

RENDERED: NOVEMBER 18, 2016; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001591-DG
AND
NO. 2013-CA-001661-DG

HARRY L. SEEGER

APPELLANT/CROSS-APPELLEE

ON DISCRETIONARY REVIEW
FROM NELSON CIRCUIT COURT
v. HONORABLE JOHN DAVID SEAY, JUDGE
ACTION NO. 12-XX-00010

SHARON LANHAM

APPELLEE/CROSS-APPELLANT

OPINION REVERSING AND REMANDING

** ** * * * * *

BEFORE: CLAYTON, COMBS, AND MAZE, JUDGES.

CLAYTON, JUDGE: The appeal and cross-appeal concern two issues: (1) did the Nelson District Court err by ordering excess social security dependent benefits received by the mother to be credited against the father's Kentucky Revised Statutes (KRS) 406.021(3) pre-petition child support liabilities?; and (2) did the

Nelson District Court err by determining there was no legal authority to award attorney's fees? The Nelson Circuit Court, acting as an appellate court, held on the first issue that the Nelson District Court erred by granting credits for the social security benefits, and it further held on the second issue that no error occurred in the district court's decision that attorney's fees could not be awarded.

Each side sought discretionary review. We granted the motions and consolidated the appeals. We further held the cases in abeyance pending finality of *N.J.S. v. C.D.G.*, 2013-CA-001110-ME. The Kentucky Supreme Court ultimately granted discretionary review of that case and issued a published opinion. *C.D.G. v. N.J.S.*, 469 S.W.3d 413 (Ky. 2015). As *N.J.S.* is now final, and the instant parties have fully briefed the two issues before us, we now address the instant case's merits.

FACTS

Harry Seeger ("Father") and Sharon Lanham ("Mother") bore a child on June 13, 2007. Though Mother and Father were each married, they were not married to each other and have never cohabitated. In 2008, Mother filed an action to establish paternity and child support. That case was ultimately dismissed due to a procedural error. Mother filed again on December 30, 2009. A temporary support order was entered on August 3, 2011. Following the temporary order, the district court's Amended Findings of Fact, Conclusions of Law and Judgment (hereinafter "Judgment") was entered May 24, 2012.

In the Judgment, the district court found that Father became eligible for social security retirement benefits between the action's initiation and the Judgment. As of January, 2011, he began collecting \$1,969 per month in social security benefits. The child receives \$1,204 per month in social security dependent benefits. Regarding these funds, the Judgment found and held in relevant part:

3. The Respondents [sic] child support obligation beginning December 1, 2001 is \$409 per month.

...

5. Respondent's current statutory liability to the Petitioner for her birthing expenses, child care costs, pre-petition child care costs and pre-petition KRS 403.212 child support is \$46,820.

6. Respondent's statutory liability for birthing expenses, child care costs and child support shall be deemed satisfied by the social security benefits paid to the Petitioner for the benefit of the Subject Child which are in excess of Respondent's KRS 403.212 base monthly child support obligation. . . .

(Judgment, p. 9). Thus, the Judgment permits the \$1,204 social security dependent benefits to satisfy the \$409 per month child support obligation and act as a \$795 per month credit against the \$46,820 pre-petition child support balance.

The parties appealed to the Nelson Circuit Court. Regarding the use of the excess social security benefits to pay the pre-petition child support balance, the Nelson Circuit Court on direct appeal affirmed in part and reversed in part:

Second, [Mother] argues the trial court incorrectly applied the rule enunciated in *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996), by allowing [Father] to pay the arrearage accruing prior to his retirement from the

‘excess’ of the Social Security dependent benefits. In *Miller*, the Kentucky Court of Appeals ruled excess social security dependent benefits could be directed toward an arrearage arising after the time of disability.

As the court argued in *Miller*, the primary purpose of the social security payments is to meet the current needs of the child. Redirecting the funds to satisfy a past child support obligation frustrates this purpose. Only in an “exceptional case [. . .] where a child support arrearage occurred because of a lapse of time between the occurrence of the disability and the commencement of benefit payments” may “any excess of payments over obligation during the benefit period may fairly be credited against that arrearage.” *Id.* at 205 (internal citations omitted).

Applying the rule in *Miller*, [Father] may receive the benefit of the “excess” dependent benefit payments to pay the arrearage accruing between the date of his retirement and the date the child received the first dependent benefit payment. The remaining portion of the arrearage cannot be paid through the benefit payments.

(Opinion, pp. 3-4). The Nelson Circuit Court also affirmed the trial court inasmuch as it determined it had no statutory authority to award attorney’s fees to Mother. Both parties sought discretionary review to this Court, which was granted. We now address the issue raised by each party.

ISSUES

I. May a trial court award a party credit against his pre-petition child support liabilities for excess social security retirement dependent benefits received by the child?

The first issue before us concerns whether a trial court may apply excess social security retirement dependent benefits as a credit against the pre-

petition child support liabilities a father incurs when a paternity action is initiated before a child turns four years old. We hold that a trial court may, in its discretion, award such credits.

In Kentucky, when a child is born to non-married parties, a paternity action may be initiated pursuant to KRS 406.021. Once paternity is established, if the father is the noncustodial parent then he is liable for the child's "cost of pregnancy, confinement, education, [and] necessary support[.]" KRS 406.021(3). If the paternity action is initiated before the child turns four years old, the father is subjected to child support liabilities that predate the paternity action's initiation. KRS 406.031(1). *See, e.g., Ramirez v. Commonwealth, ex rel. Brooks*, 44 S.W.3d 800 (Ky. App. 2000).

In the instant case, the paternity action was initiated prior to the child turning four years old. Thus, the district court calculated the pre-petition child support figure to be \$46,820. Neither party disputes this figure. At dispute is what funds should be used to pay the pre-petition child support liabilities. Father argues that any excess funds the child receives from his social security retirement dependent benefits should be applied to the pre-petition child support liabilities. Mother argues that the excess funds should not be applied to any pre-petition child support liabilities that accrued prior to the date the social security dependent benefits began. The Nelson District Court agreed with Father, and the Nelson Circuit Court agreed with Mother. Having reviewed the relevant statutory and case law, we find the Nelson Circuit Court erred.

Initially, we note that our standard of review on this issue is *de novo* because the parties have only argued that the trial court did not have the authority to grant a credit for the excess benefits. On review of the “fundamental question of whether a trial court’s discretion extends, at all, to granting a credit for retirement benefits paid to a dependent child, the standard is *de novo* because that is a purely legal question.” *N.J.S.*, 469 S.W.3d at 418. We do not have before us the question of whether, if the trial court has the discretion, the trial court’s decision was erroneous. If we did, then we would review the trial court’s decision to grant the credit for an abuse of discretion. *Id.*

The answer to the issue before us lies in the seminal cases of *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996) and *C.D.G. v. N.J.S.*, 469 S.W.3d 413 (Ky. 2015). In *Miller* the parties had been previously married. In their March, 1984-entered divorce decree, the husband was ordered to pay \$50 per week for child support. In 1993, an action was commenced against the husband for child support arrearages. The husband had paid little on his child support up until 1991, at which point he began receiving social security disability benefits, and the child began receiving \$291 per month in dependent benefits. Also, the husband’s child support obligation was changed to \$38.50 per week. 929 S.W.2d at 203.

As of 1994, the husband’s child support arrearages were approximately \$12,000. At issue on appeal was whether the husband was entitled to a credit against his child support obligation for the \$291 per month in social security benefits. A panel of this Court held that under Kentucky law the social

security disability benefits should be credited against the child support obligation. *Id.* at 204. Accordingly, every month the child received \$291 in social security disability benefits, the husband was entitled to have that money credited against his \$50 or \$38.50 per week child support obligation. Additionally, “[a]ny actual payments made by Roger *after* social security payments began should be credited to his arrearage.” *Id.* at 205 (emphasis added).

The case was remanded to “consider whether it would be justifiable to allow any credit from excess benefit payments toward any arrearage which might have accrued between the time of [Husband’s] disabling injury and the time, if any, his social security benefits began being paid for the child.” *Id.* Any remaining surplus “must be considered as a gratuity and not allowed to offset any *arrearage* for support which accrued prior to the disability. Such an amount constitutes an *existing legitimate debt which should never have accrued* and for which no credit can now be given” *Id.* (emphasis added).

In *C.D.G. v. N.J.S.*, the Kentucky Supreme Court was faced with an ancillary question that remained unresolved following *Miller*: could one also receive a credit for social security retirement benefits? The Court answered affirmatively. The Court found “no significant distinction between disability and retirement benefits[.]” 469 S.W.3d at 420. It noted that retirement benefits are income from a “government-required investment, the benefits of which are realized only after a certain age.” *Id.* Once those funds begin paying out, they operate as an “investment trust or annuity” for the dependent child and “are like independent

financial resources.” *Id.* As nothing in the statutory child support scheme prohibits giving a parent a credit for these funds, a trial court has “the discretion to award a credit for Social Security retirement benefits paid to the dependent child.” *Id.* at 421.

Thus *Miller* and *N.J.S.* establish that a trial court has discretion to award a credit for social security retirement funds. That discretion is not absolute, however, as both this Court and the Kentucky Supreme Court made clear that any credit is only to be applied to obligations that accrue after or from the date the benefits are received. *N.J.S.*, 469 S.W.3d at 424 (“Instead, [the trial court] gave him the credit he would have been entitled to had the child been receiving its benefits *from the first day of eligibility.*”) (Emphasis added); *Miller*, 929 S.W.2d at 205 (“As to the remainder of any surplus, it must be considered as a gratuity and not allowed to offset any arrearage for support which accrued prior to the disability.”).

Father argues that in light of the above case law, we should view the pre-petition child support liability as an obligation that accrues when the judgment is entered. Viewed thusly, the pre-petition child support liability is not an arrearage, and it is permissible for a trial court to credit excess social security retirement funds against the pre-petition child support obligation. Father notes that he was not in arrears when his social security benefit payments began as no court had ordered him to pay the pre-petition child support liability. We agree.

KRS 406.031(1), which establishes the pre-petition child support obligation, refers to the amount as a “liability[.]” A “liability,” is a “financial or pecuniary obligation in a specified amount[.]” Black's Law Dictionary (10th ed. 2014). To be specified, the liability must be established by the trial court as it was here in the May 24, 2012 Judgment. Prior to this date there was no specified amount that constituted the pre-petition child support liability.

In contrast to a liability, an “arrear” is the “quality, state, or condition of being behind in the payment of a debt or the discharge of an obligation.” *Id.* To have an arrearage, a person must first have a debt – a liability – that has been established, and then the person must be “behind in the payment[.]” *Id.*

In the instant case, Father’s pre-petition child support liability was not established until the May 24, 2012 Judgment. Before that date, Father could not have accrued an arrearage on a liability that had not been established. Thus, as the child began receiving the social security retirement dependent benefits before the May 24, 2012 Judgment, the trial court had discretion to apply the benefits to both the monthly child support obligation and to the pre-petition child support liability. *See N.J.S., supra.*

Accordingly, we reverse and remand the Nelson Circuit Court decision inasmuch as it held that the Nelson District Court could not credit against Father’s pre-petition child support liability any excess social security dependent benefits.

II. Could the trial court consider awarding attorney’s fees?

Mother next argues that the district and circuit courts erred by finding there was no statutory authority permitting attorney's fees to be awarded. As statutory construction issues are purely legal issues, we use a *de novo* standard of review and "[t]he trial court's . . . construction of statutes is . . . entitled to no deference on appeal[.]" *Cumberland Valley Contractors, Inc. v. Bell County Coal Corp.*, 238 S.W.3d 644, 647 (Ky. 2007) (footnotes and citations omitted).

The instant paternity action was initiated pursuant to KRS 406.021. KRS Chapter 406 contains no provisions for an award of attorney's fees. In Kentucky, the general rule regarding attorney's fees is that without "a fee-shifting statute, . . . each party assumes responsibility for his or her own attorneys' fees." *AIK Selective Self-Insurance Fund v. Minton*, 192 S.W.3d 415, 420 (Ky. 2006) (quoting *Aetna Casualty & Surety Co. v. Commonwealth*, 179 S.W.3d 830, 842 (Ky. 2005) (alterations in original)). An exception to the rule permits a trial court to apply an "equitable rule" and award attorney's fees "within the discretion of the court depending on the circumstances of each particular case." *Mo-Jack Distributor, LLC v. Tamarak Snacks, LLC*, 476 S.W.3d 900, 906 (Ky. App. 2015) (quoting *Batson v. Clark*, 980 S.W.2d 566, 577 (Ky. App. 1998)). However, to apply the equitable rule there must be some "equitable doctrine" to support the attorney's fees award. *Kentucky State Bank v. AG Services, Inc.*, 663 S.W.2d 754, 755 (Ky. App. 1984). In other words, to invoke the equitable doctrine, an inequity is necessary. If the parties both appear with counsel and contest the claims, and the

parties are both legally willing and able parties, as occurred in the instant case, there will be no equities to invoke. *See Id.*

As the parties herein are not claiming equities should have been invoked, we are left solely with the issue of whether a statute permits the trial court to order Father to pay Mother's attorney's fees. Mother argues that there are two routes a trial court could have taken to award attorney's fees. First, Mother claims that because KRS 406.025(5) permits child support to be based upon the guidelines from KRS 403.212, attorney's fees could have been awarded under KRS 403.220, which permits a trial court to award attorney's fees when a party "maintain[s] or defend[s] *any proceeding* under this chapter [KRS 403]" (emphasis added). Alternatively, Mother claims that because KRS 406.051 references the former uniform reciprocal enforcement support act, which is now the Interstate Support Enforcement Act codified in KRS Chapter 407, attorney's fees could have been awarded pursuant to KRS 407.5313(2).

We agree with Mother's first argument and do not address the second. KRS 403.220 broadly permits an award of attorney's fees in "any proceeding under this chapter[.]" The adoption of that statute in 1972 placed "an allocation of court costs and an award of an attorney's fee . . . entirely within the discretion of the court." *Wilhoit v. Wilhoit*, 521 S.W.2d 512, 514 (Ky. App. 1975). *See also Neidlinger v. Neidlinger*, 52 S.W.3d 513, 519 (Ky. 2001) (reaffirming *Wilhoit*). KRS 406.025 twice invokes KRS Chapter 403 inasmuch as it requires trial courts to utilize KRS 403.212 when entering a temporary child support order, and it

further provides that an adverse party must file an affidavit required by KRS 403.160(2) if that party desires a hearing.

In the instant case, the trial court's Judgment specifically invoked and utilized the child support guidelines of KRS 403.212 to resolve Mother's child support claims. (Judgment, p. 6). Thus, the trial court was conducting a proceeding under KRS Chapter 403 when it determined Father's child support liability. On remand, the trial court may consider whether Mother is entitled to an award of attorney's fees. *See, e.g., Combs v. Smith*, 2008 WL 2219782 (Ky. App. 2008) (not reported).

Though we are remanding on this issue, we take a moment to note that our decision is fact specific and rests on an important distinction. Mother is represented by private counsel, not the County Attorney or the Cabinet for Health and Family Services or its designee, as provided by KRS 406.021(1). Had Mother been represented by one of those parties, pursuant to KRS 406.021(3) the County Attorney or the Cabinet for Health and Family Services or its designee would have had a statutory obligation to seek the pregnancy costs, child support, and other such costs. *See id.* (“An action to enforce the liabilities of the cost of pregnancy, birthing costs, child support, and medical support shall be brought by the county attorney or by the Cabinet for Health and Family Services or its designee.”) Mother's private counsel does not appear to have had a statutory obligation to seek child support in addition to a paternity determination. *See Combs, supra* (noting the paternity issue was resolved in a proceeding separate from child support).

Accordingly, Mother's request through her private attorney for child support falls squarely under KRS Chapter 403. To that end, our decision is expressly limited to the instant facts.

CONCLUSION

We reverse and remand for further proceedings on both issues before us. First, we hold that the Nelson Circuit Court erred when it held that excess social security retirement benefits could only be applied as a credit toward the pre-petition child support liabilities from the date that the benefits began accruing. The Nelson District Court did not err by choosing to apply the excess benefits to the pre-petition child support liabilities that predated when the benefits were first received.

Second, we hold that both the Nelson Circuit Court and the Nelson District Court erred when they held that they could not consider awarding attorney's fees to Mother. Though the paternity case was initiated under KRS Chapter 406, the trial court utilized KRS Chapter 403 when it determined Mother's child support request; thus the trial court was proceeding under KRS Chapter 403 and could invoke, under its discretion, KRS 403.212 to award attorney's fees.

Accordingly, we reverse and remand for further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
APPELLEE:

William D. Tingley
Louisville, Kentucky

BRIEF FOR APPELLEE/CROSS-
APPELLANT:

Paul V. Hibberd
Louisville, Kentucky