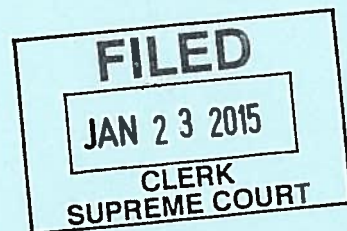


COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
2014-SC-000329-DE



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C.D.G. APPELLANT/CROSS-APPELLEE

v.

N.J.S. APPELLEE/CROSS-APPELLANT

---

ON APPEAL FROM KENTUCKY COURT OF APPEALS  
ACTION NO. 2013-CA-001110-MR  
AND  
JEFFERSON CIRCUIT COURT  
ACTION NO. 07-J-500757

---

**BRIEF FOR APPELLEE/CROSS-APPELLANT**

A handwritten signature in cursive script, appearing to read "Nancy Schook".

Nancy J. Schook  
809 Bedfordshire Rd.  
Louisville, KY 40222  
502.593.6747  
*Appellee/Cross-Appellant*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that true and correct copies of Appellee/Cross-Appellant's Brief were served upon Callie E. Walton, Goldberg Simpson, LLC, 9301 Dayflower Street, Prospect, KY 40059 and Hon. Denise Brown, Jefferson Circuit Court, Paternity Division Seven, 700 W. Jefferson Street, Louisville, KY 40202, this \_\_\_ day of January, 2015. It is further certified that the record on appeal was not withdrawn.

A handwritten signature in cursive script, appearing to read "Nancy Schook".  

*Appellee/Cross-Appellant*

COMMONWEALTH OF KENTUCKY  
SUPREME COURT OF KENTUCKY  
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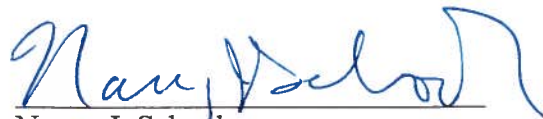
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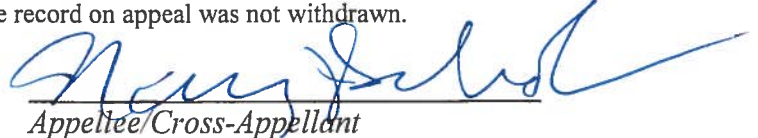
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*Appellee/Cross-Appellant*

## INTRODUCTION

This case involves whether the Court can usurp the Kentucky legislature and extend KRS 403.211(15) to allow a credit for social security *retirement* benefits when the statute only allows a credit for social security *disability* benefits. Additionally, this case involves whether requiring the custodial parent to re-pay the absent father \$17,050.00 from the child's retroactive lump sum social security benefits violates 42 U.S.C. § 407(a) which provides that a child's social security benefits are not subject to attachment or legal process.

**STATEMENT CONCERNING ORAL ARGUMENT**

Appellee/Cross-Appellant does not believe that an oral argument is necessary.

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## STATEMENT OF THE CASE

### History of the Action.

The child's parents, N. J. S. and C. D. G., were never married. (R. 245-253). The child was born December 12, 2002, while both N. J. S. and C. D. G. were married to others and while N. J. S. was C.D.G.'s employee. (R. 245-253). At the request of C. D. G., N.J.S. kept secret his paternity of the child until after she left his employment and obtained a divorce. (R. 245-253). On March 19, 2007, N.J.S. filed a paternity action in order to obtain child support from C.D.G., who vigorously defended against his obligation to support his child. (R. 001). Even after DNA results conclusively determined that C.D.G. was the biological father, he refused to live up to his obligations, costing N.J.S. substantial sums in attorneys' fees. (R.006 & Depo. of C.D.G.). However, in April 2008, the parties, whose incomes were both outside the child support guidelines, agreed in mediation that C.D.G. would pay \$775.00 per month and that N. J. S. would pay all other expenses, including health insurance and child care and that each would pay their own attorneys' fees. (R. 413-414). While the mediated agreement was silent on the application of any social security retirement dependent benefits, it was N.J.S.' belief that such benefits, if any, would be in addition to the \$775.00 and not as a credit against child support. (R. 529-530). Otherwise, she would not have agreed to the low monthly child support amount in light of C.D.G.'s substantial financial resources. (R. 529-530).

### C.D.G. Applies for Social Security Retirement Benefits in November 2011.

Upon obtaining full retirement age, C.D.G. applied for retirement benefits in November 2011 and now receives at least \$2,613.00 per month social security in addition to his income from continued employment as a lawyer with Goldberg & Simpson earning



a six figure salary, other pension and private retirement benefits. (R. 730-731). C.D.G. listed the minor child on his November 2011 application for benefits, but apparently failed to advise social security that N.J.S. was the sole custodial parent and that he had never seen nor had any relationship with the child. However, after receiving a March 6, 2012 letter from Social Security, C.D.G. apparently provided social security with N.J.S.'s contact information because she thereafter received notice from social security that she should file an application for the child's benefits. (R. 750-752). This was the first notice that N.J.S. had received that C.D.G. had filed for retirement benefits and that the child may be able to receive dependent benefits. (R. 750-752).

**N.J.S. Upon Learning the Child May Be Entitled to Benefits Promptly**

**Contacts Social Security.** N. J. S. promptly went to the social security office and began the process of applying for the child's benefits. (R. 750-752). At that time, she was told that her child was eligible, but benefits would be paid to her ex-husband because he was already receiving benefits of \$175.00 per month based on his retirement benefit. (R. 750-752). N.J.S. did not know that her ex-husband was receiving benefits for the child. (R. 750-752). Immediately thereafter, N.J.S. called her ex-husband and asked about the benefits and told him that in order for the child to receive any additional benefits based on C.D.G.'s retirement benefits, he had to appear at social security. (R. 336-338; R. 750-752).

After N.J.S., who is an attorney, was able to consider and research the matter, she determined that she should be the appropriate payee of the child's benefits and sent a letter to social security advising of the same. (R. 331). N.J.S. never took any steps to delay a ruling by social security, and in fact regularly made numerous phone calls and

wrote letters requesting updates. (R. 331-338). The speed at which the social security administration functions is obviously beyond the control of N.J.S.

**C.D.G. Files Motion With Court To Quit Paying Child Support.** On March 19, 2012, C.D.G. filed a Motion with the lower court to cease paying monthly child support and to credit social security benefits against his child support and recoup all his payment made since May 2011. N.J.S. retained an attorney, Sammy Deeb, to represent her, and she followed her attorney's advice to file an opposition since social security had not ruled, and the matter was not ripe. The Court could have granted C.D.G.'s March 2012 Motion, but choose not to do so, and did not enter any ruling on the Motion until April 22, 2013.

During this period from March 2012 through April 22, 2013, N.J.S. was never under any Court Order to escrow or preserve monies she received either through C.D.G. or social security and used all monies received solely for the benefit of the child. (R. 415 – 524; R.751). Since the parties mediated Agreed Order in which N.J.S. had settled her paternity action against C.D.G. for payment of \$775.00 per month, the child had developed extraordinary medical and dental needs and the \$775.00 was inadequate to meet those needs. (R.341; R. 529-530; R. 751; R. 775). Records of expenses for the child for the period May 2011 through March 9, 2013 showed that N.J.S. had spent a total of \$52,489 on the child's needs, or \$2,385.00 per month, while she only received from C.D.G. a total of \$17,050, during that same period at \$775.00 per month. (R. 703-708; R. 744-795). Accordingly, and in following the procedure N.J.S. believed appropriate for a modification of child support, she filed a Motion for an increase from C.D.G., which the lower court never ruled upon. On February 22, 2013, N. J.S. also filed a Supplemental

Memorandum advising the lower court that issuing an Order, or legal process or attachment, requiring repayment to C.D.G. from the child's retroactive SSA benefits is barred by the Social Security Act. (R. 350-352).

On March 15, 2013, N.J.S. was first advised by SSA that she would be named representative payee (R. 734), and on March 20, 2013 N.J.S. first learned that she would receive \$1,256.00 per month for the child. (R. 727-729) Additionally, SSA advised N.J.S. that the child would receive retroactive SSA benefits totaling \$23,780, which federal law and regulations required by spent solely for the immediate needs of the child and any sums not required for immediate needs should be invested for the child's future needs. (R.750-751). The SSA Policy on Use of Benefits, GN 602.001, also provided that all retroactive and future sums must be spent for the child's benefit. (R.525-527).

Accordingly, N.J.S. spent the retroactive payment for the child's Catholic school tuition, other immediate needs and expenses and invested the remainder in a Schwab 529 tuition account in the child's name. (R.744-795; R.779).

**The Court's April 22, 2013 Order.** On April 22, 2013, the lower court held that C.D.G.'s retirement benefits should be treated in same way as disability benefits under KRS 403.211(15) and that his child support obligation was retroactively terminated as of May 2011. (Appendix; Court's April 22, 2013 Order, p. 3) ("The termination of Respondent's obligation to pay child support directly to Petitioner is effective as of the May 2011 effective date of the child's SSA benefits through Respondent."). The lower court also held that as a result of social security's lump sum payment for retroactive benefits on behalf of the child, N.J.S. could use the child's social security funds to repay C.D.G. all child support he had paid since May 2011. *Id.* ("The Court concludes

Petitioner has the funds available for repayment as a result of the lump sum payment from Social Security for retroactive benefits.”). *Id.* N.J.S. then filed a Motion to Alter, Amend or Vacate the April 22, 2013 Order, (R. 744-795), which the court overruled.

The Court’s Order improperly expanded child support legislation beyond the clear language of the statute and violated the Social Security Act, 42 U.S.C. § 407(a) which precludes attachment or legal process against moneys paid to social security beneficiaries. The only exception to attachment of social security benefits is to enforce payment of child support from the non-custodial parent to the custodial parent or enforce payment of alimony or for unpaid federal taxes under 42 U.S.C. § 659.

C.D.G., although receiving full social security retirement benefits, is not unemployed or underemployed or disabled, and on information and belief, is now earning and receiving significantly more money than when he and N.J.S. entered into their agreement concerning child support. Since C.D.G. waited until age 67 for greater social security benefits he has no reduction in benefits despite continuing to work. In contrast, had he applied earlier, the child would have received greater benefits than the \$775.00 he was paying for support each month, thereby causing substantial loss of benefits to the child.

### ARGUMENT

#### **I. THE COURT OF APPEALS PROPERLY APPLIED A DE NOVO STANDARD OF REVIEW.**

In this case, the trial court’s Order was based upon statutory review of KRS 403.211(15) and issues of law concerning credit of social security retirement benefits against child support obligations and repayment of monies from the child’s lump sum retroactive benefits. Accordingly, the Court of Appeals’ properly applied a de novo

standard of review. *Neurodiagnostics, Inc. v. Kentucky Farm Bureau Mut. Ins. Co.*, 250 S.W.3d 321, 325 (Ky. 2008). Appellant, C.D.G. makes a frivolous argument that this Court should apply an abuse of discretion standard of review because the trial court, according to C.D.G., did not base its decision on KRS 403.211(15). C.D.G.'s original Motion was for a "credit" against his child support pursuant to KRS 403.211(15), which provides only for a credit for disability benefits. The trial court's Order held that C.D.G. was entitled to a credit because the Court "sees no reason why Respondent's Social Security retirement benefits should not be treated in the same manner as a parent's disability benefits, given that they are both earned and distributed based on the parent's employment history." Clearly, the trial court based its decision on its expansion of KRS 403.211(15). Accordingly, the Court of Appeals properly reviewed the case de novo and properly held "The provisions of KRS 403.211(15) do not authorize the court to credit against Father's child support obligation the retirement dependent benefits that his child receives on account of his receipt of Social Security retirement benefits."

By its clear language, KRS 403.11(15) only applies to money received as a result of a *parental disability*. It does not apply to payment of money received by a child as a result of *parental retirement*. The Kentucky legislature could have, but did not, include a provision for automatic credit for retirement benefits. The trial court improperly added "retirement" benefits to the plain wording of KRS 403.211(15), in violation of statutory construction. *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004) ("We should not add or subtract from the statute, nor should we interpret the statute to provide an absurd result."). Therefore, even if an abuse of discretion standard applied, the trial

court clearly abused its discretion by adding a credit for retirement benefits to KRS 403.211(15).

**II. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY EXPANDING KRS 403.211(15), WHICH EXPANSION WAS IMPROPER REGARDLESS OF WHETHER ANY OTHER PROVISIONS OF KENTUCKY'S CHILD SUPPORT STATUTE ARE CONSIDERED.**

Appellant claims the Court of Appeals erred by not construing KRS 403.211(15) as a whole. This is simply conjecture on Appellant's part as there is no evidence that the Court of Appeals failed to consider the statutory intent of Kentucky's child support statute. Indeed, the legislature's intent was to require parents to live up to their obligation to support their children. Fundamental law requires that parents provide financial support for their children. *Robinson v. Robinson*, 363 S.W.2d 111, 113 (Ky. 1962) ("Though a father's earnings are always an important factor to be considered in fixing the amount of support payments, it must be remembered that the law holds him responsible for the maintenance of his children regardless of how little he earns."). Even a father who is voluntarily unemployed or underemployed is required to pay support for his child.

In *Atrip v. Noe*, 311 S.W.3d 229, 231. (Ky. 2010), the Kentucky Supreme Court explained that social security disability benefits are a substitute for income the parent would have received but for his disability and from which his child support payments would have been made. In contrast, C.D.G.'s full social security retirement benefits are paid in addition to his continued substantial income from employment. Accordingly, he is fully capable of providing support for his child, and the legislature chose not to provide a credit for retirement benefits paid to the child.

### III. THE COURT OF APPEAL'S DECISION DOES NOT CONFLICT WITH *BOARD V. BOARD* OR *VAN METER V. SMITH*.

In the case of *Board v. Board*, 380 S.W.2d 690, (Ky. 1985), the Court did not interpret KRS 403.211(15) but rather the issue was whether a credit for social security death benefits was a modification under KRS 403.250(1). *Board v. Board*, was decided prior to the enactment of KRS 403.211(15), which statute directly addresses the issue of a child support credit and limits such credit to a parent's **disability**. Furthermore, unlike a parent's death, as in *Board v. Board*, or disability, in this case, C.D.G. continues to earn substantial income and is fully capable of providing support for his child. He simply does not want to do so.

The case of *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000) also is clearly distinguishable from this case because the decision was premised upon the father being required to repay his employer for **disability benefits** under the terms of his coordinated benefits plan.

### IV. THE LAW OF STATUTORY INTERPRETATION PROHIBITS THE COURT FROM ADDING LANGUAGE TO KRS 403.211(15) TO ALLOW A CREDIT FOR RETIREMENT BENEFITS.

C.D.G. argues that while KRS 403.211(15) does not provide for a credit for retirement benefits there is nothing to preclude such a credit. However, the law is clear that a court cannot add words to a statute. *Commonwealth v. Reynolds*, 136 S.W.3d 442, 445 (Ky. 2004) ("We should not add or subtract from the statute . . ."). The Kentucky legislature enacted KRS 403.211(15) in 1990 and has reviewed and modified the statute seven times. If the Kentucky legislature wanted to provide a credit for social security retirement benefits it could easily have done so. It is simply not the role of the Court to

add or expand a clearly and unambiguous statute. As the Kentucky Court of Appeals explained in its Order, “Courts ‘may not interpret a statute at variance with its stated language.’” Order, Apx. A to Appellant’s Brief, citing *SmithKline Beecham Corp. v. Revenue Cabinet*, 40 S.W.3d 883, 885 (Ky. App. 2001). “Statutes must be given a literal interpretation unless they are ambiguous and if the words are not ambiguous, no statutory construction is required.” *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2001). The Courts are not at liberty to add from the language used in KRS 403.211(15). *Commonwealth v. Harrelson*, 14 S.W.3d 541, 546 (Ky. 2000).

**V. THE COURT OF APPEALS CONSIDERED THE STATUORY AND CASE LAW FROM AROUND THE COUNTRY AND HELD THAT THE COURT DECISIONS DID NOT TURN ON THE APPLICATION OF STATUTORY PROVISIONS AS DOES THIS CASE.**

Appellant makes the same argument to this Court as he made to the Court of Appeals that decisions around the country provide a credit for social security retirement benefits. The Kentucky Court of Appeals clearly considered that argument and held in its Order that this case turns on the Kentucky statute and while several states with statutes like Kentucky do provide a credit for social security retirement benefits, Kentucky’s statute does not provide for such a credit. The Kentucky Court of Appeals then adopted the holding in *Wong v. Hawk*, 55 A.3d 425 (Me. 2012) that if the state has a statute for a credit then the statute must be applied as written. The Court of Appeals’ decision is sound and this Court should likewise hold that the statute must be applied as written.



**VI. THE COURT OF APPEALS CORRECTLY HELD THAT THE TRIAL COURT ERRED IN MAKING ITS CHILD SUPPORT DECISION RETROACTIVE AND ORDERING THE CUSTODIAL PARENT TO PAY BACK THE CHILD'S SOCIAL SECURITY FUNDS WHICH HAD BEEN EXPENDED FOR HER BENEFIT.**

The law is clear that child support can only be modified prospectively. *Price v. Price*, 912 S.W.2d 44, 47 (Ky. 1995). In the case at hand, the lower court retroactively terminated C.D.G.'s child support obligation back to May 2011 and ordered repayment of sums received by N.J.S., the custodial parent, even though the sums had been spent for the care of the child. It is undisputed by Appellant that all sums from the social security lump sum payment were spent for the benefit of the child.

Pursuant to *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986), The Court's Order of Recoupment Violates Kentucky Law. In *Clay*, the Kentucky Court of Appeals held that recoupment should only occur if the custodial parent "has not, in fact, expended the 'overpayment' for the support of the child and has it or its equivalent (in whole or in part), available for repayment . . ."). Despite providing evidence to the trial court that all sums from the child's lump sum payment had been expended for the support of the child, the trial court still held that repayment was required. This repayment deprives the child and violates the Social Security Act.

**VII. THE LOWER COURT VIOLATED THE SOCIAL SECURITY ACT BY ORDERING REPAYMENT OF RETROACTIVELY TERMINATED CHILD SUPPORT FROM THE CHILD'S LUMP SUM SOCIAL SECURITY BENEFITS.**

The issue of whether the trial court violated the Social Security Act by ordering repayment of the child's social security benefits to the non-custodial father was briefed to

the Court of Appeals and was preserved for review by this Court, which granted Appellee's/Cross-Appealant's Motion to present this argument.

The United States Supreme Court in *Washington State Dept. of Social & Health Serv., et. al. v. Guardianship Estate of Danny Keffeler, et. al.*, 537 U.S. 371 (2003), and *Philpott v. Essex County Welfare Board*, 93 S. Ct. 590 (1973), has held that the Social Security Act, 42 U.S. C. §§ 407(a) and 1383(d)(1), prohibits any Court from issuing an order which would attach or require payment from retroactive lump sum benefits.

42 U.S. C. §§ 407(a) provides:

**[N]one of the moneys paid or payable . . . under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process . . .**  
..

The United States Supreme Court held that “moneys paid as retroactive benefits were ‘moneys paid . . . under this subchapter’; and the suit brought [for reimbursement for moneys previously paid to take care of the beneficiary] was an attempt to subject the money to ‘levy, attachment . . . or other legal process.’” *Philpott*, 93 S.Ct. at 416. In *Philpott*, the State of New Jersey sought reimbursement from a financial assistance payee, Mr. Wilkes, from awarded retroactive social security disability insurance benefits. New Jersey argued that if the amount of the social security benefits received from the Federal Government had been made monthly, the amount of state welfare benefits could have been reduced by the amount of the federal grant. *Id.* The United States Supreme Court held that Section 407 of the Social Security Act “imposes a broad bar against the use of any legal process to reach all social security benefits. That is broad enough to include all claimants, including a State.” *Id.*

Like New Jersey, C.D.G. argued, and the lower court erroneously agreed, that the amount of his child support could have been reduced by the amount of the benefits if they had been paid monthly from May 2011. Thus, C.D.G. and the lower court have used the legal process to reach the child's retroactive social security benefits in violation of the Social Security Act.

In *Washington State Dept. of Social and Health Svcs. v. Guardianship Estate of Kefeler, et. al.*, 537 U.S. 371 (2003), the United States Supreme Court explained that "legal process" as used in Section 407 of the Social Security Act is generally, "a court order." Therefore, the federal law from the United States Supreme Court is clear that the Court's Order directing that N.J.S. repay C.D.G. \$17,050 from the retroactive lump sum social security benefits of the child violates the Social Security Act.

When N.J.S. received the child's lump sum benefits, she immediately used the funds for the needs and benefit of the child, in accordance with 20 CFR § 404.2035 which provides: "A representative payee has a responsibility to – (a) Use the payments he or she receives only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary." Moreover, pursuant to CFR 20 § 404.2045, "After the representative payee has used benefit payments consistent with the guidelines in this subpart (*See* § 404.2020 regarding use of benefits), any remaining amount shall be conserved or invested on behalf of the beneficiary. In accordance with the above referenced CFR, N.J.S., after paying for the immediate needs of the child from the lump sum amount, invested the remaining amount in a Schwab 529 educational account for the

child. (R. 779). N.J.S. had no equivalent fund from which to pay the \$17,050 to C.D.G., as ordered by the lower court. (R. 744-795; R. 752).

**42 U.S.C. § 659(a) and (b) Which Provides A Narrow Exception For Attachment of Past Due Child Support Does Not Apply In This Case.**

The Provisions of 42 U.S.C. § 659 (a) and (b) only displace the provisions of 42 U.S.C. § 407(a) when the custodial parent is seeking payment of past due child support and not when the absent, non-caring parent is seeking to have the child pay back prior support payments.

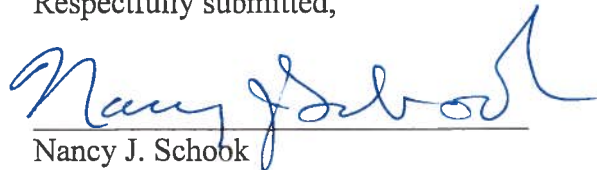
Section 659 provides simply that Section 407 does not preclude “any legal process brought by a State agency administering a program under a State plan approved under this part or by any individual oblige, *to enforce the legal obligation of the individual to provide child support or alimony.*” (emphasis added). The reason for Section 659 is clear. The overriding public policy in this country is that parents should support their children, and if they are failing to provide that support then their social security benefits may be attached. As stated earlier, this is *not* a case of failure to pay child support. N.J.S. is the legal custodian and caretaker of the child, and it is C.D.G. that is failing to properly support his child and causing detriment to her well- being and financial security. Accordingly, any argument by C.D.G. that the Court’s Order requiring that the child’s lump sum benefits can be used to pay back C.D.G. money must be readily rejected.

**CONCLUSION**

This Court of Appeals considered all applicable statutory and case law and held that Appellant was not entitled to a credit for child support for the social security

retirement benefits paid to the child. The trial court clearly erred in ordering that the custodial parent repay to the absent father the child's benefits which were spent for her education and welfare pursuant to the clear directives of the Social Security Act. This Court should AFFIRM the decision of the Court of Appeals.

Respectfully submitted,

A handwritten signature in blue ink that reads "Nancy J. Schook". The signature is written in a cursive style and is positioned above a horizontal line.

Nancy J. Schook  
809 Bedfordshire Rd.  
Louisville, KY 40202  
502.593.6747

