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THE RIGHT TO APPOINTMENT OF COUNSEL FOR THE INDIGENT CIVIL CONTEMNOR FACING INCARCERATION FOR FAILURE TO PAY CHILD SUPPORT — *McBride v. McBride*

I. INTRODUCTION

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States declares that no state shall “deprive any person of life, liberty, or property, without due process of law.”¹ The effect of the Due Process Clause of the Fourteenth Amendment on an indigent² facing a possibility of incarceration for civil contempt³ due to a failure to pay child support arrearages was recently revisited by the North Carolina Supreme Court in *McBride v. McBride*.⁴ Prior to *McBride*, the

1. U.S. CONST. amend. XIV, § 1. Section one of the Fourteenth Amendment to the Constitution of the United States reads:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

2. See N.C. GEN. STAT. § 7A-450(a) (1989). North Carolina’s statutory definition of an indigent states in the pertinent part: “An indigent person is a person who is financially unable to secure legal representation and to provide all other necessary expenses of representation in an action or proceeding enumerated in this Subchapter.” *Id.* See also *State v. Hoffman*, 281 N.C. 727, 190 S.E.2d 842 (1972) (An indigent is one who does not have available, at the time they are required, adequate funds to pay a necessary cost of his defense).

3. See N.C. GEN. STAT. § 5A-21(a) (1986). North Carolina’s civil contempt statute reads in the pertinent part:

(a) Failure to comply with an order of a court is a continuing civil contempt as long as:

- (1) The order remains in force;
- (2) The purpose of the order may still be served by compliance with the order; and
- (3) The person to whom the order is directed is able to comply with the order or is able to take reasonable measures that would enable him to comply with the order.

Id.

4. 334 N.C. 124, 431 S.E.2d 14 (1993).

North Carolina Supreme Court, in *Jolly v. Wright*,⁵ stated that due process in civil contempt cases for failure to pay child support required appointment of counsel only if counsel was necessary for an adequate presentation of the merits, or to ensure fundamental fairness.⁶

In *McBride*, the court held that "principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages."⁷ The court stated that in a civil contempt proceeding for nonsupport the trial court is to determine the likelihood of the defendant contemnor becoming incarcerated.⁸ If the court determines the civil contemnor may be incarcerated as a result of the proceeding, the court should query the defendant as to his desire for counsel and his ability to pay for legal representation.⁹ Should the defendant desire counsel but be unable to pay for such representation, the trial court must appoint counsel to represent him.¹⁰

This Note will provide a history of a civil contemnor's right to appointed counsel in North Carolina by reviewing the statutory and judicial history prior to *McBride v. McBride*, primarily through a study of the North Carolina Supreme Court holding in *Jolly v. Wright*. Next, this Note will look at the law outside of North Carolina which effected the holding in *McBride*. Next, this Note will examine the court's ruling in *McBride*, and discuss the altered judicial reasoning which led to the court's holding. Finally, this Note will address the ramifications of *McBride*, and conclude with a discussion of the decision's effects and the questions it left unanswered.

II. THE CASE

On January 12, 1989, the defendant, Terry McBride, signed a Voluntary Support Agreement in which he agreed to pay \$40 a week in child support.¹¹ On that day, the agreement was approved and signed by a district court judge, and thereby became

5. 300 N.C. 83, 265 S.E.2d 135 (1980).

6. *Id.* at 93, 265 S.E.2d at 143.

7. *McBride*, 334 N.C. at 131, 431 S.E.2d at 19.

8. *Id.* at 132, 431 S.E.2d at 19.

9. *Id.*

10. *Id.*

11. *Id.* at 125, 431 S.E.2d at 15. *See infra* note 12.

a court order.¹² On May 10, 1991, after Mr. McBride failed to appear in court to respond to a motion to show cause why he should not be held in contempt for the failure to pay child support as per the January 12, 1989 order, the district court entered an order for his arrest.¹³ On June 7, 1991, Mr. McBride was brought before the District Court, Davidson County, for a contempt hearing.¹⁴ Mr. McBride was not represented by counsel at the contempt hearing, and the issue of whether he was entitled to appointed counsel because of indigence was not raised.¹⁵ Mr. McBride represented himself, having neither requested, nor been offered, counsel.¹⁶ The trial court found Mr. McBride in willful contempt, and ordered him to be held in custody¹⁷ until he purged himself¹⁸ of the contempt by paying the full amount of the child

12. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15. The North Carolina child support statute reads in the pertinent part:

In lieu of or in conclusion of any legal proceeding instituted to obtain support for a dependent child from the responsible parent, a written agreement to support said child by periodic payments executed by the responsible parent when acknowledged . . . by a judge of the district court . . . shall have the same force and effect, retroactively and prospectively, in accordance with the terms of said agreement, as an order of support entered by the court, and shall be enforceable and subject to modification in the same manner as is provided by law for orders of the court in such cases.

N.C. GEN. STAT. § 110-133 (1991).

13. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15.

14. *Id.* Mr. McBride's hearing was one for civil, not criminal, contempt. In *Blue Jeans Corp. of Am. v. Amalgamated Clothing Workers*, 275 N.C. 503, 169 S.E.2d 867 (1969), the court noted that it is often difficult to distinguish between civil and criminal contempt. The court said that the purpose of the power exercised is a major factor, and where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil, but where the purpose is to preserve the court's authority and to punish for disobedience of its orders, the contempt is criminal. *Id.*

15. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15.

16. *Id.*

17. *Id.* The North Carolina civil contempt statute regarding imprisonment provides in the pertinent part: "A person who is found in civil contempt may be imprisoned as long as his civil contempt continues . . ." N.C. GEN. STAT. § 5A-21(b) (1986).

18. See N.C. GEN. STAT. § 5A-22(a) (1986). The statute declares that one held for civil contempt must be released when his civil contempt no longer continues. The order of the court must specify how one can purge oneself from contempt, and upon compliance, the officer having custody may release the person without a further order from the court. *Id.*

support arrearages he owed, \$1380.46.¹⁹ The trial court failed to determine whether Mr. McBride was presently able to pay the amount he owed.²⁰

Mr. McBride remained in jail until July 2, 1991, when he gave notice of appeal and was released pending his appeal.²¹ On appeal Mr. McBride argued that, because he was indigent at the time of the contempt hearing which resulted in his incarceration, the trial court had violated his constitutional right to due process by failing to appoint counsel to represent him.²² Following the reasoning of *Jolly v. Wright*,²³ the North Carolina Court of Appeals affirmed the holding of the trial court, dismissing Mr. McBride's due process argument.²⁴

Mr. McBride filed a notice of appeal as a matter of right²⁵ to the North Carolina Supreme Court,²⁶ and additionally, was granted discretionary review.²⁷ The supreme court reversed the decision of the court of appeals, holding that the Fourteenth Amendment due process principles require that indigent civil contemnors may not be incarcerated for nonsupport without the benefit of appointed counsel.²⁸ Furthermore, the court stated that "[t]o the extent that our decision in *Jolly v. Wright*²⁹ is inconsistent with this holding, that decision is overruled."³⁰

19. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15.

20. *Id.*

21. *Id.*

22. *Id.*

23. 300 N.C. 83, 265 S.E.2d 135 (1980).

24. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15.

25. See N.C. GEN. STAT. § 7A-30(1) (1989). North Carolina's appeal of right statute reads in the pertinent part:

"Except as provided in G.S. 7A-28, an appeal lies of right to the Supreme Court from any decision of the Court of Appeals rendered in a case:

(1) Which directly involves a substantial question arising under the Constitution of the United States or of this State"

Id.

26. *McBride*, 334 N.C. at 125, 431 S.E.2d at 15.

27. *Id.* at 125, 431 S.E.2d at 15-16.

28. *Id.* at 131, 431 S.E.2d at 19.

29. 300 N.C. 83, 265 S.E.2d 135 (1980).

30. *McBride*, 334 N.C. at 131, 431 S.E.2d at 19.

III. BACKGROUND

A. *Status of the North Carolina Law Prior to McBride: Jolly v. Wright*

The United States Supreme Court, in *Gideon v. Wainwright*,³¹ held that the Sixth Amendment to the Constitution of the United States,³² which is applied to the states through the Due Process Clause of the Fourteenth Amendment,³³ requires the appointment of counsel to indigent defendants in state felony trials.³⁴ In *Argersinger v. Hamlin*,³⁵ the Supreme Court expanded the holding of *Gideon* and ruled that the Sixth Amendment right to appointed counsel attaches as a matter of law in any criminal prosecution where a defendant may be imprisoned.³⁶ However, in *Gagnon v. Scarpelli*,³⁷ the Court refused to adopt the “per se rule” of *Gideon* and *Argersinger*—which requires appointed counsel as a matter of due process—to all civil proceedings where the possibility of incarceration exists.³⁸ The North Carolina Supreme Court followed the reasoning of these federal decisions when it handed down the *Jolly v. Wright* decision in 1980.³⁹

31. 372 U.S. 335 (1963). In *Gideon*, the Court declared it was overruling *Betts v. Brady*, 316 U.S. 455 (1942), which had held that the Sixth Amendment right to counsel did not extend to the states, and that a refusal to appoint counsel for an indigent did not violate the Due Process Clause of the Fourteenth Amendment unless the want of counsel under the particular circumstances could result in a conviction “offensive to the common and fundamental ideas of fairness.” *Gideon*, 372 U.S. at 339.

32. U.S. CONST. amend. VI. The Sixth Amendment reads:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

33. See *supra* note 1.

34. *Gideon*, 372 U.S. at 340.

35. 407 U.S. 25 (1972).

36. *Jolly v. Wright*, 300 N.C. 83, 90-91, 265 S.E.2d 135, 141 (1980) (citing *Argersinger v. Hamlin*, 407 U.S. 25 (1972)).

37. 411 U.S. 778 (1973).

38. *Id.* at 788. The Court in *Gagnon* stated: “We do not, however, draw from *Gideon* and *Argersinger* the conclusion that a case-by-case approach to furnishing counsel is necessarily inadequate to protect constitutional rights asserted in varying types of proceedings” *Id.*

39. 300 N.C. 83, 265 S.E.2d 135 (1980).

In *Jolly*, the North Carolina Supreme Court considered the question of whether an indigent defendant facing incarceration in a civil contempt proceeding brought to compel compliance with a child support order⁴⁰ had a statutory or constitutional right to be represented by appointed counsel.⁴¹ The defendant in *Jolly* asserted he had a right to counsel under N.C.G.S. § 7A-451(a)(1),⁴² as well as under the Due Process

40. North Carolina, under N.C.G.S. § 7A-451(a)(1), *see infra* note 42 (text of the statute), requires the appointment of counsel for an indigent facing incarceration in a criminal contempt proceeding for failure to comply with civil child support orders. *See Hammock v. Bencini*, 98 N.C. App. 510, 391 S.E.2d 210 (1990). *See also infra* text accompanying notes 44-51 (the court in *Jolly* holding that N.C.G.S. § 7A-451(a)(1) applies only to criminal cases). The difference between criminal and civil contempt is that the purpose in criminal contempt is to preserve the court's authority and to punish for disobedience of its orders, whereas, in civil contempt, the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order. *See supra* note 14.

41. *Jolly*, 300 N.C. at 85, 265 S.E.2d at 138.

42. *Id.* N.C. GEN. Stat. § 7A-451(a) (1989) enumerates fifteen actions and proceedings entitling an indigent to counsel. The statute provides:

(a) An indigent person is entitled to services of counsel in the following actions and proceedings:

- (1) Any case in which imprisonment, or a fine of five hundred dollars (\$500.00), or more, is likely to be adjudged;
- (2) A hearing on a petition for a writ of habeas corpus under Chapter 17 of the General Statutes;
- (3) A motion for appropriate relief under Chapter 15A of the General Statutes if the defendant has been convicted of a felony, has been fined five hundred dollars (\$500.00) or more, or has been sentenced to a term of imprisonment;
- (4) A hearing for revocation of probation;
- (5) A hearing in which extradition to another state is sought;
- (6) A proceeding for an inpatient involuntary commitment to a facility under Part 7 of Article 5 of Chapter 122C of the General Statutes, or a proceeding for commitment under Part 8 of Article 5 of Chapter 122C of the General Statutes.
- (7) In any case of execution against the person under Chapter 1, Article 28 of the General Statutes, and in any civil arrest and bail proceeding under Chapter 1, Article 34, of the General Statutes;
- (8) In the case of a juvenile, a hearing as a result of which commitment to an institution or transfer to the superior court for trial on a felony charge is possible;
- (9) A hearing for revocation of parole at which the right to counsel is provided in accordance with the provisions of Chapter 148, Article 4, of the General Statutes;

Clause of the Fourteenth Amendment to the Constitution of the United States.⁴³

The court in *Jolly* first discussed the statutory aspects of the issue, and in reviewing the legislative history and case law developments in the area of the Sixth Amendment right to appointed counsel, held that N.C.G.S. § 7A-451(a)(1) applied only to criminal cases.⁴⁴ The court first looked to their holding in *State v. Morris*,⁴⁵ in which they reviewed the United States Supreme Court holdings following *Gideon v. Wainwright*.⁴⁶ The court in *Jolly* stated that N.C.G.S. § 7A-451(a)(1), as adopted by the General Assembly in 1969, codified the holding of *Morris*.⁴⁷ The court next noted the effect of *Argersinger v. Hamlin*,⁴⁸ in which the United States Supreme Court stated that “absent a knowing and intelligent waiver, no person may be imprisoned for any offense,

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- (10) A proceeding for sterilization under Chapter 35, Article 7 (Sterilization of Persons Mentally Ill and Mentally Retarded) of the General Statutes; and
 - (11) A proceeding for the provision of protective services according to Chapter 108, Article 4, of the General Statutes;
 - (12) In the case of a juvenile alleged to be neglected under Chapter 7A, Article 23 of the General Statutes;
 - (13) A proceeding to find a person incompetent under Subchapter I of Chapter 35A, of the General Statutes;
 - (14) A proceeding to terminate parental rights where a guardian ad litem is appointed pursuant to G.S. 7A-289.23;
 - (15) An action brought pursuant to Article 24B of Chapter 7A of the General Statutes to terminate an indigent person's parental rights.

Id.

43. *Jolly*, 300 N.C. at 85, 265 S.E.2d at 138. The defendant in *Jolly* also asserted a right under the Law of the Land provisions in Article I, Section 19 of the North Carolina Constitution. *Id.* The court stated that in the situation in *Jolly*, the limitations imposed by this section of the North Carolina Constitution were identical to those of the Due Process Clause of the Fourteenth Amendment. *Id.* at 92 n.2, 265 S.E.2d at 142 n.2.

44. *Id.* at 86, 265 S.E.2d at 139.

45. 275 N.C. 50, 165 S.E.2d 245 (1969).

46. *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (citing *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1969)).

47. *Id.* In *Morris* the court held that the Sixth Amendment right to appointed counsel applied to all felony and misdemeanor cases in which the authorized punishment exceeded six months in prison and a \$500.00 fine. *Id.* As first adopted in 1969, N.C.G.S. § 7A-451(a)(1) read: “Any felony case, and any misdemeanor case for which the authorized punishment exceeds six months imprisonment or a five hundred dollar (\$500.00) fine . . .” *Id.*

48. 407 U.S. 25 (1972).

whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."⁴⁹ The court in *Jolly* stated that the holding of *Argersinger* was reflected in the amended version of N.C.G.S. § 7A-451(a)(1), in that the wording was changed to "[a]ny case in which imprisonment or fine of five hundred dollars (\$500.00) or more, is likely to be adjudged."⁵⁰ The court in *Jolly* declared that, notwithstanding the amended version of N.C.G.S. § 7A-451(a)(1) to reflect the holding of *Argersinger*, this section only applies to criminal cases.⁵¹

The remaining provisions of N.C.G.S. § 7A-451(a)⁵² were held in *Jolly* to not be applicable to an indigent civil contemnor facing incarceration for nonsupport.⁵³ The court applied the maxim, *expressio unius est exclusio alterius*—when certain things are specified in a statute, an intention to exclude all others from its operation may be inferred—and stated that civil contempt cases are not included in the statutory list of N.C.G.S. § 7A-451(a).⁵⁴ Thus the court held that N.C.G.S. § 7A-451(a) did not grant an

49. *Jolly*, 300 N.C. at 87, 265 S.E.2d at 139 (quoting *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972)).

50. *Id.* at 87, 265 S.E.2d at 139-40. See *supra* note 42.

51. *Jolly*, 300 N.C. at 88, 265 S.E.2d at 140. The court concluded that: [u]se of the phrase "[a]ny case" is responsive to the precise holding of *Argersinger*, which states that the Sixth Amendment precludes imprisonment of a person for "any offense," however classified, unless he was represented by counsel at his trial. The words "[a]ny case" in G.S. 7A-451(a)(1) must therefore be construed as any criminal case to which Sixth Amendment protections apply.

Id. at 87-88, 265 S.E.2d at 140.

52. See *supra* note 42 (text of the statute).

53. *Jolly*, 300 N.C. at 90, 265 S.E.2d at 141.

54. *Id.* The court in *Jolly* noted that two other types of civil cases, execution against the person, and civil arrest and bail proceedings, listed in subdivision (7), much like civil contempt, will presumably result in an adjudication of imprisonment. *Id.* Therefore, a reading of N.C.G.S. § 7A-451(a)

indicates that in subdivision (1), the legislative intent was to define the scope of entitlement to appointed counsel in criminal cases, and that in subdivisions (2) through (13), the intent was to list specifically those civil proceedings in which appointment of counsel was authorized. The failure to list civil contempt proceedings in subdivisions (2) through (13) must be construed as a legislative determination that appointed counsel for indigents is not authorized in such proceedings.

Id. See also *supra* note 42 (text of the statute). Section 7A-451(a) was amended in 1985, adding subdivisions (14) and (15), see *supra* note 42, which this author believes, applying the reasoning of the court in *Jolly*, also do not authorize appointed counsel in civil contempt proceedings.

indigent the right to appointed counsel in a civil contempt proceeding.⁵⁵

In discussing the constitutional sources of an indigent's right to appointed counsel, the court in *Jolly* noted that the sources are the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.⁵⁶ The court looked to the holdings of the Supreme Court of the United States, specifically *Argersinger v. Hamlin*⁵⁷ and *Gagnon v. Scarpelli*,⁵⁸ to determine the issue of whether an indigent civil contemnor has the constitutional right to appointed counsel in a nonsupport action likely to result in incarceration.⁵⁹ The court noted that the decision of *Argersinger* held that Sixth Amendment right to appointed counsel applies in any criminal case where a defendant may be incarcerated.⁶⁰ The argument that the holding of *Argersinger* would be improperly limited by distinguishing a civil proceeding from a criminal proceeding was rejected by The United States Supreme Court in *Gagnon*,⁶¹ and it was on this basis that the North Carolina Supreme Court in *Jolly* ruled that "due process requires appointment of counsel for indigents in non-support civil contempt proceedings only in those cases where assistance of counsel is necessary for an adequate presentation of the merits, or to otherwise ensure fundamental fairness."⁶² In *Jolly*, the court noted that, according to *Gagnon*,⁶³ the type of pro-

55. *Jolly*, 300 N.C. at 90, 265 S.E.2d at 141.

56. *Id.*

57. 407 U.S. 25 (1972).

58. 411 U.S. 778 (1973).

59. *Jolly*, 300 N.C. at 90-94, 265 S.E.2d at 141-43.

60. *Id.* at 90-91, 265 S.E.2d at 141. The United States Supreme Court in *Scott v. Illinois*, 440 U.S. 367 (1979), qualified the holding of *Argersinger*. *Argersinger*, according to *Scott*, stated only that a defendant may not be imprisoned if he was not represented by counsel. Thus, if a defendant is tried without counsel for a misdemeanor for a petty offense for which the law prescribes a fine or a jail term, but he is only fined, he has no complaint under *Argersinger*. Robert Monk, Comment, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326, 329 n.25 (1983) (citing *Scott v. Illinois* 440 U.S. 367, 373-74 (1979)).

61. *Jolly*, 300 N.C. at 91, 265 S.E.2d at 141 (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)).

62. *Id.* at 93, 265 S.E.2d at 143.

63. In *Gagnon*, the United States Supreme Court held that indigent defendants are not entitled to the automatic appointment of counsel in parole or probation revocation proceedings. *Id.* (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). The holding in *Gagnon* regarding the constitutional right to counsel at a

ceeding under consideration determines whether due process requires an automatic, or case-by-case, approach to appointment of counsel.⁶⁴ The court in *Jolly* stated that, if the proceedings are informal in nature and the legal and factual issues are not complex, then minimum requirements of due process may be satisfied by evaluating the need for counsel on a case-by-case basis.⁶⁵ The court held that the legal and factual issues for indigents in non-support contempt cases are neither numerous nor complex.⁶⁶ Therefore, the court in *Jolly* declared that, because a nonsupport civil contempt case is usually not complex, due process does not require that counsel be automatically appointed for indigents in those cases, but rather that a case-by-case evaluation as to the needs of counsel is sufficient to meet the minimal requirements of due process.⁶⁷

Lastly, the court in *Jolly*, inquiring into the nature of civil contempt,⁶⁸ stated that a right to counsel in a civil contempt action would evolve from the Due Process Clause of the Four-

probation revocation proceeding has been superseded in North Carolina by N.C. GEN. STAT. § 15A-1345(e) (1988). The statute entitles an indigent criminal to have counsel appointed at a probation revocation hearing, and is "intended to go beyond the federal constitutional right to counsel enunciated by the United States Supreme Court in *Gagnon v. Scarpelli*." *State v. Coltrane*, 307 N.C. 511, 514, 299 S.E.2d 199, 201 (1983).

64. *Jolly*, 300 N.C. at 91, 265 S.E.2d at 142.

65. *Id.*

66. *Id.* at 93, 265 S.E.2d at 143.

67. *Id.* The court's reasons for finding nonsupport proceedings non-complex were that a contemnor's obligation to pay child support has been previously adjudicated and that existence of the court order obligating payment of the child support can be determined by reference to court records. *Id.* Also, the court noted that establishment of arrearages is a simple bookkeeping matter and often not subject to dispute. *Id.* The court concluded that "[i]nquiries as to whether the purpose of the order may still be served by compliance, defendant's ability to pay, reasons for the arrearage and mitigating circumstances normally are not complicated." *Id.*

68. The court stated that civil contempt proceedings are always civil in nature. *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142. The court looked to N.C.G.S. § 5A-21 and its Official Commentary, *see generally supra* note 3 (text of North Carolina's civil contempt statute), to determine that the purpose of civil contempt is not to punish but rather to use the court's power to impose fines or imprisonment as a method to coerce the defendant to comply with an order of the court. *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142. The court noted that the coercive nature of civil contempt can be illustrated by the image of the jailed defendant, who by virtue of his ability to comply with the court order, "carries 'the keys of his prison in his own pockets.'" *Id.*

teenth Amendment, unlike a defendant's right to counsel in a criminal action, which it stated arises from the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment.⁶⁹

B. Status of the Law Outside North Carolina Prior to McBride

Subsequent to the North Carolina Supreme Court's holding in *Jolly v. Wright*,⁷⁰ the United States Supreme Court decided the case of *Lassiter v. Department of Social Services*,⁷¹ in which the Court again addressed the issue of the right to counsel under the Fourteenth Amendment. Although the holding of *Lassiter* stated that due process does not require automatic appointment of counsel in a proceeding to terminate parental rights, the Court's analysis provided the framework for the North Carolina Supreme Court's holding in *McBride v. McBride*.⁷² Apart from the Supreme Court's holding in *Lassiter*, the court in *McBride* was influenced by the decisions of the many jurisdictions which addressed the question of the indigent civil contemnor's right to automatic appointment of counsel in a nonsupport hearing likely to result in incarceration.⁷³

The circuits of the United States Courts of Appeals which have addressed this question have unanimously determined that due process requires an automatic appointment of counsel for an indigent facing incarceration in a civil contempt proceeding.⁷⁴ Similarly, the majority of states which have decided this issue have reached the same conclusion.⁷⁵ Additionally, several of the

69. *Jolly*, 300 N.C. at 92, 265 S.E.2d at 142.

70. 300 N.C. 83, 265 S.E.2d 135 (1980).

71. 452 U.S. 18 (1981), *reh'g denied*, 453 U.S. 927 (1981).

72. 334 N.C. 124, 126, 431 S.E.2d 14, 16 (1993). *See infra* text accompanying notes 80-84.

73. *McBride*, 334 N.C. at 129, 431 S.E.2d at 18.

74. *Id.* at 128, 431 S.E.2d at 17. The following cases provide that due process requires an automatic appointment of counsel for an indigent facing incarceration in a civil contempt proceeding: *United States v. Bobart Travel Agency, Inc.*, 699 F.2d 618 (2d Cir. 1983); *In re Kilgo*, 484 F.2d 1215 (4th Cir. 1973); *Ridgway v. Baker*, 720 F.2d 1409 (5th Cir. 1983); *Sevier v. Turner*, 742 F.2d 262 (6th Cir. 1984); *United States v. Anderson*, 553 F.2d 1154 (8th Cir. 1977) (per curiam); *Henkel v. Bradshaw*, 483 F.2d 1386 (9th Cir. 1973); *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986).

75. *McBride*, 334 N.C. at 128-29, 431 S.E.2d at 17-18. The following jurisdictions provide that due process requires an automatic appointment of counsel for an indigent facing incarceration in a civil contempt proceeding: *Otton v. Zaborac*, 525 P.2d 537 (Alaska 1974); *County of Santa Clara v. Santa Clara County Super. Ct.*, 5 Cal. Rptr. 2d 7 (Cal. Ct. App. 1992); *Padilla v. Padilla*, 645

states which hold that due process does not require automatic appointment of counsel, declare that indigent civil contemnors, who are unable to pay the amount of support owed, can not be incarcerated for their failure to pay, and as such are not being denied any liberty protected by the due process provisions.⁷⁶ Thus, the clear trend of the federal and state case law preceding the North Carolina Supreme Court decision in *McBride v. McBride* was to interpret due process to require the appointment of counsel to an indigent civil contemnor facing incarceration in a nonsupport proceeding. The supreme court acknowledged this trend in *McBride*, and reevaluated its position on this issue in light of the changes in the law since *Jolly v. Wright*. The court concluded in *McBride* that the decision set forth in *Jolly* was to be overruled.⁷⁷

P.2d 1327 (Colo. Ct. App. 1982); *Dube v. Lopes*, 481 A.2d 1293 (Conn. Super. Ct. 1984); *In re Marriage of Stariha*, 509 N.E.2d 1117 (Ind. Ct. App. 1987); *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982); *Johnson v. Johnson*, 721 P.2d 290 (Kan. Ct. App. 1986); *Rutherford v. Rutherford*, 464 A.2d 228 (Md. 1983); *Mead v. Batchlor*, 460 N.W.2d 493 (Mich. 1990); *Cox v. Slama*, 355 N.W.2d 401 (Minn. 1984); *Carroll v. Moore*, 423 N.W.2d 757 (Neb. 1988); *State ex rel. Gullickson v. Gruchalla*, 467 N.W.2d 451 (N.D. 1991); *In re Marriage of Gorger*, 728 P.2d 104 (Or. Ct. App. 1986); *Bradford v. Bradford*, 1986 WL 2874 (Tenn. Ct. App.); *Ex parte Gunther*, 758 S.W.2d 226 (Tex. 1988); *Tetro v. Tetro*, 544 P.2d 17 (Wash. 1975); *Smoot v. Dingess*, 236 S.E.2d 468 (W. Va. 1977); *Ferris v. State ex rel. Maass*, 249 N.W.2d 789 (Wis. 1977). However, the following jurisdictions provide that there is no due process right of counsel for indigent contemnors in nonsupport civil proceedings: *State ex rel. Payne v. Empire Life Ins. Co.*, 351 So. 2d 538 (Ala. 1977); *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983); *In re Marriage of Betts*, 558 N.E.2d 404 (Ill. App. Ct. 1990); *State v. Walker*, 386 So. 2d 908 (La. 1980); *Meyer v. Meyer*, 414 A.2d 236 (Me. 1980); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337 (Mo. Ct. App. 1986); *Duval v. Duval*, 322 A.2d 1 (N.H. 1974); *State ex rel. Dep't of Human Servs. v. Rael*, 642 P.2d 1099 (N.M. 1982); *Morgenthau v. Garcia*, 561 N.Y.S.2d 867 (N.Y. Sup. Ct. 1990); *In re Calhoun*, 350 N.E.2d 665 (Ohio 1976); *Rittel v. Rittel*, 485 A.2d 30 (Pa. Super. Ct. 1984).

76. *Andrews v. Walton*, 428 So. 2d 663 (Fla. 1983); *State ex rel. Shaw v. Provaznik*, 708 S.W.2d 337 (Mo. Ct. App. 1986). North Carolina has a similar provision in N.C. GEN. STAT. § 5A-21(a)(3) (1986), see *supra* note 3 (text of the statute), but notwithstanding this provision, the court in *McBride* determined there is a need for automatic appointment of counsel for indigents in these situations. *McBride*, 334 N.C. at 131, 431 S.E.2d at 19. See *infra* text accompanying notes 90-97.

77. *McBride*, 334 N.C. at 131, 431 S.E.2d at 19.

IV. ANALYSIS

A. McBride v. McBride

In *McBride v. McBride*,⁷⁸ the Supreme Court of North Carolina was again asked to contemplate the issue of whether an indigent defendant has a constitutional due process right to appointed counsel in a civil contempt hearing for nonsupport in which he faces a possibility of incarceration. In *McBride*, the court took note of the altered legal landscape surrounding this issue since their decision in *Jolly v. Wright*⁷⁹ and, accordingly, examined the issue under the guidance of the United State Supreme Court's decision in *Lassiter v. Department of Social Services*.⁸⁰

The court in *McBride* reasoned that the holding of *Lassiter* emphasizes that a court, in determining whether due process requires the appointment of counsel for an indigent defendant in a particular proceeding, must first focus on the potential diminishment of the indigent's personal liberty, rather than on the "civil" or "criminal" label placed on the proceeding.⁸¹ The court stated that "[w]here due process is concerned, 'it is the defendant's interest in personal freedom . . . which triggers the right to appointed counsel.'"⁸² *McBride* noted that the Court in *Lassiter* concluded that there is a presumption that an indigent has "a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty."⁸³ For this reason, the court in *McBride* concluded that the principles of due process in the Fourteenth Amendment required the trial court to apply the presumption in favor of Mr. McBride in the hearing which resulted in his incarceration.⁸⁴ The court pronounced that "[t]he private interest at stake in the present case is, perhaps, the most fundamental interest

78. 334 N.C. 124, 431 S.E.2d 14 (1993).

79. 300 N.C. 83, 265 S.E.2d 135 (1980).

80. *McBride*, 334 N.C. at 126, 431 S.E.2d at 16 (citing *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), *reh'g denied*, 453 U.S. 927 (1981)). Although *Lassiter* held that there was no due process requirement of automatic appointment of counsel in a proceeding to terminate parental rights, the court in *McBride* stated that the Supreme Court's analysis in *Lassiter* was instructive with regard to the analysis they had to apply in addressing the issue in the case *sub judice*. *Id.*

81. *Id.*

82. *Id.* (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), *reh'g denied*, 453 U.S. 927 (1981)).

83. *Id.* at 127, 431 S.E.2d at 16 (quoting *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18 (1981), *reh'g denied*, 453 U.S. 927 (1981)).

84. *Id.* at 130, 431 S.E.2d at 18.

protected by the Constitution of the United States - - the interest in personal liberty."⁸⁵ It noted that an indigent civil contemnor incarcerated for nonsupport does not "hold the keys to the jail" if he is unable to pay the child support arrearages which would provide his release,⁸⁶ and that in such situations, the deprivation of liberty that occurs is tremendous notwithstanding the fact that a civil contempt order contains a purge clause allowing for the contemnor's release upon payment of the arrearages.⁸⁷ Therefore, in conclusion, the court in *McBride* held "that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages."⁸⁸ The court also stated that, to the extent that *Jolly v. Wright* is inconsistent with the holding of *McBride*, *Jolly* is overruled.⁸⁹ By reversing the holding in *Jolly*, the North Carolina Supreme Court, in *McBride*, joined the majority of other jurisdictions which have decided this issue.⁹⁰

B. Incarceration of Those Without the Present Ability to Comply With a Court Order

The court in *McBride* was particularly concerned with the incarceration of indigent civil contemnors who do not have the present ability to pay their child support arrearages. The court noted that although it is true that a civil contemnor should not be fined or incarcerated for failure to comply with a court order without a determination by the trial court that the contemnor is pres-

85. *Id.*

86. *Id.* See *supra* note 68.

87. *McBride*, 334 N.C. at 130, 431 S.E.2d at 18. See *supra* notes 18 and 19.

88. *McBride*, 334 N.C. at 131, 431 S.E.2d at 19. The court set forth the procedure to be followed to effectuate this holding. It stated:

At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him.

Id. at 132, 431 S.E.2d at 19.

89. *Id.* at 131, 431 S.E.2d at 19.

90. See *supra* notes 74 and 75.

ently able to comply,⁹¹ the facts of the *McBride* case reveal that trial courts do not always make this determination before incarcerating the civil contemnor.⁹² The trial courts are statutorily bound to not incarcerate a civil contemnor who does not have the present ability to comply with the court order.⁹³ If a trial court fails to determine a civil contemnor's present ability to pay, it may result in the incarceration of an indigent who has no means to obtain his release, and who could be incarcerated for an indeterminate length of time.⁹⁴

The court in *McBride* sought to curtail what it perceived as a problem at the trial court level, notwithstanding the statutory requirements—making the proper determination of whether an unrepresented civil contemnor has the present ability to comply with the court order.⁹⁵ The court wanted to assure that an indigent civil contemnor is aware of the fact that one may not be incarcerated for want of the present ability to comply with the court order.⁹⁶ Additionally, the court wanted to make certain that indigents know how to prove their inability to pay.⁹⁷ The court in *McBride* stated that an attorney would raise these issues on behalf of an indigent civil contemnor, and that “experience has now shown that absent appointed counsel for indigent defendants

91. *McBride*, 334 N.C. at 130, 431 S.E.2d at 18 (citing *Jolly v. Wright*, 300 N.C. 83, 92, 265 S.E.2d 135, 142 (1980)).

92. *Id.*

93. *See supra* note 3.

94. *McBride*, 334 N.C. at 130, 431 S.E.2d at 18. In a situation involving these circumstances, it has been stated that it is “absurd to distinguish criminal and civil incarceration; from the prospective of the person incarcerated, the jail is just as bleak no matter which label is used.” *Id.* at 130, 431 S.E.2d at 19 (quoting *Walker v. McLain*, 768 F.2d 1181 (10th Cir. 1985), *cert. denied*, 474 U.S. 1061 (1986)). *See also supra* note 17.

95. *McBride*, 334 N.C. at 131 n.4, 431 S.E.2d at 19 n.4. The court noted in dicta that an examination of civil contempt cases heard by the state's appellate courts indicated that a “failure of trial courts to make a determination of a contemnor's ability to comply is not altogether infrequent.” *Id.*

96. *Id.* at 131, 431 S.E.2d at 19. The court stated:

indigent defendants faced with imprisonment in a civil contempt proceeding for nonpayment of child support could avoid imprisonment if they showed that they were unable to pay the amount of child support owed at the time of the hearing. However, as the present case illustrates, indigent defendants often are unaware of this fact.

Id.

97. *Id.* The court noted that without an attorney, “many such defendants would not know how to prove their inability to pay.” *Id.*

in civil contempt proceedings, the risk of an erroneous deprivation of personal liberty is high.⁹⁸

The decision in *McBride* should lead to a reduction in the actual number of indigent civil contemnors being incarcerated. Simply by virtue of the automatic right to appointment of counsel, the indigent will be more readily able to present proof of any inability to comply with the court order, thus precluding incarceration without knowledge of the rights provided by the Fourteenth Amendment.

C. *Effects of, and Unanswered Questions After, McBride*

In addition to reducing the number of indigent civil defendants being incarcerated, the most apparent effect of *McBride v. McBride* will be an increase in the number of counsel appointed to represent indigent civil contemnors in nonsupport proceedings.⁹⁹ The state provides the funding for counsel assigned to represent indigents,¹⁰⁰ and the effect of *McBride* on the payment of such counsel is yet to be determined.¹⁰¹

Another, more critical, effect of *McBride* that is yet to be determined, is the efficiency with which the trial courts will follow the procedure for making a determination of when to appoint counsel as set forth in *McBride*.¹⁰² It can only be presumed that the trial courts will correctly administer the scheme, but the court in *McBride* was concerned with the trial courts' failure to determine an indigent's present ability to comply with a court order,¹⁰³ and noted that failure to make such a determination was not that infrequent.¹⁰⁴

The Supreme Court of North Carolina in *McBride* did not discuss the statutory provisions entitling indigents to services of counsel in certain actions, as it did previously in *Jolly v.*

98. *Id.*

99. At the time of the decision in *McBride*, assignments of counsel to Central Carolina Legal Services of Guilford County, North Carolina, which represented Mr. McBride, were averaging between two and three per week for this one county only. Fees per assignment were averaging between \$250.00 and \$300.00. There was no specific data as to changes in these figures since *McBride*. Telephone Interview with Stanley B. Sprague, defendant's attorney, Central Carolina Legal Services (Sept. 28, 1993).

100. N.C. GEN. STAT. § 7A-452(b) (1989).

101. *See supra* note 99.

102. *See supra* note 88.

103. *See supra* text accompanying notes 91-98.

104. *See supra* note 95.

Wright,¹⁰⁵ nor was it necessary to do so, for the decision was based on the due process provisions of the Fourteenth Amendment.¹⁰⁶ It remains to be seen, however, whether the North Carolina Legislature will amend the statutory provisions to reflect the holding of *McBride*, and thereby statutorily declare an indigent civil contemnor's right to appointed counsel in a nonsupport proceeding. The legislature previously amended N.C.G.S. § 7A-451,¹⁰⁷ following the United States Supreme Court decision in *Argersinger v. Hamlin*,¹⁰⁸ to reflect the expansion of an indigent's right to appointed counsel as declared in that case.¹⁰⁹ Should the legislature choose to amend N.C.G.S. § 7A-451, it will serve to solidify the holding of *McBride*, and reduce much of the scrutiny which will be directed toward the trial courts with respect to the determination of when to appoint counsel.

Finally, in *Jolly v. Wright*,¹¹⁰ the court stated that it was limiting its holding to the "precise questions posed."¹¹¹ In contrast, the *McBride* court did not explicitly limit its holding, and whether it will be extended to cover other civil contempt proceedings is unclear. Other civil contempt proceedings which may result in incarceration include: domestic relations cases where one has failed to comply with a marital settlement agreement or decree; failure to attend a court ordered deposition; and, failure to comply with pendente lite alimony orders.¹¹² It is probable that the holding in *McBride* could be extended to pendente lite civil contempt proceedings, because the material elements are very similar to those litigated in *McBride*.¹¹³ However, one's indigence has little effect on the other two aforementioned civil contempt situations,

105. 300 N.C. 83, 265 S.E.2d 135 (1980). See *supra* text accompanying notes 44-55.

106. *McBride v. McBride*, 334 N.C. 124, 431 S.E.2d 14 (1993).

107. See *supra* note 42.

108. 407 U.S. 25 (1972).

109. See *supra* text accompanying note 50.

110. 300 N.C. 83, 265 S.E.2d 135 (1980).

111. *Id.* at 94, 265 S.E.2d at 143.

112. Michele Hermann & Shannon Donahue, *Fathers Behind Bars: The Right to Counsel in Civil Contempt Proceedings*, 14 N.M. L. REV. 275, 276 (1984).

113. See generally N.C. GEN. STAT. §§ 50-16.3-16.8 (1987). The alimony and pendente lite statutes set forth specific enforcement procedures, and remedies available, to the dependent spouse, and state that enforcement is available through civil contempt proceedings, and that disobedience may be punished by criminal contempt proceedings. *Id.* The statutes set forth no provisions specific to indigents, but do allow for modification of the order due to changed circumstances. *Id.*

and, therefore, it appears less probable that the holding in *McBride* will be extended to cover these circumstances. These questions will be determined if and when a case arises under these circumstances asserting the holding of *McBride*, or in the unlikely event that the legislature chooses to address them.

Regardless of the unanswered questions presented by *McBride*, the court made the correct determination in overruling *Jolly*. The trend, as evidenced by the decisions of the federal circuits and the numerous state courts, is to expand the due process rights of the Fourteenth Amendment to include the loss of liberty that an indigent may face in a civil contempt proceeding. Provided that there is often a hazy line of distinction in North Carolina between civil and criminal contempt,¹¹⁴ it is certainly equitable to extend the rights enjoyed by an indigent criminal contemnor to an indigent civil contemnor.

V. CONCLUSION

In *McBride v. McBride*, the North Carolina Supreme Court revisited the question of whether an indigent civil contemnor facing incarceration for the failure to pay child support arrearages has the constitutional due process right to be represented by appointed counsel. The court overruled its prior decision in *Jolly v. Wright* and declared that such a right does exist in North Carolina. The court based its decision in *McBride* on the development of the legal landscape involving due process rights of civil contemnors since the earlier holding of *Jolly*. The court looked to the reasoning of the United States Supreme Court and the federal circuits of appeal, as well as to the holdings of the majority of the states which have decided this issue. Moreover, in *McBride* the court looked at the status of the law in North Carolina, and found that indigent defendants in nonsupport civil contempt proceedings were being denied their physical liberties as protected by the Constitution of the United States. The court ruled that this denial of liberty without the ability to afford representation of counsel violated the due process provisions with respect to indigents, notwithstanding that their contempt was civil in nature. As a result of *McBride*, indigent civil contemnors will be appointed counsel in all nonsupport actions which may result in incarceration. Absent an appointment of counsel by the trial court, an indigent civil contemnor may not be incarcerated for a failure to pay

114. See *supra* notes 14 and 40.

child support arrearages. Therefore, notwithstanding the incapability of affording counsel, an indigent civil contemnor will not be denied representation in a nonsupport hearing which might lead to imprisonment, resulting in greater protection for the contemnor and an increased capacity to provide proof of a present inability to comply with a court order, and, in the end, a reduction in the number of civil contemnors unjustly incarcerated.

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