

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Docket No. 33312

IN THE CIRCUIT COURT OF CABELL COUNTY, WEST VIRGINIA

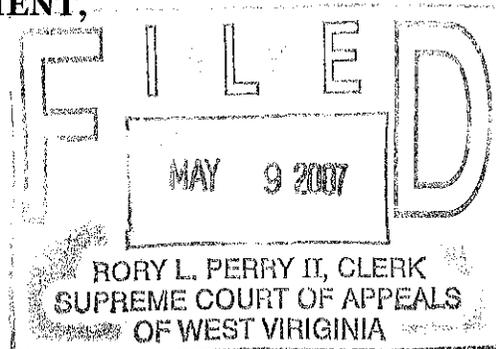
**ANGELA ADKINS (now CLAY),
Plaintiff/Appellee,**

v.

Civil Action No. 04-D-612

**CHRISTOPHER ADKINS,
Defendant/Appellant.**

**WV DEPARTMENT OF HEALTH AND HUMAN RESOURCES,
BUREAU FOR CHILD SUPPORT ENFORCEMENT,
Appellee.**



**RESPONSE BRIEF OF APPELLEE,
BUREAU FOR CHILD SUPPORT ENFORCEMENT**

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Statement of Facts and Proceedings Below

The Bureau for Child Support Enforcement agrees with the statement of facts as presented by Appellee, Angela Clay. The facts of this case are not disputed. Therefore, the Bureau for Child Support Enforcement will incorporate by reference the Statement of the Case presented by Appellee, Angela Clay.

Standard of Review

The Supreme Court of Appeals of West Virginia reviews the Circuit Court's final order and ultimate disposition under an abuse of discretion standard. Challenges to findings of fact are reviewed under a clearly erroneous standard. Conclusions of law are reviewed *de novo*. Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996); Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996). *See also* Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995).

Statement Regarding Alleged Errors

The Bureau for Child Support Enforcement assigns no specific error to the Order entered September 27, 2006, by the Family Court of Cabell County. However, the Bureau does advocate for this Court to address the issues presented by the Appellant due to the statewide inconsistency of Family Court rulings.

Appendix A is a compilation of BCSE attorneys' responses to the question: "What does the family court judge order in cases where the obligated parent is either asking to modify a support obligation because of incarceration or is already incarcerated prior to any award of child support?"

Points and Authorities

W. Va. Code §25-1-3c (2006)

W. Va. Code § 48-1-204 (2006)

W. Va. Code § 48-11-302 (2005)

Burgess v. Potterfield, 469 S.E.2d 114 (W. Va. 1996)

Burnside v. Burnside, 460 S.E.2d 264 (W. Va. 1995)

Shrader v. Shrader, 474 S.E.2d 579 (W. Va. 1996)

Yerkes v. Yerkes, 824 A.2d 1169 (Pa. 2003)

ARGUMENT REGARDING APPELLANT'S ASSIGNMENTS OF ERROR

- I. **The West Virginia Legislature has enacted a statute which specifically relates to an individual's child support obligation and his or her incarceration.**

Christopher Adkins asserts that, based upon his incarceration, his child support obligation should be modified to a lower amount. The Family Court found that Christopher Adkins would be attributed his pre-incarceration income and ruled that modification was not warranted based upon his voluntary unemployment due to his commission of a crime.

Some courts view the elimination or reduction of the support obligation while an individual is incarcerated as a reward to the individual for his or her wrongful actions. Child support is a debt, like a mortgage payment, rent, car payment, or any other type of debt. Debts do not go away when an individual is incarcerated. Instead, debts accrue until the individual takes action to terminate the debt.

Recently, the Legislature recognized the continued obligation of an incarcerated obligor, like Christopher Adkins, to support his children. On April 15, 2005, House Bill No. 2471 was passed. This bill was codified at West Virginia Code § 25-1-3c and became effective July 14, 2005. The purpose of the bill is to make the incarcerated obligors continue to pay their support by requiring the Division of Corrections to assist the inmates in developing a financial plan for meeting their obligations. The financial plan of the inmate will be used to assess the inmate's level of acceptance and responsibility. Wardens will also deduct payments for support from the earnings of the inmate.

The bill states, "A person owing a duty of child support who chooses to engage in behaviors that result in the person becoming incarcerated should not be able to avoid child support obligations; and...should be encouraged to meet his or her legitimate court-ordered financial obligations." The Legislature stated that nothing in the bill limits the BCSE from collection actions against inmate's money, assets, or property.

In this statute, the Legislature recognizes that an obligation continues to be owed and the obligor is expected to support his child. However, the Legislature did not address the amount of support obligation owed by an inmate.

Although it is impossible for the BCSE to guarantee that each incarcerated obligor receives information, the BCSE has cooperated with the Regional Jail Authority and the West Virginia Department of Corrections to make incarcerated obligors aware of the BCSE's services. In 2006, the BCSE initiated an outreach program in the West Virginia prison system. We also coordinate with the work release programs. Our goal is to inform the inmates of their rights and responsibilities relating to support. Pamphlets, videos, and live presentations are available during intake at all State institutions.

Although West Virginia has not addressed the issues presented by Christopher Adkins, most other states have evaluated the issue. The Supreme Court of Pennsylvania has undertaken both the most recent and most comprehensive study of the question in *Yerkes v. Yerkes*, 824 A.2d 1169 (Pa. 2003).¹ 824 A.2d at 1171. The *Yerkes* Court discovered "...a wealth of case law that can be loosely categorized into three groups, each of which represents a

¹In *Yerkes*, an incarcerated father petitioned to reduce his existing child support obligation on grounds that his prison income of \$0.41/hour made it impossible for him to satisfy a support obligation that had been based on a previous salary of over two hundred forty dollars (\$240.00) per week. 824 A.2d at 1170. The father argued that his incarceration and attendant lower income was a "material change in circumstances" sufficient to justify a reduction in his support obligation under the rules governing child support in Pennsylvania.

different approach to assessing the effect of incarceration on support obligations.” 824 A.2d at 1171-72.

The first approach, dubbed the “**no justification**” rule, generally deems criminal incarceration as insufficient to justify elimination or reduction of an open obligation to pay child support. (Cites omitted). The second approach, known as the “**complete justification**” rule, generally deems incarceration for criminal conduct as sufficient to justify elimination or reduction of an existing child support obligation. (Cites omitted). Finally, the third approach is the “**one factor**” rule, which generally requires the trial court to simply consider the fact of criminal incarceration along with other factors in determining whether to eliminate or reduce an open obligation to pay child support. (Cites omitted).

824 A.2d at 1172 (emphasis added); *see also, Halliwell v. Halliwell, supra; In re Thurmond*, 962 P. 2d 1064 (Kan. 1998). The Appellee, Angela Clay, has given a sufficient overview of the three approaches which need not be repeated by the BCSE. The BCSE has compiled a chart of states’ approaches with citations to relevant case or statutory law. *See Appendix B.*

II. Uncollectible support obligations of incarcerated obligors have a negative effect on the State of West Virginia and its funding for the Bureau for Child Support Enforcement.

The Appellee, Angela Clay, recognizes in her brief that Federal funds to State child support agencies are based in part on the State’s collection efficiency. The BCSE appreciates that, while the support obligation of an incarcerated individual has a financial impact on the BCSE’s funding, the more important financial consequences are thrust upon the children of the State. The statements below are made only to further inform the Court of the effects of its decision in this matter.

By maintaining the support obligation at an uncollectible rate during incarceration, the BCSE's performance score decreases on two measures - current support collected and arrears collected. In turn, it lowers the BCSE's collection ratio of money spent for the program versus support collected, thereby reducing the federal funds available to the BCSE based on the Federal performance measures. Accordingly, this limits the resources available to the BCSE to collect support. Additionally, due to the Deficit Reduction Act of 2006, the funding to the BCSE's program is being further negatively impacted.

Collection issues often continue following the obligor's release from incarceration. The conviction and sentence will probably have an adverse effect on the obligor's ability to gain employment. In many instances, the obligor will be unable to return to the income level attained prior to incarceration. Then, collection of the current support and the arrears remain a challenge.

Conclusion

Currently, two additional cases are pending before this Court, requesting determination of very similar issues regarding incarcerated obligors. In the case of Jamie Lynn Knapp v. Charles Patrick Knapp, Greenbrier County Civil Action Number 06-D-93, Circuit Court Judge Joliffe entered an Order on February 16, 2007, petitioning this Court to answer the certified questions therein. In the case of Terry Lynn Garrett v. Martin Dale Fitzpatrick, Cabell County Civil Action Number 00-D-0411, the obligor, Martin Dale Fitzpatrick, filed a Petition for Appeal to this Court on February 5, 2007.

The Bureau for Child Support Enforcement requests that the Court address the specific related issues in order to better guide the Family Courts when deciding similar cases:

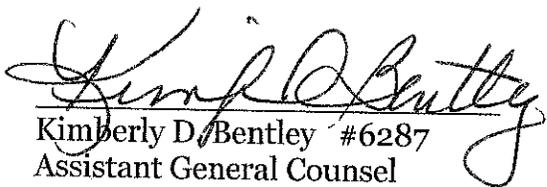
1. Should the Family Court consider whether the obligor is

incarcerated for the crime of failure to support a child?

2. Is the Family Court granted discretion regarding the establishment of a support obligation for an incarcerated obligor?
3. Is the Family Court granted discretion regarding the modification of the existing support obligation for an incarcerated obligor?
4. If the Family Court has discretion, what factors should be considered in its decision (length of incarceration, etc.)?
5. If the Family Court does not have discretion, what standard rule should the Family Court apply? (attribute income at previous earning capacity, attribute income at minimum wage, use actual income, set support at \$50.00 per month minimum, or set support at \$0 in all cases)
6. If a reduced amount is ordered during incarceration, should the Family Court address the support obligation to be owed by the obligor upon release from incarceration?

WHEREFORE, the Bureau for Child Support Enforcement prays that the Court address the support issues presented by incarcerated obligors, such as the Appellant, Christopher Adkins.

**Bureau for Child Support Enforcement,
By Counsel**


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County: FCJ	Establishment	Modification	Additional Info
Kanawha: Smallridge Kelly Snyder Montgomery	zero \$25 per month zero zero	zero \$25 per month zero zero	
Cabell: Keller Anderson	Attribute minimum wage. \$50 per month	deny \$50 per month	
Wayne: Lewis	\$50 per month	\$50 per month	
Putnam: Watkins	*	*	*varies - \$50 per month or attribute min wage
Barbour, Taylor, & Preston: Longo	Zero	Zero	Will also set amount to begin upon release
Harrison: Crislip	Attribute minimum wage	deny	
Wood, Wirt, Pleasants, & Ritchie: Fantasia Tallman	Zero Zero	Zero zero	Fantasia requires obligor to notify upon release; if not, support will be modified retroactive to release
Boone & Lincoln: Jarrell	<\$50 per month or zero	<\$50 per month or zero	
Logan: Codispoti	Zero	Zero	
Nicholas, Clay, & Webster: Ruckman	\$50 per month	\$50 per month	
Raleigh & Wyoming: Staton McGraw	Zero Zero	Zero Zero	
Pocahontas, Hardy, & Pendleton: Arrington	\$188 per month*	\$188 per month*	Attributes minimum wage based on Pennsylvania case of <i>Yerkes v. Yerkes</i>
Fayette & Summers: Steele	Zero usually	Zero usually	Occasionally sets at \$50 per month
Marion: Born	Zero	Zero	
Mercer & McDowell: Wiley Griffith	Zero recently* Zero recently*	Zero recently* Zero recently*	Previously set at \$50 per month
Marshall, Wetzel, & Tyler: Hicks	Zero	Zero	
Ohio, Brooke, & Hancock: Chernenko Sinclair	Zero Zero	Zero Will consider facts	
Randolph, Tucker, & Grant: Wilfong	\$50 per month	\$50 per month	
Berkeley & Jefferson: Jackson Wertman	Zero/\$50 per month Zero/\$50 per month	Zero/\$50 per month Zero/\$50 per month	
Braxton, Lewis, & Upshur: Sowa	Zero	Zero	
Greenbrier & Monroe: Pomponio	Zero	Zero	
Hampshire, Mineral, & Morgan: Parsons	Zero unless assets	Zero unless assets	If caretaker objects, then \$50 per month
Mason & Jackson: Nibert	\$50 per month	\$50 per month	
Monongalia: Culpepper	\$50 per month	\$50 per month	Will order original amt to reinstate upon release
Mingo: Calfee	Zero	Zero	requires obligor to notify

States Undecided=shaded	No Justification	Complete Justification	One Factor
Alabama			Alred, 678 So2d 144 (1996)
Alaska			Bendixen, 962 P2d 170 (1998)
Arizona		McEvoy, 955 P2d 988 (1998)	
Arkansas	Reid, 944 SW2d 559 (1997)		
California		Smith, 108 Cal.Rptr.2d 537 (2001)	
Colorado			Hamilton, 857 P2d 542 (1993)
Connecticut			Conn. Gen. Stat. § 46b-215 (2007)
Delaware	Harper, 570 A2d 1180 (1990)		
District of Columbia		Lewis, 637 A2d 70 (1994)	
Florida			Held, 617 So2d 358 (1993)
Georgia	Staffon, 587 SE2d 630 (2003)		
Hawaii			
Indiana			Lambert, 861 NE2d 1176 (2007)
Idaho		Nab, 757 P2d 1231 (1988)	
Illinois		Meyer, 568 NE2d 436 (1991)	
Iowa			Walters, 575 NW2d 739 (1998)
Kansas	Thurmond, 962 P2d 1064 (1998)		
Kentucky	Marshall, 15 SW3d 396 (2000)		
Louisiana	Nelson, 587 So2d 176 (1991)		
Maine	Hebert, 475 A2d 422 (1984)		
Maryland		Wills, 667 A2d 331 (1995)	
Massachusetts			Naranjo, 63 Mass. App. Ct. 256 (2005)
Michigan		Pierce, 412 NW2d 291 (1987)	
Minnesota		Frazen, 521 NW2d 626 (1994)	
Mississippi			Avery, 864 So2d 1054 (2004)
Missouri			Oberg, 869 SW2d 235 (1993)
Montana	Mooney, 848 P2d 1020 (1993)		
Nebraska	Longnecker, 660 NW2d 544 (2003)		
Nevada			Sanders, 67 P.3d 323 (2003)
New Hampshire	Noddin, 455 A2d 1051 (1983)		
New Jersey			Kuron, 752 A2d 752 (2000)

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APPENDIX B

New Mexico	Thomasson, 903 P2d 254 (1995)		
New York	Winn, 768 NYS2d 708 (2003)		
North Carolina	Termination: T.D.P., 595 S.E.2d 735 (2004)		
North Dakota	Kamara, 653 NW2d 693 (2002)		
Ohio			Richardson, 681 NE2d 507 (1996)
Oklahoma	Jones, 990 P2d 235 (1999)		
Oregon		Willis, 840 P2d 697 (1992)	Willis, 840 P2d 697 (1992)
Pennsylvania	Yerkes, 824 A2d 1169 (2003)		
South Carolina	Termination: Parker, 336 S.C. 248 (1999)		
South Dakota			
Tennessee			Pennington, 2001 Tenn. App. LEXIS 192 (2001)
Texas	Reyes, 946 SW2d 627 (1997)		
Utah	Proctor, 773 P2d 1389 (1989)		
Vermont			
Virginia	Layman, 488 SE2d 658 (1997)		
Washington		Blickenstaff, 859 P2d 646 (1993)	
West Virginia			
Wisconsin	Rottscheit, 664 NW2d 525 (2003)	Voecks, 491 NW2d 107 (1992)	
Wyoming	Glenn, 848 P2d 819 (1993)		

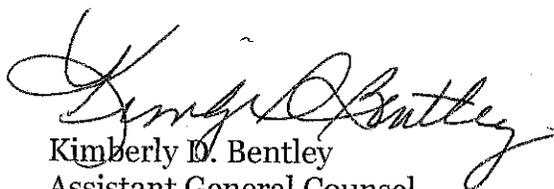
CERTIFICATE OF SERVICE

I, Kimberly D. Bentley, Assistant General Counsel, for the State of West Virginia Department of Health and Human Resources, Bureau for Child Support Enforcement, do hereby certify that a true copy of the hereto RESPONSE BRIEF OF APPELLEE, BUREAU FOR CHILD SUPPORT ENFORCEMENT was duly serviced upon the parties by delivering a true and correct copy of the same to them by REGULAR FIRST CLASS MAIL, postage prepaid, on this 7th day of May 2007, to the following addresses:

TO:

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Huntington, WV 25715-1388

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