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DIRECTIVE #07-23

**(Supersedes Directive #02-14
and Directive #15-08)**

[Questions or comments may be
directed to 609-815-3810]

**TO: Assignment Judges
Trial Court Administrators**

FROM: Glenn A. Grant, Administrative Director

**SUBJECT: Use of Warrants and Incarceration in the Enforcement of Child
Support Orders**

DATE: May 15, 2023

This Directive provides guidance on child support bench warrants and incarceration. It supersedes Directive #02-14, the July 16, 2014 Supplement to Directive #02-14, and Directive #15-08 (which Directive #02-14 had modified). It also provides guidance as to the procedures for obligors who are being detained on other charges in addition to the child support bench warrant.

Among other things, this Directive promulgates for immediate use a revised version of the “Civil Action Order for Relief to Litigant – Enforcement of Litigant’s Rights” order (CS702) (CN 11213) for use at expedited enforcement hearings to capture the findings that need to be made (e.g., determinations of indigence and ability to pay) and the various other reliefs that may be ordered by the Judge in sufficient detail to support those findings. Originally promulgated by Supplement to Directive #02-14, the form has been streamlined for ease of use. The Uniform Summary Support Order (USSO) should continue to be used for orders resulting from scheduled enforcement hearings, usually before a child support hearing officer. However, these orders should contain the same detailed findings regarding indigence and ability to pay if coercive incarceration is recommended and is ordered by the judge.

This superseding Directive also clarifies that the 72-hour hearing time frame is a maximum and that every effort must be made to conduct the hearing by the close of the next business day.

A. Background

This Directive presents a conceptual and legal framework for the use of incarceration in cases involving obligors who are brought before the court on child support enforcement cases under Rule 1:10-3, Relief to Litigant. This sets forth standards on the conduct of proceedings, required findings of fact, right to counsel, the use of forms, and the setting of an amount the payment of which will secure the obligor's release from custody, referred herein as a "release amount," consistent with Pasqua v. Council, 186 N.J. 127 (2006) ("Pasqua"), and Turner v. Rogers, 564 U.S. 431, 131 S.Ct. 2507 (2011) ("Turner").

In Pasqua, the New Jersey Supreme Court held that indigent parents charged with violating child support orders and subject to coercive incarceration at hearings to enforce litigants' rights have a right to appointed counsel. In Pasqua, the court recognized that, as with any involuntary commitment, termination of parental rights, and tier classification in a Megan's Law proceeding, under Article 1, 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.

Some five years after the Pasqua ruling, the United States Supreme Court reached a similar conclusion in Turner v. Rogers. The question in Turner was whether the due process clause of the 14th Amendment of the U.S. Constitution requires states to provide legal counsel to an indigent person at a child support civil contempt hearing that could lead to incarceration in circumstances where the custodial parent or opposing party was not represented by legal counsel. The U.S. Supreme Court held that under those circumstances, the state does not necessarily need to provide counsel to an unrepresented noncustodial parent if the state has "in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question, whether the supporting parent is able to comply with the court order." See Turner at 2512.

This Directive relates primarily to child support enforcement actions brought by the Probation Division and discusses the nature of the court's findings, the rights of the obligor, the form of order, and the conduct of hearings. Although this Directive applies to all relief in litigant proceedings, including those initiated by individuals, it is not intended to involve the Probation Division's support enforcement staff in cases other than support matters enforced through the Probation Division.

New Jersey law defines three distinct bases for incarceration for refusal to comply with obligations established by child support orders:

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

Of these three, relief to litigant proceedings under R. 1:10-3 are the most frequently used enforcement process and they are discussed in this Directive in the greatest detail. Since either criminal prosecutions under N.J.S.A. 2C:24-5 or contempt proceedings under R. 1:10-2 are rare in New Jersey, this Directive concludes with a brief description of these practices.

B. Rule 1:10-3 Relief to Litigant Proceedings

1. Two Types of Hearings

To coerce payment from an obligor who has become delinquent in the payment of court-ordered child support, the court may conduct a hearing to enforce litigant's rights under R. 1:10-3. Such a hearing may be either a scheduled Enforcement of Litigant's Rights Hearing (ELR Hearing) or an Expedited Enforcement of Litigant's Rights Hearing (Expedited ELR Hearing). In an ELR Hearing an obligor is compelled to appear before a judge or a Child Support Hearing Officer (CSHO). In an Expedited ELR Hearing, the obligor is compelled to appear before a judge and may be compelled to appear without additional notice. The Probation Division will recommend to the court whether an Expedited ELR Hearing is required. The obligor's appearance for an Expedited ELR Hearing may be compelled by either the issuance of a warrant or a notice to appear.

At ELR and Expedited ELR Hearings, there must be a determination of the obligor's non-compliance with the child support order and the extent of such non-compliance. Having found there to be

non-compliance, the court may then fashion a remedy to give appropriate relief to the obligee. Probation may indicate the remedies available to the court, which should take into consideration a number of factors, as more fully described below in Section B5 (ELR and Expedited ELR Hearing Procedures).

a. ELR Hearings Before a Child Support Hearing Officer (CSHO)

Generally, the first enforcement activity in such matters is an ELR Hearing scheduled before a CSHO on notice of motion pursuant to R. 5:4-1, with that notice indicating that a warrant may issue for failure to appear. The notice directs the obligor to appear for the hearing at a specific date and time. The obligee is also provided notice of the proceeding, but the obligee's appearance at the hearing is optional. In the event a party disagrees with the CSHO's recommendation, that party is entitled to an immediate de novo hearing before a judge.

The obligor is required to appear at the ELR Hearing (remote or in-person) to respond to the allegations of non-compliance contained in the motion. The ELR Hearing allows the obligor to present any defenses, with the CSHO making findings as to the validity of the defenses and the obligor's ability to pay or comply with the order. Any recommended order providing relief must take into consideration factors affecting the obligor's ability to pay, e.g., employment, disability, public assistance. Such hearings may 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 component, the order may provide that if future payments are missed, a warrant may be issued without any additional 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 future alleged non-compliance.

In order to recommend that enforcement include coercive incarceration, the CSHO must make findings as to the obligor's non-compliance and ability to pay. The CSHO also will ensure that Probation has the information needed to complete the Probation Child Support Enforcement *Obligor Questionnaire* (CS700). As required by R. 5:25-3(c)(10)(B), once all of the

information required to complete the CS700 is elicited and the hearing is concluded, any recommendation by the CSHO for incarceration must go to a judge for determination.

b. A Warrant for an Expedited ELR Hearing Before a Judge

A warrant for an Expedited ELR Hearing before a judge is usually issued when there is a continued failure to make support payments or provide medical coverage subsequent to an ELR Hearing or failure to appear at one or more ELR Hearings. As noted above, the recommendation that such a proceeding occur is made by Probation based on consideration of several factors related to the case. A supervisory review within Probation also is required before any such recommendation to issue a warrant is forwarded to the judge.

A warrant requiring expedited appearance before a judge should, where appropriate, specify a release amount, the payment of which would eliminate the need for an enforcement hearing.

Characteristics of the Expedited ELR Hearing before a judge are described below in detail in Section B5 (ELR and Expedited ELR Hearing Procedures).

2. Use of Warrants and Incarceration in ELR and Expedited ELR Hearings

The court may issue warrants to arrest obligors or order the coercive incarceration of obligors in connection with ELR and Expedited ELR Hearings in three basic circumstances: (See Sections B3 and B5 below for detailed explanation of what must occur prior to and during these hearings.)

a. Failure to Appear for an ELR Hearing (Virtual or In-Person)

Where an obligor, after service of notice to appear, fails to appear for a ELR Hearing and arrest thus is necessary to ensure obligor's appearance before the court. See "*Warrant – Failure to Appear (CS594A)*."

b. Future Failure to Make One or More Child Support Payments

Where an order resulting from an ELR 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 address the non-compliance expeditiously. See “*Warrant – Failure to Pay After Order* (CS594B).”

c. Coercive Incarceration

Where an obligor has been ordered at an Expedited ELR 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 court’s order. See attached revised “*Civil Action Order for Relief to Litigant – Enforcement of Litigant’s Rights*” (Form: CN 11213/CS702).

3. Circumstances for Issuance of Warrants and Subsequent Arrests

It is of great importance to have a clear understanding of the different circumstances that may form the basis for issuance of warrants and subsequent arrests. Each of the following circumstances raises different issues that must be addressed to ensure that the process is fair and that the rights of all parties are protected. Each such circumstance will be addressed here in turn.

a. Failure to Appear for an ELR Hearing (Virtual or In-Person)

When the obligor has failed to appear for a scheduled ELR (virtual or in-person) Hearing, a warrant may be issued. The purpose of the arrest and incarceration is to ensure the appearance of the obligor before the court to respond to the motion related to the obligor’s failure to pay court-ordered support. See “*Warrant – Failure to Appear* (CS594A).” Key points regarding the issuance of a CS594A are as follows:

1. Warrant is issued because of obligor’s failure to appear.
2. Purpose of warrant/incarceration is to ensure obligor’s appearance before a judge.

3. Legal authority for warrant is in R. 1:10-3 and R. 5: 4-1 (c).
4. Payment of a specified amount will secure release. (See Section B5 (a) below.)

b. Future Failure to Make One or More Child Support Payments

The court may prospectively and conditionally order issuance of a warrant based on one or more future missed payments. See “*Warrant – Failure to Pay After Order (CS594B)*.”

The court has discretion to order the issuance of a warrant conditioned on 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 or working “off the books”).

Additionally, a child support order requiring the obligor to make a lump sum payment toward arrears on or before a specified date may include a provision for the issuance of a warrant if the lump sum payment is not made. The child support order requiring the lump sum payment would specify that the refusal by the obligor to make a lump sum payment by the specified date may result in the issuance of a warrant.

While appearance can be achieved by the less extreme use of a notice to appear at an ELR Hearing, the issuance of a warrant is used to compel the obligor’s expedited appearance to address non-compliance. Key points regarding the issuance of a CS594B are as follows:

1. Warrant is issued for failure to make court-ordered payments.
2. Purpose of warrant/incarceration is to ensure obligor’s expedited appearance before a judge to address obligor’s non-compliance with the order.
3. Legal authority for warrant is found in R. 1:10-3 and R. 5: 4-1(c).

4. Payment will secure release. (See Section B5(a) below.)

c. Coercive Incarceration

Coercive incarceration, ordered pursuant to R. 1:10-3, is designed to force compliance with the payment ordered at ELR and Expedited ELR proceedings. See attached revised “*Civil Action Order for Relief to Litigant – Enforcement of Litigant’s Rights* (Form: CN 11213/CS702).” Unlike incarceration that takes place prior to an Expedited ELR Hearing – that is, incarceration to ensure obligor’s timely appearance before the court – coercive incarceration that is ordered by the court during the course of such a hearing is 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 may only occur after an obligor is advised of his or her right to counsel. If the court determines the obligor to be indigent, the obligor must be afforded counsel upon request. The court may proceed with the Expedited ELR Hearing and make appropriate findings and order appropriate relief. The court must make findings regarding the indigence, ability to pay, and right to counsel on the record. All findings and corresponding reasons must also be fully documented on the CS702 order. The court may not incarcerate an indigent obligor to coerce compliance with the order unless a method is found to provide counsel to obligors who are determined to be indigent. Accordingly, coercive incarceration ordered pursuant to R. 1:10-3:

(1) Must Be Based on 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.

(2) Must Not Infringe on the Rights of those Deemed Indigent

A determination of the obligor's indigence must be made prior to the Expedited ELR Hearing. If the court determines the obligor to be indigent, and obligor is not afforded 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 the obligor's economic status.

(3) Must Be Based on a Finding of Ability to Comply/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 payment or otherwise comply with its order. Since incarceration imposed under R. 1:10-3 is intended to be coercive, not punitive, it is essential that the court at the hearing find the obligor has an ability to pay an amount acceptable to the court. Such payment will secure the obligor's release without delay. Therefore, it is within the obligor's control to avoid incarceration and such incarceration is considered coercive. If the obligor does not have the ability to pay, incarceration is not available as a relief, as such incarceration in that situation would be punitive in effect.

Key points with regard to coercive incarceration are as follows:

1. Cause of incarceration is obligor's refusal to make a specified payment as ordered by the court.
2. Purpose of warrant/incarceration is to coerce compliance with the order for payment.
3. Legal authority for coercive incarceration is found in R. 1:10-3. Payment of a specified amount will

secure obligor's release. (See Section B5(a) Release Upon Payment of Arrears) below.)

4. Probation Division's Role in the Issuance of Warrants

The Probation Division will recommend to the court whether an expedited hearing is required. In such cases, the obligor's appearance may be compelled by the issuance of a warrant rather than a notice to appear. Such warrants must be issued by a judge. Probation's recommendation should take into consideration a number of factors that may include, but are not limited to the following:

- a. A thorough case review must be conducted including completion of the *Enforcement Review Checklist*, which must be attached to the bench warrant chain. If 90 days have elapsed since the last checklist, the entire checklist must be completed. If 90 days have not elapsed, Probation Child Support Enforcement (PCSE) staff at a minimum must complete the following sections of the checklist: Review Details, Case Information, Case Review (Nos. 1, 3, 5, 7, 9, and 11), and verify NCP/obligor is not incarcerated.
- b. Arrears only cases must have a minimum amount of arrears of over \$500.00 for a warrant to be requested, except in the following circumstances:
 1. Obligor has multiple arrears only cases and the total arrears on all cases exceeds \$500.00;
 2. Warrant was issued for failure to appear; or
 3. Warrant is issued for failure to comply with a medical provision of the order.

Note: All other arrears only cases that do not meet the criteria above must be scheduled for an ELR instead of requesting a warrant.
- c. Compliance with the provisions of the court order over a three-month period of time.
- d. Whether or not any payments have been received.
- e. Confirm in NJKiDS or other available sources whether a motion/application has been filed with the court, for modification of the support obligation, determination of arrears, direct payment credit, emancipation, or termination of support.
- f. Amount of the order and unpaid support.

- g. Any known delays in posting payments to NJKiDS or pending payments due to known administrative enforcements such as tax offset and Financial Institution Data Match (FIDM).
- h. Age of the child or children on the court order (allocated or unallocated) and the likelihood that a child age 19 or older may be subject to termination.
- i. Enforcement history of the case.
- j. Pending civil settlements where the obligor anticipates a significant monetary award.
- k. Payments are being received through an income withholding order.
- l. Request of the obligee that a warrant is not issued for the obligor's arrest. Any such request should be based on a significant temporary matter, e.g., an accident involving the obligor where they are temporarily unable to comply.
- m. 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 the payments directed by the order, Probation should proceed against the employer.

5. ELR and Expedited ELR Hearing Procedures

The purpose of ELR and Expedited ELR Hearings is to enforce litigant's rights by determining whether there has been non-compliance with the child support order and, if so, taking appropriate action to effectuate compliance. Where an obligor through issuance of a warrant has been compelled to appear for an Expedited ELR Hearing before a judge, the hearing must be conducted as expeditiously as possible. Every effort must be made to conduct the hearing by the close of the next business day, but not later than 72 hours after obligor's apprehension allowing for weekends and holidays, unless the obligor is being detained on other charges unrelated to the child support warrant. It is otherwise expected that obligors will in most instances be brought before a judge within one business day. If the NCP/obligor is not available to the court, Probation must contact the court to seek guidance on the discharge of the warrant. The judge should make a finding, which is memorialized with an administrative order (CS702).

a. Release Upon Payment of Arrears

An obligor may avoid the ELR or Expedited ELR Hearing by acknowledging non-compliance and bringing their child support obligation into compliance with the order by making the required payments prior to the hearing. Warrants issued to compel appearance at an Expedited ELR Hearing typically specify the arrears amount – referred to as the “release amount” – the payment of which will eliminate the need for the hearing. Payment of the release amount is applied to the child support arrears, thus making the hearing no longer necessary. If the hearing is no longer necessary, neither is incarceration of the obligor to ensure appearance at the hearing. The obligor at that point would be released from incarceration. See *Notice and Receipt of Child Support Release Payment* (Form: CN 10818).

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 the obligor’s 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 their subsequent appearance at the ELR or Expedited ELR Hearing by posting the amount claimed due to be deposited in the support account and held in abeyance pending the hearing. Upon release under these conditions, the obligor must report to the Probation Division by the close of the next business day to confirm the contest and obtain a hearing date. See *Notice and Receipt of Child Support Release Payment* (Form: CN 10818). The Probation and Finance Divisions within each county should establish a protocol for communicating such contests to ensure that the release payments are held until a determination is made at the hearing.

b. Pre-Hearing Interview

The Probation Division must conduct an interview of the obligor and complete the Probation Child Support Enforcement *Obligor Questionnaire* (CS700) in order to facilitate the court's determination as to the obligor’s indigence.

c. Right to Counsel and Indigence Determination

At an Expedited ELR Hearing, before coercive incarceration can be ordered, the obligor must first be advised of the right to counsel. If the obligor indicates that they want to retain counsel, but the attorney is not present, the court in its discretion may release the obligor or may remand the obligor to the jail until such time as the attorney is able to appear.

At the hearing, the court must then make a determination as to non-compliance with the child support order and, if so, the extent of the non-compliance. The court will then gather information about the obligor's financial situation, based on information provided by Probation and through the obligor's testimony. See *Conducting the Ability to Comply Hearing for an Obligor Held on a Support Warrant*. Information provided by the obligee may also be considered. Based on these various information components, the court will make findings as to the obligor's ability to (1) retain private counsel (indigence), and (2) pay some or all of the current support obligations (ability to pay). All information regarding the findings of indigence, ability to pay, and right to counsel must be fully documented on the CS702 order.

If the judge determines that an obligor is indigent, the court may proceed with the hearing and make appropriate ability-to-pay findings and consider the appropriate remedy for enforcement of its order. However, unless a method is found to provide counsel to obligors who are determined to be indigent, incarceration may not be used as an option to coerce compliance with support orders. 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.

d. Hearing to Determine Indigence and Ability to Comply With the Current Child Support Obligation

Before proceeding with an Expedited ELR Hearing, the completed "Probation Child Support Enforcement *Obligor Questionnaire*" (CS700) must be reviewed by the court. In every instance, the revised "*Civil Action Order for Relief to Litigant – Enforcement of Litigant's Rights*" (CS702) must be completed

and issued to ensure that the trial court has made specific factual findings regarding (1) the court's determination of the obligor's indigence, and (2) its separate determination of the obligor's ability to comply with the previously ordered child support obligation, consistent with Pasqua. The court must ensure that the appropriate box in the caption of the CS702 is checked off, indicating that the hearing is either an "Ability to Comply Hearing" or a "Subsequent Review Hearing," or both. If the court determines that the obligor is indigent, the court must complete paragraph 3(a) of the CS702.

If the court determines that the obligor is indigent, the court may proceed with the hearing and make appropriate ability-to-pay findings and consider the appropriate remedy for enforcement of its order. 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. An attorney must be appointed to represent the obligor found to be indigent if the court is considering coercive incarceration as a remedy to compel payment of child support. 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 may not be used as an option to coerce compliance with support orders.

If the court determines that the obligor is not indigent, the court must complete paragraph 3(b) of the CS702, which provides additional space for the court to set forth specific reasons on which it based its determination that the obligor is not indigent. 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. 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, or the court may adjourn the matter to provide the obligor with an opportunity to retain private counsel.

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 CS702 identifying the hearing as a Subsequent Review Hearing. Further, the court must include in the introductory paragraph of the CS702 the date that the Ability to Comply Hearing was conducted.

e. Alternative Remedies

In addition to incarceration, other appropriate remedies that the court may consider for enforcement of its order include, but are not limited to:

1. Wage execution, if not in place.
2. Lump sum payable today/immediately.
3. Lump sum payable on a future date.
4. Missed payment status (also known as a "bench warrant stipulation," usually stating that missing two subsequent payments may result in the issuance of a new bench warrant).
5. Lien on lawsuit.
6. Job search report to Probation (directing obligor to provide proof of application for a certain number of suitable jobs on a weekly or biweekly basis).
7. Referral to the Department of Labor's One Stop Center (Work Requirements Program), and resources available through the Probation Child Support Enforcement (PCSE) Employment Services Program.
8. Direct obligor to provide Probation/National Medical Support Notice (NMSN) Center with medical insurance information.
9. Initiation of driver's or professional license suspension or restoration.
10. Community service as provided in R. 5:3-7(b), where available.

11. Direct obligor to sell assets and tender proceeds to the court.

Where an obligor has been ordered at an Expedited ELR Hearing to make a payment toward child support arrears, or provide medical coverage and fails to do so, and relief other than incarceration has been deemed necessary to coerce compliance with the order, the court may set forth those requirements in the revised “*Civil Action Order for Relief to Litigant – Enforcement of Litigant’s Rights*” (Form: CN 11213/CS702).

If the obligor’s responses lead the court to conclude that modification of the support order may be appropriate because of the obligor’s incarceration, disability, or other change in circumstance, the court in its discretion may (1) recommend that the obligor file a support modification motion/application, or (2) arrange for a hearing to address the relevant change in circumstances, with such hearing to be on a date provided by the Family Division or the Probation Division, as appropriate, that will allow adequate time for service of notice on the obligee of the hearing.

f. Ordering Coercive Incarceration

To order coercive incarceration, the court, after advising the obligor of their right to retain counsel, must make each of the following findings in the following sequence:

1. Obligor is subject to an order to pay child support;
2. Obligor has repeatedly failed to comply with other provisions of the order, such as participation with employment workgroups, conducting employment searches, or other actions required by the court;
3. Obligor has failed to comply with that order and thus owes arrears;
4. The court previously has directed obligor to make a payment to be applied to arrears;
5. Obligor is not indigent and is therefore not entitled to court-appointed counsel, or the obligor is indigent and appointed counsel is available;

6. The court has determined that the obligor has financial ability to pay the amount ordered by the court at the ELR Hearing;
7. Obligor refuses to pay the amount ordered at the ELR hearing; and
8. Incarceration is necessary to coerce compliance.

When the court orders an obligor to be incarcerated, the obligor must be brought back before the court within 10 calendar days and not to exceed 14 calendar days including weekends and holidays to consider the obligor's particular circumstances and whether incarceration is still an effective means to coerce compliance. Any subsequent review hearing must reference the date the Ability to Comply Hearing was originally conducted as part of the court record and be recorded in the order. 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. Mathei, 327 N.J. Super. 512, 527-529 (App. Div. 2000).

(1) Releasing an Obligor

The court may also release the obligor on condition that the obligor makes certain payments or meets 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 their dependents. Most commonly, however, the relief requires the obligor to make payments.

(2) Indigent Obligor

If the judge determines that an obligor is indigent, the court may proceed with the hearing and make appropriate findings and order appropriate relief. However, unless a method is found to provide counsel to those obligors whom the court finds to be indigent, incarceration may not be used as an option to coerce compliance with support orders.

C. Generating Warrants

Presently warrants are produced by NJKiDS as part of the bench warrant chain. (See *Warrant – Failure to Appear* (CS594A) and *Warrant – Failure to Pay After Order* (CS594B).) These warrants set out the accumulated arrears amount, with the full arrears amount as of the day the warrant is issued constituting the “release amount.” In the event that the warrant is issued for failure to provide medical support, the obligor’s release should be conditioned on the obligor furnishing proof of medical coverage. The Sheriff’s Office has access to NJKiDS to verify, at the obligor’s request, the current arrears amount. If that verified amount is less than the amount noted on the warrant, the arresting authority must accept payment of that lesser amount as the release amount. Payment of the amount stated on the warrant will satisfy the warrant even if the total arrears amount on NJKiDS is greater than the amount at the time of obligor’s arrest.

D. Receipts for Payment of Release Amount

Obligors paying release amounts or payments of child support obligations must be given receipts for those payments. It is important to maintain the distinction between release amounts and bail payments. Release amounts are not bail, nor should money paid as bail be used for release payment purposes. All vicinages must use the form of receipt attached as “*Notice and Receipt of Child Support Release Payment* (Form: CN 10818).” The form includes an acknowledgment by the payer that the payment will be applied to the support arrears and will not be returned to the payer. The form also provides for release of the obligor upon payment of the release amount, even if the obligor wishes to contest the arrears amount (see the procedure described in Section B5(a) above). This form is available at all locations where such payments are collected.

The Judiciary has enlisted 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 Title IV-D Child Support Program as well as the Sheriffs’ Title IV-D cooperative agreements.

E. Rapid Notice to Probation of Obligor’s Arrest

Since the Probation Division routinely receives rapid notification of an obligor’s arrest, Probation generally is able to schedule an obligor to be brought before a judge the same day or the following day. Obligors arrested

on warrants for violating support orders must be brought before a court as soon as possible, and every effort must be made to conduct the hearing by the close of the next business day, but not to exceed 72 hours after arrest allowing for weekends and holidays.

F. 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 as verified by the Sheriff's Office and are released immediately.

Those obligors who do not pay the Sheriff either the release amount as shown on the face of the warrant or their full arrears amount as verified by the Sheriff, are taken into custody. In addition to the indigency interview procedure outlined in Section B5(b) above, Probation is authorized in appropriate cases to attempt to reach agreement with the arrested obligor on a payment amount that will be recommended to the judge, which amount may be less than the full amount shown on the warrant. In such matters, the recommendation generally is accompanied by an agreement by the obligor to resume timely payment of the ongoing court-ordered obligation(s). Agreement is reached in the substantial majority of such cases. If the judge decides to accept Probation's recommendation, the terms of the agreement will be included in the judge's order. After that payment is made, the warrant should be discharged, and the obligor released. In the majority of cases, this happens on the same day as the arrest or the following day. However, if no such agreement is reached, the Expedited ELR Hearing shall proceed.

Probation conducts the required indigency interview and arranges for a prompt hearing before a judge, and, wherever practical, attempts to negotiate a release amount with the obligor prior to the obligor appearing before the judge.

G. Notifying Obligees of Arrested Obligor's Expedited ELR Hearing

The obligee frequently has information that can help the judge determine the obligor's ability to pay. Probation thus should attempt to contact the obligee by telephone in all cases in which an arrested obligor will have an Expedited ELR Hearing. In those cases where Probation is able to reach the obligee prior to such hearing, the obligee can submit relevant information over the phone or by fax to Probation, by the obligee appearing in person at the hearing, or by the obligee speaking by phone with the judge's staff. It should be emphasized to the obligee that they may appear in person

at the Expedited ELR Hearing. Probation should ask for relevant information whenever an obligee calls regarding missed payments. The obligee can send the information in writing, or Probation can make a record of any oral report as a case note on NJKiDS. This information would then be available to the judge at the hearing.

While Probation should make efforts to contact the obligee and while the obligee may appear at the hearing, such efforts must not delay the hearing. See Anyanwu v. Anyanwu, 339 N.J. Super. 278 (App. Div. 2000), certif. den.170 N.J. 388 (2001).

H. Timing of the Expedited ELR Hearing Following Arrest – Next Business Day, Excluding Holidays/Weekends

In all cases in which 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 be brought before a judge for an Expedited ELR Hearing. Probation also should attempt to contact the obligee. (See Section G above.) All arrested obligors should be seen by a judge as soon as possible and every effort must be made to conduct the hearing by the close of the next business day. That normally means within one business day, unless a weekend intervenes or there is no judge available. In no case, however, should this occur any later than 72 hours after the time of arrest, excluding holidays or the obligor being detained on other charges unrelated to the child support warrant. Video conferencing, where available, should be used in order to expedite the process.

I. Subsequent Hearing or Reviews

In cases where the judge orders coercive incarceration at the ELR Hearing (See Section B5 above), the judge must conduct subsequent periodic reviews to determine whether incarceration continues to be an effective means to compel obligor's compliance. Such subsequent reviews should be held within 10 calendar days and not to exceed 14 calendar days including weekends and holidays unless the obligor is being detained on other charges or serving a criminal sentence unrelated to the child support warrant. At each review, Probation should advise the judge as to how long the obligor has been incarcerated.

These subsequent 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 to refer the case to the County Prosecutor pursuant to N.J.S.A. 2C:24-5.

J. Rule 1:10-2 Contempt Proceedings

It is contemplated that the great majority of those who are incarcerated subsequent to the ELR or Expedited ELR Hearing will be jailed to coerce compliance under R. 1:10-3. However, the judge also may determine that the obligor's acts or omissions are sufficiently severe to warrant punishment. In such cases, the judge may institute an order to show cause or for arrest specifying those acts or omissions to be contumacious under R. 1:10-2. It is important to keep in mind the important distinctions that differentiate these R. 1:10-2 proceedings from the R. 1:10-3 hearings: (1) R. 1:10-2 proceedings are punitive, rather than coercive, and (2) any sentence of incarceration must be determinate in length.

In R. 1:10-2 proceedings, the alleged contemnor (1) must receive notice of the specific acts alleged to be contumacious and must have the opportunity to be heard, (2) may have the right to a jury trial, (3) has the right to retain counsel or, if indigent, to have counsel appointed, and (4) has the right to be released on their own recognizance, unless the court determines that the imposition of bail is necessary to ensure 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 the ability to pay exists.

These R. 1:10-2 cases must be prosecuted by the Attorney General or by the County Prosecutor. The aggrieved litigant's (obligee's) attorney should not prosecute except for good cause shown. If found guilty of contempt under R. 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.

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

Notwithstanding any action taken by the court pursuant to R. 1:10-2 or R. 1:10-3, the Attorney General or the County Prosecutor may pursue criminal charges against the obligor under N.J.S.A. 2C:24-5. Such approach is appropriate if the obligor willfully fails to provide support that the obligor (1) can provide, and (2) knows that they are legally obliged to provide. In such proceedings, the obligor would be charged with a fourth-degree criminal offense. 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. As with R. 1:10-2 proceedings, in these matters the obligor has the right to be represented by counsel and, if indigent, is entitled to assigned counsel or a public defender. In such matters the accused (that is, the obligor) may be entitled to a trial by jury. If the obligor makes that demand, the Rules of Court require the prosecution to be transferred from the Family Part to the Criminal Division.

L. 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 USSO. If the court, however, determines that a modification of the child support obligation is appropriate at the emergent 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.

Any questions about this directive may be directed to Probation Services at 609-815-3810.

Attachments

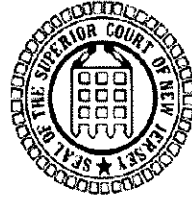
- (1) Warrant - Failure to Appear
- (2) Warrant – Failure to Pay After Order
- (3) Notice and Receipt of Child Support Release Payment (CN 10818)
- (4) Order for Relief to Litigant - Enforcement of Litigant’s Rights (CN 11213)(CS 702)

cc: Chief Justice Stuart Rabner
Steven D. Bonville, Chief of Staff
AOC Directors and Assistant Directors
Jeannette Murray, Chief, Child Support Enforcement
Nancy Manuele, Chief, Family Practice Division
Family Presiding Judges
Child Support Hearing Officers
Family Division Managers
Finance Division Managers
Probation Division Managers
Assistant Probation Division Managers, CS

**WARRANT
FAILURE TO APPEAR**

Date of Warrant

<< >>



SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
<<County Name>> COUNTY

Docket Number: << >>

Case ID: << >>

DFD ID: << >>

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 <<Obligor Name>> and confine this person to the county jail.

Subject has failed to appear in court on << Court Date>> 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 the close of the next business day from the time of the arrest.

Conditions of Release:

The subject may be released upon the payment of \$ <<Release Amount>>. 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 1-877-NJKIDS-1 (655-4371) 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 <<Judge Name>>, Judge of the Superior Court, in and for <<County>>, do herewith issue and make this your warrant to arrest <<Obligor Name>> to answer for said trespasses against the dignity, power, and authority of this court.

Signature Line _____, J.S.C.
Honorable << >>, J.S.C.

Warrant Information

Name: << >>

Address: << >>

Subject Information: << >>

DOB: << >>

SSN: << >>

Sex: << >>

Race: << >>

Ethnicity: << >>

Height: << >>

Weight: << >>

Hair: << >>

Eyes: << >>

Description: << >>

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

**WARRANT
FAILURE TO PAY AFTER ORDER**

Date of Warrant

<< >>



SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, FAMILY PART
<<County Name>> COUNTY

Docket Number: << >> _____

Case ID: << >> _____

DFD ID: << >> _____

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 <<Obligor Name>> and confine this person to the county jail.

Subject has failed to make child support payments as directed by court order, 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 the close of the next business day from the time of the arrest.

Conditions of Release:

The subject may be released upon the payment of \$ <<Release Amount>>. If said person, upon arrest, alleges that the total arrears are lower than the aforesated amount, the arresting agency may call the child support hotline at 1-877-NJKIDS-1 (655-4371) to confirm the arrears amount. If, after making said call, the total arrears are determined to be less than the aforesated 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 <<Judge Name>>, Judge of the Superior Court, in and for <<County>>, do herewith issue and make this your warrant to arrest <<Obligor Name>> to answer for said trespasses against the dignity, power, and authority of this court.

Signature Line _____, J.S.C.

Honorable << >>, J.S.C.

Warrant Information

Name: << >>

Address: << >>

Subject Information: << >>

DOB: << >>

SSN: << >>

Sex: << >>

Race: << >>

Ethnicity: << >>

Height: << >>

Weight: << >>

Hair: << >>

Eyes: << >>

Description: << >>

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

Docket/Warrant
Number _____
CS Case Number _____
Amount Paid \$ _____

In the Matter of:

**Notice and Receipt of
Child Support Release Payment**

_____,
Obligor

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 1-877-655-4371 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:

Name (Print): _____

Address: _____

Telephone Number: _____

Signature

Date

- 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 their 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

Plaintiff Obligee* / Obligor*

vs.

Defendant Obligee* / Obligor*

Civil Action

**Order for Relief to Litigant -
Enforcement of Litigant's Rights**

- Ability to Comply Hearing
- Subsequent Review Hearing
- Negotiated Settlement
- Administrative Order

With appearance by:

Obligee Attorney for Obligee _____

Obligor Attorney for Obligor _____

IV-D Attorney _____

_____ County Probation Division _____

THIS MATTER having come before the Court on this ____ day of _____, 20__.

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;

* Obligee – Person receiving support / Obligor – Person paying support

- 3. For the limited purpose of obtaining counsel for this emergent hearing, the court has determined the Obligor is:
 - indigent and does not have the ability to provide their own counsel;
 - not indigent and has the ability to provide their own counsel or waives their right to counsel;
 - for the following reasons as set forth on the record:

- 4. The Obligor has the current ability to pay \$_____ toward the arrearages for the following reasons:

- 5. The Obligor has the ability to comply with the order and willfully refuses to do so.

- a. Incarceration **is not necessary** at this time for the following reasons:

- The Obligor has custody of the child(ren) on this order;
- The Oblige is no longer the custodial parent/guardian on this order. The child now is in the custody of _____;
- Other reasons as set forth on the record:

- b. Incarceration **is necessary** to coerce compliance for the following reasons:

- The Obligor is employed and has been employed for _____.
- The Obligor has a source of income from _____ and/or assets from _____.
- The Obligor is willfully underemployed because: (Enter background information to support the court's finding. Can include, but is not limited to education, technical or trade skills, work history, no medical limitations.)

- Other reasons as set forth on the record:

It is hereby ordered on this ____ day of _____, 20__.

- 1. 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 Obligor's incarceration on _____ if the above release payment has not been paid and the Obligor remains incarcerated.
- 2. The Obligor be released from custody in this matter;
- 3. The support-related bench warrant currently issued in this matter is discharged;
- 4. Payments shall be made by Income Withholding on current and future income sources, including:

Name of income source	Address of income source

The Obligor must make payments any time that the full amount of support and arrears is not withheld from their income source.

- 5. The guidelines were completed on child support cases, or the parties consented for alimony cases and the support obligation is modified as follows:

Child support obligation:

\$_____ per _____ effective _____ allocated/ unallocated

Spousal/Alimony obligation:

\$_____ per _____ effective _____

Medical support obligation:

\$_____ per _____ effective _____

Arrears payback:

\$_____ per _____ effective _____

- 6. In addition to regular court ordered payments, a lump sum payment(s) of:

\$_____ must be paid by the Obligor by _____

\$_____ must be paid by the Obligor by _____

\$_____ must be paid by the Obligor by _____

Failure to make the lump sum payment(s) as ordered may result in the issuance of a bench warrant for the arrest of the Obligor.

- 7. Effective _____ missing _____ payment(s) or more, within the next 12 months, may result in the issuance of a warrant.
- 8. 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. Failure to comply may result in the issuance of a bench warrant.
- 9. The obligor **is hereby noticed** to appear before this court on _____ at _____ am/ pm in _____ for further review and possible modification of the child support obligation. The _____ County Family Division shall serve notice to the Obligee and other interested parties, if any, in this matter.
- 10. **It is further ordered:**

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.