State of New Hampshire
Supreme Court

NO. 2003-0514

2004 TERM

APRIL SESSION

MATTER OF

DENISE ANGLEY-COOK

and

JOHN W. COOK

BRIEF OF DENISE ANGLEY-COOK

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QUESTIONS PRESENTED

1. Does the New Hampshire child support statute provide any authority for a court to give a child support obligor credit for the amount of money received by his child pursuant to the child's federal government social security retirement benefit?

2. If a child support obligor is entitled to credit for his child's federal social security retirement benefit, is the amount of that credit within the discretion of the trial court?

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Denise Angley-Cook and Dr. John Cook were married in 1982 and divorced in 1993. They have one child, Katrina Cook, who is now 15.

On behalf of Katrina, Ms. Angley-Cook had been receiving from Dr. Cook $866 monthly in child support. In February 2000, due to Dr. Cook's retirement and the cessation of his dental practice, his monthly child support obligation was halved. At the same time, Katrina began to receive social security retirement benefits, which are provided by the federal government to minor children of retired workers, in the amount of $788 per month.

In October 2002, Dr. Cook petitioned the Sullivan County Superior Court to eliminate his obligation, on the grounds that he should get credit for the government benefit. The court (*Jean K. Burling*, J.) issued a uniform support order, in effect denying the elimination. Dr. Cook appealed.

SUMMARY OF ARGUMENT

Denise Angley-Cook first argues that New Hampshire's child support statute does not authorize a court to consider a child's federal government social security retirement benefits in calculating an obligor's child support obligation.

She then argues that even if it does, the amount of credit the obligor enjoys is not a dollar-for-dollar match, but rather it is within the discretion of the trial court.

ARGUMENT

I. The Court Has No Statutory Authority to Credit a Child Support Obligor With a Minor Child's Federal Social Security Retirement Benefits

The federal social security system provides benefits to minor children of retired (as well as disabled and dead) parents. The purpose of the program, 42 U.S.C. § 402(d), is to aid unfortunate minors – not their parents – and ensures that children of retired workers are not in jeopardy of poverty and welfare lines. *See Ziskin v. Weinberger*, 379 F.Supp. 124, 126 (S.D. Ohio 1973); *Davis v. Richardson*, 342 F.Supp. 588, 593 (D.C. Conn. 1972), *aff'd*, 409 U.S. 1069; *Ray v. Social Sec. Bd.*, 73 F.Supp. 58, 62 (S.D. Ala 1947).

The New Hampshire child support statute, RSA 458-C, does not authorize a court to credit a child support obligor for the amount of money the child receives from these federal social security retirement benefits.[1]

A. Support is Calculated According to Parents' Income, Not Child's Resources

The New Hampshire child support statute works so that the amount of support paid by the obligor, and received by the obligee on behalf of the child, is calculated according to the current income of both parents. The statute repeatedly refers to the *parents* income. *See e.g.*, RSA 458-C:2, VI ("Net income" means the *parents'* combined adjusted gross income) (emphasis added); RSA 458-C:2, VII & VIII ("Obligor" and "Obligee" "means the *parent* responsible for the payment" and the "*parent* who receives the payment") (emphasis added); RSA 458-C:3, II(a) ("The total support obligation shall be determined by multiplying the *parents'* total net income . . . by the appropriate percentage") (emphasis added); RSA 458-C:3, II(b) ("The total child support

[1]The only New Hampshire case bearing on the matter, *Griffin v. Avery*, 120 N.H. 783 (1980), was decided before enactment of the current child support guidelines statute.

obligation shall be divided between the *parents* in proportion to their respective incomes") (emphasis added); *Matter of Plaisted & Plaisted*, 149 N.H. 522, 525 (2003) ("As the guidelines make clear, it is the *parent's income* that is used to determine the appropriate amount of child support payments.") (emphasis added); 2004 CHILD SUPPORT GUIDELINES WORKSHEET (Form 650), New Hampshire Department of Health and Human Services, Division of Child Support Services (columns labeled "Obligor" and "Obligee") (example of completed form contained in the notice of appeal, *NOA* at 27).

Nowhere in the statute, in any known case construing it, or on any known form required for the calculation of child support, does there appear a requirement for listing the assets or income of the child. By its absence it is apparent that the Legislature did not intend for courts to take into account in calculating child support generalized resources available to the child. Rather the Legislature constructed a system based on parents' current income. *West v. Turchioe*, 144 N.H. 509 (1999).

As noted, federal benefits available to minor children of retired workers are for the purpose of benefitting the child, and as such belong to the child. 42 U.S.C. § 402(d)(1) ("Every [qualifying] child . . . shall be entitled to a child's insurance benefit"). Dr. Cook has conceded that Ms. Angley-Cook receives them merely as a conduit for Katrina. *Dr. Cook's Br.* at 8, 11, 23, 24; *Trn.* at 7.

Dr. Cook also concedes that there is no direct statutory way for him to account for Katrina's federal retirement benefits in the calculation of his child support obligation other than by using the statute's "other special circumstances" provision. RSA 458-C:5, I(j). By suggesting that the provision should broadly encompass the child's own resources however, Dr. Cook

proposes a construction of the statute out of line with the Legislature's intent that the obligation is based on *parents'* income.

Such a construction would require that courts inquire into children's work income, inheritances, gifts and other resources. His construction would require that the *child* file a financial affidavit, disclosing her income and expenditures. It would require a re-write of the Child Support Guidelines Worksheet to include a column for "Child" in addition to the present columns for "Obligor" and "Obligee." It may necessitate the child having separate representation in her parents' divorce action. Such a construction would be far beyond the Legislature's intent, and should therefore be rejected. *Matter of Plaisted,* 149 N.H. at 526 (court will not "undertake the extraordinary step of creating legislation where none exists").

B. Dr. Cook's Circumstances Are Neither Confiscatory Nor Special

Dr. Cook's suggestion that the statute's savings clause be so broadly construed is also at odds with its language.

The savings clause provides that in setting a child support obligation, the court may take into account "other special circumstances found by the court to avoid an unreasonably low or confiscatory support order." RSA 458-C:5, I(j). Thus, to adjust the obligation down, the court must determine that the guidelines calculations, otherwise deemed presumptively correct, would result in a "confiscatory" support order. *See e.g., In re Dolan*, 147 N.H. 218, 222 (2001).

The statute does not define "confiscatory," but the word is a strong one, historically associated with constitutional takings. *See e.g., Fed. Power Comm'n v. Hope Natural Gas Co,* 320 U.S. 591 (1944); *Ware v. Hylton*, 3 U.S. 199 (1796) (property of British subjects escheats to infant United States); *Appeal of Pennichuck Water Works*, 120 N.H. 562 (1980); *Sprague v.*

Town of Acworth, 120 N.H. 641 (1980). Confiscatory means that something is unduly seized or forfeited, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (unabridged 1993), and applies when an action results in the inability of a person or company to meet basic day-to-day financial obligations. *Appeal of Eastman Sewer Co.*, 138 N.H. 221, 225 (1994) ("rates must be sufficient to pay only the expenses of operating the system").

By using language so strong and historically laced with constitutional overtones, it is apparent the Legislature intended to give courts the widest possible latitude to set child support obligations right up to – but not beyond – a constitutional maximum. *See Morgenstern v. Town of Rye*, 147 N.H. 558, 562 (2002) (savings clause in zoning ordinance exempted pre-existing lots from area and frontage requirements to avoid confiscatory result).

In any event, Dr. Cook neither alleged nor proved that his child support payment is confiscatory such that because of it he is unable to support himself or to meet his other financial obligations.

Even if RSA 458-C:5, I(j) is a catch-all provision rather than a savings clause, by its language it is intended to apply to "special circumstances." Dr. Cook's claim is that because his investments did not do as well as he had hoped given the recent performance of the financial markets, he should be allowed to eliminate his child support obligation. Special circumstances apply to something peculiar or unusual. *See e.g., Matter of Feddersen & Cannon*, 149 N.H. 194 (2003) (applying RSA 458-C:5, I(j) to a $3.4 million settlement of patent infringement lawsuit). But virtually everyone with investments has not done well in the recent financial markets, belying Dr. Cook's claim of peculiarity.

C. Definition of Income Does Not Include Child's Social Security Benefits

New Hampshire's child support statute includes a definition of income. RSA 458-C:2, IV.[2] The definition explicitly deals with social security and retirement. It provides that when calculating child support, the amount of retirement benefits are included in a parent's income, and the amount of retirement contributions are deducted. *See Matter of Watterworth & Watterworth*, 149 N.H. 442 (2003). Thus, it is clear that the Legislature was aware of the existence of social security and of retirement plans generally. Had its intent been to legislate what Dr. Cook now claims, it would have said so. *See Matter of Plaisted*, 149 N.H. at 525 ("absent legislative direction, we will not add words that the legislature did not see fit to include"). Because the statute does not authorize the calculation of support with regard to the child's government retirement benefits, the Court should affirm the judgment of the court below.

D. Minors' Retirement Benefits are Unalienable

The federal law creating benefits for minor children of retired workers prevents the alienation of those benefits. The law provides:

> 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.

42 U.S.C. § 407(a).

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[2] "Gross income" means all income from any source, whether earned or unearned, including, but not limited to, wages, salary, commissions, tips, annuities, social security benefits, trust income, lottery or gambling winnings, interest, dividends, investment income, net rental income, self-employment income, alimony, business profits, pensions, bonuses, and payments from other government programs (except public assistance programs, including aid to families with dependent children, aid to the permanently and totally disabled, supplemental security income, food stamps, and general assistance received from a county or town), including, but not limited to, workers' compensation, veterans' benefits, unemployment benefits, and disability benefits. . . RSA 458-C:2, IV.

Dr. Cook requested that he be given credit for the amount of social security benefits payable to his daughter. Katrina currently gets $788 per month in benefits, and Dr. Cook would like his child support to be reduced by that same amount – resulting in the elimination of his obligation. If he had his way, he, rather than Katrina, would be the beneficiary of the federal program. That result is financially identical to giving him the government's money. In effect he is asking that her benefits be transferred to him. Dr. Cook's request violates the federal anti-alienation provision, and should be therefore denied. *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973).

E. Disability Cases Do Not Apply Here

In his brief, Dr. Cook relies on a large number of cases, largely culled from an article also cited in the brief. Virtually all the cases, however, concern disability benefits and not retirement, and therefore do not apply. *See e.g.*, *Griffin v. Avery*, 120 N.H. 783 (1980).

Whatever the wisdom of crediting a child support obligor for disability benefits paid to a minor child, there is a vast difference between disability and retirement. As disability cannot be predicted, it is an unforeseeable event. Retirement, however, is foreseeable, predictable, and generally planned. In choosing to have a child late in life, Dr. Cook cannot claim to be surprised or harmed upon learning his daughter is the recipient of her federal government retirement benefits.

II. If an Obligor Gets Credit for his Child's Retirement Benefits, the Amount of Credit is Within the Discretion of the Trial Court

Even if New Hampshire's child support statute allows Dr. Cook a credit for Katrina's retirement benefits, the amount of credit is undetermined.

Dr. Cook argues that he should be awarded a dollar-for-dollar credit – that his obligation should go down by the exact amount of Katrina's federal retirement benefit – thus eliminating his obligation. There are several problems with this approach.

The purpose of benefits paid to minor children of retired workers is to benefit the child, not the retiree, and Katrina should be the one to realize the benefit. 42 U.S.C. § 402(d). Moreover, her benefit is *in addition* to Dr. Cook's own retirement benefits – the payment to her does not reduce the payment to him. If Dr. Cook were credited with the entire amount of Katrina's benefit, he would gets two benefits and Katrina would get none.

Dr. Cook's child support obligation is less than Katrina's federal retirement benefit. Thus, if Dr. Cook gets the credit for the federal benefit, his child support obligation would be abolished, contrary to New Hampshire's child support statute, which envisages both parents sharing the costs of minor children.

If Ms. Angley-Cook and Dr. Cook had not divorced, it is believed there would be two federal benefits in their household – one for Katrina, and another for Dr. Cook. The purpose of the New Hampshire child support statute is to "minimize the economic consequences [of divorce] on children." RSA 458-C:1. By giving Dr. Cook a credit for Katrina's benefit, Katrina has much less money, in contravention of the Legislature's policy.

At most, who gets Katrina's retirement benefit should be a factor within the discretion of

the trial court. *Griffin v. Avery*, 120 N.H. 783, 787 (1980) (allowing trial court discretion to determine that obligor parent got credit for child's social security disability benefit).

Here, the court was correct in exercising its discretion to not give Dr. Cook credit for Katrina's social security benefit. Beyond the government benefit, there is nothing in the record showing that Katrina is somehow wealthy and does not need the money for her support. Ms. Angley-Cook's financial affidavit shows that beyond the modest income she earns from her job at an insurance company, she has no other means. Dr. Cook's affidavit, on the other hand, shows he has interest or dividends income, disability income, and his federal retirement benefit. Although his investments might reap less than he hoped, they are not insignificant, and the court did not find that Dr. Cook's child support obligation could not be met within his income.

Consequently, this court should defer to the trial court and leave untouched its factual determination. *Matter of Crowe & Crowe*, 148 N.H. 218, 223 (2002).

CONCLUSION

Based on the foregoing, Ms. Angley-Cook respectfully requests that this Court hold that there is no statutory authority for courts to consider minor children's social security retirement benefits in calculating the amount of an obligor's support, or in the alternative, hold that the court properly exercised its discretion in ordering Dr. Cook's obligation remain unchanged.

Respectfully submitted,
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Dated: April 19, 2004

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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

Denise Angley-Cook requests that her counsel, Joshua L. Gordon, be allowed 15 minutes for oral argument.

I hereby certify that on December 15, 2003, copies of the foregoing will be forwarded to Catherine A. Feeney, Esq., counsel for John Cook.

Dated: April 19, 2004

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