

STATE OF WISCONSIN
IN THE SUPREME COURT

IN RE THE MARRIAGE OF:

TONI L. (DUMLER) ROTTSCHIEIT,

PETITIONER-RESPONDENT,

STATE OF WISCONSIN,

RESPONDENT

v.

Appeal No. 01-2213

Circuit Court Case No. 1090 FA 124

TERRY L. DUMLER,

RESPONDENT-APPELLANT-PETITIONER,

NON-PARTY BRIEF OF THE CENTER ON FATHERS, FAMILIES, AND
PUBLIC POLICY JOINED BY THE WISCONSIN COUNCIL ON CHILDREN
AND FAMILIES

AN APPEAL FROM CLARK COUNTY CIRCUIT COURT, THE HONORABLE
JON M. COUNSELL, PRESIDING

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I. INTEREST OF AMICI

The Center on Fathers, Families, and Public Policy (CFFPP) is interested in this issue because it is concerned about low-income noncustodial parents in general and about the ability of these parents to support their children in particular. CFFPP has seen the negative effects that child support orders that are beyond a noncustodial parent's ability to pay have on the entire family.

The Wisconsin Council on Children and Families is a statewide, non-profit child advocacy organization founded in 1881 as the Wisconsin Conference on Corrections and Charities. It has had five name changes through its years of continuous operation but the commitment to improving the well-being of children and their families, especially those who are most vulnerable, has remained constant. The Council works to achieve its goal through technical assistance, research, education and governmental relations in the areas of juvenile justice, health, education, child care, child welfare, and economic security.

II. SUMMARY OF ARGUMENT

When an incarcerated parent has no assets, setting child support orders at pre-incarceration levels will not tangibly support the child. All this will do is create arrears that cannot be collected. This has negative consequences for the noncustodial parent and the State of Wisconsin. Ultimately, these child support debts are not in the best interest of the child. Therefore, when an incarcerated parent has no assets, the district court should grant a modification of his child support to reflect what he has the ability to earn.¹

III. ARGUMENT

Amici supports the legal arguments made in the principal brief on behalf of Terry Dumler. Amici writes separately to address the public policy considerations of Mr. Dumler's position. It is better public policy to base child support orders on prison wages and the assets of the incarcerated parent. A court should order incarcerated parents with income-producing assets or assets that can be liquidated to pay based on what the assets may produce in

¹This brief will refer to noncustodial parents as fathers. The author acknowledges that many custodial parents are fathers. Yet "[o]f all custodial parents, 85 percent were mothers and 15 percent were fathers." TIMOTHY GRAIL, U.S. CENSUS BUREAU, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT, 1 (2002).

child support. These assets can be used to tangibly support their children and will not result in uncollectable arrears.

Incarcerated parents without assets should have their child support orders based on their prison wages. For these parents, orders based on their pre-incarceration earning capacity will not tangibly benefit their children. Courts may order such payments but the children still will not receive the money. The only thing this will do is cause arrears to accumulate.

A. Child support orders set at pre-incarceration levels for incarcerated parents without assets negatively impact parents who already face significant barriers to supporting themselves and their children

The first direct negative consequence of accumulating arrears is the impact that this will have on fathers who already face significant barriers to financially supporting their children. Low-income fathers face employment barriers and economic hardship including limited education, joblessness, and health worries. ELAINE SORENSEN, URBAN INST., HELPING POOR NONRESIDENT DADS DO MORE 1(2002). As noted by the Idaho Court of Appeals in a similar case, "Imposing upon the incarcerated parent a continuing support obligation, beyond his ability to pay, does not help the child. It simply adds to an accumulating burden which

falls upon the parent at a time when he is least able to bear it - -immediately upon release from prison." *Nab v. Nab*, 757 P.2d 1231, 1238 (Idaho Ct. App. 1988).

Some would argue that being incarcerated is the noncustodial parent's fault and he can simply pay this child support upon release from prison. "This preoccupation with the absent father's fault and irresponsibility, however, displaces awareness of the limited resources of many absent fathers and of the administrative costs of 'making them pay.'" Roger J.R. Levesque, *The Role of Unwed Fathers in Welfare Law: Failing Legislative Initiatives and Surrendering Judicial Responsibility*, 12 LAW & INEQ. J. 93, 105 (1993). "Economic opportunities for these low-income parents are limited. For many men, getting a 'good' job [making more than \$10 per hour] was quite difficult, given their previous convictions." DAVID J. PATE, JR., UNIVERSITY OF WIS. -MADISON, *An Ethnographic Inquiry into the Life Experiences of African American Fathers with Children on W-2*, in 2 W-2 CHILD SUPPORT DEMONSTRATION EVALUATION, REPORT ON NONEXPERIMENTAL ANALYSIS, 29, 80 (Mar. 2002). Even if they obtain a job it is difficult to maintain employment given issues created by their poverty and debt. *Id.*

Preoccupation with the fault of incarcerated parents also fails to realistically look at the situation of these

parents. People do not engage in criminal activity to reduce their income. *Johnson v. O'Neill*, 461 N.W.2d 507,508 (Minn. Ct. App. 1990). Much less do they engage in criminal activity to reduce their income and thereby reduce their child support orders. Nor for that matter while these parents are incarcerated do they have the ability to earn even minimum wage no matter what the court orders them to pay in child support. See *State v. Porter*, 610 N.W.2d 23,28 (Neb. 2000).

B. Child support orders set at pre-incarceration levels for incarcerated parents without assets negatively impact Wisconsin's ability to collect its share of federal incentive funding

The second negative result of child support arrears accumulating during incarceration is the fiscal consequence for Wisconsin. The federal government awards money to each state based on each state's child support enforcement agencies' performance in five areas. See 42 USC § 658a (2002). These five areas are the number of paternities established, number of support orders set, payment level on current support orders, payment level on arrears, and the cost-effectiveness of each state's child support system. *Id.* at § 658a(b) (4). In fiscal year 2002, the federal government awarded \$450 million to the states in incentive payments. *Id.* at § 658a(b) (2) (iii). Since incarcerated

parents without assets are unable to pay support, their child support debt will negatively impact Wisconsin's performance. This will reduce Wisconsin's ability to collect the federal incentive payments.

C. Child support orders set at pre-incarceration levels are not in the best interest of the child

Ultimately, setting child support orders at pre-incarceration levels distorts family law's focus on serving the best interest of the child. The likelihood of a noncustodial parent paying child support is directly related to the parent's economic situation and employment. Therefore, it is not in the best interest of the child to impose an order that a parent cannot pay and that may prevent a released parent from paying any child support at all.

There are many reasons an unrealistic child support order discourages or makes it impossible for released parents to pay any support. First, it is already difficult for formerly incarcerated parents to obtain employment. HARRY J. HOLZER ET AL., UNIV. OF CAL., BERKELEY, WILL EMPLOYERS HIRE EX-OFFENDERS? EMPLOYER PREFERENCES, BACKGROUND CHECKS, AND THEIR DETERMINANTS 1 (2001). "From the viewpoint of employers, a criminal history record may signal an untrustworthy or otherwise problematic employee.

Employers may avoid such workers due to a perceived increased propensity to break rules, steal, or harm customers." *Id.* Even if a released parent secures employment, significant barriers remain to maintaining employment. Pate, *supra*, at 80.

Second, the difficulty of finding or maintaining employment will only be exacerbated by unrealistically high child support debt. Child support orders for fathers that are based on their pre-incarceration earning capacity substantially increase the depth of poverty among fathers who are already poor. Daniel R. Meyer, *The Effect of Child Support on the Economic Status of Nonresident Fathers*, 67, 89 in *FATHERS UNDER FIRE* (Irwin Garfinkel et al. eds. Russell Sage Foundation 1998). This debt and poverty may discourage fathers from seeking any employment because they feel their situation is so dire that there is no point in working. Pate, *supra*, at 70.

These orders often make it more difficult to find employment in other ways. For example, Wisconsin statutes technically provide protections against an incarcerated parent's driver's license or other professional license being suspended for non-payment of child support. Nonetheless, the lack of legal representation for low-income litigants makes it

unlikely that the statutory protections will prevent these fathers from losing their driver's license. See Pate, *supra*, at 80. Many poor noncustodial parents need their driver's license to maintain employment.

The likelihood of a noncustodial parent paying child support is directly related to the parent's economic situation and employment. The strongest predictor of paying child support is the number of weeks a noncustodial parent works. MARK D. TURNER AND ELAINE J. SORENSEN, URBAN INST., FACTORS INFLUENCING NONRESIDENT FATHERS' CHILD SUPPORT PAYMENTS 13(1998). Instead of making noncustodial parents work more, for many these large debts are likely to push them to not work at all or to work in the underground economy. See *Bendixen v. Bendixen*, 962 P.2d 170, 172 n.14 (Alaska 1998). This will make it impossible for the government to garnish wages and thereby collect child support.

The effect of unrealistic child support orders is shown by studies analyzing payment of child support. Studies reveal that child support orders that are not based on the economic reality of parents discourage the payment of any child support. As the Office of Inspector General pointed out:

Where imputed income was used to calculate the amount of the child support obligation owed in cases established in 1996, almost half of the cases generated no payments toward the financial obligation over a 32 month period. In contrast, where cases were not based on imputed income, only 11 percent of cases received no payments during this time period.

OFFICE OF INSPECTOR GEN., U.S. DEP'T OF HEALTH &
HUMAN SERVS., THE ESTABLISHMENT OF CHILD SUPPORT ORDERS
FOR LOW INCOME NON-CUSTODIAL PARENTS 16 (2000). Similarly,
basing a child support order on the incarcerated parent's
pre-incarceration earning capacity will likely discourage
payment of any support.

Modification of Mr. Dumler's child support will
avoid the "accumulation of unrealistic debt, thereby
encouraging productive reintegration into society and
resumption of parental duties upon release from
prison." *Bendixen, supra*, at 172 n14.

* * * *

This Court should reverse the trial court and
instruct it to grant Mr. Dumler's child support
modification. This case presents a situation where
temporarily ordering less child support will likely
result in the child ultimately receiving more support.

CONCLUSION

For the foregoing reasons, as well as those stated in the principal brief on behalf of Mr. Dumler, the Court should reverse the decision of the trial court denying Terry Dumler's motion for modification of his child support obligations and should remand to the trial court with instructions on the standards to be applied in the unique situation faced by incarcerated parents.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 13 pages.

Scott Sussman