No. 19A-204

# In The
# Supreme Court of the United States

GAIL ROSIER,

Petitioner,

v.

JEFFREY STROBEL,

Respondent,

On Petition for a Writ of Certiorari
to the Supreme Court of Arizona

## PETITION FOR WRIT OF CERTIORARI

D. Jeffrey Craven
The Craven Firm, PLLC
14555 N. Scottsdale Rd. Ste. 320
Scottsdale, AZ 85254
Phone: 480-582-1547
Email: jeff@cravenfirm.com
Attorney for Petitioner Gail Rosier

## I. QUESTIONS PRESENTED:

1. In light of *Turner v. Rogers*, 564 U.S. 431 (U.S. 2011), what minimum procedural safeguards are required to ensure due process for incarcerated and indigent obligors who face child support proceedings under the Uniform Interstate Family Support Act ("UIFSA") and the possibility of contempt and imprisonment?
2. In determining whether to register and enforce a foreign order, do principals of full faith and credit bar a state from considering due process, subject matter jurisdiction or fraud upon the court if those issues were not actually raised or fully and fairly litigated in the foreign state?
3. The UIFSA provides that an obligor may seek to vacate the registration of a foreign support order if he or she establishes "a defense under the law of this state to the remedy sought." Does this mean that a foreign support order may not be enforced via contempt and imprisonment if the underlying obligation is considered an ordinary money debt per the laws and constitution of the registering state? Stated differently, is a registering state obligated to apply child support remedies that would not be available had the order originated in the registering state?

## LIST OF PARTIES

**Petitioner**:

Gail Rosier represented by
Attorney D. Jeffrey Craven
(U.S. Sup. Ct. Bar No. 298766)
The Craven Firm, PLLC
14555 N. Scottsdale Rd. Ste. 320
Scottsdale, AZ 85254
Phone: 480-582-1547
Email: jeff@cravenfirm.com
and
Mark W. Horne, Esq. (AZ Bar No. 029449)
Degnan Law, PLLC, 5320 N. 16th St, Suite 205
Phoenix, AZ 85016, Phone: 602-320-0061
Email: m.horne@degnanlawaz.com

**Respondent**:

William A. Richards
Baskin Richards, PLC
2901 N. Central Avenue, Suite 1150
Phoenix, Arizona 85012
Email: dwood@baskinrichards.com
Attorney for Respondent Jeffrey Strobel

**Interested None Party:**

Carol A. Salvati
Assistant Attorney General
1275 W. Washington
Phoenix, Arizona 85007-2997
Email: Carol.Salvati@azag.gov
Attorney for the State of Arizona

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## IV. PETITION FOR A WRIT OF CERTIORARI

Petitioner Gail Rosier, an Arizona citizen and resident, respectfully petitions this Court for a writ of certiorari to review the judgment of the Arizona Court of Appeals attached at Appendix ("App.") App.7-29.

## V. OPINIONS BELOW

The decision by the Arizona Superior Court denying the A.R.S. defense at App. 1. The order of the Arizona Court of Appeals denying Gail's motin for reconsideration, App.5. The decision by the Arizona Court of Appeals denying Gail's direct appeal App. 7-29 is *Strobel v. Rosier*, No. 1 CA-CV 16-0644 FC (Ariz. App. October 18, 2018). The Arizona Supreme Court denied Gail's petition for review on May 28, 2019, App.30-31.

## VI. JURISDICTION

Gail's Petition for Review to the Arizona Supreme Court was denied on May 28, 2019 App.30-31. Gail's Application to extend the deadline to file this Petition from August 26, 2019 to October 25, 2019 was granted by the Honorable Justice Kagan on August 22, 2019. Gail invokes this Court's jurisdiction under 28 U.S.C. § 1257 having timely filed this petition for a writ of certiorari within the time so provided.

## VII. CONSTITUTIONAL PROVISIONS INVOLVED

**United States Constitution, Amendment V:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**United States Constitution, Amendment XIV, 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.

**United States Constitution, Amendment IV, Section 1:**

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

## VIII. STATEMENT OF THE CASE

### Introduction

This Petition arises from contempt proceedings to enforce a New Hampshire order (the "Arrearages Order") for the payment of an adult's college expenses that was registered in Arizona pursuant to the AUIFSA for enforcement against Gail. Respondent Jeffrey Strobel ("Strobel") obtained the Arrearages Order through fraudulent means during *ex parte* proceedings in a foreign court that was without jurisdiction to issue it. In 1996, Congress passed the Personal Responsibility and Work Opportunity Act (42 U.S.C. § 666), which required that states adopt UIFSA by January 1, 1998 or face loss of federal funding for child support enforce-

ment. Every U.S. state has adopted either the 1996 or a later version of UIFSA, and Arizona's version is the AUIFSA.

When it comes to registering and enforcing support orders under the UIFSA states face much confusion and have very little guidance with respect to what their obligations are to ensure due process for obligors that face contempt proceedings and imprisonment. Those who are indigent and/or incarcerated are particularly vulnerable under the UIFSA because they cannot afford representation and do not have access to resources or knowledge necessary to participate in foreign proceedings. To require indigent and incarcerated obligors to appear in a foreign state under the threat of contempt would be quixotic. It seems that procedural safeguards should be in place in each state to ensure that incarcerated and indigent obligors can be heard telephonically and prove their case and financial condition without strict adherence to the varying procedures of the several states. When facing contempt and imprisonment under the UIFSA, the indigent should have the right to be appointed counsel and be informed of such right. However, this was not the reality for Gail or the thousands of others nationwide falling victim to the lack of procedural safeguards and utter confusion between the several states.

This case presents an opportunity for this Court to give much needed clarity and guidance to the states regarding their obligation to protect the due rights of indigent and incarcerated obligors. App.32-37 (excerpts 2008 Cornell Journal of Law). It also presents an opportunity for the Court to clarify under what circumstances registering states may refuse enforcement of foreign support orders they find violative of their citizen's constitutional protections. This Court should define what the UIFSA means by an obligor's "defense under the law of this state to the remedy sought."

**The New Hampshire Proceedings**

The parties were previously married and had one child by the name of Connor, whose date of birth is October 9, 1991.[1] When they divorced in 1996 there was no provision or orders for the payment of child support. The parties entered into a contract whereby Strobel waived child support and the parties would save money for Connor's college expenses. In 2006 Gail, a resident of Arizona, registered the parties' divorce decree in New Hampshire to establish a

[1] Connor became an adult when he turned eighteen on October 9, 2009.

parenting plan that provided for Connor's travels to Arizona for visitation. The parenting plan entered by the New Hampshire Court did not order the payment of child support.

In October of 2008, Strobel filed a "Motion to Clarify" requesting that "the back child support plus accrued interest being held by Gail Rosier (by agreement for Connor's college) be used in the first instance of those expenses and that any remaining balance be given to Jeffrey Strobel." The New Hampshire court held a hearing on the Motion to Clarify at which Gail (who lived in Arizona) did not appear. The New Hampshire court issued an order on the Motion to Clarify (the "Forrest Order") stating that the parties' agreement to pay Connor's college expenses was "valid and enforceable." The Forrest Order directed Gail to "take all necessary steps to liquidate" a property she had owned with her second husband (the "Hopkinton Property") and hold the funds in trust for the payment of the college expenses "as they accrue." However, the New Hampshire court was without jurisdiction to issue the Forrest Order. *In re Goulart*, 965 A.2d 1068 (N.H. 2009). This is due to a New Hampshire statute RSA 458:17, which provided:

> No child support order shall require a parent to contribute to an adult child's college expenses or other educational

> expenses beyond the completion of high school. Id.

In other words, any enforcement of the parties' agreement to pay college expenses should have been handled in a separate civil proceeding and not in the family court as an order for support.

On June 15, 2009, Gail was incarcerated in Arizona, had suffered financial disaster, and could not afford to hire an attorney for the New Hampshire matter. In July of 2009, Strobel filed a Petition for Contempt alleging that Gail was intentionally avoiding her obligations under the Forrest Order. Strobel requested that a hearing be set at the court's "earliest convenience" and that a warrant for Gail's arrest be issued if she failed to appear.

Gail sent a letter to the New Hampshire court about her incarceration and requested a continuance. The letter gives the addresses of both her jail and her criminal attorney, and she specifically requests that everything be sent to those addresses. Gail's previous address ("the Church Road address") had been taken by foreclosure and she no longer lived there. Judge Barry had Strobel read the letter in open court, told him to get a copy and reset the hearing for December 22, 2009.

Gail requested a continuance of the December 22, 2009 hearing via a hand-written letter to the court stating that she was "most eager to resolve

this issue" but that she was incarcerated. Still, on December 22, 2009 Strobel and his attorney Catherine Shanelaris ("Shanelaris") met with Judge Barry, *ex parte*, and "argued hard to let the hearing go forward as a default." Judge Barry granted Strobel's "proposed order on an ex parte basis" holding Gail in contempt for her "failure to pay child support" and abide by the Forrest Order. Judge Barry also "granted" Gail's request for a continuance as a result of her being incarcerated. *Id*. Gail was not served with or notified of the contempt order.

Unaware that she had already been held in contempt, Gail sent yet another letter requesting to appear telephonically, or in the alternative for a continuance, expressly informing the court that she could not afford to travel to New Hampshire or hire an attorney. Gail included documentation to show she was trying to liquidate assets to pay for Connor's college and that her efforts to liquiddate were held up as a result of her late husband's probate litigation and her incarceration. At the hearing in front of the Honorable Judge Colburn, at which Gail could not appear, Shanelaris said she got Gail's letter but did not tell the court that Gail had requested to appear telephonically. The New Hampshire court did not consider or rule on Gail's requests. At no time was there any procedure for Gail to appear in the New Hampshire proceedings telephonically.

Shanelaris told the Court they needed "to get an order to the division of child support services before Strobel's son turns eighteen" but at that time Connor had already turned eighteen. Shanelaris handed the court a proposed contempt order and proposed uniform support order that were filed that same day and which were not served upon Gail. The proposed order provided that Gail currently owes $202,500 in child support arrearages and accrued interest and that Gail must pay a lump sum of $25,000 or be incarcerated. Judge Colburn asked Shanelaris if "the $202,500 as of 10/31/09 is a calculation based on a prior uniform support order approved by Master Forrest," and Shanelaris told the court "yes." Judge Colburn signed the proposed orders the same day and issued a capias for Gail's arrest with a bond amount of $25,000 for her release from incarceration.

Strobel then filed a "Motion to Clarify" requesting that the court "adjust and clarify the USO to have the Court order monthly, consistent payments on the arrears" which Shanelaris served at the Church Road Address. Judge Colburn granted the motion and executed the Arrearages Order setting Gail's monthly payments at $10,000.

**The Arizona Proceedings**

In January 2012, the State of Arizona filed to

register the Arrearages Order under the AUIFSA and a Petition to Enforce Support via contempt proceedings. After Gail had been held in contempt in Arizona and arrested in court, the State of Arizona filed a request to stay enforcement, and also requested time to research whether a debt resulting from a private agreement to pay college expenses constitutes "child support."

Gail retained counsel in New Hampshire, who moved to set aside the Order based primarily on an "error of law" or "error of fact." The New Hampshire court stated "you got to move along" and "why don't you get to what you think my authority is to do something about it?" The Court repeatedly indicated that it had no authority to do anything about the prior Orders. The New Hampshire court concluded that Gail "defaulted" and issued an order that there was no legal or factual basis for setting aside the Order. There was no evidentiary hearing held as would be provided for under UIFSA procedures when seeking to vacate registration of a foreign order, as codified in Arizona as A.R.S. § 25-1307.

After New Hampshire refused to set aside the Order, the State of Arizona then decided on its own to not enforce the Order because an adult's college expenses are not "child support." Arizona's constitution and case law expressly prohibit contempt proceedings to enforce the

payment of an adult's college educational expenses. However, Arizona was told by the federal government that it had no choice but to enforce the Order and so it proceeded with enforcement proceedings.

Gail then requested a UIFSA hearing in Arizona under A.R.S. § 25-1307 arguing that: (1) New Hampshire court was without subject matter jurisdiction, (2) the order was issued in violation of Gail's rights to due process, (3) the order was the result of a fraud upon the New Hampshire court, and (4) that it is not child support and cannot be enforced by contempt. The State of Arizona filed a response stating that New Hampshire appears to have characterized the obligation to pay college tuition as "child support" and requested the court decide the matter on its merits. Strobel argued that Gail's defenses were barred by *res judicata* and full faith and credit, and that under New Hampshire law an agreement to save for college expenses is child support. The trial court found that Gail "failed to establish a defense under subsection A of A.R.S. § 25-1307" and confirmed registration.

## IX. REASONS FOR GRANTING THE WRIT

### 1. To avoid erroneous deprivations of due process for the indigent and incarcerated obligors who face contempt and imprisonment under the UIFSSA.

This Court in *Turner v. Rogers*, 564 U.S. 431 (U.S. 2011) held that a state need not provide counsel for an indigent non-custodial parent, but with the caveat that "the State must nonetheless have in place alternative procedures that ensure a fundamentally fair determination of the critical incarceration related question, which is whether the supporting parent is able to comply with the support order." These safeguards include (1) notice that "ability to pay" is a critical issue in the contempt proceeding, (2) use of a form that can be used to elicit relevant financial information, (3) providing an opportunity at the contempt hearing for the non-custodial parent to respond to statements and questions about his/her financial status, and (4) requiring an express finding by the court that the non-custodial parent has the ability to pay on the individual facts of the case. If these safeguards are not present, an indigent obligor facing imprisonment has the right to appointment of counsel.

Gail was indigent during and after her release from incarceration and expressly told the New Hampshire court that she couldn't afford an attorney in her letters. Yet Gail received none of the minimal procedures to ensure a fair hearing, and no attorney was appointed despite the matter being extremely complex and that Strobel was represented by a New Hampshire attorney. The order to appear in New Hampshire did not

inform Gail exactly what issues would be of importance or awarded. The court never made any express findings as to her indigent status, ability to pay, or need for counsel, whileit conclusively found her in contempt multiple times for failing to liquidate her property and for her failure to appear at an *ex parte* hearing even though she had been granted a continuance.

Gail sent in letters to the court regarding her lack of financial resources due to her incarceration as well as explanations and evidence that she was trying to comply with the order to liquidate her property but that she could not due to probate litigation. Gail was consistently denied adequate notice and a fair opportunity to be heard while facing contempt charges that would result in incarceration and the loss of her liberty. The Arrearages Order arose from the contempt proceedings and is not independent of the New Hampshire court's failure to accord Gail with fair notice and the right to be heard.

The Arizona Court of Appeals decided that "Gail didn't ask for an attorney" and that Gail "failed to establish how she would have been treated unfairly if she had appeared on her own behalf in New Hampshire . . ." ¶ 26. However, Gail was not notified that she may have the right to an attorney even though she sent letters to the court informing it that she could not afford one. She also sent a letter stating she could not fill

out her affidavit of financial information in jail. In coming to its conclusion with regard to prejudice, the Court of Appeals did not address that (1) Strobel was represented by an attorney, (2) Gail was unaware she had already been held in contempt of court *ex parte*, or (3) that Strobel's proposed order containing $202,500 in arrearages and a $25,000 capias for her arrest were filed with the court ex parte on the day of the hearing.

The Court of Appeals concluded that "although the ex parte/default nature of the December 2009 and June 2010 orders seems unusual, we cannot conclude on this record that Mother was deprived of due process." This decision essentially green-lights ex parte contempt proceedings involving ex-spouses who face incarceration and undermines the very purpose of UIFSA's provisions protecting against enforcement of ill-gotten foreign orders.

The Court of Appeals decided that Gail did not provide the court with a "proper notification of change of address" but did not explain what constitutes a "proper notification" in New Hampshire, nor did it analyze what more Gail could have done while she was incarcerated or why the her address is in fact changed with the court.

The Arizona court of appeals erred in affording the Order full faith and credit. This case pre-

sents this Court with an opportunity to apply the principles set forth in *Turner* to UIFSA proceedings involving indigent and incarcerated obligors who face contempt and imprisonment in foreign states. Absent intervention by this Court, the indigent and incarcerated throughout this country will continue to be left without the ability to be heard in proceedings under the UIFSA.

**2. To guide states on the extent of their autonomy under UIFSA and clarify what the UIFSA means by "a defense under the laws of this state to the remedy sought."**

The Arizona Court of Appeals' holding that Gail could not raise Arizona's constitutional and legal protections against debtor imprisonment is not consistent with UIFSA's Section 607(a)(5), codified in Arizona as A.R.S. § 25-1307(A)(5), which provides that a party may seek to vacate the registration of a foreign support order if he or she establishes "a defense under the law of this state to the remedy sought." The Arizona court of appeals' holding seems contrary to the UIFSA's plain language and there is no decision from this Court, and very little nation-wide, interpreting Section 607(a)(5). What little case law there is results in varying interpretations with no clear and sometimes conflicting

definitions. See eg. In *Burnett-Dunham v. Spurgin*, 245 S.W. 3d 14, 17 (Tex. App. 2007) ("Equitable estoppel" constitutes a "defense under the law of this state to the remedy sought").

However, the only case found that addresses the autonomy of a state to treat a foreign support order as an ordinary debt is *Weiss v. Weiss*, 100 So. 3d 1220, 1228-29 (Dist. Ct. App. 2012), but the majority opinion did not address it because (unlike this case) the obligor had not yet been held in contempt or incarcerated. The dissenting opinion concluded that the order would have to be enforced as an ordinary money judgment because full faith and credit "does not subordinate Florida's laws — prohibiting imprisonment for mere debt — to Illinois' laws." Id. at 1228-29.

This is an opportunity for this Court to define this provision of the UIFSA for the first time, and to clarify whether principles of full faith and credit supersede a state's constitutional protections against debtor imprisonment. Clarity is desperately needed as to what autonomy states have, if any, to uphold their constitutions and protect their citizens from corrupt foreign support orders.

## X. CONCLUSION

For the foregoing reasons, Petitioner Gail Rosier respectfully requests that this Court issue

a writ of certiorari to review the judgment of the Arizona Court of Appeals

Dated: October 24, 2019

s/

D. Jeffrey Craven
The Craven Firm, PLLC
14555 N. Scottsdale Rd. Ste. 320
Scottsdale, AZ 85254
Phone: 480-582-1547
Email: jeff@cravenfirm.com
Attorney for Petitioner Gail Rosier

## APPENDICES

**APPENDIX** A

**SUPERIOR COURT OF ARIZONA**
**MARICOPA COUNTY**

FC 2012-001202 03/21/2016

HONORABLE PAUL J. MCMURDIE

CLERK OF THE COURT
J. Escargega Deputy

DAVID E WOOD

**IN THE MATTTER OF**

**JEFFREY STROBEL**

**AND**

**GAIL ROSIER**

MARK W. HORNE
AG CHILD SUPPORT
SOUTH CENTRAL OFFICE

**UNDER ADVISEMENT RULING**

Respondent contests the validity or enforcement of a registered support order under A.R.S. 25-1306 and -1307. Respondent requested a hearing and filed a statement of defenses. The

Department or Economic Security took no position on the defenses raised. The real party in interest Jeffrey Strobel filed a response. Respondent filed a reply.

On February 26, 2016 this Court conducted an evidentiary hearing on the defenses raised.

**THE COURT FINDS** after considering the evidence and arguments presented, that Respondent has failed to establish a defense under subsection A.R.S. 25-1307. Therefore,

**IT IS ORDERED** confirming the order registered.

**IT IS FURTHER ORDERED** confirming that the amount due and owing on the New Hampshire Judgment as of February 23, 2016 is $199.663.83

**IT IS FURTHER ORDERED** granting the Motion to Quash the Arrest Warrant.

**IT IS FURTHER ORDERED** setting this matter for enforcement Review



Hearing on 21st day of April, 2016 at 3:00 p.m. before

The Honorable Paul J. McMurdie
Maricopa County Superior Court
Central Court Building, Courtroom 703

201 W. Jefferson
Phoenix, AZ 85003

Respondent is advised that the failure to attend the hearing could result in the finding of contempt an issuance of a child support arrest warrant.

**FILED**: Exhibit Work Sheet

**IT IS FURTHER ORDERED** signing this minute entry as a formal order of this Court pursuant to Rule 81, Arizona Rules of Family Law Procedure.

Dated this 21st day of March 2016.

/s/ Honorable Paul J. McMurdie



SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

FC 2012-001202 03/21/2016

**IT IS FURTHER ORDERED** setting this matter for Enforcement Review Hearing on 21st day of April, 2016 at 3:00 p.m. before:

The Honorable Paul .J. McMurdie
Maricopa County Superior Court

Central Court Building, Courtroom
703 201 W. ,Jefferson
Phoenix, AZ 85003

Respondent is advised that the failure to attend the hearing could result in the finding of contempt an issuance of a child support arrest warrant.

**FILED**: Exhibit Worksheet

**IT IS FURTHER ORDERED** signing this minute entry as a formal order of this Court pursuant to Rule 81. *Arizona Rules of Family Law Procedure.*

DATED the 21st day of March, 2016

Maricopa County Superior Court Judge

All parties representing themselves must keep the Court updated with address changes. A form may he downloaded at:
http://www.superiorcourt.maricopa.gov/Superior Court/Self- ServiceCenter.,

**APPENDIX B**

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

| | |
|---|---|
| JEFFREY STROBEL, Petitioner/Appellee, | Court of Appeals Division One No. 1 CA-CV 16-0644 FC |
| v. | Maricopa County Superior Court |
| GAIL ROSIER, Respondent/Appellant, | No. FC2012-001202 |

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STATE OF ARIZONA, ex rel.,
DEPARTMENT OF ECONOMIC SECURITY,

Intervenor/Appellee.

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**ORDER DENYING MOTION FOR RECONSIDERATION ORDER WITHDRAWING MEMORANDUM DECISION ORDER ISSUING MEMORANDUM DECISION**

The court, Presiding Judge Michael J. Brown, Judge Jennifer B. Campbell, and Chief Judge

Samuel A. Thumma participating, has received and considered Appellant's Amended Motion for Reconsideration and Appellee's Response.

**IT IS ORDERED** denying Appellant's Amended Motion for Reconsideration.

**IT IS FURTHER ORDERED**, on the court's own motion, withdrawing the Memorandum Decision filed December 26, 2017, and issuing a Memorandum Decision this date.

**IT IS FURTHER ORDERED** directing the Clerk of this Court to send a copy of this order to each party that received notice of the Memorandum Decision filed December 26, 2017.

/s/
MICHAEL J. BROWN,
Presiding Judge

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A copy of the foregoing was sent to:

William A Richards
David E Wood
Mark W Horne
Carol A Salvati
Raymond L Billotte
Hon Suzanne E Cohen

# APPENDIX C

NOTICE: NOT FOR OFFICIAL PUBLICATION. UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

**IN THE**
**ARIZONA COURT OF APPEALS**
**DIVISION ONE**

JEFFREY STROBEL, Petitioner/Appellee,

v.

GAIL ROSIER, Respondent/Appellant,

STATE OF ARIZONA, ex rel., DEPARTMENT OF ECONOMIC SECURITY,
Intervenor/Appellee.

No. 1 CA-CV 16-0644 FC
FILED 10-18-2018

Appeal from the Superior Court in Maricopa County No. FC2012-001202

The Honorable Paul J. McMurdie, Judge
**AFFIRMED**

COUNSEL

Baskin Richards PLC, Phoenix
By William A. Richards, David E. Wood
Counsel for Petitioner/Appellee

Horne Law PLLC, Phoenix
By Mark W. Horne
Counsel for Respondent/Appellant

Appendix "A"



**MEMORANDUM DECISION**

Presiding Judge Michael J. Brown delivered the decision of the Court, in which Judge Jennifer B. Campbell and Chief Judge Samuel A. Thumma joined.

**BROWN, Judge:**

¶1 Gail Rosier ("Mother") challenges the superior court's ruling confirming the validity of a registered order enforcing New Hampshire child support arrearage orders. For the following reasons, we affirm.

## BACKGROUND

¶2 Jeffrey Strobel ("Father") obtained child support arrearage orders in New Hampshire, where he lives with the parties' now adult child. Father sought to enforce the New Hampshire orders in Arizona. In early 2012, the Arizona Department of Economic Security ("ADES") filed a notice of registration and petition to enforce support, asking the superior court to enter a judgment against Mother for $202,500 for past due child support. The New Hampshire orders in question are the product of a complicated procedural dispute, summarized as follows.

¶3 The parties' marriage was dissolved in 1996 pursuant to a Dominican Republic divorce decree that did not include an order for child support. In 2006, Father and the child lived in New Hampshire, and Mother lived in Arizona. Mother filed a petition to register the divorce decree in New Hampshire and establish a parenting plan, which resulted in a July 2006 order registering the decree and establishing long-distance visitation. This order did not include any child support provisions.

¶4 In 2008, Father filed a motion to clarify, which essentially requested a child support order. Father alleged the parties agreed in 1997 that Mother would save for college instead of paying child support, and in the 2006 proceedings, she admitted in her financial affidavit that she held an interest in real

property valued at $150,000 for that specific purpose.[1] As



a result, the New Hampshire court entered an order in March 2009 ("March 2009 Order") directing Mother to immediately liquidate the real property being held for the child's education expenses and place the funds in an appropriate account. The court stated that although there had never been a child support order entered, it specifically considered and found it had jurisdiction over Mother "to establish, enforce, or modify a support order pursuant to [New Hampshire Revised Statutes Annotated ("R.S.A.") section] 546-B:3 II, III, and IV," and that the parties' 1997 agreement was valid and enforceable. Mother was not present at the hearing and the court found she was in default.

¶5 When Mother failed to provide an accounting as ordered, Father filed a petition for contempt in July 2009, asking the New Hampshire court to enter an order specifying that Mother owed $105,000 in past child support. In a letter to the court dated December 8, 2009, Mother stated she

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[1] Later, Mother asserted she made a clerical error in her financial affidavit, and that the value of her interest in the real property was actually
$105,000.

was incarcerated in Arizona and could not appear at the contempt hearing set for December 22, 2009, until after she was released and received permission to travel from her parole officer. On December 22, 2009, the court granted Mother's request and continued the hearing to March 9, 2010. However, the court also granted Father's proposed order "on an ex parte basis" and found Mother in contempt of the March 2009 Order to pay child support.

¶6 In a subsequent letter, Mother informed the New Hampshire court she could not afford to attend the March 9, 2010 hearing and asked to appear telephonically. Mother also stated her late husband's assets were subject to probate litigation and she could not liquidate the real property.

¶7On March 9, 2010, the New Hampshire court entered an order ("2010 Arrearage Order") finding Mother in contempt for failing to pay child support and ordered an immediate payment of $25,000. The court found Mother owed $202,500 in child support arrearages plus interest and ordered Mother to reimburse Father for a $7,500 inheritance her late husband left for the child that "she spent." The 2010 Arrearage Order included a payment schedule indicating Mother owed $105,000 in back child support as of March 1, 2010, payable immediately or pursuant to a payment schedule that added $10,000 a year, up to and including March 1, 2020 for a

total of $205,000 in back child support. The New Hampshire court issued a corresponding Uniform Support Order ("USO") for child



support arrearages of $202,500 as of October 31, 2009, which included the payment schedule.[2]

¶8 Shortly thereafter, Father moved to clarify the USO to require that Mother make consistent monthly payments. In June 2010, the New Hampshire court issued an amended USO ("June 2010 USO") ordering Mother to pay child support arrearages of $202,500 at the rate of $10,000 per month. The June 2010 USO did not include the payment schedule attached to Father's motion to clarify.

¶9 Father, with the assistance of ADES, sought to enforce the June 2010 USO in Arizona. In response to the Arizona petition to enforce, Mother claimed the New Hampshire orders were issued ex parte, in violation of her due process rights and without any legal basis. Mother admitted she was served with unspecified papers regarding the New Hampshire motions while incarcerated but stated she was in no position to respond financially or emotionally. Mother informed the Arizona court that a hearing on her

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[2] Mother claimed she first received the 2010 Arrearage Order on November 11, 2013, after appearing in court in Arizona.

motion to vacate the New Hampshire orders was pending, which resulted in a continuance of the hearing in Arizona pending a resolution of Mother's New Hampshire motion to vacate.

¶10 In May 2014, after briefing and oral argument, the New Hampshire court found no basis for vacating the existing orders, concluding that the June 2010 USO "is an enforceable order on a child support arrearage." The New Hampshire Supreme Court declined Mother's notice of appeal.[3]

¶11 Back in Arizona, Mother raised several defenses to enforcement pursuant to Arizona Revised Statutes ("A.R.S.") section 25-1307 and the Full Faith and Credit for Child Support Orders Act, 28 United States Code ("U.S.C.") section 1738B. ADES took no position on Mother's request to vacate the registration or enforcement. Father argued Mother was precluded from seeking relief from enforcement under the



doctrines of res judicata, the Full Faith and

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[3] As the New Hampshire Supreme Court explained, pursuant to "Rule 7(1)(B), the supreme court may decline to accept a notice of discretionary appeal from the superior or circuit court. No appeal, however, is declined except by unanimous vote of the court with at least three justices participating."

Credit Clause of the United States Constitution, and 28 U.S.C. § 1738B.

¶12 After an evidentiary hearing, the Arizona superior court found Mother failed to establish a defense to enforcement under A.R.S.§ 25-1307(A) and confirmed the registration of the New Hampshire arrearage orders. We have jurisdiction over Mother's timely appeal pursuant to A.R.S. § 12-2101(A)(1).

## DISCUSSION

¶13 To contest the validity or enforcement of the New Hampshire orders, Mother has the burden of proving the orders were not entitled to full faith and credit or establishing one of the defenses recognized in A.R.S.§ 25-1307(A), which is part of Arizona's version of the Uniform Interstate Family Support Act. Judgments rendered in a particular state shall be given the same full faith and credit by the courts of every other state "as the judgment would be accorded in the rendering state." *Phares v. Nutter*, 125 Ariz. 291, 293 (1980). "But foreign judgments may be attacked if the rendering court lacked jurisdiction over the person or subject matter, the judgment was obtained through lack of due process, the judgment was the result of extrinsic fraud, or if the judgment was invalid or unenforceable." Id. Whether a foreign judgment is entitled to full faith and credit is a question of

law that we review de novo. *Grynberg v. Shaffer,* 216 Ariz. 256, 257, ¶ 5 (App. 2007).

### A. Subject Matter Jurisdiction

¶14 Pursuant to 28 U.S.C. § 1738B(c)(1)(A), a foreign support order is entitled to full faith and credit if the issuing court had subject matter jurisdiction to hear the matter and enter the order and had personal jurisdiction over the parties. "[A] duly authenticated judgment of a court of general jurisdiction of a sister state is prima facie evidence of that court's jurisdiction to render it and of the right which it purports to adjudicate." *Lofts v. Superior Court*, 140 Ariz. 407, 411 (1984). Mother asserts the New Hampshire court did not have subject matter jurisdiction (1) to enforce the agreement to pay college expenses as a child support order, or (2) to enter an arrearage order when there was no prior child support order.

¶15 Mother characterizes these arguments as challenges to the New Hampshire court's subject matter jurisdiction; however, her arguments are based on the correctness of the rulings under applicable New Hampshire law. Subject matter jurisdiction "refers to a court's statutory or constitutional power to hear and determine a particular case." *In re*

*Marriage of Thorn,* 235 Ariz. 216, 220, ¶ 17 (App. 2014) (quoting *State v. Maldonado*, 223 Ariz. 309, 311, ¶ 14 (2010)). Allegations of legal error do not constitute a lack of subject matter jurisdiction. In Estes v. Superior Court, our supreme court "distinguished 'the right of a court to misconstrue the law measuring the rights of the parties . . . [from] the right of a court to misconstrue a statute or law from which jurisdiction or power of the court flows—a jurisdictional law.'" *Estes v. Superior Court*, 137 Ariz. 515, 517 (1983) (quoting *Ariz. Pub. Serv. Co. v. S. Union* Gas Co., 76 Ariz. 373, 382 (1954)). "Misinterpreting a procedural matter amounts to legal error which may result in reversal by an appellate court, but subject matter jurisdiction remains unaffected by the misinterpretation." Id. Allegations that the New Hampshire orders were improperly based on a contract, instead of child support guidelines, and were not based on a prior child support order, constitute assertions of legal error, not a lack of subject matter jurisdiction.

¶16 Even assuming Mother is challenging more than the correctness of the New Hampshire court's rulings, she has failed to establish that the arrearage orders are void for lack of subject matter jurisdiction. Relying on *In re Goulart*, 965 A.2d 1068, 1071 (N.H. 2009), Mother argues that "New Hampshire courts are without subject matter jurisdiction to issue or enforce any order for the payment of college expenses." In *Goulart,*

the parents stipulated to inclusion of a provision for payment of college expenses in the anticipated divorce decree, notwithstanding a statutory provision that prohibited such an order. Id. at 1070 (citing R.S.A. 461–A:14, V ("No child support order shall require a parent to contribute to an adult child's college expenses or other educational expenses beyond the completion of high school.")). The New Hampshire Supreme Court held that the family court lacked subject matter jurisdiction to approve a parenting plan or issue an order requiring a parent to pay an adult child's college education expenses and a parent's "'waiver' could not confer subject matter jurisdiction where it did not exist; and any such orders were void." *Id.* at 1071. The New Hampshire arrearage orders in this case, although based on the parties' 1997 agreement, do not require Mother to contribute to her son's "college expenses or other educational expenses" and thus the orders do not fall within the plain language of the statute at issue in *Goulart*. See id. at 1070 (citing R.S.A. 461–A:14, V).

¶17 Moreover, Mother fails to acknowledge the "proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the

jurisdictional issues, and where the decree is not susceptible to



such collateral attack in the courts of the State which rendered the decree." *Sherrer v. Sherrer*, 334 U.S. 343, 351–52 (1948); see also *Williams v. North Carolina,* 325 U.S. 226, 230 (1945) ("It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication. This applies also to jurisdictional questions. After a contest these cannot be relitigated as between the parties.").

¶18 Mother had a full opportunity to challenge the New Hampshire court's subject matter jurisdiction but did not do so until Father registered the arrearage orders in Arizona. In fact, Mother indicated just the opposite when she filed her 2014 motion to vacate in New Hampshire, stating that "[she] does not dispute that the Court had jurisdiction to establish a child support order under the Uniform Interstate Family Support Act, [R.S.A.] chapter 546-B:31." Thus, Mother has failed to meet her burden of showing that the New Hampshire court lacked subject matter jurisdiction to issue the arrearage orders.

**B. Res Judicata**

¶19 Mother's collateral attacks on the merits of the New Hampshire orders are precluded under the doctrine of res judicata (claim preclusion),

which provides that an existing final judgment on the merits by a court of competent jurisdiction bars further litigation between the same parties on every point decided as well as every point that could have been decided on the record in the prior proceeding. See *Underwriters Nat'l Assurance Co. v. N.C. Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 710 (1982) ("A party cannot escape the requirements of full faith and credit or res judicata by asserting its own failure to raise matters clearly within the scope of a prior proceeding."); *Pettit v. Pettit*, 218 Ariz. 529, 530, ¶ 1 (App. 2008) (holding that res judicata bars re-litigation of matters actually litigated in a prior action as well as issues that might have been litigated); see also *Brooks v. Trs. of Dartmouth Coll.*, 20 A.3d 890, 894 (N.H. 2011) (same).

¶20 Mother argues the 2010 Arrearage Order and subsequent New Hampshire orders were based on Father's fraudulent misrepresentations in the March 2010 hearing. Mother's allegations of legal errors and fraud were either raised or could have been raised in the 2014 New Hampshire proceedings or earlier. In seeking to vacate the March 2009 Order and subsequent orders, Mother argued in part there was no basis in fact or law for the New Hampshire orders. And as her counsel acknowledged at the Arizona evidentiary hearing, Mother could have

raised all of her substantive claims, including fraud, in her 2014 New Hampshire motion to vacate, but she failed to do so.

¶21 Mother contends the New Hampshire orders do not have preclusive effect because they were entered by default, citing *Schilz v. Superior Court*, 144 Ariz. 65 (1985). In that case, our supreme court held that a foreign judgment was not entitled to full faith and credit because neither the father nor his counsel had appeared or otherwise litigated the matters at issue. *Schilz*, 144 Ariz. at 68. Thus, the Arizona courts could consider whether the issuing court properly exercised jurisdiction. *Id*. Here, although Mother did not contest jurisdiction in New Hampshire, she appeared, or had the opportunity to appear, in those proceedings and thus had the opportunity to raise defenses and objections, including lack of jurisdiction. Accordingly, the New Hampshire orders are entitled to res judicata effect. See *Lofts*, 140 Ariz. at 411 ("When the rendering court in a contested hearing determines it has jurisdiction, its determination is res judicata on the jurisdictional issue and cannot be relitigated in another state."). As to Mother's non-jurisdictional arguments, a "default judgment has the same res judicata effect as a judgment in a matter where the issues were litigated." *Norriega v. Machado*, 179 Ariz. 348, 353 (App. 1994) (citing T*ech. Air Prods., Inc. v. Sheridan-Gray, Inc.,* 103 Ariz. 450, 452 (1968)).

¶22 Mother relies on *State ex rel. Dep't of Econ. Sec. v. Powers*, 184 Ariz. 235 (App. 1995), which is also distinguishable. In Powers, the parties' default divorce decree did not mention any children common to the parties. *Id*. at 237–38. In addressing a subsequent paternity action, we concluded that the child's paternity was not actually litigated in the divorce proceeding and thus we declined to apply collateral estoppel (issue preclusion). *Id*. at 238. The analysis in Powers did not involve application of res judicata and thus it is not relevant to the issues presented here. Unlike collateral estoppel, res judicata does not require actual litigation. See *Circle K Corp. v. Indus. Comm'n*, 179 Ariz. 422, 427 (App. 1993) ("Issue preclusion does not apply in this case because the issue of causation has never been litigated."); see also *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source,* 212 Ariz. 64, 70 n.8, ¶ 14 (2006) (noting that only "claim preclusion" was at issue and recognizing that with respect to a default judgment, "none of the issues is actually litigated.").

¶23 Mother never appealed the 2009 New Hampshire orders, and they became final. Her attempt to vacate those orders in 2014 was unsuccessful. She argues the 2014 New Hampshire proceedings are not entitled to res judicata effect because the issues raised were not

actually litigated. However, in her motion to vacate and at the 2014 hearing, Mother



argued there was no child support order on which to base an arrearages order; the amount of the arrearages had no factual basis; she could not liquidate the real property and thus could not be found in willful violation of a court order; and she was wrongfully denied a continuance or telephonic appearance. The New Hampshire court affirmed the prior orders, and Mother's subsequent appeal was denied. Regardless of whether the New Hampshire courts decided these issues correctly in 2009, 2010, and again in 2014, the doctrine of res judicata precludes Mother from challenging those orders in this proceeding.[4]

### C. Due Process

¶24 Mother also argues the New Hampshire orders are not entitled to full faith and credit because she was denied due process. See 28 U.S.C. § 1738B(c)(2). She contends she was never served with the December 2009 order, the 2010

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[4] Because we conclude the New Hampshire orders are entitled to full faith and credit, we need not address Father's argument that Mother's unsuccessful litigation against Father in federal district court also precludes Mother's challenge to the New Hampshire orders.

Arrearage Order, Father's May 2010 motion to clarify, or the resulting June 2010 USO. However, Father's 2010 motion to clarify included a certificate of service signed by his attorney. The June 2010 USO states it was issued after a hearing and lists Mother's Church Road address. Mother now claims the Church Road address was incorrect and that she notified the New Hampshire court to send everything to her criminal defense attorney in Arizona. But Mother's December 8, 2009 letter to the court does not list an Arizona address or give her criminal defense attorney's address. Similarly, Mother's letter asking to continue the March 9, 2010 hearing does not provide a criminal defense attorney's address, and although it includes a different address under her signature, the letter does not constitute proper notification of a change of address.

¶25 Additionally, at the 2014 hearing in New Hampshire, Mother stated she received the "2010 order" and "contacted her New Hampshire attorney." In the 2014 New Hampshire proceedings, Mother never claimed she was not served or did not receive any orders. This is inconsistent with her claim in the Arizona proceedings that she was not aware of the 2010 Arrearage Order until November 2013. In light of these facts and Mother's letters to the New Hampshire court in December 2009 and March 2010, we can reasonably infer that the Arizona court found

Mother's claim that she was unaware of the New Hampshire orders or the status of the arrearage litigation was not credible. See *Wippman v. Rowe*, 24 Ariz. App. 522, 525



(1975) (holding that an appellate court "may infer from any judgment the findings necessary to sustain it if such additional findings do not conflict with express findings and are reasonably supported by the evidence").

¶26 Mother also contends she was denied due process by the New Hampshire court's denial of her request to appear telephonically and to appoint counsel. Regarding appointment of counsel, Mother does not point or direct us to any part of the record where she made such a request in the New Hampshire court proceedings. Thus, we reject Mother's contention that she was denied due process when the New Hampshire court failed to sua sponte appoint counsel. Moreover, a trial court may appoint counsel in child support enforcement cases when the possibility of incarceration exists and when the defendant may be treated unfairly without the assistance of counsel. *Duval v. Duval*, 322 A.2d 1, 4 (N.H. 1974). Mother has failed to establish how she would have been treated unfairly if she had appeared on her own behalf in New Hampshire in connection with the 2009 and 2010 proceedings.

¶27 The reasons for the New Hampshire court's failure to rule on Mother's informal request to appear telephonically at the hearing are unclear. The New Hampshire court continued the December 2009 hearing, thus implicitly denying the request, but in the same order it found Mother in contempt. The 2010 Arrearage Order was entered after Mother sent another letter stating she was available to appear telephonically or was "open to continuing the matter." Father claimed he received Mother's letter one day before the March 2010 hearing. Mother did not establish when the New Hampshire court received her letter. Without such evidence, the New Hampshire court properly may have deemed Mother's request untimely or improperly filed. Mother also raised this issue in the 2014 New Hampshire motion to vacate, which was denied. Although the ex parte/default nature of the December 2009 and June 2010 orders seems unusual, we cannot conclude on this record that Mother was deprived of due process.

**D. Application of A.R.S. § 25-1307(A)**

¶28 Under A.R.S. § 25-1307(A)(5), a party may seek to vacate the registration of a foreign support order if he or she establishes "a defense under the law of this state to the remedy sought." That section provides as follows:

> A party contesting the validity or enforcement of a registered support

> order or seeking to vacate the registration has the burden of proving one or more of the following defenses:



1. The issuing tribunal lacked personal jurisdiction over the contesting party.
2. The order was obtained by fraud.
3. The order has been vacated, suspended or modified by a later order.
4. The issuing tribunal has stayed the order pending appeal.
5. There is a defense under the law of this state to the remedy sought.
6. Full or partial payment has been made.
7. The statute of limitations applicable under § 25-1304 precludes enforcement of some or all of the alleged arrearages.
8. The alleged controlling order is not the controlling order.

A.R.S. § 25-1307(A). Mother contends her obligation to pay college expenses is not child support, but instead is a contractual obligation which cannot be enforced by way of contempt in Arizona after the child turns 18. *In Solomon v. Findley*, 167 Ariz. 409, 411–12 (1991), our supreme court held that the superior court lacked authority to enforce child support provisions after a child reached majority, but the

parties' agreement to pay college expenses was enforceable as an independent contract claim.

¶29 Mother contends she could not have raised this Arizona defense in the New Hampshire proceedings; therefore, it is not barred by res judicata. However, her attempt to challenge the authority to enter a child support order that arguably should have been handled as a contract claim constitutes an impermissible collateral attack on the New Hampshire arrearage order. Correctly or incorrectly, the New Hampshire court expressly concluded that the parties' agreement supported a valid and enforceable child support order. After Mother failed to comply with that order, the New Hampshire court found her in contempt and entered a child support arrearage order. Mother improperly seeks to apply Arizona law regarding agreements to pay college expenses to an issue already decided by the New Hampshire court based on New Hampshire law.[5]



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[5] New Hampshire does allow contempt enforcement in some circumstances. See *Solomon*, 167 Ariz. at 411–12 n.2 (citing *Lund v. Lund,* 74 A.2d 557, 559 (N.H. 1950) (allowing contempt action for spouse's failure to pay tuition expenses of the parties' child after she turned 18, as one of several jurisdictions allowing post-majority support provisions to be enforced by contempt)).

¶30 Because Mother challenges the interpretation of the arrearage order as a child support order, the law of the issuing state applies. See 28 U.S.C. § 1738B(h)(2). This is not an issue of enforcement, where Arizona law would apply. See id. § 1738B(h)(1). On this choice of law question, 28 U.S.C. § 1738B governs and "preempts all similar state laws pursuant to the Supremacy Clause of the United States Constitution." *In re Marriage of Yuro*, 192 Ariz. 568, 571, ¶ 7 (App. 1998). Pursuant to 28 U.S.C. § 1738B(h), we apply New Hampshire law to interpret the orders, not Arizona law. Mother, therefore, cannot rely on *Solomon* in her effort to challenge the correctness of the arrearage orders issued by the New Hampshire court.

**CONCLUSION**

¶31 We affirm the order to enforce the arrearage orders. We deny Father's request for an award of attorneys' fees on appeal because he failed to cite any authority to support his request. See *Ezell v. Quon,* 224 Ariz. 532, 539, ¶ 31 (App. 2010); see also Arizona Rules of Civil Appellate Procedure ("ARCAP") 21(a)(2).

Court seal
(COURT OF APPEALS
STATE OF ARIZONA)

AMY M. WOOD • Clerk of the Court
FILED: AA

# APPENDIX D

COURT SEAL
(Supreme Court State of Arizona)

Supreme Court
STATE OF ARIZONA

SCOTT BALES
Chief Justice

JANET JOHNSON
Clerk of the Court

ARIZONA STATE COURTS BUILDING 1501
WEST WASHINGTON STREET, SUITE 402
PHOENIX, ARIZONA 85007-3231
TELEPHONE: (602) 452-3396

May 28, 2019

**RE: JEFFREY STROBEL v GAIL ROSIER/STATE ex rel DES**
Arizona Supreme Court No. CV-18-0305-PR
Court of Appeals, Division One No. 1 CA-CV 16-0644
FC Maricopa County Superior Court No. FC2012-001202

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on May 28, 2019, in regard to the above-referenced cause:

**ORDERED: Petition for Review - DENIED**.

**Vice Chief Justice Brutinel did not participate in the determination of this matter.**

Janet Johnson, Clerk

TO:
William A Richards
Austin Jeffrey Miller
Carol A Salvati
Amy M Wood
Pm

**APPENDIX E**
**Excerpts from**
**CIVIL CONTEMPT AND THE INDIGENT CHILD SUPPORT OBLIGOR: THE SILENT RETURN OF DEBTOR'S PRISON**
**Elizabeth G. Patterson 2008; CORNELL JOURNAL OF LAW AND PUBLIC POLICY [Vol. 18:95}**
**Pages 116 to 121**

**....**

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*A. Extent of Incarceration of Indigents*

The inability of indigent obligors to make court-ordered payments or to pay purge amounts would not be a systemic legal problem if courts were not finding such obligors in contempt and then coercively imprisoning them despite their inability to pay. There is little hard data to show the number of indigent child support obligors who are jailed for nonpay-

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ment, nor even the total number of child support contemnors.151 However, the limited existing data suggest that the number is substantial:

- When a 2003 New Jersey Supreme Court ruling mandated the release of all indigent child support contemnors who had not been represented by counsel, experts estimated that 300 persons would be released.152
- The Delaware Supreme Court found that in that state the Family Court sentenced 518 civil

contemnors to a period of incarceration in 1995.153

- A 1982–1983 study found that during a two-year period, 131 civil contemnors were jailed for nonpayment of child support in a single New Mexico county.154
- An Indiana child support prosecutor reported in 2002 that 2,400–3,300 child support obligors were incarcerated annually for nonpayment, 80–85 percent of them for civil contempt.155
- A 2005 survey of South Carolina jails revealed that the state's jails averaged over 1,500 child support contemnors at any given time.156
- A report by the Center for Family Policy and Practice summarizes numerous newspaper and other reports from thirty-six states documenting widespread arrests and incarcerations of nonpaying obligors.157

The demographics of child support caseloads, particularly those with significant arrearages, support the conclusion that a substantial majority of these contemnors are indigent or otherwise without the means to pay the purge amount. According to the federal Office of Child Support Enforcement, in 2006 over $105 billion in arrearages were owed by 11.1

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million obligors.158 The majority of the obligors with arrearages, and thus subject to repeated contempt proceedings, are below the poverty

line.159 The federal Office of Child Support Enforcement reports that 70 percent of child support arrearages are owed by noncustodial parents with no annual earnings or earnings less than $10,000.160 Only 4 percent are owed by non-custodial parents with an annual income of $40,000 or more.161

The contempt process is used only with those contemnors from whom support cannot be obtained through other enforcement techniques, including wage withholding and seizure of assets.162 Non-indigent obligors against whom it is necessary to institute contempt proceedings generally pay the arrearage when threatened with jail. It can reasonably be inferred, therefore, that when large numbers of child support obligors are incarcerated, most are indigent.

This conclusion is further buffered by the facts of appellate cases from throughout the nation that show indigent obligors being jailed for civil contempt with little attention to the economic circumstances underlying their noncompliance.163 Indigents are especially unlikely to appeal civil contempt orders, given their lack of access to appellate counsel in most states and the brevity of the typical contempt sentence.164 Therefore, the reported cases can be seen as indicators of a much larger number of unappealed contempt incarcerations.

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B. The Heavy Burden of Proving Inability to Pay

There are a number of interrelated reasons why courts incarcerate substantial numbers of indigent obligors for civil contempt despite their inability to pay the ordered support or the purge amount. Particularly important is the lack of hard evidence on issues related to the obligor's inability to pay, combined with the unfavorable structuring of the burden of proof and a judicial disinclination to find obligors' testimony credible.

In civil contempt proceedings, unlike those for criminal contempt, 165 absence of willfulness is treated as a defense, and the initial burden is on the contemnor to plead and present evidence of his or her inability to comply with the order.166 Some states shift the burden back to the petitioner once the alleged contemnor makes a prima facie showing of inability to comply,167 but others place the full burden of proof in regard to willfulness/inability to comply on the defendant.168 Proving inability to comply can be factually complex, implicating the economic circumstances of the obligor, his work history and potential, his available assets,169 and his own subsistence needs.170 To meet

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this burden, the alleged contemnor must at the very least present evidence of his or her employment (or lack thereof), wages, expenses, and assets. However, gauging the ability to pay may be much more complicated than this, involving issues of good faith responsibility for other

obligations,171 voluntariness of the obligor's unemployment or underemployment,172 and the availability of borrowed funds173 or assets

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owned by others174 to satisfy the obligor's debt. There may be legal as well as factual components to these issues.175 The complexity of these issues puts them beyond the understanding of most indigents, who will rarely be able to effectively respond to the petitioner's case in these areas, much less present a case in chief of their own. Even the simplest "inability to pay" argument requires articulating the defense, gathering and presenting documentary and other evidence, and responding to legally significant questions from the bench—tasks which are "probably awesome and perhaps insuperable undertakings to the uninitiated layperson." 176 This is particularly true where the layperson is indigent and poorly educated.

Adding to the obligor's burden is the potential that the court will hold his or her testimony concerning inability to pay to be insufficient evidence or lacking in credibility in the absence of documentary corroboration.177 Retention of the necessary records among indigents is rare, particularly given the widespread instability in their employment, housing, and other aspects of their lives. Even in the many states in which the civil contemnor has a right to appointed counsel, the lack of documentary evidence makes it difficult for the attorney to prove to the satisfaction of the court his client's inability to pay. The indigent contemnor without counsel will rarely if ever be able to do so.

C. The Role of Judicial Perceptions and Attitudes

The most disturbing aspect of the case law, and a significant contributor to inappropriate coercive incar-

cerations, is the frequency with which indigent child support obligors are imprisoned as a result of trial courts' abuse of their civil contempt authority. Repeatedly, the reported