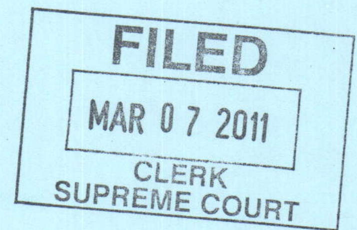

COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
FILE NO. 2010-SC-0527

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 CIRCUIT COURT
ACTION NO. 08-J-000098

RENEE IVY (NOW KNIGHTEN) APPELLEE

BRIEF FOR APPELLEE, RENEE IVY (NOW KNIGHTEN)

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KATHLEEN KALLAHER SCHMIDT

Introduction

The Appellee, Renee Ivy (now Knighten), was held in contempt by the McCracken Family Court for failing to pay $106 in child support when her sole source of income was from SSI benefits, and was sentenced to 30 days in jail stayed on the condition she pay $65 in support and arrears even though her payee only gave her $25-50 per month for her to control and refused to pay child support from the rest of her benefit. The Court of Appeals found the trial court erred in so holding because Ivy demonstrated her inability to pay. The Court of Appeals should be affirmed.

Statement Concerning Oral Argument

Renee Ivy requests oral argument in this case.

Citations to the Record

The record consists of one volume of Transcript of Record and one CD. They will cite as TR page number, and VR date; time.

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ARGUMENT The trial court abused its discretion in holding Renee Ivy in contempt for failure to pay $106 per month in child support and ordering her to pay $65 per month in support or serve 30 days in jail. Ordering a parent whose sole source of income is from SSI benefits to pay child support, and then holding her in contempt and making the keys to her jail cell be payment of support from her benefits, conflicts with 42 U.S.C. Section 407 (a) and violates the Supremacy Clause of the federal constitution 12

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Statement of the Case

Introduction

The Commonwealth has presented Ms. Ivy with a set of impossible choices worthy of a remake of Sophie's Choice. The uncontroverted evidence in this case paints a picture of a woman so mentally ill that she cannot raise her any of her three children.[1] The same trial court who held Renee Ivy in contempt also found she was so mentally ill that she should lose all custody of D.G. when he was only six months old. She is a woman who has been receiving Social Security Income [SSI] for almost two decades after the federal government determined she could not be gainfully employed. Her sole source of income is her SSI benefits of $647 per month. Since 1992, she has had a guardian who receives this money and then pays her essential bills- housing, utilities-takes an administration fee then gives her what is left over. That amount is $25-$50 per month, depending on how high her utilities are that month. This woman is supposed to buy clothing and other basic needs of life from that amount. Her guardian WILL NOT pay her child support from her SSI- he believes it is contrary to federal law. At the time of the contempt hearing, she also had a new baby and she bought diapers for that child.

Yet the Family Court included her SSI benefit (the only amount listed on the chart) in calculating child support and first set her child support at $106 per month. Then it held Renee in contempt for not paying that entire amount.

[1] Toddler D.G. is the subject of this case; Renee has two older children but does not have custody of either child. She had a fourth child, a new baby, with Mr. Knighten at the time of the contempt hearing in this case.

Then in the same proceeding, the court modified the amount to $60 per month.

So the question is framed- can the Commonwealth and the trial court hold this mentally ill woman in contempt and assess jail time when child support was ordered based solely on her SSI benefits, her entire income derives from SSI and she has only $25-$50 in discretionary income per month for her basic needs?

Procedural History

Here's how Renee Ivy (now Knighten)[2] got to this Court. Renee and Larry Barnes had a child, D.G., on February 20, 2008.[3] Barnes filed a Petition to Establish Paternity and Child Custody almost immediately, on February 22, 2008. TR 1-3. Ms. Ivy and Mr. Barnes were not married and appeared not to be in a relationship by the time D.G. was born. In fact, Ms. Ivy was in a relationship with Jonathan Knighten and gave the baby Mr. Knighten's last name.

On April 14, 2008, the trial court[4] awarded joint custody of D. G. to Renee and Larry Barnes, but awarded Barnes primary residential custody. TR 25-6. See Attached at Appendix Tab 3. In that order, as part of its findings concerning why Ms. Ivy could not have residential custody of her newborn, the trial court found that Ms. Ivy had "a history of past and present mental health issues that adversely affect her ability to function, and that have resulted in her being found disabled by the Social Security Administration, with a representative payee appointed to

[2] Renee Ivy (now Knighten) will be referred to as Renee or Ms. Ivy.

[3] Ms. Ivy has two other children. She voluntarily gave up custody of her oldest son to her sister when he was three months old. This same trial court removed her two year old daughter from her when that child was six months old and awarded permanent custody to the sister. TR 24. Ivy was not paying current support for those children at the time of the hearing.

[4] As the Appellant points out in its brief, this is the same trial court who presided over all the proceedings regarding D.G., including the contempt hearing.

handle her financial matters and to receive benefit payments on her behalf." TR 24. The trial court also found "the ... mother has ***overwhelming*** evidence of instability in her home and work, with several residence addresses in the past two years, at least two evictions in the past two years, and with a limited work history before she became ***entitled*** to disability benefits." TR 24.[emphasis added].

On May 15, 2008, pursuant to the April court order, Larry Barnes filed a Notice of Filing of Petitioner's Wage Information. TR 28. In this document, he stated that Renee Ivy received SSI disability benefits, with a monthly gross income in 2008 of $637.00. That amount was used in calculating the support obligations of each parent. See TR 30-1 for the Monthly Support Obligation Worksheets, attached at Appendix Tab 4. That was the **only** amount listed as an income figure for Ms. Ivy. No other income amount was imputed to Ms. Ivy. On May 16, 2008, the trial court entered an order setting Ms. Ivy's child support at $106 per month. TR 32. Ms. Ivy did not appeal. Barnes also did not object or appeal the amount of support set.

On July 31, 2008, the County Attorney's Office intervened for purposes of securing support, uninsured medical and daycare expenses and health insurance on behalf of the child. TR 46, 48. The court ordered Ms. Ivy to provide health insurance if it became available to her at a reasonable cost from any employer. TR 50. She was also ordered to pay 26% of all medical expenses not covered by health insurance and daycare incurred. TR 51. Both parties were ordered to report any change in economic circumstances including employment within 15 days of that change. *Id.*

After a motion to modify the trial court's prior order, sole custody was granted to Larry Barnes on September 5, 2008, and Ms. Ivy's visitation was supervised. TR 55.

At some point, Ms. Ivy and Mr. Knighten married and had a new baby.

On February 26, 2009, the County Attorney's Office, moved the trial court for a "Rule" requiring Ms. Ivy to show cause why she should not be held in contempt for failing to pay her child support as ordered. TR 61. It was alleged that Ms. Ivy was delinquent in her payments according to the attached affidavit of the Assistant County Attorney, in the amount of $853.76 through January 31, 2009. TR 62-3. One can presume from his diatribe at the conclusion of the show cause hearing, the County Attorney was upset because Ms. Ivy did not consistently use birth control, since he declared that Ms. Ivy was a "baby making machine who did not come with a moneymaking machine" and that she kept having children not "giving a damn" who supported or raised them, including the taxpayers. (VR No. 1: 6/16/09; 09:56:25).

The motion was set for March 24, 2009. TR 62. However, on March 3, 2009, the court entered an order for Ms. Ivy to appear at a hearing on April 14, 2009, to show cause why she should not be punished and held in contempt for failure to make the ordered child support payment. The order stated that the Rule was made returnable before the court at that time and date. TR 67. Ms. Ivy purportedly signed the Order and Rule but no date of service was filled in nor was there a signature or badge number for a deputy for serving the Rule.

On March 3, 2009, Ms. Ivy filled out and signed an Affidavit of Indigency asking that counsel be appointed. TR 66. The trial court granted the motion the same day, determining that she was a needy person as defined in KRS 31.110, and appointed the Department of Public Advocacy to represent her. TR 65.

The parties agreed to continue the hearing until June 16, 2009. TR 69.

A hearing was held on that date. The County Attorney stated the child support was set at $106 per month; the last payment that had been received was in June, 2009, for $38.31. (VR No. 1: 6/16/09; 09:24:57). The arrearage amount was $1,124.53 and Renee had never been held in contempt before. (Id.; 09:24:50, 09:25:12). The Commonwealth had no other proof.

Defense counsel called Kenneth Anderson, who is a practicing attorney and a public guardian and administrator for 13 counties including McCracken. In 1992, the public guardian's office was appointed as the official agency of the Social Security Administration to provide supervisory and financial assistance services to Ms. Ivy after her disability was approved. (Id.; 09:26:00). Her impairment was such that she required supervision. (Id.; 09:26:25). A finding of disability means the person is incapable of gainful employment due to a physical, mental or other impairment such that Social Security determines she will never support herself for at least two years from the date of the last payment of assistance. (Id.; 09:29:40). Ms. Ivy's benefits are paid into a fiduciary account and the guardian's office disburses them according to the guidelines and regulations of the Social Security Administration [SSA] for the shelter, maintenance and support of Ms. Ivy. (Id.; 09:27:29).

Ms. Ivy receives $674 per month. (Id., 09:30:40). Out of that, Anderson pays her approximately $400 a month rent on her trailer and her utilities. (Id.; 09:27:44, 09:32:45). He then gives her between $25 and $50 per month, depending on how much her utilities are, for groceries and personal hygiene items; she is not allowed disposable income for luxury or discretionary items. (Id.; 09:27:52, 09:30:28). Mr. Anderson explained that 42 U.S.C. Sec. 407 requires that SSI be used for the maintenance and support of the beneficiary only. (Id.; 09:28:21, 09:28:48). Based on 42 U.S.C. Chapter 7 Section 407 (a), he does not pay Ms. Ivy's child support and is forbidden by law from paying her child support. (Id.; 09:28:15, 09:28:48, 09:29:35, 09:41:09).

Ms. Ivy cannot have outside employment- it would be fraud. She has no other source of income that he knows of and has no assets. (Id.; 09:30:52). She has no earned income he is aware of. (Id.; 37:00). They leave $50-$100 in her account to keep it open and a $37 operating fee for Mr. Anderson's services is deducted every month. (Id.; 09:33:40). He is very familiar with Ms. Ivy because she kept calling in January through March, asking for additional grocery money and he could not give it to her because it was hard to keep up with the utilities because of the cold winter. (Id.; 09:34:55).

Anderson said four child support payments were made by Ms. Ivy herself from her grocery and personal hygiene money. If she chooses to eat less or wear less than they think appropriate, that is her choice. (Id.; 09:29:54).

Anderson was aware Ms. Ivy had a roommate (her husband, Jonathan Knighten) and he was required to file a form with SSA concerning his

circumstances. He listed his employment as intermittent and periodic. (Id.; 09:36:20). Ms. Ivy does not receive any SSA benefits on behalf of her and her husband's baby.

When Ms. Ivy did not want to testify as a witness for Mr. Barnes, the prosecutor and the court told her it was her burden to show why she should not be held in contempt. (Id.; 09:46:45).

Ms. Ivy then testified. She said she lived with her husband and their baby. Her husband worked construction depending on what work was available and the weather. She thought he made $7-$8 an hour and worked 20-25 hours a week, but she was not sure. (Id.; 09:49:35). He did not contribute to the rent because the lease is in her name only; he contributes to utilities when need be. (Id.). They were on food stamps. He used his money to buy the necessities she cannot buy from her SSI benefits, like toilet paper, dishwashing soap and things for their baby. (Id.; 09:50:12). Her husband supported their baby and the baby gets WIC. (Id.; 09:53:00). Most of the money she got from Mr. Anderson goes for diapers. (Id.; 09:53:36).

Ms. Ivy had applied for low income housing in Bartle but the waiting list was six months long. (Id.; 09:50:39). She had no other income besides her SSI to use for child support. (Id.; 09:51:00).

The trial court was clearly surprised that child support had been set at $106 per month when Ms. Ivy only received $25-$50 per month that she could spend herself. The trial court thought they had no clue about that when they support was set. (Id.; 09:56:10).

The trial court said that "while marginal" she was going to find Renee in contempt. This was based on her being able to buy diapers for her new baby but not buying any for D. G. (Id.; 09:59:30). The court sentenced Ms. Ivy to 30 days in jail conditionally discharged and told her to pay $5 per month toward the arrearage. (Id; 10:02:14). The court granted Ms. Ivy's oral motion to modify her child support obligation and reduced her child support to $60 per month and commented that was fair until she could get rid of Mr. Anderson.[5] (Id.; 10:03:00); TR 73.

On June 22, 2009, the trial court entered a "Show Cause Hearing Order" and "found that [Ms. Ivy is] an able bodied person capable of providing financial support to her child and is found to be in contempt of court for failure to provide said support." TR 75. See attached at Appendix Tab 2. The trial court cited no evidence to support that finding or to reconcile the evidence Ms. Ivy presented to the contrary. The trial court sentenced her to 30 days in jail stayed on the condition that she pay her basic child support obligation of $60 per month plus $5.00 per month on the child support arrearage. The Order concluded by stating, "Upon failure of the Defendant to follow the orders of the Court **a bench warrant will be issued for her arrest** to bring her before the Court to show cause why the jail sentence herein imposed should not be served." *Id.*

Ms. Ivy was found to be $1,124.52 in arrears as of May 31, 2009.

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[5] The trial court's answer to Renee's dilemma seemed to be that she try and get control of her money so she could direct where it went. The trial court did not address how it thought Renee could be trusted with finances when she could not be trusted with her baby D.G. or how she was going to make the paltry amount she received stretch to cover herself and court-ordered child support.

Notice of Appeal was filed on July 6, 2009. TR 79. Ms. Ivy was again found to be a pauper within the meaning of KRS 453.190 and KRS 31.110(2)(b) and DPA was appointed to represent her on her direct appeal. TR 78.

Appeal to the Court of Appeals

On appeal, Ms. Ivy argued that the trial court abused its discretion because it held her in contempt for failing to pay $106 per months when the record established irrefutably that her sole income derived from SSI and she only got $25-50 per month in income. Ivy also argued that even the reduced amount- $60 per month plus $5 per month arrearages- was an abuse of discretion. In short, Renee was being compelled by contempt to do an impossible act in violation of this Court's opinion in *Lewis v. Lewis*, 875 S.W.2d 862, 864 (Ky. 1993).

Ms. Ivy also argued that it violated federal law for her to be ordered to pay child support from her SSI benefits because it conflicts with 42 U.S.C. Sec. 407 (a). Ms. Ivy relied in part of the decision in *Burns v. Edwards*, 842 A.2d 186 (N.J.Super.A.D. 2004). See Attached at Appendix Tab 5.

The Court of Appeals of Opinion

The Court of Appeals noted, in addition to the facts set out above, at a prior hearing on August 26, 2008, Renee said she could drive a car and was pregnant again. At a subsequent hearing, she said she had given birth and her husband supported the child and she bought diapers when she could afford to. She also said her bipolar disorder which was the basis of her SSI claim, was under

control- she was taking her medication. *Ivy v. Commonwealth* et al., slip op. at 3.[6] See Attached at Appendix Tab 1.

The Court of Appeals agreed that under *Lewis v. Lewis*, the trial court abused its discretion in holding her in contempt and compelling her to either pay $65 per month or spend 30 days in jail when she only gets $25-$50 per month from her SSI. *Id.*, slip op. at 6. "Pursuant to undisputed testimony, Ms. Ivy only receives $25.00 to $50.00 per month for personal expenses and has no other source of income. Under this current arrangement, it is simply impossible for Ms. Ivy to pay $60.00 per month in child support and $5.00 per month in arrearages. The family court's finding that Ms. Ivy was able to pay those amounts was therefore arbitrary, unfair, and an abuse of discretion." *Id.* The Court of Appeals found that testimony given prior to the contempt hearing that Renee could drive a car and mow her yard were insufficient to support the finding that she was "'able[-]bodied person capable of providing financial support to her child.'" *Id.*, slip op. at 7. Furthermore, the Court of Appeals noted that Ms. Ivy had been denied custody of D.G. due to "'a history of past and present mental health issues that adversely affect her ability to function ... .'" *Id.*, citing the trial court's order of April 14, 2008. It also noted "her disability requires a representative payee to handle her financial matters and to receive benefit payments on her behalf." *Id.*

As part of its discussion of why it was unreasonable to believe Ms. Ivy would be able to meet the support obligation through sporadic work, the Court of

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[6] The Appellant states that nowhere in the entire record does it specify what was the basis of the disability. Brief for Appellant, p. 10. Yet the Appellant also makes reference to this hearing on p. 9. The Appellant did not dispute the Court of Appeals' finding and did not ask to modify the Court of Appeals Opinion. So it appears logical that bipolar disorder was the basis for the disability finding.

Appeals, in dicta, discussed what would happen to her benefits if Ms. Ivy were to get a part-time or minimum wage job. *Id.*, slip op. at 8. But the record established that Ms. Ivy had no job at the time of the hearing so no actual issue was presented about how work would affect her benefits.

The Court of Appeals found "[i]n light of the substantial evidence establishing Ms. Ivy's disability and her entitlement to said benefits, we are compelled to find such an order arbitrary, unfair and an abuse of discretion." *Id.* The Court of Appeals reversed the order holding Ms. Ivy in contempt and ordering her to pay $65 per month, holding "[t]his record conclusively establishes that Ms. Ivy is currently unable to work in any capacity and, therefore, the trial court's order to the contrary is an abuse of discretion and is in error." *Id.* The Court of Appeals' holding when it states in its Introduction that the basis of the Court of Appeals' was that Renee's compliance with the orders of the trial court would jeopardize her benefits

The Court of Appeals did not reach the issue of whether forcing someone whose sole income is from SSI benefits to pay child support from those benefits violates federal law because it conflicts with a federal statute.

The Appellees filed a Motion for Discretionary Review which was granted by this Court on December 8, 2010.

ARGUMENT

The trial court abused its discretion in holding Renee Ivy in contempt for failure to pay $106 per month in child support and ordering her to pay $65 per month in support or serve 30 days in jail. Ordering a parent whose sole source of income is from SSI benefits to pay child support, and then holding her in contempt and making the keys to her jail cell be payment of support from her benefits, conflicts with 42 U.S.C. Section 407

(a) and violates the Supremacy Clause of the federal constitution.

This case revolves around the specific record made in this case, well-settled Kentucky case law on contempt, the interplay between KRS 403.212 and 42 U.S.C. Section 407 (a) and principles of statutory construction.

1. Supplemental Security Income

a. Purpose and General Provisions

Understanding the nature of Supplemental Security Income [SSI] is critical to reaching the correct holding in this case. SSI was established by Congress in 42 U.S.C. 1381a. "The SSI program is a federally-funded public assistance program established under Title XVI of the Social Security Act. It provides minimum subsistence benefits to persons under 65 who are blind or disabled and whose other incomes and resources fall below a prescribed level set by statute." *Ellender v. Schweiker*, 575 F.Supp. 590, 592 (D.C.N.Y. 1983). It is public assistance, an income maintenance program designed to replace state programs with a federal program. *Hannington v. Weinberger*, 393 F.Supp. 553, 555 (D.C. 1975). Unlike Social Security Disability Income [SSDI] benefits[7], SSI benefits are not remuneration for employment past or present but are provided based on need. *Becker County Human Services, Re Becker County Foster Care v. Pappel,* 493 N.W.2d 573, 574 (Minn.App. 1992); *Davis v. Office of Child Support Enforcement,* 20 S.W.3d 273, 276-7 (Ark. 2000). It is a means-tested form of public assistance. *McGill v. McGill,* 801 N.E.2d 1249 (Ind.App. 2004); *Becker, supra*. "The purpose of SSI benefits is to assure that the income of a recipient is maintained at a level viewed by Congress as the minimum necessary for subsistence. *Schweiker v. Wilson*, 450 U.S. 221, 223, 101 S.Ct. 1074, 1077, 67

[7] SSDI is also a non-means tested program as opposed to SSI which is a means-tested program. *Burns, supra*.

L.Ed.2d 186, 191 (1981)... ." See also *Burns v. Edwards,* 842 A.2d 186, 191 (N.J.Super.A.D. 2004). "They constitute a 'safety net' to protect indigent persons." *Id.*, citing *Tennessee Dep't of Human Servs. ex rel. Young v. Young,* 802 S.W.2d 594, 597 (Tenn.1990). "Put simply, SSI is federal welfare for the poorest of the nation's citizens." *Davis, supra* at 277.

The disabled include all those "unable to engage in any substantial gainful activity 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 if not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). See also 20 C.F.R. § 416.905(a).

b. Federal Anti-attachment Statute Applies to SSI Benefits

Congress does not generally allow social security benefits to be forcibly taken from recipients. Section 207(a) of the Act, 42 U.S.C. 407 (a) states:

> (a) The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law.

That provision applies to SSI benefits. See 42 U.S.C. 1383 (d). Federal regulations also specify that SSI benefits are not subject to garnishment. 5 CFR 581.104 (j). Federal law does except benefits based on remuneration for employment and thus SSDI and other such benefits like veteran's benefits are subject to legal process for enforcement of child support orders. 42 U.S.C. 659. But SSI does not represent remuneration for employment. *Davis*, at 276-7.

This section was adopted "to protect social security benefits from the reach of creditors." *Ellender, supra* at 598. That includes a state. *King v. Schafer*, 940 F.2d 1182, 1184 (8th Cir.1991). The express language of Section 407 (a) evinces the "clear intent" of Congress that Social Security benefits are not attachable. *Bennett v. Arkansas*, 485 U.S. 395, 398 (1988). "Congress' clear and stringent interpretation of the prohibition on transfer or assignment of benefits in section 207(b) further compels us to strictly interpret that clause to prohibit voluntary as well as involuntary transfers or assignments." *Ellender, supra* at 599. This is a property interest which enjoys protection under the Due Process Clause of the federal constitution. *Dionne v. Bouley*, 757 F.2d 1344 (1st. Cir. 1985).

c. Legal Process Includes Contempt Proceedings

"The 'legal process' language of section 407(a) is interpreted broadly. It may "require utilization of some judicial or quasi-judicial mechanism, though not necessarily an elaborate one, by which control over property passes from one person to another in order to discharge or secure discharge of some allegedly existing or anticipated liability." *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003). "The Social Security Administration's Program Operations Manual System (POMS), the publicly available operating instructions for processing Social Security claims, defines 'legal process' as used in § 407(a) as 'the means by which a court (or agency or official authorized by law) compels compliance with its demand; generally, it is a court order.' POMS GN 02410.001 (2002), ..." *Id.* at 385.

Other courts have held "[w]hile a government agency's typical collection procedures may not violate section 407(a), *Fetterusso v. New York*, 898 F.2d

322, 328 (2nd Cir.1990); *Wyatt v. Commonwealth*, 75 Pa.Cmwlth. 347, 463 A.2d 64, 67 (1983), an implied or express threat of formal legal sanction constitutes a "legal process' within the meaning of section 407(a). *Moore v. Colautti*, 483 F.Supp. 357, 368 (E.D.Pa.1979), aff'd, 633 F.2d 210 (3d Cir.1980). *Moore* was cited with approval by the Eighth Circuit Court of Appeals in *King v. Schafer*, 940 F.2d 1182, 1185 (8th Cir.1991)." *Becker, supra* at 575. In *Moore, supra,* the Court held the practice of caseworkers warning recipients not to cash their initial lump-sum supplemental security income checks constituted an implied threat of legal process and was illegal and invalid.

In *King, supra,* the Missouri Department of Mental Health used various methods to obtain the social security benefits of persons involuntarily committed to the state because of a mental disease or defect, and also found to be disabled by Social Security due to mental illness, to pay for their care and treatment. The Department sent letters to the representative payees of persons billing them for the charges of the disabled person and telling them if they ever failed to pay, legal action would be taken against them and their income taxes would be seized to satisfy the debt.[8] Although no legal action was actually taken, the threat of legal action constituted "other legal processes" and the state was prohibited from doing so. "What the state cannot do, it cannot threaten to do." *King, supra* at 1185.

A threat to hold an SSI recipient in contempt qualifies as a "legal process" under the federal anti-attachment statute. *Becker, supra* at 575.

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[8] The state admitted it knew it could not seize the benefits because of 407 (a) and never intended to do it.

Logic unerringly follows that if a parent's SSI benefits are her sole source of income, the state cannot force her to transfer part of those benefits to either the parent or the state as reimbursement for public payments made to the child or for current or past court-ordered child support obligations. This includes forcing a transfer through legal process such as a contempt proceeding. If the state cannot garnish SSI benefits, it cannot get around the anti-assignment statute through the backdoor by holding the threat of contempt and jail against the disabled parent. Contempt is intrinsically coercive as to equate with legal process. Contempt is an actual judicial process initiated in a court of law involving a demand to force compliance of a previously entered court order for support and resolved after a formal hearing by a judicial officer. A contempt proceeding is the essence of a legal process.[9]

2. Kentucky Child Support Guidelines

[9] While Ms. Ivy does not believe the Morris majority directly reached the issue of whether contempt proceedings against a parent constituted "legal process" in 42 U.S.C. 407 (a), it suggested that the definition of legal process in the exemption statute in 42 U.S.C. 659(e) limited the reference to legal process in 407 (a) to an order to a governmental agency to pay money from one person to another to satisfy a child support or alimony obligation. That is a misreading of that statute. Also, *Morris* was decided in 1998. The U.S. Supreme Court's decision in *Washington State Dept. of Social and Health Services v. Guardianship Estate of Keffeler, supra*, specifically interpreting what legal process in Section 407 (a) means, clearly finds it to be more broad than that. Also, 659(i) (formerly (e)) states the definitions are for use in that section. The plethora of other courts who have addressed this issue when the state action is taken against the individual parent also do not interpret legal process to be limited by Section 659. Furthermore, the Morris Court states in its conclusion, "This case began its appellate odyssey after the trial court denied appellee's motion for reduction of child support payments but before any effort directed toward enforcement such as contempt, garnishment, execution, or other coercive means authorized by various statutes. If enforcement had been sought, defenses would have been asserted, hearings held, and a record made which would permit complete appellate review. As it is, we have nothing more than the bare legal question of whether the state statute conflicts with the federal statute, and we have held that it does not." *Id.* at 842. The Court lists contempt, garnishment and other coercive means together which indicates it considered contempt in the same vein.

Turning to the state law on establishment of child support, Kentucky's statute on child support guidelines defines income as "actual gross income of the parent if employed to full capacity or potential income if unemployed or underemployed." KRS 403.212 (1). SSI benefits are specifically included in the definition of gross income. KRS 403.212(2) (b). "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 [FN1], and food stamps. FN 1. 42 U.S.C.A. § 601 et seq." *Id.* As Ms. Ivy has previously shown, SSI is without question a means-tested public assistance program. The Commonwealth has cited no case to the contrary and does not even address the underlying character of SSI and the intent of Congress in establishing the program except to parrot the test for eligibility for SSI. Therefore, a patent conflict exists within KRS 403.212(2)(b) about whether SSI is included or excluded. The Commonwealth does not acknowledge or address this conflict.

The child support guidelines table sets a minimum child support amount of $60 for one child even if the parents have a combined income of $0. While the guidelines serve as a "rebuttable presumption" to establish the amount of child support, courts "may deviate from the guidelines where their application would be unjust or inappropriate." KRS 403.211 (2). A finding that the application of the guidelines would be unjust or inappropriate can rebut the presumption if based on a number of enumerated factors including "[a]ny similar factor of an extraordinary nature specifically identified by the court which would make application of the guidelines inappropriate." KRS 403.211 (3) (g). "[T]he courts

have the flexibility to fashion appropriate orders for situations not addressed by our statutory scheme." *Brown v. Brown,* 952 S.W.2d 707, 708 (Ky.App. 1997).

The Court of Appeals affirmed such a deviation in *Dvorak v. Dvorak,* 2010 WL 1814845 (Ky.App. 2010). See attached at Appendix Tab 6. In that case, the trial court refused to order a mother who was "essentially homeless, required intensive mental health and substance abuse treatment, and was unemployed" to pay any child support at that time. *Id.* at 3.

3. Statutory Construction Principles

KRS 446.080(4) requires this Court to give statutory language its plain, ordinary meaning. A cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect.

However, "[i]t is a basic rule of construction that '[w]here there is an apparent conflict between statutes or sections thereof, it is the duty of the court to try to harmonize the interpretation of the law so as to give effect to both sections or statutes if possible.' *Commonwealth v. Halsell,* 934 S.W.2d 552, 555 (Ky.1996), quoting *Ledford v. Faulkner,* 661 S.W.2d 475, 476 (Ky.1983). In the same vein, '[i]t is well settled that two or more acts dealing with the same subject matter must be construed *in pari materia,* and any apparent conflict between them must be reconciled, if possible, so as to give effect to both.' *Sumpter v. Burchett,* 304 Ky. 858, 861, 202 S.W.2d 735, 736 (1947)." *Galloway v. Fletcher,* 241 S.W.3d 819, 823 (Ky.App. 2007).

While courts must make every effort to save statutes from being held unconstitutional, this Court is well aware of its authority to declare part or all of a statute unconstitutional when necessary. For example, in *Jones v.*

Commonwealth, 319 S.W.3d 295 (Ky. 2010), this Court examined a statute which was plain as to its language and intent but ran afoul of the separation of powers provision of the Kentucky Constitution. This Court held one section of the statute unconstitutional thus saving the remainder of the statute because that section was severable. *Id.* at 300.

The Commonwealth argues because the language of KRS 403.212 expressly includes SSI benefits as gross income for the calculation of child support, that is as far as this Court's inquiry can or must go about whether SSI beneficiaries can be forced to pay child support from their benefits. Nothing can be further from the truth.

4. KRS 403.212 Conflicts with 42 U.S.C. 407 (a), as do the Contempt Proceedings Against Renee Ivy; Kentucky Should Join the Vast Majority of States Which Recognize that Federal Law Prevents SSI Benefits from being Ordered or Collected for Child Support.

a. Prior Kentucky Decisions

In *Com. ex rel. Morris v. Morris*, 984 S.W.2d 840, 841 (Ky.1998), the Court considered the issue of whether KRS 403.212(2)(b) conflicted with 42 U.S.C. Sec. 407 (a). The Court recognized that "[t]he patent intent of this statute is to prohibit creditors from asserting claims upon SSI funds that take precedence over the SSI recipient's rights to such funds."

In a four-to-three opinion, the Court reached only the narrow, specific issue presented to it. "[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." *Id.* at 841-2.

The Court noted that the case began on appeal after a motion to modify support was made but prior to any effort to enforce payment of that support. This Court did not address the issue of whether a contempt proceeding against a parent whose sole income comes from SSI benefits conflicts with the federal law. But the instant case is a collection or involuntary transfer case.

The Appellant reads the holding of *Morris* to answer the contempt question yet it does not (and from its plain language this Court consciously declined to do so). Even if SSI can be included in the calculation of child support, it does not mean those benefits can be attached or transferred through legal process like contempt. This is not a question of a parent asking this Court to legislate from the bench by changing a valid statute. Rather it is a parent asking this Court to find what all the states below have found- federal law prevents Kentucky from forcing an SSI recipient to use her benefits to pay child support and thus attempts to do so violate the Supremacy Clause of the federal constitution. That is the question the instant case presents.

b. Pre-emption and the Supremacy Clause

If KRS 403.212 is interpreted to mean that inclusion of SSI benefits into child support calculations also means that a recipient can be ordered to pay child support from those benefits or be held in contempt for not obeying that order when her sole source of income is those SSI benefits, then that statute, and those acts, violate the Supremacy Clause. The Supremacy Clause in Article 6, clause 2 of the U. S. Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

While laws relating to the family are generally left to the states, when a state family law conflicts with a federal law, "review under the Supremacy Clause [is limited] to a determination whether Congress has 'positively required by direct enactment' that state law be pre-empted." *Hisquierdo, supra,* 439 U.S., at 581, 99 S.Ct., at 808, quoting *Wetmore v. Markoe,* 196 U.S. 68, 77, 25 S.Ct. 172, 175, 49 L.Ed. 390 (1904). Before a state law governing domestic relations will be overridden, it "must do 'major damage' to 'clear and substantial' federal interests." *Hisquierdo, supra,* 439 U.S., at 581, 99 S.Ct., at 808, quoting *United States v. Yazell,* 382 U.S. 341, 352, 86 S.Ct. 500, 506, 15 L.Ed.2d 404 (1966)." *Rose v. Rose,* 481 U.S. 619, 625 (1987).

The Supreme Court of the United States has decided several cases addressing the interplay between 42 U.S.C. Section 407 (a) and the Supremacy Clause. In *Bennett v. Arkansas,* 485 U.S. 395 (1988), the Court held that a state law that allows the state to seize the property of state prisons to defray the costs of the prison system conflicted with Section 407 (a) and thus violated the Supremacy Clause. In *Philpott v. Essex County Welfare Bd.,* 409 U.S. 413 (1973), the Court held that the Supremacy Clause and 407 (a) prohibited a state from attaching the bank account, containing social security disability insurance back payments, of a person who applied to a state welfare agency for financial assistance due to total disability but was required by state law to sign an agreement to reimburse the county for any payments received.

Jurisdictions have recognized these holdings. "Moreover, by virtue of the Supremacy Clause, the protection of § 407(a) must prevail over any conflicting

actions authorized by state law. See, e.g., Philpott v. Essex County Welfare Board, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973)." *King, supra* at 1184.

While the U.S. Supreme Court has not specifically addressed whether inclusion of SSI benefits in child support calculations violates 407 (a) and thus the Supremacy Clause, it did decide *Rose, supra.* In that case, the Court held that 38 U.S.C. § 3101 did not bar a state court from holding a disabled veteran in contempt for failing to pay child support, even though the veteran's only means of paying his obligation was to use his VA disability benefits because the benefits in question were designed by Congress to support not only the recipient of the benefits, but also his dependents. As is clear from the federal statute, and the Supreme Court's decision in *Rose,* SSI benefits are *not* to be used on one's dependents.

In analyzing whether a Supremacy Clause violation occurs in child support/SSI cases, states differ over what actions cause such a violation-including SSI benefits as income in calculating child support, allowing a court to order support based on SSI benefits or forcing a parent to pay SSI benefits to satisfy a child support order.

In *Davis, supra,* a woman disabled due to paranoid schizophrenia, receiving $494 in SSI benefits as her sole source of income, was ordered to pay $70 per month in child support to her ex-husband for their two children. The right to collect that obligation was eventually assigned to the state child support collection office. At a hearing to establish support after the assignment, the state questioned Davis about how she used her SSI check. Davis testified that $400

went to pay for rent, groceries, and cigarettes (she lived with her sister). The $94 left was used for medication for her mental illness. No other witnesses were called or other evidence introduced. The fact-finder ruled Davis had to pay $70 per month, $36 in fees and $37.50 in filing fees, reasoning she had funds to smoke a pack of cigarettes a day.

By state Administrative Order, income was defined broadly to include any payment, including disability payments. The Order was interpreted by the trial court to include SSI benefits as income.

The mother argued that federal law explicitly and implicitly pre-empted any attempt by the state to impose a child support obligation on her SSI benefits. The Arkansas Court held that federal law prevents a state from ordering child support payments exclusively from SSI benefits. "Given its purposes, we find that subjecting SSI payments to state court child-support orders would do 'major damage' to a clear and substantial federal interest.' Therefore, we hold that the sovereign immunity exception created by § 659 does not apply to SSI benefits." *Id.* at 277-8, citing *Young, supra.* [footnote omitted].

The Arkansas Court took on the concern expressed by the dissenter from the Court of Appeals in the instant case, i.e. must not every parent support her child? "We note that the responsibility of a parent to provide for the support of their minor children is as the supreme court has stated, 'a moral imperative.' Certainly, parents can do by choice what the law cannot command. In the case of disabled parents living exclusively on subsistence income, with rare exception, there is little choice." *Id.* at 277 fn. 1. See also *Burns, supra* at 193.

The Court then held:

> We hold, however, that although SSI comes within the definition of income for child-support purposes, it is not subject to state court jurisdiction. Congress has made no sovereign immunity exception for non-remunerative federal benefits such as SSI. Hence, those benefits remain free from 'execution, levy, attachment, garnishment, or other legal process.' We thus join the majority of the states that have addressed this issue and hold that Arkansas courts cannot order child-support payments based upon income from federal SSI disability benefits.

Id. at 278.

However, Nevada went a step farther. In *Metz v. Metz,* 101 P.3d 779, 788 (Nev. 2004), Nevada imposed a duty on parents to support their children and, by statute, both SSI and SSDI can be included in the definition of gross income. See NRS 125B.070(1)(a). The Court was faced with the question of whether the state statute conflicted with federal law exempting social security benefits from legal process, thus violating the Supremacy Clause, or stated otherwise, whether SSI could be included in a parent's income for calculation of child support. The Court analyzed the difference between SSI and SSDI. It found, "SSI is a 'means-tested' benefit. Government benefits are 'means-tested' if eligibility for the benefits is determined based on the recipient's income or resources. Further, SSI is intended to supplement a recipient's income, not substitute lost income because of a disability. The recipient is not required to pay into the social security system in order to qualify for SSI benefits. Thus, SSI provides a person with a minimum income and is designed to help poor, needy people." *Id.* at 782-3, citing both *Burns* and *Davis* [other footnotes omitted]. Although the Court concluded that

the state statute had to be interpreted to include both SSI and SSDI in gross income, it also found that it conflicted with the exemption provision of 42 U.S.C. Section 407. *Id.* at 784-5.

Citing the test from the U.S. Supreme Court in *Rose, supra,* the Court held:

> We conclude that under 42 U.S.C. § 407(a), Congress has expressly exempted supplemental security income from child support payments. Thus, a district court is prohibited from utilizing a noncustodial parent's supplemental security income in setting a child support obligation....
>
> The purpose of SSI is to provide a recipient with a minimum income for his or her own needs. Thus, using SSI benefits to satisfy a child support obligation would do " 'major damage' to a clear and substantial federal interest." [footnote omitted]. Our conclusion is supported by the law from other jurisdictions as well. A majority of states have expressly exempted SSI benefits from income considerations under child support statutes.FN40. Other states, through case law, have held that §407(a) prohibits state courts from ordering child support to come from SSI benefits. FN 41....
>
> FN40. See Cal. Fam.Code § 4058(c) (West 2004) (excluding from annual gross income, funds derived from any public assistance program); Colo.Rev.Stat. § 14-10-115(7)(a)(I)(B) (2004) (providing that " '[g]ross income' does not include benefits received from means-tested public assistance programs"); Me.Rev.Stat. Ann. tit. 19-A, § 2001(5)(G) (West 1998) (providing that "[g]ross income does not include that amount of money received from means-tested public assistance programs, including, ... supplemental security income"); Md.Code Ann., Fam. Law § 12-201(5) (Supp.2004) (same); N.M. Stat. Ann. § 40-4-11.1(C)(2)(a) (Michie 1999) (providing that " 'gross income' shall not include benefits received from means-tested public assistance programs"); Ohio Rev.Code Ann. § 3119.01(C)(7)(a) (Anderson Supp.2003) (providing that gross income does not include supplemental security income); Utah Code Ann. § 78-45-7.5(3)(b) (2002) (providing that benefits received from supplemental security income are excluded from gross income); Wash. Rev.Code Ann. § 26-19-071(4)(e) (West 2004) (same); W. Va.Code Ann. § 48-1-228(9)(d)(3) (Michie 2004) (same); Wyo. Stat. Ann. § 20-2-303(a)(ii) (Michie 2003) (providing that means-tested income sources, such as supplemental security income, are not considered income)....
>
> FN41. See *Davis,* 20 S.W.3d at 276; *Becker County Human Services v. Peppel,* 493 N.W.2d 573, 576 (Minn.Ct.App.1992); *Young,* 802 S.W.2d at 597-99."

Id. at 786.

The Court reached a different conclusion for SSDI. The Court did not strike down the entire statute but simply interpreted the statute not to include SSI benefits in gross income.

Appellant has cited an unpublished case, *Martin v. Commonwealth et. al.*, 2003 WL 22520024 (Ky. App. 2003), raising the issue that the federal government has not pre-empted the field and thus inclusion of SSI benefits in an order to pay support does not run afoul of the Supremacy Clause of the federal constitution. Ms. Ivy will demonstrate below why *Martin* does not directly reach the question presented in this case, and does not render any opinion of precedential value.

First, Ms. Ivy notes that *Martin* has a peculiar procedural history. Even though Appellant cites this as a Kentucky Supreme Court case, see Brief for Appellant, p. 4 fn. 9, it is in reality an unpublished opinion from the Court of Appeals. In fact, a Motion for Discretionary Review filed by Martin was granted by this Court on September 16, 2004. But the case was dismissed upon joint motion of the parties on December 9, 2004. See this Court's public website, File No. 2003-SC-980.

Furthermore, the factual situation presented in *Martin* was similar to that in *Morris*. The subject of the appeal was the denial by the trial court of Martin's motion to amend, alter or vacate an order establishing her monthly base child support and arrearage payments. It did not have to do with a contempt or other enforcement proceeding. Martin argued that including her SSI benefits in

calculating child support conflicted with federal law, was thus barred by federal preemption and was unconstitutional. Martin argued that *Morris* was distinguishable because she had been arrested and charged with flagrant non-support based on the order and the repeatedly wanted contempt and criminal sanctions against her for failure to comply with the order. Martin cited the opinion of the three dissenters in *Morris* and the case law they relied upon.

Based on *Morris*, the Court of Appeals affirmed the trial court. In dicta, the Court erroneously read *Morris* to find that contempt was not legal process under the federal statute which Morris did not specifically hold.

The instant case deals squarely with enforcement through civil contempt while *Morris* and *Martin* did not.

c. The Vast Majority of Other States Hold SSI recipients cannot be forced to use their benefits for child support.

Numerous other jurisdictions have tackled this issue, both from the aspect of whether SSI can even be included in the calculation of child support and also whether SSI benefits can be ordered paid or collected for child support even if originally included in the calculation. Several opinions from other jurisdictions which have dealt with the intricacies of this thorny issue are extraordinarily thorough and informative.

In *Burns v. Edwards*, 842 A.2d 186 (N.J.Super.A.D. 2004), the New Jersey Court dealt extensively with this subject and its opinion is illustrative of the interplay between SSI, child support guidelines and collection of support. The facts are eerily similar to those in Ms. Ivy's case. The defendant was a 41 year old man diagnosed with schizophrenia who had been declared eligible for SSI

benefits. His sole source of income was his SSI benefits and the record was devoid of evidence that he had any earning capacity and supported the conclusion that he did not. He lived in a boarding house for disabled persons. His benefit was $576 per month, from which $495 was paid directly to the boarding house. He received a personal needs allowance of $80.50 per month. The family court entered a child support order against the defendant, based on an erroneous listing of his benefits as SSD.

The New Jersey Court held that federal SSI benefits received by a disabled parent may not be utilized as income when calculating a child support obligation when such benefits are the sole source of support of that parent, and income cannot otherwise be imputed to the parent. The Court noted that the United States Supreme Court has not answered the question of whether a state may include SSI benefits in calculating child support. However, a majority of jurisdictions, including the federal government, do not allow this practice. *Id.* at 194-5. "Thirty-eight states exempt SSI benefits from inclusion in a calculation of gross income for child support purposes. Those states are: California, Georgia, Iowa, Nebraska, New Mexico, Wisconsin, Rhode Island, Alabama, Alaska, Arizona, Colorado, Connecticut, Delaware, Hawaii, Indiana, Kansas, Louisiana, Maine, Maryland, Michigan, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wyoming." *Davis v. Office of Child Support Enforcement,* 20 S.W.3d 273, 278 fn. 2 (Ark. 2000).

The minority that allow SSI to be used to set support distinguish calculation of child support from collection of that support interpret 407 (a) to mean only that the federal government cannot be used as a collection agency to seize SSI benefits. *Id.* at 195, citing *Griggs v. Griggs*, 435 So.2d 103, 105 (Ala.Civ.Ct.App.1983);*Commonwealth ex rel. Morris v. Morris, supra*; and *Whitmore v. Kenney*, 426 Pa.Super. 233, 626 A.2d 1180, 1184-85 (1993) (mother admitted ability to pay and no attachment was issued).

States have dealt with this issue both through legislation preventing SSI benefits from being included in child support calculations in the first place or judicial decisions holding that federal law prevents child support being seized from SSI payments.[10]

In *Becker County Human Services, Re Becker County Foster Care v. Peppel*, 493 N.W.2d 573 (Minn. App. 1992), the parent was a disabled alcoholic whose sole income was $407 in SSI benefits who was ordered to pay $69 per month plus arrearages in child support and told she would be held in contempt if she failed to pay. The Court held the Supremacy Clause prohibits a state from ordering a parent to expend SSI benefits for child support. The state statute did not include or exclude SSI specifically but excepted AFDC and other general assistance benefits. The Court found that "SSI benefits are designed to provide for the minimum needs of the individual recipient, and should not be considered income for any other purpose." *Id.* at 576. See also *Gifford v. Benjamin*, 892 A.2d 738 (N.J.Super.A.D. 2006) (citing *Burns* with approval, discussing difference

[10] Ms. Ivy includes citations to state statutes which exclude SSI from income calculations to inform this Court as to the determination by other legislators that these benefits cannot be included in setting child support.

between SSI and SSDI and noting child support guidelines worksheet excludes SSI received by parent from gross income, McKinney's Family Court Act § 413 (5) (vii) (F)).

Here is a representative list: **Arkansas-** *Davie v. Office of Child Support Enforcement*, 76 S.W.3d 873 (Ark. 2002) (parent who sole income is from SSI cannot be required to provide financial support to her children); **California-** *Elsenheimer v. Elsenheimer*, 22 Cal.Rptr.3d 447 (Cal.App.4.Dist. 2004) (interpreting West's Ann.Cal.Fam.Code § 4058(a)(1) (c) to hold, as a matter of first impression, that prohibition from including public assistance in parent's gross income for calculation of child support includes SSI); **Georgia**- Ga.Code Ann. § 19-6-15(f)(2)(B)(iii) (SSI benefits excluded from child support calculations); **Indiana**- *McGill v. McGill*, 801 N.E.2d 1249 (Ind.App. 2004) (Means-tested public assistance programs such as SSI are specifically excluded from a parent's income for the purpose of computing child support under Child Supp. G. 3(A)(1). "As a matter of law, SSI recipients lack the money or means to satisfy child support obligations." *Id.* at 1251); **Kansas**- KCSG § II.D. (2004 Kan. Ct. R. Annot. 100) (domestic gross income is income from all sources excluding public assistance including SSI benefits); **Louisiana**- LSA-R.S. 9:315(C)(3)(d)(i) (excluding supplemental security income from inclusion in gross income); **Nevada**-*Metz v. Metz, supra* (see prior analysis at p. 24); **Texas**- *Reyes v. Gonzales,* 22 S.W.3d 516 (Tex.App. 2000) (holding the federal anti-attachment provision applies to SSI benefits and they should not have been included in calculation of child support even though the parent was not subject to a garnishment order; by ordering support, if he failed to pay, state could not

garnish his benefits); **Wisconsin-** *Langlois v. Langlois,*441 N.W.2d 286, 288 (Wis.App. 1989) (order that parent pay 25% of SSI violates law regardless of whether it is within or outside guidelines).

The dissenters in *Morris* also listed a number of decisions holding that taking SSI benefits into consideration when calculating child support is in conflict with 42 U.S.C. 407 (a). *Id.* at 844 (Stephens, C.J., dissenting).

5. Resolving the conflict between 42 U.S.C. and Kentucky's inclusion of SSI benefits in calculating, ordering and collecting child support through contempt proceedings

This Court has a number of options for resolving this conflict which puts Kentucky on the wrong side of the Supremacy Clause and the rest of the nation.

a. Hold the portion of KRS 403.212 (2)(b) that includes SSI in gross income unconstitutional; overrule *Morris*.

One approach this Court could take to clarify the law in Kentucky is to act as it did in *Jones, supra*, and find that the portion of the statute that includes SSI benefits in gross income conflicts with the federal anti-attachment statute, and due to federal preemption, must be struck down under the Supremacy Clause. The remainder of the statute is still valid and should remain intact. *Morris,* and any case inconsistent with this holding, should be overruled.

This Court can recognize that the dissenters in *Morris,* and the numerous other states who so hold, had the analysis correct. The reality is if SSI benefits are included in determining the amount of a child support obligation, and that obligation is reduced to an order or judgment against the parent, the parent is forced to use SSI benefits, if they are her sole source of income, to satisfy the order. And if she fails to do so, she clearly can be held in contempt and jailed, with her only key to her jail cell being payment of the aforementioned SSI

benefits. It is hard to see where trying to deal with this situation by breaking the chain in the middle link, i.e. when contempt proceedings are initiated, truly acknowledges what happens to the SSI benefits of these parents or brings Kentucky into compliance with the federal law and constitution. The state's ability to force a parent to use SSI benefits to pay child support is greatly lessened if they are never included in the calculation to begin with.

Additionally, because under the child support guidelines even parents with $0 income are supposed to pay $60 per month unless there is a downward departure, Renee asserts that an order of a trial court to force a parent to pay $60 per month when the record before the trial court establishes that the parent's sole income derives from SSI benefits conflicts with 42 U.S.C. 407(a) and the Supremacy Clause because for the reasons stated above, such an order is inherently coercive. A judge has demanded that the parent pay. Actions, or in this case, inaction, has consequences.

The benefit of this approach is it leaves the judges and litigants in the Commonwealth with a crystal clear rule for how to proceed with parents who receive SSI. If those parents have other income or property that did not cause a total loss of benefits, it can be included in the chart and a downward departure can be requested where is needed.

The Appellant's parade of horribles about what will happen to Kentucky if it follows the law and prevents SSI benefits from being used to pay child support is overstated and slightly hysterical. The Appellant says 4.9% of Kentucky residents receive SSI and in many counties, those SSI payments are their sole

income. The Appellant finds these statistics "overwhelming" but that is simply her opinion- Ms. Ivy does not. First, Ms. Ivy disputes the statistics as stated by the Appellant. They are supposedly based in part on census data which means only those who responded to the census are included. Also, the QuickFacts page cited by the Appellant does not contain, as far as Ms. Ivy can see, any statistic that says in many counties SSI is the primary source of income. Furthermore, the table of SSI recipients do not reveal how many of these recipients have children to whom they have a support obligation. It is safe to assume it is not 100%. If one looks at the chart, it includes persons receiving SSI who are minors and are over the age of 65. Also some parents have their children living with them. So how many of that 4.9% are actually affected by child support orders is unclear. So the assertion "that a large percentage of our population would no longer be required to provide even a scintilla of support for their children" is just not the case.

In fact, Ms. Ivy believes it is telling that in the past 13 years, the Appellant can only find two cases in Kentucky on this issue, one published case from 1998 (*Morris*) and an unpublished Court of Appeals case from 2004 (*Martin*) that this Court wanted to review. Ms. Ivy suggests that it is because contempt proceedings are not generally initiated against parents who are living solely off SSI benefits, regardless of whether they have been ordered to pay child support, because litigants recognize the obvious- these people have little or nothing to give and it is not worth going after. How much is the state losing in paying county attorneys and other child support collection personnel and using precious court resources to collect part of an amount of money that hardly covers the bare necessities of life? The Commonwealth does not address the costs to the judicial system and the

executive branch in trying to collect what amounts to blood from a turnip, not to mention the enormous cost to the counties of incarcerating parents who are actually jailed for contempt. While she freely admits she does not have statistics to prove it, Ms. Ivy cannot believe the cost-benefit analysis is a favorable one.

For example, if one assumes a per diem rate of $30 (assuming the jail does not have to pay for medicine and mental health services), holding Renee Ivy in jail for 30 days would cost the county $900 which represents almost **14 months** of total support payments. So we would be paying $900, plus attorney and judicial costs, to try and compel the receipt of $65 from a woman who gets $25-50 a month to spend.

This is how the Court of Appeals came to discuss what would happen if Renee miraculously was able to find a job (which her representative payee Kenneth Anderson testified she is not allowed to do). The Court's point was she was not going to make more than a maximum of $780 a year or she would lose her benefits. The net result is still not any sum of money that will have a meaningful impact on either the child's standard of living or the state's coffers.

Plus, with all due respect to the Commonwealth, Ms. Ivy does not believe for a minute that this Court should or will ignore the overwhelming case law which makes it clear that, at the very least, an act by the state to collect child support from SSI benefits violates the U.S. Constitution, just because it might have some minimal effect on Kentucky's financial interests.

b. This Court can leave KRS 403.212 intact and allow SSI to be included in calculation of support but hold that a trial court must not undertake execution, levy, garnishment or other legal processes, including the coercive process of a contempt proceeding.

This approach addresses the specific situation presented by Renee Ivy's case. It represents the question left open in *Morris*. The Court could also uphold both KRS 403.212 (2) (b) and the basic holding of *Morris* (although not its view of legal process). This Court would only have to clarify that the trial court cannot hold a parent in contempt for failing to pay support when her only income is SSI or force her to pay SSI benefits because as the keys of her jail cell have been set at an amount that requires her to relinquish her benefits.

It also allows a trial court to hold a hearing to determine the current circumstances of the parent and then decline to impose a contempt finding if the parent's sole income is from SSI.

The downside to this approach is that it makes inclusion of the SSI benefits to form the basis of a child support order superfluous because, barring some very unusual circumstance, the parent will still be in the same situation as when support was set. This seems inefficient and does not encourage respect for the trial court's orders. Courts would enter orders they know they will not enforce if the parent does not pay. Or the trial court would have to either depart downward from the chart in setting support or ignore the chart if SSI benefits were the only income received.

c. This Court can recognize that SSI benefits are a means-tested public assistance program which are excluded from gross income and resolve the conflict within KRS 403.212.

This Court should address the obvious conflict between the inclusion of SSI benefits and the exclusion of means-tested public assistance which is what SSI is. There is no logical way to reconcile this conflict except to interpret means-tested assistance to include SSI and thus rule it cannot be included in gross income. There would be no rational basis for the Legislature to exclude some forms of means-tested public assistance but not others. Doing so would

constitute a violation of the due process clause of the Fourteenth Amendment. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

d. Under any approach, the contempt finding against Ivy must be set aside.

Without question, Renee Ivy's SSI benefits were the sole income listed to calculate and order her to pay support. Without question, the evidence at the contempt hearing proved her SSI benefits were her sole source of income. Without questions, that income was included in what amount the trial court wanted her to pay and whether she could eventually earn some meager amount of money or not, she had no other money besides her SSI benefits when she was ordered to pay $65 per month or go to jail for 30 days. So holding her in contempt for failing to pay $106 per month and ordering her to pay $65 per month to stay out of jail violates 42 U.S.C. 407(a) and the Supremacy Clause.

6. *Lewis v. Lewis* and the prohibition of requiring an impossible act

After all the discussion above of the larger constitutional questions raised by this case, it is important to note that the Court of Appeals did not reach those issues. Instead, the Court of Appeals' reached the right result based on the rule established in *Lewis v. Lewis, supra,* that inability to pay is a defense to contempt, the record in **this** case supports that result, is sound and should be affirmed by this Court. While there are broad and important principles of law to consider in this case, the narrow question of what should happen to Renee Ivy is easily decided.

In *Lewis v. Lewis*, 875 S.W.2d 862, 854 (Ky. 1993), this Court stated:

> The question of the ability of a debtor to satisfy a judgment is a question of fact to be determined by the trial judge. Citing *Clay v. Winn*, 434 S.W.2d 650 (Ky., 1968). The power of contempt cannot be used to compel the doing of an impossible act. Citing *Rudd v. Rudd*, 214 S.W. 791 (Ky. 1919). *Clay, supra* held that a father delinquent in his child support payment, but financially unable to pay, had a valid defense to contempt. *Clay* further indicated that the trial judge should

> make a finding of fact on the question of the ability to pay and any further contempt proceedings should be limited to those amounts which the delinquent father is found to be able to pay. *Spurlock v. Noe*, 467 S.W.2d 320 (Ky. 1971), held that a defendant in custody only because he was unable to pay a fine because of his indigence must be released. Spurlock, supra, indicated that such a ruling did not mean that the fine was extinguished or that the state could not compel payment but only that the indigent defendant must be given some reasonable alternative to satisfy the fine.
>
> ...
>
> This Court is not unmindful of the fact that the trial court has the capacity to enforce its orders even if it is unable to effectively incarcerate indigent debtors. The trial judge may order the debtor to report periodically regarding job search efforts so that appropriate wage assignments can be made. Legally proper actions can be taken to impound any Federal or State Income Tax refund to which the debtor may be entitled as a result of whatever employment has been obtained. The trial court can include provisions in its support collection orders requiring the debtor to report child support obligations when applying for unemployment benefits. By no means do we wish to limit the opportunity for innovative counsel and courts to enforce the collection of proper child support payments and arrearage.

The Lewis Court concluded "Civil contempt charges should be related to the amount the defendant is found able to pay." *Id.* at 865.

In *Commonwealth, ex rel. Bailey v. Bailey,* 970 S.W.2d 818 (Ky. App. 1998), the Court of Appeals followed *Lewis* and stated that the power of contempt cannot be involved to compel the doing of an impossible act. "If the contemnor has absolutely no opportunity to purge himself of contempt, then such imprisonment is punitive in nature regardless of a civil 'label' and is tantamount to a proceeding for criminal contempt." *Id.* at 820.

The facts in *Clay, supra*, are almost identical to the facts in the case at bar. Clay was indebted to his wife in the amount of $6,388.92 for past child support. *Id.* at 651. The court entered an order adjudging Clay to be in contempt and

committed him to the Fayette County jail until such time as he purged himself of contempt by paying the amount of the judgment. *Id.* This Court stated, "Inability of a debtor to satisfy a judgment is a fact to be determined by the trial court. *Terrell v. Terrell*, Ky., 239 S.W.2d 975; *Roper v. Roper*, 242 Ky. 658, 47 S.W.2d 517. A chancellor should not use the penalty of contempt to compel the doing of an impossible act. *Rudd v. Rudd*, 184 Ky. 400, 214 S.W. 791." *Id.* at 652. This Court found that "in view of the foregoing cases, it is apparent that if Petitioner was financially unable to satisfy the judgment at the time he was adjudged in contempt this would constitute a valid defense." *Id.*

The Court of Appeals remanded the case to the Fayette Circuit Court for the purpose of determining whether Clay was financially able to satisfy the judgment or any part thereof. This Court concluded:

> If he is unable to pay the entire amount then the trial court may properly determine if he is able to pay any portion thereof at the present time. After a proper determination of his ability to pay is made it should be clearly set forth in a finding of fact. Thereafter all contempt orders should be limited in their coverage to those amounts which the court has previously found are within the ability of the Petitioner to satisfy. The court may properly, in its discretion, if it finds Petitioner unable to satisfy the entire judgment at this time, order payments made on same over a period of time, which are within the ability of the Petitioner to satisfy.

Id. at p. 652 – 653.

Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). But in reviewing the decision of a trial court, the test is not only whether the findings of the trial judge were clearly erroneous but also whether the trial judge abused her discretion.

Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky.1982). Abuse of discretion occurs when a court's decision is unreasonable or unfair. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994).

Here are the uncontroverted facts. The trial court found Ms. Ivy to be indigent on March 3, 2009. She received $647 per month from SSI. The SSI had been awarded to her because she was found to be so disabled that she could not be substantially gainfully employed. The only source of income listed for Renee when child support was established was her SSI benefits. The same trial court had just held in April, 2008, that Appellant had "a history of past and present mental health issues that adversely affect her ability to function." TR 24. In the same order, the trial court also found "the ... mother has ***overwhelming*** evidence of instability in her home and work, with several residence addresses in the past two years, at least two evictions in the past two years, and with a limited work history before she became ***entitled*** to disability benefits." TR 24.[emphasis added]. This was only 10 months before contempt proceedings were initiated.

No one presented any evidence that Renee had a job or could realistically earn money in any capacity. Her payee, Kenneth Anderson, presented uncontroverted testimony about Renee's finances. Renee had been disabled since 1992. She had him as her representative payee because she needed supervision. He testified he used her SSI benefit to pay his supervision fee of $37, her rent of $400 and her utilities. The money left over- $25 to $50 per month- was provided to Ms. Ivy for her to feed, clothe and clean herself and her home. Some months, such as in the winter, Anderson had a hard time paying the utilities and Ms. Ivy

did not get enough money for food. Anderson testified that it was illegal for him to pay child support from Ms. Ivy's benefits and he did not pay child support from her benefits. Ms. Ivy had absolutely no control over that.

Anderson also testified that Ms. Ivy could not have outside employment- it would be fraud. [11] She has no other source of income that he knows of and has no assets. (Id.; 09:30:52). He was her payee because it had been determined that Ms. Ivy needed financial supervision.

Ms. Ivy testified she had applied for low income housing and there was a six month waiting list. The prosecutor produced no evidence to dispute that. Ivy's husband's income was spotty and was meager also. He provided information to SSA about his finances.[12] She would still have had to provide a place to live for herself and her new baby even if he had not resided with her. Her husband was not legally obligated to spend his income to support D.G. However, her husband was legally obligated to support their baby so funds expended for that purpose were not discretionary. He did help her with necessities such as toilet paper, and detergent. Again, the idea that a person could provide for all her personal needs on $25 a month is ludicrous.

The facts show undisputed evidence that it is legally impossible for Ms. Ivy to pay her support. It is impossible to pay $106 per month when you receive a maximum of $25 to $50 for your basic food and personal care. It was impossible for her to come up with $1,124.52 to pay off the arrearage. It is impossible to pay

[11] Regardless of whether that was legally correct, the opposing parties did nothing to dispute that testimony and the judge appeared to have no basis for disbelieving this was true.
[12] If Renee's living expenses had been paid for by her husband, SSA would have reduced her benefits.

$65 per month to stay out of jail for 30 days when you only get $25 to $50 per month.

Although she received food stamps, there could be no possible dispute that $25 to $50 per month for the necessities of living aside from a roof over her head was grossly inadequate.

Curiously, the trial court appeared not to question that Renee could not pay a full $65 per month from the $25-50 she got from Mr. Anderson, telling her she hoped she could pay "something". (Id.; 09:59:34). The surprise evinced by the trial court when she realized that she had ordered Rene to pay $106 per month when she only got the amount she did in SSI (Id.; 09:56:16), and her decision to modify the base amount of that obligation to $60 at some level demonstrates the trial court did not doubt that she had no other income or could earn any significant sum of money over her benefits.

But without making specific findings as to Renee's financial circumstances from the evidence presented, even though the trial court found Renee to be indigent, the judge found Rene was able-bodied and capable of providing financial support. The trial court should have made a finding that Ms. Ivy did not have the financial ability to pay the amount required to maintain her liberty. See *Reed v. Commonwealth*, 2009 WL 1974475 (Ky.App. 2009), attached at Appendix Tab 7.

The trial court chided Renee for using some of that $25-$50 for diapers for her new baby. She accused Renee of discrimination or preferential treatment of that child. Even if she spent some of that money for diapers, she was also legally

obligated to provide for the new baby and it goes without saying that diapers are an absolute necessity. What was she supposed to do? Neglect that baby, which is also against the law? The trial court could also not reasonably find from the evidence that using part of $25-$50 per month to buy diapers left her with sufficient funds to have paid $106 per month or to pay $65 per month for child support for D.G. The trial court's proposed solution was that Ms. Ivy get a different payee, ostensibly so she could have more discretion over how her money was spent. But having a different payee does not change the federal statute covering SSI benefits nor would it make $674 per month spread far enough to cover the bare necessities for Renee. This is similar to the cases where recipients have used part of their meager funds to smoke except diapers are essential.

The trial court's finding that Renee was in contempt for not paying the $106 per month and the order to pay $65 per month was based on the unsupported finding that she was able-bodied and could provide financially for her child. To the contrary, the evidence was she was not able-bodied- she suffered from an illness of her mind. Renee presented evidence she did not work, she could not work or she would lose her benefits and she had a newborn and a serious mental illness. Even if she could drive a car and mow her grass, no evidence was presented that she ever earned money doing these things. Evidence to support the rank speculation made only by the Appellant after the fact, not at the hearing itself, that Renee could do numerous odd jobs like walk dogs, clean houses, run errands, answer phones, etc., is totally missing from the record. In fact, the Appellant chose not to challenge Renee on cross-examination about her ability to work. The idea that a mentally ill woman with a new baby (and

presumably no money for regular childcare), whom the same trial court already found had overwhelming instability in her home and work and had limited work history even before she was declared disabled, could find and be hired to do these jobs is fantasy.

The Appellant makes much of the fact that the trial court here heard and saw the entirety of the proceedings from the birth of the child to the contempt hearing, although it erroneously characterizes it as "years of hearings and substantial testimony." Brief for Appellant, pg. 9.In fact, the child was born in February, 2008 and the contempt hearing was held in June, 2009. But the fact that the same judge heard the entire proceedings about D.G. hurts, not helps, the Appellant's case.

First, Ms. Ivy disputes Appellant's version of the facts, stating that the trial court based its finding on testimony from other hearings. See Brief for Appellant, p. 2. Ms. Ivy believes this "other evidence" was suggested by the Commonwealth in its brief to the Court of Appeals and was not relied upon by the trial court in finding Ms. Ivy "able-bodied." There was no evidence of Renee being able to drive a car, mow grass or perform any other labor elicited at the contempt hearing itself. While the Appellant says no evidence was elicited at the contempt hearing about what Rene's disability was, that was almost certainly because the trial court already acknowledged it in her April 2008 order removing D.G. from Renee's home, using her mental illness as a reason to take her child away from her.

The Commonwealth also complains that a trial court should not have to accept the SSA's finding that a person is disabled enough to receive SSI as a

finding that person cannot work. However, **in this case**, the same trial court that held Renee in contempt found in April 14, 2008 that she had "a history of past and present mental health issues that adversely affect her ability to function, and that have resulted in her being found disabled by the Social Security Administration ... " TR 24. So the trial court believed that Renee was currently mentally ill in April, 2008, and had a history of mental illness, resulting her to be declared disabled. The trial court had this in the right order- Renee's mental illness existed before and caused the SSA finding. This is not a case of a trial court that had no basis for believing the SSA finding was supported. Plus Ms. Ivy does not agree that a state trial court can ignore a finding of disability by a federal agency. At the very least, there would have to be substantial evidence that the disability no longer existed. Here the trial court itself thought Renee was mentally ill a bare year before holding her in contempt. In any event, once a parent proved she received SSI benefits, any challenge to it would be up to the opposing parties to present evidence to dispute the parent's claim that she is disabled. The parties did not do that in this case. No one attacked the underlying disability.

So even if this Court finds that a family court could hold a person in contempt for not paying a portion of her SSI benefits to meet child support obligations, the trial court still abused its discretion in doing so based on the record in this case.

As this same sad situation of disabled parents who can hardly support themselves much less their children play out across the nation, other cases illustrate what some courts have faced but with different results. In *McGill,*

supra, while recognizing that every parent has a moral obligation to support her children, the Court considered a case involving a parent who sole income was $276 in SSI benefits and $296 in SSDI benefits.[13] His support was originally set at $25 per week when he was receiving SSI only. After motions were filed by both parties, the trial court ordered the parent to pay $15.57 base support plus $5 arrearages per week. The father "contend[ed] that the trial court abused its discretion by ordering him to pay child support at a level that deprives him of the means of self-support at a minimum subsistence level." *Id.* at 1251. Specifically, the father argued that "blind adherence" to the Guidelines, without carefully examining the circumstances in his case, would result in him being homeless and going hungry. As in this case, the father had a representative payee, his brother, for eight years. The payee testified about the father's monthly bills- $185 for his trailer payment and $145 for lot rent, $125 for light, gas and phone, $25 for trailer insurance and $20 for child support payments. The payee said the father used the remaining $72 for food, toiletries and other "basic needs." Id. at 1252. The father smoked three packs of cigarettes at $1.80 per pack and also spent $40 per week on food.

The Court was left with "with the firm conviction that a mistake has been made." Id. at 1253. It recognizes his expenses were absolutely essential and even excluding the $20 in child support, he barely broke even. Despite his obligation to support his children, the Court found that the father "is a disabled, non-

[13] The Court also recognized that SSI should not have been included in the income upon which the support was calculated.

custodial, and indisputably indigent parent, living on public assistance benefits directed at providing him with the minimum support necessary to live. By requiring these benefits, specifically designed to guarantee a minimum of subsistence for Walter, to be diverted for child support purposes would be tantamount to undercutting the minimum support guarantee that these programs intended." *Id.* at 1253.

While the child support guidelines suggested a monthly payment of $60, the Court noted that this would leave the father with $12 per month for food and other basic necessities. It defied logic and the facts to set support at a total $20.57 per week "without the appropriate concern for Walter's ability to pay, given that he receives minimal income sufficient only to meet his basic needs." The Court found "the trial court abused its discretion by ordering Walter to pay child support at a level which denied him the means of self-support at a minimum subsistence level." *Id.*

The Court of Appeals had the same recognition about Renee Ivy's case. Like it or not, the indisputable evidence in the case was that her only income came from her SSI. If the trial court thought she could earn more, it should have included that in the original child support calculations. Renee's circumstances do not appear to have significantly improved from when the support was originally established. In fact, they became more dire because she became pregnant again and had a newborn to care for and support.

It violates the due process clause of the Fourteenth Amendment to imprison a person who does not have the ability to pay a required amount. See generally *Bearden v. Georgia*, 461 U.S. 660, 672-3 (1983). The trial court abused its discretion in holding Renee in contempt and ordering her to pay $65 per month or serve 30 days in jail. The Court of Appeals was correct to do find; its Opinion should be affirmed.

Conclusion

Renee Ivy requests that this Court affirm the Court of Appeals opinion reversing the order of the McCracken Family Court.

Respectfully Submitted,

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