

STATE OF MICHIGAN

IN THE JUVENILE DIVISION OF THE CIRCUIT COURT FOR DELTA COUNTY

In the Matter of:
VICTOR LEE NOWLIN, d.o.b. 7-31-93

File No. 07-DL-0258
Hon. Robert E. Goebel, Jr.

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**BRIEF IN SUPPORT OF RESPONDENT EDWINA NOWLIN'S MOTION
FOR RELIEF FROM SUPPLEMENTAL ORDER DATED MARCH 3, 2009**

Edwina Nowlin, by and through her attorneys, Pence & Numinen, P.C., by Karl P. Numinen, submits the following Brief in Support of her Motion For Relief.

Introduction

Like many people in these desperate economic times, Edwina Nowlin has been laid off from her job and she lost her home. She is surviving by living with various friends and picking up part time work to try to make ends meet. To make things worse, Ms. Nowlin's 16-year-old son was

recently found responsible for committing a crime and sentenced to a juvenile detention facility.

Although Ms. Nowlin has never been convicted of any crime, she was sentenced on March 3, 2009 to 30 days in jail because she was too poor to pay the court \$104.00 per month to reimburse the juvenile detention facility for the cost of incarcerating her son. On March 6, 2009, she was given a day of work release from jail so she could pick up her paycheck for her part-time job. This check would have been sufficient to pay the \$104.00 incarceration costs for her son; however, the jail officials forced her sign over the check to the Delta County Sheriff Department to pay for her "room and board" at the jail. Assuming that Ms. Nowlin is released from jail at the end of the 30-day term, she is going to face the same problem the following month when she is unable to make the next court-ordered payment.

This country did away with debtor's prisons more than a century ago. The imprisonment of Ms. Nowlin because she is too destitute to make court-ordered payments for a crime she did not commit is a miscarriage of justice. For the reasons set forth in this brief, Ms. Nowlin seeks relief from the order finding her in contempt of court for her inability to pay the costs of her son's confinement in the juvenile detention facility.

Statement of Facts

Edwina Nowlin was held in civil contempt of court for her failure to pay the costs to reimburse the Court for her son's care at Bay Pines Center juvenile detention facility. She was ordered to pay \$104 per month. However, Ms. Nowlin lacks the financial ability to pay this amount.

Ms. Nowlin was laid off from her full-time job at Clare Bedding and, as a result, she lost her house and is now homeless. She alternates between sleeping on the couch at two friends' houses. She must pay the costs for staying at these houses plus pay for food and other living expenses for her 14-year-old son Seth and herself. From time to time, she is called back to work very limited hours at Clare Bedding and sometimes she is able to work very limited hours a friend who is a home health aid, but this income is barely enough to scrape by. Moreover, according to the financial statement she submitted to the court when requesting a court-appointed attorney, she is approximately \$17,000 in debt and her wages have been garnished.

Ms. Nowlin brings the present motion pursuant to MCR 2.612(C)(1)(f) seeking relief from the Court's order finding her in civil contempt for the reasons that follow.

Argument

I. Standard For Relief Pursuant To MCR 2.612

A motion for relief from judgment brought pursuant to MCR 2.612(C)(1)(f) permits the trial court to grant relief from a judgment for any reason justifying relief. The Court of Appeals in *Heugel v Heugel*, 237 Mich App 471, 480-481 (1999), recognized that MCR 2.612(C)(1)(f) provides the court with "a grand reservoir of equitable power to do justice in a particular case" and empowers courts to vacate judgments when that action is appropriate to accomplish justice.

While there is no particular time limit under which to file a motion under this Court Rule, it must be filed "within a reasonable time." MCR 2.612. Where, as here, Ms. Nowlin is not only incarcerated, but she is also subject to an ongoing order to pay \$104 per month, this motion is timely.

In fact, the Michigan Court of Appeals has held that to ability of parents to file a motion for relief from judgment pursuant to MCR 2.612(c)(1)(f) saves the reimbursement statute from a procedural due process challenge. See *In re Juvenile Commitment Costs*, 240 Mich App 420, 441 (2000).

II. The Court Erred When It Sentenced Ms. Nowlin To Jail For Her Failure To Pay A Court Ordered Reimbursement Of \$104 Per Month When She Is Financially Unable to Pay That Amount.

A. The Statute Permits Only “Reasonable” Amounts of Restitution.

Michigan law allows the Court to order a parent to reimburse the Court for the cost and care of a juvenile but only if that amount ordered “is reasonable.” MCL 769.1(7). In determining reasonableness, the Court must “tak[e] into account both the income and the resources of the juvenile and those responsible for the juvenile’s support.” *Id.*

Considering the facts of Ms. Nowlin’s dismal financial situation, the amount ordered by this Court clearly is not reasonable by any standard of measure. At a minimum, before a parent is found in contempt of court, the state must establish at a hearing that the amount the parent was order to pay was reasonable in light of the parent’s income and assets.

B. Sentencing Ms. Nowlin to Jail for Failure to Pay Costs that She Cannot Afford is Unconstitutional.

Debtor’s prisons are a relic of the past. The Michigan Supreme Court has characterized debtor’s prisons as an institution from a bygone era when “public flogging of women” occurred and “ample work could be found for the agile bodies and nimble fingers of small children.” See *Smith v. City of Detroit*, 338 Mich 637, 647-648 (1972).

In 1889 the Michigan Supreme Court, using unusually harsh terms, struck down a statute because it permitted the jailing of a person for failure to fix his sidewalk even though he was “so poor and indigent as to receive support from his charitable neighbors.” *City of Port Huron v. Jenkinson*, 77 Mich. 414, 420 (1889). The court wrote:

No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible to perform, and then make his non-performance of such a duty a crime for which he may be punished by both fine and imprisonment. . . . It is hardly necessary to say these two sections of the statute are unconstitutional and void. . . . They are obnoxious to our constitution and laws [and] are a disgrace to the legislation of the state. [*Id.* at 419-420.]

The U.S. Supreme Court has held that once a criminal defendant is sentenced to probation for a crime, it violates the Fourteenth Amendment to revoke his probation and sentence him to jail if he lacks the resources to pay it. *Bearden v. Georgia*, 461 U.S. 660, 667-668 (1983). In the present case, Ms. Nowlin, who has never even been convicted of a crime, was sentenced to jail even though she lacks the resources to reimburse a juvenile home for the cost of housing her son. As in *Jenkinson*, Ms. Nowlin is relying on the support of charitable friends since she lost her fulltime job, her home and her son. As in *Jenkinson* and *Bearden*, Ms. Nowlin's Fourteenth Amendment rights have been violated and she must be released from jail.

C. Even if Requiring a Homeless Mother to Pay \$104 Per Month Was Reasonable, The Contempt Sanction of Incarceration Is The Wrong Remedy.

Enforcement of a money judgment by the power of contempt is limited to instances where execution is unavailable. MCLA 600.1701(5). Hence, money judgments, including the property settlement provisions of a divorce judgment for example, may not be enforced by contempt

proceedings. *Belting v Wayne Circuit Judge*, 245 Mich 111 (1929); *Thomas v Thomas*, 337 Mich 510 (1953). This limitation is reflected in the general contempt statute which codifies much of the judiciary's inherent, common-law contempt power. The statute reaffirms the court's authority to punish as contempt "the nonpayment of any sum of money which the court has ordered to be paid, *in cases where by law execution cannot be awarded for collection of the sum.*" MCL 600.1701(5)(emphasis added). Also see Const. 1963, art 1, sec 21; *Brownwell Corp v Ginsky*, 247 Mich 201 (1929).

Thus, even if the order to pay \$104 per month was reasonable in light of Ms. Nowlin's circumstances, and even if it did not violate the Fourteenth Amendment, the proper remedy for contempt was garnishment of her meager wages, not imprisonment.

III. The Court Erred When It Imposed Criminal Sanctions After A Finding Of Civil Contempt and Failed To Make A Finding That Ms. Nowlin Has The Ability To Comply With The Court's Order.

The sanctions for civil contempt are designed to be remedial in nature. They are intended to compel compliance with a court's directives by imposing a conditional sanction until the alleged contemnor complies or no longer has the ability to comply. *Jaikins v Jaikins*, 12 Mich App 115, 120 (1968). Thus, civil contemnors carry "the keys of their prison in their own pocket." *In re Nevitt*, 117 F 448, 461 (CA 8, 1902).

The Michigan Court of Appeals has distinguished civil contempt from criminal contempt by comparing the purpose for imposing sanctions: "If the court's purpose is to preserve its authority by punishing past misconduct through the imposition of an unconditional and fixed sentence, the

proceedings are criminal. If instead of punishing past misconduct, the court seeks to compel future compliance through the imposition of a sanction of indefinite duration terminable upon compliance or inability to comply, the proceedings are civil.” *Williams International Corp v Smith*, 144 Mich App 257, 262-263 (1985), *leave granted* 425 Mich 852 (1986). See also, *Spalter v Wayne Circuit Judge*, 35 Mich App 156, 160-161 (1971).

In a civil contempt proceeding, the alleged contemnor must be given an opportunity to purge the contempt. *Williams International Corp v Smith*, 144 Mich App 257, 265-266 (1985). If damages are assessed against a defendant as a condition of continued incarceration, then defendant must have the ability to pay those damages. *Gonzalez v Gonzales*, 121 Mich App 289, 291 (1982). It is well-established Michigan law that a civil contempt defendant “carries the keys to the jail in her own pocket” and is supposed to have the ability to use those keys at any time she chooses.

In the present case, the Court appears to have sentenced Ms. Nowlin to criminal contempt even though the order calls it civil contempt. By sentencing Ms. Nowlin to an unconditional and fixed sentence of incarceration (30 days), the Court's purpose appears to be punitive rather than coercive. Further, the Court has not given Ms. Nowlin “the keys to the jail” since nowhere does the contempt order allow Ms. Nowlin's release upon compliance with the Court's order to pay the \$104.00 care costs for her son. Finally, though it is clear that the Court imposed the jail sentence for Ms. Nowlin's failure to pay her son's costs, and those damages are a condition of Ms. Nowlin's continued cooperation, the Court failed to take into consideration Ms. Nowlin's inability to pay those damages.

IV. The Court Erred When It Denied Ms. Nowlin's Request For Court Appointed Counsel To Represent Her At The Contempt Hearing.

By sentencing Ms. Nowlin to a fixed (30 day) jail sentence which is not rescinded by the payment of the \$104.00, the Court has imposed a criminal sentence after a finding of civil contempt. Since a criminal sentence was imposed, Ms. Nowlin had the absolute right to the appointment of legal counsel to represent her throughout the contempt proceedings. The Sixth Amendment right to counsel has been held applicable to all criminal proceedings in which the defendant is imprisoned. See *Argersinger v Hamlin*, 407 US 25; 92 S Ct 2006; 32 L Ed 2d 530 (1972). In *People v Johns*, 384 Mich 325, 333 (1971), the Michigan Supreme Court held that "conviction for criminal contempt can be sustained only upon a record which shows compliance with the procedural safeguards established for the prosecution of any other crime of equal gravity."

In the present case, Ms. Nowlin requested a court appointed attorney because she could not afford to hire one. The Court denied that request based on its holding that these were merely civil contempt proceedings which do not require the appointment of counsel. However, when the Court then went on to impose a criminal sanction, the Court should have provided the same procedural safeguards for Ms. Nowlin that are required for the prosecution of any other crime for which Ms. Nowlin could have been sentenced to 30 days in jail. The failure of the Court to follow this basic procedural safeguard is a violation of Ms. Nowlin's most basic constitutional rights and should render the imposition of the criminal sanction void.

Conclusion and Relief Requested

It appears that the Court did not make a finding that Ms. Nowlin was financially capable of paying the costs assessed. The fact is that Ms. Nowlin has no ability to pay \$104.00 per month to the Court. The Court exceeded its statutory, constitutional and common law authority when it sentenced her to prison. Further, it appears that the Court imposed criminal penalties after a finding of civil contempt. Finally, the Court violated Ms. Nowlin's Sixth Amendment right to counsel when it denied her request for the appointment of an attorney.

It would be against the interests of justice to continue Ms. Nowlin's incarceration in light of these facts. Therefore, Ms. Nowlin respectfully requests this Court rescind its order of contempt and its supplement order sentencing her to thirty (30) days in jail, grant her immediate release from incarceration, rescind the continuing order that she pay \$104 per month to the court and grant any other relief this Court deems just and equitable.

Respectfully submitted,

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