
OCSE Guidance on the Turner v. Rogers Decision

The Federal Office of Child Support Enforcement (OCSE) issued an Action Transmittal (AT-12-01) dated June 18, 2012 that provides policy guidance to state child support agencies on the United States Supreme Court decision in the case of *Turner v. Rogers*.¹

AT-12-01 includes:

- an overview of the *Turner* case,
- a brief review of the contempt power of the court in the context of child support, and
- an outline of specific processes and practical recommendations to help states “ensure that obligors are afforded sufficient due process protections.”

The recommendations and suggestions in the Action Transmittal pertain to civil contempt proceedings in child support cases like *Turner* in which ability to pay is at issue.

The Action Transmittal clearly states and frequently reiterates the importance of procedural due process for unrepresented defendants in child support contempt proceedings. And it is clear from the OCSE guidance that while the Supreme Court decision does not prohibit contempt proceedings or incarceration, child support agencies should carefully screen and individually review cases to determine “actual and present ability to comply.”

However, there remains an important unresolved question of how, in practice, civil contempt proceedings may continue to serve as “a procedural mechanism to order a noncustodial parent to participate in programs or take advantage of other services as an alternative to incarceration.”

OCSE Guidance

The Action Transmittal from the Commissioner of the Office of Child Support Enforcement provides an analysis of the Supreme Court decision and policy recommendations to guide state child support enforcement practices into alignment with the holding in *Turner v. Rogers*. OCSE suggests that child support agencies that routinely use contempt proceedings that could lead to incarceration reassess agency policy and practice in light of the *Turner* decision. Further, the Action Transmittal strongly recommends that state agencies institute specific safeguards against constitutional violation of the due process rights of defendants in those cases.

For additional information and analysis from CFFPP on *Turner v. Rogers*, see:

In the Interest of Parents: Child Support:
Ability to Pay and Incarceration (2011)

The Supreme Court of the United States
Decides *Turner v. Rogers* (2011)

Both briefs, along with other reports on child support and its effects on low-income parents and families, are available at:
www.cffpp.org/ChildSupportDebt.html

¹ Unless otherwise noted, all information and quotes are attributable to OCSE AT-12-01.
www.acf.hhs.gov/programs/cse/pol/AT/2012/at-12-01.htm

Specifically, AT-12-01 recommends that:

A. IV-D agencies should consider screening cases for actual and present ability to pay before referring or initiating civil contempt proceedings that can lead to incarceration.

1. Cases should be individually reviewed.

...wherever possible, the IV-D agency should also make an inquiry into the actual and present circumstances of the individual obligor before initiating contempt.

2. The individual review should examine actual and present ability to comply.

The IV-D agency should only pursue civil contempt proceedings that could lead to incarceration under the following circumstances:

- (a) There is evidence (or a good faith belief) that the child support debtor had the ability to pay the order, but did not do so; and
- (b) The debtor has the present ability to pay the purge amount ordered.

B. Notice should be provided to the obligor that “ability to pay” is a critical issue in the contempt proceeding.

Notice that is sufficient to inform the obligor of the critical nature of the proceedings is the essential first criterion to assure due process.

IV-D agencies may want to consider implementing a face-to-face meeting or conference with the obligor in advance of scheduling a contempt hearing.

IV-D agencies may wish to provide information about legal resources available to the noncustodial parent...

C. Judicial procedures should provide an opportunity for the defendant to be heard on the issue of ability to pay and result in express court findings [i.e. a written determination by the court].

It is important to note that suggestions for judicial procedures are not within the sphere of control or responsibility of the child support agency. However, OCSE included the following information in its guidance for state agencies:

...basic due process requires that the alleged contemnor [obligor/defendant] be provided an opportunity at the contempt hearing to respond to statements and questions about his or her financial status.

Having an opportunity to be heard is a foundation of due process.

In light of *Turner*, at the conclusion of the hearing, the court should make an express finding that the noncustodial parent has the ability to pay the purge amount ordered.

A determination that the noncustodial parent has the actual and present ability to pay or otherwise comply with the purge order should be based upon the individual circumstances of the obligor.

...in calculating a purge amount, states are discouraged from setting standardized purge amounts – such as a fixed dollar amount, a fixed percentage of arrears, or a fixed number of monthly payments – unrelated to actual, individual ability to pay.

Unresolved Issues

Taken as a whole, the guidance contained in the June 18th Action Transmittal calls for states to work aggressively to reduce court and child support agency reliance on contempt proceedings and incarceration. In fact, much of the policy advice and information from OCSE to state agencies recognizes the significant probability that an individual obligor will be unable to pay or otherwise comply with a court order. OCSE suggests that based on the decision in *Turner*, constitutional procedural due process requires that states ascertain present and actual ability to pay before initiating contempt proceedings that could lead to incarceration. However, even this comprehensive analysis of the procedural safeguards suggested in the *Turner* decision appears to leave some question with regard to using civil contempt in child support proceedings that can lead to incarceration and in which ability to comply with an order to participate in programming is at issue.

Contempt Proceedings: Avoiding Constitutional Violations or Recommended Practice?

The advice and recommendations in the first four sections of the Action Transmittal call for significant changes in state agency processing of child support cases where contempt proceedings might lead to incarceration. It contains strong recommendations for screening, individual case review, examination of “actual and present ability to comply with a court order,” and adequate notice to obligors that ability to pay is a critical issue in a contempt proceeding.

Specifically, under the section *Screening Cases Before Referring or Initiating Civil Contempt Proceedings that Can Lead to Incarceration*, all IV-D programs are urged to screen cases before initiating any civil contempt action that could lead to incarceration for nonpayment. And, according to AT-12-01,

Generally, ...[a] contempt action should only be initiated in these cases where there is evidence of the noncustodial parent’s ability to comply with the underlying child support order and evidence that there is actual and present ability to pay the purge amount ordered.

The guidance in the Action Transmittal goes on to strongly recommend that, where ability to pay is at issue, a review process be completed in each case before initiating litigation or referral for contempt proceedings that can lead incarceration. OCSE advises state agencies to begin contempt proceedings only **after** following a protocol of careful information gathering and review that determines that the defendant (1) had the ability to pay the original order, but did not do so; and (2) had an actual and present ability to comply with the purge order.

In an Information Memorandum (IM-12-01) on alternatives to incarceration also dated June 18, 2012, OCSE advises state agencies **not** to rely on incarceration to enforce child support because it is, at best, an ineffective and inefficient method of child support collection. The memorandum goes on to present the evidence:

Approximately 25 percent of noncustodial parents have a limited ability to pay child support... The underlying problem for some parents is that they face multiple employment barriers and cannot find or maintain a job.²

² www.acf.hhs.gov/programs/cse/pol/IM/2012/im-12-01.htm

However, the short final portion of the Action Transmittal (Section V *Using Civil Contempt in Child Support Cases in Which Ability to Comply is at Issue*) appears to diverge from the rest of AT-12-01’s strong recommendation to avoid contempt of court proceedings. Instead, Section V seems to promote the use of contempt proceedings in some cases regardless of current ability to pay. The section addresses civil contempt proceedings in so-called “alternative to incarceration” orders. Such orders have been used to mandate an obligor’s participation in workforce development, fatherhood, or other service programming. According to OCSE, the basis of the judicial power to order participation is the “threat of contempt sanctions,” which can properly be used to “direct noncustodial parents to participate in programs or activities that will improve their ability to reliably support their children.”

The Action Transmittal advises state agencies that, “...the use of contempt proceedings may be a procedural mechanism to order a noncustodial parent to participate in programs or take advantage of other services as an alternative to incarceration.”

However, assuming a state’s adoption of the OCSE-recommended process for review, it is unclear under what circumstance an obligor for whom it has been determined that there is no evidence of present and actual ability to pay (and would therefore benefit from a program or activity to improve their ability to support their children) could become subject to a contempt proceeding that could lead to incarceration.

After *Turner*: Unresolved Agency Practice and Due Process Questions

Most of the analysis and recommendations in AT-12-01 cite the United States Supreme Court case of *Turner v. Rogers* as the foundation for the OCSE guidance to states. There is no such citation in Section V, and OCSE acknowledges that, in the wake of the *Turner* decision, there are unresolved issues with regard to due process for unrepresented obligors in child support contempt actions.

Based solely on the Action Transmittal, at least three questions rise to the top of a list of unresolved procedural due process issues in child support contempt proceedings that can lead to incarceration:

1. How should an agency proceed in the case of a defendant for whom there is no evidence of ability to pay (either the amount of the underlying child support order or any purge amount), but who might benefit from participation in a workforce or fatherhood program? How will the decision be made to initiate contempt proceedings after a determination that there is no evidence of present and actual ability to pay?
2. In child support agency practice, what procedural safeguards should be instituted to ensure due process for defendants in civil contempt proceedings that can lead to incarceration where ability to comply with an order to participate in programming is at issue?
3. If there are no procedural safeguards in “alternative to incarceration” cases, under what circumstances and by whom can the case be made that the defendant has no actual ability to comply (e.g. is disabled or lacks an essential resource)? Further, there is an outstanding question of right to counsel in these cases.

To ensure the shared goal of secure children and families, it will be important to clarify how this guidance and subsequent state action might impact low-income parents and children. Families are counting on government agencies and court and policy makers to resolve this issue in favor of the welfare and economic security of children and their parents.