

The Law Office of
David Perry Davis
31 Jefferson Plaza
Princeton, NJ 08540
(732) 274-9444
(732) 274-2050 (fax)
DavePDavis@aol.com

June 5, 2000

Hughes Justice Complex
25 West Market Street
Trenton, NJ 08625
609-777-4565

Hon. Richard Newman, JAD
155 Morris Avenue
Springfield, NJ 07081
973-912-0573

Re: Scottcox (deceased), Williams & Brookins v. Tolbert
Docket No.s FD-11-1516-86, FD-1425-86, FD-11-250-89
Appellate Docket No. A-

Dear Judges Skillman and Newman:

Please accept this letter brief in lieu of a more formal brief in support of plaintiff's application to be immediately released from the Mercer County Corrections Center pending an ability to pay hearing, and preventing his re-incarceration unless and until such time as the trial court finds, based on substantial and credible evidence, that defendant has the present ability to comply with the present support Orders, and ordering that any future proceedings shall be heard by a judge other than Hon. Gerald J. Council.

Factual Statement

This matter was filed as an emergent application on June 5, 2000. Since that time, counsel has determined that this is a social services case; that is, all the parties involved (Ms. Scottcox [deceased], Ms. Williams, Ms. Brookins and Mr. Tolbert) are now or have received public assistance. Accordingly, the

Mercer County Board of Social Services is the proper adversary in this matter.

On June 7, 2000, this Court issued an Order compelling " ". The Probation Department scheduled an enforcement hearing for June 8, 2000.

At said hearing, the trial court again failed to make any findings of fact to justify a coercive incarceration.

Defendant testified that he had no funds (5-5 to 5-7) available. The Court made no adverse credibility determination as to defendant's access to other funds beyond the \$1,500 his fiancée brought to the hearing.

In spite of several reviews of other inmates being held for child support (the most recent having been held on Thursday, June 1, 2000), defendant's case has not been reviewed since April 13, 2000, apparently on Judge Council's order that he would remain incarcerated for six months or until he raised \$10,000.

Defendant has now been incarcerated for seventy (70) days and remains unable to obtain the release amount. The \$1,000 his fiancée brought to the April 17, 2000 hearing has been spent to provide for the family during defendant's seventy day incarceration.

I. LEAVE SHOULD BE GRANTED TO EXTEND THE TIME TO FILE
THE NOTICE OF APPEAL AND THE FILING FEE
SHOULD BE WAIVED.

Pursuant to R. 2:4-1(a), the time for filing a Notice of Appeal is 45 days, however R. 2:4-4(a) permits this time to be extended by 30 days upon a showing of "good cause and an absence of prejudice." In this matter, the time to appeal Judge Council's April 17, 2000 Order expired June 1, 2000. Defendant is a high school dropout who was unrepresented and had no idea

that an appellate process was available.

It has been repeatedly stated that the public policy of our State strongly favors resolving claims on their merits. Cases should be won or lost on their merits and not on technicalities, unless noncompliance was purposeful and no lesser remedy is available. See, e.g., S.E.W. Friel Company v. N.J. Turnpike Authority, 73 N.J. 107 (1977), Audobon Volunteer Fire Co. No. 1 v. Church Constr. Co., Inc., 206 N.J.Super. 405, 406-407, (App.Div. 1986). It is respectfully submitted that good cause exists to invoke the thirty day grace period of R. 2:4-4(a).

Defendant is unemployed, having been incarcerated for a period of seventy (70) days. He was last employed in a motel as for \$7.00 per hour. He is responsible for the support of two children who reside with him, as well as a child support order for two children. Defendant's counsel is handling this matter *pro bono* as defendant was unable to afford even a modest retainer. The filing fee for the instant appeal should be waived pursuant to R. 1:13-2 (a).

II. DEFENDANT MUST BE IMMEDIATELY RELEASED AS HE WAS NOT AFFORDED AN ABILITY TO PAY HEARING AND NO EVIDENCE EXISTS THAT HE HAS THE ABILITY TO PAY THE ARREARS AMOUNT SET BY JUDGE COUNCIL ON APRIL 17, 2000.

At the summary hearing in this matter, which did not occur until defendant had been in custody for seventeen days, there was no meaningful inquiry into whether defendant had the present ability to pay a significant portion of the \$116,261.56 (2-19) in child support arrears that he owes (transcript, generally).

In fact, the trial Court indicated that it does not focus on the ability of incarcerated indigent child support obligors to pay a release figure, stating on the record:

THE COURT: I have people who have sat for six months for owing seven and \$8000, you owe over \$100,000. I'm not going to just let you go. You've got to pay some money (5-13 to 5-16).

Without a scintilla of evidence that defendant has the ability to pay he cannot be incarcerated for child support arrears. Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996), Pierce v. Pierce, 122 N.J.Super. 359 (App.Div. 1973); Federbush v. Federbush, 5 N.J.Super. 107, (App.Div.1949); Biddle v. Biddle, 150 N.J.Super. 185 (Ch.Div. 1977); Department of Health v. Roselle, 34 N.J. 331 (1961), commentary to R. 1:10-3.

This issue was recently visited by two appellate panels, who issued unpublished opinions on March 27, 2000 in Weinstein v. Weinstein ("Weinstein I"), on April 7, 2000 in Weinstein v. Weinstein ("Weinstein II") and on April 12, 2000 in Bachman v. Cohen ("Cohen"). These opinions are enclosed.

In these opinions, two appellate panels reversed three the trial court orders incarcerating child support obligors. In Weinstein I, the appellate division issued a short (two page) Order reversing the trial court on the grounds that "the trial court failed to determined whether defendant has the ability to pay all or a portion of the support arrears." The immediate release of Defendant was ordered on the condition that he complete and file a Case Information Statement and appear before the trial court on March 31, 2000 to determine if he had the present ability to comply.

As ordered, Mr. Weinstein filed a Case Information Statement and returned to court on March 31. At that more in depth hearing, the trial court found that Mr. Weinstein had willfully neglected his support obligation and again ordered him incarcerated. In the resulting appeal (Weinstein II), the appellate division again reversed and ordered Mr. Weinstein's release holding that while the findings of the trial court were based on substantial and credible evidence in the record as a whole, Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974), the incarceration remedy chosen by the trial court was not supported by the facts. The appellate division ruled:

An order incarcerating a debtor-spouse in aid of litigant's rights which contains an amount to be paid as a condition for release presupposes that the judgement debtor has assets that have been secreted or otherwise placed beyond the reach of execution. . . the purpose of such an order, and its legal justification, is to induce compliance with a lawful order. In such cases, the incarcerated party has the key to freedom in his/her hands because the debtor-spouse has the ability to comply with the order as a condition for release. The record before us is devoid of any evidence that defendant has assets that can be used to satisfy the release amount ordered by the court. . .

The Court went on to instruct that the appropriate remedy under the facts presented would be to order the obligor to obtain employment and require strict reporting requirements, and, if an obligor failed to comply at that juncture, the court could consider incarceration or referring the matter to the prosecutor for proceedings pursuant to N.J.S.A. 2C:24-5 (Willful nonsupport).

In Cohen, the defendant had recently paid \$20,476.44 in arrears while maintaining his current obligation, but had failed to make an additional required payment in the amount of

\$1,500 toward arrears. While the appellate division "appreciate[d] the frustration and skepticism of the court and counsel for the [obligee]", Judge Cuff held that the record did not support Mr. Cohen's continued incarceration, and specifically stated "defendant's continued incarceration after twelve (**12**) days may suggest that he has exhausted that source of funds."

In the case before the court, the defendant has now been incarcerated for seventy (**70**) days. He was not even granted an initial review until seventeen (17) days had passed. There is no evidence in the record that defendant has access to an untapped source of funds.

The record before this Court is in line with the facts of the Weinstein I appeal and the caselaw cited by the Appellate Division therein, where an indigent child support obligor has been incarcerated without even a pretense of the required due process of a proper ability to pay hearing, and in the absence of any evidence that he has any ability to comply.

Conclusion

This Court should reverse Judge Council's April 17 Order and require the immediate release of Mr. Tolbert, conditioned on his cooperating with future enforcement proceedings, and should specifically order that he shall not be re-incarcerated absent a finding that he has the present ability to comply with a reasonable purge amount.

The fact that Mr. Tolbert has remained in the Mercer County Correction Center for **seventy** (70) days kept away from his eight year son, his family, and his ability to earn and contribute to anyone's support should invoke in this court a deep sense of alarm. This is simply not supposed to happen in our legal

system.

Alerted to Mr. Tolbert's case, this Honorable Court should issue an Order compelling the immediate review of all indigent child support obligors who have been incarcerated for any period in excess of seven days to determine whether they have the present ability to comply with the amount set for their release.¹

The Constitution demands nothing less.

Respectfully,

David Perry Davis, Esq.

cc: Mr. Raymond A. Tolbert, Sr.
Edward Hoffman, Esq.
Mercer County Probation Dept.,
Child Support Enforcement Unit
Hon. Gerald J. Council, JSC

DPD/jz

¹ As an officer of the Court, counsel for appellant certifies that he has become in the last six weeks personally aware that Judge's Council's statement that there are "people who have sat for six months for owing seven and \$8000" (5-13 to 5-16) is accurate and extremely disturbing. In Mercer County only, there are at least a half dozen cases to back Judge Council's statement.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

APPLICATION TO FILE APPEAL OR MOTION ON AN EMERGENT BASIS

TO: Hon. Stephen Skillman DATE: June 3, 2000
FROM: David Perry Davis, Esq. TELEPHONE: 732-274-9444

The following questions are to be answered by the attorney or pro se litigant requesting emergent relief. This questionnaire is simply designed to determine if the application be handled in the ordinary course or on an emergency basis. COMPLETION OF THIS APPLICATION DOES NOT IN ANY SENSE CONSTITUTE THE FILING OF AN APPEAL OR MOTION. There is no right to be heard orally on an emergency application.

CASE NAME: Brookins v. Tolbert, Williams v. Tolbert

1. What is the vicinage of the matter? (i.e. what judge, in what county or what agency entered the decision?)

Hon. Gerald J. Council, Mercer County

2.a) What is your name, address, phone number and fax number?

David Perry Davis, Esq.

31 Jefferson Plaza

Princeton, NJ 08540

732-274-9444

732-274-2050

b) Whom do you represent?

Defendant

3. What is your adversary's name, address, phone number and fax number?

Address of plaintiffs Brookins and Williams are unknown.

Proceedings were instituted by Probation, service is being made on Mercer County Probation Department, 175 South Broad Street, Trenton.

Defendant believes that a portion of the child support arrearage is owed to the Mercer County Board of Social Services. Service is being made on Edward Hoffman, Esq., attorney for Mercer County Board of Social Services.

4. Do you have a written order or judgement entered by the judge or a written agency determination? YOU MUST ATTACH A COPY OF THE ORDER, JUDGEMENT OR DECISION.

No written order was received by defendant.

5. Are there any claims against any party below, either in this or a consolidated action, which have not been disposed of, including counterclaims, cross-claims, third-party claims and applications for counsel fees? IF SO, THE DECISION IS NOT FINAL, BUT RATHER INTERLOCUTORY, AND LEAVE TO APPEAL MUST BE SOUGHT.

No. Incarceration Order was final.

6. Have you filed for a stay before the trial court or agency? If so, do you have a court order or agency decision denying or granting same?

Not applicable.

7. If the order or agency decision is interlocutory, are you filing a motion for leave to appeal?

Not applicable.

8.If interlocutory, are you filing a motion to stay the trial court or agency proceeding?

Not applicable.

9.If the order, judgement or agency decision is final, have you filed a notice of appeal?

Enclosed.

10.What is the essence of the order, judge or agency decision?

Defendant was incarcerated without an ability to pay hearing and while he is indigent and unable to pay child support arrears.

11.Has any aspect of this matter been presented to or considered by another judge or part of the Appellate Division by emergent application or prior appeals proceedings? If so, which judge or part?

No.

12.What is the nature of the emergency?

Defendant is being deprived of his liberty in violation of state law. He has now been incarcerated for seventy (70) days without an ability to pay hearing.

Defendant has custody of an eight year old child and a sixteen year old child who require his support (financial and otherwise).

13.What is the irreparable harm?

Unconstitutional deprivation of liberty / incarceration constitutes irreparable harm.

14.What relief do you seek?

Release pending an ability to pay hearing

15.What citation is most important for the proposition that you are likely to prevail on appeal?

Saltzman v. Saltzman, 290 N.J.Super. 117 (App.Div. 1996), Pierce v. Pierce, 122 N.J.Super. 359 (App.Div. 1973); Federbush v. Federbush, 5 N.J.Super. 107, (App.Div.1949); Biddle v. Biddle, 150 N.J.Super. 185 (Ch.Div. 1977); Department of Health v. Roselle, 34 N.J. 331 (1961). Also, three recent unpublished appellate decisions in the matters of Weinstein v. Weinstein and Bachman v. Cohen.

16.Have you notified your adversary that you will be appealing?

Yes; Mercer County Probation and Edward Hoffman being sent a copy of this application.

17.If this application is being made during trial, does the judge know of it?

Not applicable.

18.Have you served your adversary with all papers?

Yes.

19.Have any transcripts been ordered (particularly of the trial judge's challenged ruling)?

Yes - on a 24 hour basis.

If so, when will the transcripts be available?

Transcript has been ordered on expedited basis, will be available by Tuesday, June 6, 2000, at noon, and will accompany brief if leave to file emergent appeal is granted.

20.Please give me a brief summary of the facts of your case:

Defendant is the father of seven children.

He has custody of two children (Ray Tolbert, Jr., age 8 and Ray Williams, age 16).

Defendant has an outstanding current support obligation of \$200 per week for two children (Erika & Erik Brookins, twins, age 14). Defendant has an arrears-only probation account for three children (Ray Williams [prior to defendant obtaining custody of him], Jasmine Williams, 14, Ashley Williams, 12) with a weekly obligation of \$25.00.

Defendant is indigent and unemployed. He last worked at The Comfort Inn motel in Bordentown, earning \$7.00 an hour. He lost his job in January, 2000 due to illness and had no medical insurance nor disability insurance. He suffers from severe asthma.

Defendant's support arrears total \$109,804.20 for both cases. He is the sole breadwinner for his eight and sixteen year old children who reside with him.

Defendant was arrested as a result of his failure to pay child support on March 27, 2000. He was not reviewed at all until April 13, 2000. Judge Council set a release amount of \$10,000 without conducting an ability to pay hearing. Defendant's family appeared at the hearing with \$1,000. Judge Council refused to lower the release amount and told defendant that he would "see him in six months."

In spite of several reviews of other inmates being held for child support (the most recent having been held on Thursday, June 1, 2000), defendant's case has not been reviewed since April 13, 2000, apparently on Judge Council's order that he would remain incarcerated for six months or until he raised \$10,000.