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Summary of Rodriguez v. District Court, 128 Nev. Adv. Op. 14

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Rodriguez v. District Court, 120 Nev. Adv. Op. No. 87
102 P.3d 41 (2004)¹

Domestic Relations– Child Support, Contempt for Non-Payment of Child Support

Summary

Petitioner Charles Rodriguez (Rodriguez) and the real party in interest, Nicole Eddowes (Eddowes), divorced in November 2001. The terms of the initial custody order and divorce decree awarded primary physical custody of the couple’s daughter to Eddowes and ordered Rodriguez to pay child support, half of the child’s insurance premiums, and half of any unreimbursed medical expenses incurred on the child’s behalf.

Rodriguez failed to make payments as required, and on March 1, 2004, the district court issued its third contempt order against Rodriguez for the non-payment of child support. The district court denied Rodriguez’s assertion that he was an indigent defendant and entitled to appointed counsel in the contempt proceedings because of the possibility of jail. The court ordered Rodriguez to serve twenty-five days in jail, with the possibility of early release upon payment of \$10,000 in outstanding arrearages.

Rodriguez filed a petition for a writ of habeas corpus challenging the district court order denying him counsel, holding him in contempt, and sentencing him to jail. The Nevada Supreme Court ordered a temporary stay pending review.

The Nevada Supreme Court held that the Sixth Amendment right to counsel does not apply in civil contempt proceedings. However, due process requires the trial court to evaluate the need for appointing counsel on a case-by-case basis. The court remanded the case to the trial court for a determination of whether Rodriguez was indigent for purposes of determining whether he was entitled to the appointment of counsel.

Issue and Disposition

Issue

Is an indigent defendant in family court entitled to appointed counsel in a contempt hearing when the hearing may result in the imposition of a jail sentence for nonpayment of child support?

Disposition

Possibly. The need for appointed counsel turns on an initial determination of indigency. If an indigent party faces the threat of possible incarceration for the nonpayment of child support, the court should then seek to balance the private liberty interest at stake, the government’s interest, and the risk of erroneous finding, taking into account the complexity of the legal and factual issues as well as the party’s ability to effectively communicate on his own behalf.

¹ By Beth Rosenblum.

Commentary

State of the Law Before *Rodriguez*

The issue presented in *Rodriguez* is one of first impression in Nevada. Other jurisdictions have adopted three approaches to determine whether an indigent defendant is entitled to counsel in contempt proceedings involving the non-payment of child support that may result in a jail sentence.

Other Jurisdictions – Absolute Right to Appointed Counsel

Courts taking this view do not distinguish between civil and criminal contempt proceedings, and instead rely on a finding of indigency as the critical factor in the analysis. For instance, the Tenth Circuit in *Walker v. McClain* held that due process required the appointment of counsel for defendants in hearings for non-payment of child support when those defendants establish indigency.² The Court of Appeals stated that the right to counsel turns on whether the proceeding results in a deprivation of liberty, regardless of whether it is characterized as civil or criminal.³ Other courts that follow this reasoning have determined that the risk that an indigent defendant could be jailed erroneously if not provided with counsel outweighs any government interests, particularly in light of other alternatives to compel compliance with child support orders such as income withholding or property liens.⁴

Other Jurisdictions – No Right to Appointed Counsel

Courts following this view have determined that there are no circumstances under which a parent is entitled to court-appointed counsel in a civil contempt proceeding for failure to pay child support. These courts have reasoned that a party cannot be found guilty of failing to pay child support and sentenced to jail because if the parent is indigent, the trial court cannot make the essential finding needed for contempt: that the parent has the ability to pay and has willfully refused to do so. Thus, there is no threat of imprisonment. Accordingly, the Florida Supreme Court in *Andrews v. Walton* determined that a father who had the ability to pay his support obligation but willfully refused to do so was not denied his due process rights when the trial court ordered incarceration without appointing counsel.⁵

Other Jurisdictions – Discretionary Appointment of Counsel

Courts subscribing to this approach have held that due process does not require the appointment of counsel every time an indigent party faces the possibility of imprisonment for civil contempt due to the nonpayment of child support. In *Department of Human Services v. Rael*, the New Mexico Supreme Court adopted a case-by-case analysis, providing discretion to the trial court to determine whether fundamental fairness required the appointment of counsel in

² *Walker v. McClain*, 768 F.2d 1181, 1185 (10th Cir. 1985).

³ *Id.* at 1183.

⁴ *E.g.*, *Mead v. Batchlor*, 460 N.W.2d 493, 503 (Mich. 1990).

⁵ *Andrews v. Walton*, 428 So. 2d 663, 665-66 (Fla. 1983).

any given case.⁶ The court stated that the trial court should consider relevant factors such as the party's ability to understand the proceeding, the complexity of the issues, and the defenses that might be presented.⁷

Effect of the Decision on Current Law

The decision in *Rodriguez* gives trial courts the discretion to consider whether or not counsel should be appointed to an indigent parent in a contempt hearing for nonpayment of child support. Trial courts will have to follow the three-part balancing test enunciated by the United States Supreme Court in *Mathews v. Eldridge* to determine whether the interests of due process have been met in these cases.⁸ This test requires a review of the private interests at stake, the government's interest, and the risk that the procedures used will lead to erroneous decision.⁹ After balancing these elements, trial courts must measure them as a whole against the presumption that a right to appointed counsel arises only when the indigent defendant may lose his personal freedom.¹⁰

The decision is also consistent with Nevada's approach to appointing counsel in other civil cases. In civil litigation, courts engage in a balancing test by looking to a party's current financial status.¹¹ Courts balance income and assets against debts and liabilities to determine that whether that party is indigent for purposes of appointing counsel.¹²

Unanswered Questions

The court in *Rodriguez* fails to address concerns about the risk of punitive confinement facing defendants in non-support contempt proceedings. Trial courts may sense that the failure to obey past orders for child support offends the dignity of the court, creating a strong impetus toward punitive sentencing.¹³ Courts may also believe that they are authorized to impose sentences on parents with little means to pay in order to motivate them to greater diligence in the future.¹⁴ The purpose is punitive, as deterrence is one of the goals of punishment.¹⁵ Moreover, the court does not address the argument that putting a father in jail for an extended stay may be counterproductive to the ultimate goal of coercing his payment of child support.

Conclusion

Although the Nevada Supreme Court adopts a balancing approach, its decision in *Rodriguez* reflects the rationale of the Florida Supreme Court and other courts that will not appoint counsel in contempt hearings for non-payment of child support. The court acknowledges

⁶ Dep't of Human Serv. v. Rael, 642 P.2d 1099, 1103 (N.M. 1982).

⁷ *Id.* at 1104.

⁸ *Mathews v. Eldridge*, 452 U.S. 319, 335 (1976).

⁹ *Id.*

¹⁰ *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 27 (1981).

¹¹ NEV. REV. STAT. 12.015; *see Nikander v. Dist. Ct. in & for First Judicial Dist.*, 711 P.2d 1260, 1263 (Colo. 1986).

¹² *Nikander*, 711 P.2d at 1262.

¹³ Robert Monk, *The Indigent Defendant's Right to Court-Appointed Counsel in Civil Contempt Proceedings for Nonpayment of Child Support*, 50 U. CHI. L. REV. 326, 340 (1983).

¹⁴ *Id.*

¹⁵ *Id.*

that Rodriguez would not be found indigent and thus entitled to counsel if he were willfully unemployed, as declared by the trial court. Accordingly, there would be no threat of a due process violation because an indigent party cannot be imprisoned. It is unlikely, then, that defendants like Rodriguez will receive counsel. Still, because the decision at least leaves open the possibility that defendants may receive assistance of counsel, the court properly complied with the requirements of due process.