



Greater Upstate Law Project, Inc.

119 Washington Avenue Albany, New York 12210 (518) 462-6831 Fax (518) 462-6687

Child Support Arrears

It is important that those released from prison make a transition to the outside world in a way that does not encourage recidivism. One significant barrier that formerly incarcerated parents face in their transition to the world outside of prison is the accrual of child support arrears while in prison. The law in New York currently prohibits those in prison from obtaining modifications of their support orders while they are in prison, creating a situation that assures that upon release, these parents will not only be overwhelmed with penalties for the arrears that have accrued, but these very penalties will make it more difficult for them to seek and obtain employment and to support their children.

New York courts have taken the position that support orders may not be modified downward while a person is incarcerated, because the incarcerated parent's "current financial hardship is solely the result of his wrongful conduct." Knights v. Knights, 71 N.Y.2d 865 (1988); Furman v. Barnes, 293 A.D. 2d 781 (Third Dep't 2002); Ontario County o/b/o Powers v. Jackson, 212 A.D. 2d 1056 (Fourth Dep't 1995). In Onondaga County Department of Social Services o/b/o Gloria T. v. Timothy S., 294 A.D. 2d. 27 (2002), the Fourth Department, relying on the Knights case, specifically held that Family Court Act 413(1)(g), which limits arrears to \$500 when a person's income is below the poverty level, does not apply to someone in prison because the incarcerated parent can not be allowed to "benefit from the conduct that led to his or her incarceration." This policy means that upon release, most of these parents are faced with overwhelming arrears, which have accrued during a time that they have no ability to make payments. Should the formerly incarcerated parent find a job, up to 65% of his income may be subject to income execution to recover child support arrears. CPLR § 5242(c)(2)(i),(ii). Additionally, arrears of more than four months will likely result in the loss of the parent's driver's license and any occupational licenses. FCA § § 458-a, 458-b, 458-c. Finally, should the court reduce the amount to a money judgment, any bank accounts or other assets, it will be subject to seizure in their entirety, making re-entry even more difficult. FCA § § 454, 460; CPLR § § 5201, 5202, 5203 et. seq.

New York's rule prohibiting modification is called the "no justification" rule, and is shared by Kansas, Indiana, North Dakota, Nebraska, New Hampshire and Louisiana. See *analysis of state approaches to this issue in Halliwell v. Halliwell*, 326 N.J.Super. 442, 454 - 455; 741 A.2d 638, 644-645 (N.J.Super.A.D. 1999). Such policies are, in fact, counterproductive. They create substantial barriers to successful re-entry and increase the pressures leading to recidivism. Moreover, they undermine the actual goal of promoting the payment of child support by impeding the acquisition of lawful employment and creating perverse incentives to enter the black market economy.

Other states have taken a more reasoned approach. Some examine the intent of the obligor in committing the act that resulted in incarceration (Oregon), some consider whether the obligor has assets that can be used to satisfy the obligation (Ohio, Idaho), some determine what is in the best interest of the child (Pennsylvania) and some combine these factors, making a case by case determination (New Mexico, Missouri, Colorado). Id.

In cases where the support obligor has been sentenced to a lengthy period of incarceration and has no assets, New Jersey transfers modification petitions to an inactive calendar pending the obligor's release. Upon release, the Court makes a determination of appropriate current support and arrears, based upon ability to pay. Id. at 326 N.J.Super. 442, 457, 460; 741 A.2d 638, 647, 648. Such an approach is currently impossible in New York, where the Family Court Act prohibits the retroactive reduction or annulment of arrears. Family Court Act §451.

We recommend that New York amend the Family Court Act to allow an approach similar to New Jersey's so that those who are released from prison have orders that are realistic and so that the non-custodial parent is not overwhelmed with debt and forced into the underground economy. Significant steps can be taken in the interim by state agencies to mitigate the effect of these policies. Because many children of incarcerated parents receive public assistance, a substantial percentage of the child support arrears of people returning from jail or prison is owed to the Office of Temporary and Disability Assistance. While courts cannot currently waive child support arrears, OTDA has the discretion to forgive arrears owed to it. OTDA should craft more equitable policies that forgive arrears accrued during incarceration.

Susan C. Antos
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