

February 27, 2009

David Luria, Esq.
Attorney Advisor
Superior Court of the District of Columbia
500 Indiana Avenue, NW, Room 5400
Washington, DC 20001

RE: Addition of Rule 32(e) and Proposed Amendment to Rule 32(b)(2) of the District of Columbia Superior Court Rules of Criminal Procedure

Dear Mr. Luria:

We are writing to submit comments regarding the proposed amendments to the District of Columbia Superior Court Rules of Criminal Procedure completed by the Superior Court Rules Committee. We strongly support the addition of Rule 32(e), which we hope will increase compliance with the Child Support Payment Modification Amendment Act of 2004, D.C. Code Section 23-112a. We propose an amendment to Rule 32(b)(2) that we believe would strengthen the efforts to enforce this statute. We hope this amendment will be given serious consideration by the Rules Committee.

I. Addition of Rule 32(e)

We fully support the addition of Rule 32(e), Defendant's Right to Seek Modification or Suspension of Child Support Payments. We believe that this proposed rule is an important step toward ensuring compliance with the Child Support Payment Modification Amendment Act of 2004, D.C. Code Section 23-112a.

Every year, hundreds of noncustodial parents with DC child support orders are incarcerated. The vast majority of these parents do not have the necessary resources to continue to pay their child support orders while in prison. The District of Columbia Court of Appeals has presumed that an obligor's ability to pay child support during incarceration is "essentially nothing." *Lewis v. Lewis*, 637 A.2d 70, 73 (D.C. 1994). Therefore, incarcerated noncustodial parents are presumptively entitled to a modification or suspension of their child support order; they simply have to file a motion to modify. Unfortunately, many obligors are *pro se* and are not aware of this requirement.

If a noncustodial parent later learns that he or she could have filed a motion to modify or suspend the child support order during incarceration, it is too late. Federal and local law prohibit retroactive modification of child support orders. *See* 42 U.S.C. § 666(a)(9); D.C. Code §42-204(c). A child support order can only be modified back to the date that the motion to modify was filed. Therefore, a noncustodial parent must move to modify the child support order as soon

as a “substantial and material change” in circumstances (e.g., incarceration) occurs, or face the accrual of hundreds or thousands of dollars in debt which easily could have been avoided by the timely filing of a motion to modify.

This unnecessary accrual of child support arrears poses a significant barrier to successful re-entry for child support obligors after they are released from prison. For example, obligors with arrears can have their driver’s license suspended. Consequently, even if these individuals are able to secure employment, they may be unable to travel to and from work. Faced with overwhelming debt and numerous consequences for failure to pay, these recently released obligors may quit their employment, move to another jurisdiction, or join the underground economy, leaving their children without the additional financial and emotional support that they need and deserve.

In an attempt to prevent the unnecessary accrual of arrears, D.C. Code Section 23-112a requires Superior Court judges to: 1) advise defendants who are sentenced to more than 30 days of incarceration who are also child support obligors of their right to file a motion to modify; 2) provide them with the motion; and 3) allow them to file the motion in open court. Unfortunately, this statutory obligation is not being met in a large number of cases. We hope and expect that Rule 32(e) will increase compliance with the statute. Therefore, we strongly support its inclusion in the Rules of Criminal Procedure.

II. Proposed Changes to Rule 32(b)(2)

The effort to enforce D.C. Code Section 23-112a would be bolstered further if the Rules of Criminal Procedure require that the presentence investigation (PSI) report includes information regarding whether a defendant is subject to any child support orders in the District of Columbia. The report should also include a copy of a *pro se* motion to modify the child support order that the defendant can complete during the sentencing hearing.

These additions to the PSI report will help sentencing judges identify which defendants should be given the notification outlined in D.C. Code Section 23-112a. These additions will also ensure that defendants are notified of their right to modify or suspend their child support order before the sentencing hearing occurs.

We propose adding the following language to the amended version of Rule 32(b)(2), which outlines the required contents of the PSI report. The new language is bolded and underlined.

(2) Report. The report of the presentence investigation must contain:

(A) any prior criminal record of the defendant;

(B) such information about the defendant’s characteristics, financial condition and the circumstances affecting the defendant’s behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant;

(C) any victim impact statement as prescribed in D.C. Code § 23-1904;

(D) information regarding whether the defendant is subject to any child support order(s) in the District of Columbia, and, if the defendant is subject to such order(s), a copy of a *pro se* motion to modify the child support order(s) for the defendant to complete; and

(E) such other information as may be required by the court.

It is our understanding that pursuant to a 2006-2008 federal grant focusing on incarcerated child support obligors, the Child Support Services Division of the Office of the Attorney General for the District of Columbia (CSSD) worked collaboratively with the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA) to begin including this information in the PSI report. The amendment to Rule 32(b)(2) that we propose above would formally establish this requirement.

When CSOSA included information about a defendant's child support order(s) in the PSI report, this information was placed in the financial section of the report. Unfortunately, the information did not come to the attention of the judges. We believe that it is critical that information about a defendant's child support order(s) is placed in the sentencing section of the PSI report to ensure that the sentencing judge will be aware of this information and give the defendant the notification required by D.C. Code Section 23-112a.

III. Conclusion

Thank you for the opportunity to comment on the proposed amendments to the District of Columbia Superior Court Rules of Criminal Procedure. As indicated above, we fully support the addition of Rule 32(e). We hope that the Superior Court Rules Committee will accept our proposed addition to Rule 32(b)(2). We believe that this amendment will strengthen the effort to increase compliance with the Child Support Payment Modification Amendment Act of 2004, D.C. Code Section 23-112a, and prevent the unnecessary accrual of child support arrears.

Sincerely,



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