

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001053-DG

CHARLES LEE HAHN, II

APPELLANT

DISCRETIONARY REVIEW
FROM ANDERSON CIRCUIT COURT
v. HONORABLE CHARLES R. HICKMAN, JUDGE
ACTION NO. 05-XX-00005

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF HUMAN RESOURCES,
CABINET FOR SOCIAL SERVICES

APPELLEE

OPINION
REVERSING AND REMANDING

** ** *

BEFORE: KELLER, LAMBERT AND STUMBO, JUDGES.

STUMBO, JUDGE: Charles Lee Hahn, II appeals from an order of the Shelby Circuit Court affirming a child support order rendered by the Shelby District Court. The district court included Hahn's tax refund in its calculation of his gross income for purposes of establishing child support. Hahn argues that this calculation improperly resulted in the same income being counted in two consecutive years, and that the Shelby Circuit Court erred in failing to so find. For the reasons stated below, we reverse and remand the order

on appeal.

Deborah Hahn is the 17-year-old daughter of Appellant Charles Lee Hahn, II (hereinafter “Hahn”) and Lisa Sutherland. In December, 2004, a Dependency, Neglect or Abuse action was initiated by the Commonwealth against Hahn in Shelby District Court. The action arose after Deborah stated to a social worker that Hahn, with whom she lived, was verbally abusive and threatened to bring about bodily harm to her. These allegations are contained in the record and need not be restated herein.

Deborah began residing with her aunt and uncle, and shortly thereafter an emergency custody order to that effect was rendered upon the court finding that Deborah was in danger of serious physical injury if she continued to live with Hahn. The record indicates that Deborah is thriving in the new environment, having earned good grades, engaged in various school activities, and developed good peer relationships.

On January 10, 2005, the Commonwealth moved to establish child support payable to Deborah’s aunt and temporary custodian, Tammy Stratton. Proof was taken on the motion, and on September 30, 2005, the Shelby District Court ordered Hahn to pay \$151.64 per week in support, plus \$53.95 per week to be applied to an arrearage of \$5,610.68. The calculation included as part of Hahn’s gross income a tax refund for the 2004 tax year which was received in 2005.

On October 7, 2005, Hahn filed a motion with the Shelby District Court to alter, amend or vacate the child support order. As a basis for the motion, Hahn argued that the tax refund should not have been counted as gross income for the 2005 tax year

because it was earned in 2004. The motion was overruled, and Hahn appealed to the Shelby Circuit Court. That court affirmed the order of the Shelby District Court, and Hahn filed a motion for discretionary review with the Kentucky Court of Appeals. A panel of this Court sustained the motion on September 13, 2006, and this appeal followed.

Hahn now argues that the Shelby Circuit Court committed reversible error in sustaining the child support order of the Shelby District Court. The sole issue now before us is Hahn's contention that the tax refund he received in 2005 (representing overwithholding in 2004) should not have been attributed as income in 2005 for purposes of calculating a 2005 child support order. The corpus of Hahn's argument is that such a calculation improperly attributes the income to Hahn in the year the refund was received (2005), even though it was also subject to inclusion as gross income in the year it was earned (2004). He maintains that the same income may not be counted in more than one year, and that doing so runs afoul of the legislative intent embodied in KRS Chapter 403 as well as general principles of fairness. While not disputing that his entire gross income, minus the statutory exclusions, should be attributed to him, he argues that the District Court and Circuit Court erred in counting a portion of his income twice. In response, the Commonwealth notes that KRS 403.212(2)(b) defines gross income as "income from any source", and citing *Schoenbachler v. Minyard*, 110 S.W.3d 776 (Ky. 2003), it points to the general notion that the term "gross income" should be broadly defined for purposes of calculating child support.

Having heard the oral arguments and closely examining the record and the law, we must conclude that the District and Circuit Courts erred in attributing to Hahn's 2005 gross income the tax refund received in 2005. Child support calculations are questions of law, and are therefore subject to *de novo* review by the appellate court. *Clary v. Clary*, 54 S.W.3d 568 (Ky.App. 2001). We must first note that there appears to be no Kentucky caselaw or statutory law directly on point. Our review of extra-jurisdictional caselaw reveals two methods of establishing an obligor's income for purposes of calculating child support. The net income method looks to the obligor's available income *after taxes are taken into account*. For example, if an obligor earns \$30,000 per year in gross income and pays \$5,000 in taxes leaving a net income of \$25,000, in "net income method" jurisdictions the courts will base the child support calculation on the \$25,000 amount actually available to the obligor. See generally, *In re Marriage of Ackerley*, 775 N.E.2d 1045 (Ill.App. 2002) ("Thus, in calculating respondent's net income, we deducted the actual federal income tax that he paid from the actual total income that he received. An alternate approach employed by some courts is to begin with net income and add back in any refunds, which represent overwithholding."); *Lenz v. Wergin*, 408 N.W.2d 873 (Minn.App. 1987) ("However, it is also proper to compute net income by deducting amounts withheld and adding amounts refunded during a particular year."); *Koury v. Koury*, 410 N.W.2d 31 (Minn. App.1987) ("Income tax refunds may be considered in calculating net income in the year in which they are received.").

When using the net income method, amounts withheld to pay taxes, and which are subject to refund the following year, are not attributed as income in the year they are withheld. Rather, those funds are attributed as income - if at all - only in the year they are refunded. So, in the above example, if the obligor withholds \$5,000 in year #1 and from that withholding receives a refund of \$1,000 in year #2, that \$1,000 refund is attributed as income only in year #2.

In contrast, other jurisdictions look to the obligor's gross income when calculating child support. Under this method, if an obligor earns \$30,000 and withholds \$5,000 leaving a net income of \$25,000, the court bases its child support calculation on the \$30,000 pre-tax amount. See *Schoenbachler, supra*. When using this method, a tax refund received the following year would *not* be attributed as income in the year it is received, because it was already attributed as gross income in the year it was earned. So going back to the above example, the \$5,000 withheld as taxes in year #1 is attributed as income in year #1, so any refund of that amount would not be attributed again in year #2.

Kentucky employs the gross income method of calculating child support.

KRS 403.212 states,

(2) For the purposes of the child support guidelines:

(a) "Income" means actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed.

(b) "Gross income" includes income from any source, except as excluded in this subsection, 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, workers'

compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received. Specifically excluded are benefits received from means-tested public assistance programs, including but not limited to public assistance as defined under Title IV-A of the Federal Social Security Act, and food stamps.

The Legislature has directed that the trial court consider the obligor's pre-tax, gross income when calculating child support. *Id.* When applied to the facts at bar, this means that Hahn's withholdings in 2004 (a portion of which was refunded in 2005) were to be attributed as income - if at all - solely in 2004. Stated differently, the tax refund received by Hahn in 2005 should not have been attributed as gross income in 2005 because it was part of his gross income in 2004.

Since Kentucky employs the gross income method of establishing an obligor's income, KRS 403.212(2), and because principles of both legislative intent and general equity demand that the same dollar not be attributed as income more than once, we hold that a child support obligor's tax refund is not attributable as income for purposes of KRS Chapter 403. Such a holding does not represent a windfall to the obligor, since those funds were already part of the obligor's gross income which was properly attributable in the year they were earned. Accordingly, we conclude that the Circuit Court erred in affirming the District Court's child support calculation.

For the foregoing reasons, we reverse the order of the Shelby Circuit Court and remand the matter to the Shelby District Court for any additional further proceedings.

ALL CONCUR.

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