

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002755-MR

CARLA BURKART

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE PATRICIA M. SUMME, JUDGE
ACTION NO. 89-CI-00673

STEPHEN C. BURKART

APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

*** **

BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE: Carla Burkart appeals an order of October 15, 1999, of the Kenton Circuit Court which modified the amount of child support that her former husband, Stephen Burkart, is obligated to pay. Specifically, Carla argues that the trial court erred in setting an amount of child support that deviates from the guidelines and in allocating the right to claim their daughter, Stephanie, as a dependent for tax purposes. We agree with Carla to the extent that she contends that the trial court's deviation from the child support guidelines was erroneous. Thus, we affirm in part and reverse in part and remand.

The record reveals that the parties were married in 1983; Stephanie was born in 1986. Incident to the dissolution of their marriage, Carla and Stephen executed a property settlement agreement in January 1990 in which they agreed that Carla would have sole custody of Stephanie, that Stephen would pay child support in the amount of \$80 per week, and that the parties would alternate the right to claim Stephanie as a dependent for state and federal income tax purposes. After moving for a reduction of his support obligation, Stephen's child support was lowered to the amount of \$65 per week in September 1991.

In 1999, Carla moved for an increase in child support. As grounds for her motion, she cited Stephen's enhanced income, the increased needs and expenses of their child since the issue of child support had been last reviewed in 1991, and her own uncertain ability to continue to work due to health problems. By the time that a hearing was conducted in July 1999, Carla had been determined to be eligible for Social Security disability benefits of \$925 per month. It was also established that beginning in September 1999, Carla would receive an additional \$462 per month from Social Security for the benefit of Stephanie. Stephen testified that his gross monthly earnings were \$2988.42. Based on this information, the trial court calculated Stephen's support obligation to be \$95 weekly pursuant to the child support guidelines. Kentucky Revised Statutes (KRS) 403.212(7) It

ordered that he pay that amount beginning in May 1999.¹ However, the trial court also ordered that beginning in September 1999, Stephen's support obligation would be reduced to \$65 per week, citing simply the child's "independent financial means" as its justification. The order does not reflect the manner in which the trial court calculated the amount of the deviation from the support indicated by the guidelines - nor does it contain any findings to explain its reduction of Stephen's support obligation.

In her appeal, Carla insists that the trial court erred in relieving Stephen of any portion of his obligation to support Stephanie because of the receipt of Social Security disability benefits payable to Stephanie on account of Carla's disability. In response, Stephen contends that the trial court has broad discretion to deviate from the guidelines and insists that there was no abuse of that discretion in this case. After a review of the record and of both the statutory and case law concerning the child support guidelines, it is our belief that the trial court erred in deviating from the guidelines.

KRS 403.211(2) provides that a trial court may deviate from the presumptive amount of support indicated by the child

¹Although the calculation is not set forth in the order or anywhere in the record, it appears to be correct. Adding Carla's total monthly income of \$1,387 (social security benefits of \$925 and \$462) to Stephen's income for purposes of the child support guidelines, \$2,957.42 (\$2988.42, less \$31, the cost of health insurance for Stephanie), results in a combined parental income of \$4344.42. Applying the percentage of Stephen's income of the combined monthly income, 68%, to the total support obligation under the guidelines, \$603, results in a monthly support obligation of \$410.04; that is, a weekly obligation of \$94.69 (\$410.04 divided by 4.33), or \$95.

support guidelines where the application of the guidelines "would be unjust or inappropriate." Subsection (3) of that statute lists criteria that the trial court may consider in adjusting the amount of support in either direction – including KRS 403.211(3)(d), the "independent financial resources, if any, of the child."

Stephen relies on two cases construing this statute, Rainwater v. Hill, Ky.App., 930 S.W.2d 405 (1996) and Barker v. Hill, Ky.App., 949 S.W.2d 896 (1997). He argues that these cases support the trial court's deviation from the guidelines and its reduction of his support obligation for Stephanie. These cases are helpful in our consideration of the issue presented in this appeal. However, because the nature and source of the child's independent resources in these cases are significantly different from the benefits at issue in the case before us, we disagree that their reasoning mandates a decision in Stephen's favor. In Rainwater, the child had a monthly income from a structured settlement resulting from a personal injury sustained by the child. In Barker, the child was the recipient of Supplemental Security Income (SSI) based on the child's disability – not that of either parent.

Significantly, Barker states that "[t]he child support obligation under KRS 403.212 is presumed to be correct." 949 S.W.2d at 897. That case also holds that before any deviation is allowed, the trial court must fulfill the statutory requirement of articulating written findings to substantiate its deviation. Id. at 898. Barker cautions a trial court to "be mindful . . .

that there is nothing inherently unjust or inappropriate about making a father support his child, if he is able to do so." Id. Barker holds that the fact that a child has independent resources in excess of the amount of support indicated by the guidelines does not – standing alone – justify a deviation from the guidelines; nor does that fact render application of the guidelines "unjust or inappropriate." Thus, even if the KRS 403.211(3)(d) could be interpreted as providing the trial court with broad discretion to deviate from the guidelines where Social Security benefits are paid for the child as a result of the disability of the custodial parent, such deviation would have to be accompanied by the requisite findings relative to the needs of the child and other resources of the parties sufficient to address the statutory standard of "unjust or inappropriate."

We have found nothing in our review of the record to indicate why application of the guidelines would be unjust or inappropriate. Nor has Stephen, who has more than twice the monthly income of Carla and Stephanie combined, offered any reason to justify a departure from the guidelines. The Kenton Circuit Court did not make any findings on the issue of why it deviated from the guidelines. It merely reiterated one of the criteria set forth in KRS 403.211 permitting deviation without specific reference to the facts of this case. Thus, even if the benefits awarded to Carla for Stephanie were capable of being correctly construed as Stephanie's independent resources, the case would have to be remanded for further findings. See Caller

v. Ison, Ky., 508 S.W.2d 776 (1974), holding that an order merely reiterating the language of a statute is insufficient for review.

Under the particular circumstances of this case, however, we believe that a remand for findings to support the trial court's deviation from the guidelines is unnecessary. We conclude that Stephen is not entitled to benefit from the Social Security benefits paid for Stephanie as a matter of law. By giving Stephen a reduction in the amount of support that he owes because of benefits resulting from Carla's disability, the trial court has both misconstrued the nature of Social Security disability benefits and has allowed Stephen to benefit from Carla's misfortune – a result that certainly was not contemplated by the General Assembly in enacting KRS 403.211(3)(d).

As this Court recognized in Miller v. Miller, Ky.App., 929 S.W.2d 202 (1996), a disabled support obligor normally is entitled to credit for Social Security disability payments for support that is contemporaneously owed by that parent. Quoting from Binns v. Maddox, 57 Ala.App. 230, 327 So.2d 726 (Ala.Civ.App. 1976), the Court reasoned:

An order of support is for the benefit of the children, even though directed paid to the mother or other custodian. If the sum directed to be paid by the father is paid by the government through social security benefits derived from the account of the father, the purpose of the order has been accomplished. The father is entitled to be credited with such payments against his liability under the decree.

However, unlike the circumstances in Miller, the Social Security disability payments in this case are not attributable to the disability of Stephen, the support obligor. Furthermore, unlike

Rainwater or Barker, the payments are not paid to compensate for the child's own injury or disability. Rather, the benefits at issue are to be paid as a result of the disability of the custodial parent, Carla.

As Miller explains, 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." Id. at 204, quoting Horton v. Horton, 219 G. 177, 132 S.E.2d 200 (1963). Social Security disability payments are designed "to replac[e] income lost because of the employee's inability to work." Id. Thus, the Social Security benefits paid to Clara for Stephanie are neither a form of welfare (like the SSI payments in Barker) nor are they in anyway attributable to Stephen's earnings or his contributions to the Social Security program. Rather, they are very similar to private disability insurance payments for which the insured has paid a premium.

Although we agree that issues concerning child support are "largely left, within the statutory parameters to the sound discretion of the trial court[,]" VanMeter v. Smith, Ky.App., 14 S.W.3d 569 (2000), we hold that the trial court erred in this case. These government entitlements were earned by virtue of Clara's earlier employment and were intended to substitute for her lost ability to provide for herself and for Stephanie's support through future earnings. The court misconstrued them as an "independent financial resource" of the child capable of justifying the reduction of the support owed by Stephen.

Carla raises as error the trial court's ruling which allows Stephen to claim Stephanie as a dependent for income tax purposes. She insists that she is still required to file a tax return and that she can "make use of the exemption."

We agree with Stephen that there is no error in this regard. The trial court retains the authority to award the right to claim the federal and state tax dependents exclusively to a non-custodial parent. See Pegler v. Pegler, Ky.App., 895 S.W.2d 580 (1995). While the trial court's findings are lacking in specificity, it is apparent from a review of the record and of the undisputed facts regarding the parties' financial situations that the tax exemption can best be utilized by Stephen, who has taxable income.

Accordingly, the judgment of the Kenton Circuit Court is affirmed in part, reversed in part, and remanded for entry of an order increasing Stephen's child support to an amount consistent with the child support guidelines.

ALL CONCUR.

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