IN THE COURT OF APPEALS OF IOWA

No. 0-403 / 99-1196
Filed October 25, 2000

IN RE THE MARRIAGE OF KATHLEEN J. HILMO AND CHRIS A. HILMO

Upon the Petition of
KATHLEEN J. HILMO, n/k/a KATHLEEN J. GERETY,
Petitioner-Appellant,

And Concerning
CHRIS A. HILMO,
Respondent-Appellee.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

The Petitioner appeals a ruling on Respondent's Application for Modification of the child support provisions of a dissolution decree. **AFFIRMED AS MODIFIED.**

Daniel D. Bernstein of William J. Bribriesco & Associates, Bettendorf, for appellant.

Dennis D. Jasper of Stafne, Lewis, Jasper, Preacher & Rowe, Bettendorf, for appellee.

Considered by Sackett, C.J., and Streit and Vaitheswaran, JJ.

VAITHESWARAN, J.

Kathleen and Chris Hilmo have three children, two of whom are minors. Taylor, the youngest child, lives with Kathleen. Danielle, the second child, lives with Chris. Each parent is obligated to contribute child support to the daughter in the other parent's care. Chris is disabled and receives social security benefits for himself and dependency benefits for Danielle. As a result of Chris's disability, Kathleen also receives dependent care benefits for Taylor. The issue raised in this appeal is whether Kathleen is entitled to offset Danielle's dependency benefits against her child support obligation to Danielle. In a modification proceeding, the district court answered no to this question. We agree and, accordingly, affirm, but modify the child support obligations based on the new guidelines.

I. Background Facts and Proceedings

Kathleen and Chris divorced after twelve years of marriage, with Kathleen assuming primary care of Taylor, Danielle, and the oldest child Nicole, and Chris incurring a support obligation. Chris subsequently lost his vision and began receiving social security disability benefits of $1232 per month. The Social Security Administration also began paying Kathleen dependency benefits of $200 per month for each child, based on Chris's disability.

When she was fourteen, Danielle decided to live with Chris. Chris subsequently applied to modify the child support provisions of the decree to accommodate this split care arrangement. In the meantime, Nicole graduated from high school. Each remaining child began receiving $300 per month in dependency benefits.

The district court considered the case on stipulated facts. The parties agreed Kathleen had gross annual earnings of $42,000. Chris's annual income from social security disability benefits and private pensions totaled $16,776.00. The parties further stipulated Kathleen had net monthly income of $2392.35 and Chris had net monthly income of $1398.00.

The district court concluded under the then-existing child support guidelines that Chris would be required to pay $296.38 per month toward the care of Taylor and Kathleen would owe $509.57 for Danielle. The court credited the $300 in dependency benefits paid for Taylor against Chris's child support obligation. This left Chris with a net child support obligation to Taylor of zero. The court did not afford Kathleen a corresponding credit for the $300 in dependent care benefits Chris received for Danielle. This appeal followed.

II. Contentions on Appeal

Kathleen contends the district court acted inequitably in refusing to credit Danielle's dependency benefits against her support obligation. Although she concedes her net monthly income before support is $2392.35 as compared to Chris's $1398.00, she maintains the court's award does not factor in the burdens she faces as a single working parent raising a young child. Chris responds that Kathleen did not preserve error on her present claim that she will incur greater costs in raising young Taylor relative to the costs Chris will incur in raising Danielle, a teenager. Additionally, he argues the law mandates only he receive an offset against his child support obligation. Beginning with the premise that social security dependency benefits are not income for purposes of applying the child support guidelines, he maintains he is the only person entitled to a credit for

those benefits because they are based on his blindness. Finally, he contends the court's support ruling is equitable in that it leaves each party with essentially the same amount of income.

III. Preservation of Error

As a preliminary matter, we agree with Chris that Kathleen has failed to preserve error on her present equitable assertion that she will incur greater costs in raising Taylor than Chris will incur in raising Danielle. Therefore, in deciding whether Kathleen should receive a credit against her child support obligation, we will not consider this assertion. *In re Marriage of Rebouche*, 587 N.W.2d 795, 798 (Iowa App. 1998).

IV. Standard of Review

Our review of this modification proceeding is de novo. *In re Marriage of Walters*, 575 N.W.2d 739, 740-41 (Iowa 1998). We review facts as well as law and determine rights anew on those propositions properly presented. *In re Marriage of Winegard*, 257 N.W.2d 609, 613 (Iowa 1977). A party who stipulates to certain facts normally would be deemed to have waived error as to those facts. *Rebouche*, 587 N.W.2d at 798. However, we have stated our de novo appellate review permits a broader determination. *In re Marriage of Olive*, 340 N.W.2d 792, 795 (Iowa App. 1983); *In re Marriage of Huston*, 263 N.W.2d 697, 699 (Iowa 1978) (examining basic fairness of decree's provisions in light of total record made at trial).

V. Credit

As the name suggests, dependency benefits are to be used for the care and benefit of dependents of persons with work-related disabilities. 42 U.S.C. §

402(d)(1) (1994). Courts have generally allowed non-custodial disabled parents to offset against their current child support obligation dependency benefits paid by the Social Security Administration on behalf of their children. *See In re Marriage of Foley*, 501 N.W.2d 497, 499 (Iowa 1993); *Newman v. Newman*, 451 N.W.2d 843, 844 (Iowa 1990); *see also Crago v. Donovan*, 594 N.W.2d 726, 730 (S.D. 1999). This offset or credit is based on a recognition that dependency benefits are derived from the disabled parent's hard work and social security contributions over the years preceding the disability.[1]

Our highest court, however, has rejected application of "a rigid rule" that would allocate a credit "only when the government benefits are paid from the account of the obligor parent." *In re Marriage of O'Brien*, 565 N.W.2d, 619, 622 (Iowa 1997). Instead, in determining whether a credit is appropriate, the court has stated we "strive for a resolution that is fair and equitable under the circumstances before us." *Id.*

In order to determine whether Kathleen should receive a credit against her child support obligation, we find it necessary to examine the parties' respective incomes and their child support obligations under the guidelines absent a credit to either party. As noted, the parties stipulated Chris's net monthly income was $1398. This figure did not include the $600 in dependency benefits derived from

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[1] *See generally* Michael A. DiSabatino, *Right to Credit on Child Support Payments for Social Security or Other Government Dependency Payments Made for Benefit of Child*, 34 A.L.R.5th 447 (1995); *see also In re Marriage of Foley*, 501 N.W.2d 497, 499 (Iowa 1993); *Potts v. Potts*, 240 N.W.2d 680, 681 (Iowa 1976); *State ex. rel. Pfister v. Larson*, 569 N.W.2d 512, 516 (Iowa App. 1997) (noting purpose of social security disability benefits is to replace income lost because of employee's disability); *Andler v Andler*, 217 Kan. 538, 544, 538 P.2d 649, 653-54 (Kan. 1975).

his account. At the outset, therefore, we must determine whether this amount should have been included in his income. [2]

The Iowa legislature has not specified what constitutes income for purposes of determining child support, but has relegated to the Iowa Supreme Court the duty of defining income and implementing support guidelines. Iowa Code § 598.21(4) (1999). The most recent guidelines[3] only exclude from gross monthly income "public assistance payments." Our appellate courts have determined that supplemental security income payments and aid to families with dependent children payments are public assistance payments which are excluded from gross monthly income, while social security disability payments, workers compensation payments and veterans benefits are not. *In re Marriage of Benson,* 495 N.W.2d 777, 782 (Iowa App. 1992); *In re Marriage of Lee,* 486 N.W.2d 302, 305 (Iowa 1992).

Against this backdrop, we turn to the treatment of social security disability dependency benefits. Our court addressed the issue in *Benson.* The pertinent facts of that case are instructive. Marilyn and Stephen adopted Harold. Harold received social security dependency benefits based on his natural father's disability. Marilyn and Stephen got divorced and Marilyn received custody of Harold. In calculating Stephen's support obligation, the decretal court included Harold's dependency benefits as income to Marilyn. Marilyn appealed, contending these benefits were not income to her. We agreed. *Benson,* 495

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[2] Although Kathleen stipulated to a net income figure for Chris which did not include as income the $600 in dependency benefits, we may examine de novo the facts supporting entitlement to a credit, including Chris's presumption that the dependency benefits were not income. *See Olive,* 340 N.W.2d at 795.

[3] We apply the guidelines that became effective on August 1, 2000 to cases pending on appeal as of the effective date. *In re Marriage of Roberts,* 545 N.W.2d 340, 343 n.2 (Iowa App. 1996).

N.W.2d at 782. We did not, however, reach the question facing us here: whether the benefits were income to the parent whose disability generated the benefits. We now conclude the benefits are income to the disabled parent.

Our courts have repeatedly stated "social security disability dependent benefits" are a substitute or replacement for income. *See In re Marriage of O'Brien*, 565 N.W.2d 619, 622 (Iowa 1997); *Jahnke v. Jahnke*, 526 N.W.2d 159, 164 (Iowa 1994); *State ex. rel. Pfister v. Larson*, 569 N.W.2d 512, 516 (Iowa App. 1997). While cogent arguments may be made for excluding dependency benefits from the disabled parent's income,[4] these unequivocal statements by our courts that disability dependency benefits stand in the shoes of earned income lead us to conclude dependency benefits are properly included in the disabled parent's income for purposes of calculating child support. *Cf. In re Marriage of Maples*, 78 Wash App. 696, 899 P.2d 1 (Wash App. 1995) (holding that to exclude dependency payments from disabled parent's income would result in windfall to disabled parent).

Having determined social security disability dependency benefits should be considered income to the disabled parent, we next recalculate the parties' respective support obligations. When we include the dependent care benefits of $600 in Chris's income, his net monthly income rises from $1398 to $1998. Applying the most recent child support guidelines to this revised income figure, Chris's child support obligation increases from $296.38 to $427.57 per month.

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[4] *See Drummond v. State*, 350 Md. 502, 714 A.2d 163 (Md. 1998) (considering dependency benefits income to child and a basis for deviation from the child support guidelines); *Graby v. Graby*, 87 N.Y.2d 605, 664 N.E.2d 488, 491-92 (N.Y 1996) (stating social security dependency benefits should not be deemed income because they are an entitlement to children at no "purchase cost" to disabled parent); *In re Marriage of Krompel*, 129 Or. App. 394, 879 P.2d 223, 224 (Or. App. 1994) (holding dependency benefits are income to the child).

Kathleen's income remains at $2392.35. However, under the new guidelines, Kathleen's child support obligation decreases from $509.57 to $480.86 per month.

We may now determine whether Kathleen should be allowed to offset against her child support obligation the dependency benefits Danielle receives while living with Chris. We conclude she should not receive a credit. The inclusion of the dependency benefits in Chris's income results in an increase in his child support obligation. Kathleen does not challenge the district court's allocation of a credit to Chris's support obligation. After application of that credit to the revised support figure, Kathleen will receive $127.57 in monthly support for Taylor plus the $300 in dependency benefits, which is precisely the sum authorized by the guidelines. Because Kathleen has already derived a benefit from inclusion of the dependency benefits in Chris's income, there is no reason to also afford her a credit. To do so would effectively circumvent Kathleen's obligation to pay support based on her own means. *See Jendreas v. Jendreas*, 664 N.E.2d 367, 372 (Ind. App. 1996). We additionally note Kathleen has not furnished any evidence that she did anything to generate the dependency benefits, or was responsible for Taylor or Danielle's receipt of these benefits. *See Grunewaldt v. Bisson*, 494 N.W.2d 193, 196 (S.D. 1992) (notwithstanding split care arrangement, mother cited no authority for proposition she should receive a credit for benefits received as a result of father's disability); *Jendreas*, 664 N.E.2d at 372. (holding mother could not be relieved of her obligation to support child based upon benefits received by child as a result of father's inability to work). *Cf. O'Brien*, 565 N.W.2d at 622 (by marrying stepfather who became disabled,

mother was responsible for her non-custodial child's receipt of dependent care benefits). For these reasons, we conclude Kathleen is not entitled to offset the dependency benefits Chris receives for Danielle against her child support obligation.

VI. Disposition

Kathleen's child support obligation is modified to $480.86 per month based on the new child support guidelines. Chris is ordered to pay Kathleen $127.57, the difference between his revised child support obligation and the dependency benefits received by Taylor. Kathleen has requested for the first time on appeal that we apply our ruling retroactively. We decline to do so. *See* Iowa Code § 598.21(8); *In re Marriage of Thede*, 568 N.W.2d 59, 62 (Iowa App. 1997)(noting decision to apply order retroactively is discretionary). Chris's application for attorney fees is denied.

AFFIRMED AS MODIFIED.