

RENDERED: APRIL 3, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-001115-ME

JAMES STEPHEN NOE

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT
HONORABLE JOHN SCHRADER, JUDGE
ACTION NO. 97-CI-01784

LEVODIS ARTRIP

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

** ** * * * * *

BEFORE: LAMBERT AND TAYLOR, JUDGES; GRAVES,¹ SENIOR JUDGE.

GRAVES, SENIOR JUDGE: This appeal is an appeal from a Fayette Family

Court judgment decreasing the amount of child support payable to James Noe.

The appeal presents two primary issues: (1) whether a withdrawal from a thrift-

¹ Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

savings plan (TSP) should be considered income for calculation of child support; and (2) whether a non-custodial, non-disabled parent is entitled to a credit toward his/her child support obligation based upon the children's receipt of social security benefits. We shall discuss each argument in turn.

The marriage between Noe ("Father") and Levodis Artrip ("Mother") was dissolved by a Decree of Dissolution on August 8, 1997. As a result of mediation, the parties reached an agreement as to joint custody of the two children with Mother being the primary residential custodian. Pursuant to the agreement, Father was required to pay child support in the amount of \$300.00 per month for twenty-four months and \$400.00 per month thereafter.

In May 2007, Father became the temporary primary residential custodian. In August 2007, Father moved for child support. The trial court granted his motion on September 11, 2007, and found that Mother owed child support in the amount of \$415.00 per month. On October 1, 2007, the trial court increased mother's obligation to \$563.79 because she stopped paying for the children's insurance. On February 19, 2008, Father moved to compel Mother's compliance with court orders and to find Mother in contempt for her failure to notify the court of her withdrawal from the TSP. Father also made a motion to modify custody. Mother responded on February 28, 2008, and explained that she had to withdraw \$21,928.59 to pay mounting debts. In addition, Mother requested that the trial court reduce her child support obligation to \$303.62 to reflect the children's receipt of social security benefits. In an order dated May 27, 2008, the

trial court reduced Mother's child support obligation. It is from that order which Father appeals.

This Court will not disturb a trial court's ruling on child support as long as the trial court complied with the child support guidelines or adequately justified, in writing, any deviation from the guidelines. *Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 400-01 (Ky. App. 2000). Kentucky trial courts have broad discretion in examining parental assets and determining the appropriate amount of child support obligations. *Redmon v. Redmon*, 823 S.W.2d 463, 464-65 (Ky. App. 1992). We must review the trial court's decisions under an abuse of discretion standard. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). That is, we must ask whether the trial court's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky. 2000); *Clary v. Clary*, 54 S.W.3d 568, 570 (Ky. App. 2001).

Father claims that the May 27, 2008, order must be reversed because the trial court failed to impute the withdrawal of TSP funds as income for the purposes of calculating Mother's child support obligation. We disagree.

There is no Kentucky caselaw directly on point. However, Kentucky Revised Statutes (KRS) 403.212(3) clearly requires that child support obligations be assessed in proportion to parental gross income. KRS 403.212(2)(b) defines gross income as:

income from any source and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, worker's compensation benefits, unemployment insurance benefits, alimony or maintenance received. . . .

The trial court found that Mother's child support obligation should not be increased by a withdrawal from her TSP because the money saved in the TSP was previously included, or should have been included, in calculations of Mother's gross income. The trial court found that an inclusion of the withdrawal in Mother's gross income would unfairly result in a double inclusion.

We agree with the trial court that the withdrawal of funds should not be imputed in Mother's current gross income because it constitutes income from previous years. Thus, the withdrawal of previously earned monies does not constitute gross income in the year it is withdrawn. Therefore, we affirm the trial court's finding that the withdrawal constitutes income from previous years and cannot be included in the current assessment of Mother's gross income.

Father also claims that Mother was improperly given a \$265.00 credit against her child support obligation due to the children's receipt of social security benefits. In its September 11, 2007, order, the trial court addressed Mother's request for a reduction and stated:

. . . . [t]he Court finds that there are grounds to deviate from the guidelines based on the children's social security income totaling \$794.00 per month. The Court finds that one-third of the total monthly social security payments to the children, or \$265.00, should be deducted

from Mother's child support obligation as calculated pursuant to the worksheet attached hereto. Mother's child support obligation shall be \$415.00 per month.

Although Kentucky law clearly provides for such credits to be taken, we find that a credit may only be taken by the disabled parent from whom the payments stem. These social security benefits in essence step into the shoes of the income lost by the father as a result of his disability. KRS 403.211(14) states, in part, "[a] payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent." In *Miller v. Miller*, 929 S.W.2d 202, 204 (Ky. App. 1996), we held that such social security disability benefits represent money which an employee has earned during the term of employment and money that the employer, for the benefit of the employee, has paid into a common trust under the Social Security Act. The payments are received by the children for the purpose of replacing income lost due to the disabled parent's inability to work. Since these payments substitute as income, a non-custodial parent is entitled to credit against court-ordered child support of social security disability benefits received by the child on account of his disability. *Id.*; KRS 403.211(14). A credit given to Mother defies the rationale of KRS 403.211 and the purpose of the social security disability benefits. In this case, Father was both the custodial and disabled parent and should have been the only party eligible to receive a credit toward his obligation. Therefore, we must reverse the trial court's ruling on this issue and remand this matter for recalculation of Mother's child support obligation.

Accordingly, the order of the Fayette Family Court is affirmed in part, reversed in part, and this case is remanded for further proceedings consistent with this opinion.

LAMBERT, JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FILES SEPARATE OPINION.

TAYLOR, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the majority in affirming the family court, that Mother's withdrawal of funds from the TSP should not be included in Mother's current gross income for purposes of calculating child support.

However, I must respectfully dissent as concerns the majority's conclusion that the trial court erred in granting a credit against Mother's child support obligation for the children's receipt of \$800.00 per month in social security benefits arising from Father's disability. The family court's reduction of child support as a result of the disability payments appears to be consistent with the analysis required by KRS 403.211(14). Absent a contrary interpretation by the Kentucky Supreme Court, I can see no distinction in the statute as to which parent is disabled for child support purposes, when the social security benefit paid is an entitlement of the child.

Accordingly, I would affirm the family court's order in its entirety.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

Debra Ann Doss
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