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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

APPLICATION TO FILE APPEAL OR MOTION ON AN EMERGENT BASIS

TO: Hon. James M. Havey, JAD DATE: March 4, 2001

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: Cruz v Cruz

1. What is the vicinage of the matter? (i.e. what judge, in what county or what agency entered the decision?)
Hon. Rosalie B. Cooper, JSC, Ocean County

2.a) What is your name, address, phone number and fax number?
David Perry Davis
31 Jefferson Plaza
Princeton, NJ 08540
(732) 274-9444
(732) 274-2050 (fax)

b) Whom do you represent?
Juan Cruz (For appellate purposes only)

3. What is your adversary's name, address, phone number and fax number?
Ocean County Probation Dept
PO Nancy Cain
Ocean County Justice Complex
PO Box 2191
Toms River, NJ 08754

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 order has yet been received by any party. Please note that in a prior application (Tolbert) that mirrors the present one, no written order was ever entered. A copy of the (2 page) Order on Emergent Application is enclosed; the Appellate Division acted without a written order in that matter after both Judge Skillman's law clerk and I attempted unsuccessfully to obtain a written order from the trial court. I have written the Probation Department and the Judge and requested that an Order be issued and faxed to me.

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; this is a post-judgement matrimonial matter brought pursuant to R. 5:7-5 and R. 1:10-3.

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?

No; client was pro-se at the support enforcement hearing. Also, technically no stay is being sought, summary reversal is being sought.

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?

Not yet; will do so immediately upon decision on this application.

10. What is the essence of the order, judge or agency decision? Defendant was incarcerated for child support arrears without a proper ability to pay hearing and without any allegation that he has the ability to pay.

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?

Not as to this party. Four prior emergent applications of a similar nature have been filed and all were granted.

12. What is the nature of the emergency?

Defendant is being deprived of his liberty.

13. What is the irreparable harm?

Unconstitutional or improper deprivation of liberty / incarceration constitutes irreparable harm.

14. What relief do you seek?

Release pending an ability to pay hearing.
Minor supplementation of the record on appeal.

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), Lake v. Speziale, 580 F Supp 1318 (D.Conn. 1984).

See also unpublished decisions on emergent applications in Weinstein v. Weinstein, (App. Div., 3/27/00), Weinstein v. Weinstein, (App. Div., 4/7/00), Bachman v. Cohen, (App.Div. 4/12/00), Williams & Brookins v. Tolbert, (App.Div. 6/7/00) (copy enclosed).

16. Have you notified your adversary that you will be appealing?
Yes, by 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 - in possession of appellant (copy enclosed, 4 pages).

If so, when will the transcripts be available?
See above

20. Please give me a brief summary of the facts of your case:
Defendant-appellant is in arrears on a child support obligation. He has arrears of \$57,748.74 and an ongoing obligation of \$90.00 for current support, \$10.00 toward arrears. The last payment made was in November of 2000 when defendant borrowed \$2,000 following his arrest. Defendant is incarcerated in the Ocean County Jail. A brief hearing as to his continued incarceration was conducted on February 27, 2001. At that hearing, it was uncontradicted that defendant is indigent and unemployed. No inquiry was made into defendant's assets. A letter submitted by defendant's sister and considered by the Court on the record during the hearing indicated that defendant has psychiatric difficulties and is unable to work. The trial court (correctly) ordered that defendant be evaluated and pursue SSI if he is disabled. The trial court (incorrectly) ordered defendant to remain incarcerated in the interim. Defendant seeks summary reversal of the Order incarcerating him pending a proper ability to pay hearing.

The "children" involved are both over 18 and neither is a full-time college student. Defendant seeks to supplement the record to establish this undisputed fact. Defendant was pro se until his family hired counsel for this appeal; he has never applied to have the children declared emancipated. This is a "pure debt" incarceration.

SUPERIOR COURT OF NEW JERSEY - APPELLATE DIVISION

TITLE OF ACTION AS CAPTIONED BELOW ATTORNEY OF RECORD

NAMED David Perry Davis, Esq.

Brenda Cruz

ADDRESS 31 Jefferson Plaza

Plaintiff Princeton, NJ 08540

PHONE NO. (732) 274-9444

vs.

ATTORNEY FOR Defendant

Juan Cruz

ON APPEAL FROM

Defendant Superior Court of New Jersey

Chancery Division, Family Part

Ocean County

TRIAL COURT OR STATE AGENCY

FM-15-354-85

TRIAL DOCKET OR INDICTMENT NUMBER

NOTICE IS HEREBY GIVEN THAT Defendant APPEALS TO THE
SUPERIOR COURT OF N.J. APPELLATE DIVISION FROM THE JUDGEMENT (X)
ORDER () OTHER (SPECIFY)

ENTERED IN THIS ACTION ON February 27, , 20 01 IN FAVOR
OF Plaintiff

IF APPEAL IS FROM LESS THAN THE WHOLE SPECIFY WHAT PARTS OR
PARAGRAPHS ARE BEING APPEALED.

ARE ALL ISSUES AS TO ALL PARTIES DISPOSED OF IN THE ACTION BEING
APPEALED? YES (X) NO ()

IF NOT IS THERE A CERTIFICATION OF FINAL JUDGMENT ENTERED PURSUANT
TO R. 4:42-2? n/a

PRIORITY UNDER R. 1:2-5 YES () NO (X) APPLICABLE SECTION
UNDER THE RULE

F1

1/ NOTICE OF APPEAL HAS BEEN SERVED ON: DATE OF TYPE OF
NAME SERVICE SERVICE

TRIAL COURT JUDGE Hon. Rosalie B. Cooper, JSC

TRIAL COURT CLERK STATE AGENCY

ATTORNEY GENERAL OR GOVERNMENTAL

OFFICE UNDER R. 2:5-1 (H)

OTHER PARTIES

NAME AND DESIGNATION DATE OF TYPE OF
NAME SERVICE SERVICE

Ocean County Probation Dept / Child Support Enforcement Division

Brenda Cruz

3/6/01

FedEx

I HEREBY CERTIFY THAT I HAVE SERVED A COPY OF THIS NOTICE OF
APPEAL ON EACH OF THE PERSONS REQUIRED AS INDICATED ABOVE

March 4

2001

SIGNATURE OF ATTORNEY OF RECORD

2/ PRESCRIBED TRANSCRIPT REQUEST FORM HAS BEEN SERVED ON:
(ALSO INDICATE IF SOUND RECORDED)

DATE OF TYPE OF
NAME SERVICE SERVICE
ADMINISTRATIVE OFFICE OF THE COURTS
CHIEF COURT REPORTING SERVICES

COURT REPORTER'S SUPERVISOR
CLERK OF COUNTY OR AGENCY

COURT REPORTER

I HEREBY CERTIFY THAT I HAVE SERVED THE PRESCRIBED COURT
TRANSCRIPT REQUEST FORM ON EACH OF THE ABOVE PERSONS
AND PAID THE DEPOSIT AS REQUIRED BY R. 2:5-3(d)

n/a already in possession

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SIGNATURE OF ATTORNEY OF RECORD

3/ I HEREBY CERTIFY THAT:

() THERE IS NO VERBATIM RECORD
(X) TRANSCRIPT IS IN THE POSSESSION OF THE ATTORNEY OF RECORD
() A MOTION FOR ABBREVIATION OF TRANSCRIPT HAS BEEN FILED WITH
THE COURT OR AGENCY BELOW
() A MOTION FOR FREE TRANSCRIPT HAS BEEN FILED WITH THE COURT
BELOW

GIVE A BRIEF STATEMENT OF THE FACTS AND PROCEDURAL HISTORY:
Defendant was improperly incarcerated without an ability to pay hearing, and has now been incarcerated for in excess of 10 days. See attached application for leave to file an emergent appeal.

TO THE EXTENT POSSIBLE, LIST THE PROPOSED ISSUES TO BE RAISED ON THIS APPEAL, AS THEY WILL BE DESCRIBED IN APPROPRIATE POINT HEADINGS PURSUANT TO R. 2:6-2(A)(5).
(APPELLANT OR CROSS APPELLANT ONLY.)

I. See attached application for leave to file an emergent appeal.

II. Such other points as research and preparation of the appellant's brief and appendix may reveal.

IF YOU ARE APPEALING FROM A JUDGMENT ENTERED BY A TRIAL JUDGE SITTING WITHOUT A JURY OR FROM AN ORDER OF THE TRIAL COURT, COMPLETE THE FOLLOWING:

1. Did the trial judge issue oral findings or opinion?

Yes No

If so, on what date? February 27, 2001

2. Did the trial judge issue written findings or opinion?

Yes No

If so, on what date? _____

Caution: Before you indicate that there was neither an opinion nor findings, you should inquire of the trial judge to determine whether findings or an opinion was placed on the record out of counsel's presence or whether the judge will be filing a statement or opinion pursuant to R. 2:5-1(b).

Date of your inquiry: _____

Will the trial judge be filing a statement or opinion pursuant to R. 2:5-1(b)? Yes No

All civil appeals will be screened under the Civil Appeals Settlement Program to determine their potential for settlement or, in the alternative, a simplification of issues, abbreviation of transcript and any other matters that may aid in the disposition or handling of the appeal. Please consider these when responding to the following question.

State whether you think this case may benefit from a conference. Yes No

Explain your answer. A negative response will not necessarily rule out the scheduling of a pre-argument conference. Defendant should be immediately released pending a proper ability to pay hearing; at said hearing he should not be incarcerated absent evidence his non-compliance constitutes a willful disregard of the child support obligation and/or he has the present ability to comply.

NOTICE OF MOTION FOR
EMERGENT RELIEF

PLEASE TAKE NOTICE that, at a time and place selected by the
appellate division, defendant shall move for an Order:

1. Waiving the required filing fee in this matter pursuant to R.
1:13-2(a) and granting leave to appeal out of time pursuant to R.
2:4-1(a);
2. Summarily reversing the trial court's February 27, 2001 Order
pursuant to R. 2:8-3(b) and compelling the immediate release of
defendant pending a proper ability to pay hearing;
3. Ordering that defendant shall not be re-incarcerated absent a
finding, based on substantial and credible evidence, that he has
the present ability to comply with the court orders subject to
enforcement or that he has wilfully failed to comply with any
employment-related conditions or disability-related conditions set
by the court;
4. Permitting minor supplementing of the record on appeal;
5. For such further relief as the court may deem equitable and
just.

Defendant shall rely on the enclosed letter brief, certification
and attachments.

David Perry Davis, Esq. The Law Office of
David Perry Davis
31 Jefferson Plaza
Princeton, NJ 08540
(732) 274-9444
(732) 274-2050 (fax)
Attorney for defendant

Brenda Cruz,

Plaintiff / Respondent

vs.

Juan Cruz,

Defendant / Appellant

.....

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-

Civil Action

CERTIFICATION

(As to waiver of filing fees)

DAVID PERRY DAVIS, ESQ., does hereby certify as follows:

1. I am the attorney for the defendant in this matter and make this application in support of my motion to waive the applicable filing fees. I am personally familiar with all the facts alleged herein.
2. My client is presently incarcerated and cannot be reached, either in person or by fax, to provide an affidavit supporting his indigency in connection with this application. However, I have attached (as exhibit A) a copy of the trial court transcript wherein my client testified as to his indigency, and (as Exhibit B) a letter from my client's sister, which, although technically hearsay, was considered without objection by the Court below.
3. I respectfully request that the applicable filing fees be waived based on Mr. Cruz's inability to pay.
4. I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements are willfully false, I am subject to punishment.

David Perry Davis, Esq.

DATED:

The Law Office of
David Perry Davis
31 Jefferson Plaza
Princeton, NJ 08540
(732) 274-9444
(732) 274-2050 (fax)
Attorney for defendant

Brenda Cruz,

Plaintiff / Respondent

vs.

Juan Cruz,

Defendant / Appellant

.....

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-

Civil Action

PROOF OF SERVICE

DAVID PERRY DAVIS, of full age, hereby certifies as follows:

1. I am the attorney for defendant in this matter.
2. On this date, I caused a copy of the enclosed Notice of Motion, supporting certification, supporting letter brief, and this Proof of Service to be served upon the following:

1.
Ocean County Probation Dept
Child Support Enforcement
Ocean County Justice Center
PO Box 2191
Toms River, NJ 08754
By Fax and regular mail

2.
Brenda Cruz

By FedEx