

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT
Division of Workforce Solutions
Bureau of Child Support

**CHILD SUPPORT
BULLETIN**

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To: Child Support Directors
Child Support Supervisors or Lead Workers
Child Support Attorneys

From: Director
Bureau of Child Support

Subject: Setting and Modifying Child Support for Incarcerated NCPs

Purpose

The purpose of this Child Support Bulletin is to relate policy for setting and modifying child support orders for incarcerated non-custodial parents.

Background

Wisconsin has several published decisions regarding setting and modifying child support orders for incarcerated individuals. The cases of note are:

Parker v. Parker, 152 Wis. 2d 1, 447 N.W. 2d 64 (Ct. App. 1989)

In this 1989 decision, the Wisconsin Court of Appeals affirmed the trial court's refusal to suspend Parker's child support order for the period of his incarceration for theft. The court found that Parker should not be relieved of his child support obligation because he willingly committed the crime which resulted in his imprisonment. The court also noted that Parker had been previously held in contempt of court for nonpayment of child support. The court pointed out that the children's needs were not diminished, the arrearage would continue to accrue during the incarceration, and upon release Parker may be fairly required to pay the arrears.

The Court of Appeals held that child support need not *automatically* terminate during incarceration, and that in exercising its discretion about whether or not to terminate the order, the court may consider the intentional nature of the crime, the likelihood of future income, and other relevant evidence.

Voecks v. Voecks, 171 Wis. 2nd 184, 491 N.W.2d 107 (Ct. App. 1992)

In this 1992 decision, the Court of Appeals affirmed the trial court's order reducing the amount of support from \$55 per week to \$25 per month based on prison income, following Voecks' incarceration for conviction for cocaine delivery. The court noted that *Parker* does not preclude the modification of a child support obligation resulting from imprisonment.

The court concluded that Voecks' incarceration did not constitute "shirking", as there was no evidence that he engaged in criminal conduct with the *intent* to reduce income and avoid paying child support. In the decision the court states, "we cannot conclude . . . that the criminal conduct must be treated as deliberate conduct designed to reduce income to avoid paying child support," and distinguished the case from *Parker*, who had been held in contempt for nonpayment for child support prior to his incarceration.

The Court of Appeals held that incarceration is a change in circumstances that gives a trial court competence to review the amount of a child support order for an incarcerated payer. The court held that the lower court properly exercised its discretion in determining that Voecks' reduction in child support was appropriate when it considered the total economic circumstances of the family and the fact that the child would reach majority before Voecks' release from prison.

Modrow v. Modrow, 247 Wis. 2d 889, 634 N.W.2d 852 (Ct. App. 2001)

In this 2001 decision, the Court of Appeals considered the question of setting a new child support order for an incarcerated obligor. Modrow was incarcerated for his fifth offense for operating a motor vehicle while intoxicated. In the final divorce decree, the trial court imputed income based on Modrow's pre-incarceration earning capacity. The divorce court delayed equalizing the assets of the marital residence until after Modrow's release, and then offset this property division by the amount of any unpaid child support that would accrue during his incarceration. The court noted that the family would be struggling financially during Modrow's incarceration, and that the delay in equalization of the property value would permit the children to remain in the family home. The court noted that upon release from prison if Modrow was unsuccessful in finding comparable employment, he could petition the court for a modification of the child support order.

The Court of Appeals concluded that incarceration is a valid factor for the lower court to consider in arriving at initial determination of child support, but upheld the trial court's child support award based on the former payer's earning capacity. The court further concluded that the trial court properly exercised its discretion by providing for the offset of the property division by the amount of the arrearage that would accrue during the period of incarceration. The court held that in setting the child support order the trial court properly considered the intentional nature of the crime, its potential effect on the payer's future income, and the needs of the children during the payer's incarceration, and the assets of the payer.

Rottscheit v. Dumler, 2003 WI 62, 262 Wis.2d 292, 644 N.W.2d 525

This is the first Supreme Court ruling related to the impact of incarceration on a child support obligation. In this 2003 decision (*Dumler*), the Supreme Court of Wisconsin affirmed an unpublished Court of Appeals decision affirming the circuit court's denial of Dumler's motion for suspension of his child support order during his incarceration for operating a vehicle while intoxicated (OWI) and cocaine possession.

The Supreme Court decision discusses and agrees with the decisions in the other relevant Wisconsin Court of Appeals cases including *Parker*, *Modrow*, and *Voecks*. The Supreme court reiterated that incarceration is an appropriate factor for courts to consider in reviewing a motion for modification; the fact of incarceration alone is insufficient for a court to modify, or refuse to modify, a child support order. The Supreme Court rejected the use of shirking analysis for incarcerated payers unless the incarceration arises from non-support. Various decisions from court cases in other states are acknowledged, and the court noted that parents should not automatically be rewarded with a payment reduction as a result of incarceration.

In this decision, the Supreme Court stated its standard for review is "not whether we agree with the circuit court's ruling, but rather, whether the circuit court acted within the realm of its discretion." This decision affirms the lower court's heavy reliance on the "nature of the offense" and cited "the obligor's course of conduct over a period of time" as a basis for denying the reduction in child support. The court notes that Dumler had been involved in 11 criminal court cases since 1986, and had been incarcerated on at least three previous occasions for OWI. The Supreme Court concluded that this "pattern of offenses shows disregard for the welfare of his children and a lack of responsibility."

The majority decision of the Wisconsin Supreme Court holds that the lower court had properly exercised its discretion, and that incarceration is a change in circumstances to give a court competence to review a child support order. However, incarceration is only one factor to consider. Other factors that a court should examine include: the length of incarceration; the nature of the offense and the relevant course of conduct leading to incarceration; the payer's assets, the payer's employability and the likelihood of future income upon release; the possibility of work release during incarceration; the amount of arrearages that will accumulate during incarceration; the needs of the children; and all other relevant circumstances.

In a dissenting opinion, Chief Justice Shirley Abrahamson (joined by Justice Ann Walsh Bradley) does not agree that a circuit court may refuse to modify an incarcerated parent's child support order based on the nature of the underlying offense that led to incarceration because this improperly adopts a shirking analysis for incarceration. The opinion notes that permitting these factors to be considered in all cases will tip the balance against modifying child support for incarcerated parents. Abrahamson cites the large arrearage that will accrue and notes that child support orders that are beyond a non-custodial parent's ability to pay are not in the best interests of the child. Chief Justice Abrahamson would reverse the decision of the court of appeals and remand the case to the circuit court to apply the proper standards to determine whether Dumler's support order should be reduced.

Discussion and Analysis

In determining whether to move the court for a modification, child support agencies consider two elements. First, whether there has been a substantial change in circumstances to permit a revision under Wis. Stat. 767.32; and, second, whether the factors of the case might result in a change in the amount of child support owed by the obligor.

Based upon the Voecks and Dumler decisions, incarceration is a substantial change in circumstances that provides the authority to review for modification an obligor's child support order.

The decisions also lay out several factors to consider when making a determination whether to modify an incarcerated obligor's child support order, including:

The length of incarceration; the intentional nature of the offense; the course of conduct leading to incarceration; the payer's assets and possibility of work release during incarceration; the payer's employability and earning capacity; the amount of arrearages that will accumulate during incarceration; the needs of the children, including the total economic circumstances of the family; whether the children will reach the age of majority before release; and the payer's employability and likelihood of future income upon release.

Note that in each of the cases appealed, the higher court upheld the lower court's decision to modify or to refuse to modify the child support order for an incarcerated obligor. So long as the trial court examines the evidence and considers the relevant factors in the case, applies the appropriate legal standard, and reaches a reasoned conclusion, whatever decision is reached, it should be upheld.

These cases are also instructive in the following respects:

Modrow: Permits the family court to enter a new order for child support for an incarcerated individual.

Voecks: Permits the family court to grant a reduction of child support during a period of incarceration.

Parker, Modrow and Dumler: Permits the family court to deny a reduction or termination of child support during a period of incarceration.

Voecks and Dumler: Rejects the supposition that the incarceration of an obligor should be considered shirking, except where the incarceration arises from non-support.

Parker and Dumler: Supports the family courts' decision to deny a reduction in a child support order by pointing to prior findings of contempt for non-payment of support, or by determining that the obligor's criminal activity is a "course of conduct over a period of time" that demonstrates a "disregard for the welfare of (the) children."

Modrow: Supports the family court's decision to impute income for an incarcerated obligor based on past earning capacity.

Voecks: Supports the family court's decision to establish income for an incarcerated obligor based on \$65 per month prison income.

Voecks: Permits the court to consider whether the child will have reached the age of majority before the obligor's release from prison in reducing the child support order.

*Voecks: Cites *Abitz v. Abitz*, 155 Wis. 2d 161, 174, 455 N.W. 2d 609, 615 (1990), in permitting the court to consider the total economic circumstances of the incarcerated obligor's family, including the stepfather's income.*

Modrow: Permits a divorce court to defer the equalization of property and consider the arrearages expected to accrue during a period of incarceration in the final property settlement.

Modrow and Dumler: Considers that the obligor may petition the court for a reduction in child support following release if the obligor's earning capacity is reduced due to incarceration.

Summary and Required Action

Child support agencies may rely on the higher courts' determinations that incarceration is a substantial change of circumstances sufficient to pursue a modification of an obligor's child support order by stipulation or motion.

The CSA should not seek a modification in cases where the NCP is incarcerated for nonpayment of child support.

In negotiating a stipulation for a suspension or reduction of child support, the CSA must inform the CP that reductions or suspensions of support are not appropriate in all cases involving incarcerated obligors, and that the CP does not have to agree to a reduction or suspension of support. Further, BCS recommends that the stipulation include the relevant factors that apply to the case.