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Acting Administrative Director of the Courts

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MEMORANDUM

Directive # 02-14
(modifies Directive #15-08)

**To: Assignment Judges
Trial Court Administrators**

From: Glenn A. Grant, J.A.D. 

Date: April 14, 2014

Re: Probation/Family - Enforcement of Child Support - (1) Revised "Order for Relief to Litigant - Enforcement of Litigants Rights" and (2) Hearing to Determine Ability to Comply with Current Child Support Obligation

Introduction

This memorandum promulgates for immediate statewide use, as approved by the Supreme Court, the attached revised "Order for Relief to Litigant - Enforcement of Litigants Rights" (CN 11213) ("ELR Order"). The revisions to the form are due to a significant increase in the number of emergent appeals to both the Appellate Division and the Supreme Court challenging the orders of incarceration for nonpayment of child support obligations. The revised order is intended to ensure that the trial court has included in the order for enforcement of litigant rights specific factual findings regarding (a) the court's determination of the obligor's indigence, and (b) its separate determination of the obligor's ability to comply with the previously ordered child support obligation, consistent with Pasqua v. Council, 186 N.J. 127 (2006), and the promulgating Directive #15-08, which outlined policies and procedures for trial courts when involved in a child support enforcement hearing.

In Pasqua, the Court recognized, as with any involuntary commitment, termination of parental rights, and tier classification in a Megan's Law proceeding, Article I, paragraph 1 of the New Jersey Constitution requires the appointment of counsel to indigent individuals facing incarceration pursuant to R. 1:10-3. See Pasqua at 149. The Court held that before ordering coercive incarceration, the (trial) court must find that the parent was capable of providing the required support, but willfully refused to do so. Id. at 141, n. 2.

As a result of the holding in Pasqua, at child support enforcement hearings, trial courts must advise all parents charged with violating a court order of their right to

counsel. In addition, the Court advised that all parents facing potential incarceration must be advised of their right to counsel if they are indigent and, upon verification of indigency, must be afforded counsel. Otherwise incarceration may not be used as an option to coerce compliance with support orders. Id. at 153.

When a child support-related warrant is issued and an obligor is taken into custody, the court shall advise the obligor of his/her right to counsel. The trial court is required to make two findings. The court must first determine whether the obligor is indigent for representation purposes. If the answer is yes and counsel is not provided, incarceration is not available as a tool for coercive enforcement of the child support obligation. If the obligor is found to be indigent and counsel is provided (or the obligor knowingly waives the right to counsel and is advised of the potential for incarceration) or if the obligor is found not to be indigent, the court must then make a second finding as to the obligor's ability to comply with the current child support obligation, that is, a finding as to the obligor's "ability to pay." In addition to revisions to the form order, training is being provided to the judges and staff to ensure consistent application of the policy set forth in Pasqua and Directive #15-08. The order has also been modified to include numbered paragraphs in both the findings and relief sections in accordance with R. 4:42-1(a)(4).

Indigence Determination

To determine indigence, the "Probation Child Support Enforcement Obligor Questionnaire" (CN 10819) must be completed and must be reviewed by the court. If the court determines that the obligor is indigent, the court completes paragraph 3(a) of the revised order. If the court determines that the obligor is not indigent, specific findings of fact must be set forth by the court in paragraph 3(b) of the revised order.

If the determination is made that the obligor is indigent, an attorney must be appointed to represent the obligor if the court is considering coercive incarceration as a remedy to compel payment of child support. In such a situation, the indigent obligor: (1) must be advised of the right to appointed counsel based on indigence; and (2) must be provided an explanation that waiving the right to counsel will expose the obligor to possible incarceration. If the obligor is found by the court to be indigent, does not waive the right to counsel, but counsel for whatever reason cannot be appointed, incarceration is not an available remedy. If the obligor is found not to be indigent, the court may conduct the hearing to determine whether the obligor has the ability to comply with the child support obligation, or the court may adjourn the matter to provide the obligor with an opportunity to retain private counsel.

The first page of the revised ELR Order provides for additional space in the order to be used by the court in setting out the specific reasons on which it based its determination of the obligor not to be indigent (paragraph 3b).

Hearing to Determine Ability to Comply With the Current Child Support Obligation

After the indigence determination, the court must conduct a hearing to determine whether the obligor has the ability to comply with the existing child support obligation

and must make and include in the order specific factual findings in that regard. Court staff must check off the appropriate box in the caption of the revised ELR order identifying the hearing as the "ability to comply" hearing. (The same form order also is used for Subsequent Review Hearings.) The revised ELR order includes additional space for use by the court in setting out the specific factual findings regarding the obligor's ability to comply with the child support obligation (paragraph 4a) and the justification for ordering coercive incarceration (paragraphs 4b and 4c).

In cases where the court orders coercive incarceration, the judge must conduct subsequent periodic reviews every two weeks to determine whether incarceration continues to be an effective means to compel the obligor's compliance. Court staff must check off the appropriate box in the caption of the revised ELR order identifying the hearing as a Subsequent Review Hearing. Further, the court must set out in the introductory paragraph of the revised ELR order the date that the ability to comply hearing was conducted.

Modification of Child Support or Arrears and Technical Revisions

In most situations, modifications of the child support obligation should occur as part of a separate filing and be recorded on a Uniform Summary Support Order (USSO). If the court, however, determines that a modification of the child support obligation is appropriate at the emergent ELR hearing, and modifies the child support or the arrears, paragraph 9 of the revised ELR order must be completed. If the child support is modified, a completed Child Support Guidelines Worksheet must be attached to the ELR order.

Training and Implementation

On April 7, 2014, Family Division judges received mandatory training regarding Pasqua and Directive #15-08, including the proposed revised ELR order.

The Probation Services Division and Family Practice Division will be conducting joint training for court staff on the procedures to ensure compliance with Directive #15-08 and this memorandum. AOC staff will coordinate the training with the vicinages.

We have advised the Division of Family Development (DFD) that the Supreme Court has revised the form ELR Order, and a request has been made to DFD to make conforming updates to this order in New Jersey Kids Deserve Support (NJKIDS), New Jersey's child support enforcement system. Notwithstanding my November 15, 2011 memo indicating that all child support orders should be created electronically in NJKiDS, until the conforming updates have been made to the ELR Order in NJKiDs, the court must use the revised attached ELR order.

As noted at the outset, the purpose for making these revisions to the form ELR Order is to ensure that the court is in all cases making specific factual findings as to both the indigence determination and the ability to comply, thereby creating a more complete record if the case is appealed.

Questions or comments may be directed to Assistant Director Elizabeth Domingo, Probation Services Division (609-292-1589) or Assistant Director Joanne M. Dietrich, Family Practice Division (609-984-4228).

Attachment: Revised Order for Relief to Litigant - Enforcement of Litigants Rights (CN 11213)

cc: Chief Justice Stuart Rabner
Family Presiding Judges
Steven D. Bonville, Chief of Staff
Robert W. Smith, Director
Elizabeth Domingo, Assistant Director
Joanne M. Dietrich, Assistant Director
Gurpreet M. Singh, Special Assistant
Amelia Wachter-Smith, Chief
Elidema Mireles, Chief
Family Division Managers
Vicinage Chief Probation Officers
Asst. Family Division Managers
Multicounty Vicinages
Vicinage Asst. Chief Probation Officers
Multicounty Vicinages

Plaintiff
☐ Obligor / ☐ Obligee

v.

Defendant
☐ Obligor / ☐ Obligee

Superior Court of New Jersey
Chancery Division, Family Part

County

Docket Number: F _____

Probation Account Number: CS _____

Civil Action
Order for Relief to Litigant -
Enforcement of Litigants Rights

☐ Ability to Comply Hearing
☐ Subsequent Review Hearing

With appearance by:

☐ Plaintiff ☐ Attorney for Plaintiff _____
☐ Defendant ☐ Attorney for Defendant _____
☐ IV-D Attorney _____
☐ _____ County Probation Division _____

THIS MATTER having come before the Court on the _____ day of _____, _____;

☐ AND the court having conducted an ability to comply hearing on _____;

AND the Court having considered the evidence and arguments presented, and having found that:

1. The obligor is under a Court Order to pay \$ _____ per _____ for the support of _____ child(ren), \$ _____ per _____ for spousal support and \$ _____ per _____ toward arrearages effective _____;
2. The obligor has failed to make payments and owes arrearages totaling \$ _____ as of _____ due to the Obligee and/or _____ County Welfare;
- ☐ 3a. The obligor is indigent and: ☐ qualifies for court appointed counsel, but none is available;
☐ qualifies for court appointed counsel and _____ is appointed;
- ☐ 3b. The obligor is not indigent and does not qualify for court appointed counsel for the following reasons:

_____;
- ☐ 4a. The obligor has the current ability to pay \$ _____ toward the arrearages for the following reasons:

_____;

- ☐ 4b. The obligor has the financial ability to pay and willfully refuses to do so, however, incarceration is not necessary at this time for the following reasons:
- ☐ The obligor has custody of the child(ren).
 - ☐ The obligee is no longer the custodial parent/guardian. The child now is in the custody of _____.
 - ☐ Other:

- ☐ 4c. The obligor has the financial ability to pay and willfully refuses to do so, and incarceration of the obligor is necessary to coerce compliance for the following reasons:
- ☐ The obligor is employed, and has been employed for _____ [length of time].
 - ☐ The obligor has a source of income from _____ and/or assets from _____.
 - ☐ The obligor is willfully underemployed because (background to support the court's finding includes, but is not limited to: education, technical or trade skills, work history, no medical limitations)
 - ☐ Other:

Therefore it is hereby ORDERED that:

- ☐ 5. The obligor be incarcerated in the _____ County Jail until the Obligor pays \$_____ to be applied to said arrears or until further Order of this Court. The Court will review the continuing efficacy of this Order for coercive incarceration no later than two weeks from the date of this Order so long as the above release payment is not paid and the Obligor remains incarcerated.
- ☐ 6. The obligor be released from custody in this matter;
- ☐ 7. The support-related bench warrant currently issued in this matter is discharged;
- ☐ 8. Payments shall be made by Income Withholding on current and future income sources, including:

Name of income source

Address of income source

Obligor shall, however, make payments at any time that the full amount of support and arrears is not withheld.

- ☐ 9. The current child support obligation is modified as follows: The Obligor shall make support payments of \$_____ per _____ plus \$_____ per _____ toward arrears for a total amount of \$_____ per _____.
- ☐ 10. A lump sum payment of \$_____ must be paid by the obligor by _____ or a bench warrant for the arrest of the obligor shall issue without further notice.
- ☐ 11. Effective _____ future missed payment(s) numbering _____ or more may result in the issuance of a warrant, without further notice.
- ☐ 12. An employment search must be conducted by the obligor. Written records of at least #_____ contacts per week must be presented to the Probation Division. If employed, proof of income and the full name and address of employer must be provided immediately to the Probation Division.
- ☐ 13. The obligor is hereby noticed to appear before this court on _____ at _____ in _____ for further review and possible modification of the child support obligation. The _____ Family/ Probation Division shall serve notice to the Obligee and other interested parties, if any, in this matter.
- ☐ 14. The Motor Vehicle Commission, State of New Jersey, shall TAKE NOTICE that the suspension of the Obligor's Driver's License caused by the non-payment of child support is hereby removed; the Obligor must take note, however, that the Commission requires a fee for restoration of the license, and that this order does not pertain to any reason for license suspension other than non-payment of child support.
- ☐ 15. It is further ORDERED:

16. It is further ORDERED that all provisions of any prior Orders in this matter, not in conflict with this Order, shall remain in full force and effect.

_____, Date _____, J.S.C.