RENDERED: JUNE 8, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000324-MR

COMMONWEALTH OF KENTUCKY EX REL., WILLIAM R. HALE — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE BILL CUNNINGHAM, JUDGE
ACTION NO. 00-CI-00080

LESLIE A. STOVALL — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: STUMBO, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.[1]

BUCKINGHAM, SENIOR JUDGE: The Commonwealth of Kentucky, on behalf of William R. Hale, appeals from an order of the Caldwell Circuit Court "suspending"[2] appellee Leslie Stovall's child support obligation to William. Because the circuit court

[1] Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] We construe the circuit court's "suspension" of Leslie's child support obligation as setting her monthly obligation as $0.00.

acted within its discretion pursuant to Kentucky Revised Statutes (KRS) 403.212, we affirm.

William and Leslie were married on July 18, 1994. Three children were born during the marriage. On May 5, 2000, William filed a petition for dissolution of marriage.

In connection with the divorce proceedings, the parties entered into an agreement that provided, among other things, that the parties would have joint custody of the children, with William having primary residential custody of one of the children and Leslie having primary residential custody of the other two. The agreement further provided that William would pay Leslie child support of $200.20 per month. On January 10, 2001, the final decree was entered dissolving the marriage. The decree adopted the parties' agreement, including the provisions relating to child support.

Following a motion by William, on January 17, 2002, the circuit court entered an order granting him primary residential custody of the two children who had previously been in the primary custody of Leslie. On September 10, 2002, an order was entered establishing Leslie's child support obligation as $243.00 per month for the three children.

The record discloses that Leslie's compliance with her child support obligation was sporadic and that she began to accrue an arrearage. During the ensuing months, various other motions concerning Leslie's child support obligation were before the circuit court.

On September 26, 2005, Leslie filed a motion to "suspend all child support collection action efforts against her." She argued in her motion that her only source of income was her federal Social Security Supplemental Income (SSI) check and that, pursuant to federal law and *Commonwealth ex rel. Morris v. Morris*, 984 S.W.2d 840 (Ky. 1998), her SSI income was not subject to execution, levy, attachment, garnishment, or other legal process. She asserted that she was accordingly entitled to have her obligation to pay child support suspended. Following a hearing, the circuit court issued an order "suspending" Leslie's child support obligation. This appeal, wherein the appellant contends that the circuit court erred by suspending Leslie's child support obligation, followed.

KRS 403.212 sets forth the child support guidelines that are to be used in calculating a noncustodial parent's child support obligation. KRS 403.212(2)(b) specifically provides that SSI benefits are to be included in a parent's (whether custodial or noncustodial) "gross income" for purposes of calculating child support. In the *Morris case,* the Kentucky Supreme Court held that the provision of KRS 403.212(2)(b) providing for the inclusion of SSI benefits in the calculation of a child support obligation does not conflict with the inalienability provisions of 42 U.S.C. § 407(a).[3] 984 S.W.2d at

[3] This inalienability provision provides as follows: "The right of any persons to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the monies paid or payable or the rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law."

842. As such, SSI income should, as a beginning point, be included in the calculation of a noncustodial parent's child support obligation.

In its order suspending Leslie's child support obligation, the circuit court stated, in relevant part, as follows:

> The Kentucky Supreme Court decision in *Morris* was a close 4-3 vote. This Court finds that the logic and reasoning of Justice Stephens' dissent which paralleled the Tennessee view discussed herein, is more consistent with existing Federal and state statutes, and will likely be adopted by the high court on a revisit.
>
> The case that has most thoroughly addressed the issue of whether SSI benefits can be used for child support is *Tennessee Department of Human Services, ex. Rel. Young v. Young*, 802 S.W.2d 594 (Tenn.1990). In this case the Tennessee Supreme Court ruled that while Social Security disability benefits were clearly designed by Congress to be considered in making a child support determination, it was equally clear that SSI disability benefits were not. The difference is that "SSI payments are a form of public assistance and have nothing to do with earnings a person may have had." While Social Security disability benefits are based upon a beneficiary's work history and how much the person has paid into the program, "the amount of money to which an SSI recipient is entitled is based upon how little the person makes or has, rather than how much."
>
> This Court agrees with the Tennessee Supreme Court that the automatic inclusion of SSI benefits in the parent's gross income is contrary to the federal statutory provisions regarding SSI benefits. In the case now before this Court the Respondent was ordered to pay child support based upon the amount of her monthly SSI disability payments. As this is her only source of income, the only way she can comply with the court's order is to pay child support out of her SSI disability payments.

> While the Court firmly believes that every parent should be required to support his or her children, the idea is not always practical.[4] [Footnote in original] The Court must balance the financial abilities and needs of both the non-custodial parent and the minor children in awarding child support, and feels the inclusion of SSI benefits into the equation is inappropriate. Here the Respondent's present income is barely above the subsistence level.
>
> The Kentucky child support guidelines allow courts in their discretion to stray from strict adherence thereof based upon "any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate." Here the argument would be the Respondent's poverty is a "factor of an extraordinary nature."
>
> While the Court is sympathetic as well as frustrated by any child suffering as the result of being unable to receive the support of a non-custodial parent due to that individual having SSI benefits as his or her sole means of support, it cannot in good conscience further impoverish the Respondent because of her disability.
>
> Based upon all of the foregoing, IT IS HEREBY ORDERED AND DIRECTED that the child support obligation of the Respondent imposed under the order entered by this Court on August 18, 2005 is SUSPENDED retroactive to the date she began receiving SSI benefits. However, nothing in this order abates the obligation of the Respondent to pay the entire amount of child support arrearage that had accrued at the time she began receiving SSI benefits. Therefore, IT IS FURTHER ORDERED AND DIRECTED that effective January 1, 2006, the Respondent shall pay $25.00 per month toward any arrearage until same is satisfied in full.

The circuit court's order could be construed as declining to follow the *Morris case* and instead following the Tennessee case cited in its decision. To the extent

[4] This Court echoes the sentiment of the Supreme Court of Tennessee which stated, "We take no pleasure in reaching the conclusion that a father need not share at least some part of his income, however meager, with his minor child. . . ."

the circuit court did so, it erred. Circuit and district courts, as well as this court, are bound by the decisions of the Kentucky Supreme Court. *See* Rules of the Supreme Court 1.040(5) and 1.030(8)(a).

However, the circuit court also relied upon the provisions of KRS 403.211, which allow a court to deviate from the child support guidelines. KRS 403.211 provides, in relevant part, as follows:

> (3) A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
> . . . .
>
> (c) Either parent's own extraordinary needs, such as medical expenses;
> . . . .
>
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate.
>
> (4) "Extraordinary" as used in this section shall be determined by the court in its discretion.

Thus, although SSI benefits (along with any other sources of income identified in KRS 403.212(2)(b)) must initially be used in determining a noncustodial parent's child support obligation under the guidelines, pursuant to the provisions of KRS 403.211, upon the identification of, and corresponding written findings relating to, factors that would justify a deviation from the guidelines, the court may, at its discretion, deviate

therefrom. *See Rainwater v. Williams*, 930 S.W.2d 405, 407 (Ky.App. 1996) (A decision on whether to deviate from the guidelines is within the trial court's discretion).

We conclude that the circuit court properly exercised its discretion in deviating from the child support guidelines in this case and that it made sufficient findings in support of its decision. The court's order identifies Leslie's bare subsistence level of income as a factor of an extraordinary nature justifying deviation from the guidelines. Based upon its finding that Leslie's income was at a bare subsistence level, we conclude that the court did not abuse its discretion in setting her monthly child support obligation at $0.00.[5] *See Rainwater*, *supra*.

We emphasize, however, that our decision to affirm the circuit court's deviation from the guidelines does not rest upon the fact that Leslie's sole source of income was SSI, but, rather, because she received a mere bare subsistence level of income from that source. Again, pursuant to the *Morris* case, SSI income is not exempt from inclusion in income for purposes of child support obligation calculations, and in a different case in which a child support obligor's sole source of income is SSI, a total exemption from child support may not be warranted.

Lastly, we note the circuit court's directive that Leslie's child support obligation be suspended "retroactive to the date she began receiving SSI benefits."[6] As

[5] We recognize that KRS 403.212(4) provides that "[t]he minimum amount of child support shall be sixty dollars ($60) per month." While the section uses the term "shall" and would, upon first consideration, appear to be mandatory, we construe this provision as a component of the guidelines from which KRS 403.211 authorizes deviation. *See Brashears v. Commonwealth, Cabinet for Human Resources*, 944 S.W.2d 873, 874-75 (Ky.App. 1997).

[6] The exact date that Leslie began receiving SSI benefits is not clear from the record.

we construe this provision of the order, it extinguishes any arrearage accrued by Leslie subsequent to the date she began receiving SSI benefits. As a general principle, unpaid child support payments for the maintenance of children become vested when due, and courts are without authority to "forgive" vested rights in accrued unpaid child support. *Dalton v. Dalton*, 367 S.W.2d 840, 842 (Ky. 1963). *See also Heisley v. Heisley*, 676 S.W.2d 477 (Ky. 1984) (unpaid child support becomes vested when due and is a fixed/liquidated debt), and *Stewart v. Raikes*, 627 S.W.2d 586, 587 (Ky. 1982) (a court has no power to modify a decree as to past-due child support). However, the appellant has not raised retroactivity as an issue in this appeal, and we accordingly construe the issue as waived. *See Herrick v. Wills*, 333 S.W.2d 275, 276 (Ky. 1959) (It is incumbent upon the appellant to present to this court all grounds for reversal. Questions decided by the trial court, but not argued in the briefs, will not be considered upon appeal).

For the foregoing reasons, the order of the Caldwell Circuit Court is affirmed.

STUMBO, JUDGE, CONCURS.

HENRY, SENIOR JUDGE, DISSENTING IN PART AND CONCURRING IN PART.

HENRY, SENIOR JUDGE. I respectfully dissent insofar as the majority affirms the circuit court's order suspending payment of the appellee's child support arrearage retroactive to the date she began receiving SSI benefits. As noted in the majority opinion, child support payments become vested when due, and are then a fixed, liquidated debt which the court has no authority to forgive. *Price v. Price*, 912 S.W.2d

44, 46 (Ky. 1995). As the court lacked jurisdiction to forgive the accrued, unpaid support, its order is void to that extent and the issue cannot be waived. In my view we should reverse and remand for entry of an order to that effect.

Aside from that, I concur with the majority because "[t]here are few matters over which the trial court has more discretion than cases involving domestic relations issues," *Com. ex rel Marshall v. Marshall*, 15 S.W.3d 396, 400 (Ky.App. 2000), and I agree that the trial court did not abuse his discretion by suspending the support obligation. I write separately only to emphasize that even though KRS 403.212(2)(b) requires that an obligor's SSI benefits be included in the calculations to determine the amount of the child support obligation, such benefits are admittedly exempt from levy and execution.[7] *See Morris v. Morris,* 984 S.W.2d 840, 841, discussing 42 U.S.C. § 407 (a). It is important to remember the distinction. For as long as the obligor can demonstrate that her only income is from SSI, she is essentially "judgment proof." While it may seem futile or even unfair to impose a mounting and apparently uncollectible child support obligation upon a poor person, there exists the possibility that other means of payment will become available. Indeed, dramatic improvements in financial circumstances are not unprecedented in the annals of child support enforcement, (*see, e.g., Heikkinen v. Cote,* 742 A.2d 942 (Me. 2000)), and on rare occasions they have occurred after the child has attained the age of majority and the obligation for continuing support has terminated. Should the appellee in this case

[7] Presumably, this exemption also applies to prohibit collection of the $25-per-month arrearage payment assessed by the trial court in this case. *See* 42 U.S.C. Sec. 407 (a).

become employed, inherit a fortune or win the lottery, the child will recoup nothing for the period during which the obligation is suspended. The General Assembly closed that potential loophole by enacting KRS 403.212 (2)(b).

I agree wholeheartedly with the majority's comment that the circuit court erred "to the extent" that it declined to follow *Morris* in favor of a Tennessee ruling. There appear to be sound policy reasons behind KRS 403.212 (2)(b), whether or not one agrees with our Supreme Court that it is not in conflict with 42 U.S.C. § 407 (a) for Supremacy Clause purposes, and a 4-3 decision is just as binding as a unanimous one. With that said, I concur with the majority except as stated above.

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