

Matter of Pamela J. W v Adrian D. W

2021 NY Slip Op 31183(U)

April 12, 2021

Family Court, Montgomery County

Docket Number: O-00018021

Judge: Philip V. Cortese

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At a term of the Family Court of the State of New York, held in and for the County of Montgomery, at the courthouse located in the Village of Fonda on the 8th day of April 2021.

PRESENT: HON PHILIP V. CORTESE
Judge of the Family Court

In the Matter of a Family Offense Proceeding

Pamela J. W
Petitioner,
-against-

File No.:
Docket No.: O-00018-21
O-00018-20/21B

Adrian D. W
Respondent.

DECISION AND ORDER ON MOTION
(Child Support)

NOTICE: YOUR WILLFUL FAILURE TO OBEY THIS ORDER MAY RESULT IN COMMITMENT TO JAIL FOR A TERM NOT TO EXCEED SIX MONTHS FOR CONTEMPT OF COURT OR PROSECUTION FOR CRIMINAL NON-SUPPORT. YOUR FAILURE TO OBEY THIS ORDER MAY RESULT IN SUSPENSION OF YOUR DRIVER'S LICENSE, STATE-ISSUED PROFESSIONAL, TRADE, BUSINESS AND OCCUPATIONAL LICENSES AND RECREATIONAL AND SPORTING LICENSES AND PERMITS; AND IMPOSITION OF REAL OR PERSONAL PROPERTY LIENS.

Petitioner having filed a violation of an order of protection (O-00643-20/21B) and a new Family Offense petition (O-00018-21) with this court on the 12th day of January 2021, and petitioner having filed an Order to Show Cause on the 19th day of March 2021 seeking an order directing the respondent to turn over the petitioner's share of the CARES Act stimulus money as well as that designated for their child and the respondent's step-son, and the respondent having filed an affidavit in opposition on the 8th day of April 2021, and the following appearances having been noted:

- Petitioner having appeared with John N. Clo, Esq.
- Respondent having appeared with Joan E. Coughtry, Esq.
- The child having been represented by Carol D. Pollard, Esq.

NOW, having reviewed the papers submitted I do make the following findings of fact and conclusions of law for the limited purpose of determining this motion.

HISTORY OF THE MATTER

The petitioner and respondent are married and share one child, Jaylyn, age 4 years. The parties share joint legal custody of Jaylyn with primary physical custody being with the mother. (Montgomery County Family Court Order entered November 25, 2020; V. /-20; File No.:

9.) The mother commenced a proceeding in Montgomery County Family Court on August 26, 2020, seeking child support and spousal support. That matter is schedule for a hearing on April 13, 2021. That petition does not mention the CARES Act stimulus payments. The respondent in this matter commenced a matrimonial action on February 24, 2021. As of today's date, no consolidation order has issued from the Supreme Court.

LAW

Family Court Act § 828 permits the court to issue a temporary order for child support and spousal maintenance within a family offense proceeding.

“Notwithstanding the provisions of section eight hundred seventeen of this article the court may, together with a temporary order of protection issued pursuant to this section, issue an order for temporary child support, in an amount sufficient to meet the needs of the child, without a showing of immediate or emergency need. The court shall make an order for temporary child support notwithstanding that information with respect to income and assets of the respondent may be unavailable. Where such information is available, the court may make an award for temporary child support pursuant to the formula set forth in subdivision one of section four hundred thirteen of this act. An order making such award shall be deemed to have been issued pursuant to article four of this act.

Upon making an order for temporary child support pursuant to this subdivision, the court shall advise the petitioner of the availability of child support enforcement services by the support collection unit of the local department of social services, to enforce the temporary order and to assist in securing continued child support and shall set the support matter down for further proceedings in accordance with article four of this act.

Where the court determines that the respondent has employer-provided medical insurance, the court may further direct, as part of an order of temporary support

under this subdivision, that a medical support execution be issued and served upon the respondent's employer as provided for in section fifty-two hundred forty-one of the civil practice law and rules" (FCA § 828 [4]).

The court must examine the financial resources of the parents when making a temporary order. "One of those factors, and that with the most impact in this case, is the 'financial resources' of the parents (Family Ct Act § 413 [1] [f] [1]), which has not unreasonably been defined as 'everything available to support the child' (*Matter of Commissioner of Social Servs. of City of N. Y. v Rush*, 152 Misc. 2d 823, 826). It is not necessary that the court be able to impute income from an asset in order to consider it as a resource. Once the amount of basic child support obligation is found to be unjust or inappropriate, all resources may be considered, in whatever manner the court deems reasonable. In a given set of circumstances, the court may determine that it is appropriate to require a parent to reinvest or liquidate certain assets to provide for his or her children" (*Webb v. Rugg*, 197 AD2d 777, 778–79 [3rd Dept 1993]).

While this court could not find caselaw that addresses one parent withholding a child's CARES ACT payments, an analogy may be made to other Federal benefits designated for the support of children. "Fundamentally, benefits received by children under certain government welfare programs should not be considered income to the parent for purposes of calculating a parent's means (*see, Sullivan v. Stroop*, 496 U.S. 478; *Head v. State*, 632 N.E.2d 749 [Ind.App.1994] [Social Security disability payments are not child support]).³ In fact, in a related context, this Court has already held that a parent's paramount duty to support minor children is not abrogated by a child's receipt of public assistance (*Matter of Commissioner of Social Servs. [Wandel]*, *v. Segarra*, 78 N.Y.2d 220, *supra*; *see also*, Family Ct Act § 415). Like public assistance, Social Security disability dependents' benefits are an entitlement granted by Congress to children at no purchase cost to the disabled parent (*Stultz v. Stultz*, 659 N.E.2d 125, 127

[Sup.Ct.Ind.1995]). Social Security payments to dependent children do not reduce the disabled parent's benefits or in any way increase that parent's financial burden (*see, Matter of Sergi v. Sergi*, 58 A.D.2d 692). Indeed, although a dependent child's Social Security benefits are derived from the disabled parent's past employment, they are designed to supplement existing resources, and are not intended to displace the obligation of the parent to support his or her children. Accordingly, under the present statutory scheme, the Social Security benefits paid to petitioner's dependents on the basis of his disability are 'financial resources' of the children that should be considered by the court after the basic support obligation is calculated and only then pursuant to a section 413(1)(f) 'unjust or inappropriate' determination" (*Graby v. Graby*, 87 NY2d 605, 611 [1996]).

The Family Court has jurisdiction to order a non-custodial parent to turn over Federal funds designated for the benefit of the children to a custodial parent. "Contrary to the father's contention, the Support Magistrate did not err in directing him to apply to the Social Security Administration for a change in the representative payee of the subject children's social security disability (SSD) benefits from the father to petitioner-respondent mother. The court in a child support matter has discretion to consider 'everything available to support the child' (*Matter of Webb v. Rugg*, 197 A.D.2d 777, 778; *see Matter of Graby v. Graby*, 87 N.Y.2d 605, *rearg. denied* 88 N.Y.2d 875). The evidence in the record before us establishes that the mother had primary physical custody of the subject children, and that their needs were best served by having their SSD benefits paid to her. We further conclude that, because those payments are to be used for the benefit of the children and the father failed to establish that he had done so, the Support Magistrate did not err in directing that he pay to the mother the amount of those benefits that he received after the mother filed the petition seeking

those payments for the benefit of the children (*see* Family Ct. Act § 449[2]; *McDonald v. McDonald*, 262 A.D.2d 1028, 1028–1029; *see generally* *Matter of Kummer*, 93 A.D.2d 135, 185–186). Contrary to the father's contention, the Support Magistrate did not award those funds to the mother as support arrears. Instead, the Support Magistrate directed the father to provide the mother, the children's primary custodian, with funds that were 'for the children's social security payment that [the father] received and did not give to' the mother and that he failed to establish that he used for the children's benefit." (*Holeck v. Beyel*, 145 AD.3d 1600, 1600–01 [4TH Dept 2016]).

Income tax deductions are governed under Federal law and rules and are outside the jurisdiction of this court. "Whether defendant is entitled to claim the children as tax exemptions depends upon defendant's compliance 'with the IRS rules' (*see generally* 26 USC § 152[e]; Internal Revenue Service Publication Nos. 504 [Divorced or Separated Individuals], 501 [Exemption, Standard Deduction])" (*Etzel v. Etzel*, 22 AD3d 906, 908 [3 Dept 2005]).

Non-recurring lump sum payments received by a child support obligor, are appropriately considered by the Court when determining child support. The court retains discretion in determining how that child support obligation shall be determined and paid. "A lump-sum payment received by a parent in a tort action is not excluded from consideration in determining child support (*see Matter of Christian v Christian*, 5 AD3d 765, 766 [2004]; *Matter of Boyette v Wilson*, 291 AD2d 908, 908-909 [2002]). One approach where a parent receives a nonrecurring large sum of money is to increase the weekly (or other periodic payment) support obligation by applying a reasonable rate of return to the funds received and imputing that amount as income (*cf. Matter of Cody v Evans-Cody*, 291 AD2d 27 [2001]). Indeed, this may be a preferred approach in most situations involving a lump-sum settlement.

However, directing the payment of a portion of the nonrecurring sum received is not precluded by the statute (*see* Family Ct Act § 413) and may be appropriate under some circumstances (*cf. Matter of Bryant v Bryant*, 235 AD2d 116 [1997])” (*Walker v. Gilbert*, 39 AD3d 1112, 1114 [3rd Dept 2007]).

Due to the COVID pandemic, the Federal Government passed legislation entitled the CARES Act on March 27, 2020 (Public Law No: 116-136. [03/27/20]).

As a part of that legislation, money was set aside for direct payments to individuals (\$1,200.00) or person filing income taxes jointly (\$2,400) and an additional \$500.00 per child. The stimulus checks were based on an applicant’s 2019 income tax returns.

Subtitle B--Rebates and Other Individual Provisions

SEC. 2201. 2020 RECOVERY REBATES FOR INDIVIDUALS.

(a) In General.--Subchapter B of chapter 65 of subtitle F of the Internal Revenue Code of 1986 is amended by inserting after section 6427 the following new section:

SEC. 6428. <<NOTE: 26 USC 6428.>> 2020 RECOVERY REBATES FOR INDIVIDUALS.

“(a) In General.--In the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of—

“(1) \$1,200 (\$2,400 in the case of eligible individuals filing a joint return), plus
“(2) an amount equal to the product of \$500 multiplied by the number of qualifying children (within the meaning of section 24(c)) of the taxpayer.

“(b) Treatment of Credit.--The credit allowed by subsection (a) shall be treated as allowed by subpart C of part IV of subchapter A of chapter 1.

“(c) Limitation Based on Adjusted Gross Income.--The amount of the credit allowed by subsection (a) (determined without regard to this subsection and subsection (e)) shall be reduced (but not below zero) by 5 percent of so much of the taxpayer's adjusted gross income as exceeds--“(1) \$150,000 in the case of a joint return,“(2) \$112,500 in the case of a head of household, and“(3) \$75,000 in the case of a taxpayer not described in paragraph (1) or (2).

On December 27, 2020, the President signed additional COVID-19 economic relief legislation which included provisions to extend Economic Security (CARES) Act (H.R. 133 – Consolidated Appropriations Act, 2021). Payments are based on the applicant’s income as reported on the most recent tax return.

“SEC. 272. ADDITIONAL 2020 RECOVERY REBATES FOR INDIVIDUALS.

(a) In General.--Subchapter B of chapter 65 of subtitle F is amended by inserting after section 6428 the following new section:

“SEC. 6428A. ADDITIONAL 2020 RECOVERY REBATES FOR INDIVIDUALS.

“(a) In General.--In addition to the credit allowed under section 6428, in the case of an eligible individual, there shall be allowed as a credit against the tax imposed by subtitle A for the first taxable year beginning in 2020 an amount equal to the sum of-- “(1) \$600 (\$1,200 in the case of eligible individuals filing a joint return), plus “(2) an amount equal to the product of \$600 multiplied by the number of qualifying children (within the meaning of section 24(c)) of the taxpayer.

“(b) Treatment of Credit.--The credit allowed by subsection (a) shall be treated as allowed by subpart C of part IV of subchapter A of chapter 1.

FINDINGS OF FACT

This court makes the following findings based upon the papers submitted for the limited purpose of determining the motion concerning the CARES Act money. Petitioner alleges that respondent would have received \$3,400.00 during the first stimulus money distribution package. That represents \$1,200.00 for the respondent, \$1,200.00 for the petitioner, \$500.00 for their shared child Jaylyn and \$500.00 for petitioner’s other child, Anthony. Petitioner further alleges that the respondent received a total of \$2,400.00 for the second stimulus distribution package. That represents \$600.00 for the respondent, \$600.00 for the petitioner, \$600.00 for their shared child Jaylyn and \$600.00 for the petitioner’s other child, Anthony. She admits the respondent has paid her \$300.00 which she deems CARES Act stimulus money.

Respondent does not deny that he received and retained the money. He argues that the issues involve equitable distribution, or in the alternative, should be determined by the Support Magistrate during the upcoming hearing on April 13, 2021. He argues that they resided together as a family unit through August 2020 and that he pays child support.¹ He also

¹ A Temporary Order of Support was entered in the Montgomery County Family Court on December 1, 2020 directing the respondent to pay \$85.24 per week for the child Jaylyn. [F-00810-20]. A revised Temporary Order of

complains that the petitioner, the custodial parent since November 2020, claimed Jaylyn on her income tax return for the tax year 2020.

CONCLUSIONS OF LAW

This court clearly has the authority under the family offense petition to address the pending child support issues. The child's portion of the stimulus checks was intended for the support of the child during the pendency of the COVID pandemic. The stimulus money payments received as a result of the December 2020 legislation belongs entirely to petitioner as the custodial parent of Jaylyn during that time period. The problem here is that the petitioner and respondent have not been separated for the entire year and so the stimulus moneys received in the Spring of 2020 and designated for Jaylyn is not clearly entirely that of the respondent's or the petitioners. This court does not have a formula to use concerning the apportionment of those funds between parents who are together when the money is received, and subsequently live separate and apart from one another, and declines to fashion one now.

This court distinguishes the holding in *Etzel v Etzel* 22 AD3d 906, 908 [3rd Dept 2005]. Income tax returns are based on parental income and this court does not have the jurisdiction to order a party to contravene Federal law. Here, the CARES Act payments are specifically designated between the parents and the children. The CARES Act income designated for the child is for the support of the child, independent of any other income the parent may have, and follows that child to the custodial parent. This court finds the CARES Act payments to be analogous to derivative SSD payments and the holdings in *Graby v. Graby* and *Holeck v. Beyel* (*supra*).

Support was entered in the Montgomery County Family Court on January 26, 2021 directing the respondent to pay \$120.00 per week child support for Jaylyn.

A lump sum distribution pursuant to FCA § 413 is inappropriate as that assumes the money was the respondent's income to begin with. The money is designated specifically by the Federal Government to support the child pursuant to the holdings in *Graby v. Graby* (87 NY2d 605, 611 [1996]) and *Holeck v. Beyel*, (145 AD3d 1600, 1600-01 [4TH Dept 2016]).

The money designated for the child Anthony also belongs to the petitioner, as the respondent is not under any obligation to support Anthony, unless and until Anthony becomes a public charge.² However, this court does not have the jurisdiction to determine the CARES Act payment for Anthony as that child is not the proper subject of the current child support proceeding.

As for the mother's share of the stimulus checks, this court will not rule on that issue. That is, as argued by the respondent, an issue for the Supreme Court to determine; therefore it is

ADJUDGED that the issues concerning the retained CARES Act stimulus money for the child Anthony is beyond the jurisdiction of this court; and it is further

ADJUDGED that the issues concerning the retained CARES Act stimulus money for the petitioner are in the nature of equitable distribution and therefore beyond the jurisdiction of Family Court; and it is further

ORDERED that the respondent shall immediately pay \$600.00 to the petitioner as and for the December 2020 CARES Act payments for the child Jaylyn; and it is further

ORDERED that the motion concerning the CARES Act payments for the child Jaylyn, received in the Spring of 2020 is denied; and it is further

² See FCA § § 445 and 415.

ORDERED that the respondent shall provide the petitioner with proof of the deposits he received from the CARES Act stimulus program no later than 15 days after receipt of service of the entered decision and order upon him by counsel for the petitioner; and it is further


ORDERED that all other issues concerning petitioner's application for child support and spousal support shall be determined by the Support Magistrate; and it is further

ORDERED that counsel for petitioner shall have the respondent personally served with a copy of this order, with proof of entry, within 10 days of the issuance thereof.

Dated: 4/12/21
Fonda, New York

ENTERED
MONTGOMERY COUNTY FAMILY COURT

APR 12 2021

ENTER

HON. PHILIP V. CORTESE
Family Court Judge

ENTERED _____ CLERK

To: John N. Clo., Esq., by email
Joann E. Coughtry, Esq., by email
Carol D. Pollard, Esq., by email