OPINION NO. 87-053

Syllabus:

1. Under R.C. 3113.21(B)(3)(b), the findings and recommendations of an investigation ordered by a court under R.C. 3113.21(B)(3)(a) may be sent through any appropriate means that is reasonably calculated to apprise defendant-obligors of their right to a hearing.

2. A defendant has no right to a jury in a contempt hearing conducted pursuant to R.C. 2705.05.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 10, 1987

I have before me your request for my opinion concerning the impact of certain statutory amendments contained in Am. Sub. H.B. 509, 116th Gen. A. (1986)(effective December 1, 1986). Specifically, you ask:

> (1) Whether findings and recommendations of certain court-ordered investigations must be sent by certified mail under R.C. 3113.21(B)(3)(b), and
> (2) Whether a defendant has a right to trial by jury due to the potential penalties that may be assessed against a defendant who is found to be in contempt of a lawful court order under R.C. 2705.05.

R.C. 3113.21 provides that in certain situations, courts may order employers to withhold an amount from the earnings of employees who have child support orders outstanding against them ("obligors"). R.C. 3113.21(B)(3)(a) provides that the bureau of support or local Title IV-D agency[1] shall conduct an investigation in certain circumstances to determine the obligor's employment status, social security number, the name and business address of the obligor's employer, whether the obligor is in default on his child support payments, the amount of any arrearages, and any other information necessary to enable the court to issue one of the orders described in R.C. 3113.21(D).[2] When this investigation is completed, R.C.

---

[1] Federal guidelines codified in Title IV-D of the Social Security Act (42 U.S.C. Sections 651-669) require states to establish local agencies to promote enforcement of child support orders. In Ohio, "local title IV-D agencies," established pursuant to R.C. 5101.31 and accompanying regulations, cooperate with county bureaus of support, established within the courts of common pleas pursuant to R.C. 2301.35, to promote enforcement of child support orders. See generally 1987 Op. Att'y Gen. No. 87-022.

[2] R.C. 3113.21(D) allows the court to issue orders garnishing an obligor's income from many different sources, including wages, worker's compensation payments, pensions, life insurance payments, and funds held in a financial institution.

3113.21(B)(3)(b) requires certain information to be sent to the obligor:

> Any investigation conducted pursuant to division (B)(3)(a)(i) or (ii) of this section shall be completed within ten days after the court receives the notice of default and any investigation conducted pursuant to division (B)(3)(a)(iii) or (iv) of this section shall be completed within twenty days after the obligor's or obligee's motion is filed with the court or the court orders the bureau or agency to conduct an investigation. When the bureau of support or a local Title IV-D agency completes an investigation under division (B)(3)(a) of this section, the bureau or agency immediately shall file its findings with the court that issued the order, immediately shall send a copy of its findings to the obligee, and immediately shall send all of the following to the obligor:
>
> (i) A copy of its findings;
>
> (ii) A notice that contains the date on which the notice is sent, the amount of any arrearages owed by the obligor as determined by the bureau or agency, the types of orders described in division (D) of this section that will be issued to pay support and any arrearages, the amount that will be withheld or deducted pursuant to those orders, a statement that any order for the withholding or deducting of an amount from personal earnings or other income will apply to all subsequent employers of the obligor, financial institutions in which the obligor has an account, and other persons who pay or distribute income to the obligor, a statement that any order described in division (D) of this section that is issued will not be discontinued solely because the obligor pays any arrearages, and an explanation of the court action that will take place if the obligor contests the issuance of any of the orders;
>
> (iii) A conspicuous notice that if the obligor, pursuant to division (B)(2) of this section, does not request the issuance of orders described in division (D) of this section, he may contest the inclusion of an amount to pay arrearages in any order described in division (D) of this section by filing with the court, within ten days after the date on which the notice was sent to him pursuant to this division, a request that the court hold a hearing pursuant to division (B)(1) of this section to determine whether, because of a mistake of fact, it is not proper to include an amount to pay arrearages in any orders issued pursuant to division (D) of this section;
>
> (iv) A notice that one or more orders described in division (D) of this section will be issued and that, if the obligor does not request a hearing in accordance with division (B)(3)(c) of this section and the bureau or agency determines that the obligor is in default under the order, the orders will require that the amount of money withheld or deducted include an amount to pay arrearages.
>
> Unless the court holds a hearing pursuant to division (B)(1) of this section or the court detects a mistake of fact in the findings, discovers other irregularities in the findings, or determines that the findings are not sufficiently complete to enable the

> court to issue an order, the court immediately upon the filing of the findings of the bureau or the agency shall issue one or more appropriate orders in accordance with division (D) of this section. If a hearing is necessary, the court shall hold a hearing in a manner consistent with division (B)(1) of this section. (Emphasis added.)

I note particularly that division (B)(3)(b)(iii) requires that the obligor receive "[a] conspicuous notice" informing him that under certain circumstances he may request a hearing on the issue of whether the court can order the deduction of an amount to pay arrearages. Thus, one of the purposes of sending the information to the obligor is apparently to inform him of his right to request that hearing. The General Assembly did not specify what method the bureau or agency must use to send this information; R.C. 3113.21(B)(3)(b) simply provides that the bureau or agency "immediately shall send [the information] to the obligor." I note that R.C. 3113.21(B)(1)(b), in contrast, specifically provides: "[i]f the court holds a hearing pursuant to division (B)(1)(a) of this section, the court, within forty-five days after the notice was given to the obligor pursuant to division (B)(3)(b) of this section, shall send to the obligor by ordinary mail a notice of any withholding or deducting order that has been issued...." (Emphasis added.)

The General Assembly has specified the method or methods that may be used to provide notice in many other instances in which notice of various kinds is required to be sent. See e.g., R.C. 101.75 (requiring notice to be sent by certified mail); R.C. 4731.23 (requiring notice by personal service or certified mail); R.C. 6103.05 (requiring notice by publication and by ordinary first-class or certified mail). Because the General Assembly did not specify the method the bureau or agency must use to provide notice under R.C. 3113.21(B)(3)(b), the bureau or agency may choose any reasonable method to send this information. See Jewett v. Valley Railway Co., 34 Ohio St. 601, 608 (1878), in which the Ohio Supreme Court concluded that "[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the legislature intended the party might perform it in a reasonable manner"; see also 1987 Op. Att'y Gen. No. 87-014, 1986 Op. Att'y Gen. No. 86-108. Accordingly, the bureau or agency may choose any appropriate method of sending notice that complies with relevant constitutional provisions and legal standards.

The fifth and fourteenth amendments to the United States Constitution forbid federal and state governments from depriving any person of property without "due process of law." Meaningful notice and an opportunity to be heard are traditional elements of this due process right. See generally Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950). Accordingly, the method of notice chosen should be consistent with standards recognized by the United States Supreme Court and the Ohio Supreme Court. In 1980, the Ohio Supreme Court applied the United States Supreme Court's standard and decided that sending notice by ordinary mail in conjunction with publication could fulfill the requirements for due process of law. In re Foreclosure of Liens for Delinquent Taxes, 62 Ohio St. 2d 333, 405 N.E.2d 1030 (1980). In that case, a taxpayer whose rental property had been sold after foreclosure sued, claiming that the notice provided for in R.C.

5721.18(B) was constitutionally insufficient. The court agreed that the actual notice sent was insufficient under the terms of the statute, but concluded that the notice provisions of the tax lien foreclosure statute did not deny due process. The court applied the United States Supreme Court's test for the constitutionality of a statutory notice provision. That test does not require that the interested party actually receive the notice; rather, it requires that the method for providing the notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 336, 405 N.E.2d at 1032 (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). The Ohio Supreme Court noted that the Mullane Court specifically acknowledged that "notification by 'ordinary mail to the record addresses' would comport with due process requirements." Id. (quoting Mullane, 339 U.S. at 318).

Thus, no specific method of providing notice is required to comply with due process requirements. Rather, the bureau or agency sending the notice must determine what method is likely to "apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In the situation you describe, no particular action is pending; however, the obligors must be timely notified of their opportunity to request a hearing on the issue of arrearages. I believe that the standard enunciated in Mullane and applied in In re Foreclosure of Liens is sufficiently analogous to be applied to the notice provisions of R.C. 3113.21. Accordingly, the bureau of support or title IV-D agency charged with sending the information to the defendant-obligors under R.C. 3113.21(B)(3)(b) may send the information using any method that is "reasonably calculated, under all the circumstances, to apprise" the defendant-obligors of their rights to request a hearing "and afford them an opportunity" to request that hearing.

In your second question you ask whether a defendant-obligor has a right to a jury trial due to the potential penalties that may be assessed against him under R.C. 2705.05 if he is found to be in contempt of a lawful court order. Both the United States and Ohio Constitutions make general provision for jury trials. Article III, §2, of the United States Constitution provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by jury," and the sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...." (Emphasis added.) Furthermore, Article I, §10 of the Ohio Constitution provides in pertinent part: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel...and...to have...a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed...." (Emphasis added.)

In addition, R.C. 2945.17 provides:

> At any trial, in any court, for the violation of any statute of this state, or of any ordinance of any municipal corporation, except in cases in which the penalty involved does not exceed a fine of one hundred dollars, the accused has the right to be tried by a jury. (Emphasis added.)

Despite these seemingly broad grants of a right to a jury trial, I conclude that defendant-obligors are not entitled to a jury trial under R.C. 2705.05. R.C. 2705.05(A), which governs contempt proceedings, provides:

> In all contempt proceedings, the court shall conduct a hearing. At the hearing, the court shall investigate the charge and hear any answer or testimony that the accused makes or offers and shall determine whether the accused is guilty of the contempt charge. If the accused is found guilty, the court may impose any of the following penalties:
>
> (1) For a first offense, a fine of not more than two hundred fifty dollars, a definite term of imprisonment of not more than thirty days in jail, or both;
>
> (2) For a second offense, a fine of not more than five hundred dollars, a definite term of imprisonment of not more than sixty days in jail, or both;
>
> (3) For a third or subsequent offense, a fine of not more than one thousand dollars, a definite term of imprisonment of not more than ninety days in jail, or both. (Emphasis added.)

No right to a jury trial exists under R.C. 2705.05 because a criminal contempt "hearing" differs from a criminal "trial." For example, by definition, R.C. 2945.17 does not apply to a criminal contempt hearing. That statute explicitly provides for juries in trials "for the violation of any statute of this state." (Emphasis added.) A criminal contempt hearing results from the violation of a court order or disobedience to court authority[3] rather than the violation of a statute. Thus, no right to a jury exists under R.C. 2945.17. Furthermore, the plain language of R.C. 2705.05 indicates that the proceedings are solely before the court. R.C. 2705.05(A) specifically states that in all contempt hearings, "the court...shall determine whether the accused is guilty of the contempt charge." (Emphasis added.) In addition, R.C. 2705.03, which enumerates further procedural rights available in contempt hearings, makes no mention of a right to a jury:

---

[3] R.C. 2705.02 provides:

> A person guilty of any of the following acts may be punished as for a contempt:
>
> (A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;
>
> (B) Misbehavior of an officer of the court in the performance of his official duties, or in his official transactions;
>
> (C) A failure to obey a subpoena duly served, or a refusal to be sworn or to answer as a witness, when lawfully required;
>
> (D) The rescue, or attempted rescue, of a person or of property in the custody of an officer by virtue of an order or process of court held by him;
>
> (E) A failure upon the part of a person recognized to appear as a witness in a court to appear in compliance with the terms of his recognizance.

> In cases under [R.C.] 2705.02...a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel. This section does not prevent the court from issuing process to bring the accused into court, or from holding him in custody, pending such proceedings.

I further note that the General Assembly used the word "hearing" rather than "trial" when it revised R.C. 2705.05 as part of Am. Sub. H.B. 509 in 1986. R.C. 1.42 provides that "[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." Black's Law Dictionary defines a "hearing" as a

> [p]roceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and parties proceeded against have right to be heard, and is much the same as a trial and may terminate in [a] final order. It is frequently used in a broader and more popular significance to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury at any stage of the proceedings subsequent to its inception, and to hearings before administrative agencies as conducted by a hearing examiner or Administrative Law Judge.

Black's Law Dictionary 649 (5th ed. 1979)(emphasis added).

In addition, R.C. 1.49(D) provides that courts may consider "former statutory provisions" when construing ambiguous statutes. The former version of R.C. 2705.05 provided that "[u]pon the day fixed for the trial in a contempt proceeding...." R.C. 2705.05 (amended 1986)(emphasis added). The current version of R.C. 2705.05, on the other hand, provides that "[i]n all contempt proceedings, the court shall conduct a hearing." (Emphasis added.) The Ohio Supreme Court has also noted that "[t]he presumption is that every amendment of a statute is made to effect some purpose." Dennison v. Dennison, 165 Ohio St. 146, 149, 134 N.E.2d 574, 576 (1956)(citation omitted). Accordingly, I conclude that the General Assembly purposely changed the word "trial" to "hearing" in R.C. 2705.05, and that by that change it meant to permit a less formal proceeding than a trial.

The language of R.C. 2705.05 indicates that a court, rather than a jury, is the finder of fact in a contempt hearing, and I find nothing to indicate that a defendant has the right to a jury in this type of proceeding. On the contrary, even before the revision of R.C. 2705.05, courts had traditionally heard contempt actions without a jury unless the seriousness of the possible punishment made the contempt a "serious offense." See United States v. Barnett, 376 U.S. 681, 692 (1964), Bloom v. Illinois, 391 U.S. 194, 198 (1968). The maximum ninety days' punishment permitted by R.C. 2705.05 does not appear to make criminal contempt in Ohio a "serious offense." The United States Supreme Court has held that a defendant sentenced to six months' imprisonment for criminal contempt of an order of the United States Court of Appeals was properly convicted without a

jury. Cheff v. Schnackenberg, 384 U.S. 373 (1966). The Ohio Supreme Court cited Cheff v. Schnackenberg when it held that the penalty provided for in the earlier version of R.C. 2705.05 (ten days) did not create a right to a jury trial. State v. Weiner, 37 Ohio St. 2d 11, 13, 305 N.E.2d 794, 796 (1974).

The language of R.C. 2705.05 does not provide for a jury in a criminal contempt hearing. I find nothing outside of the statute that imposes such a requirement. I therefore conclude that a jury need not be provided for criminal contempt hearings under 2705.05.

Accordingly, it is my opinion, and you are advised that:

1. Under R.C. 3113.21(B)(3)(b), the findings and recommendations of an investigation ordered by a court under R.C. 3113.21(B)(3)(a) may be sent through any appropriate means that is reasonably calculated to apprise defendant-obligors of their right to a hearing.

2. A defendant has no right to a jury in a contempt hearing conducted pursuant to R.C. 2705.05.