431 (2011)?
2. Without the Department of Revenue (DOR) fulfilling its obligation to assist the payor under G.L. c. 119A, § 2?
3. Without the Probate and Family Court accepting the payor's counterclaim for modification?
4. Without the Probate and Family Court appointing counsel for the payor?

II. Procedural History

The mother filed a pro se complaint for civil contempt against the noncustodial child support payor in Probate and Family Court. The complaint was marked "DOR full service case." The payor filed an answer and counterclaim for modification.

At a hearing, the payor appeared pro se but DOR was represented by counsel. The payor represented the he had been incarcerated and was unemployed but training. DOR denied knowledge of the payor filing a complaint for modification. The Probate and Family Court ordered the payor to spend ten days in jail or pay a \$500 purge amount. The payor filed a notice of appeal.

III. Rule of Law

1A. The U.S. Supreme Court held that in Turner that it was not a violation of Federal due process to not provide a child support payor potentially facing incarceration without appointed counsel.

1B. Turner requires safeguards: (1) notice to the payor that his "ability to pay" is a critical issue in the contempt proceeding; (2) use of a form or equivalent to elicit relevant financial information; (3) opportunity at hearing to respond to statements and questions regarding financial status; and (4) an express court finding that the payor does not have the ability to pay.

1C. When DOR counsel is involved, DOR counsel's role is to represent DOR's interests, not to create an attorney-client relationship with a child support payee. G.L. c. 119A, § 3(a).

2. DOR shall provide services to payors to modify child support orders.

3. The Probate and Family Court has power to modify a support order in the context of either a complaint for contempt or a complaint for modification, even in the absence of a contempt finding.

IV. Holding

¹ The author handles appeals and complex trial motions for busy trial lawyers who love going into court but who lack the time to decamp to a law library. He can be reached at kpowers@kevinpowerslaw.com.

1. The Probate and Family Court abused its discretion by holding the payor in civil contempt.
2. DOR did not fulfill its statutory obligations to assist the payor.
3. The Probate and Family Court erred in not accepting the payor's counterclaim for modification.

V. Dicta

Justice Cypher, writing for the Court, noted that the Supreme Judicial Court would leave open for another day whether, when an indigent noncustodial child support payor receives the procedural safeguards required by Turner, he or she must be provided with counsel.

VI. Disposition

The SJC vacated the civil contempt judgment.

VII. Concurrence

Chief Justice Gants, writing in concurrence, raised six points regarding the possibility of a constitutional right to counsel for indigent payors who face a realistic risk of incarceration in civil contempt proceedings:

1. If the Turner safeguards are not, in practice, consistently applied in the DOR session, then the Fourteenth Amendment Due Process Clause would require a right to counsel.
2. Where a purge amount is ordered to be paid forthwith, the court must find by clear and convincing evidence that the payor has the ability to pay that purge amount.
3. The issue of ability to pay in civil contempt cases is far more complex than an indigency determination regarding a payor's entitlement to counsel, in part because ability to pay may include findings regarding imputed income.
4. Massachusetts case law provides a right to counsel in circumstances where the Fourteenth Amendment Due Process Clause does not.
5. Where DOR counsel is at the contempt hearing seeking to enforce a child support order through a finding of contempt, the custodial spouse is not DOR counsel's client (DOR is the client), but the interests of the custodial spouse and DOR counsel are closely aligned. This eliminates the "asymmetry" feared by the Supreme Court in Turner.
6. Appointed counsel would certainly assist a payor in proving that the payor should not be imprisoned for contempt because he or she was unable to pay the amount ordered or any designated purge amount. But a more able attorney, with the help of the resources of the Committee for Public Counsel services, might also help a payor to pay more child support in the future. For instance, an attorney could help a payor to obtain financial counseling.