

RENDERED: January 21, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001703-MR

WILLIAM CONRAD HALE

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE RODERICK MESSER, JUDGE
ACTION NO. 00-CI-00031

PATRICIA HALE

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART
AND REMANDING

** ** * * * * *

BEFORE: KNOPF AND TACKETT, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

KNOPF, JUDGE: William Conrad Hale appeals from a decree entered by the Laurel Circuit Court dissolving his marriage to Patricia Hale. He argues that the trial court erred in its calculation of child support, in failing to give him credit for social security

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

retirement benefits received by the child on his behalf, in awarding maintenance, and by declining to make the final child-support and maintenance awards retroactive to the date of the temporary order. We agree that William is entitled to credit for social security retirement benefits received by the child on his behalf, and that he is entitled to credit excess benefits paid to the child against any arrearage to the extent the arrearage accrued after his retirement. We find no error or abuse of discretion in any of the trial court's other findings. Hence, we affirm in part, reverse in part, and remand for further findings on the amount of credit to which William is entitled.

William and Patricia Hale were married in 1984 and separated on May 31, 1997. One child was born of the marriage. On January 14, 2000, Patricia filed a petition for dissolution of the marriage. The parties initially proceeded *pro se*, but subsequently they retained separate counsel. Following a motion by Patricia, the trial court ordered William to pay temporary child support and maintenance in the respective amounts of \$399.90 and \$700.00 per month.

The matter was referred to a domestic relations commissioner (DRC), who conducted a hearing and issued her findings of fact, conclusions of law and recommended order on June 19, 2003. In pertinent part, the DRC recommended that William's child-support obligation be set at \$347.13 per month

and that William pay maintenance to Patricia in the amount of \$400.00 per month for seven years. The trial court overruled William's objections to the DRC's findings and adopted the DRC's recommended order and decree on August 12, 2003. This appeal followed.

As an initial matter, we note that Patricia has not filed a brief in this appeal. Under CR 76.12(8), we may accept William's statement of the facts and issues as correct, reverse the judgment if we believe that William's brief supports such a result, or treat Patricia's failure to file a brief as a confession of error and reverse the judgment without considering the merits of the case.² This Court is not, however, required to consider Patricia's failure to file a brief as a confession of error and to reverse the trial court for that reason.³ Furthermore, "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of witnesses."⁴ Likewise, we review the trial court's conclusions of law de novo, and we are not bound to accept William's

² See also Scott v. Scott, 80 S.W.2d 447, 451 (Ky.App. 2002).

³ See Kupper v. Kentucky Board of Pharmacy, 666 S.W.2d 729, 730 (Ky. 1983).

⁴ CR 52.01. See also Whicker v. Whicker, 711 S.W.2d 857, 858-59 (Ky.App. 1986).

allegations of error in this regard. Consequently, we decline to view Patricia's failure to file a brief as a confession of error.

William primarily argues that the trial court erred in its calculation of his child support obligation. William receives \$2,100.00 per month in retirement benefits from the Commonwealth of Kentucky and approximately \$800.00 per month in social security retirement benefits. Patricia testified that their daughter receives \$575.00 per month as her portion of William's social security benefits. For purposes of calculating child support, the trial court included this latter amount in Patricia's income. William argues that the trial court erred in so doing. He also argues that the trial court should have given him a credit for the social security benefits received by their daughter from his account.

In Miller v. Miller,⁵ this Court held that social security disability payments represent money which an employee has earned during his employment and also that which his employer has paid for his benefit into a common trust fund under the Social Security Act. These payments are for the purpose of replacing income lost because of the employee's inability to work upon becoming disabled. Because these payments substitute as income, a non-custodial parent is entitled to credit against his

⁵ 929 S.W.2d 202 (Ky.App. 1996).

court-ordered child support for social security disability benefits received by the child on account of his disability.⁶

The Court in Miller went on to hold that benefits received by the child due to the father's disability should be included in the mother's income to calculate the parties' child support obligations. This holding led to a seeming paradox, in that disability benefits received by the child on the father's behalf must be included in the mother's income and yet the father remained entitled to a credit against his child support obligation. In Van Meter v. Smith,⁷ this Court explained that SSD benefits are like the income received from an insurance policy or a trust. Although the income belongs to the custodial parent who receives it, the benefits are paid on behalf of the non-custodial parent. Consequently, the non-custodial parent is entitled to credit for payments received by the child against his child-support obligation.⁸

William points out that KRS 403.211(14), which was enacted after the decisions in Miller and Van Meter, requires a trial court to exclude benefits received by the child on a parent's behalf when calculating child-support. However, KRS

⁶ Id. at 204.

⁷ 14 S.W.3d 569 (Ky.App. 2000).

⁸ Id. at 573.

403.211(14) specifically addresses treatment of disability benefits. In contrast, the record indicates that the amounts received by the daughter are based upon William's retirement benefits. Therefore, those benefits are outside of the scope of the statute. Under the circumstances, we conclude that the rule set out in Miller and Van Meter remains applicable to social security retirement benefits received by the daughter on William's behalf. Consequently, the trial court's calculation of William's child-support obligation was correct.

Miller also holds that the obligor parent is entitled to a credit for disability benefits received in excess of the child support obligation against a child support arrearage which accrued after the date of the parental disability, but not for any arrearage that accrued prior to the date of disability. Although the current case involves retirement benefits rather than disability benefits, we see no reason to treat these benefits differently. Both types of benefits are earned by an employee based on contributions in the form of deductions from wages during employment, and both serve as substitutes for income. Furthermore, a majority of jurisdictions considering the question have held that parents with child support obligations were presumptively entitled to credit against those obligations for social security benefits paid to their children as a result of the obligor parents' retirement, at least to the extent that

the social security payments were contemporaneous with the support obligations.⁹

In his exceptions to the DRC's report, William asserted a right to a credit against his child-support arrearage for retirement benefits received by his daughter in excess of his support obligation. However, the trial court did not make any specific findings on the amount of William's child support arrearage which accrued after his retirement or the amount of benefits received by his daughter in excess of his child support obligations. Consequently, this matter must be remanded for additional findings to determine the amount of the credit to which William is entitled.

William also argues that the trial court erred by not making the new child-support amount retroactive to the date of the temporary order, or at least to the date of the final hearing. He primarily contends that he would be entitled to a refund of any excess support if the final child-support order had

⁹ See Michael A. DiSabatino, "Right to Credit on Child Support Payments for Social Security or other Government Dependency Payments Made for Benefit of Child", 34 ALR 5th 447 (1995 & 2004 Supp.). See also Child Support Enforcement Agency v. Doe, 990 P.2d 1158 (Hawaii, 1999). But see Stultz v. Stultz, 695 N.E.2d 125 (Ind., 1995); Arnoldt v. Arnoldt, 147 Misc.2d 37, 554 N.Y.S.2d 396 (App.Div.1990); Lainson v. Lainson, 219 Neb. 170, 362 N.W.2d 53 (1985); Moritz v. Moritz, 368 N.W.2d 337 (Minn.Ct.App.1985); Nibs v. Nibs, 625 P.2d 1256 (Okla.1981); and Miller v. Miller, 385 So.2d 54 (Ala.Civ.App.1980); holding that a credit is not an automatic right but benefits are merely a factor to be considered by the trial court.

been applied retroactively. However, restitution or recoupment of excess child support is inappropriate unless there exists an accumulation of benefits not consumed for support.¹⁰

Furthermore, to the extent that the social security retirement payments received by the daughter exceed the amount of William's child-support obligation and arrearages accrued after the date of his retirement, William is not entitled to a reimbursement of any excess support paid absent a showing of extenuating circumstances.¹¹ Therefore, retroactive application of the final support order would change the result in this case.

William next argues that the trial court erred by awarding Patricia maintenance, or in the alternative, that the trial court abused its discretion by requiring him to pay maintenance to Patricia for seven years. A court may only grant maintenance if it finds that the spouse seeking maintenance (a) lacks sufficient property to provide for her reasonable needs; and (b) is unable to support herself through appropriate employment. Once a trial court makes these findings, the court determines the amount and duration of maintenance using the criteria set out in KRS 403.200(2)(a)-(f). The amount and duration of maintenance is within the sound discretion of the

¹⁰ Clay v. Clay, 707 S.W.2d 352, 354 (Ky.App. 1986).

¹¹ Van Meter v. Smith, 14 S.W.3d at 573-74.

trial court,¹² and will not be disturbed on appeal absent a showing of clear error in its factual findings or abuse of discretion.¹³

The trial court's factual findings concerning Patricia's entitlement to maintenance were supported by substantial evidence. The court specifically found that Patricia lacked the financial resources and income to meet her reasonable needs. Although Patricia had worked at minimum wage jobs both before and during the marriage, the trial court noted that she also maintained the household and had been the primary care-giver for the child for most of the parties' seventeen-year marriage. Moreover, the trial court found that Patricia's reasonable monthly expenses significantly exceed her earning capacity. Based on these findings, the trial court did not err in awarding Patricia maintenance.

Likewise, the trial court did not abuse its discretion in either the amount or duration of maintenance. In addition to her limited work history, the trial court noted that Patricia did not complete high school and has not obtained a GED. While the trial court rejected Patricia's claim that she is disabled due to back pain, it also concluded that she is incapable of earning

¹² Weldon v. Weldon, 957 S.W.2d 283, 285-286 (Ky.App. 1997); Russell v. Russell, 878 S.W.2d 24, 26 (Ky.App. 1994).

¹³ Perrine v. Christine, 833 S.W.2d 825, 826 (Ky. 1992).

more than minimum wage at this time. The court concluded that seven years is a reasonable period for Patricia to acquire sufficient skills to obtain a job with an income sufficient to sustain her needs. The trial court further found that William has sufficient income to meet his reasonable needs while paying maintenance to Patricia. William points to no evidence of record supporting his assertion that either the amount or duration of maintenance was unreasonable.

Lastly, William argues that the trial court should have made any award of maintenance retroactive to the date of the temporary maintenance order or to the date of the final hearing. We disagree. An award of temporary maintenance must be made on the same basis as permanent maintenance.¹⁴ However, determination of a final award is necessarily contingent upon a division and allocation of marital property. While a court may make a final maintenance award retroactive if it determines that the temporary award was excessive,¹⁵ William points to no evidence supporting this assertion. Consequently, the trial court did not err by declining to make the final maintenance award retroactive.

¹⁴ KRS 403.160(5).

¹⁵ Calloway v. Calloway, 832 S.W.2d 890, 894 (Ky.App. 1992).

Accordingly, the judgment of the Laurel Circuit Court is reversed and remanded for additional findings on the amount of credit to which William is entitled for social security retirement benefits received by the child on his behalf. In all other respects, the judgment is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

No brief for appellee.

Douglas G. Bengé
Jensen Cessna Bengé & Webster
London, Kentucky