

[Cite as *In re J.W.*, 2015-Ohio-4503.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 102737

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**IN RE: J.W.**  
**A Minor Child**

[Appeal By Father]

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**JUDGMENT:**  
**AFFIRMED**

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Civil Appeal from the  
Cuyahoga County Court of Common Pleas  
Juvenile Division  
Case No. PR-96-773080

**BEFORE:** S. Gallagher, J., Stewart, P.J., and Boyle, J.

**RELEASED AND JOURNALIZED:** October 29, 2015

**ATTORNEYS FOR APPELLANT**

Van Carson  
Lauren Mogavero Grindall  
Lisa J. Zak  
Squire Patton Boggs (U.S.) L.L.P.  
127 Public Square  
4900 Key Tower  
Cleveland, Ohio 44114

**ATTORNEYS FOR APPELLEE**

**For CJFS-OCSS**

Timothy J. McGinty  
Cuyahoga County Prosecutor

BY: Joseph C. Young  
Assistant Prosecuting Attorney  
P.O. Box 93894  
Cleveland, Ohio 44101

**Also listed:**

S.E., pro se  
920 E. 224th Street  
Euclid, Ohio 44123

SEAN C. GALLAGHER, J.:

{¶1} Appellant E.W. appeals the decision of the trial court that denied his motion to modify child support. Upon review, we affirm.

{¶2} On November 10, 2009, the trial court terminated appellant's current child support obligation because of the emancipation of the subject child, and ordered that past-due support arrearage be paid in the sum of \$267.65 per month plus a processing charge. On June 30, 2014, appellant filed a motion to modify child support. Appellant sought "an order modifying the Child Support Order for arrears in the amount of \$272.99 per month, which amount is being withheld from his monthly Social Security Disability benefit[.]" Appellant filed an affidavit in which he stated he had suffered a debilitating stroke in November 2012, which had rendered him totally disabled and unable to engage in gainful employment, and that his Social Security disability insurance ("SSDI") was his sole source of income.

{¶3} Following pretrials in the matter, the magistrate issued a decision that recommended appellant's motion be denied as "there does not exist a legal basis to grant the relief sought by the movant." The trial court overruled objections to the magistrate's decision filed by appellant. The court denied appellant's motion to modify upon finding "there does not exist a legal basis to grant the relief sought by movant." This appeal followed.

{¶4} Appellant raises three assignments of error for our review. Under his assignments of error, appellant claims that (1) the trial court erred in finding a legal basis did not exist to grant the relief sought, (2) SSDI is not income and cannot be garnished under Ohio law, and (3) R.C. 2329.66 provides a complete exemption for disability assistance. We find no merit to appellant's arguments.

{¶5} In *Taskey v. Bonner*, 8th Dist. Cuyahoga Nos. 94601 and 94602, 2010-Ohio-5488, ¶ 17, this court found the trial court erred in reducing the father's monthly arrearage payments to an amount below what he had previously been ordered to pay because courts are constrained to apply the mandates set forth in R.C. 3121.36 and 3123.14. *See also Bennett v. Bennett*, 9th Dist. Summit No. 22798, 2006-Ohio-1305, ¶ 16.

{¶6} R.C. 3121.36 provides in relevant part:

The termination of a court support order or administrative child support order does not abate the power of any court or child support enforcement agency to collect any overdue and unpaid support or arrearage owed under the terminated support order \* \* \*. The termination does not abate the authority of the court or agency to issue any notice \* \* \* to collect any overdue and unpaid support or arrearage owed under the terminated support order. If a notice is issued pursuant to section 3121.03 of the Revised Code to collect the overdue and unpaid support or arrearage, *the amount withheld or deducted from the obligor's personal earnings, income, or accounts shall be at least equal to the amount that was withheld or deducted under the terminated child support order.*

(Emphasis added.)

{¶7} R.C. 3123.14 provides the following:

If a child support order is terminated for any reason, the obligor under the child support order is or was at any time in default under the support order and, after the termination of the order, the obligor owes an arrearage under the order, the obligee may make application to the child support enforcement agency that administered the child support order prior to its termination or had authority to administer the child support order to maintain any action or proceeding on behalf of the obligee to obtain a judgment, execution of a judgment through any available procedure, an order, or other relief. If a withholding or deduction notice is issued pursuant to section 3121.03 of the Revised Code to collect an arrearage, *the amount withheld or deducted from the obligor's personal earnings, income, or accounts shall be at least equal to the amount that was withheld or deducted under the terminated child support order.*

(Emphasis added.)

{¶8} The above statutory provisions mandate that the amount of an obligor's monthly arrearage payment may not be less than the amount ordered under the terminated child support

order. Contrary to the arguments of appellant's counsel, no discretion is afforded under these provisions. Therefore, the trial court was without authority to reduce the amount of appellant's monthly arrearage payments.

{¶9} Appellant relies upon the decision in *Wortham v. Wortham*, 2d Dist. Montgomery No. 23831, 2010-Ohio-4524, in support of his argument that the trial court has authority to modify the arrearage order in this case. In *Wortham*, it was found the trial court did not abuse its discretion in reducing the obligor's monthly arrearage payment after the child was emancipated where the obligor had averred he was disabled and receiving SSDI and that his current arrearage payment created an economic hardship. *Id.* at ¶ 3, 12. However, in that decision, the appellant raised a challenge under R.C. 3123.21, which establishes that the presumed minimum payment on an arrearage when an obligor has a current child support obligation is rebuttably presumed to equal at least 20 percent of the current support payment. *Wortham* at ¶ 9. The court recognized that there was no current support payment because the child was emancipated, and proceeded to find, "[i]n any event, the \$75 per month arrearage payment the trial court ordered is almost exactly twenty-percent of [the obligor's] previous support obligation \* \* \*." *Id.* at ¶ 11. The court did not engage in any analysis, let alone reference R.C. 3121.36 or 3123.14. As such, *Wortham* is not a case on point with the applicable statutory mandates herein.

{¶10} Next, although appellant argued in his brief that his SSDI benefit does not constitute income, appellant's counsel conceded at oral argument that it is income. R.C. 3121.01(D) defines income to include "\* \* \* disability or sick pay; insurance proceeds; \* \* \*; federal, state, or local government benefits to the extent that the benefits can be withheld or deducted under the law governing the benefits; \* \* \*; and any other payment in money."

{¶11} Although 42 U.S.C. 407 generally prevents garnishment of Social Security disability benefits, 42 U.S.C. 659(a) makes an exception “to enforce the legal obligation of [an] individual to provide child support or alimony.” As this court has previously recognized, “under 42 U.S.C. § 659, social security disability benefits payable to a parent are subject to legal process to enforce the parent’s outstanding child support obligations notwithstanding the exemption otherwise provided by 42 U.S.C. § 407.” *State ex rel. Miller v. Comer*, 8th Dist. Cuyahoga No. 75763, 2000 Ohio App. LEXIS 666, \*8 (Feb. 24, 2000); *see also Wortham* at ¶ 7 (“[F]ederal law expressly authorizes state courts to issue withholding orders to collect federal funds to satisfy a child-support obligation. See, e.g., 42 U.S.C. 659(a). This includes Social Security benefits.”).

{¶12} Nevertheless, appellant’s counsel asserted at oral argument that 42 U.S.C. 659 deals with child support and not arrearages, which she maintains is not for the support of a child at the current time or for actual support. Counsel argued that there is a distinction between the federal statutes that involve child support funds and R.C. 3121.36 and 3123.14, which relate to collecting child support arrearages following the termination of a court support order. We are not persuaded by this argument.

{¶13} It is simply irrelevant whether the payments are owed for the current support of a child. *See In re Leibowitz*, 217 F.3d 799, 803 (9th Cir.2000) (“[A] debt can qualify as ‘in the nature of support’ even if the debt provides no current benefits to the child.”). The basis of the arrearage was an unpaid child support obligation. In fact, two provisions of the Social Security Act, 42 U.S.C. 653(p) and 42 U.S.C. 659(i)(2), provide that a “support order” or “child support” may include “arrearages or reimbursement.” Further, R.C. 3121.36 authorizes the court or child support enforcement agency to collect “any overdue and unpaid support or arrearage owed” under the terminated support order. No distinction is drawn under these provisions between child

support and an arrearage owed on a child support obligation. Accordingly, SSDI benefits are properly characterized as income and are subject to withholding for the payment of a child support obligation.

{¶14} Appellant also maintains SSDI is exempt from garnishment or attachment under R.C. 2329.66(A)(9)(f). However, this provision exempts “[d]isability financial assistance payments, as exempted by section 5115.06 of the Revised Code[.]” Disability financial assistance is a state- and county-funded program that is not governed by federal regulations. O.A.C. 5101:1-5-01(A)(1). Pursuant to R.C. 5115.02(A)(1), an individual is not eligible for disability financial assistance under R.C. Chapter 5115 if the individual is “eligible to participate in or receive assistance through another state or federal program that provides financial assistance similar to disability financial assistance[.]” Thus, R.C. 2329.66 is inapplicable in this case.

{¶15} Appellant’s assignments of error are overruled.

{¶16} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, JUDGE

MARY J. BOYLE, J., CONCURS;

MELODY J. STEWART, P.J., CONCURS IN JUDGMENT ONLY

