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IN RE THE MARRIAGE OF, JEFFREY LAMBERT, Appellant (Petitioner below), v. JILL LAMBERT, Appellee (Respondent below).

No. 32S01-0604-CV-136

SUPREME COURT OF INDIANA

861 N.E.2d 1176; 2007 Ind. LEXIS 94

February 22, 2007, Decided
February 22, 2007, Filed**SUBSEQUENT HISTORY:** Decision reached on appeal by, Sub nomine at *Freese v. Lambert*, 2011 Ind. App. Unpub. LEXIS 656 (Ind. Ct. App., May 11, 2011)**PRIOR HISTORY: [**1]** Appeal from the Hendricks Superior Court, No. 32D01-0207-DR-104. The Honorable Robert W. Freese, Judge. On Petition to Transfer from the Indiana Court of Appeals, No. 32A01-0412-CV-535.*Lambert v. Lambert*, 839 N.E.2d 708, 2005 Ind. App. LEXIS 2336 (Ind. Ct. App., 2005)**CASE SUMMARY****PROCEDURAL POSTURE:** In a divorce case between appellant father and appellee mother, the trial court imputed pre-**incarceration** income to the father in calculating his **child support** payment. The father appealed. The Court of Appeals (Indiana) affirmed. The present court granted transfer and vacated the Court of Appeals' decision.**OVERVIEW:** The parties separated after the mother's nieces accused the father of molesting them. As part of a provisional agreement, the father agreed to pay \$277 per week in **child support**. Before the final hearing on the dissolution, the father was convicted of sex offenses and was sentenced to **incarceration**. At the time of the final hearing, the father was in jail, but the trial court ordered that he continue to pay the \$277 per week. The court held that although **incarceration** did not relieve parents of their **child support** obligations, courts were not to impute potential income to an imprisoned parent based on pre-**incarceration** wages or other employment-related income, but were to calculate **support** based on the actual income and assets available to the parent. Such an approach preserved the traditional rule imposing **support** without

ignoring the realities of **incarceration**. It allowed courts to comply with the **Child Support** Guidelines by imposing at least the minimum **child support** order as provided by Ind. **Child Support** Guideline 2. This did not preclude setting **support** orders that reflected the actual income or resources of an incarcerated parent.

OUTCOME: The court affirmed the trial court's **support** order as it respected the period after the father's **incarceration**. It held that the trial court erred in ordering the father to pay **support** after his **incarceration** in the same amount as that paid before his **incarceration**. It remanded the case for the entry of a current amount as it reflected the father's actual present resources.

CORE TERMS: incarceration, support obligations, child support, support order, pre-incarceration, non-custodial, obligor's, unemployment, guidelines, incarcerated parents, modification, prisoner's, re-entry, impute, support payment, imprisoned, reduction, earning, arrearage, earning capacity, underemployment, support guidelines, present ability, best interests, commit a crime, inappropriate, imprisonment, imputing, punitive, earn

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11/21/12 **Indiana's Child Support** Guidelines obligate every parent to provide some **support** even when they have no apparent present income. [More Like This Headnote](#)

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11/21/12 **Incarceration** does not relieve parents of their **child support** obligations. On the other hand, in determining **support** orders, courts should not impute potential income to an imprisoned parent based on pre-**incarceration** wages or other employment-related income, but should rather calculate **support** based on the actual income and assets available to the parent. [More Like This Headnote](#) | [Share This Headnote](#) | [Restrict By Headnote](#)

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11/21/12 **It** seems appropriate to impute pre-**incarceration** income to a **child support** obligor after release and place the burden on the obligor to seek modification if such is warranted. [More Like This Headnote](#) | [Share This Headnote](#) | [Restrict By Headnote](#)

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11/21/12 **The** duty to **support a child** under law ceases when the **child** becomes 21 years of age unless the **child** is emancipated, or the court determines that the **child** is at least eighteen, not attending school, and supporting herself through employment. Ind. Code Ann. § 31-16-6-6 (2006). [More Like This Headnote](#)

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1990 * Ind. Code Ann. § 31-16-6-6(a)(2) (2006) provides that **child support** will last beyond the twenty-first birthday when a **child** is incapacitated, in which case, the **child support** continues during the incapacity or until further order of the court. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

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1990 * Established common law tradition that has long held parents responsible for the **support** of their offspring. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

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1990 * Potential income may be determined if a parent has no income, or only means-tested income, and is capable of earning more. Ind. **Child Support** Guideline 3(A)(3). The commentary uses the case of a parent who is capable of entering the work force, but voluntarily fails or refuses to work or to be employed. Ind. **Child Support** Guideline 3, cmt. 2(c)(2). This provision indicates that the concept of voluntary unemployment or underemployment as used in the Guidelines requires both the ability to earn more income, and the conscious choice on the part of a parent to reduce income. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

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1990 * Ind. Code § 31-16-6-1(a)(4) instructs courts to consider the financial resources and needs of the noncustodial parent when setting **support** orders. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

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1990 * Most criminal activity reflects a voluntary choice, and carries with it the potential for **incarceration** and consequent unemployment. Still, the choice to commit a crime is not quite the same as voluntarily failing or refusing to work or to be employed. Ind. **Child Support** Guideline 3, cmt. 2(c)(2). A parent's moral culpability in the events that led to **incarceration** is relevant to the extent that it demonstrates an intent to reduce available income or assets to avoid paying **child support**. The choice to commit a crime is so far removed from the decision to avoid **child support** obligations that it is inappropriate to consider them as identical. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

Family Law > Child Support > Obligations > General Overview [...](#)

1990 * The **child support** system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make--and is capable of making--to share fairly the economic burdens of **child rearing**. Ind. **Child Support** Guideline 1. [More Like This Headnote](#) | [Shepardize](#) | [Restrict By Headnote](#)

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30/02/2013 A court may, obviously, consider other sources of income when calculating **support** payments. Ind. **Child Support** Guideline 3(A). Consequently, prisoners who do have the capacity to pay higher **support** obligations remain responsible for that **support** level. [More Like This](#) [Headlines](#) | [Sign Up for eAlerts](#) By [Print](#)

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JUDGES: Shepard, Chief Justice. Dickson, Sullivan, Boehm, and Rucker, JJ., concur.

OPINION BY: Shepard

OPINION

[*1176] Shepard, Chief Justice.

When appellant Jeffrey Lambert and his former wife were about to be divorced, it was already apparent that Lambert was soon headed for prison. The trial court issued a **child support** order based on Lambert's wages from his existing private employment. It was appropriate to base **support** after release on that rate of income, and thus place the burden on Lambert to establish after his release, through petition to modify, that his income might be lower than it had been before his conviction. While [our Child Support](#) Guidelines obligate every parent to provide **[**2]** some **support** even when they have no apparent present income, it was error to set **support** based on employment income that plainly would not be there during **incarceration**.

Facts and Procedural History

Jeffrey Lambert and Jill Lambert married in October 1995. Seven years later, two of Jill Lambert's nieces accused Jeffrey of molesting them. The couple subsequently separated and filed for divorce.

As part of a provisional agreement, Jeffrey agreed to pay \$ 277 per week to **support** **[*1177]** the couple's two children. Apparently, this figure was based on Jeffrey's bi-weekly income at the time, about \$ 3,100, derived from rental properties and his work as a computer consultant. After the provisional order took effect, but before the final hearing on the dissolution, Jeffrey was convicted of two counts of "improper and inappropriate physical contact with [Jill's] minor nieces" and sentenced to a period of **incarceration**. (Appellant's App. at 17; Tr. at 18.) Jeffrey was in jail at the time of the final hearing and, therefore, earning virtually nothing. Still, the Final Decree ordered that he continue to pay the \$ 277 per week in **support**. The court concluded that because Jeffrey's "**incarceration** **[**3]** [was] due entirely to his own voluntary actions" it was proper "to impute income to [him] consistent with the original **child support** calculation." (Appellant's App. at 18.)

Jeffrey appealed, arguing that the court erred in imputing to him pre-**incarceration** income

in calculating the **child support** payment. A divided panel of the Court of Appeals rejected this argument and affirmed. *Lambert v. Lambert*, 839 N.F.2d 708, 717 (Ind. Ct. App. 2005), vacated. The majority concluded that criminal activity constituted voluntary unemployment or underemployment under Ind. **Child Support Guidelines 37**(3), and justified the calculation of the **child support** payment based on Jeffrey's potential, or pre-**incarceration**, income. *Id.* at 712-15.

We granted transfer, vacating the decision of the Court of Appeals. ¹ Guided by the lodestar of **support** issues -- the best interests of the **child** -- and following examination of the various approaches to this issue, we hold that **incarceration** does not relieve parents of their **child support** obligations. On the other hand, in determining **support** orders, courts should not impute potential income to an imprisoned parent based **[**4]** on pre-**incarceration** wages or other employment-related income, but should rather calculate **support** based on the actual income and assets available to the parent.

FOOTNOTES

¹ Jeffrey also raises a claim that the trial court erred in dividing the marital estate equally between the parties. (Appellant's Br. at 14-17.) We summarily affirm the decision of the Court of Appeals as to that portion of the appeal. Ind. Appellate Rule 58(A).

I. Alternative Approaches Reflected in Other States

By some estimates, nearly a quarter of all state prisoners are parents who have open **child support** cases. Re-Entry Policy Council, Report of the Re-Entry Policy Council: Charting the Safe and Successful Return of Prisoners to the Community 190, 198 (2004). ² It is thus not surprising that several states have dealt with how to treat **incarceration** for the purposes of determining income when setting or modifying **child support** obligations. Most of these reported cases deal with whether **incarceration** should justify the reduction of an **[**5]** existing **support** order, and we must be careful to distinguish that issue from the case at hand. See Frank J. Wozniak, Annotation, *Loss of Income Due to Incarceration As Affecting Child Support Obligation*, 27 A.L.R. 5th 540 (1995).

FOOTNOTES

² See also Jessica Pearson, Building Debt While Doing Time: **Child Support** and **Incarceration**, Judges' J., Winter 2004, at 5, 5.

Among the relatively small number of cases that deal directly with this issue, a number of separate approaches have been articulated. We examine these approaches here briefly to provide the basis ¹⁰⁰ for further discussion.

A. *Absolute Justification Rule.* Some seven states consider imprisonment absolutely **[*1178]** sufficient grounds to justify modifying or suspending **child support**. *Yorkes v. Yorkes*, 573 Pa. 294, 300 n.4, 834 A.2d 1369, 1375 n.4 (2003). A typical example of this approach is the case of *Leasure v. Leasure*, 578 Pa. Super. 177, 549 A.2d 277 (1998). There, the Pennsylvania Superior Court ordered **[**6]** a non-custodial parent's **support** obligation suspended during **incarceration** because imprisonment represented a change in circumstances sufficient to justify modification. *Id.* at 181 n.1, 549 A.2d 278. The court rejected the argument that imprisonment constituted voluntary unemployment or underemployment, and instead noted that continuing the **support** order would excessively

burden the parent least likely to be able to pay the debt. 501 U.S. 616-17, 549 A.2d at 227.

While the Pennsylvania Supreme Court later disapproved *Reardon*, we mention it here because it typifies other state authority and is roughly analogous to the issue presented here in the sense that the outcome is the same no matter when the **support** order is set. That is, if **incarceration** is a sufficient non-voluntary change in circumstances to justify a modification or suspension of the obligation, it could also **support** an approach where no obligation is imposed on an individual who is imprisoned at the moment the order is set.

B. Imputation of Pre-Incarceration Income Allowed. A number of states have concluded that it is appropriate to impute pre-**incarceration** income to the non-custodial **[**7]** parent. See *Wozniak*, *supra*, at 587-91.

In most of these cases, the question turns on whether **incarceration** constitutes a voluntary reduction of income. In *In re Marriage of Olson*, 255 Mont. 116, 845 P.2d 1076 (1997), for example, the Montana Supreme Court considered whether a trial court had improperly imputed pre-**incarceration** income to an individual who was imprisoned at the time the final order was entered. Affirming the decision to impute that income, the court specifically rejected the parent's contention that "while his criminal conduct was voluntary, the resulting unemployment . . . was involuntary and unforeseeable under the circumstances." *Id.* at 315, 848 P.2d at 1031. Instead, the court followed the reasoning of its prior cases that "a criminal should not be offered a reprieve from [his] **child support** obligations when we do not do the same for one who becomes voluntarily unemployed." *Id.* (citing *Morris v. Johnson*, 217 Mont. 197, 200-01, 848 P.2d 1020, 1023-23 (1997)).

Similar decisions linking criminal conduct with the voluntary reduction of income are found elsewhere. See, e.g., *In re R.H.*, 2004 ND 170, 686 N.W.2d 107 (N.D. 2004); **[**8]** *Proctor v. Proctor*, 773 P.2d 1389 (Utah Ct. App. 1989).

C. Disallowing Imputation of Pre-Incarceration Income. In at least one case, a state supreme court has cited the state's **child support** guidelines as a basis for holding that a trial court cannot impute pre-**incarceration** income to an individual imprisoned at the time the order is set.

In *State v. Porter*, 259 Neb. 366, 373-74, 610 N.W.2d 23, 27-29 (2000), the Nebraska Supreme Court concluded that imposing pre-**incarceration** income on a felon would conflict with the state's **child support** guidelines precisely because an imprisoned individual had no "earning capacity." It likened the situation to other cases in which it had "approved the use of earning capacity instead of actual earnings in an initial determination under [the guidelines]" and concluding that in those cases, "there has been evidence that the parent had the present ability to achieve his or her earning capacity." *Id.* at 373-74, 610 N.W.2d at 28. Unlike those cases, the court concluded, a prisoner has no present **[*1179]** ability to achieve the income. *Id.* at 374, 610 N.W.2d at 29.

The court specifically **[**9]** rejected the notion that his voluntary choice to commit a crime led to the reduction in his income by stating that so long as "earning capacity is used as a basis for an initial determination of **child support** . . . there must be some evidence that the parent is capable of realizing such capacity." *Id.* It imposed the minimum **child support** obligation as outlined in the state's guidelines and noted that income does not consist solely of wages, thus leaving open the possibility for a higher **support** obligation. *Id.*

II. What Is Most Likely to Produce Support?

We conclude that the approach taken in Nebraska is the most consistent with the Guidelines

and applicable statute, with one caveat. It seems appropriate to impute pre-**incarceration** income to the obligor after release and place the burden on the obligor to seek modification if such is warranted. We lay out below the basis for this holding.

*A. Suspending **Support** Inconsistent with Statute.* Adopting a system that considers **incarceration** an absolute justification for the reduction or suspension of **child support** appears inconsistent with the policy embedded in Indiana's statutes.

The Indiana Code provides that "[t]he ****10** duty to **support** a **child** under [law] ceases when the **child** becomes twenty-one (21) years of age" unless the **child** is emancipated, or the court determines that the **child** is at least eighteen, not attending school, and supporting herself through employment.³ Ind. Code Ann. § 31-16-6-6 (West 2006). Given the robust approach our legislature has taken to ensure that all children are supported adequately by their parents until the age of majority, we cannot imagine that the legislature intended for incarcerated parents to be granted a full reprieve from their **child support** obligations while their children are minors. Consequently, we think it would be inappropriate to adopt a practice of "absolute justification."

FOOTNOTES

³ The statute also provides that **child support** will last beyond the twenty-first birthday when a **child** is incapacitated "[i]n [which] case, the **child support** continues during the incapacity or until further order of the court." Ind. Code Ann. § 31-16-6-6(a)(2) (West 2006).

Moreover, adopting such ****11** a position would cut against the well-established common law tradition that has long held parents responsible for the **support** of their offspring. In this state, that tradition extends back a very long time. See, e.g., *Haase v. Robinson*, 10 Ind. 66, 68 (1854) ("[i]t is the duty of a father to **support** and educate his minor children"). It makes little sense to choose a path that cuts against the grain of statute, legal tradition, and natural instinct so completely.

B. No Justification Rule Inconsistent with Guidelines. Indiana **child support** policy has long looked to an obligor's capacity to earn. Obligors who could work and do not, or appear regularly underemployed, face demands to do better by their dependent children.

The Guideline provisions on "voluntary unemployment or underemployment" reflect this approach. The commentary to Ind. Child Support Guidelines 3(A)(3) states: "Potential income may be determined if a parent has no income, or only means-tested income, and is . . . capable of earning more." Child.Supp. G. 3(A)(3) (emphasis added). As the example most relevant to the current situation, the commentary uses the case of a parent who "is capable of ****12** entering the work force, but voluntarily fails or refuses to work or to be ***1180** employed." Child.Supp. G. 3 cmt. 2(c)(2) (emphasis added). This provision indicates that the concept of "voluntary unemployment or underemployment" as used in the Guidelines requires both the ability to earn more income, and the conscious choice on the part of a parent to reduce income.

Our statutes complement this interpretation. Ind. Code Ann. § 31-16-6-1(d)(4) instructs courts to consider "the financial resources and needs of the noncustodial parent" when setting **support** orders. This strongly implies that it is actual present ability of the non-custodial parent to pay the **support** ordered that a court is to consider.

The Court of Appeals was correct to note that most criminal activity reflects a voluntary choice, and carries with it the potential for **incarceration** and consequent unemployment. Lambert, 839 N.E.2d at 714. Still, the choice to commit a crime is not quite the same as "voluntarily fail[ing] or refus[ing] to work or to be employed." *Child Support*, cmt. 2(c)(2). Chief Justice Abrahamson clarified the relationship between the choices best when she observed that "[a] **[**13]** parent's moral culpability in the events that [led to **incarceration**] is relevant . . . to the extent that it demonstrates an intent to reduce available income or assets to avoid paying **child support**." *In re Marriage of Kistner*, 2003 WI 62, 262 Wis. 2d 292, 326, 664 N.W.2d 325, 541 (2003) (Abrahamson, C.J., dissenting). The choice to commit a crime is so far removed from the decision to avoid **child support** obligations that it is inappropriate to consider them as identical.

We believe the conclusion is also supported by the overarching policy goal of all family court matters involving children: protecting the best interests of those children. The **child support** system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make -- and is capable of making -- to share fairly the economic burdens of **child** rearing. *Child Support*. Considering the existing sociological evidence, it seems apparent that imposing impossibly high **support** payments on incarcerated parents acts like a punitive measure, and does an injustice to the best interests of the **child** by ignoring factors that can, and frequently **[**14]** do, severely damage the parent-**child** relationship.

Individual reactions to economic realities can have profound effects on the behavior of non-custodial parents. Substantial sociological research has focused on the effects **child support** obligations and **incarceration** have on the behavior of non-custodial parents.⁴ These studies have generally concluded that the existence of unsustainable **support** orders actually leads to greater failure of non-custodial parents to pay their **support** obligations.⁵

FOOTNOTES

⁴ See, e.g., Judi Bartfeld & Daniel R. Meyer, **Child Support** Compliance Among Discretionary and Nondiscretionary Obligor, 77 Soc. Serv. Rev. 347 (2003); Harry J. Holzer & Paul Offner, The Puzzle of Black Male Unemployment, Pub. Int., Winter 2004, at 74; Harry J. Holzer et al., Declining Employment Among Young Black Less-Educated Men: The Role of **incarceration** and **Child Support** (2004); I-Fen Lin, Perceived Fairness and Compliance with **Child Support** Obligations, 62 J. Marriage & Fam. 388 (2000).

⁵ For a more detailed description, see the sources cited above. For **support** for the opposite conclusion, that enforcement policies have limited impact on non-custodial parent compliance or participation in the legitimate labor market, see Richard B. Freeman & Jane Waldfogel, Does **Child Support** Enforcement Policy Affect Male Labor Supply?, in *Fathers Under Fire: The Revolution in Child Support Enforcement* 94 (Irwin Garfinkel et al. eds., 1998).

[15]** **[*1181]** The Council of State Governments has created the Re-Entry Policy Council to promote study and innovation in this field, and federal departments such as Justice and Labor have supported its work. The Council has produced a comprehensive report on the difficulties of readmitting prisoners into society. The report identified **child support** obligations, especially arrearages, as a barrier to successful re-entry into society because they have a tendency to disrupt family reunification, parent-**child** contact, and the employment patterns of ex-prisoners. Re-Entry Policy Council, *supra*, at 327.

Among the factors identified as contributing to lack of compliance with **support** orders is the perception among obligors, whether incarcerated or not, that the imposition of high **support** orders is punitive or otherwise unfair. Lin, *supra* note 4, at 395-96. Analysis reveals that when the **support** order has produced large arrearages, there is a significant decline in compliance with the order. Bartfeld & Meyer, *supra* note 4, at 365. The ultimate implication of this research is that when a parent is finally released from prison with a large **child support** arrearage, the parent is less likely to **[**16]** comply with the order.

Moreover, once released, non-custodial parents tend to view the methods employed to collect **support** and arrearages as a disincentive to seek legitimate gainful employment. Research suggests that high maximum garnishment rates ⁶ and other enforcement mechanisms tend to discourage employment, particularly among the lower socioeconomic strata, which tend to view employment as elastic in nature. Holzer & Offner, *supra* note 4, at 79-80; Holzer et al., *supra* note 4, at 24. When combined with the difficulty faced by felons in obtaining employment, there is thus a strong incentive to seek work in the "underground economy" where it is difficult for authorities and custodial parents to track earnings and collect payments. Re-Entry Policy Council, *supra*, at 327.

FOOTNOTES

⁶ See, e.g., Ind. Code Ann. § 24-4.5-5-105(D) (West 2006) (up to 65% of disposable earnings).

The ultimate lesson to be drawn from this research is that when high **support** orders continue through a period of **incarceration [**17]** and thus build arrearages, the response by the obligor is to find more methods of avoiding payment. To the extent that an order fails to take into account the real financial capacity of a jailed parent, the system fails the **child** by making it statistically more likely that the **child** will be deprived of adequate **support** over the long term.

C. Not Imputing Income Is the Best Solution. Ultimately, adoption of the non-imputation approach preserves the traditional rule imposing **support** without ignoring the realities of **incarceration**. Unlike the absolute justification rule, the non-imputation approach allows courts to comply with the Guidelines by imposing at least the minimal **support** order as provided by Ind. Child Support Guideline 2. This serves the **child support** system by ensuring that all non-custodial parents remain responsible -- at least to some degree -- for the **support** of their children.

The most obvious examples of the unfair results that would occur under an absolutist approach are the case of the very wealthy and the very poor non-custodial parent. Under an absolute justification system, the very wealthy but incarcerated parent is absolved of **support** obligations when, **[**18]** in fact, there is the likelihood that sources of income exclusive of wages could reasonably be expected to pay the cost of **[*1182] support**. On the other hand, the imputed income rule unfairly burdens the very poor incarcerated parent under circumstances in which he lacks the capacity to pay his **support** obligations.

None of the foregoing precludes setting **support** orders that reflect the actual income or resources of an incarcerated parent. It merely counsels against imputing pre-**incarceration** wages, salaries, commissions, or other employment income to the individual. A court may, obviously, still consider other sources of income when calculating **support** payments. See *Child.Supp. G. 3(A)*. Consequently, unlike the absolute justification rule, prisoners who do have the capacity to pay higher **support** obligations remain responsible for that **support**

level.

Moreover, a court could well order an increased **support** payment as soon as the incapacity caused by prison is removed from a non-custodial parent's ability to earn income. In other words, a court could prospectively order that **child support** return to the pre-**incarceration** level upon a prisoner's release because following release, the parent **[**19]** is theoretically able to return to that wage level. Such an order has multiple benefits. First, it encourages non-custodial parents to track carefully their **support** obligation, as it would require an incarcerated parent to seek modification of the order upon their release. Second, it relieves the custodial parent from the added burden of tracking the expected release date of the obligor and filing for modification upon that release.

Conclusion

Here, the court was justified in predicting that the obligor might re-attain something like his pre-**incarceration** income -- and placing on the obligor the burden to petition for a modification. Ordering that same **support** during **incarceration** was error, however, unless there were other means (like the obligor's income derived from rental properties and his portion of the property division) to meet it. The record here suggests that such means might exist in this case.

We affirm the trial court's **support** order as respects the period after Lambert's **incarceration** and remand for entry of such current amount as reflects Lambert's actual present resources.

Dickson, Sullivan, Boehm, and Rucker, JJ., concur.







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