IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF GUAM,
Plaintiff-Appellee,

v.

JOHN S. RUBEN and MONA S. RUBEN,
Defendants-Appellants,

SUPREME COURT NO. CV-05-0005-GA
Superior Court No. 93-1114

Cite as: 2008 MP 22

Decided December 23, 2008

Jane Mack, Saipan, Northern Mariana Islands, for Appellants.
Michael A. White, Saipan, Northern Mariana Islands, for Appellee.

BEFORE: JESUS C. BORJA, Justice Pro Tem; EDWARD MANIBUSAN, Justice Pro Tem; TIMOTHY H. BELLAS, Justice Pro Tem

BORJA, J.P.T.:

¶ 1 Appellants John A. Ruben ("John") and Mona S. Ruben ("Mona") appeal the trial court's order of February 1, 2005, holding them in contempt of court. Appellants claim that (1) they were entitled to court-appointed counsel, (2) the order to seek and obtain work was illegal or unconstitutional, and (3) the trial court erred in ordering Mona to work when John, using marital property, was already paying on the judgment debt. We hold that Mona was entitled to court-appointed counsel, the order to seek and obtain work was constitutional, and the trial court did not err in regard to marital property. Accordingly, the trial court's decision is REVERSED in part and AFFIRMED in part. We REMAND the case to the trial court for further proceedings consistent with this opinion.

I

¶ 2 John and Mona Ruben are husband and wife and live together with their three children. A judgment was entered in 1994 jointly and severally against Mona and John after appellee Bank of Guam ("BOG") repossessed their car. Deficiency judgments for the motor vehicle were brought against Mona and John individually and later consolidated. The original judgment was for $8,470.83, which represented $4,619.91 in principal, $2,970.92 in interest from August 15, 1988 at 12% per annum, $800.00 in attorney's fees, and $80.00 in costs. As of January 29, 2005, John was making payments on a prior contempt order. Mona was required to make her own payments separately.

¶ 3 On November 19, 2001, the trial court directed Mona to pay the judgment at the rate of $50.00 per month. When she did not, BOG moved for contempt by order to show cause. A hearing was held on November 29, 2004, and Mona appeared without counsel. She was held in contempt for willfully failing to comply by order dated December 6, 2004, and sentenced to 10 days in jail, suspended on the condition that she seek employment. The trial court ordered Mona to register with employment agencies and report back to the court with ten job applications. On December 27, 2004, the trial court found that she had substantially complied, but was still without work. The trial court continued the hearing to January 26, 2005 for Mona to file ten more job applications to attempt to find employment. On January 29, 2005, after Mona appeared and had not made the efforts required to find work, the trial court entered a further finding of contempt. The contempt order:

> means, if I find that I've issued an order, that you have the ability to perform but you didn't perform it, and haven't provided a valid excuse. When you are found

> in contempt the Court can imposed [sic] a jail sentence. In this case, I don't want to do that because I don't think this is the appropriate situation because I know you won't let this happen again.

ER at 31. By a written order of February 1, 2005 (the "Order") based on the January 29 hearing, the trial court found that Mona knew of the January 7, 2005 order, had the ability to comply and willfully failed to do so, and held Mona in contempt. Although the trial court warned Mona it could jail her, no sentence was imposed. Instead, the trial court continued the matter to a further hearing on February 23, 2005. Additional hearings were held on February 23, March 9, March 30, and April 27, 2005. The February 1, 2005, Order is at issue before us here, not the December 6, 2004 order which sentenced Mona to jail. Throughout the proceedings, Mona was unrepresented by counsel in this action until she filed the instant appeal.

¶ 4 This Court has jurisdiction over an appeal from a final order of the Commonwealth Superior Court pursuant to Article IV, Section 3 of the Commonwealth Constitution and Title 1, Section 3102(a) of the Commonwealth Code. The Order being appealed was entered February 1, 2005 and Mona filed her appeal on March 1, 2005. Accordingly, this appeal is timely filed pursuant to Rule 4 of the Commonwealth Rules of Appellate Procedure.[1]

II

Entitlement to Court Appointed Counsel

¶ 5 Appellants claim that the trial court erred in failing to appoint counsel for Mona, an indigent faced with a possible loss of liberty in a civil contempt case. Appellants cite the due process clause of the United States Constitution for the requirement that courts appoint counsel for indigent litigants when they may lose their physical liberty as a result of litigation.[2] We review a claim of right to counsel de novo. *Ada v. Sablan*, 1 N.M.I. 415, 422 (1990).

¶ 6 As a threshold matter, this Court must determine whether due process demands that counsel be appointed for any litigant subject to a contempt proceeding brought in the Commonwealth courts under 7 CMC §4208. The statute provides:

> If any debtor fails without good cause to comply with any order in aid of judgment made under this chapter, the debtor may be adjudged in contempt as a civil matter, after notice to show cause why the debtor should not be so adjudged

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1 However, there is a question of whether the order being appealed is final. This issue was not directly raised by the parties. Our general rule regarding finality of judgments is that "a decision is not 'final' unless it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Matsunaga v. Matsunaga*, 2001 MP 11 ¶ 13. We have treated imposition of sanctions, when entered as final orders, as final for purposes of appeal. *Matsunaga* at ¶ 14.

2 The Due Process Clause of the United States Constitution is applicable to the Commonwealth through Section 501(a) of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note.

> and an opportunity to be heard thereon, and upon such adjudication shall be committed to jail until the debtor complies with the order or is released by the court or serves a period fixed by the court of not more than six months in jail, whichever happens first.

7 CMC § 4208. This statute does not directly address the right to counsel. It is clear, however, that any debtor who has not complied with an order to pay faces potential incarceration. The United States Supreme Court has generally held that appointment of counsel is necessary for indigents in civil contempt proceedings if they face a possible loss of liberty. *Lassiter v. Dept. of Social Services of Durham County, North Carolina*, 452 U.S. 18, 25 (1981). The threat of imprisonment is what makes a civil contempt proceeding effective: "[t]he civil label does not obscure its penal nature." *In re Grand Jury Proceedings*, 468 F.2d 1368, 1369 (9th Cir. 1972). Due process requires that, when one's liberty is at stake, the need for the assistance of counsel is beyond question. *See Sanders v. Shephard*, 185 Ill. App. 3d 719, 729-30 (1989) (finding that due process entitles a civil contemnor to counsel based on *Lassiter* and "virtually every decision" that imposes incarceration).

¶ 7 The crux of this appeal is whether Mona was actually threatened with imprisonment by the Order. The initial order which made a finding of contempt and issued a suspended jail sentence is not being appealed here. Mona argues that the trial court's first finding of contempt, which threatened incarceration, still controls, as there was no new order to show cause ("OSC"). The last OSC filed against Mona was dated October 8, 2004. Therefore, all subsequent hearings by the trial court were continuances of that Order, as the jurisdictional prerequisite of an OSC for a new contempt hearing was not satisfied. We find this argument convincing. Despite the fact Mona only received a suspended sentence, the threat of incarceration still loomed over her head. *See Alabama v. Shelton*, 535 U.S. 654, 674 (2002) (finding that a defendant who receives a suspended or probated sentence of imprisonment has a constitutional right to counsel). The hearings which produced the Order were a continuation from the initial contempt hearing which issued a suspended sentence. *See* 7 CMC § 4208. The trial court noted substantial compliance with the conditions of suspension, namely the seeking of employment, at the hearing of December 27, 2004. ER at 25. However, this does not affect the contempt order's future applicability. When Mona failed to seek employment by the hearing of January 29, 2005, the contempt order brought Mona under the authority of the initial OSC, which threatened incarceration. The trial court warned Mona that if she is "found in contempt, the Court can impose a jail sentence." ER at 31.

¶ 8 In contempt proceedings, some courts hold that constitutional protections, including the right to counsel, depend on whether the contempt is characterized as civil or criminal. *U.S. v.*

Ayres, 166 F.3d 991, 995 (9th Cir. 1999). There are many decisions parsing the criminal versus the civil nature of contempt proceedings and then making findings about which constitutional provisions apply. *See, e.g., Hicks v. Feiock*, 485 U.S. 624, 632 (1988). The great majority of jurisdictions are in line with *Lassiter's* holding that the right to counsel attaches for any kind of contempt hearing if there is a possibility of incarceration. *See generally Autotech Tech. LP v. Integral Research & Dev. Corp.*, 499 F.3d 737, 746-47 (7th Cir. 2007) (holding that due process requires that one charged with contempt of court has the right to be represented by counsel and noting that this principle extends to both criminal and civil cases); *Washabaugh v. Curtsinger*, 2008 WL 2312670 Ky. App., 2008 (holding that whenever imprisonment is a possible outcome of a proceeding, whether in a criminal or civil matter, a defendant is entitled to counsel); *Caesar v. Horel*, Slip Copy, 2008 WL 4670492 N.D.Cal., 2008 (stating that there is no constitutional right to counsel in a civil case unless an indigent litigant may lose his physical liberty if he loses the litigation).[3] In the absence of other persuasive authority, we look to other jurisdictions for guidance. 7 CMC § 3401; *Commonwealth v. Demapan*, 2008 MP 16 ¶ 15.

¶ 9 In the Commonwealth, the sole case that deals with the right to counsel in a similar situation is *Paulis v. Superior Court*, 2004 MP 10. *Paulis* involved a similar fact pattern regarding contempt with a different legal argument. The *Paulis* case involved a petition for a writ of prohibition. This Court analyzed the case based on the guidelines established in *Tenorio v. Superior Court*, 1 NMI 1, 9 (1989). In that case, an unemployed grandmother failed to make payments after a money judgment was entered against her. She then appeared without counsel at a contempt hearing. The trial court sentenced her to three days in jail, suspended on the condition that she pay $25.00 per month. She made one payment, and the trial court then issued a commitment order on the application of the creditor. She served three days in jail. Then she appeared again less than two years later at another contempt hearing without counsel. She was sentenced to five days in jail, again suspended on the condition that she make $25.00 monthly

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3 United States Courts of Appeals conclude that due process requires the appointment of counsel for indigent civil contemnors facing imprisonment. *See Walker*, 768 F.2d at 1183; *Sevier v. Turner*, 742 F.2d 262, 267 (6th Cir. 1984); *Ridgway*, 720 F.2d at 1413; *United States v. Bobart Travel* Agency, 699 F.2d 618, 620 (2d Cir. 1982); *United States v. Anderson*, 553 F.2d 1154, 1155-56 (8th Cir. 1977); *In re Kilgo*, 484 F.2d 1215, 1221 (4th Cir. 1973); *United States v. Sun Kung Kang*, 468 F.2d 1368 (9th Cir. 1972). The majority of state courts have followed *Lassiter*; in fact, only the state of Florida does not. *See Andrews v. Walton*, 428 So. 2d 663, 665-66 (Fla. 1983). None of the above federal appeals courts employ a balancing test to determine whether a civil contemnor is entitled to court-appointed counsel. Of the twenty-six state courts that have addressed the issue and held that a due process right to appointed counsel exists, only two have concluded that the trial court should apply a balancing test to determine the right on a case-by-case basis. *New Mexico v. Rael*, 642 P.2d 1009, 1103 (N.M. 1982); *Duval v. Duval*, 322 A.2d 1, 4 (N.H. 1974). We decline to follow this small minority of jurisdictions.

payments. In her petition for a writ of prohibition, she argued that because "she was sentenced to a determinate jail sentence without a purge clause for civil contempt," her constitutional rights were violated, citing *Hicks v.* Feiock, 485 U.S. 624, 634 (1988). *Paulis* ¶ 31. This Court determined in *Paulis* that her contempt was civil in nature, and did not require the constitutional safeguards demanded in her appeal. *Paulis* ¶ 33. We held that the trial court did not commit clear error in sentencing her to jail for a fixed period of time.

¶ 10 In the present situation, the sentence was civil in nature, because it was imposed pursuant to the Commonwealth's civil contempt statute, which automatically inserts a purge clause into sentences by the language "shall be committed to jail until the debtor complies with the order." 7 CMC § 4208. Under this statute, if a judgment debtor violates an order in aid of judgment, the debtor may be committed to jail until he or she complies with the order or serves out his or her sentence. The debtor may free himself or herself upon compliance with the order in aid of judgment because there is a purge clause for every contempt order issued under this statute. Hence, a contempt order sentencing a debtor to jail for a fixed amount of time of not more than six months contains an automatic purge clause whereby the debtor can avoid jail by complying with the order in aid of judgment. While the *Paulis* decision did not address the right to counsel in civil contempt cases, it did find that these types of consumer debt contempt hearings are civil in nature. The *Paulis* decision holds that if a contempt proceeding is civil in nature, which it automatically is under our statute because of the "purge clause," then the debtor is not entitled to constitutional protections.

¶ 11 However, *Lassiter*, and subsequent United States Supreme Court decisions, require the appointment of counsel for indigents in civil contempt proceedings if they face a possible loss of liberty. The right to counsel is an established tenet of criminal procedure. Com. R. Crim. P. 44. Since the result of most criminal prosecutions is incarceration, the same threat in a civil situation, such as probationers at revocation hearings, should, and indeed does, require appointed counsel. Com. R. Crim. P. 32.1(a)(1)(D). *See Thompson v. Thompson*, 559 A.2d 311, n.5 (D.C. 1989) (holding that "[i]t is the actual punishment imposed that . . . determines the right"); The order of December 6, 2004 found Mona in contempt, but the trial court did not actually incarcerate Mona; it suspended her jail sentence on the condition that she seek employment. However, the threat of incarceration was always there if Mona failed to comply with the condition.

¶ 12 Our ruling in this case is distinguishable from that of *Paulis.* While the *Paulis* decision found that criminal contemnors required counsel, we did not explicitly state that the right to counsel is an unnecessary protection required for civil contempt. Moreover, although civil litigants facing actual imprisonment may not be entitled to the full panoply of due process rights,

they are entitled to counsel.[4] The right to counsel is recognized as unique among the umbrella of due process rights. *See Bowerman v. MacDonald*, 431 Mich. 1, 13 (1988) (noting that the right to counsel is a "particular and clearly demarcated right" separate from the full panoply of due process rights); *Custis v. United States*, 511 U.S. 485, 496 (1994) ("[f]ailure to appoint counsel for an indigent defendant [is] a unique constitutional defect"). Finally, the *Paulis* decision states that "[t]he trial court, in the interests of fairness should advise unrepresented litigants in situations similar to Paulis' of their right to appeal or obtain a stay and also of the availability of free legal advice at Micronesian Legal Services Corporation or at the Public Defender's office." *Paulis* ¶ 25. While this is not mandatory language that requires counsel, when taken in conjunction with the *Lassiter* line of cases, we find that extending the right to counsel for such indigents is a tenable next step. Indeed, this Court used similar reasoning in *Pacific Financial Corporation v. Muna* distinguishing *Paulis*, stating that the right to counsel issue in *Paulis* is "at most, non-binding dicta." 2008 MP 21 ¶ 12. Therefore, in accordance with *Pacific*, the right to counsel is to be uniformly extended to indigents in commercial civil contempt proceedings when facing a loss of liberty.

¶ 13 As a practical matter, we find that the trial court must proactively advise contemnors of their due process right to counsel when their liberty is in danger. It is the trial court's duty to inform the contemnor that possible contempt sanctions may include incarceration. At that time, the contemnor must be notified that he or she is entitled to an attorney, and, if indigent, that court appointed counsel is available. The contempt proceedings for an indigent can proceed only after the assignment of counsel, or a waiver of counsel, by the contemnor. In so holding, we do not inhibit the ability of the trial court to enforce its orders; we merely require that an indigent litigant be afforded the right to representation prior to the enforcement of an order imposing incarceration.

The Order to Seek and Obtain Work

¶ 14 Appellants claim that the trial court erred in ordering Mona to seek and obtain gainful employment in violation of the Thirteenth Amendment of the United States Constitution, as well as Commonwealth law. The order to work can be construed as a payment method authorized by the order in aid of judgment. *Paulis* ¶ 29. Contempt is within the trial court's inherent authority to enforce its judgments. 1 CMC § 3202. However, the constitutional implications are more troubling. The Thirteenth Amendment prohibits slavery and involuntary servitude, except as

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4 The United States Supreme Court held that the due process clause does not protect civil contemnors from a burden-shifting rule. *Hicks v. Feiock*, 485 U.S. 624, 631 (1988). Likewise, in *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), the Court held that due process does not entitle a civil contemnor to a trial by jury.

punishment for a crime established by conviction. The Thirteenth Amendment applies in the Commonwealth through the Covenant. Covenant § 501, Pub. L. 94-241. This is an issue of law, reviewed de novo. *Ada*, 1 NMI. 415, 422 (1990).

¶ 15 Since the promulgation of the Thirteenth Amendment, the United States Supreme Court has established that there is a right to labor free from compulsory service. However, many of the early cases involved attempts to perpetuate slavery by forcing a person to work for a particular employer to repay funds advanced by that employer. *See Pollack v Williams*, 322 U.S. 4 (1944). Similarly, in *United States v. Kozminski*, the Supreme Court made it clear that "[t]he primary purpose of the 13th amendment was to abolish the institution of African Slavery" and that "the phrase 'involuntary servitude' was intended to extend 'to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results." 487 U.S. 931, 942 (1988). The United States Supreme Court has unambiguously held that the government cannot compel one man to labor for another in payment of a debt by punishing him as a criminal if he does not perform the service or pay off the debt. *Bailey v. Alabama*, 219 U.S. 219, 244 (1911); *see also Pollack v. Williams*, 322 U.S. 4, 18 (1994) ("Congress has put it beyond debate that no debtedness warrants a suspension of the right to be free from compulsory service").

¶ 16 BOG counters that this Court's precedent supports their position. In the *Paulis* case, we considered:

> whether suspending a contempt order on condition that one utilize best efforts to find a job in the modern economy present in the CNMI is clearly akin to the antebellum slavery contemplated by the Thirteenth Amendment. Certainly if Paulis wished to switch employers to obtain a better job, she would not be prevented by physical force from doing so. Moreover, Paulis has pointed to no explicit authority whereby the requirement to register with a governmental employment services agency constitutes unlawful involuntary servitude under the Thirteenth Amendment.

Paulis ¶ 5. We agree with BOG. In the instant case, Mona was not forced to change employers for a better job; she simply chose not to follow the trial court's order to seek work. Appellee cites numerous cases that order an unemployed judgment debtor to seek employment without constituting involuntary servitude.

¶ 17 In *Freeman v. Freeman*, 397 A.2d 554, 557 (D.C. 1979), a lower court was found to have properly ordered a defendant to seek employment so that he could pay a child support obligation. Similarly, in *Moss v. Superior Court*, 17 Cal. 4th 396, 428 (Cal. 1998), the California Supreme Court held that a parent who could not pay child support because he willfully failed to seek and obtain employment could be sanctioned for contempt. The court found that requiring a parent to

meet his "fundamental obligation to support a child did not implicate a 13th Amendment violation" *Id.* 66-7. An order to work is acceptable in child or spousal support cases "because child support is not considered a debt, but a duty, enforcement of that duty does not violate the Thirteenth Amendment's prohibition against slavery." *In the interest of J.S.Q.W.*, 2004.TX.0007925 ¶ 16. However, the instant case is of unsecured consumer debt, not child support.

¶ 18 While consumer debt does not rise to the level of a fundamental obligation to support a child, the rights of creditors are substantial. Contrary to appellants' assertions, the order to seek employment is not akin to debt peonage, which is the only type of compelled labor that has been characterized as involuntary servitude. *Kozminski*, 487 U.S. at 943. Mona is not forced to work for BOG to pay her debt; she merely needs to make the effort to apply for jobs in compliance with the order in aid of judgment. Any similarity this situation may have with the horrors of slavery outlawed by the Thirteenth Amendment is purely superficial. Mona can still choose her employer, and keep what is necessary from her earnings to support her family. The United States Supreme Court holds that, "[w]hen as here, . . . the person claiming involuntary servitude is simply expected to seek employment, if available . . . none of the aspects of 'involuntary servitude' which invoke the need to apply a contextual approach to the 13th Amendment analysis are present." *Moss*, 17 Cal. 4th at 416. Commonwealth law indicates that the trial court has the right to "make such order in aid of judgment as is just for the payment of any judgment." 7 CMC § 4206. The statute further provides that the court shall "determine the fastest manner in which the debtor can reasonably pay a judgment." 7 CMC § 4205. This Court will not scrutinize the trial court's decision-making process during its hearings in aid of judgment. Indeed, to limit the trial court's ability to enforce its own judgments would severely cripple its authority, and stymie creditors' legitimate collection efforts. Appellants' argument that orders to work would in effect create a debtor's prison is unfounded. Compliance with an order to seek work does not necessarily carry along with it a prison sentence. Nowhere in the Commonwealth Constitution is there a provision prohibiting such orders in aid of judgment.

The Use of Marital Property to Pay the Debt

¶ 19 Appellants argue that the trial court abused its discretion by ordering Mona into the paid workforce when her husband already works and pays on the debt. We review this issue for an abuse of discretion. *Cf.. Milne vs. Lee Po Tin*, 2001 MP 16 ¶ 31. The trial court abuses its discretion when it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence. *Commonwealth v. Campbell*, 4 NMI 11, 17 (1993); *Chen*, 2006 MP 14 ¶ 6. The trial court found Mona and John jointly and severally liable on the debt. As of the

January 29, 2005 review hearing, John has paid on and remains liable for the July 8, 2004 payment order. ER at 29. NMI law and Chamorro custom do not address the issue of spousal debt in regard to marital assets used to satisfy the obligation of both marital partners. Therefore, we must look to see whether other courts have allowed a debt to be imposed on a spouse when the other spouse is currently paying on it.

¶ 20 Common law indicates that allowing the enforcement of a debt against a married couple when both spouses are jointly and severally liable is permissible. The law is careful to preserve spouses' separate property rights, so a married couple cannot be made to function as one person or unit in a circumstance where both are severally liable. Common law indicates that "three distinct forms of liability attach when a husband and wife incur a debt joint and severally: the husband becomes liable personally both jointly and severally; the wife becomes liable personally both jointly and severally; and the marital entity, *i.e.*, the husband and wife as such, becomes liable. . . ." *In re Paeplow***,** 119 B.R. 610, 622 (Bankr. N.D. Ind., 1990) (citing *Gilbert v. Indiana Bank and Trust Co. of Fort Wayne (In re Gilbert)*, Bankr. No. FB 76-513, (Bankr.N.D.Ind. September 30, 1977)). It makes no difference that one of the spouses is currently paying on the debt. *Leake v. Rucker (In re Rucker)*, 1995 Bankr. Lexis 1664, 12 (holding that joint and several liability provides a plaintiff with the option to choose to sue one or all of several defendants); *Household Fin. Corp. v. Smith*, 70 Wn.2d 401, 403 (Wash. 1967) (holding that the wages of either spouse of a married couple jointly and severally liable on a debt could be reached to satisfy a judgment). Therefore, the trial court did not clearly err in enforcing the judgment severally against Mona. Appellants' contentions that the marriage's zone of privacy was intruded upon have no bearing on a joint and several debt that both parties are liable for. Likewise, appellants' arguments as to garnishment and the applicability of 15 U.S.C. § 1673 were not raised in the trial court, and as such, we cannot hear them now.

III

¶ 21 For the foregoing reasons, we hold that Mona was entitled to court-appointed counsel, the order to seek and obtain work was constitutional, and the trial court did not err in regard to the usage of marital property to pay a joint and several spousal debt. Accordingly, the trial court's decision is REVERSED in part, and AFFIRMED in part. We REMAND the case for further proceedings consistent with this opinion.

Concurred:
Manibusan, J.P.T., Bellas, J.P.T.