

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
NO. 2010-SC-0527-DE

COMMONWEALTH OF KENTUCKY  
CABINET FOR HEALTH AND FAMILY SERVICES, ET AL.

APPELLANTS

FROM THE COURT OF APPEALS  
2009-CA-001279-ME

v.

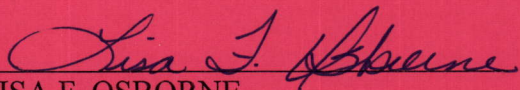
ON APPEAL FROM  
MCCRACKEN FAMILY COURT NO. 08-J-00098

RENEE IVY (NOW KNIGHTEN)

APPELLEE

**APPELLANT CABINET FOR HEALTH AND FAMILY SERVICES' BRIEF**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and accurate copy of Appellant's Brief has been served upon the following via U.S. Mail, postage prepaid, this the 5<sup>th</sup> day of February 2011: Kathleen Kallaher Schmidt, Dept. of Public Advocacy, Suite 302, 100 Fair Oaks Lane, Frankfort, KY, 40601; Karen Alderdice, 433 Adams Street, Paducah, KY, 42001; Public Defender, 400 Park Avenue, Paducah, KY, 42001; Daniel Boaz, Commonwealth Attorney, McCracken County Courthouse, 301 South 6<sup>th</sup> Street, Paducah, KY, 42003; Hon. Cynthia Sanderson, Judge, McCracken County Family Court, McCracken County Courthouse, 301 South 6<sup>th</sup> Street, Paducah, KY, 42003; and the Court of Appeals, 360 Democrat Drive, Frankfort, KY, 40601.

  
LISA F. OSBORNE

## I. INTRODUCTION

This case is about the role of Social Security Supplemental Income (SSI) in the calculation of child support obligations. The Legislature, through KRS 403.212(2)(b) requires that SSI benefits be included in the calculation. The Court of Appeals, however, has rejected the amount set under that statute, the amount of the statutory minimum (KRS 403.212(4)) and the finding of contempt, on the erroneous basis that compliance with either obligation would jeopardize the recipient of SSI benefits.

## **II. STATEMENT REGARDING ORAL ARGUMENT**

The Cabinet requests oral argument and believes that it would be helpful in deciding the issues presented.

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#### IV. STATEMENT OF THE CASE

##### A. Issue

The child support guidelines specifically direct child support to be based upon a parent's gross income. Further, in defining "gross income" the guidelines specifically include income derived from Supplemental Security Income (SSI). Lastly, the guidelines set forth that the minimum amount of child support shall be sixty dollars (\$60) per month. The Court of Appeals rejected a support obligation established under those guidelines based upon a conclusion that a parent determined to be disabled and receiving SSI is unable to financially support a child and that enforcing a child support obligation jeopardizes the parent's receipt of SSI benefits.

Therefore, the Cabinet requests this Court to reverse the Court of Appeals' decision that rejects the statutory requirements for setting child support, rejects the minimum support obligation set forth in the statute, and interferes with the discretion of the Family Court.

##### B. Background

Renee Ivy and Larry Barnes are the parents of DG. During the first two years of the child's life, Mr. Barnes initiated a case before the McCracken County Family Court to determine paternity, custody, visitation, and child support. The Family Court awarded Mr. Barnes primary custody of DG when the child was two months old, and later the Court granted him sole custody.<sup>1</sup> In May 2008, based upon Mr. Barnes' actual income

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<sup>1</sup> (Transcript of the Record, 55 [hereinafter T.R.]).

and Ms. Ivy's SSI benefit, the Family Court calculated and ordered Ms. Ivy to pay child support of \$106.00 per month.<sup>2</sup>

Ms. Ivy continued to file motions and participate in hearings before the Family Court. She did not ask the Family Court to reconsider the child support order and she did not appeal the child support order. Ms. Ivy made only a few child support payments; thus, the County Attorney's office filed a motion for rule in February 2009 requesting the Family Court to hold Ms. Ivy in contempt for failing to follow the Order of the Court.

At the show cause hearing on June 16, 2009, Ms. Ivy testified that she was unable to make the \$106 monthly payment out of her \$674 monthly SSI benefit.<sup>3</sup> Kenneth Anderson also testified at the hearing and identified himself as Ms. Ivy's public guardian, who manages her finances. He testified that he oversees Ms. Ivy's monthly income and expenses and that her sole income is her \$674 monthly SSI benefit. He testified that her expenses include her entire monthly rent expense for herself and her husband (the father of her second child) and her monthly utility bills for herself and her husband and the little remaining money is given to Ms. Ivy for personal needs<sup>4</sup>. Ms. Ivy testified that she uses this discretionary money for herself and to provide for her new baby.

Based on this testimony and testimony from previous hearings about Ms. Ivy's ability to function and work,<sup>5</sup> the Family Court found Ms. Ivy in contempt because she

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<sup>2</sup> (T.R. at 32).

<sup>3</sup> (Video Record No. 1: 6/19/09; 9:49:50 [hereinafter V.R. 2]).

<sup>4</sup> (V.R. 2: 6/19/09 at 9:26:45 to 9:37:40).

<sup>5</sup> (Video Record No. 1:8/26/08; 9:36:40 [hereinafter V.R. 1]).

was able to perform some work, yet had failed to make any attempt to support her child.<sup>6</sup> The Court did, however, reduce the support obligation from \$106.00 to the statutory minimum of \$60.00 per month and ordered Ms. Ivy to pay an additional \$5.00 on the arrearage.

Ms. Ivy appealed the contempt finding on the basis that she had been declared unable to work by the Social Security Administration and receives SSI; Ms. Ivy argued that she was ordered to do an impossible act.

The Court of Appeals reversed the Family Court's order of contempt and held that Ms. Ivy could not pay \$65.00 per month for child support and arrearage, despite the fact that SSI benefits are to be counted as income and included in calculating child support. Although the parties disagree over the contempt finding, the bigger issue here is that the Court of Appeals decision is at odds with the statutory child support guidelines and ignores the evidence that Ms. Ivy is able to perform some work without jeopardizing her SSI benefits. This decision also conflicts with Morris v. Morris, 984 S.W.2d 840 (Ky. 1998).

## V. ARGUMENT

### A. Pursuant to KRS 403.212, "gross income" is defined as including Social Security Supplemental Income for purposes of calculating child support

KRS 403.212 is commonly known as the "Child Support Guidelines" statute, and the Kentucky Legislature has headed this statute with a note reading "Child support guidelines; terms to be applied in calculations; table." The statute further defines the terms to be applied in child support calculations to include "gross income" as "...income

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<sup>6</sup> (T.R. at 75.)

from any source...and includes....income from...Supplemental Security Income (SSI)....”<sup>7</sup> In Morris v. Morris, the Court of Appeals determined that KRS 403.212(2)(b) mandates that “...SSI benefits are to be included in the calculation for the purposes of determining the amount of child support payments.”<sup>8</sup> Since 1998 the courts in Kentucky have consistently followed the logic of Morris and the mandates of KRS to include SSI as gross income for the purpose of calculating child support.<sup>9</sup> Thus, when the Family Court in this case included Ms. Ivy’s SSI benefits as gross income on the worksheet used to calculate her child support obligation, the law of the state of Kentucky was appropriately applied and the child support obligation was appropriately set.

If the decision by the Court of Appeals is affirmed, the Court of Appeals will have, in essence, created a new standard of review in child support cases and require that SSI benefits no longer be included as gross income, running afoul of the legislated mandates at KRS 403.212. The Court of Appeals is bound to defer to principles well

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<sup>7</sup> KRS 403.212(2)(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)** (emphasis added), 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 (42 USCA § 601 et seq.), and food stamps.

<sup>8</sup> Morris v. Morris, 984 S.W.2d 840, 841 (Ky. 1998).

<sup>9</sup> See, Martin v. Commonwealth, et al, WL 22520024 (Ky. 2004), unpublished opinion attached hereto as Appendix 3.

established in Kentucky case law,<sup>10</sup> and this case presents no exception. Neither the Court of Appeals nor the Supreme Court, may change the law as it is written.<sup>11</sup> The Child Support statutes are plain and unambiguous<sup>12</sup> regarding not only the use of gross income for purposes of calculating child support, but also the inclusion of SSI income in the determination of “gross income.”<sup>13</sup> The Supreme Court of Kentucky of course understands and appreciates their position as the Judicial Branch of state government. When discussing the roles of the Judiciary and Legislative branches of state government, Justice Minton recently indicated that the timing for and the actual change of a Kentucky statute “...is a policy decision that belongs to the General Assembly. And since the General Assembly has not yet chosen to amend....we are without authority to amend the law for them.”<sup>14</sup>

When the Court of Appeals Ordered that, based upon Ms. Ivy’s net income, she cannot be required to pay even the statutory minimum of support, the Court established a

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<sup>10</sup> See Fisher v. Kentucky Unemployment Ins. Com’n, 880 S.W.2d 891, 892 (Ky. App. 1994).

<sup>11</sup> Kentucky State Fair Bd. v. Fowler, 221 S.W.2d 435, 439 (Ky. 1949). “The public policy of a state is to be found: first, in the Constitution; second, in the Acts of the Legislature; and third, in its Judicial Decisions. Where the Constitution is silent, the public policy of the State is to be determined by the Legislature on subjects which it has seen fit to speak. It is only where the Constitution and the Statutes are silent on the subject that the Courts have an independent right to declare the public policy.”

<sup>12</sup> Lichtenstein v. Barbanel, 322 S.W.3d 27 (Ky. 2010). The Court can enforce a statute only as written, and the intent of the Legislature must be deduced from the language it used, when it is plain and unambiguous.”

<sup>13</sup> KRS 403.212(2)(b). “Gross Income” includes...Supplemental Security benefits...”

<sup>14</sup> J.N.R. v. O’Reilly, 2007-SC-000175-MR.

precedent that will be far reaching and have significant impact for cases throughout Kentucky. Currently, 4.9% of Kentucky's population receives SSI benefits and in many of these counties, SSI is the primary source of income.<sup>15</sup> While the statistics regarding the reliance of Kentucky's citizens on SSI are themselves overwhelming, the ramifications of the Court of Appeals decision in this case will be even more devastating. The idea that a large percentage of our population would no longer be required to provide even a scintilla of support for their children is yet another burden placed upon Kentucky's children. The public policy implications are far reaching and if the opinion is allowed to stand and SSI benefits can no longer be imputed to the obligor as gross income to be used in child support calculations, then the result for a large portion of Kentucky's parents will be that the long standing duty to provide for your children until they reach majority no longer applies.<sup>16</sup>

**B. Receipt of Social Security Supplemental Income does not equate to a federal determination that child support obligor cannot work.**

The eligibility of a child support obligor to receive SSI does not automatically mean that the obligor completely lacks the ability to work. In 1972, Congress enacted Title XVI of the Social Security Act, initiating the Supplemental Security System this is commonly referred to as "SSI."<sup>17</sup> SSI is intended to provide those over age 65, blind, and

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<sup>15</sup> SSI Recipients by State and County, 2009, SSA Publication No. 13-11976, released: May 2010, Table 3, pp 37-40; 2010; 2010 US Census, Kentucky, <http://quickfacts.census.gov/qfd/states/21000.html>.

<sup>16</sup> See Commonwealth v. Mason, 317 S.W.2d 166, 168 (Ky. 1958) ("The liability of the parent to support the child arose by law the moment the child was born[.]").

<sup>17</sup> 42 USC §1381.

disabled individuals with a minimum income, and the rules for defining disability for SSI purposes include whether an individual is actually engaged in substantial gainful activity.<sup>18</sup> Those rules do not require that the determination be based on whether or not such an individual has the ability or inability to work. The rules define the term “disability” to mean: inability to engage in any **substantial gainful activity** (emphasis added) by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months.”<sup>19</sup> Substantial gainful activity is defined as work activity that “involves doing significant physical or mental activities.”<sup>20</sup> The Fourth Circuit Court of Appeals clarified that the substantial gainful activity standard for SSI did not require that the claimant be completely unable to work by holding that “...the ability to work only a few hours a day or to work only on an intermittent basis is not the ability to engage in substantial gainful activity.”<sup>21</sup>

In the current case, the Court of Appeals found that the ruling in the lower court was in essence forcing Ms. Ivy to lose her disability benefits; however, this is not accurate. By requiring Ms. Ivy to earn \$15/week to support her child, the Family Court was not placing a burden on Ms. Ivy that was too heavy for her to carry. The Family Court was not asking Ms. Ivy to choose between receiving her SSI benefits and paying her child support. The Family Court did not place an impossible decision in front of Ms.

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<sup>18</sup> Id.

<sup>19</sup> 42 USC §§423(d) & 1382.

<sup>20</sup> 20 CFR §404.1572.

<sup>21</sup> Cornett v. Califano, 590 F.2d 91, 94 (4<sup>th</sup> Cir. 1978).

Ivy since her benefits would not be in jeopardy if she were to contribute \$15/week toward the care of her child, and she could earn \$15/week by working a few hours a week at numerous odd jobs, e.g., cleaning a home, running errands, walking a dog, answering phones, to name a few. The Family Court heard no testimony from Ms. Ivy that she was unable to do any of these chores, and any of the aforementioned odd jobs would not violate the federal definition of “substantial gainful activity” since they do not involve “significant physical or mental activities.”<sup>22</sup>

**C. Family Court’s finding that Appellee was able to pay minimum child support amount of sixty dollars per month was not an abuse of discretion.**

The Family Court’s finding that Appellee was able to pay the minimum child support amount of sixty dollars per month was not an abuse of discretion by the Family Court. To determine whether a trial judge’s decision was an abuse of her discretion, the reviewing court must consider if the decision was “...arbitrary, unreasonable, unfair, or unsupported by sound legal principles.”<sup>23</sup> In addition, a reviewing court should “...defer to the lower court’s discretion in child support matters whenever possible.”<sup>24</sup> So long as

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<sup>22</sup> 20 CFR §404.1572.

<sup>23</sup> McKinney v. McKinney, 257 S.W.3d 130 (Ky.App.2008). Trial court's broad discretion in considering a parent's assets and setting correspondingly appropriate child support is not unlimited; the test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.

<sup>24</sup> See Pegler v. Pegler, 895 S.W.2d 580 (Ky. App. 1995).

there is evidence in the record and a reasonable basis for the Family Court's decision regarding child support, the Court of Appeals is not to disturb the ruling.<sup>25</sup>

The decision by the Family Court that Ms. Ivy was able to financially contribute to the upbringing of her child was a sound, well-reasoned one based on numerous court appearances and a thorough review of all the evidence. Kentucky case law and statutes have established that a trial court is in the best position to determine if the facts are adequate and of a quality to make the necessary findings and conclusions. A reviewing Court is not permitted to substitute its judgment for that of the family court unless its findings are clearly erroneous.<sup>26</sup> As the trier of fact, the Family Court was in the best position to weigh and balance the testimony and consider whether Ms. Ivy was capable of providing minimal support for her child of \$15/week. After years of hearings and substantial testimony during the course of the proceedings, it was appropriate that the Family Court decide Ms. Ivy could find and/or earn \$15/week once Ms. Ivy's monthly rent, living expenses, and total circumstances were considered. Judge Sanderson clearly did not find that it was an impossible act for Ms. Ivy to pay \$15.

The record below illustrates that at times it was to Ms. Ivy's advantage to present herself in a favorable light (e.g., when seeking custody) and at other times it was to her advantage to demonstrate an inability to function (e.g., when seeking to limit child support). In fact, at several hearings, Ms. Ivy competently represented herself.<sup>27</sup> During

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<sup>25</sup> Downing v. Downing, 45 S.W.3d 449 (Ky.App.,2001). So long as there is evidence in the record and reasonable basis for setting child support above the child support guidelines, appellate court will not interfere with trial court's discretion.

<sup>26</sup> Sherfey v. Sherfey, 74 S.W.3d 777, 782 (Ky. App. 2002).

<sup>27</sup> (V.R. 1: 8/26/08).

one hearing, Ms. Ivy testified that the condition which gave rise to her claim for SSI benefits was under control.<sup>28</sup> In the manner consistent with the philosophy behind the Family Court System, Judge Sanderson was the one Judge who observed the parties at all of these hearings. Judge Sanderson alone had a unique opportunity to accurately assess the parties' relative intelligence, credibility, motivation, and general character. The Court of Appeals sees "substantial evidence establishing Ms. Ivy's disability and her entitlement to said benefits"<sup>29</sup> which is what compelled the Court of Appeals to find Judge Sanderson's Order arbitrary, unfair and an abuse of discretion. A review of the entire record does not reveal the nature of the condition for which SSI was granted. There is no other possible interpretation of the Court of Appeals decision other than the interpretation that an award of SSI alone is sufficient evidence to establish a parent is disabled and unable to support a child.

The Appellee contends that by virtue of Ms. Ivy receiving Social Security Income, she is unable to work, unable to contribute. Ms. Ivy presented absolutely no proof at the contempt hearing as to her employability, other than the fact that she receives SSI. The Appellee makes no response or defense to this, except to repeat that Ms. Ivy received too little SSI to provide for her current family and this older child.

After hearing testimony and evaluating all facets of the case, the Family Court found that Ms. Ivy was able to perform some work and that her failure to make any child support payments constituted contempt of court.

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<sup>28</sup> (V.R. 1: 8/26/08 at 9:41:45).

<sup>29</sup> Ivy v. Commonwealth of Kentucky, et al, 2009-CA-001279-ME, pg. 8.

## VI. CONCLUSION

In order to preserve the statutory guidelines and reinforce the Commonwealth and this Court's position that parents are obligated to support their children,<sup>30</sup> the Cabinet requests this Court to reverse the Court of Appeals' decision that rejects the statutory requirements for setting child support, rejects the minimum support obligation set forth in the statute and interferes with the discretion of the Family Court.

Respectfully submitted,

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<sup>30</sup> Jewell v Jewell, 255 SW3d 522, 524 (Ky. App. 2008).