SJC-12784

DEPARTMENT OF REVENUE CHILD SUPPORT ENFORCEMENT & another[1] vs. JOSHUA GRULLON.

Essex. January 9, 2020. - June 25, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Divorce and Separation, Child support, Modification of judgment. Parent and Child, Child support. Contempt. Practice, Civil, Contempt, Assistance of counsel.

Complaint for divorce filed in the Essex Division of the Probate and Family Court Department on December 12, 2016.

A complaint for contempt, filed on July 11, 2018, was heard by Randy J. Kaplan, J.

The Supreme Judicial Court granted an application for direct appellate review.

Anna S. Richardson (Eve C. Savage Elliott & Catherine Fisher also present) for the defendant.

David C. Kravitz, Assistant Attorney General, for Department of Revenue Child Support Enforcement.

The following submitted briefs for amici curiae:

Michael Dsida & Andrew Cohen, Committee for Public Counsel Services, for Committee for Public Counsel Services.

[1] Radelis Y. Polanco.

Martin W. Healy & Thomas J. Carey, Jr., for Massachusetts Bar Association & others.

Jamie Sabino & Deborah Harris for Massachusetts Law Reform Institute.

Harvey Weiner & Lincoln A. Rose for Jewish War Veterans of the United States of America, Inc.

Ruth A. Bourquin for American Civil Liberties Union of Massachusetts, Inc.

CYPHER, J. The defendant, Joshua Grullon, appeals from a civil contempt order and subsequent judgment by a judge of the Probate and Family Court on a complaint for unpaid child support filed by the defendant's former wife (mother). At the hearing on the complaint, the defendant and the mother appeared pro se, and an attorney represented the child support enforcement division of the Department of Revenue (department). Without making findings about the defendant's ability to pay $500 to prevent incarceration for contempt (purge amount), the judge ordered the defendant to spend ten days in jail. We granted the defendant's application for direct appellate review. The defendant raises the issues whether (1) the judge abused her discretion in finding the defendant guilty of civil contempt; (2) a right to counsel exists for indigent defendants in civil contempt proceedings where the defendant faces a realistic risk of incarceration; (3) the department fulfilled its statutory obligations to assist the noncustodial parent; and (4) the judge erred in not accepting the defendant's counterclaim for modification. We hold that it was an abuse of discretion for

the judge to hold the defendant in civil contempt, that the department did not fulfill its statutory obligations to assist the noncustodial parent, and that the judge erred in not accepting the defendant's counterclaim for modification. Although this case is moot, we reach the merits of these three issues because they are "capable of repetition, yet evading review" (citation omitted), Commonwealth v. McCulloch, 450 Mass. 483, 486 (2008), and are issues of public importance and have been briefed by both parties, Commonwealth v. Yameen, 401 Mass. 331, 333 (1987), cert. denied, 486 U.S. 1008 (1988). We need not answer the question whether there is a right to counsel where the procedural safeguards or their equivalent are provided.[2]

Background. We present the relevant facts and procedure. The defendant and the mother divorced in November 2017. The divorce judgment provided that defendant pay $123 per week in child support (payments) through the department. In July 2018, the mother filed a pro se complaint for civil contempt (complaint) in the Probate and Family Court, alleging that the

[2] We acknowledge the amicus briefs submitted in support of the defendant by the Massachusetts Bar Association, the Boston Bar Association, and Mark Spiegel; and the Jewish War Veterans of the United States of America, Inc.; and amicus letters submitted by the Committee for Public Counsel Services; the Massachusetts Law Reform Institute; and the American Civil Liberties Union of Massachusetts.

defendant was $3,690 behind in his payments. The complaint was marked "DOR full service case," meaning that the department was providing services in the case.

The department served the complaint and summons on the defendant on behalf of the mother. With assistance from Veterans Legal Services, the defendant filed an answer and counterclaim for modification.[3] In his answer, the defendant denied that he had "willfully disobeyed a clear and unequivocal court order" as he lacked the ability to make his payments due to his past incarceration and subsequent difficulty obtaining employment. In the defendant's counterclaim for modification, he requested a reduction in the child support order because his income had decreased, resulting in a difference between the order in place and the proper amount under child support guidelines.

The judge held a hearing on the complaint, at which the defendant appeared without counsel. Counsel for the department was present and participated at the hearing. Before the hearing, the defendant completed a financial disclosure form, stating that his weekly income was $136.24 and that he had fifty dollars in weekly expenses. At the hearing, the department's

[3] The summons instructed the defendant to serve his answer on the department on behalf of his former wife, and provided the department's address. The defendant mailed his answer and counterclaim to the department.

attorney reported that the defendant owed $5,636 in payments to the mother.[4] The judge reviewed the defendant's answer to the complaint, observing that the defendant said that he had been incarcerated from December 2017 to March 2018 and from July to August 2018.[5] The department's attorney did not challenge these factual assertions. The defendant informed the judge that he was unemployed at the time of the hearing, but that he was enrolled in classes in a tractor trailer driver program, with his graduation date a few weeks away. The defendant informed the judge that the classes had been paid for through the United States Department of Veterans Affairs.

The judge inquired whether the defendant had filed a complaint for modification, and the department attorney stated, "Not to my knowledge." The defendant said he had tried to file a complaint for modification at a different court. When the judge explained that he had to file the complaint for modification at the court where the hearing was being held, the defendant responded that he understood and that "It is crystal clear. I actually have an attorney." The defendant did not

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[4] The department also reported that the defendant had paid $145 in child support payments since the order had entered.

[5] The defendant told the judge that he "posted a thousand some odd bail" and that he had been released on a bail in the amount of $750. The judge did not inquire into whether he paid these amounts from his own resources.

inform the judge that he had filed a counterclaim for modification with his answer to the complaint.

Counsel for the department requested incarceration, subject to a $500 purge amount. At first, the judge opposed incarceration, but then ordered it after having an exchange with the defendant, in which the judge stated the defendant had a "poor attitude." The judge ordered the defendant to spend ten days in jail or pay the $500 purge amount. The judge further ordered that the defendant's weekly child support payments be increased to $153.75 per week, an amount that included $30.75 toward arrearage. The defendant was unable to pay his $500 purge amount and was taken into custody and incarcerated, serving his full ten-day sentence.

Insofar as relevant here, through counsel, the defendant filed a notice of appeal from the civil contempt order and a motion to stay the contempt order pending appeal. At a hearing, the judge found that the defendant had complied with the civil contempt order, and therefore denied as moot his request to stay further contempt proceedings, and instead entered judgment on the complaint for civil contempt. During this hearing, the judge again informed the defendant that he had to file and serve a complaint for modification. The defendant, with assistance of counsel, filed a complaint for modification that day.

After a hearing, the judge entered judgment on the defendant's complaint for modification, reducing his ongoing child support obligation to his requested amount, effective retroactively to the date he filed his answer and counterclaim. The defendant filed a notice of appeal from the judgment on the complaint for civil contempt and renewed his notice of appeal from the civil contempt order.

Discussion. 1. Legal framework. "Two important public policies are furthered by the Massachusetts child support scheme: (1) providing for the best interests of children, and (2) ensuring that the taxpayers are secondary to the parents in meeting the financial needs of dependent children." Department of Revenue v. Mason M., 439 Mass. 665, 669 (2003). See G. L. c. 119A, § 1 ("It is the public policy of the commonwealth that dependent children shall be maintained, as completely as possible, from the resources of their parents, thereby relieving or avoiding, at least in part, the burden borne by the citizens of the commonwealth").

The department administers the State child support program and is the Commonwealth's sole, so-called IV-D agency. See G. L. c. 119A, § 1; 45 C.F.R. § 302.12(a) (2019). An IV-D agency is the single organizational unit within a State "that has the responsibility for administering or supervising the administration of the State plan under title IV-D of the [Social

Security] Act." 45 C.F.R. § 301.1 (2019) ("State plan means the State plan for child and spousal support under section 454 of the [Social Security] Act"). The department provides IV-D services to children and families, including services for the "establishment, modification, or enforcement of child support obligations." G. L. c. 119A, § 1A (defining "IV-D services"). The services provided also include "the enforcement of support orders through civil and criminal proceedings." G. L. c. 119A, § 2 (a). In addition to the cases for which it provides services by statute, the department also "shall accept applications for services from individuals seeking to establish, modify, or enforce orders of child support." Id.

Where a department attorney is involved in a case, his or her role is to represent the department's interests, not to create an attorney-client relationship with an individual who may benefit from the IV-D services provided. G. L. c. 119A, § 3 (a).

2. Civil contempt order. The defendant and the department agree that under the facts of this case, the judge erred in finding the defendant in civil contempt. We agree, given that the defendant did not receive adequate procedural due process protections.

A Probate and Family Court judge has the power and authority to find a person in contempt. G. L. c. 215, § 34.

"[A] civil contempt finding [must] be supported by clear and convincing evidence of disobedience of a clear and unequivocal command." Birchall, petitioner, 454 Mass. 837, 838-839 (2009). Before finding a defendant in civil contempt, the judge must find that the defendant had the ability to pay at the time the contempt order or judgment is entered. Furtado v. Furtado, 380 Mass. 137, 144 (1980). We review a judge's ultimate finding of contempt for an abuse of discretion and we subject questions of law to plenary review. See Warren Gardens Hous. Coop. v. Clark, 420 Mass. 699, 701 (1995); Martinez v. Lynn Hous. Auth., 94 Mass. App. Ct. 702, 705 (2019), citing Massachusetts Comm'n Against Discrimination v. Wattendorf, 353 Mass. 315, 317 (1967).

In Turner v. Rogers, 564 U.S. 431, 435 (2011), the United States Supreme Court held that in a civil contempt proceeding where both parents were unrepresented by counsel and the indigent noncustodial parent potentially faced incarceration, it was not a violation of the noncustodial parent's Federal due process rights to not provide him with counsel. However, the Court emphasized that "the State must nonetheless have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order." Id. The safeguards identified in Turner "include (1) notice to the defendant that his 'ability to pay' is a critical

issue in the contempt proceeding; (2) the use of a form (or the equivalent) to elicit relevant financial information; (3) an opportunity at the hearing for the defendant to respond to statements and questions about his financial status (e.g., those triggered by his responses on the form); and (4) an express finding by the court that the defendant has the ability to pay." Id. at 447-448.

The Federal regulations related to the enforcement of support obligations were updated after Turner and required states to "establish guidelines for the use of civil contempt citations in IV-D cases." Department of Health & Human Services, Centers for Medicare & Medicaid Services; Administration for Children & Families; Flexibility, Efficiency, & Modernization in Child Support Enforcement Programs; Final Rule, 81 Fed. Reg. 93492, 93496 (Dec. 20, 2016) (revising 45 C.F.R. § 303.6[c][4]). Title 45 C.F.R. § 303.6(c)(4) (2016) provides that the guidelines established by an IV-D agency for the use of civil contempt citations in IV-D cases must include requirements that the agency "(i) Screen the case for information regarding the noncustodial parent's ability to pay or otherwise comply with the order; (ii) Provide the court with such information regarding the noncustodial parent's ability to pay, or otherwise comply with the order . . . ; and (iii) Provide clear notice to the noncustodial parent that his or her

ability to pay constitutes the critical question in the civil contempt action."[6]

The department has memorialized the Federal guidance in a civil contempt policy and procedures (policy) memorandum, dated March 17, 2017, which the department represents was circulated to all department staff in the department. The policy states, inter alia, that "[i]t is [the department's] obligation to ensure that there is sufficient evidence that the parent has a present ability to pay before . . . assisting with service of a pro se customer's complaint for contempt" and that "[a] parent's present ability to pay is the key issue at every step of the contempt process -- from screening through court hearings."

The defendant was not provided the Turner procedural safeguards, or their equivalent, nor did the department follow its own policy, in accordance with the Federal regulations. First, there is no indication that he received notice "that his

[6] "The revised language in [45 C.F.R. § 303.6(c)(4)] sets out minimum requirements that IV-D agencies must meet when bringing a civil contempt action involving parties in a IV-D case and ensures that contempt is used in appropriate cases where evidence exists that the noncustodial parent has the income and assets to pay the ordered monthly support obligation, but willfully fails to do so, and the purge amount or conditions are within the noncustodial parent's ability to pay or meet." Department of Health & Human Services, Centers for Medicare & Medicaid Services; Administration for Children & Families; Flexibility, Efficiency, & Modernization in Child Support Enforcement Programs; Final Rule, 81 Fed. Reg. 93492, 93534 (Dec. 20, 2016).

'ability to pay' [was] a critical issue in the contempt proceeding." Turner, 564 U.S. at 447. The department asserts that it could have provided this notice when it served the defendant with the mother's complaint. It states that it generally includes a notice, entitled "Important Notice Regarding Contempt," with the civil contempt complaint that it serves. The notice states, in bold print: "Your ability to pay child support is a critical issue in determining whether or not you will be found in contempt."[7] However, there is nothing in the record to show that the defendant received this notice, and the department does not contend that he did. The forms that the defendant did receive did not provide him with notice that his ability to pay would be a critical issue in the contempt proceeding, and therefore the first safeguard, or its equivalent, was not met.

Second, although the defendant filled out a financial disclosure form on the day of the contempt hearing that elicited his financial information, it is unclear that the department or the judge referred to the information he provided on the form. See Turner, 564 U.S. at 447. For instance, it is not clear from

[7] The policy states that "[department] staff must include the contempt [notice] with every complaint for contempt that is sent out for service. (Staff should also provide the noncustodial parent a copy at each hearing on a contempt action)."

the record whether, before advising the judge that "incarceration would be appropriate," the department followed the procedures it set for itself, in accordance with the Federal regulations. See 45 C.F.R. § 303.6(c)(4) (must screen case for and provide court with information about noncustodial parent's ability to pay, or otherwise comply with order). The defendant stated on the financial disclosure form that his gross weekly income was $136.24 and that his weekly expenses were fifty dollars. Therefore, his remaining $86.24 income per week was $36.76 under his weekly child support obligation of $123 per week. Therefore, the defendant did not have the present ability to pay, and the counsel for the department should not have requested incarceration. See 45 C.F.R. § 303.6(c)(4)(iii) (incorporated in department's policy). See also Furtado, 380 Mass. at 144. In addition, it is unclear from the transcript of the civil contempt hearing whether the judge considered the financial information that the defendant listed on the form. Based on the lack of discussion at the hearing of the contents of the financial disclosure form and the assertion by the counsel for the department that the defendant should be incarcerated, it appears the defendant's form, although complete, was not used in any meaningful manner, and therefore this second safeguard, or its equivalent, was not fulfilled.

Third, the judge did not provide the defendant with an opportunity to "respond to statements and questions about his financial status (e.g., those triggered by his responses on the form)." Turner, 564 U.S. at 448. As discussed supra, it does not appear that the defendant's statements on his financial disclosure form were used in a meaningful way. The judge's questions to the defendant focused on his incarceration and his attempts to file a complaint for modification. She also inquired about his school and how he was paying for it. After the department's attorney recommended a $500 purge amount and incarceration, the judge initially stated that she was going "to put [the matter] over until December" and encouraged the defendant to get a job and begin making child support payments. It was not until the defendant responded, "She's fine," that the judge stated, "Maybe I'll be rethinking what I am going to do today." Once the judge switched from continuing the case to the next month to considering incarceration, she did not then pause to inquire into whether the defendant had the present ability to pay his child support. For the reasons stated, the defendant was not provided with the benefit of the third Turner safeguard, or its equivalent.

Fourth, the record also is void of an indication that the judge made an express finding that the defendant had the ability to pay. See Turner, 564 U.S. at 448. A judge must determine

both the defendant's ability to pay the underlying child support obligation at the time the payment was due and the defendant's present ability to pay the purge amount. See Caveney v. Caveney, 81 Mass. App. Ct. 102, 117-118 (2012) (judge expressly found defendant had ability to pay purge amount). See also Turner, 564 U.S. at 442, quoting Hicks v. Feiock, 485 U.S. 624, 633 (1988) (civil contemnor "carr[ies] the keys of [his] prison in [his] own pockets"). As discussed supra, the transcript reveals that the judge decided to find the defendant in civil contempt not because of an assessment of his ability to pay, but because of his "poor attitude." This decision by the judge was error, as it disregarded the procedural safeguard of ability to pay. See Turner, 546 U.S. at 448; Sodones v. Sodones, 366 Mass. 121, 130 (1974). The judge's decision also blurred the line between civil contempt, which is remedial in nature, and criminal contempt, which is punitive in nature. See Birchall, petitioner, 454 Mass. at 848, quoting Sodones, 366 Mass. at 129-130 ("aim [of civil contempt] is to coerce the performance of a required act by the disobedient party for the benefit of the aggrieved complainant," whereas "aim [of criminal contempt] is to vindicate the court's authority and to punish the contemnor for doing a forbidden act or for failing to act as ordered"). Moreover, although not determinative to the case, in the contempt order, the box next to "the defendant has the ability

to pay this order" is not checked. Therefore, the defendant was not provided with the fourth Turner procedural safeguard, or its equivalent, nor did the judge engage in the essential inquiry whether the defendant was able to pay at the time of the proceeding.[8] See Furtado, 380 Mass. at 144.

It is apparent that the judge's decision to find the defendant in civil contempt was error. The failure of the department and the Probate and Family Court judge to provide the Turner procedural safeguards, or their equivalent, or to follow Federal regulations, State law, or the department's own policies resulted in the defendant wrongfully being held in civil

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[8] The purge amount of $500 set for the defendant also was not set with a determination of his ability to pay, thus again ignoring the purpose of a civil contempt. See Birchall, petitioner, 454 Mass. at 848, quoting International Union, United Mine Workers v. Bagwell, 512 U.S. 821, 828 (1994) (contempt "is civil if 'the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus "carries the keys of his prison in his own pocket"'"); Caveney v. Caveney, 81 Mass. App. Ct. 102, 117-118 (2012). See also Department of Health & Human Servs., Office of Child Support Enforcement, AT-12-01, Turner v. Rogers Guidance at 14 (June 18, 2012) ("in calculating a purge amount, states are discouraged from setting standardized purge amounts -- such as a fixed dollar amount, a fixed percentage of arrears, or a fixed number of monthly payments -- unrelated to actual, individual ability to pay. A purge amount that the noncustodial parent is ordered to pay in order to avoid incarceration should take into consideration the actual earnings and income as well as the subsistence needs of the noncustodial parent. In addition, purge amounts should be based upon a written evidentiary finding that the noncustodial parent has the actual means to pay the amount from his or her current income or assets").

contempt and spending ten days incarcerated. As such, we vacate the contempt judgment.[9]

We leave open for another day whether, when an indigent noncustodial parent receives the procedural safeguards detailed above, he or she must be provided with counsel.

3. Department's obligation toward noncustodial parent. The defendant argues that the department had an obligation to assist him in his attempt to seek a modification and that it failed to fulfill this obligation. The department contends that this argument is waived, moot, and unsupported by the record. We determine that the department did not comply with its statutory obligation to assist the defendant in his effort to seek modification of his child support order.

The department "shall provide IV-D services to children and families . . . to establish, modify, and enforce child support

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[9] We note that although civil contempt is an available remedy, its use may not have the desired effect of enforcing child support payments for the benefit of the Commonwealth's children. The United States Office of Child Support Enforcement, Division of Policy and Training, noted in its memorandum on civil contempt: "States that have reduced their over-reliance on contempt proceedings have found that they increased collections and reduced costs at the same time. There is no evidence that the routine use of contempt proceedings improves collection rates or consistent support payments to families." Department of Health & Human Servs., Office of Child Support Enforcement, Final Rule, Civil Contempt -- Ensuring Noncustodial Parents Have the Ability to Pay, https://www.acf.hhs.gov/sites/default/files/programs/css/fem_final_rule_civil_contempt.pdf [https://perma.cc/6UJL-TGFV].

obligations. Said services shall include, through the use of expedited administrative and judicial procedures, . . . the establishment, modification, and enforcement of child support orders . . ." (emphases added). G. L. c. 119A, § 2. See G. L. c. 119A, § 3B.

As detailed supra, in his answer, the defendant set forth his counterclaim for modification. Then, at the hearing on the complaint for civil contempt, the judge inquired whether the defendant had filed a complaint for modification. The defendant stated that he had not filed one but that he attempted to file a complaint for modification at a different court near where he lives, and that he "tried to reach out to [the department] but I left a voicemail, too, but no response." The counsel for the department told the judge that there had not been a complaint for modification filed. On the limited record before us, it appears that the department did not fulfill its duty of assisting the defendant with his request for modification.

4. Method for filing modification of child support order. The defendant next argues that the judge erred by requiring the defendant to file a (new) complaint for modification, rather than acting on the counterclaim for modification he had included in his answer. The department contends that this issue also is waived and moot. We agree with the Appeals Court's recent explanation of the issue of the Probate and Family Court's power

to modify a child support order. See Feinstein v. Feinstein, 95 Mass. App. Ct. 230, 234 (2019). "A Probate Court has power to modify a support order in the context of either a complaint for contempt or a complaint for modification" (citation omitted). Id. "A modification on a complaint for contempt may occur even in the absence of a contempt finding." Id.

Conclusion. The record demonstrates that the defendant's case should not have reached the civil contempt hearing stage and that when his case did reach this stage, the department failed to follow the Federal regulations and its own procedures, and the judge failed to provide the defendant with sufficient procedural safeguards. Therefore, we vacate the civil contempt judgment against the defendant.

So ordered.

GANTS, C.J. (concurring). The court's opinion ably demonstrates that the order of civil contempt in this case, which resulted in the unjust imprisonment of defendant Joshua Grullon for ten days, was the product of a compendium of errors. He was effectively denied every procedural safeguard that he is entitled to as a matter of due process under the Fourteenth Amendment to the United States Constitution: (1) he was not given the required notice "that his 'ability to pay' is a critical issue in the contempt proceeding"; (2) he was provided with a financial information form, which he filled out, but it appears that neither the judge nor the attorney with the child support enforcement division of the Department of Revenue (department) reviewed it or in any way considered it; (3) no apparent inquiry was made into his ability to pay the amount due in child support payments; and (4) the judge made no finding that the defendant had the ability to pay the purge amount of $500. See Turner v. Rogers, 564 U.S. 431, 447-448 (2011). The court correctly vacates the civil contempt order but does not reach the question whether there is a constitutional right to counsel for indigent defendants in civil contempt proceedings who face a realistic risk of incarceration. The court declares that it need not answer that question "where the procedural safeguards or their equivalent are provided." Ante at .

I do not quarrel with the court's decision not to reach this question in this case. I write separately, however, to raise six points.

First, it is important to emphasize the premise that underlies the court's rationale for deferring this question -- that the procedural safeguards that were denied the defendant in this case will be faithfully provided to future defendants. The record in this case is inadequate to allow us to determine whether the denial of the procedural safeguards required under the Fourteenth Amendment by the Turner decision is the exception or the norm in the so-called "DOR session" of the Probate and Family Court. If it emerges over time that it is the norm, or more than an isolated exception, a right to counsel would be necessary to ensure that these procedural safeguards are faithfully applied. The Supreme Court in Turner attached "an important caveat" to its conclusion that the State need not provide counsel to a parent in a civil contempt proceeding for failure to provide child support -- "the State must . . . have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the support order" (emphasis added). Turner, 564 U.S. at 435. If the required procedural safeguards are not, in practice, consistently applied in the DOR session to "ensure" that a

thorough inquiry is made into the defendant's ability to pay and that a judge makes a careful finding by clear and convincing evidence regarding the defendant's ability to pay, then the caveat would not be satisfied and a right to counsel would be required under the due process clause of the Fourteenth Amendment.

Second, because a finding of civil contempt may result in a loss of liberty, the standard of proof is a demanding one: "clear and convincing evidence of disobedience of a clear and unequivocal command." Birchall, petitioner, 454 Mass. 837, 838-839 (2009) (Birchall). The violation of the court's order must be wilful, which means there must be clear and convincing evidence that the defendant had the ability to pay the amount ordered. See Salvesen v. Salvesen, 370 Mass. 608, 611 (1976), citing Sodones v. Sodones, Mass. 366 Mass. 121, 130 (1974) ("A person judged in civil contempt may not be sentenced to prison for failure to pay a compensatory sum of money if he shows that he is unable to comply"). See also Commonwealth v. Henry, 475 Mass. 117, 121 (2016) ("A defendant can be found in violation of a probationary condition only where the violation was wilful, and the failure to make a restitution payment that the probationer is unable to pay is not a wilful violation of probation"). In fact, a "jail term is a coercive civil contempt sanction rather than a punitive criminal contempt sanction" only

"because the contemnor retains the ability to obtain his [or her] release from custody by paying an amount he [or she] is able to pay." Birchall, 454 Mass. at 849. Therefore, as here, where a purge amount was ordered to be paid forthwith, there must be a finding by clear and convincing evidence that the defendant has the ability to pay that purge amount.

Third, the Supreme Court in Turner recognized that "the critical question likely at issue in these cases concerns . . . the defendant's ability to pay." Turner, 564 U.S. at 446. But the Court declared that a defendant's ability to pay is "often closely related to the question of the defendant's indigence," and concluded that, because courts routinely make an indigency finding at the beginning of a criminal case to determine whether a defendant is entitled to appointed counsel, a finding of ability to pay in many cases will be similarly "straightforward." Id. I believe this analogy is misleading. If we were to provide a right to counsel where the department seeks incarceration of a noncustodial spouse through an order of civil contempt, the right would be limited only to indigent defendants, but that would not mean that every defendant who would be entitled to counsel would, as a consequence of the finding of indigency, be entitled to a finding of not guilty on the charge of civil contempt because of his or her inability to pay. The issue of ability to pay in civil contempt cases is far

more complex than an indigency determination regarding a defendant's entitlement to counsel, in part because it may include findings regarding a defendant's imputed income, that is, the amount he or she could earn but chooses not to earn. See C. Kindregan, M. McBrien, & P.A. Kindregan, Family Law and Practice § 92:4 (4th ed. 2013) (judge may hold defendant in civil contempt not only where judge has determined that defendant has sufficient assets to satisfy support obligations, but may also consider such matters as whether defendant has voluntarily left employment or stripped self of assets).

Fourth, our Massachusetts case law provides a right to counsel in circumstances where the Fourteenth Amendment's due process clause does not. Therefore, even if there were no such right under the United States Constitution, there may yet be a right under Massachusetts law. For instance, in Massachusetts a defendant has a right to counsel in a probation revocation proceeding "whenever imprisonment palpably may result from a violation of probation." Commonwealth v. Patton, 458 Mass. 119, 125 (2010), citing Williams v. Commonwealth, 350 Mass. 732, 737 (1966) ("'simple justice' requires that, absent waiver, a probationer is entitled to assistance of counsel"). The Supreme Court, however, has declined to recognize a right to counsel in probation revocation cases. See Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973). This court has held that indigent parents have

a "constitutional right to court-appointed counsel in a contested proceeding to terminate parental rights." See Department of Pub. Welfare v. J.K.B., 379 Mass. 1, 6 (1979).[1] The Supreme Court has found otherwise under the United States Constitution. See Lassiter v. Department of Social Servs. of Durham County, N.C., 452 U.S. 18, 31-32 (1981) (Constitution does not require appointment of counsel for indigent parents in every parental status termination proceeding).

Fifth, where a defendant faces the risk of incarceration for failure to pay a fine, we have declared that an indigent defendant has a right to counsel. See Commonwealth v. Gomes, 407 Mass. 206, 211 (1990). If a defendant is entitled to counsel when he or she faces the risk of incarceration for failing to pay a fine, it is fair to ask why the same right would not apply where a defendant faces the risk of incarceration for failing to pay a court-ordered child support payment.

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[1] See also L.B. v. Chief Justice of the Probate & Family Court Dep't, 474 Mass. 231, 242 (2016) ("when an indigent, unrepresented parent seeks. . . to remove a guardian for a minor child and thereby regain custody of the child, the parent has a due process right to counsel to prosecute the petition" where parent makes colorable claim for removal); Guardianship of V.V., 470 Mass. 590, 594 (2015) (indigent parent whose child is subject of guardianship petition has right to have counsel appointed); Adoption of Meaghan, 461 Mass. 1006, 1007 (2012) (indigent parents have right to counsel in termination and adoption proceedings initiated by would-be adoptive parents).

The distinction appropriately made in response to this question, and one highlighted by the Supreme Court in Turner, is that where the party "opposing the defendant at the hearing is not the government represented by counsel but the custodial parent unrepresented by counsel," (emphasis in original), Turner, 564 U.S. at 446, "[a] requirement that the State provide counsel to the noncustodial parent in these cases could create an asymmetry of representation that would 'alter significantly the nature of the proceeding,'" id. at 447, quoting Gagnon, 411 U.S. at 787. I certainly appreciate the risk of such "an asymmetry of representation" where the spouse who has failed to pay child support, for whatever reason, is granted a right to counsel and the custodial spouse who is owed child support payments is not. But this asymmetry only exists where the custodial spouse is without the assistance of counsel. Where the attorney for the department is at the contempt hearing seeking to enforce a child support order through a finding of contempt, the custodial spouse is not the attorney's client (the department is the client), but the interests of the custodial spouse and the department attorney are closely aligned. The "asymmetry" appropriately feared by the Supreme Court in Turner does not exist where the department appears in court seeking a finding of contempt to enforce a child support order.

Sixth, the concern about an "asymmetry of representation" suggests that civil contempt proceedings regarding child custody payments are always a zero-sum game, but that is often not the case. The goal of the hearing should be the provision of child support, as ordered by the judge, but incarceration for civil contempt may not always be the most effective way to accomplish that goal, as illustrated by this case. Here, the defendant was ordered incarcerated when he was just weeks away from graduation from the New England Tractor Trailer School, whose tuition was being paid by the United States Department of Veterans Affairs through its vocational rehabilitation program. The record does not reflect whether his incarceration prevented his graduation from that program, but even if it did not, it certainly put his graduation at risk and therefore risked diminishing his subsequent ability to find stable work in the trucking industry that would enable him to make his child support payments.

An appointed attorney would certainly assist a defendant in proving that the defendant 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 appointed attorney, with the help of the resources of the Committee for Public Counsel Services, might also help a defendant to pay more child

support in the future.[2] For instance, an attorney could help the defendant to obtain financial counselling that could enable the defendant to increase future income by applying for public benefits to which the defendant is entitled or by helping the defendant to find job training opportunities. Or the financial counselling may help the defendant to cut expenses, thereby freeing up income that can be devoted to pay child support.

I therefore concur with the court's opinion in this case, and will await a case that provides a more complete record as to whether the constitutionally required procedural safeguards are being complied with in DOR sessions throughout the Commonwealth, where the question regarding a right to counsel that was deferred by this court might need to be answered.

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[2] The children and family law division of the Committee for Public Counsel Services lists a number of social service resources for parents like the defendant. See http://publiccounsel.net/cafl/professional/social-servicessocial-work/ [https://perma.cc/5E5A-96P6].