

STATE OF MICHIGAN
COURT OF APPEALS

STATE TREASURER,

Plaintiff-Appellee,

v

BRIAN HITCHCOCK, a/k/a BRIAN
HITCHCOX,

Defendant-Appellant,

and

CHARLES COSTELLO,

Defendant.

UNPUBLISHED

July 5, 1996

No. 168751

LC No. 93-454772-CZ

Before: Wahls, P.J., and Hood and M.E. Clements,* JJ.

PER CURIAM.

In this action for reimbursement for the costs of incarceration, defendant Hitchcock appeals as of right from an order granting plaintiff's motion for summary disposition and awarding it ninety percent of Hitchcock's assets. We affirm.

On March 10, 1992, Hitchcock was sentenced to incarceration in the Michigan prison system. At the time, Hitchcock owned a ten-year annuity which was being paid to him in the amount of \$204 per month. Plaintiff commenced this action on May 7, 1993, pursuant to the State Correctional Facility Reimbursement Act (reimbursement act), MCL 800.401 *et seq.*; MSA 28.1701 *et seq.*, seeking that ninety percent of defendant's assets be used to help reimburse the State for the costs of defendant's incarceration. The trial court granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(9).

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant argues that his annuity was exempt from reimbursement pursuant to MCL 600.6023; MSA 27A.6023, and the Internal Revenue Code. However, both statutes apply to individual retirement account annuities. 26 USC 408; MCL 600.6023(k); MSA 27A.6023(k). Because the annuity that defendant receives is the result of a wrongful death action involving defendant's deceased mother, and is not an individual retirement annuity, neither statute applies. Accordingly, there is no Supremacy Clause conflict and the annuity is not exempt.

Defendant argues that his student loan obligation should exempt his annuity from plaintiff's request for reimbursement. When deciding whether to order a prisoner to reimburse the state for costs of incarceration, the circuit court must "take into consideration any legal obligation of the defendant to support a spouse, minor children, or other dependents and any moral obligation to support dependents to whom the defendant is providing or has in fact provided support." MCL 800.404(5); MSA 28.1704(5). A student loan is not a legal obligation to a spouse or dependent, and the statute does not otherwise require the court to consider a prisoner's debts. MCL 800.404; MSA 28.1704. Defendant's argument fails.

Defendant argues that the reimbursement award was a garnishment, and thus limited to twenty-five percent of his annuity. However, a garnishment is defined as a legal procedure by which the "earnings" of an individual are required to be withheld. 15 USC 1672(c). "Earnings" are defined as "compensation paid or payable for personal services." 15 USC 1672(a). Because defendant's annuity was obtained through a wrongful death lawsuit, it was not compensation for "personal services." The twenty-five percent garnishment limit does not apply to defendant's annuity.

Defendant argues that the trial court lacked jurisdiction to enter a preliminary injunction and/or a temporary restraining order. The only order which the trial court issued prior to its final order was the order for defendant to show cause why his assets should not be used for reimbursement and for defendant Costello to forward all funds received from the annuity to defendant's prisoner account. This order was proper pursuant to MCL 800.404a(1); MSA 28.1705(1).

Defendant argues that his annuity could not be used for reimbursement because it was too small. The statute requires the attorney general to seek reimbursement when the prisoner has sufficient assets to pay at least ten percent of the total estimated cost of his care, or ten percent of the estimated cost of care for two years, whichever is less. MCL 800.403(2); MSA 28.1703(2); *State Treasurer v Cuellar*, 190 Mich App 464, 466-467; 476 NW2d 644 (1991). When the prisoner's assets are below that threshold, the attorney general still has discretion to seek reimbursement. *Cuellar, supra*, p 467. Plaintiff was entitled to seek reimbursement from defendant regardless of the size of defendant's annuity.

Finally, defendant argues that his right to equal protection of the laws was violated by the trial court's order of reimbursement. Equal protection requires that persons in similar circumstances be treated similarly; it does not require that persons in different circumstances be similarly treated. *Thompson v Merritt*, 192 Mich App 412, 424; 481 NW2d 735 (1991). Defendant has not identified

any person or group of persons who had circumstances similar to defendant's but was treated differently.

Although defendant's argument resembles a due process argument, defendant had no right to appointed counsel since he was not under threat of incarceration in this action. See *Mead v Batchlor*, 435 Mich 480, 498; 460 NW2d 493 (1990). There is no evidence that defendant requested the opportunity to argue before the circuit court. The trial court heard and ruled on defendant's motion for waiver of costs and fees. As to defendant's motion for an appointed attorney, defendant was not entitled to an attorney. *Mead, supra*, p 498.

Affirmed.

/s/ Myron H. Wahls

/s/ Harold Hood

/s/ Martin E. Clements