NOT FOR PUBLICATION WITHOUT
APPROVAL OF THE COMMITTEE ON PUBLICATIONS

Anne Pasqua, Ray Tolbert, and Michael Anthony, individually and on behalf of all persons similarly situated,

Plaintiffs

vs.

Poritz Council, et al Hon. Gerald J. Council and Hon. F. Lee Forrester, in their official capacity as Judges of the Superior Court, and on behalf of all Superior Court Judges of the State of New Jersey who have in the past conducted Ability to Pay Hearings or who will in the future conduct Ability to Pay hearings,

Hon. Deborah Poritz, in her official capacity as Chief Justice of the Supreme Court of New Jersey,

Hon. Richard J. Williams, in his official capacity as Administrative Director of the Courts of the State of New Jersey,

Defendants

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION-MERCER COUNTY
DOCKET NO. MER-L-406-03

Civil Action

OPINION

Decided: April 24, 2003

David Perry Davis, for the plaintiffs (David Perry Davis, Esquire, on the brief).

Peter C. Harvey, Acting Attorney General of the State of New Jersey, for the plaintiffs (Diane M. Lamb, Deputy Attorney General of the State of New Jersey, on the brief).

FEINBERG, A.J.S.C.

BACKGROUND

In June of 2000, plaintiffs, three child support obligors, filed an action in the United States District Court for the District of New Jersey. The complaint named two Superior Court Judges assigned to the Family Part; the Chief Justice, individually and in her capacity as Chief Justice of the Supreme Court of New Jersey; and, Richard Williams, individually and in his official capacity as Administrative Director of the Courts, as defendants. In September of 2000 the Attorney General, acting on behalf of all named defendants, filed a motion to dismiss on the grounds of judicial immunity. Plaintiffs opposed the motion to dismiss and filed a cross-motion seeking a preliminary injunction and class certification. In October 2000, defendants filed a reply and asserted the doctrine of abstention pursuant to Younger v. Harris, 401 U.S. 37 (1971). On November 16, 2000 oral argument was held before the Honorable Garret E. Brown, U.S.D.J.

In March 2001, Judge Brown granted the application for abstention. A Notice of Appeal was filed with the United States Court of Appeals for the Third Circuit in June of 2001. On January 17, 2003, the Third Circuit affirmed the abstention ruling, reasoning that, as a matter of first impression, the child support enforcement system is "a comprehensive and fluid system designed to address the ever-present and ever-changing realities of child support orders [and] must be viewed as a whole, rather than as individual, discrete hearings" and that plaintiffs had not demonstrated that the State was resistant to adjudicating the constitutional issue. To the limited extent that the Third Circuit addressed the merits, the Court held that it was "confident that any constitutional challenge to state court practice would receive proper consideration by the New Jersey courts." Anthony v. Council, 316 F.3d 412 (3d Cir. 2003).

On February 14, 2003, the plaintiffs re-filed the complaint along with an order to show cause seeking preliminary restraints. On February 24, 2003, this court denied emergent relief, established a briefing schedule and listed the matter for oral argument on March 28, 2003 at 9:00 a.m. On March 21, 2003, defendants filed and served a notice of motion to dismiss the complaint. Based on issues presented during the March 28, 2003 oral argument, the court permitted the parties to submit supplemental briefs.

It is undisputed that all three named plaintiffs are under a current order to pay child support and that each of them, at different times, has been incarcerated for the failure to pay outstanding child support arrearages. Each of them, according to counsel, were indigent at the time of the enforcement hearings and were entitled to the appointment of counsel.

ANALYSIS

I. CHILD SUPPORT ENFORCEMENT PROCESS

Rule 5:7-5 sets forth the procedural mechanism for the enforcement of child support obligations and provides:

> If a person fails to make payments or provide health insurance coverage as directed by an order or judgment, the Probation Division responsible for monitoring and enforcing compliance shall notify such person by mail that such failure may result in the institution of contempt proceedings. Upon accumulation of a support arrearage equal to or in excess of the amount of support payable for 14 days or failure to provide health insurance coverage as ordered, the Probation Division shall file a verified statement setting forth the facts establishing disobedience of the order or judgment. The court in the county in which the person resides ... may then, in its discretion, institute contempt proceedings in accordance with Rule 1:10-2, and an aggrieved party or the Probation Division on that party's behalf may apply to the court for relief in accordance with Rule 1:10-3.[R. 5:7-5(a).]

As noted in the rule, the enforcement and collection process commences upon the failure of the child support obligor to pay the court ordered support or provide health insurance coverage. It is the responsibility of the Probation Division responsible for monitoring and enforcing the obligation, rather than the office with which the judgment or order is filed, to provide notice to the child support obligor that the continued failure to provide the required support may result in the institution of a proceeding in accordance with R. 1:10-2 or an application in accordance with R. 1:10-3.

While oftentimes, when served with notice by the Probation Division, a child support obligor will satisfy the full outstanding arrearages or reach an amicable alternative resolution, many obligors, despite notice, do not contact the Probation Division. In those cases, the Probation Division will initiate the enforcement proceedings outlined in R. 5:7-5 by filing a motion to enforce litigant's rights in accordance with R. 1:10-3.

In New Jersey, Child Support Hearing Officers (Hearing Officer) conduct child support enforcement hearings. These officers undergo extensive training offered through the Administrative Office of the Courts (AOC). Based on statewide statistical information obtained for the period from July 2001 through June 2002, one-half of the matters scheduled before hearing officers included initial establishment cases, applications for modifications or periodic reviews. The remaining cases were comprised of enforcement matters initiatedby the Probation Department. As noted in Leonard v. Blackburn, MER-L-3761-01, slip. op. at 7 (Law Di v. Jan. 22, 2002) approximately 50,000 enforcement hearings are scheduled each year before hearing officers.

Notices to appear for child support enforcement hearings are forwarded by the Probation Department by regular and certified mail. Statewide, the number of obligors who fail to appear is significant. For example, in the Mercer Vicinage, the non-appearance rate is approximately sixty-five percent. If the hearing officer is satisfied that notice has been made upon the defaulting obligor, the hearing officer will recommend the issuance of a bench warrant.1 Absent proof of service, the matter will be rescheduled or some other action taken. Hearing officers assigned to conduct enforcement hearings may recommend the following: (1) a lump sum payment by the obligor on the day of the hearing or at some future date specified in the court order; (2) the entry of an order that if the obligor misses two payments a bench warrant shall issue; (3) the incarceration of the defendant until payment is made; or (4)

1 The policy of the AOC is that personal service is required before the issuance of a bench warrant.

that the obligor maintain contact with, and cooperate with the Probation Department concerning the collection and enforcement of child support arrears.2

2 If approved by the court, normally a judge assigned to the Superior Court, Chancery Division will sign the appropriate child support orders or warrants. In some counties only daytime warrants are issued. In others, the obligor may be arrested at any time of the day.

In those cases in which the Probation Department recommends a specific payment plan, and not incarceration, an obligor may elect to appeal the decision of the Hearing Officer. Based on procedures and policies established by the AOC, the obligor is entitled to an immediate hearing before a Judge in the Superior Court-Chancery Division, Family Part. If the hearing officer has recommended incarceration until a specific payment is made, the obligor is entitled to an automatic appeal. Based on statistical information from the Mercer Vicinage, historically, the number of appeals is less than five percent. More significantly, recommendations to incarcerate an obligor for the failure to pay support represent less than one-percent of the recommendations. According to the Chief of Child Support Services in the Mercer Vicinage, the number of recommendations to incarcerate obligors has dropped dramatically over the past several years.

While a bench warrant will be ordered when an obligor does not appear for a scheduled child support enforcement hearing, a warrant may also be issued when an obligor appears at an enforcement hearing, is given a specific time period to pay outstanding arrearages, is advised that the failure to comply will result in the issuance of a warrant and the obligor, nonetheless, does not pay the required amount due. In these situations, the Probation Division will issue a warrant upon the default of the obligor.

Consistent with the decision in *Leonard,* an obligor who is arrested for the failure to pay child support must be brought before the court for an ability to pay hearing within 72 hours of the arrest. At the ability to pay hearing, the Probation Division must establish that the obligor violated the court's child support order. The obligor then has the burden of showing an inability to pay. If the obligor fails to meet the burden, the court may find him in willful violation of the order and, determine the appropriate means by which to ensure compliance with the order.

For the most part, child support enforcement hearings are initiated when the Probation Division files a notice of motion to enforce litigant's rights. Rule 1:10-3, provides that "notwithstanding that an act or omission may also constitute contempt of court, a litigant in any action may seek relief by application in the action." Significantly,

absent a finding that the debtor has assets that have been secreted or otherwise placed beyond the reach of execution, the rule prohibits the commitment to enforce a money judgment; however permits the commitment to compel the payment of child support. In pertinent part, the rule provides:

> If an order entered on such an application provides for commitment, it shall specify the terms of release provided, however, that no order for commitment shall be entered to enforce a judgment or order exclusively for the payment of money, except for orders and judgments based on a claim for equitable relief including orders and judgments of the Family Part and except if a judgment creditor demonstrates to the court that the judgment debtor has assets that have been secreted or otherwise placed beyond the reach of execution. In family actions, the court may also grant additional remedies provided by R. 5:3-7. An application by a litigant may be tried with a proceeding under R. 1:10-2(a) only with the consent of all parties and subject to the provisions of R. 1:10-2(c).
> [R. 1:10-3.]

The comments to the rule recognize that the purpose of the 1994 amendment was to "make clear that enforcement by incarceration was never intended to create a so-called debtor's prison, except as to Family Part orders, general equity orders, and those instances in which the debtor is defeating the normal discovery, and execution process, it is that process and not incarceration of the debtor that is to provide the appropriate collection remedy." R. 1:10-3, Comment 5.

The significant distinction between proceedings pursuant to R. 1:10-3 and proceedings pursuant to R. 1:10-1 and R. 1:10-2 is that, an order of confinement may not be for a specific duration; instead the confinement must be terminable upon the party's compliance with the order. Essex County Welfare Bd. v. Perkins, 133 N.J. Super. 189 (App. Div. 1975), cert. denied, 68 N.J. 161 (1975); Pierce v. Pierce, 122 N.J. Super. 359 (App. Div. 1973) (reversing an order entered pursuant to R. 1:10-3 which imposed a 30-day jail sentence upon a defendant for failure to comply with a support order in a matrimonial cause, the court holding that the term must be related to the continuance of the noncompliance). Furthermore, a monetary sanction intended to be entirely punitive rather than coercive may not be imposed absent proceedings under R. 1:10-2. See Ridely v. Dennison, 298 N.J. Super. 373, 381 (App. Div. 1997).

As early as 1949 the courts in New Jersey recognized the continuous obligation of parents to support their minor children. Federbush v. Federbush, 5 N.J. Super. 107 (App. Div. 1949). Recognizing the obligation to pay on-going child support, the Federbush court acknowledged that only obligors who had the ability to pay the outstanding support, but who had willfully refused to pay risked incarceration. In Federbush, the court noted:

> The judgment of contempt must have been founded upon the court's conclusion from the evidence that in conjunction with defendant's disobedience of the order he clearly possessed the financial means, but not the willingness, to meet the order... The contempt was civil in nature and defendant's instant ability to respond to the order was inherent in the adjudication of contempt, otherwise the judgment must amount to imprisonment for debt.
> Incarceration in civil contempt is part of equitable process to enforce judgment, but it is available only against a resistive suitor capable of meeting the judgment. His ability to satisfy the judgment is his means of freedom.
> [Id. at 112.]

In New Jersey, as in all states, a child support obligor cannot be incarcerated for the failure to pay a child support obligation until the court determines that the obligor has the ability to pay on the basis of evidence adduced at a hearing at which he has had the opportunity to testify. Pierce, supra, 122 N.J. Super. 359; Federbush, supra, 5 N.J.

Super. 107; Saltzman v. Saltzman, 290 N.J. Super. 117 (App. Div. 1996). If the court determines, based on the evidence adduced at the hearing, including defendant's testimony, that a defendant has the ability to pay but is unwilling to do so, incarceration may be ordered as a coercive means to require payment, but not as a punitive measure.

At issue is not whether the obligor is entitled to an ability to pay hearing. Rather, the issue before this court is whether an indigent child support obligor who faces incarceration is entitled to the appointment of counsel.

II. THE RIGHT TO COUNSEL

A. SIXTH AMENDMENT ANALYSIS

The Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions the accused shall enjoy the right to have the assistance of Counsel for his defense." U.S. Const. Amend VI. The text of the amendment guarantees criminal defendants the right to the assistance of counsel "in all criminal prosecutions." It was not until 1963 that the Supreme Court first applied the Sixth Amendment right to counsel to the states, through the Fourteenth Amendment. Overruling its 1942 holding in Betts v. Brady, 316 U.S. 455 (1942)3 the Court in Gideon v. Wainwright, 372 U.S. 335 (1963), held that the right to counsel for a criminal defendant is

3 In Betts, when confronted with the quandary of whether due process mandated the appointment of counsel for every indigent criminal defendant, the Court refused to hold that the due process clause of the Fourteenth Amendment incorporated the Sixth Amendment right to counsel. Betts, 316 U.S. 455.

"fundamental," and that "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." Id. at 344. While the Gideon Court clearly addressed the issue of due process and the Sixth Amendment, it did not ultimately determine what constituted a "criminal prosecution" for entailing Sixth Amendment coverage.

In 1972 the court answered that question with its holding in Argersinger v. Hamlin, 407 U.S. 25 (1972). Charged in Florida with carrying a concealed weapon, a crime punishable by up to six months imprisonment, and/or $1,000 fine, plaintiff was tried, convicted, and sentenced to 90 days in jail. Upon these facts the Court held that a defendant threatened with imprisonment, regardless of length of potential sentence, is entitled to the assistance of counsel and further, that a defendant is entitled to the appointment of counsel when he cannot afford his own. Ibid. The Court specifically stated that, under the Sixth Amendment, "no person may be imprisoned for any offense, whether classified as petty, misdemeanor or felony, unless he was represented by counsel at trial." Id. at 37. The court made clear that the right to counsel in a criminal case is not dependent on the character of the charge, but rather on the potential loss of liberty.

The Court clarified its position in Scott v. Illinois, 440U.S. 367 (1979), by holding that the Sixth Amendment's right to counsel extended only to criminal defendants that were faced with "actual imprisonment" and that its boundaries did not include defendants that were threatened with fines or "the mere threat of imprisonment." In Scott, the Court refused to extend the Sixth Amendment's right to counsel to include prosecutions that were criminal, but did not result in any loss of liberty. Ibid. Importantly, Scott leaves undisturbed the underlying premise of Argesinger that, when the state uses its vast resources to deprive an accused of his liberty, the due process of the fourteenth amendment requires that the accused be represented by counsel in order to ensure a fair trial. Since Gideon, the focus in determining the right to appointed counsel remains on the deprivation of liberty - an element inextricably linked to the concept of fundamental fairness. [Robert S. Catz & Nancy Lee Firak, The Right to Appointed Counsel in Quasi-Criminal Cases: Towards an Effective Assistance of Counsel Standard, 19 Harv. C.R.-C.L. L. Rev. 397, 406 (1984).]

One year prior to the Argersinger decision, the New Jersey Supreme Court in Rodriquez v. Rosenblatt, 58 N.J. 281 (1971), referring to the Sixth Amendment right to counsel held:

> When the very charge and the attendant circumstances indicate that the indigent defendant will be in need of the assistance of assigned counsel, he should of course have it. Indeed, whenever the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood on conviction, the indigent defendant should have counsel assigned to him unless he chooses to proceed pro se with his plea of guilty or his defense at trial. In those rare instances where there is a plea or trial proceeds without any tender or assignment of counsel and actual imprisonment or other consequence of magnitude looms appropriate to the municipal judge despite the preindications to the contrary, the defendant should be given the option of starting anew with suitable safeguards including, where necessary, trial before a substituted municipal judge. [Id. at 295.]

B. THE SCALCHI v. SCALCHI DECISION

In Scalchi v. Scalchi, 347 N.J. Super. 493 (App. Div. 2002), the defendant, Frank Scalchi, appealed an order entered pursuant to an enforcement hearing resulting from arrears of child and spousal support. At the hearing before the trial court, defendant asserted that he was indigent and was entitled to the appointment of counsel. Ibid. The trial court denied the request. Ibid. On appeal, the defendant, appearing pro se, raised the identical issue. Ibid. Affirming the decision of the trial court, the Appellate Division held that the court is not required to appoint counsel for an indigent child support obligor at a support enforcement hearing. Ibid.

In a two and one-half-page opinion, the Appellate Division reasoned that the enforcement hearings are "civil" in nature and not "criminal." Citing Essex County Welfare Bd., supra, 133 N.J. Super. at 195, the court recognized previous observations made regarding child support enforcement hearings and possible incarceration, stating:

> There is no doubt that there is a vast difference between a [criminal] contempt proceeding...and a [civil] proceeding to enforce litigants rights . . . .The latter is essentially a civil proceeding to coerce the defendant into compliance with the court's order for the benefit of the private litigant. In such proceeding the judge, before ordering any sanction, must determine that the defendant has the ability to comply with the order which he has violated, and incarceration may be ordered only if made contingent upon defendant's continuing failure to comply with the order. Release must be available immediately upon defendant's compliance. Defendant may not be sentenced to a specific jail time. [Scalchi, supra, 347 N.J. Super. at 495-96.]

Relying on the distinction between civil contempt and criminal contempt, the Appellate Division went on to state that:

> In an ideal world with unlimited resources, it would be preferable and appropriate to assign an attorney who desired such representation and could not afford to pay for it. The Sixth Amendment to the United States Constitution, however, does not provide for counsel in a non-criminal setting. The current law in New Jersey has not extended the Rodriquez case to require that counsel be assigned to an indigent in a support enforcement proceeding. The fact alone that other states have imposed an obligation to appoint counsel in certain civil contempt proceedings for nonsupport is an insufficient basis for this court to do so, absent direction from our Supreme Court.

> See, e.g., McBride v. McBride, 334 N.C. 124 (1993) (citing cases from Alaska, Connecticut, Indiana, Iowa, Maryland, Michigan, Minnesota, Nebraska, Texas and Washington); Young v. Whitworth, 522 F. Supp. 759 (S.D.Ohio 1981).
> [Scalchi, supra, 347 N.J. Super. at 496-97.]

Rejecting the notion that a child support obligor in a proceeding to enforce payment is entitled to the appointment of counsel, the court, nonetheless in a footnote recognized that in civil proceedings related to Title 9 Abuse and Neglect actions, N.J.S.A. 9:6-3 (statutorily permitting the respondent parent or guardian to apply for an attorney through the Department of Public Advocate and requiring the court to appoint a law guardian for the child) and termination of parental rights actions, N.J.S.A. 30:4C-11 to 24, "that justice demands nothing less in light of the magnitude of the consequences involved" (citing Rodriquez, supra, 58 N.J. at 281-95), and therefore the appointment of counsel is required.

C. ENTITLEMENT TO COUNSEL BASED ON THE FOURTEENTH AMENDMENT

The Sixth Amendment is not the only source of a right to counsel. The due process clause of the Fourteenth Amendment affords a second constitutional basis for the right to counsel. Therefore, the right to appointed counsel for an indigent child support obligor must also be evaluated under the Fourteenth Amendment due process clause. The Fourteenth Amendment to the United States Constitution provides that "no person shall be deprived of life, liberty or property without due process of law and equal protection of the laws." U.S. Const. Amend. XIV.

As noted heretofore, the defendants filed a motion to dismiss the complaint for failure to state a claim relying, for the most part, on three arguments. First, defendants assert that the precise issue before this court has already been fully considered and answered and that the Appellate Division firmly rejected the identical claim of entitlement to the appointment of counsel. Furthermore, defendants argue that implicit in the analysis of the State's obligation under the Sixth Amendment, the court in Scalchi analyzed and considered the issue of the appointment of counsel based solely on the Fourteenth Amendment. Second, defendants submit that regardless of whether this court finds that Scalchi is controlling, plaintiffs have failed to establish any due process violation under the Fourteenth Amendment. To support this position, the defendants argue that every child support obligor is entitled to an ability to pay hearing in order to ascertain whether a child support obligor is in fact indigent and that if the court answers that question in the affirmative, then no incarceration can or will be ordered. This process, according to the defendants, accords with fundamental fairness and does not violate due process. Finally, defendants represent that an ability to pay hearing, unlike other civil proceedings where the courts of this State have previously found that a right to the appointment of counsel exists, does not place a child support obligor in the position of being forced to address sophisticated issues of fact or law, and thus appointment of counsel is not warranted.

In response, plaintiffs submit that, while the court in Scalchi correctly held that the Sixth Amendment does not require the appointment of counsel in a civil contempt proceeding, it did not evaluate an obligor's entitlement to the appointment of counsel based on the Fourteenth Amendment. Relying on the Fourteenth Amendment, plaintiffs argue that an indigent child support obligor facing incarceration is entitled to the appointment of counsel.

For the reasons set forth herein, the court rejects the arguments offered by the defendants and finds that the Fourteenth Amendment due process clause requires the appointment of counsel for an indigent child support obligor who faces incarceration. While the practical implications of such a decision may be cumbersome and burdensome, the constitution demands no less.

The Deputy Attorney General at the March 28, 2003 oral argument, noted that the appellate court in Scalchi makes reference to other jurisdictions that, pursuant to the Fourteenth Amendment's due process requirements, have recognized a right to counsel in civil contempt proceedings: McBride v. McBride, 334 N.C. 124 (1993)

decided by the Supreme Court of North Carolina, and Young v. Whitworth, 522 F. Supp. 759 (D.C. Ohio 1981). Both of these cases reach the conclusion that the Fourteenth Amendment requires appointment of counsel to an indigent defendant who is faced with contempt charges for nonsupport.4 The Attorney General asserts that reference to these cases demonstrates that the court considered the

4 In McBride, the defendant was held in civil contempt for failing to pay child support, and he appealed alleging that his right to due process was violated because he was not appointed counsel for his contempt hearing. The Court of Appeals affirmed and remanded, and on appeal, the Supreme Court of North Carolina, overruling prior North Carolina precedent, held that the principles of due process embodied in the Fourteenth Amendment requires the appointment of counsel to indigents in civil contempt proceedings for nonsupport. McBride, supra, 334 N.C. at 132. In Young, an indigent father filed an application for a writ of habeas corpus alleging that his due process rights were violated when he was incarcerated for contempt of court in a nonsupport hearing, but was not advised of his right to appointed counsel in such a case. On respondent's motion to dismiss, the District Court held that the Fourteenth Amendment required that when an indigent father is faced with imprisonment on contempt charges for nonsupport counsel must be provided to him. Young, supra, 522 F. Supp. at 766.

implications of the Fourteenth Amendment in reaching its decision not to appoint counsel.

The Attorney General's assertion, while plausible, is not persuasive. The court's citations to McBride and Young were announced by the introductory signals "See, e.g." and followed the court's statement that "[t]he fact alone that other states have imposed an obligation to appoint counsel in certain civil contempt proceedings for nonsupport is an insufficient basis for this court to do so, absent direction from our Supreme Court." Scalchi, supra, 347 N.J. Super. at 496-97. Clearly, the court was citing these cases as representative of jurisdictions that have imposed the obligation to appoint counsel in civil contempt proceedings for nonsupport, and does not support the notion that the court addressed the Fourteenth Amendment as part of its analysis.5

5 The signal "See, e.g." is used where the "cited authority states the proposition...[and] other authorities also state the proposition, but citation to them would not be helpful or is not necessary." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2, at 22 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000). The citation, pursuant to Bluebook Rule 1.2 commands that the ensuing citations state the preceding proposition. Here, the preceding proposition discussed the conclusion the courts made, not the analysis they used in doing so.

This court rejects the notion asserted by the Deputy Attorney General that the mere citation to other jurisdictions' holdings means that the court considered, but rejected, the Due Process Clause of the Fourteenth Amendment as providing a right to counsel in civil contempt proceedings for nonsupport. Significantly, the court never mentioned or included the Fourteenth Amendment nor made any reference to the United States Supreme Court's examination of the issue in Lassiter v. Dep't of Soc. Serv., 452 U.S. 18 (1981). Furthermore, the court cites the Sixth Amendment as the basis for providing counsel and then cites the McBride and Young cases. Implicit in that sequence is the notion that the court limited its analysis to the Sixth Amendment. (emphasis added.)

As the history of the right to counsel in criminal cases reveals, the Supreme Court is most solicitous of an indigent defendant confronted with the threat of incarceration. Indeed, it is the deprivation of physical liberty, and not the characterization of the alleged offense as a felony or misdemeanor, that entitles a defendant to appointed counsel. It is but a short step from this to the proposition that the characterization of the proceedings as "civil" should not frustrate the constitutional mandate of appointed counsel where an indigent litigant is threatened with confinement. The Court took this step in Lassiter, by erecting a presumption of a right to appointed counsel "where the litigant may lose his physical liberty if he loses the litigation." Id. at 25. Where physical liberty is not at stake, the Court held, no such presumption exists. The potential loss of "physical liberty" therefore becomes the critical factor determining the right to counsel; Lassiter made clear that the labels "civil" and "criminal" are no longer important.

In Lassiter, the United States Supreme Court held that the right to appointed counsel arises "only where the litigant may lose his physical liberty if he loses the litigation." Ibid. In Lassiter the Supreme Court stated:

> The Court's precedent speaks with one voice about what "fundamental fairness" has meant when the Court has considered the right to appoint counsel, and we thus draw from them the presumption that the indigent litigant has a right to counsel only when, if he loses, he may be deprived of his physical liberty. It is against this presumption that all the other elements in the due process decision must be measured. [Id. at 26-27.]

In Lassiter, the state of North Carolina had terminated the petitioner's parental rights due to her lack of concern for her child's care and welfare. Petitioner argued that, because she was indigent, the Fourteenth Amendment required the state to appoint counsel to represent her at the termination hearing. The Court found that there is a presumption "that an indigent litigant has a right to appointed counsel only when, if he loses, he may be deprived of his physical liberty." Id. at 18. Because the petitioner was not threatened with the loss of her physical liberty, the Court found that the factors set forth in Mathews v. Eldridge, 424 U.S. 319 (1976), should be considered and then weighed against the presumption to determine whether the Fourteenth Amendment requires the state to appoint counsel in parental termination hearings. Lassiter, supra, 452 U.S. at 27.

Mathews v. Eldridge sets out three factors which must be considered in determining what due process requires in a particular case: (1) the private interests at stake; (2) the government's interest; (3) and the risk that the procedures used will lead to an erroneous decision. Mathews, supra, 424 U.S. at 335. The Lassiter court found that these factors balanced in favor of a right to appointed counsel, but did not overcome the presumption that a litigant is not entitled to appointed counsel unless threatened with the loss of physical liberty. Thus, in a case like the present one, where a person is being held in contempt for failure to pay child support, it appears that we must first determine whether a defendant's physical liberty is at stake. If not, then according to Lassiter, a court must analyze the three factors set forth in Mathews and then balance these with the presumption against appointing counsel.

The Lassiter approach has been strictly adhered to in the federal courts in other jurisdictions. In Mastin v. Fellerhoff, 526 F. Supp. 969 (D.C. Ohio), the court addressed the threshold issue of jurisdiction and then proceeded to address the merits. On June 29, 1981, plaintiff, James Mastin, was found in contempt of an order of the Hamilton County Court of Common Pleas, Division of Domestic Relations for the non-payment of child support. Id. at 970. Pursuant to that order, plaintiff was incarcerated for three days. Ibid. At the conclusion of the June 29, 1981 hearing, plaintiff was told to return to the Domestic Relations Court on August 17, 1981. Ibid. Plaintiff was advised that he would be incarcerated for ten more days if he could not make support payments at that time. Ibid. At the hearing, plaintiff was not represented by counsel. Ibid. Plaintiff advised the court that he was unable to afford a lawyer and requested the appointment of counsel. Ibid. The request was refused on the grounds that, because the proceeding was not "criminal," plaintiff had no right to appointed counsel. Ibid.

Unable to afford counsel for the hearing scheduled for August 17, 1981, plaintiff filed a complaint and application for emergent relief with the United States District Court. Ibid. The application for emergent relief sought a preliminary injunction against the Domestic Relations Court prohibiting it from incarcerating plaintiff or any other indigent person found in contempt of court for failure to pay support without first advising them of their right to have counsel appointed. Ibid. Defendants agreed to stay proceedings until the case was decided on the merits. Inasmuch as there was no genuine issue of fact, the case was decided on cross-motions for summary judgment. The sole issue before the court was whether the practice of the Domestic Relations Court of holding contempt proceedings, and of incarcerating class members found in contempt without providing counsel violated their constitutional rights guaranteed under the Fourteenth Amendment to the United States Constitution.

Before the District Court, defendant first argued that the court should sustain from interfering with the proceeding of the state court under the principles articulated in Younger, that in the absence of extraordinary circumstances, federal courts may not intervene in state court proceedings if the plaintiff has the opportunity to raise his federal claim in the state proceeding. Younger, 401 U.S. at 41. According to the defendants, the Ohio Supreme Court never ruled on the question whether an indigent defendant in a civil contempt hearing was entitled to appointed counsel under the Fourteenth Amendment, and therefore the District Court should abstain under Younger so as to give the state courts an opportunity to decide the merits of plaintiffs' constitutional claim.

Plaintiffs argued that the Ohio Supreme Court decision in In re Calhoun, 47 Ohio St. 2d 15 (1976), was dispositive and plaintiffs therefore had no remedy in state court.6 Ruling on defendant's habeas corpus petition, the Ohio Supreme Court in Calhoun held that the Sixth Amendment right to counsel as articulated by the United States Supreme Court in Argesinger, did not apply to a civil contempt hearing for non-payment of child support. Calhoun, supra, 47 Ohio St. 2d at 17. As to the abstention doctrine the court held:

> The abstention doctrine, however, is not an invitation to state courts to avoid the mandate of the United States Constitution, and it only applies if the plaintiffs have an opportunity to fairly press their constitutional claims in the state court. Lack of opportunity to fairly assert a constitutional claim in state court therefore would direct this Court to decide the issue rather than abstain. The question is whether plaintiffs have an opportunity to pursue this claim in the state court or whether the federal court is the only viable forum. [Mastin, supra, 526 F. Supp. at 971 (citations omitted).]

6 In a separate order, plaintiff's motion to certify this case as a class action was granted. The class consists of: all individuals who have been or will be summoned to appear in the Hamilton County Court of Common Pleas, Division of Domestic Relations to answer charges that they are in contempt of court by failing to pay child support, and who face incarceration by reason thereof, and who are unable to afford counsel to represent them in such proceedings.

The District Court proceeded to decide the case on the merits and rejected the abstention argument raised by the defendants. The court recognized that Calhoun expressly relied on the Sixth Amendment alone, but held that "implicit in thatholding is a rejection of any Fourteenth Amendment right to counsel under the same circumstances." Id. at 971. As a result the District Court held that "it would be unjust to require plaintiffs in this case to pursue a futile appeal through the state courts when the issue has already been ruled upon by the highest court in Ohio. Where plaintiffs have no adequate means of redress in the state courts, 'extraordinary circumstances' envisioned by Younger exist and the federal courts need not abstain. Id. at 971, quoting Parker v. Turner, 626 F.2d 1, 10 (6th Cir. 1980).

Significantly, the United States District Court rejected the defendant's argument that the right to counsel at contempt hearings should be determined on a case-by-case basis by stating "it is clear to this Court that a state may not deprive a person of his physical liberty unless that person is represented by counsel, no matter what the nature of the proceeding." Mastin, supra, 526 F. Supp. at 973. The court added:

> To characterize a proceeding as civil rather than criminal is a distinction without a difference if the end result is loss of physical liberty. Appointment of counsel is an absolute requirement of due process whenever the proceeding may result in imprisonment of that defendant. We believe in the balancing factors set forth in Eldridge apply only in cases where the right is not absolute, and the court must determine whether there is a right to counsel under a particular set of facts... That plaintiffs in this case stand to be deprived of their physical liberty is without dispute. The only question is whether the Fourteenth Amendment requires appointment of counsel in civil, as well as criminal proceedings, where the litigants

> are indigent and may be deprived of their physical liberty. The answer to this question must necessarily be yes and, although we have some reluctance to impose such a burden on the state system, the federal constitution requires no less. [Ibid.]

Defendants in the case at bar, assert that the language in Mastin, "we recognize that Calhoun expressly relied on the Sixth Amendment only, but implicit in that holding is a rejection of any Fourteenth Amendment right to counsel under the same circumstances," is binding and that the holding by the appellate division in Scalchi by necessity incorporated a Fourteenth Amendment analysis. Mastin, supra, 536 F. Supp. at 971. There are several reasons to reject the position advanced by the defendants. First, a District Court opinion from Ohio is not binding on this court. Second, the decision in Mastin, conflicts with the Third Circuit's decision to permit the State court to examine the constitutional issue and to therefore abstain from exercising jurisdiction. Third, the decision that implicit in the holding in Calhoun was a rejection of the Fourteenth Amendment right to counsel under the same circumstances, was made by the District Court in the course of denying Ohio's abstention application pursuant to Younger, supra, 401 U.S. 37, and was the justification asserted to reach the merits, thus abrogating the holding of the Ohio Supreme Court in Calhoun, that the appointment of counsel was not required. Fourth, the District Court in Mastin was confronted with a situation where the unambiguous Constitutional mandate of Lassiter was not being applied and, rather than entering an order that would have resulted in more delay, it chose to adhere to its duty and address the Constitutional issue placed before it rather than abstain.

Defendant's reliance on Mastin for the proposition that the court in Scalchi implicitly decided the Fourteenth Amendment is misplaced. Mastin provides no authority for its conclusion that the Ohio Supreme Court implicitly addressed the Fourteenth Amendment when it issued a decision based on the Sixth Amendment.

Notably absent from Scalchi, however, is any reference by the court to the Fourteenth Amendment or the phrase "due process."7 Had the Scalchi Court intended to address Lassiter, it would have done so explicitly. Moreover, the Appellate Division in Scalchi could not have considered Lassiter nor the due process arguments raised, inasmuch as consideration of these issues would have mandated a different result than the one reached in Scalchi.

7 The Appellate Division in Scalchi also did not address the New Jersey Supreme Court case law requiring that a defendant in a capias ad satisfaciendum proceeding receive the same "procedural rights and protections as if he were arrested on a criminal charge" nor did it address R. 5:3-4(a).

During oral argument, the defendants asserted that the court in Scalchi "didn't come right out and say this is based on the Sixth Amendment," implying that the court considered all of the legal basis on which the appointment of counsel could be based. To the contrary, the court was quite clear as to the authority it was considering in reaching its decision. The court explicitly relied on the Sixth Amendment and held:

> The Sixth Amendment to the United States Constitution, however, does not provide for counsel in a non-criminal setting . . . The fact alone that other states8 have imposed an obligation to appoint counsel in certain civil contempt proceedings for nonsupport is an insufficient basis for this court to do so, absent direction from our Supreme Court. [Scalchi, supra, 347 N.J. Super. at 496-97 (citations omitted).]

8 Notably, the Appellate Division referred only to states", not the Federal Constitutional challenge raised here.

The Court in Scalchi based its decision on the Sixth Amendment only. It was not asked, and did not consider, the Fourteenth Amendment constitutional issues before this Court. In Anthony, the Third Circuit examined plaintiff's standing and held that sufficient injury was alleged under the Fourteenth Amendment to prosecute this matter in Federal Court. Anthony, 316 F.3d at 416. In upholding the District Court's abstention decision, the Court noted

Scalchi's holding that "[t]he current law in New Jersey [does not] require that counsel be assigned to n indigent in a support enforcement proceeding," yet held that "but this statement does not demonstrate that the New Jersey courts are resistant to adjudicating indigent parents' constitutional rights." Anthony, supra, 316 F.3d at 423. The court also noted:

> Plaintiffs have offered no reason why their claims could not be fully heard by New Jersey courts. Moreover, defendants contend plaintiffs would encounter no difficulty adjudicating their claims in the New Jersey courts. Defendants' contentions are undisputed by plaintiffs and we find no reason to doubt them. Plaintiffs have the opportunity to raise their claims in any child support hearing and to appeal adverse decisions through the state appellate system and eventually to the United States Supreme Court. [Id. at 422.]

Most importantly, the Third Circuit recognized the difference between the Sixth Amendment right to counsel and the separate and independent right to counsel afforded under the due process clause. This distinction is apparent as the court stated:

> The New Jersey Supreme Court has suggested indigent defendants should be afforded counsel "whenever the particular nature of the charge is such that imprisonment in fact or other consequence of magnitude is actually threatened or is a likelihood of conviction." Rodriquez, supra, 58 N.J. 281. Moreover, after the New Jersey Supreme Court decision, the United States Supreme Court expressed a similar sentiment when it stated there is a "presumption that an indigent litigant has a right to appointed counsel . . . when, if he loses, he may be deprived of his physical liberty."
> [Id. at 423 (citations omitted).]

Interestingly, the Third Circuit acknowledged that a few federal courts "held that abstention was inappropriate in the particular cases due to 'extraordinary circumstances,' which denied plaintiffs the ability to press their claims adequately in state court. Id. at 423, citing Mastin, supra, 526 F. Supp. 969; Johnson v. Zurz, 596 F. Supp. 39 (D.C. Ohio 1984).

If Scalchi is read as having addressed the Fourteenth Amendment, it is in direct conflict with Lassiter and would indeed have demonstrated that "New Jersey courts are resistant to adjudicating indigent parents' constitutional rights." Anthony, supra, 316 F.3d at 423. The Third Circuit found standing to pursue this issue under the Fourteenth Amendment and stated that New Jersey is not "resistant to adjudicating indigent parents' constitutional rights". Ibid. Therefore Scalchi cannot be read as having addressed the Fourteenth Amendment.

If Mastin is viewed as binding, or even persuasive to this court, the case would be followed for the proposition that plaintiffs in this case stand to be deprived of their physical liberty is without dispute. The only question is whether the Fourteenth Amendment requires appointment of counsel in civil, as well as criminal proceedings, where the litigants are indigent and may be deprived of their physical liberty. The answer to this question must necessarily be yes and, although we have some reluctance to impose such a burden on the state system, the federal Constitution requires no less. [Mastin, supra, 526 F. Supp. at 973.]

Additionally, many Federal district and circuit courts addressing this issue have repeated the same holding; that due process does require the appointment of counsel in civil contempt proceedings where incarceration is a possible consequence. The circuits of the United States Court of Appeals that have addressed this question have determined that due process requires an automatic appointment of counsel for an indigent facing incarceration in a civil contempt proceeding. See Wilson v. State of N.H., 18 F.3d 40 (1st Cir. 1994); United States v. Bobart Travel Agency, 699 F.2d 618 (2d Cir. 1983); In re Kilgo, 484 F.2d 1215 (4th Cir. 1973); Ridgway v. Baker, 720

F.2d 1409 (5th Cir. 1983); Sevier v. Turner, 742 F.2d 262 (6th Cir. 1984); Matter of Grand Jury Subpoena, 739 F.2d 1354 (8th Cir. 1984); United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977); Henkel v. Bradshaw, 483 F.2d 1386 (9th Cir. 1973); Walker v. McClain, 768 F.2d 1181 (10th Cir. 1985). Civil contempt hearings are examples of proceedings which are civil in form but which can nevertheless result in incarceration. The Supreme Court in Lassiter was unequivocal in stating that an indigent civil litigant has a right to appointed counsel if he may be incarcerated as a result of an adverse outcome. It is the defendant's interest in personal freedom and not the Sixth Amendment right to counsel in criminal cases that trigger the right to appointed counsel in these situations.

Thus, Lassiter provides the standard by which the right to counsel in civil contempt cases is to be determined.

Following the Supreme Court's decision in Lassiter, the North Carolina Supreme Court revisited the issue of appointing counsel in these types of cases.9 In McBride, the court held that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages...At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation but is unable due to his indigence to pay for such representation, the trial court must appoint counsel to represent him. [McBride, supra, 334 N.C. at 131-32.]

9 In Jolly v. Wright, 300 N.C. 83 (1980), the North Carolina Supreme Court considered the question of whether an indigent defendant facing incarceration in a civil contempt proceeding brought to compel compliance with a child support order had a statutory or constitutional right to be represented by appointed counsel. In Jolly, the court rejected the claim that the obligor had either a Sixth Amendment or Due Process Clause of the Fourteenth Amendment right to appointed counsel.

Significantly, in McBride the court recognized the constitutional infirmity in making a distinction between criminal and civil proceedings by noting:

> A defendant who is found in civil contempt and incarcerated for nonsupport does not "hold the keys to the jail" if he cannot pay the child support arrearage which will procure his release. Under such circumstances, the deprivation of liberty that occurs is tremendous and may not be diminished by the fact that a civil contempt order contains a purge clause providing for the contemnor's release upon payment of arrearages. While it is true that a defendant in a civil contempt action should not be fined or incarcerated for failing to comply with a court order without a determination by the trial court that the defendant is capable of complying, the facts of the present case illustrate that trial courts do not always make such a determination before ordering the incarceration of a civil contemnor... When a truly indigent defendant is jailed pursuant to a civil contempt order which calls upon him to do that which he cannot do -- to pay child support arrearage which he is unable the pay - the deprivation of his physical liberty is no less than that of a criminal defendant who is incarcerated upon conviction of a criminal offense.
> [Id. at 130 - 31 (citations omitted).]

Importantly, the court held that "[i]n light of the Supreme Court's opinion in Lassiter, we now hold that principles of due process embodied in the Fourteenth Amendment require that, absent the appointment of counsel, indigent civil contemnors may not be incarcerated for failure to pay child support arrearages." Id. at 131. As noted heretofore, the Court in Lassiter emphasized that, in determining whether due process requires the appointment of counsel for an indigent litigant in a particular proceeding, a court must first focus on the potential curtailment of

the indigent's personal liberty rather than on the "civil or criminal label placed on the proceeding. Where due process is concerned it is the defendant's interest in personal freedom that triggers the right to appointed counsel." Id. at 127, citing Lassiter, supra, 452 U.S. at 25.

Similarly, many states have reached the identical conclusion as the federal courts in holding that due process requires the appointment of counsel for an indigent facing incarceration in civil contempt proceedings. See Alabama, Ex Parte Parcus, 615 So.2d 78 (Ala. 1993); Alaska, Otton v. Zaborac, 525 P.2d 537 (Alaska 1974); California, County of Santa Clara v. Santa Clara County Superior Court, 5 Cal.Rptr.2d 7 (Cal. Ct. App 1992); Colorado, Padilla v. Padilla, 645 P.2d 1327 (Colo. Ct. App. 1982); Connecticut, Emerick v. Emerick, 613 A.2d 1351 (Conn. App. Ct. 1992); Delaware, Black v. Div. of Child Support Enforcement, 686 A.2d 164 (Del. 1996); Indiana, In Re Marriage of Stariha, 509 N.E.2d 1117 (Ind. Ct. App. 1987); Iowa, McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982); Kansas, Johnson v. Johnson, 721 P.2d 290 (Kan. Ct. App. 1986); Maryland, Rutherford v. Rutherford, 464 A.2d 228 (Md. 1983); Michigan, Mead v. Batchlor, 460 N.W.2d 493 (Mich. 1990); Minnesota, Cox v. Slama, 355 N.W.2d 401 (Minn. 1984); Missouri, Hunt v. Moreland, 697 S.W.2d 326 (Mo. Ct. App. 1985); Nebraska, Carroll v. Moore, 423 N.W.2d 757 (Neb. 1988); New York, 516 N.Y.S.2d 928 (N.Y. Sup. 1987); North Carolina, McBride, supra, 334 N.C. 124; Ohio, Renshaw v. Renshaw, 2000 WL 1528635 (Oh. Ct. App. 2000); Tennessee, Bradford v. Bradford, 1986 WL 2874 (Tenn. Ct. App. 1986); Vermont, Choiniere v. Brooks, 660 A.2d 289 (Vt. 1995); Washington, Tetro v. Tetro, 544 P.2d 17 (Wash. 1975); West Virginia, Smoot v. Dingess, 236 S.E.2d 468 (W.Va. 1977); and Wisconsin, Brotzman v. Brotzman, 283 N.W.2d 600 (Wis. Ct. App. 1979).

Additionally, various jurisdictions that have not mandated appointment of counsel as a result of litigation, require appointment by statute or some other means. For example, in Florida, the office of the Public Defender provides representation at Ability to Pay hearings pursuant to Fla.R.Crim.P. 3.840(a). In Kentucky, appointment of counsel is mandated by statute, and in Massachusetts it is provided as a matter of right. The Virginia Supreme Court has issued a memorandum instructing trial courts that they have the discretion to appoint counsel for indigent contemnors facing incarceration, and as a result certain counties appoint counsel regularly.

Only a handful of jurisdictions currently hold that there is no right to counsel for indigent contemnors in nonsupport hearings. See Louisianna, State v. Walker, 386 So.2d 908 (La. 1980); Maine, Meyer v. Meyer, 414 A.2d 236 (Me. 1980); New Hampshire, Duval v. Duval, 322 A.2d 1 (N.H. 1974); New Mexico, State ex. rel. Dept. of Human Services v. Rael, 642 P.2d 1099 (N.M. 1982). Interestingly, of the three jurisdictions listed, only one has revisited the issue of providing a right to counsel after the Lassiter decision.

Additionally, several of the states that hold that due process does not require automatic appointment of counsel, declare that indigent civil contemnors, who are unable to pay the amount of support owed, cannot be incarcerated for their failure to pay, and as such are not being denied any liberty protected by the due process provisions. Kurt F. Hausler, The right to appointment of counsel for the indigent civil contemnor facing incarceration for failure to pay child support, McBride v. McBride, 16 Campbell L. Rev. 127 (1994).

Three months after Scalchi was decided, the Appellate Division decided In the Matter of the Civil Commitment of D.L., 351 N.J. Super. 77 (App. Div. 2002), which explicitly addressed both the Fourteenth Amendment and the Lassiter decision. The only defense offered by the State to explain the holding of I/M/O D.L. was that civil psychiatric commitments under the Sexually Violent Predators Act differ from contempt proceedings.

However, the Appellate Division explicitly held that "the label affixed to a case ... is not the dispositive consideration. Rather, we look to the infringement upon the person's due process rights to guide our decision." Id. at 88-91. Directly citing Lassiter and the Fourteenth Amendment, the Court in I/M/O D.L. held that the appointment of counsel is Constitutionally mandated whenever a defendant's liberty interests are at stake.
The courts in the State of New Jersey have a long-standing reputation of protecting the constitutional rights of its citizens. Adhering to that tradition, the Fourteenth Amendment of the United States Constitution requires that no indigent child support obligor be incarcerated without being afforded the opportunity of assigned counsel.

D. WRIT OF CAPIAS AD SATISFACIENDUM

In Marshall v. Matthei, 327 N.J.Super. 512 (App. Div. 2000), the Appellate Division was asked to review a writ of capias ad satisfaciendum issued as a result of the defendant's refusal to comply with a judgment entered against him by his former attorney, in spite of evidence that he had the ability to comply with the order. In incarcerating the defendant, the trial court found, based on defendant's admissions, that he had the ability to pay at least $20,000 toward his arrears but was openly and belligerently refusing to do so. Id. at 519.

A writ of capias ad satisfaciendum is nearly identical to a coercive incarceration under R. 1:10-3. In fact, the only distinguishing characteristic is that the writ involves debts based on contracts (which potentially could be discharged in bankruptcy) whereas R. 1:10-3 is employed in Family Part matters and under the Court's general equitable powers to enforce compliance with its orders. N.J.S.A. 2A:17-78.

In discussing a coercive incarceration in connection with a writ of capias ad satisfaciendum, the Appellate Division noted that it could "discern no reason why the same standards as have developed to govern civil contempt and proceedings in relief of litigants' rights should not apply, as appropriate,10 to capias ad satisfaciendum commitments." Id. at 526. In discussing these rights, the Marshall court cites to Perlmutter v. DeRowe, 58 N.J. 5, 13-14 (1971) (discussing the "function and place of capias ad satisfaciendum") and Fidelis Factors Corp. v. Du Lane Hatchery, Ltd., 47 N.J. Super. 132, 139-40 (App. Div. 1957).

In Perlmutter, the Supreme Court of New Jersey held that "civil arrest under a Ca. re. [capias ad satisfaciendum] is substantially analogous to arrest under a criminal complaint and a defendant should have all the same procedural rights and protections as if he were arrested on a criminal charge for the same fraud upon which the civil action and the Ca. re. are based." Id. at 17, citing In re Harris, 446 P.2d 148 (Ca. 1968); Cf. Desmond v. Hachey, 315 F. Supp. 328 (D.Me.1970). This holding is in line with the determination of several courts that, when considering whether the appointment of counsel is constitutionally mandated, a Court should look at the effect on a defendant's liberty interests, not the label attached to the proceedings. See, e.g., Argersinger, supra, 407 U.S. at 32 (stating it is the result, not the nature of the particular offense, that requires appointment of counsel); I/M/O D.L., 351 N.J. Super. 77; Walker v. McLain, 768 F.2d 1181, 1183 (10th Cir. 1985) (stating that "from the perspective of the person incarcerated, the jail is just as bleak no matter which label [civil or criminal contempt] is used.")

10 In Marshall, the Appellate Division holds that review hearings must be held no less frequently than every 18 months, "the maximum term that may be imposed for criminal contempt under N.J.S.A. 2C:29-9a and 2C:43-6a(4)." In Leonard, this Court held that Due Process requires incarceration reviews every two weeks under R. 1:10-3. These different reviews do not represent a conflict, as a debt for which one is imprisoned under a writ of capias ad satisfaciendum is subject to discharge in bankruptcy; thus, unlike a child support contemnor, an incarcerated litigant always has "the key to the prison" in his possession as he can always file for bankruptcy and be released from confinement. Marshall, supra, 327 N.J. Super. at 528, citing Perlmutter v. DeRowe, 58 N.J. 5, 14 (1971). A child support debtor does not have this option and the more frequent reviews are thus justified.

When viewed in conjunction with the holding of the United States Supreme Court in Lassiter, and that of the New Jersey Appellate Division in I/M/O D.L. this Court is satisfied that the Appellate Division's application of the safeguards of R. 1:10-3 to capias ad satisfaciendum proceedings also mandate the inverse, or that (as far as the right to counsel is concerned), "a defendant should have all the same procedural rights and protections as if he were arrested on a criminal charge for the same contempt upon which the civil action and the R. 1:10-3 incarceration are based."

As noted herein, there is already case law from the New Jersey Supreme Court mandating the appointment of counsel in civil matters where incarceration under a writ of capias ad satisfaciendum is involved. This Court is

satisfied the court should apply the same reasoning in the context of child support obligors facing incarceration at enforcement hearings.

E. APPOINTMENT OF COUNSEL UNDER R. 5:3-4

Plaintiffs argue that R. 5:3-4 supports their position that an indigent child support obligor facing incarceration is entitled to the appointment of counsel. The defendants assert that R. 5:3-4 is inapplicable because there is no constitutional provision or law that permits the appointment of counsel in civil matters of this nature. In light of the court's decision in this matter, as set forth above, resolution of this issue is not necessary. However, based on the plain language of the Rule, this court finds that an indigent child support obligor who faces institutional commitment or another consequence of similar magnitude is entitled to the appointment of counsel. While the defendants may assert that a period of incarceration pending the payment of child support does not equate to institutional commitment, i.e., for a criminal offense, without doubt a period of incarceration for any period of time is a consequence of magnitude.

III. IMPLEMENTATION

As part of its research, this court conducted an exhaustive review of all of the state and federal courts that have addressed the appointment of counsel for indigent child support obligors subject to incarceration for nonpayment. The results outlined in this opinion are self-explanatory. Significantly, all of these states have developed procedures to ensure the timely appointment of counsel.

While this court also holds that indigent child support obligors who face incarceration are entitled to the appointment of counsel, many logistical and practical questions remain unanswered. One of these is what standard should apply to determine whether an obligor is indigent. This question is easily answered inasmuch as there are already standards established by the Office of the Public Defender to determine whether an individual qualifies for the appointment of counsel. See N.J.S.A. 2A:158A-14 and N.J.S.A. 2A:158A-15. The 2003 Income Eligibility Guidelines are based on the Poverty Index developed and periodically updated by the United States Department of Health and Human Services published in the Federal Register. See, 68 Fed. Reg. 26, page 6456-58. These guidelines are based on annual gross income based on a household size of one to eight.

Although the standards employed by the Office of the Public Defender are appropriate to apply to child support obligors who apply for the appointment of counsel, the Office of the Public Defender has no statutory obligation to provide representation in a civil contempt proceeding to determine the ability to pay. See Madden v. Delran, 126 N.J. 591 (1992) (holding that while municipal court indigent defendants are statutorily entitled to the appointment of counsel, the failure of the Legislature to fund its statutory imposed obligation properly resulted in a finding by the trial court that the obligation was therefore unenforceable). See also In re Spann Contempt, 183 N.J. Super. 62 (App. Div. 1982); Norton v. State, 167 N.J. Super. 212 (App. Div. 1979).

Absent representation through the services of the Office of the Public Defender, the court has the inherent power to require private attorneys to serve and protect the vital interests of indigent litigants, where circumstances demand it. While this authority exists, this court appreciates the practical implications involved in the selection and appointment of counsel to provide representation at a hearing held within 72 hours after the arrest of the obligor. See Leonard, supra, MER-L-3761-01 (holding that the ability to pay hearing must be held within 72 hours after the arrest of the obligor).

Given the strict time requirements set forth above, and the logistical problems related to the appointment of counsel from the private legal community, it may be appropriate to utilize the services of attorneys who are employed by the Office of the County Counsel or to secure the services of private counsel on a regular basis to provide these services. In many Vicinages, like Mercer, private counsel has been hired part-time to provide

services to indigent defendants charged with domestic violence contempt orders that are cognizable before the Family Part.

Regardless of the method employed to provide services, it is incumbent that procedures be established to determine the eligibility for services and that a system be developed to provide for the appointment of counsel in a timely fashion. From a best practices perspective, a standardized eligibility form and set of procedures should be developed to ensure that applicants statewide are evaluated by the same guidelines. The protocol developed should incorporate the current operating guidelines employed by the Office of the Public Defender in determining the eligibility for Public Defender services.

The more difficult issue, of course, will be the actual appointment of counsel. While the pro bono list maintained by each Vicinage is available, the utilization of this list may be problematic due to the quick turnaround time between the time of an arrest and the ability to pay hearing. As a result, some counties may choose to utilize the services of the Office of County Counsel while others may elect to secure, by contract, the services of private attorneys to represent those entitled to the appointment of counsel.

Importantly, an indigent child support obligor is only entitled to the appointment of counsel if the obligor may be incarcerated. Hopefully, this decision will encourage Probation Departments across the State to develop mediation methods to resolve child support obligations and to attempt to negotiate settlements in order to secure the payment of outstanding arrears and to eliminate the possibility of incarceration, thereby not requiring the appointment of counsel. Furthermore, judges may over time develop alternative ways to secure child support payments without the need for incarceration.

At the outset of a civil contempt proceeding for nonsupport, the trial court should assess the likelihood that the defendant may be incarcerated. If the court determines that the defendant may be incarcerated as a result of the proceeding, the trial court should, in the interest of judicial economy, inquire into the defendant's desire to be represented by counsel and into his ability to pay for legal representation. If such a defendant wishes representation, but is unable to secure representation due to his indigence, the trial court must appoint counsel to represent him.

This court understands, all too well, the practical implications of a decision that requires the appointment of counsel within 72 hours. In fact, this problem is exacerbated when, in most vicinages, an ability to pay hearing is held within 24 hours.

Recognizing the time constraints noted herein, this court has considered the development of an alternative process designed to preserve and protect the due process rights of an indigent obligor facing incarceration while at the same time minimizing the practical difficulties related to the appointment of counsel. The alternative approach, in many respects, would resemble the current system, inasmuch the appointment of counsel would not be provided at the initial ability to pay hearing. Instead, the ability to pay hearing would proceed and any application for the appointment of counsel would be denied without prejudice pending the outcome of the hearing. In the event that the court made a finding that the obligor had the ability to pay and second, that the obligor faced a period of incarceration pending the payment of those funds, then the court would be required to stay the execution of the period of incarceration pending an expedited appeal before the Appellate Division and appoint counsel for purposes of the appeal.

In order to provide meaningful appellate review, counsel for the child support obligor would be permitted to supplement the record on appeal by providing written documentation. In the event that counsel desired to provide testimonial evidence to supplement the record, then the appellate court would have the authority to remand the matter to the trial court for purposes of expanding the record.11

11 In lieu of an appeal to the Superior Court, Appellate Division, it may be appropriate for the Court to consider the

adoption of a procedure requiring the trial court to automatically schedule a motion for reconsideration to permit appointed counsel the opportunity to appear on behalf of the obligor and to supplement the record. Pending the motion for reconsideration, the trial court would be directed to stay the imposition of incarceration and schedule the motion for consideration within thirty days.

If this approach were adopted, it would be incumbent for the court to establish an expedited appeal process, i.e., within 30 days, to review these matters. While the rights of the obligor must be protected, it is also important that the issue of child support be resolved expeditiously so as to protect the rights of children who are entitled to support from their parents. Additionally, in order to minimize the paperwork and technical rules normally part of the appellate process, this court recommends that the trial court be required to transmit the paperwork directly to the appellate court without any separate filing requirements on the part of the obligor.

It is anticipated that this approach may result in a decreased number of ability to pay findings and therefore fewer appeals. While the majority of the Family Part judges in this State apply the appropriate standards when conducting ability to pay hearings, a review of recent transcripts in some counties disclose that, at times, some do not. And, while an appellate process is always available to an obligor who is dissatisfied, many lack the resources to pursue an appeal. This alternative approach, if adopted, may improve the administration of justice.

This alternative approach is not without problems. First, many times an obligor is in jail due to a failure to appear at a child support enforcement hearing. Therefore, a stay of the execution of the period of incarceration, will release the obligor into the community without any assurance that they will appear at a later time. In order to address this potential problem, the child support obligor must be advised in open court of their obligation to: (1) provide a current address; (2) notify the court of any change of address; (3) cooperate with assigned counsel and provide all documentation or information that may be requested by counsel; and (4) appear, as required, for all future court appearances regarding the pending matter. The aforementioned obligations should be set forth in a standardized written document to be signed by the obligor with copies provided to the court, the obligor and to appointed counsel.

In the event that the obligor failed to meet any of the requirements imposed as a condition of the stay, then the court would have the authority to enter a self-executing order vacating the stay.

IV. CONCLUSION

For the reasons set forth herein, the motion to dismiss the complaint filed by the defendants is denied and judgment is entered in favor of the plaintiffs.12 The application for counsel fees is reserved pending the filing of supplemental briefs to address the award of counsel fees in this action.13

12 For the reasons set forth on the record on March 28, 2003, the application for class certification is denied.

13 The documentation submitted by counsel for the plaintiffs shall include a certification of services.