

THE FELONY NON-SUPPORT CASE
and
CONTEMPT PROCEEDINGS
A Defense Perspective
(It's all about the money!)

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INTRODUCTION

These materials are designed to assist court-appointed counsel in Wayne County from a defense perspective. Legal sources have been provided by the other very capable presenters. Many attendees are very experienced and familiar with these topics. The intent of this section is to supply all counsel, new and seasoned, with some functional, practical suggestions. Hopefully, you will find this useful. If not, winter is coming, it makes great fire starter!

CONTEMPT PROCEEDINGS/NON-SUPPORT-GETTING STARTED*

Anyone who may be at risk of incarceration, either jail or prison, is entitled to court appointed counsel in Wayne County. Thus, any respondent who is show caused for violation of a court order (in our case, for not paying support or for violating a personal protection order/PPO), or defendants facing a felony are entitled to representation. Contempt proceedings are held in the Coleman Young Building, CAYMC. If assigned to the "PPO/Show Cause Docket" counsel must budget the entire day. On the day of your appointment, report to room 770 in CAYMC for directions. Do not be late. Current check-in time is 8:45 am. As the policy changes over time and with each judge, understand where you need to report and when to be there.

For PPO/Show Causes in CAYMC, four types of hearings are held. In the morning, counsel will represent respondents show caused for non support based on petitions filed by their custodial parent (CP) or you will be assigned to represent respondents show-caused for violating a personal protection order (PPO). In the afternoon, counsel will represent respondents arrested on bench warrants or respondents show caused by the Friend of the Court attorneys.

In the morning, in most instances, counsel will normally be assigned to a court room on the 9th floor. There, custodial parents (CP's) and respondents gather for interviews with the Friend of the Court (FOC) Attorneys. The Court clerk will advise you to be available. The FOC attorneys will interview CP's and respondents. If they are not able to resolve the show cause, a hearing will be scheduled before the assigned judge. You will represent the respondent. The hearing will usually involve the FOC summarizing the payment history, the CP telling the judge why your client should go to jail, and your client explaining why he cannot pay and why he should not go to jail.

An alternate morning assignment is the PPO docket. You will be asked to report to a different court room, possibly on the 9th floor. There you will meet with the court clerk who will know what PPO matters are on the docket. You will meet with the assigned prosecutor before the hearing and be briefed on the types and status of the cases. Some will be at a review stage (adjourned previously for compliance/monitoring), some will have missing parties and some will be ready for hearing. Those ready for hearing will require you to meet with the respondent in the hall and discuss defenses. If the parties cannot resolve the violation, a hearing is held. Plaintiff

testifies to details supporting the violation. Respondent can explain why there was no violation. The court will then rule.

In the afternoon, you will handle any cases left from the morning and represent respondents arrested on bench warrants. You will report back to room 770 usually around 1:00 pm. You will receive a print-out from an email from FOC with the names of those in custody, or respondents who walked in from a bench warrant. You will need to interview all respondents in lock-up in the Sheriff's detail room on the 17th floor. You will then report to the assigned judge for hearings. Respondents are brought before the court. The FOC attorney provides the judge with a payment history. The FOC attorney has already interviewed your client (before you!) in the jail and also provides that information to the court (sometimes incriminating!). You present your defenses, make your argument and the court rules.

At the conclusion of afternoon hearings, you are required to return to room 770 for further instructions. Usually you will be required to remain available until around 4:00 pm. For these hearings, you receive no order appointing you and are paid per diem to represent all respondents appearing on that day.

FELONY NON-SUPPORT (FNS)-GETTING STARTED.

You will report to the assigned counsel office on the 9th floor around 8:45 am in Frank Murphy Hall of Justice. You will receive a packet of materials that will include 2 orders of appointment for each defendant and discovery. The orders are important. You need them to voucher and get paid. You will sign and date one for each defendant and place it in the order tray in that office. You will then proceed to Judge Wade McCree's court room, room 204 in Frank Murphy Hall.

Once there take note of the most important people who can assist you, clerk's Rebecca and Darlin, and APA Nancy Neff. They will help facilitate your efforts to resolve and/or move your case.

Review your files. Find out whether the case is prosecuted by Wayne County or the Assistant Attorney General (AAG) so you know who to meet with. Find out how many cases your client has, how much is owed in back support, how much is owed to the CP and how much is owed to the state of Michigan. Find out what they are "cycling at" ie, how much is their "current order." *Meet with your client and listen to him/her!*

Client: What is your bond? If you get out, where will you live? Do you work? If so, how much do you earn? When was the last time you worked? When was the last time you got a paycheck? If you get out, can you go to work? Do you have family or friends who can help you? Can you prove that you have made direct payments? Do you have any disabilities? If so, for what and do you get SSI? SSD? Can you get together *any* money and if so, how much and when? If I can get you out, how much can you *really* pay monthly, if given a chance?

If your client cycles at what seems to be an excessive rate, maybe his rate is based on a former job. In that case he needs a modification of support ("a mod"). There is a FOC staff member assigned to the court room to assist these defendants. Have your client interviewed. He will be given detailed instructions on how to obtain a reduction in support. This is an excellent opportunity that should be utilized as much as possible.

Your first appearance will be a pre-exam. You will need to explain to your client why they probably do not benefit from holding a probable cause hearing. Have them sign the waiver form (in the court file from Rebecca). Your focus then is on reducing your clients bond so he

can get out and work. If you want real progress, try to resolve the case with the prosecutor or AAG at the pre-exam. (detailed below).

CONTEMPT HEARINGS FOR NON-SUPPORT/BENCH WARRANTS

All of the hearings held in CAYMC are “contempt” hearings. All of the remedies are for civil contempt. In rare instances, however, a court could subject a PPO violator to criminal contempt sanctions (example: to curb assaultive behavior). A first violation carries up to 45 days, a second up to 90 days. Either the CP or the FOC can initiate them.

The court must find that a valid court order for support exists, the payer had notice of the order (or appeared in court previously) and that an arrearage exists. To make a contempt finding, the court must then find that the payer had the capacity to pay all or some of the amount due through due diligence or that he has the ability to pay from current resources.

Client: Are you aware of a court order for support? Have you ever been to court for non-support before? What is your work/education history? What is your health history? Do you have any disabilities? What efforts have you made to find work? Do you have any assets you can sell to pay support? Can you offer the court any money today or in the near future? Can you call anyone for help with payment? What is your current obligation? Is your client eligible for a modification of support?

Present your clients equities as best you can, in a concise manner. Let the court know if your client can come up with a lump sum and when. Sometimes the court will set that as a condition of release. Example: “I find the respondent in contempt, sentenced to 45 days in jail, to be released upon the payment of \$500.00.” Ask for work release, if applicable. Also, if applicable, you may want to go an extra step and make a call for them at the conclusion of the hearing.

CONTEMPT HEARINGS FOR NON-SUPPORT FILED BY CUSTODIAL PARENT

In instances where a CP has initiated a show cause for non-support you may have to hold a hearing involving testimony. In that instance, you should prepare as if it was a trial. The FOC attorney will usually give you some indication why the CP and the respondent cannot reach an agreement that day. Usually it involves, as in all of these instances, a lack of funds. Either the respondent’s payment history is poor, he/she cannot come up with enough money that day or the CP has exhausted their patience and needs to go before the judge.

In these cases, try to get as much information about the CP’s position from the FOC attorney as possible. What will she settle on? Maybe there is another issue she needs to have resolved. Can we pay some now and some in the future? Then talk frankly with your client. Is there a negotiable sum that your client can promise to pay in the future and if so, when? Can the matter be adjourned for payment? Can you get some financial help from someone? In some rare instances, the CP is unreasonable and the court may see through it. However in most instances, your client will not benefit by insisting on a hearing. Remind your client that the courts remedies are limited and the burden of proof low. If your client is found in contempt and is locked up, offer to make a call for them. In most instances *someone* on their behalf will step up.

CONTEMPT HEARINGS IN PPO CASES

Respondents are show caused for violation of PPO's and are entitled to hearings. These cases can be contentious as the parties usually are extremely antagonistic. Many times plaintiffs are vindictive and will not be satisfied unless they tell their story to the judge and insist on jail time for the defendant. You should treat these hearings as if they were trials. The rules of evidence do apply.

Initially, speak with the prosecutor in detail about the history of the case. It may be one of their "favorites" involving parties with a long court history. When was the PPO order signed? Was the defendant served? Is notice an issue? Is service of the order to show cause an issue? What activity did the PPO preclude? Is that the nature of the complaint? When did the events occur? In a no-contact case, has the plaintiff ever initiated contact? Does your client have cell phone texts or other evidence that can be used to impeach plaintiff? Did plaintiff bring witnesses? Did defendant bring witnesses? If so, interview them. Remember also that the plaintiff is limited to evidence supporting the allegations of the motion. Evidence of other violations would present a "notice" issue for your client. As with any contempt hearing, remind your client of the possible sanctions, 45 or 90 days in jail? If your clients position seems untenable, try to resolve the matter without a hearing. If your client is employed, remind the plaintiff (in many instances it is a custodial parent receiving support) that your client may lose their job if jailed.

If found in contempt treat the sanction portion as a sentencing hearing. The court does not have to jail your client. The court can delay sentence and monitor the parties behavior. Ask the court to set a review date to see if defendant's behavior has improved.

THE FNS CASE

A brief reference to the law is appropriate. A person is guilty of FNS (a 4 year offense) if defendant has notice of a court order for support and does not pay "in the amount or at the time stated in the order." Notice is required but any appearance in any FOC proceeding suffices. For all practical purposes, there is no defense. Even the Court of Appeals has declared the statute a strict liability offense. *People v. Adams*, 215 Mich App89 (2004). It is a "continuing offense," meaning each missed payment technically could result in new charges. *People v. Westman*, 262 Mich App 184 (2004). If the defendant never pays, the statute of limitations never begins to run. *People v. Monaco*, 262 Mich App 596 (2004). Even termination of parental rights does not relieve the payer of a support obligation. In Re Beck Children, MSCt #140842, 12/20/10.

At the arraignment, bond of not less than \$500.00 or 25% of the arrearage, whichever is greater, must be set. Only for "good cause shown" can that bond be reduced. Good cause exists (luckily in Wayne County) for anyone with minimal equities such as a current job, likely job or a job interview! However, if a bond reduction is granted it always comes with conditions such as future payment before the defendants next court date.

For defenses, counsel is limited. Some relief can be financial if the FOC audit shows miscalculations or children that may erroneously be cycling. There may be notice issues or service issues if the parties have never been acquainted. Inquire whether your client made direct payments for which he was not credited. There may be a statute of limitations issue (6 years, MCL 767.24 (5). The offense "occurs" only while there is a current obligation. If charges re-occur, see if the same time period is alleged. Double jeopardy may apply.

Most recently the defense of “inability to pay” is being addressed by the Michigan Supreme Court. In a Court of Appeals opinion, *People v. Likine*, 288 Mich App 648 (2010) the Court of Appeals not only held inability to pay not a viable defense but *irrelevant*. *Likine* is pending before the Michigan Supreme Court. The consensus is, however, that it will provide little relief to defendant’s based upon the nature of inquiries raised at oral argument. See *People v. Likine*, pending, MSCt No. 141154.

So, is it hopeless? Not really. A number of available scenarios can benefit your client. Remember, it’s all about the money. Two basic options are available. The charge could be reduced to a Circuit Court misdemeanor or your client could benefit from a delayed sentence and ultimate dismissal after one year.

Once you have identified which agency is prosecuting your client, you will discuss possible resolutions with either an assistant attorney general (AAG) or an assistant Wayne County prosecutor. The AAG’s office has limited authority. Their current policy is to reduce the charge to a misdemeanor, attempt, but only if the defendant can pay the entire arrearage off within the period of probation and a lump sum is paid before sentencing. They will only offer a delayed sentence if a lump sum is offered early, all arrears are paid within one year, and the current amount of support is maintained. In each instance the financial burden is obvious.

The Wayne County prosecutor’s office is a bit more flexible. Once you have talked to your client and are aware of the equities, speak with the prosecutor. They will want to know is your client working, how much can be paid and over what period of time. If your client can offer nothing, remind your client that, without any offer, bargaining is limited.

If you cannot resolve the matter at the pre-exam, see if the prosecutor will agree to set it for a pre-trial. Let the clerk know you are ready (have your waiver of exam form signed by your client) and when the case is called, waive the exam, stand mute for the arraignment on the information and set it for a pre-trial. You will need to address bond and if your client obtains a bond reduction, it will be conditioned on some payment before the next court date. Be sure your client understands. “This extra time should be devoted to *working and saving money* so I can keep you out of jail.” Remember, though, any negotiations that fail at the pre-exam stage will have to be remedied at the pre-trial or the prosecution will be less likely to sympathize with your client.

A good piece of advice for your clients in all FNS and non-support cases is commonly known as the “regular payment” defense. Explain to the defendant that the court is reluctant to have the taxpayers in the community pay to support them in jail or prison. Under those circumstances no-one wins, not the CP, not the defendant, not the children and not the community. If your client is unable to pay the required \$200.00 per month, but does show a regular history of paying \$30.00 or \$40.00 or *something regularly*, it demonstrates to the court that you are trying. Under those circumstances, most judges are much more sympathetic.

FNS SENTENCING

Sentencing issues will most likely arise if your client has to plead guilty as charged. In that event, you will have to convince the judge that your client actually has the capability of contributing *something* toward the welfare of the children. If there is any possibility your client can become gainfully employed, in any capacity, these possibilities should be brought to the court’s attention.

With respect to guidelines, FNS is a 4 year offense, class F. Attempt is a class H crime. Prior record variables are calculated normally based upon your clients history. Remember that offenses more than 10 years old (discharge from custody or jurisdiction) cannot be scored in PRV 1-5. Offense variables can vary depending on the position the prosecution takes. Issues arise with OV 9, number of victims. The people can argue that the children are victims rather than the CP. In that instance, 2-9 children could result in 10 points. You can argue, probably unsuccessfully, that the CP is the only victim. OV 16 may be another issue if the people argue that the arrearage is to be recognized as a “degree of damage.” As many as 10 points may result.

*These procedures are generally followed by Wayne Circuit Court. Variations may occur as the Court is constantly modifying and improving service. Practitioners should check with the Court Administrators office to verify current practice.

