

Use of Warrants and Incarceration in the Enforcement of Child Support Orders

Directive #2-04
(supersedes #10-95)
Issued by:

March 16, 2004
Richard J. Williams
Administrative Director

On February 26, 2004 the Judicial Council approved the attached policy on the use of warrants and incarceration in the enforcement of child support orders. The policy articulates the legal standards for the use of warrants and incarceration in child support matters, addresses the circumstances of indigent obligors without counsel, and provides new forms for warrants and for the receipt of release payments made by arrested obligors. The standards set forth in the policy are to be implemented immediately, and the warrant and receipt forms should be put into use as soon as practicable.

In the near future, training programs on this Directive will be conducted for Family Judges, Child Support Hearing Officers, and Probation and Family Division staff involved in handling child support matters. In the meantime, questions concerning this Directive may be directed to Assistant Director of Probation at (609) 984-5022, the Assistant Director of Family at (609) 984-4853, or to the Chief, Child Support Enforcement Services at (609) 984-7721.

**Use of Warrants and Incarceration in the
Enforcement of Child Support Orders (Directive #2-04)
Revised “Notice and Receipt” Form (Appendix D)**

Directive #2-04
(Supplement)
Issued by:

April 22, 2004

Richard J. Williams
Administrative Director

This supplements Directive #2-04, issued March 16, 2004, which promulgated the Judicial Council-approved policy on the use of warrants and incarceration in the enforcement of child support orders.

That Directive included as Appendix D a form entitled “Notice and Receipt for Child Support Release Payment.” Appended here is a revised version of that “Notice and Receipt” form. This revised version of the form supersedes the form initially distributed with the Directive.

As with the Directive itself, any questions concerning this revised form may be directed to Probation Assistant Director Mary DeLeo ((609) 984-5022), Family Assistant Director Harry Cassidy ((609) 984-4853), or to Richard Narcini, Chief, Child Support Enforcement Services ((609) 984-7721).

USE OF WARRANTS AND INCARCERATION IN THE ENFORCEMENT OF CHILD SUPPORT ORDERS

**Approved by the Judicial Council
February 26, 2004**

A. Introduction

Incarceration for refusal to comply with obligations established by child support orders is authorized in three distinct ways under New Jersey law:

- Relief to litigant proceedings pursuant to Rule 1:10-3, Rule 5:3-7.
- Contempt proceedings pursuant to Rule 1:10-2.
- Criminal prosecution pursuant to N.J.S.A. 2C: 24-5.

Of these alternatives, proceedings for relief to litigants under Rule 1:10-3 are the most frequently used enforcement process. This report presents a conceptual and legal framework for the use of incarceration in Rule 1:10-3 applications as well as standards on the conduct of proceedings, the use of forms and the setting of an amount that will secure for the obligor release from custody, referred herein as a release amount (formerly known as the “purge amount”). These principles apply to relief to litigant proceedings initiated by individuals as well as to enforcement initiated by Probation. The report incorporates the directions in the recent directives concerning the use of incarceration when the obligor is indigent, as well as the recommendations of the Child Support Warrant working group that was convened by the Conference of Family Presiding Judges prior to the court decision in the *Pasqua* case.¹

Also, since the resort to either criminal prosecution under N.J.S.A. 2C: 24-5 or contempt proceedings under Rule 1:10-2 is very infrequent in New Jersey, the report concludes with a brief description of these practices.

B. Rule 1:10-3 Relief to litigant proceedings (ELR Hearing)

1. Types of Proceedings

In order to coerce payment from an obligor who has become delinquent in the payment of court ordered child support, the Court may convene a hearing to enforce litigant’s rights under Rule 1:10-3. At a Rule 1:10-3 hearing, there must be a determination of non-compliance with the child support order and, if so, the extent of the non-compliance. Having found non-compliance, the court may then fashion a remedy to give appropriate relief to the aggrieved obligee. Such a hearing may take two forms: a scheduled hearing before a Child Support Hearing Officer or a hearing before a judge in which the obligor may be compelled to appear by Notice or, without delay, by issuance of a warrant. The purpose of both hearings is to enforce litigant’s rights and both will be referred to herein as ELR hearings. The determination of whether an expedited hearing is required is normally made by the

¹ *Pasqua v. Council*, Docket number MER-L-406-03, in which the court determines that a child support obligor has a right to counsel at a hearing to enforce litigant’s rights, pursuant to Rule 1:10-3, if the obligor faces the possibility of incarceration to coerce compliance with the child support order. See also the Administrative Director’s memorandum to Assignment Judges dated August 26, 2003, Coercive Incarceration of Child Support Obligors Pursuant to Rule 1:10-3, implementing *Pasqua*.

Probation Division. In such cases, the appearance of a defendant may be compelled by the issuance of a warrant rather than a notice to appear. If a warrant is to issue, a judge must order it.

At the hearing, if the court or hearing officer finds that there has been non-compliance with its support order, it must consider an appropriate remedy for enforcement of its order. The remedy recommended by Probation should take into consideration a number of factors which may include, but are not limited to:

- Prior compliance with the provisions of the court order over a significant period of time.
- Age of the order with the self-executing warrant provision, if applicable, and whether the obligor has been regularly paying since the provision was ordered. In cases where the obligor has been paying regularly for an extended period, subsequent non-payment would ordinarily be addressed by first scheduling an enforcement hearing.
- Whether or not some payments have been received.
- Whether a motion has been filed with the court with a return date, for modification of the support obligation, determination of arrears, direct payment credit, emancipation, or termination of support.
- Amount of the order and unpaid support.
- Any known delays in posting payments to ACSES or pending payments due to known administrative enforcements such as tax offset and Financial Institution Data Match (FIDM).
- Age of the child or children on the court order and the likelihood that a child age 18 or older may be subject to emancipation.
- Enforcement history of the case.
- Pending civil settlements where the obligor anticipates a significant monetary award.
- Payments are being received through an income withholding order.
- Request of the obligee that a warrant for the obligor's arrest not issue.
- Any other relevant information about the case (e.g., a verified change of circumstances).

NOTE: If there is a current income withholding order in place and the employer is not remitting payments directed by the order, Probation should proceed against the employer and not the obligor directly.

a. Scheduled enforcement hearings before a Child Support Hearing Officer (ELR hearing)

Generally, the first enforcement activity would be an ELR hearing scheduled before a Child Support Hearing Officer (CSHO) upon notice of motion pursuant to Rule 5:4-1 that indicates that a bench warrant may issue upon failure to appear. The obligor is summoned to appear at a specific date and time. The obligee is provided notice of the proceedings, but appearance is optional. All parties appearing before the hearing officer have the right to appeal the recommendation of the CSHO and be heard by a judge.

The obligor's appearance at the ELR hearing is required to respond to the allegations of non-compliance contained in the motion. The ELR hearing allows the obligor to present any defenses and the CSHO makes findings as to the validity of the defenses and ability to pay or comply with the order. Any order that is recommended as to the relief granted must take into consideration the obligor's ability to pay (e.g. employment, disability, public assistance, etc.). Often such hearings will result in an order in aid of litigant's rights requiring an additional payment or a series of periodic payments to liquidate the accrued arrears. As a further relief, if warranted, the order may enforce the frequency of payments by adding a provision that if future payments are missed that

a warrant may be issued without any further notice to the obligor. The purpose of such a warrant is to bring the obligor before the court on an expedited basis in the event of alleged non-compliance in the future. “Future missed payments” orders usually provide for issuance of a warrant when the obligor misses payments (or partial payments) with a dollar value equivalent to two missed payments.

If the CSHO concludes that the recommendation for enforcement should be coercive incarceration, the hearing officer makes findings as to the obligor’s non-compliance and ability to pay. Where coercive incarceration is recommended, the CSHO will also make findings with respect to the indigency of the obligor. In accordance with Rule 5:25-3 (c) (10) (b) the CSHO will refer the recommendation for incarceration to the judge once all of the information required to complete the Obligor Questionnaire is elicited and the hearing is concluded. The information will assist the judge in making a de novo determination on the issues.

b. Expedited enforcement hearing before a Judge

A warrant requiring expedited appearance before a judge may, where appropriate, include a payment amount which will eliminate the need for an enforcement hearing. Such a warrant would usually be issued upon the continued failure to make support payments or provide medical coverage, subsequent to a recent ELR hearing or failure to appear at one or more ELR hearings. As noted above, this recommendation is made by Probation based upon the consideration of several factors related to the case. A supervisory review within Probation is also required before a recommendation to issue a warrant is forwarded to the judge.

Characteristics of the ELR Hearing before a judge are described in Section B.3 below.

2. Use of Warrants and Incarceration in Rule 1:10-3 Enforcement Proceedings

There are three basic circumstances where the courts may issue warrants to arrest obligors or order the coercive incarceration of obligors in connection with Rule 1:10-3 Relief to Litigant proceedings:

- a. Where an obligor, after service of notice to appear, fails to appear for a Rule 1:10-3 hearing, and arrest is necessary to ensure appearance before the court (see Appendix A, “Warrant – Failure to Appear”);**
- b. Where an order resulting from a Rule 1:10-3 hearing provides that, if the obligor fails to make one or more child support payments in the future, a warrant for arrest may issue in order to expeditiously address the non-compliance (see Appendix B, “Warrant – Failure to Pay After Order.”);**
- c. Where an obligor has been ordered at a Rule 1:10-3 hearing before a judge to make a payment toward child support arrears or provide medical coverage and refuses to do so, and incarceration is necessary to coerce compliance with the order (see Appendix C, “Order for Coercive Incarceration”).**

It is of great importance to have a clear understanding of the different reasons for arrest and incarceration. Each of these circumstances raises different issues, which must be addressed to ensure that the process is fair and that the rights of all parties are protected. Each circumstance will be addressed in turn:

a. Where an obligor, after service of notice to appear, fails to appear for a Rule 1:10-3 hearing, and arrest is necessary to ensure appearance before the court (see Appendix A, “Warrant – Failure to Appear”).

Where the obligor has failed to appear for a scheduled Rule 1:10-3 hearing and a warrant has been issued, the reason for incarceration is to ensure the appearance of the obligor before the court. This will enable the obligor to respond to the motion related to his/her failure to pay court ordered support.

Summary:

- Cause of warrant issuance: Failure to appear
- Purpose of warrant / incarceration: To ensure expeditious appearance before a judge
- Legal authority for warrant: Rule 1:10-3 and Rule 5: 4-1 (c)
- Will payment secure release? Yes (See Section B.3a)

b. Where an order resulting from a Rule 1:10-3 hearing provides that, if the obligor fails to make one or more child support payments in the future, a warrant for arrest may issue in order to expeditiously address the non-compliance (see Appendix B, “Warrant – Failure to Pay After Order”).

It has become common to order issuance of a warrant upon a future missed payment. It is therefore imperative to be clear as to the basis for issuance of warrants in this manner. While it might not appear that the purpose of this warrant is to compel appearance, since the obligor’s appearance before the court could be achieved by the less extreme use of a notice to appear at an ELR hearing, the purpose of the warrant is in fact to compel expedited appearance. The Court has discretion to order the issuance of a warrant conditioned upon a future failure to pay when it believes that bringing an obligor before the Court on an expedited basis will be necessary. For example, this approach may be used when an obligor has demonstrated a history of failing to appear; of using scheduled hearings to delay payment of support; or has income sources that cannot be attached prior to the hearing (such as being self-employed).

Another example is the issuance of an order requiring the obligor to make a lump sum payment toward arrears on or before a specified date. The order additionally specifies that the refusal by the obligor to make this payment by the specified date will result in the issuance of a warrant. Again, the purpose of the warrant in each of these examples is to bring the obligor before the court to address the non-compliance.

Summary:

- Cause of warrant issuance: Failure to make payments ordered
- Purpose of warrant / incarceration: To ensure expedited appearance before a judge to address the non-compliance with the order
- Legal authority for warrant: Rule 1:10-3 and Rule 5: 4-1 (c)
- Will payment secure release? Yes (See Section B.3a)

c. Where an obligor has been ordered at a Rule 1:10-3 hearing before a judge to make a payment toward child support arrears or provide medical coverage and refuses to do

so, and incarceration is necessary to coerce compliance with the order (see Appendix C, “Order for Coercive Incarceration”).

To order coercive incarceration, the court must make each of the following findings:

- Obligor is subject to an order to pay child support;
- Obligor has failed to comply with order and owes arrears of \$_____;
- Court has directed obligor to make a payment of \$_____ to be applied to arrears;
- Court has determined obligor has financial ability to pay the amount ordered by it at ELR hearing;
- Obligor refuses to pay the amount ordered at the ELR hearing;
- Incarceration is necessary to coerce compliance; and
- Obligor is not indigent and is therefore not entitled to court appointed counsel.

It is important to note that coercive incarceration is designed to force compliance with the payment ordered in the ELR proceeding.

Summary:

- Cause of incarceration: Refusal to make a specified payments
- Purpose of warrant / incarceration: To coerce compliance with the order for payment.
- Legal authority for warrant: Rule 1:10-3 and Rule 5: 4-1 (c)
- Will payment secure release? Yes (See Section B.3)

3. Rule 1:10-3 Hearing (ELR Hearing)

The purpose of this hearing is to enforce litigant’s rights by determining whether there has been non-compliance with the child support order and if so, taking action to bring about compliance. Where an obligor has been compelled to appear for the hearing by issuance of a warrant, the hearing must be convened as quickly as possible, but no later than 72 hours after apprehension. The 72-hour maximum is intended for situations where obligors are held over weekends. It is otherwise expected that obligors will usually be brought before judges within two days.

a. Release Upon Payment of Arrears. An obligor may eliminate the need for the hearing by acknowledging non-compliance and choosing to come into compliance with the support order by making payment prior to the hearing. Warrants issued to compel appearance at an ELR hearing typically specify an amount of arrears, payment of which will bring the obligor into compliance and thereby eliminate the need for the hearing. This is referred to as the release amount. Where an obligor pays this amount, it will be applied to child support arrears and a hearing is no longer necessary. Therefore, the incarceration to ensure appearance at the hearing is no longer necessary and the obligor will be released from incarceration. (See Appendix D, “Notice and Receipt for Child Support Release Payment.”)

This procedure provides a means to address the rare circumstance in which the obligor is willing to pay the release amount but wishes to contest the factual basis for the arrears at the hearing that follows his or her arrest. In this circumstance, release from incarceration may also be obtained where the obligor wants to contest the issue of non-compliance and demonstrates the probability of his/her subsequent appearance at the Rule 1:10-3 hearing by posting the amount claimed due to be deposited in the support account and placed in hold status pending the hearing. Upon release under these conditions, the obligor must be advised

of the date, time and place of the hearing. (see Appendix D, Notice and Receipt for Child Support Release Payment). Each vicinage will need to implement a program for providing scheduling information to the authority that receives the payment and releases the obligor.

b. Hearing. At the ELR hearing, the court must determine if there has been non-compliance with the child support order and, if so, the extent of the non-compliance. Having found non-compliance, the court may then fashion a remedy to give appropriate relief to the aggrieved obligee.

c. Right to Counsel and Indigence Determination. Where coercive incarceration may be ordered subsequent to an ELR hearing, the obligor must be advised of the right to counsel and, if indigent, have counsel appointed on his/her behalf. In order to ensure that the Judiciary is in compliance with these requirements, the following procedures shall be followed.

- In all cases in which coercive incarceration is a reasonable likelihood, an interview with the obligor shall be conducted to facilitate the court's determination of indigence. An *Obligor Questionnaire* shall be completed and provided to the court. The interview will normally be conducted prior to the ELR hearing before the court.
- Based on the information provided by Probation, the judge will make a determination of indigence. If the obligor is found to be indigent, the judge may proceed with the hearing, making appropriate findings and ordering appropriate relief, but because publicly funded counsel is not available at this time, the judge may not incarcerate the obligor to coerce compliance. If the judge finds that the obligor is not indigent and has the ability to pay, but chooses not to, incarceration is available as a relief.
- Prior to conducting an ELR hearing, the judge will ask the obligor if he or she wishes to retain counsel. If the obligor so indicates, but the attorney is not present, at the discretion of the judge, the obligor may be released or remanded to the jail until such time as the attorney is able to appear.

4. Incarceration Subsequent to the ELR Hearing

Unlike incarceration that takes place prior to an ELR hearing (which occurs to ensure timely appearance before the court), coercive incarceration that is ordered by the court at such a hearing is always based on the court's finding that the obligor has a support order established and possesses the ability to pay, but refuses to pay. Coercive incarceration ordered under Rule 1:10-3 must:

a. Be Based upon a Finding of Failure to Comply with the Order. The court must conclude that a child support order has been established and that the obligor has failed to comply with the order. The court must determine the extent of non-compliance by entering a finding as to the amount of arrears or other form of non-compliance. The court must then enter an order setting forth the nature and extent of compliance it deems required to enforce litigant's rights and the obligor must fail or refuse to comply with that enforcement order.

b. Be Based upon a Finding of Ability to Pay. With respect to any payment or other action sought to be coerced by the incarceration, the court must make a finding that the obligor has the current ability to make said payment or otherwise comply with its order. Since incarceration imposed under Rule 1:10-3 is intended to be coercive, and not punitive, it is

essential that the obligor be found to have an ability to pay an amount acceptable to the Court at the hearing. Such payment will secure release without delay. Therefore, the obligor has the “keys to the cell” and incarceration is considered coercive. If the obligor does not have the ability to pay, incarceration is not available as a relief, as such incarceration would be punitive in effect.

c. Not Infringe on the Rights of those Deemed Indigent. A determination of indigence must be made. If determined indigent by the court, counsel will be appointed by the court to represent the obligor. If the court is unable to appoint counsel, incarceration is not available as a relief. This does not preclude the court from ordering other reliefs such as directing the obligor to seek employment or to report to probation on a regular basis in order to keep the court apprised of his or her economic status.

If appropriate, the court may incarcerate the obligor to coerce payment. The court may also release the obligor on condition that he make certain payments or meet other conditions. Examples of conditions of release include (but are not limited to) requiring the obligor to seek employment and report back to the court on those efforts, requiring the obligor to apply for unemployment benefits, and taking action to provide health care coverage for his or her dependents. More commonly, the form of relief requires the payment of money by the obligor.

When incarceration is ordered, the court must bring the obligor before the court every two weeks (see standards at section J below) to consider the particular circumstances of an obligor and whether incarceration is still an effective means to coerce compliance. Since incarceration is coercive rather than punitive, a party must be released when the coercive purpose is deemed to have failed and continued incarceration would be punitive only. Marshall v. Matthei, 327 N.J. Super. 512, 527-529 (App. Div. 2000).

C. Child Support Warrants to Compel Expedited Appearance of an Obligor for an ELR Hearing

Most counties use the child support warrant produced by Probation’s Warrant Generator Program. This warrant is available to all counties, but is not utilized by all. To eliminate confusion and to clarify the nature of the child support enforcement proceeding, Probation has modified the language of that warrant, to eliminate the word “contempt” and to specify that the warrant relates to a Rule 1:10-3 proceeding to enforce litigants’ rights.

Standards:

1. Each county not currently using the Warrant Generator Program should change the language on its warrant to eliminate the word “contempt”.
(Form of Warrant attached as Appendix A). All counties should adopt and use the Warrant Generator Program’s warrant.
2. The warrant forms attached (Appendices A and B) have been modified, adding a statement under the conditions of release that "This is a release payment. It is not bail and is not refundable." At the bottom of the warrant (by the amount paid block), a further statement is added that states, "All payments received must be acknowledged with a Notice and Receipt for Child Support Release Payment. Bail receipts must not be used."

D. Child Support Warrant/Release Amount

Every child support warrant includes an accumulated arrears amount as a condition of release. Most counties use the full arrears amount as of the day the warrant is issued as the release amount. A few counties use a fixed proportion of the arrears rather than the full amount of those arrears because they feel this results in a greater number of payments being made and more than offsets the occasional lost opportunity to get the full amount. However, this practice should be uniform across the state.

Standards:

3. All counties should use the full amount of the arrears at the time the warrant is issued as the release amount.
4. The child support hotline phone number should be printed on the face of the warrant. This would permit the Sheriff's Department to verify, at the obligor's request, the current arrears amount. If it is less than the amount that is noted on the warrant, the department must accept payment of the lesser amount. Payment of the amount set forth on the warrant will satisfy the warrant even if the total arrears on ACSES are greater than the amount at the time of arrest.

E. Child Support Warrant Payment Receipts

Some counties are currently giving bail receipts to obligors when collecting payment of release amounts. These payments are not bail and bail receipts must not be used for these payments.

Standards:

5. All vicinages should use the form of receipt attached as Appendix D. It provides for a signature block with an acknowledgment that the support payment will not be refunded. It also provides for release upon payment of the release amount, even if the obligor wishes to contest the arrears amount (see the procedure described in Section B.3.a, above).
6. This form should be available and used at all locations in each county where such payments are collected.
7. The Judiciary should enlist the cooperation of the County Sheriffs and local municipalities to use this form consistently for arrests on child support warrants. Accurate reporting of child support warrant collections benefit the Sheriffs' Title IV-D cooperative agreements.

F. Timely Notice to Probation of Obligor's Arrest

Counties vary in the way Probation learns of an obligor's arrest, but notification is timely in all counties. Probation generally is able to schedule an obligor to see a judge the same day or the following day. The few exceptions happen either because Probation and the court are unavailable on the weekend, or a holiday, or because the court is not available on Fridays or Mondays in some counties.

Standard:

8. Each county should document its communication protocol for rapid notification of Probation, and should submit it to Probation Services at the Administrative Office of the Courts.

G. Rapid Initial Contact with the Arrested Obligor

Some arrested obligors pay the support arrears amount (release amount) shown on the face of the warrant or the amount of their current arrears, and are released immediately.

The obligors who have not paid the Sheriff either the release amount or their full arrears are taken into custody. In addition to the indigency interview procedure outlined in section B.3, in some counties Probation attempts to reach agreement with the arrested obligor on a payment amount that will be recommended to the judge, which may be less than the full amount shown on the warrant. The agreement generally includes a commitment by the obligor to resume payment of the ongoing court ordered obligation(s). Agreement is reached in the substantial majority of the cases. The judge decides whether to accept Probation's recommendation. The terms are documented in the judge's order. After the payment is made, the warrant should be vacated and the obligor released. In the majority of cases, this happens on the same day as the arrest or the following day. If agreement is not reached, the ELR hearing shall proceed.

In some counties, Probation conducts the required indigency interview and arranges for a prompt hearing by a judge, but does not negotiate with the obligor concerning the release amount in advance of the hearing.

Standard:

9. Probation, in addition to the required interview, should, wherever practical, attempt to negotiate a release amount with the obligor prior to the obligor seeing the judge. In any event, the obligor must appear before the court within 72 hours.

H. Notifying Obligee of Arrested Obligor's ELR Hearing

Most counties currently notify only those obligees that request it, and it has been reported that many do not appear.

It was agreed that an effort should be made to notify the obligee of the ELR hearing, however, the hearing should not be delayed to permit attendance. (See Anyanwu, 333 N.J. Super 231 138-36, 755 A.2d 593 (App. Div. 2000). The obligee frequently has information that can help the judge determine ability to pay and may participate in a variety of ways including conveying information by fax or participating by telephone. Despite these other means of communication, it should be emphasized to the obligee that he or she may appear in person at the ELR hearing.

Standards:

10. All Probation staff should be trained to ask for relevant information whenever an obligee calls regarding missed payments. The obligee can send the information in writing, or Probation can record oral reports on the ACSES notepad for the case. This information would then be available to the judge at the hearing.

11. Probation should attempt to contact the obligee by phone in all cases where there will be an ELR hearing before a judge following the obligor's arrest. In those cases where Probation is able to reach the obligee in time, relevant information can be taken over the phone, by fax, by the obligee appearing at the hearing, or by the obligee speaking to the judge's clerk by phone.

Although efforts to contact the obligee should be made, the hearing must not be delayed to effect contact with the obligee or to allow the obligee to be present.

I. Timing of the ELR hearing following an arrest - within seventy-two hours, excluding holidays

In all cases where an obligor has been arrested on a warrant to compel appearance, and where the release amount has not been paid, Probation shall arrange for the obligor to appear before a judge for the ELR hearing. An attempt should be made to contact the obligee (See H above). Probation's survey data from 2002 indicate that in the vast majority of counties the obligors were being brought before the court for a hearing on the same or the next day. Because court is not in session every weekday in some counties, and because of weekend arrests, holding a hearing the same or next day is not always possible. However, the practice has been that nearly all of these hearings are held within seventy-two hours, excluding holidays. The practice of holding these hearings within 72 hours is now mandated in all counties

Standards:

12. All arrested obligors should be seen by a judge as soon as possible. That means the same day or the following day, unless a weekend intervenes or there is no judge available. In no case should it take more than seventy-two hours, excluding holidays, from the time of arrest.
13. Video conferencing should be encouraged where it can expedite the process.

J. Subsequent Hearing or Reviews

In cases where the judge orders coercive incarceration at the ELR hearing (See Section B.4, above), subsequent reviews must be held to determine whether incarceration continues to be an effective means to compel compliance. In most counties these reviews are conducted every two weeks.

Standards:

14. Subsequent reviews should be held at least every two weeks. At each review, Probation should notify the judge how long the obligor has been incarcerated.
15. The reviews require that the court determine whether the continued incarceration is still coercive, rather than punitive. At the point that the incarceration is no longer coercive, the court has the discretion to release the obligor or refer the case to the County Prosecutor pursuant to N.J.S.A. 2C:24-5.

K. Rule 1:10-2 Contempt Proceedings

It is contemplated that the great majority of those who are incarcerated subsequent to the *initial* hearing will be jailed to coerce compliance under Rule 1:10-3. The judge may also determine that the acts or omissions of the obligor are sufficiently severe to warrant punishment. In these cases, the judge may institute an order to show cause or for arrest specifying those acts or omissions to be contumacious under Rule 1:10-2. It is important to note two of the important distinctions that differentiate these proceedings from the Rule 1:10-3 hearings: 1) Rule 1:10-2 proceedings are punitive, rather than coercive, and 2) any sentence of incarceration must be determinate in length.

The alleged contemnor 1) must receive notice of the specific acts alleged to be contumacious and have the opportunity to be heard, 2) may have the right to a jury trial, 3) has the right to retain counsel or have one appointed if indigent, and 4) has the right to be released on his own recognizance, unless the court determines that the imposition of bail is necessary to assure appearance. For example, this approach may be appropriate where the obligor has demonstrated a pattern of failing to appear before the court, intentionally hiding assets, accumulating an excessive amount of unpaid support, and/or continuing to refuse to pay when the judge is satisfied that such ability exists.

These cases would need to be prosecuted by the Attorney General or county prosecutor. The aggrieved litigant's (obligee's) attorney should not prosecute except for good cause shown. If found guilty of contempt under Rule 1:10-2, the obligor may be punished by serving up to six months in jail, paying a fine of not more than \$1,000, or both.

L. N.J.S.A. 2C:24-5 Criminal Prosecution

Notwithstanding any action taken by the court pursuant to Rules 1:10-2 or 1:10-3, the Attorney General or county prosecutor may pursue criminal charges under N.J.S.A. 2C:24-5. This is a fourth degree criminal offense and is appropriate if the obligor willfully fails to provide support which he/she 1) can provide and 2) knows that he/she is legally obliged to provide to a spouse, child or other dependent. As is the case with Rule 1:10-2 proceedings, the obligor has the right to be represented and, if indigent, is entitled to be assigned a public defender.

The accused may be entitled to a trial by jury and, if he or she makes this demand, court rules require the prosecution to be transferred from the Family Part to the Law Division. A person who is convicted of a fourth degree crime may be sentenced to imprisonment for a term not to exceed 18 months, a fine not to exceed \$10,000, or both. In addition, persons convicted of this offense may also be ordered to make restitution.

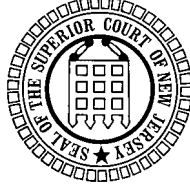
APPENDIX A

Warrant – Failure to Appear

WARRANT

FAILURE TO APPEAR

DATE OF WARRANT:2/4/2002



SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
COUNTY OF CAPE ESSEX

DOCKET FD-22-772-95
CS90090643Q DFD ID: C512345022

THE STATE OF NEW JERSEY,

TO THE SHERIFF OF THE COUNTY ABOVE OR ANY CONSTABLE OR POLICE OFFICER,

GREETINGS:

PURSUANT TO THE AUTHORITY OF THIS COURT AS DETAILED IN PART 1, SECTION 10, SUBSECTION 3, OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, YOU ARE HEREBY COMMANDED TO ARREST

JOHN JONES

AND CONFINE THIS PERSON TO THE COUNTY JAIL.

SUBJECT HAS FAILED TO APPEAR IN COURT ON 12/23/2001 FOR A HEARING TO ENFORCE LITIGANT'S RIGHTS

IF THE ABOVE NAMED PERSON CANNOT SATISFY THE CONDITIONS OF RELEASE, YOU MUST BRING THAT PERSON BEFORE A JUDGE OF THIS COURT THE SAME DAY OR NO LATER THAN 72 HOURS FROM THE TIME OF THE ARREST.

CONDITIONS OF RELEASE:

THE SUBJECT MAY BE RELEASED UPON THE PAYMENT OF **\$13,726.40**. IF SAID PERSON, UPON ARREST, ALLEGES THAT THE TOTAL ARREARS ARE LOWER THAN THE AFORESTATED AMOUNT, THE ARRESTING AGENCY MAY CALL THE CHILD SUPPORT HOTLINE AT 1-800-621-5437 TO CONFIRM THE ARREARS AMOUNT. IF, AFTER MAKING SAID CALL, THE TOTAL ARREARS ARE DETERMINED TO BE LESS THAN THE AFORESTATED AMOUNT, THE ARRESTING AGENCY IS AUTHORIZED TO ACCEPT THE LESSER AMOUNT AS A CONDITION OF RELEASE AND SHALL NOTE SAME ON THE RETURN OF THIS WARRANT TO THE COURT. **THIS IS A RELEASE PAYMENT. IT IS NOT BAIL AND IS NOT REFUNDABLE.**

I, THE HONORABLE I.A. JUDGE, JUDGE OF THE SUPERIOR COURT,
IN AND FOR THE COUNTY OF CAPE ESSEX,
DO HEREWITH ISSUE AND MAKE THIS YOUR WARRANT TO ARREST JACKIE DOE TO ANSWER FOR SAID TRESPASSES AGAINST THE DIGNITY, POWER, AND AUTHORITY OF THIS COURT.

HONORABLE _____, JSC

WARRANT INFORMATION

NAME: JONES, JOHN
ADDRESS: 216 FOB AVE VALDOSTA NJ 08000-1357
SUBJECT
DOB: 11/9/1950 SSN: 123-45-6789 SEX: M RACE: CAUCASIAN
DESCRIPTION: HEIGHT: 6 FT. 01 IN. WEIGHT: 210 LB. HAIR: BROWN EYES: BLUE

All payments received must be acknowledged with a Notice and Receipt for Release Payment. Bail receipts must not be used.

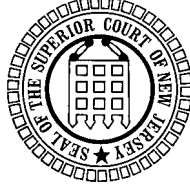
APPENDIX B

Warrant – Failure to Pay After Order

WARRANT

FAILURE TO PAY AFTER ORDER

DATE OF WARRANT:2/4/2002



SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
COUNTY OF CAPE ESSEX

DOCKET FD-22-772-95
CS90090643Q DFD ID: C512345022

THE STATE OF NEW JERSEY,

TO THE SHERIFF OF THE COUNTY ABOVE OR ANY CONSTABLE OR POLICE OFFICER,

GREETINGS:

PURSUANT TO THE AUTHORITY OF THIS COURT AS DETAILED IN PART I, SECTION 10, SUBSECTION 3, OF THE RULES GOVERNING THE COURTS OF THE STATE OF NEW JERSEY, YOU ARE HEREBY COMMANDED TO ARREST

JACKIE DOE

AND CONFINE THIS PERSON TO THE COUNTY JAIL.

SUBJECT HAS FAILED TO MAKE CHILD SUPPORT PAYMENTS AS DIRECTED UNDER THE COURT ORDER DATED 5/13/1996 WHICH REQUIRES THAT IF PAYMENT IS NOT MADE HE/SHE BE BROUGHT BEFORE THE COURT FOR AN ENFORCEMENT HEARING ON AN EXPEDITED BASIS.

IF THE ABOVE NAMED PERSON CANNOT SATISFY THE CONDITIONS OF RELEASE, YOU MUST BRING THAT PERSON BEFORE A JUDGE OF THIS COURT THE SAME DAY OR NO LATER THAN 72 HOURS FROM THE TIME OF THE ARREST.

CONDITIONS OF RELEASE:

THE SUBJECT MAY BE RELEASED UPON THE PAYMENT OF **\$13,726.40**.

IF SAID PERSON, UPON ARREST, ALLEGES THAT THE TOTAL ARREARS ARE LOWER THAN THE AFORESTATED AMOUNT, THE ARRESTING AGENCY MAY CALL THE CHILD SUPPORT HOTLINE AT 1-800-621-5437 TO CONFIRM THE ARREARS AMOUNT. IF, AFTER MAKING SAID CALL, THE TOTAL ARREARS ARE DETERMINED TO BE LESS THAN THE AFORESTATED AMOUNT, THE ARRESTING AGENCY IS AUTHORIZED TO ACCEPT THE LESSER AMOUNT AS A CONDITION OF RELEASE AND SHALL NOTE SAME ON THE RETURN OF THIS WARRANT TO THE COURT. **THIS IS A RELEASE PAYMENT. IT IS NOT BAIL AND IS NOT REFUNDABLE.**

I, THE HONORABLE I.A. JUDGE, JUDGE OF THE SUPERIOR COURT,
IN AND FOR THE COUNTY OF CAPE ESSEX,
DO HEREWITH ISSUE AND MAKE THIS YOUR WARRANT TO ARREST JACKIE DOE TO ANSWER FOR SAID TRESPASSES AGAINST THE DIGNITY, POWER, AND AUTHORITY OF THIS COURT.

HONORABLE _____, JSC

WARRANT INFORMATION

NAME: DOE, JACKIE
ADDRESS: 216 FOB AVE VALDOSTA NJ 08000-1357
SUBJECT

DOB: 11/9/1950 SSN: 761-55-7897 SEX: M RACE: AFRICAN-AMERICAN
DESCRIPTION: HEIGHT: 6 FT. 01 IN. WEIGHT: 210 LB. HAIR: BROWN EYES: BROWN

All payments received must be acknowledged with a Notice and Receipt for Release Payment. Bail receipt must not be used.

APPENDIX C

Order for Coercive Incarceration

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
FAMILY PART

Plaintiff
Obligor/Obligee

_____ COUNTY

Docket No. _____

CS _____

v.

CIVIL ACTION

Defendant
Obligor/Obligee

ORDER
for
Coercive Incarceration

THIS MATTER having come before the Court on the _____ of _____, 200____,

AND the Court having considered the evidence and arguments presented and having found that the obligor is not indigent and does not qualify for court appointed counsel,

AND having found that the obligor is under a Court Order to pay \$_____ per _____ [frequency] for the support of _____ child(ren) effective _____,

AND having found that the obligor has failed to make payments and owes arrearages totaling \$_____ to the obligee and/or _____ Welfare Agency,

AND the Court having directed that obligor make a payment of \$_____ to be applied to arrears,

AND having found that the obligor has the financial ability to pay that amount and refuses to do so, and that incarceration of the obligor is necessary to coerce compliance,

THEREFORE, IT IS HEREBY on _____ day of _____, 200____, ORDERED that the obligor be incarcerated in the _____ County Jail until the obligor pays \$_____ [amount] to be applied to said arrears or until further Order of this Court.

It is further ORDERED that all provisions of the prior order(s), shall remain in full force and effect. The Court will review the continuing efficacy of this order for coercive incarceration no later than two weeks from the date of this order.

J.S.C.

APPENDIX D

Notice and Receipt for Child Support Release Payment

[Note: Form Revised April 22, 2004.]

**NOTICE AND RECEIPT OF
CHILD SUPPORT RELEASE PAYMENT**

In the Matter of

Docket / Warrant # _____

Obligor

Child Support Case # _____

Amount Paid \$ _____

NOTICE

The above named person (obligor) is subject to proceedings to enforce a court order to pay child support. In order to be released from custody on this matter the total amount printed on the warrant or a subsequent court order must be paid. **This amount IS NOT bail and will not be returned.** It will be used to satisfy all or part of the total amount in arrears on the obligor's child support order.

Since the above amount **IS NOT** bail, no surety bonds or 10% (bail) of the arrears can be accepted. This amount must be paid in full by cash, check or money order. It must equal the amount shown on warrant, unless a lesser amount is determined by the arresting agency either by confirming the arrears amount on the 24-hour Child Support Hotline at 1-800-621-5437 or by a subsequent court order changing the amount.

ACKNOWLEDGMENT BY PAYER

I understand that my payment will be applied to the amount in arrears on the obligor's child support order. I further understand that this amount will not be returned to me.

Payer Information:

Print Name: _____

Address: _____

Signed: _____

Date: _____

Telephone: _____

- Check here if the obligor contests that this payment is owed and requests a hearing. If checked, the obligor must:
- Pay the release amount; **and**
 - Appear at the Probation Division in the county enforcing the case by noon of the business day following release to obtain the date, time and place of the hearing; **and**
 - Appear at that hearing and bring any proofs needed to support his/her position.

If contested, the funds will be deposited in the support account and placed on hold pending the outcome of the hearing. The obligor must appear at the Probation Division and at the scheduled hearing, or the matter will be deemed uncontested.

Payment Received By:

Name: _____

Title: _____

Signature: _____

Agency: _____

**ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY**

**RICHARD J. HUGHES JUSTICE COMPLEX
PO Box 037
TRENTON, NEW JERSEY 08625-0037**



**Phone (609) 984-4194
Fax: (609) 984-6968**

**Supplement to
Directive #2-04**

To: Assignment Judges

**From: Theodore J. Fetter,
Deputy Administrative Director of the Courts**

**Subj: Child Support Enforcement – Counsel – Appellate Division Decision
in Pasqua v. Council**

Date: September 14, 2004

On September 10, 2004, the Appellate Division issued a “not for publication” opinion in Pasqua v. Council, A-6875-02T3, and a copy was e-mailed to you by the Clerk of the Appellate Division. In its decision the Appellate Division reversed the order of the Law Division in Pasqua v. Council, MER-L-406-03, entered on April 24, 2003 (*supplemental opinion about counsel fees entered on July 11, 2003*), which had held that child support obligors facing coercive incarceration at a hearing to enforce litigants rights have a constitutional right to counsel.

On March 16, 2004, the Administrative Director of the Courts issued Directive #2-04, “Use of Warrants and Incarceration in the Enforcement of Child Support Orders.” That Directive set forth statewide standards and procedures recommended by the Conference of Family Presiding Judges and approved by the Judicial Council that regularized the practices relating to the use of warrants and incarceration in child support enforcement. The Directive redefined certain terminology, promulgated forms, and carefully defined the nature of hearings under R. 1:10-3. It addressed the timing of hearings to enforce litigant’s rights, the manner of determining warrant release amounts, and the form to be used for payment receipts. The Directive also included provisions relating to indigency and the right to counsel in these matters, the subject of the Law Division and Appellate Division Pasqua decisions.

In view of the Appellate Division’s Pasqua decision, and pending further developments on this issue, I am issuing this supplemental Directive to provide interim guidance as to those provisions of Directive #2-04 affected by the decision.

In accordance with the Appellate Division holding in Pasqua, those provisions of

Directive #2-04 relating to indigency review and the right to counsel are hereby withdrawn. Specifically, this includes the following sections of the Directive: B.1.a. (as to the requirement in the last paragraph that hearing officers make findings with respect to the indigency of the obligor), B.2.c. (last bullet deleted), B.3.c. (deleted in full), B.4.c. (deleted in full), G. (reference to indigency review procedure), K. (second paragraph, sentence on right to have counsel appointed), and Appendix C, Order for Coercive Incarceration (second sentence relating to finding of indigence and appointment of counsel).

All other provisions of Directive #2-04 remain in force, pending further review.

T.J.F.

cc: Chief Justice Deborah T. Poritz
Family Presiding Judges
AOC Directors & Assistant Directors
Trial Court Administrators
Richard Narcini, Chief, CSE Services
Eli Mireles, Chief, CSHO Program
Family Division Managers
Vicinage Chief Probation Officers
Vicinage Assistant Chief Probation Officers-Child Support
Child Support Hearing Officers
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant

ADMINISTRATIVE OFFICE OF THE COURTS
STATE OF NEW JERSEY

RICHARD J. HUGHES JUSTICE COMPLEX
PO Box 037
TRENTON, NEW JERSEY 08625-0037



Phone (609) 984-4194
Fax: (609) 984-6968

**Rescission of
Supplement to
Directive #2-04**

To: Assignment Judges

**From: Theodore J. Fetter,
Deputy Administrative Director of the Courts**

**Subj: Rescission of September 14, 2004 Supplement to Directive #2-04 --
Child Support Enforcement Counsel – Supreme Court Stay of
Appellate Division Decision in Pasqua v. Council**

Date: September 22, 2004

By order of September 22, 2004 the Supreme Court granted plaintiffs' motion to stay the Appellate Division's September 10, 2004 decision in Pasqua v. Council, A-6875-02T3, pending disposition of the petition for certification. That Appellate Division decision reversed the order of the Law Division in Pasqua v. Council, MER-L-406-03, entered on April 24, 2003 (*supplemental opinion about counsel fees entered on July 11, 2003*), which had held that child support obligors facing coercive incarceration at a hearing to enforce litigants rights have a constitutional right to counsel.

In light of the Court's stay of the Appellate Division's decision, my September 14, 2004 memorandum, denoted as a Supplement to Directive #2-04 and withdrawing certain portions of that Directive, is hereby rescinded. This rescission thus has the effect of reinstating Directive #2-04 in its entirety.

T.J.F.

cc: Chief Justice Deborah T. Poritz
Family Presiding Judges
AOC Directors & Assistant Directors
Trial Court Administrators
Richard Narcini, Chief, CSE Services
Eli Mireles, Chief, CSHO Program
Family Division Managers
Vicinage Chief Probation Officers
Vicinage Assistant Chief Probation Officers-Child Support
Child Support Hearing Officers
Steven D. Bonville, Special Assistant
Francis W. Hoeber, Special Assistant