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

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

v.

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

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

RENEE IVY (NOW KNIGHTEN) — APPELLEE

REPLY BRIEF

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of Appellant's Reply Brief has been served upon the following via U.S. Mail, postage prepaid, this the 22nd day of March 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 6th Street, Paducah, KY, 42003; Hon. Cynthia Sanderson, Judge, McCracken County Family Court, McCracken County Courthouse, 301 South 6th Street, Paducah, KY, 42003; and the Court of Appeals, 360 Democrat Drive, Frankfort, KY, 40601.

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I. PURPOSE AND ISSUES

The purpose of this reply brief is to focus the Court's attention on the points of contention by showing that the KRS 403.212 does not conflict with 42 USC Sec. 407. This brief also reiterates that the McCracken County Judge did not abuse her discretion when she found that Renee Ivy was an able-bodied person capable of financially supporting her child.

II. STATEMENT OF POINTS AND AUTHORITIES

III. ARGUMENT

A. KRS 403.212 does not conflict with 42 USC Section 407.

The facts of this case are simple: a mother's sole source of income is Supplemental Security Income; she was determined to be eligible for SSI nearly twenty years prior to this case. The exact reason for her disability determination is not clear from the record.[1] The Appellant's position is that KRS 403.212 is in compliance with federal mandates and its applicability to this factual pattern is within the discretion of the Family Court Judge, who has experienced numerous hearings with the mother and is intimately aware of the circumstances surrounding this case. The Appellee's position is that this mother, by virtue of her receiving SSI, is unable to work and therefore, should not be required to financially contribute to her child.

The arguments put forth in the Appellant's Brief have not been repudiated by the Appellee. Appellee argues that KRS 403.212(2)(b) is in direct conflict with 42 USC sec. 407(a); therefore, KRS 403.212(2)(b) should be held unconstitutional. However, by Appellee's own admission, the Court has considered this precise argument in *Com. ex rel. Morris v Morris*, 894 S.W.2d 840, 841 (Ky. 1998), and decided that "[N]othing in KRS 403.212(2)(b) subjects SSI benefits to execution, levy, attachment, garnishment, or any similar involuntary transfer. It merely allows the court to include SSI benefits in the calculation, and as such, there is no direct conflict between the state and the federal statutes."[2] The Court reasoned in *Morris* that KRS

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[1] Renee Ivy never produced any expert testimony regarding her disability nor any doctor's records stating her inability to work. During the course of the proceedings, one reference to Ms. Ivy's bipolar condition was made by the child's father. Other than that one reference, a review of the entire record does not reveal the nature of the condition for which SSI was granted to Ms. Ivy.

[2] *Id.* at 841-2.

403.212(2)(b) does not require an "involuntary transfer" but instead "...state[s] explicitly in the text...[that] SSI benefits are to included in the calculation for purposes of determining the amount of child support payments."[3] In fact, by including SSI as income for child support purposes, nothing in *Morris* or KRS 403.212(2)(b) does "major damage to clear and substantial federal interests."[4]

The Appellee contends that 42 U.S.C. §§ 1381 and 659 make it clear that SSI payments are not considered income under federal law. The cited statutes deal with what monies can or cannot be reached through legal process. They do not define income for the purposes of calculating child support. The provisions in these statutes are comparable to the Consumer Protection Act (CPA) that limits the amounts that can be taken from an obligor's disposable earnings. The CPA merely limits the amount taken; it does not change the amount owed under the Order.

The Appellee relies on the rationale in *Rose v. Rose*, 481 U.S. 619 (1987), and the Commonwealth agrees that *Rose* provides an analysis of 42 USC 407(a) that is important to the issue currently at hand. While 42 USC 407(a) may limit the methods for collecting child support from a person's SSI benefits since SSI benefits cannot be assigned or garnished, 42 USC 407(a) does not stand for the proposition that the child support is not owed. In *Rose*, the noncustodial parent and child support obligor's sole source of income was Veterans' benefits. Not only did the United States Supreme Court find that a court's efforts to enforce a child support order against the noncustodial parent whose sole income was Veterans' benefits were not "legal process" as defined in 42 USC 659, the Court also found "no indication in the statue that a state court order of contempt issued against an individual is precluded..." [and]..."while it may be

[3] *Id.* at 842-2.
[4] *United States v. Yazell*, 382 U.S. 341, 352 (1966).

true that these funds are exempt from garnishment or attachment while in the hands of the Administrator, we are not persuaded that once these funds are delivered to the veteran a state court cannot require that veteran to use them to satisfy an order of child support"[5]Similarly, the federal statutes limit the method for collecting child support from a person's SSI benefits (i.e., no assignment or garnishment); however, they do not stand for the proposition that the child support is not owed or that SSI is not income for child support purposes.

The Appellee's contention that federal and state law automatically precludes the filing of a contempt action solely on the basis of the obligor receiving SSI is also faulty. Being a recipient of SSI does not eliminate the recipient's debts or obligations, and 42 USC §407 does not obviate the underlying obligation of the debtor, who remains liable for the debt. 42 USC §407 does not prevent contempt proceedings from being filed against child support obligors; instead, the intended purpose of 42 USC §407 is to offer limited protection from general creditors.[6]

In *Griggs v. Griggs*, 435 So.2d 103, 104 (Ala. Civ. App. 1983), the court emphasized "... that the purpose of...42 USC §407 is to protect the recipient and **his family** [emphasis added] from the claims of creditors. Since family members fall into the protected category, there is no reason to allow the recipient to escape liability to his family."[7] The debt owed to support a child is not the same as a debt owed to a general creditor. A person's own flesh and blood is more

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[5] *Rose v. Rose*, 481 U.S. 619, 635.

[6] See *Morris*, 894 S.W.2d 840 (Ky. 1998) and *Martin v. Commonwealth Cabinet for Families and Children*, unpublished opinion, 2003 UL 22520024 (Ky. App. 2003).

[7] See also, *In re marriage of Anderson*, 522 N.W. 2d 99 (Iowa App 1994), the court forced the payor to fulfill his family support obligations from SSI stating that family support obligations are deeply rooted in moral responsibilities.

than a creditor off the street and as one court stated, "...[supporting children] is a duty of a higher obligation.[8]

Remedies do exist for Ms. Ivy. In Kentucky, the fact that KRS 403.212(2)(b) includes SSI as income does not do major damage to the federal interests involved. KRS 403.211(3) provides as follows:

> 3. A written finding or specific finding on the record that the application of the guidelines would be unjust or inappropriate in a particular case shall be sufficient to rebut the presumption and allow for an appropriate adjustment of the guideline award if based upon one (1) or more of the following criteria:
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> (a) A child's extraordinary medical or dental needs;
> (b) A child's extraordinary educational, job training, or special needs;
> (c) Either parent's own extraordinary needs, such as medical expenses;...
> (g) Any similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines appropriate.
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> 4. "Extraordinary" as used in this section shall be determined by the court in its discretion.

KRS 405.020 provides that "[t]he father and mother shall have the joint custody, nurture, and education of their children who are under the age of eighteen (18)." The trial court has the discretion in a case where a non-custodial parent's sole income is SSI to deviate from the actual guideline amount, if appropriate. The federal interests of allowing a disabled person a minimum standard of living can be weighed against that person's child receiving a minimum amount of support. There is no conflict between state and federal mandates.

The Appellee feels that because the majority of states have ruled SSI funds should not be considered as income for child support payments, the Commonwealth of Kentucky should also jump on the bandwagon. The Commonwealth submits that on this point to be in a minority of states who believe parents should support their children is highly desirable.

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[8] See, *Schlaefer v Schlaefer*, 112 F.2d 177 (1940).

B. McCracken County Judge did not abuse her discretion when she found that Renee Ivy was an able-bodied person capable of financially supporting her child.

Appellant contends that the Judge Sanderson, the McCracken County Family Court Judge, was correct to find that Renee Ivy was an able-bodied person capable of financially supporting her child. The act of financially supporting her child is not an impossible act for Ms. Ivy as the Appellee contends.[9] The Court of Appeals opines in the opinion currently on appeal that the Family Court Judge "...abused her discretion" by finding Ms. Ivy in contempt for her failure to complete the "impossible act" of paying her child support.[10] However, the Commonwealth now asks this Court, pursuant to KRE Rule 201, to take judicial notice of the fact that the "impossible act" of paying $15/week and $5/month toward arrearage has been very **possible** for Ms. Ivy since she has never failed to make her child support payment during the two years since Judge Sanderson ordered those payments.[11] As desired by this Court in the creation of the Family Court System, the Family Court Judge familiar with Ms. Ivy, her family, and her abilities is the more suitable Judge to determine whether paying $15 per week for current child support is an impossible act for Ms. Ivy.

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[9] See Appellant's Brief, pages 7-8. Also, the child support statute does not allow the Courts to consider net income for purposes of completing the child support worksheet, which is exactly what the Appellee suggests this Court do now. Ms. Ivy's net income was due to choices she made. For example, Ms. Ivy paid the entire monthly rent of $400. She could have had her employed/employable husband contribute to the $400 monthly rent, which she chose not to do. If he paid one half the monthly rent, she would have an additional $200 net income each month.

[10] See Court of Appeals opinion reversing, 2009-CA-001279-ME.

[11] See certified/notarized copy of Ms. Ivy's official "Payment Ledger," attached hereto at Appendix and take judicial notice that the Family Court Judge in this situation has been correct in her ruling regarding Ms. Ivy's ability to pay; since the last show cause hearing held on June 16, 2009, Ms. Ivy has paid her child support payment each and every month, not only for this case, but for her other child support case as well. For two years, she has been able to do this and take care of her own needs.

By the Appellee's own argument, the "Inability of a debtor to satisfy a judgment is a fact to be determined by the trial court."[12] Judge Sanderson has done just that. By requiring Ms. Ivy to pay the statutory minimum of $15 per week for her current child support obligation, Judge Sanderson complied with the requirements of KRS 403 and did not violate the purview of *Lewis v. Lewis*, 875 S.W.2d 862 (Ky. 1993), as the Appellee contends. The fact that Ms. Ivy is a recipient of SSI does not equate to a federal determination that a parent cannot work.[13] Ms. Ivy could have obtained enough employment to pay her small child support obligation without effecting her SSI.[14] Simply put, the child should not suffer due to Ms. Ivy's *choice* not to supplement her disability benefit, which the Family Court clearly believes Ms. Ivy capable of doing. There has been no requirement by Judge Sanderson that Ms. Ivy complete an impossible act since the eligibility of a child support obligor to receive SSI does not automatically mean that the obligor completely lacks the ability to work.

According to the Appellee's own contention, *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994), delineates the abuse of discretion standard as occurring when a court's decision is unreasonable or unfair, and the argument continues that Judge Sanderson abused her discretion by making the unreasonable, unfair requirement of Ms. Ivy to work. The Appellee relies on the testimony of Ms Ivy's payee, Mr. Kenneth Anderson, to persuade this Court that Ms. Ivy cannot work. The Appellee quotes Mr. Anderson as having testified that, "Ms. Ivy could not have outside employment—it would be fraud."[15] With all due respect to Mr. Anderson, he may

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[12] See Appellee's Brief, pg. 38, citing *Clay v. Winn*, 434 S.W.2d 650 (Ky., 1968).

[13] See Appellant's Brief, pp 6-8.

[14] KRS 403.212(2)(a) does not allow the Kentucky Courts to consider net income for purposes of completing the child support worksheet, which is exactly what the Appellee suggests this Court do now. Ms. Ivy could have had her employed/employable husband contribute to the monthly rent, which she chose not to do.

[15] See Appellee's Brief, pg. 40.

believe that Ms. Ivy cannot obtain outside employment if she is a recipient of SSI; however, the law states otherwise. The Social Security Act does not require that a determination of disability be based on whether or not such an individual has the ability or inability to work.[16] The Social Security Act permits an individual with a disability determination to work as long as that work does not involve "...doing significant physical or mental activities."[17] Judge Sanderson did not require Ms. Ivy to perform "significant" activities.

Appellee enumerates several options for "resolving this conflict" currently before the Court. Appellant respectfully submits that the proper finding for this Supreme Court is to find that there is no conflict between Kentucky's child support statutes and the applicable federal laws. This Court's only option is to reverse the Court of Appeals decision that rejects the statutory requirement for setting child support, rejects the minimum support obligation set forth in the statues and interferes with the discretion of the Family Court.

Respectfully Submitted,

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[16] 42 USC §1381.
[17] 20 CFR §404.1572.