



Child Support: Ability to Pay and Incarceration

The formation and development of social welfare policy, social service practice, and precedential case law are distinct, yet interdependent disciplines. One area of intersection and overlap among them is the national child support enforcement system. In this federally structured system, state courts and child support agencies establish, administer, and enforce child support orders. The processes and products of this system can have profound positive and negative effects on low-income children and families.

The discussions and debates that have gone into creating and sustaining this system frequently cite the best interest of children, occasionally include the interest of the state, and infrequently mention the interest of parents. The latter concern—the individual interest of an adult parent—is the focus of *Turner v. Rogers*, a pertinent child support enforcement case on the current docket of the United States Supreme Court.

Some Relevant Facts of the Turner Case

In 2003, a South Carolina family court ordered Michael Turner, a noncustodial parent, to pay child support. Over time, and depending on his employment status (and, presumably, his opportunity to borrow money), he made sporadic, but insufficient payment. He was summoned to court many times over the years to account for the delinquency, and in January 2008, he was summoned to explain or remedy his state of arrears at that time. Turner appeared without a lawyer and said that he was unable to pay the amount owed. The family court judge found him to be in “contempt of court” based on his failure to pay and ordered incarceration for a period of 12 months or until the amount was paid in full.

An attorney (who volunteered legal services) filed an appeal to a higher South Carolina court. The petition argued for Turner’s right to appointed counsel as an indigent defendant at risk of being incarcerated. The South Carolina Supreme Court affirmed the lower court ruling and held that the U.S. Constitution does not require appointment of a lawyer in civil contempt cases, regardless of the risk of incarceration for the defendant.

The court based its decision on the difference between civil and criminal contempt, holding:

[A]ppellant [Mr. Turner] does not have a constitutional right to appointed counsel before being incarcerated for civil contempt for nonsupport. Because appellant may avoid the sentence altogether by complying with the court’s previous support order, he holds the keys to his cell door and is not subject to a permanent or unconditional loss of liberty.¹

In June 2010, another *pro bono* attorney petitioned the U.S. Supreme Court to hear this case and decide whether “an indigent defendant has no constitutional right to appointed counsel at a civil contempt proceeding which results in his incarceration.” Friend of the court (*amicus curiae*) briefs in support of both Supreme Court attention to this case and of Mr. Turner’s constitutional argument were subsequently filed.



Social Welfare Policy and Practice

The argument in favor of Mr. Turner’s position rests on the application and interpretation of legal precedent and current state law. The legal process here included a finding of contempt of court followed by incarceration. The goal of that process in a civil case is to coerce the defendant into making the payment. However, in this case, the facts conflict with the intention of the law. The facts include circumstances of unemployment and poverty. If Turner had no ability to pay this debt, he did not “have the keys to his cell.” These elements of fact exist in an overwhelming majority of IV-D child support arrears cases.²

According to amicus curiae Elizabeth G. Patterson, a 2010 observational study of hundreds of South Carolina child support contempt hearings revealed the following:

- Over 98% of parents held in “willful” contempt were not represented by counsel.
- At least 95% of all contemnors were sentenced to jail; the average sentence imposed was three months.
- Over 75% of all contemnors testified that they were presently or previously unemployed or having difficulty finding work.
- Parents who appeared without counsel were held in contempt more than twice as often as parents who were represented by counsel.

According to Patterson’s analysis of the data:

...one of the unintended consequences of South Carolina’s system, which denies counsel to those accused of civil contempt: South Carolina’s jails are filled with family court contemnors, creating a modern day debtors’ prison for poor noncustodial parents who lack the ability to pay support. Surveys of county jail administrators and sheriffs in 2005 and 2009, for example, reported that 13% to 15% of the total jail population was made up of family court contemnors. Publicly available jail expenditure reports indicate that the cost to detain this individual is staggering.³

Also, counsel for Mr. Turner argues that:

In the child support context, alleged contemnors are especially likely to be unable to comply with underlying court orders, unable to afford their own lawyers, and unable to establish any defense without the assistance of counsel...⁴

And he cites Sorensen et al., Urban Inst., *Assessing Child Support Arrears in Nine Large States and the Nation* (2007) when he says:

‘70% of unpaid support in nine states was owed by obligors earning less than \$10,000 per year.’ And few such individuals are likely to be able to understand let alone anticipate and satisfy their burden of proof.⁵



In keeping with constitutional protections, the Turner case privileges the individual's interest in being free from imprisonment (his liberty interest); however, there are important competing interests. One of the other interests argued by the parties in this case is that of the state in collecting child support. Another is the interest of the child—ostensibly the basis for most family welfare policy and practice. Policy and practice discussions and decisions are affected by the obvious tension (and sometimes clear conflict) among these three interests. This tension is apparent even though policy discussions rarely mention the individual interest of adult parents. In fact, the concerns and interests of adults are often specifically dismissed in the family policy conversation.

However, the bilateral tension between the separate interests of the child and the state is evident in many child support policy discussions. The welfare of children in low-income families is consistently invoked, and the coffers of the “taxpayer” and the state are vociferously guarded.

Though the interest of the child is said to be paramount, the importance of the state interest is taken for granted. The foundation and source of that state interest have been called into question. Daniel Hatcher, a law professor at the University of Baltimore, considers the stated mission of the child support agency in Maryland, citing a Maryland Department of Human Resources document, *Maryland Child Support Enforcement Program: The Mission of Child Support Enforcement*. Mr. Hatcher says:

The agency first explains the dual purposes of child support: ‘Child Support exists 1) to raise the standard of living for children by enforcing their right to support from both of their parents and 2) to reduce or recover welfare costs. Then, apparently recognizing the conflict, the agency clarifies: ‘Child Support Enforcement operates with these guiding principles: The best interest of the child is our highest priority.’ However, when the conflict was presented in the courts, the agency argued the reverse, contending that the welfare cost recovery goals have always been and continue to be the paramount concern of child support enforcement.⁶

With regard to the issue of incarceration for nonpayment, the basis of state interest is particularly unclear. An amicus brief in the Turner case raises the question of effectiveness and makes a common-sense argument that imprisonment for nonpayment of child support in civil contempt cases is counterproductive to the goal of the state. The argument includes the following points:

- Incarceration only helps if it provides money that was otherwise unavailable.
- Incarceration has deleterious effects on employment prospects.
- Incarceration will further disable ability to pay.
- While incarcerated, the parent cannot support the child, and the child is deprived of social, emotional, and economic support.⁷

Parents, families, and social service providers routinely question the tactic of imprisonment for unemployed debtors. Incarceration for child support arrears has been compared to debtors' prison.⁸ And imprisonment exacerbates the devastating effects of poverty and unemployment for both parents and children. Therefore, what interest does it serve?



Conclusion

A hearing in the Supreme Court of the United States is constructed to elicit a narrow ruling on a specific question. In this particular case, the question concerns a right to appointed counsel in a civil contempt proceeding where the liberty of the defendant is at risk. The legal arguments are technical and narrowly constructed, and it is difficult to anticipate the court's judgment or the effect of that judgment on policy or practice. However, the situation presented by this case identifies the need for clear explication of the goal and definition of the interests involved in child support policy and practice.

Policy makers and social service providers in the areas of family support and child-well being have accumulated experience and expertise in addressing situations such as the one presented in the Turner case. The pertinent issues have been outlined and discussed at roundtables, conferences, meetings, and webinars. This national conversation has resulted in clarity on at least two points: 1) child support is an important source of income for low-income children and families; and 2) both parents are responsible for the care and support of their children.

The facts and information presented in the Turner v. Rogers case highlight a central question: Can parents adequately provide for themselves and their children when they do not have the economic security provided by consistent living-wage employment? This question warrants further discussion and demands innovative policy making, regardless of whether the interest being attended to is that of the child, the parent, or the state.

Endnotes

¹ *Turner v. Price*. 691 S.E.2d 470. S.C. 2010.

² Elaine Sorenson, Liliana Sousa, and Simon Schaner. *Assessing Child Support Arrears in Nine Large States and the Nation*. Washington, DC: Urban Institute. 2007.

³ Lisa S. Blatt and Anthony J. Franze. *On Writ of Certiorari to the Supreme Court of South Carolina Brief of Elizabeth G. Patterson and South Carolina Appleseed Legal Justice Center as Amici Curiae in Support of Petitioner*. Michael D. Turner v. Rebecca L. Rogers *et al.* No. 10-10. Supreme Ct. of the US 11 Jan. 2011.

⁴ Seth P. Waxman. *On Writ of Certiorari to the Supreme Court of South Carolina Brief for Petitioner*. Michael D. Turner v. Rebecca L. Rogers *et al.* No. 10-10. Supreme Ct. of the US 4 Jan. 2011.

⁵ *Ibid.*

⁶ Daniel Hatcher. *Child Support Harming Children: Subordinating the Best Interests of Children to the Fiscal Interests of the State*. Wake Forest Law Review. Vol. 42, No. 4, 2007.

⁷ John C. Moylan, III. *On Petition for a Writ of Certiorari to the Supreme Court of South Carolina. Brief of Amici Curiae Center for Family Policy and Practice, Professor Elizabeth G. Patterson, South Carolina Appleseed Legal Justice Center, and South Carolina Center for Fathers and Families*. Michael D. Turner v. Rebecca Price and South Carolina Department of Social Services. No. 10-10. Supreme Ct. of the US. 29 July 2010.

⁸ Elizabeth Patterson. *Civil Contempt and the Indigent Child Support Obligor: The Silent Return of Debtor's Prison*. Cornell Journal of Law and Public Policy. Vol. 18, No. 1, 2008.