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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001110-MR

N.J.S.

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 07-J-500757

C.D.G.

APPELLEE

OPINION VACATING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

COMBS, JUDGE: N.J.S. (Mother) appeals from an order of the Jefferson Circuit Court entered on April 25, 2013. She contends that the court erred by crediting the dependent benefit that their minor daughter receives (due to Father's receipt of Social Security retirement benefits) against the child support obligation of C.D.G. (Father). Mother also contends that the court erred in ordering her to reimburse Father for an "overpayment" of child support from the child's retroactive lump-

sum Social Security benefit. We agree with Mother's contentions. Consequently, we vacate the circuit court's order and remand for further proceedings.

In April 2008, Mother and Father, whose incomes were both outside the child support guidelines, agreed in mediation that Father would pay \$775.00 per month for the support of the parties' minor daughter. Their agreement did not address the application of any future Social Security dependent benefits.

While Father continued to be gainfully employed, he applied for Social Security retirement benefits in November 2011. He also applied for retirement dependent benefits.

In March 2012, Father filed a motion with the circuit court for an order permitting him to substitute the child's anticipated dependent benefit for his monthly child support obligation and to recoup from Mother the child support he had paid since May 2011. No order was forthcoming, and Father continued to pay the mediated sum of \$775.00 per month for the support of the parties' child. Mother filed a motion to increase the monthly child support obligation.

On March 20, 2013, Mother was notified that she would receive \$1256.00 per month as the representative payee for the child's Social Security dependent benefits and that the child would receive retroactive benefits totalling \$23,780.00. Mother was informed by the Social Security Administration that she was required to spend that portion of the benefit necessary to meet the immediate needs of the child and to invest the remainder for the child's future needs.

In an order entered on April 25, 2013, the circuit court concluded that Father's Social Security retirement benefits should be treated like disability benefits under the statutory provisions governing a disabled parent's child support obligation (Kentucky Revised Statute[s] (KRS) 403.211(15)) and granted Father's motion for a credit against his monthly child support obligation based upon the value of the retirement dependent benefit payable to Mother. The court analyzed the issue as follows:

The Court believes this is the most equitable outcome in this situation and sees no reason why [Father's] Social Security retirement benefits should not be treated in the same manner as a parent's Social Security disability benefits, given that they are both earned and distributed based on the parent's employment history. The termination of [Father's] obligation to pay child support directly to [Mother] is effective as of the May 2011 effective date of the child's SSA benefits through [Father].

With respect to Father's request that Mother be ordered to reimburse him \$17,050.00 for the overpayment of his monthly child support payments made from May 2011 to March 2013, the court concluded as follows:

[Mother] shall reimburse to [Father] the child support payments he has made since the effective date of the termination of [Father's] child support order. The Court concludes [Mother] has the funds available for repayment as a result of the lump sum payment from Social Security for retroactive benefits. Under *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986), since [Mother] has funds available for repayment, it would be unfair and unjust to [Father] for this Court to deny him the ability to recoup his overpayment from those funds.

This appeal followed.

Mother contends that the circuit court erred as a matter of law by granting Father a credit against his monthly child support obligation for the child's receipt of the retirement dependent benefit because the provisions of KRS 403.211(15) authorize a credit against a parent's child support obligation only where funds are received by the child as a result of parental disability and not as a result of the child's parent having reached the age of retirement. We agree.

In concluding that the provisions of KRS 403.211(15) permit a credit toward a child support obligation for retirement dependent benefits, the court was dealing with an issue of statutory construction. Therefore, we review its decision *de novo*.

A number of principles govern the court's interpretation of a statute. Courts "may not interpret a statute at variance with its stated language." *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky.App. 2001). "[S]tatutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required." *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002). Finally, we are not at liberty to add or subtract from the language used in a statute. *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

KRS 403.211(15) provides as follows:

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. A payment shall not be

counted as income to either parent when calculating a child support obligation. An amount received in excess of the child support obligation shall be credited against a child support arrearage owed by the parent that accrued subsequent to the date of the parental disability, but shall not be applied to an arrearage that accrued prior to the date of disability. The date of disability shall be as determined by the paying agency. (Emphasis added.)

The statute does not provide for a credit against the child support obligation for dependent benefits payable as a result of a parent's qualification for retirement benefits. Father persuasively argues that this omission is immaterial and that the court should focus not upon the statutory language but rather upon the equities of the case. Father contends that the dependent benefit – whether payable as a result of disability or qualification for retirement – derives from the same source (the obligor parent's contribution from earnings into the Social Security system). Therefore, he urges that principles of fairness require that his support obligation be offset by the child's receipt of dependent benefits to which she became entitled through his application for retirement benefits. Father contends that a majority of jurisdictions which have considered the issue have held that there is no basis for distinguishing between disability and retirement benefits in this context, thus permitting family courts to apply the credit.

We have reviewed the many cases collected from around the country that address this issue. *See* Michael A. DiSabatino, J.D., Annotation, *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child* 34 A.L.R. 5th 447 (1995). While we are

generally persuaded that disability dependent benefits and retirement dependent benefits can often be treated synonymously in this context, it is notable that these decisions did not turn on the application or interpretation of applicable statutory provisions. Case law is distinguishable from specific statutory enactments in this context.

More relevant to our decision is a review of similarly applicable statutory provisions from around the country. Like Kentucky, California,¹ Utah,² Washington,³ and Maine⁴ have enacted statutory provisions governing the effect of dependent benefits upon child support obligations. The various statutes enacted by the California, Utah, and Washington legislatures specifically provide that payments for the support of a child attributable to the earnings of a parent – whether made payable based upon the disability *or retirement* of the obligor parent – shall be credited toward his child support obligation. It is significant that these statutes specifically include provisions directly addressing payments made to a child based upon an obligor’s retirement – as well as his disability. Thus, we are persuaded that this omission from the provisions of KRS 403.211(15) is significant and that we are not at liberty to ignore it.

¹ Cal. Fam. Code §4504.

² Utah Code section 78B-12-203(8)(b).

³ Wash. Rev. Code §26.18.190(2).

⁴ 19-A Maine Revised Statutes §2107.

We are bolstered in our opinion by the holding of the Supreme Judicial Court of Maine in *Wong v. Hawk*, 55 A.3d 425 (Me. 2012). In *Wong*, the court concluded that the child’s father was not entitled to credit toward his child support obligation based upon his daughter’s receipt of Social Security retirement dependent benefits. The court observed that the relevant statute provided for a credit toward the obligation “[i]f a child receives dependent benefits as a result of the obligor parent’s disability” and did not expressly provide a credit for dependent benefits payable as a result of a parent’s retirement. *Id.* at 429. The court concluded that reading the statutory provision to apply to retirement accounts as well would render superfluous the provision’s reference to dependent benefits based on a disability. We find this analysis persuasive and adopt it as our own.

The provisions of KRS 403.211(15) do not authorize the court to credit against Father’s child support obligation the retirement dependent benefit that his child receives on account of his receipt of Social Security retirement benefits. While it was within the power of the General Assembly to include a provision addressing the effect of retirement dependent benefits upon a parent’s child support obligation, it did not do so. We are compelled to presume from this omission that the legislature did not intend to permit a credit for retirement dependent benefits. Consequently, the court erred by vacating the child support order on this basis – although its reasoned analysis of the equities was both sound and sensible. It necessarily follows that the court erred further by ordering Mother to reimburse

Father for the perceived “overpayment” of child support from the child’s retroactive lump-sum Social Security benefit.

This clearly is an issue that invites the scrutiny of the General Assembly. However, as presently written, the statute cannot be expanded by our judicial *fiat* to create the more just result found by the family court.

We vacate the circuit court’s order and remand for consideration of Mother’s pending motion for modification.

CLAYTON, JUDGE, CONCURS.

NICKELL, JUDGE, CONCURS BY SEPARATE OPINION.

NICKELL, JUDGE, CONCURRING: Principles of proper statutory construction and sound legal analysis compel me to concur with the majority’s opinion, which, while reversing the family court, correctly acknowledges the family court’s well-reasoned and legitimate analysis of the equities supporting its more just result. I write separately to underscore the need—and my hope—that our General Assembly will quickly revisit this unfortunate omission of retirement dependent benefits from the provisions of KRS 403.211(15), so that a fair and equitable credit for such benefits may be authorized regarding a parent’s child support obligation—the same as is currently specifically provided for in regard to disability dependent benefits.

BRIEF FOR APPELLANT:

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