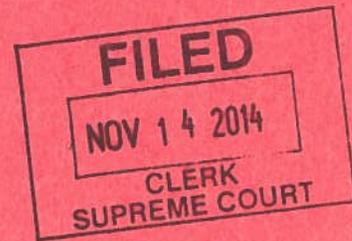


COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
2014-SC-000329-DE



C. D. G.

APPELLANT/CROSS-APPELLEE

v.

N. J. S.

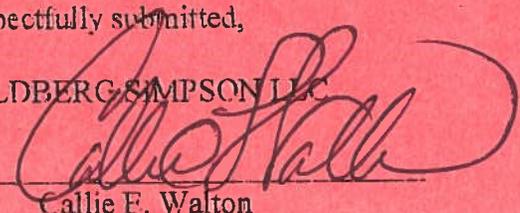
APPELLEE/ CROSS APPELLANT

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

BRIEF FOR APPELLANT / CROSS-APPELLEE

Respectfully submitted,

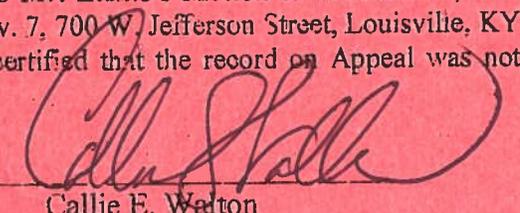
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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of Appellant/Cross Appellee's Brief was mailed, via U.S. Mail, postage prepaid to Laurence J. Zielke, Zielke Law Firm, PLLC, 462 Fourth Street, Suite 1250, Louisville, Kentucky 40202, *Counsel for Appellee*; and Nancy J. Schook, Suite 1250 – Meidinger Tower, 462 Fourth Street, Louisville, Kentucky (pursuant to Mr. Zielke's Motion to Withdrawal) and Hon. Joseph W. O'Reilly, Jefferson Circuit Court, Family Div. 7, 700 W. Jefferson Street, Louisville, KY 40202, on the 13th day of November, 2014. It is further certified that the record on Appeal was not withdrawn.

By: 
Callie E. Walton
Counsel for Appellant/Cross-Appellee

INTRODUCTION

This matter involves a dollar for dollar credit for Appellant's Social Security Retirement dollars paid to the Child against his child support obligation. The Trial Court properly followed the law of this Commonwealth and exercised its discretion holding that Appellant's Social Security Retirement dollars were the same as his earnings and a credit against his child support obligation was appropriate.

STATEMENT CONCERNING ORAL ARGUMENT

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

BRIEF FOR APPELLANT/CROSS-APPELLEE
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STATEMENT OF THE CASE

This matter involves the satisfaction of a child support obligation for the minor child, M.S., born December 2, 2002 (the “Child”). C.D.G. is the biological father of the minor Child. On March 14, 2012, C.D.G. filed a Motion in the Jefferson Family Court, Paternity Division Seven (the “Trial Court”) seeking to apply a credit of C.D.G.’s social security retirement dollars to be paid to the Child against his child support obligation. [Certified Record on Appeal (“R”) at pp. 179-88].

The benefit that the Child received came from C.D.G.’s earnings and contributions into the Social Security Administration (“SSA”). C.D.G.’s monthly child support obligation was \$775.00. The monthly SSA retirement dollars paid from C.D.G.’s account was \$1,256.00. Thus, the \$775.00 was satisfied and the Child received an additional \$481.00 per month.

The SSA benefits were retroactive to May, 2011. Appellee, N.J.S., received a lump sum for the retroactive period of \$23,780.00 in late March 2013. [R 727]. For the same period, N.J.S. also received \$775.00 in monthly child support from C.D.G. For the period of May 2011 to March 2013 child support was paid twice by C.D.G., resulting in an overpayment of \$17,050.

Due to the double payment, C.D.G. sought recoupment of overpaid monthly child support payments from N.J.S. [R 179]. Before the lump sum benefits were paid to N.J.S., C.D.G. requested that the Trial Court order the parties to escrow the monthly child support payments and the lump sum SSA award pending its decision. [R 197, 711-13]. N.J.S. ignored this request and claimed to have spent the entire \$23,780 lump sum in less than three (3) days from receipt.

From November 2011 to March 2013, C.D.G. had worked to get the SSA benefits paid. It was not until February 1, 2013, that it was revealed to C.D.G. why there had been a delay in the benefit payment. It was discovered that N.J.S. was complicit in a deceit concealed from

C.D.G. which had caused the SSA to delay payment of the increased child benefits based on C.D.G.'s retirement record. SSA delayed payment because it was already paying child benefits to N.J.S.'s former husband based on his Social Security record and representations by him and N.J.S. that he was the Child's father and custodian. In addition, there was a dispute between N.J.S. and her former husband over who should be the recipient of the increased child benefits. The deception and controversy over the rightful custodian prolonged the matter for over a year.

On April 23, 2013, the Trial Court entered its Order which correctly applied its discretion and held that C.D.G. was entitled to a full credit for the retirement benefits against his child support obligation. The additional \$481.00 was not addressed. The Trial Court found that the \$1,256.00 in SSA benefits was due to C.D.G.'s earnings and employment record. The Trial Court found that C.D.G.'s employment contributions, paid upon retirement, are more than satisfying his current child support obligation. The Trial Court found that N.J.S. had sufficient funds to repay the overpaid child support. The Trial Court found that to deny C.D.G. recoupment would be unjust and inequitable. N.J.S. failed to challenge the Trial Court's findings and the sufficiency of the evidence supporting the Order. Instead, she appealed without bond and paid the \$17,050 overpayment to C.D.G. The Court of Appeals reversed the Trial Court holding that C.D.G. was not entitled to a credit under KRS 403.211(15), and remanded the matter to the Trial Court for review. [Opinion attached marked **Exhibit A**]. The Court of Appeals denied C.D.G.'s Petition for Rehearing . [Order attached marked **Exhibit B**]. C.D.G. filed his Motion for Discretionary Review. N.J.S. filed a Cross Motion for Discretionary Review which was granted on October 15, 2014.

Case History

In December, 2002, when the Child was born, N.J.S., was married to and living with Mr. Joseph Schook (“**Mr. Schook**”) [R 001, 006-008] She was also the mother of four minor children presumably fathered by her then husband, Mr. Schook. [R 006]. N.J.S. had been married to Mr. Schook since 1981 and remained married to him until May 2007. [R 006]. From 2002 until 2007, Mr. Schook believed that he was the biological father of the Child. [R 006-008; Affidavit of Mr. Schook, R 681-83; VR 30:3/13/13: 03:16:19, attached marked “**Exhibit C**”]. Mr. Schook consistently provided her care and considered himself to be her father. [Id]. It was not until late 2006, after N.J.S. become pregnant and gave birth to her sixth child that divorce proceedings between Mr. Schook and N.J.S. began. [R 006-07].

The Schook divorce action was initiated by N.J.S. in October 2006, and styled, *Nancy J. Schook v. Joseph H. Schook*, Civil Action No. 06-CI-503770, Family Court Division Seven (7). [R 006-007]. It was later revealed that the father of N.J.S.’s sixth child was Mr. Laurence Zielke, Esq. [Id.]. From the date of the Child’s birth through October 2006, both N.J.S. and Mr. Schook continuously represented to the world that Mr. Schook was the Child’s father. [R 080, 681-83, Affidavit adopted as testimony, VR 30:3/13/13: 03:16-19]. It was not until N.J.S. filed for divorce from Mr. Schook in October 2006, that N.J.S. first articulated to anyone that the minor Child, and her sixth child might not be the children of Mr. Schook. [Id at 681-83]. It was at this time, that N.J.S. indicated that the Child might be the child of C.D.G. [Id.]. From October 2006 to May 2007, extensive litigation regarding custody of all six of N.J.S.’s children and paternity of the Child, proceeded in the *Schook* divorce action.

In October, 2006, the Child was three (3), and Mr. Zielke’s child was nine (9) months old. During the course of the Schook divorce, Mr. Schook claimed to be the Child’s biological

father, and vehemently objected to any paternity testing for the Child. [R 007-008]. He repeatedly sought a ruling from the trial court that he was the father of the Child. [Id]. Mr. Schook asserted that he had been convinced by N.J.S. that he was the father of the Child, and had assumed that role willingly and lovingly. [R 008; 681-83]. N.J.S. had represented that Mr. Schook was the Child's father, and listed him as the father on the birth certificate. [Id; R 246; 740]. Both the Child and Mr. Zielke's child carried Mr. Schook's last name. The Child still carries Mr. Schook's name.

Meanwhile, on March 19, 2007, N.J.S. initiated the underlying Paternity Action against C.D.G. [R 001-015]. Before that date, N.J.S. had never sought to have C.D.G act as the father of the Child, nor had she taken any action to confirm paternity by paternity test. [R 006-008; 081]. In fact, her own pleadings filed with the Trial Court assert that there was a question as to whether C.D.G. was the father of the Child. [R 072-074]. Given all of the circumstances of N.J.S.'s actions and the birth of an additional child by Mr. Zielke, C.D.G. was not aware as to whether or not the Child was his biological child. [R 080-81].¹ Less than thirty days after filing the Paternity Action, on April 17, 2007, N.J.S. and Mr. Schook, entered into a Marital Settlement Agreement resolving custody and child support issues. [R 095-111]. The Marital Settlement Agreement, indicates that Mr. Schook has the Child no less than ½ of the time. [R 095-111; 543-553, Agreement Attached at "Exhibit D"]. In fact, currently Mr. Schook is the primary care giver for the Child and has been so for several years. [R 681-82; VR 30:3/13/13:03:19:35-50]. Mr. Schook cared for and loved the Child and had a strong father/daughter relationship with her. C.D.G. respected this relationship and the efforts that Mr. Schook undertook to protect it.

¹ C.D.G. and N.J.S. did enter into a mutual relationship between 1999 and 2003. [R 369 p1-8, excerpts from N.J.S. deposition testimony admitting mutual relationship]. However, paternity was not certain given the nature of the relationship. [VR 30: 3/13/13: 03:21:50 -22:15; 3:32:00-22].

Importantly, the Marital Settlement Agreement permits Mr. Schook to apply for his own Social Security Disability (“SSD”) benefits. [R 545]. In this litigation it was revealed that Mr. Schook had been receiving SSD benefits since 2008, or before. [R 682]. Those SSD benefits include a sum for all of his dependents, including the Child. [Id]. Mr. Schook, with the full knowledge of N.J.S., claimed the Child as his with the SSA. [R 682]. The amount awarded to Mr. Schook for the Child was \$175.00 per month. [R 682].

On April 16, 2007, C.D.G. filed his Motion to Dismiss the paternity action asserting that N.J.S. was equitably estopped from denying that Mr. Schook was the Child’s father, and that C.D.G. was not the biological father. [R 006-050]. N.J.S. responded to the Motion on June 8, 2007, and a hearing was held on June 27, 2007. [R 054-55]. On October 23, 2007, the Trial Court ruled on C.D.G.’s Motion. The Trial Court ordered paternity testing. [R 136].

On January 18, 2008, when the Child was five (5), N.J.S. filed her very *first* Motion requesting child support from C.D.G. [R 142-146]. The parties next attended mediation on April 17, 2008. On that date, the parties entered into an Agreed Judgment. [R 161-162]. As part of Agreed Judgment, paternity was established, and Child Support was set at \$775.00 per month. The Parties agreed that C.D.G. did not have a child support arrearage or other amounts due. [Id.] N.J.S. agreed to be fully responsible for the Child’s health insurance and medical expenses.² [Id.] All parties were represented by counsel and each acknowledged that they were setting the amount based upon an understanding that their respective incomes were above the Kentucky Child Support Guidelines. [R 161-162].

N.J.S. contends that she set the amount of support “low” because of the anticipated receipt of SSA benefits for the Child. There is nothing in the record supporting this self-serving

² Likewise, N.J.S. had agreed in her Marital Settlement with Mr. Schook that she would be responsible for all health insurance and medical expenses for all of her Children. [R 097].

assertion. Once C.D.G. reached 65, N.J.S. did not contact him to establish benefits. N.J.S. did not take any action to adjust child support for the four year period between the Agreed Judgment and the current dispute. [R 342]. From April 18, 2008 to March 2013, C.D.G. paid his child support timely and in full each month.

C.D.G.'s Retirement Benefits

In November 2011, C.D.G. reached 67 years of age. On November 29, 2011, he applied for retirement benefits from the SSA. [R 180; 567; 571; 730]. At the time he applied, he advised the SSA that the Child was his biological child. [Id; VR 30:3/13/13 03:36:40-03:37:40]. He was advised by the SSA that as a result of his contributions into the Social Security program, and his decision to apply for retirement benefits, that the Child could obtain dependent benefits from the SSA. [R 180; VR30:3/13/13: 03:36:40-03:37:40]. C.D.G. was advised that the custodial parent would need to complete the application for the Child's benefits. C.D.G. notified N.J.S. of this right and his application the same day, November 29, and agreed to meet her at SSA to complete the process. [VR 30:3/13/13:03:37:45; Timeline of Events, attached at "Exhibit E"]. N.J.S. representations to the Trial Court that she knew nothing of the application until March 2012 are lies. [VR 30:3/13/13: 03:37:55-03:40:00]

C.D.G.'s application meant that from May 2011 forward, the Child through her custodian, was entitled to receive an amount of money based upon C.D.G.'s contribution and employment record. [R 569]. C.D.G.'s contributions would result in a payment to the Child of \$1256.00 per month going forward, plus a lump sum amount of \$23,780 for the period of May 2011 to March 2013. [R 569, 727].

N.J.S.'s Refusal to Cooperate and Delay of SSA Payment

From November 2011 to March 2012, C.D.G. attempted to get N.J.S. to meet him at the SSA to complete the application process and obtain payment of his SSA funds. [R 542 Timeline, VR 30:3/13/13: 03:36:40-03:40:00]. He contacted her on numerous occasions, drafted a full settlement agreement regarding the matter, and thought that N.J.S. and he had reached an agreement regarding how the benefits would be applied against his Child Support. [R 542 Timeline, VR 30:3/13/13: 03:36:40-03:40:00]. However, N.J.S. refused to sign the agreement or otherwise meet C.D.G. at the SSA from November 2011 until compelled by the Trial Court in December 2012. [Id]. Even then, she did not comply, sending instead her Counsel, Lawrence Zielke, to a February 1, 2013 SSA meeting. [See Page 8-9 herein].

In March 2012, C.D.G. received a letter from the SSA indicating that failure to complete the application may result in the loss of the Child's benefits. [R 557]. To move the matter forward, on March 14, 2012, C.D.G. filed his Motion for SSA benefit Credit Against Child Support and for Recoupment of any over payment (the "Credit Motion"). [R 179-188]. The Credit Motion requested a credit of the SSA benefits against child support and a recoupment of overpaid child support. [Id]. N.J.S. continuously objected to the Credit Motion, claiming to the Trial Court that C.D.G. was not entitled to a hearing, and the Credit Motion was not ripe because the benefits had not yet been paid. [R 189; 190-94].

From March 2012 to December 2012, N.J.S. refused to work with C.D.G to complete the benefit application and get the benefits paid. [R 542; VR30:3/13/13: 03:36:40-03:40:00]. Meanwhile, N.J.S. was accepting C.D.G's child support payments of \$775.00 per month. Frustrated with the lack of cooperation from N.J.S., and resolution, in December 2012, C.D.G. asked the Trial Court to compel N.J.S.'s assistance and cooperation in meeting with C.D.G. at

the SSA to determine why the SSA child benefits had not been paid, and to grant a hearing on his pending Motions. [R 197-98]. N.J.S. again objected claiming again that C.D.G's Credit Motion was not ripe until the monies were paid. [R 201-10]. The Trial Court granted C.D.G.'s motion compelling N.J.S.'s participation and to set a hearing on the matter for March 13, 2013. [R 216, 218].

However, N.J.S. and her Counsel, Mr. Zielke, failed to disclose to C.D.G and the Trial Court that the SSA had delayed payment of Child Benefits because it had been paying Child Benefits for the Child based on the Social Security record of Mr. Schook. [R 558 at ¶1; 563 at ¶3; 573; 677-79; VR 30: 3/13/13: 03:44:44-03:46:18]. A child cannot receive benefits based upon the record of two fathers. While N.J.S. maintained her objection before the Trial Court, and accepted \$775.00 from C.D.G., she had been secretly corresponding with the SSA and coercing Mr. Schook regarding the payment of the benefits. [Id]. In order to start benefits, and to hide the deception evident in the dual father problem, N.J.S. made representations to SSA that she was *not* the custodial parent, and that Mr. Schook was. [Id; R 682 at ¶ 9, *Exhibit C herein*]. SSA then began to investigate the issue of two fathers, and who was the custodial parent. When N.J.S. realized that SSA may pay the benefits to Mr. Schook, she retracted her previous representations, claimed she was the custodial parent, and threatened to appeal any SSA decision that did not award the benefit dollars to her all the way to the Federal District Court. [R 562-63]. These deceptions, threats and tactics further delayed the benefit payments to the Child.

Thus, SSA had been paying child benefits to Mr. Schook for custody and care of the Child during all or a part of the time that C.D.G had been making child support payments to N.J.S. for care of the Child. [R 682]. This was a deception on the part of N.J.S. She knew that Mr. Schook was registered as the father, and that such was unknown to C.D.G. and the Trial

Court. [R 682]. It was not until **February 1, 2013**, when Mr. Zielke, appeared at the SSA, on behalf of N.J.S. that the entire deception was revealed to C.D.G. [R 362-63; 542; 572-74].

At the February 1, 2013 meeting, Mr. Zielke admitted that N.J.S. had made prior statements that Mr. Schook was the Child's custodian. [R 362]. N.J.S. who was not in attendance at the February 1 meeting, later wrote to the SSA trying to "explain away" her misrepresentations. [R 562-565]. C.D.G. also first learned that N.J.S. had gone to the SSA office in or around April 2012, and applied for SSA benefits for the Child from C.D.G.'s SSA account. It was further discovered that N.J.S. had Mr. Schook attend a SSA meeting because he was receiving benefits already, and thus was entitled to receive the benefit for the Child. [R 682]. N.J.S. kept the truth regarding Mr. Schook's receipt of payments for the Child from C.D.G. for over a year.

In this case, the Trial Court found that the Child resides at Mr. Schook's residence, goes to school from his residence, and spends the majority of her time there. [R 681-83; 740-741]. This was the agreement between N.J.S. and Mr. Schook regarding the Child's custody and care since birth. [Id.]. Since the Child's custodian was Mr. Schook, not N.J.S., and Mr. Schook had been receiving SSD benefits for the Child, C.D.G., on February 13, 2013, requested that the Trial Court suspend his child support obligation, and require that all future support payments be placed in escrow pending the Trial Court's decision on the pending Credit Motion. [R 224-243].

N.J.S. responded to C.D.G.'s Motion, on February 18, 2013, by filing a Motion for Increase in Child Support. [R 342-48]. N.J.S. failed to comply with Family Court Rules of Procedure, or to properly Notice the Motion, and the Motion was remanded from the Docket with instructions to re-file. [R 360-66; and Trial Court Order at R 798]. N.J.S. did later file Supplemental information with the Trial Court regarding her income, and Child Support, and

C.D.G responded. [R 684-708]. However, N.J.S. never requested that the Motion be set on the Trial Court's docket, nor filed a Child Support Worksheet, or contacted the Trial Court's secretary as required by the Order. [R. 798].

Regardless, based upon the stated income and the record before the Trial Court, the Parties incomes are only *slightly* above the Guidelines, having combined monthly gross incomes that total \$16,057, just \$1057 over the maximum of \$15,000. [R 718-25, 684-700]. A calculation based upon the highest Guideline amount would support a decrease, to \$531.00 per month, not an increase. [R 722]. The current SSA child benefit of \$1256.00 that is being paid based upon C.D.G's SSA retirement account is more than double the calculated result.

The March 13, 2013 Hearing Evidence

At the March 13th hearing, Mr. Schook testified regarding his care, love and relationship with the Child. He adopted his Affidavit as his testimony, and confirmed that the Child is with him 95% of the time. [R 681-83; VR 30:3/13/13:03:19:42 to 03:22:10]. He confirmed for the Trial Court that he had received SSD benefits for the Child and that N.J.S. knew this. He confirmed that he and N.J.S. (without C.D.G.) had gone to the SSA office to apply for the benefits and that N.J.S. had told the SSA that he was the custodial parent. [Id].

C.D.G testified to and submitted as evidence a Timeline of Relevant Events. [VR: 30:3/13/13:03:31:34, *Exhibit E herein*]. That Timeline detailed for the Trial Court the dates, times and information provided to C.D.G. regarding the SSA retirement benefit dollars, and C.D.G's request for a credit and recoupment. At the hearing, C.D.G. confirmed that the retirement benefits were based upon his income and his employment record, and that his income decreased making filing for SSA appropriate. [VR 30:3/13/13: 03:51:50]. C.D.G also advised the Court of the benefit amount of \$1256.00, and that it was anticipated in the coming weeks. [R

569]. C.D.G also testified to the numerous attempts he had made to get N.J.S. to cooperate in the payment of the benefits. [R 542; VR 30:3/13/13, 03:40:25- 03:42:38].

At the hearing, N.J.S. finally admitted to the Trial Court that she had secretly gone to SSA with Mr. Schook, and that she knew that Mr. Schook was set to get the benefits based upon his already receiving benefits for the Child. [Record 558, 562; VR 30:3/13/13; 04:08:16-04:10:55]. N.J.S. submitted letters she wrote to the SSA, but not one letter written by N.J.S. was copied to C.D.G. [R 558-566; VR 30:3/13/13; 04:16:50 to 04:18:30]. Her actions perpetuated a delay in SSA benefits that lasted for over a year.

On March 18, 2013, C.D.G. learned that Mr. Schook had received the lump sum benefits totaling \$23,780. On March 20, 2013, C.D.G filed his Motion to Join Mr. Schook as a Party and for an Order to Escrow the overpaid funds. [R 711-13]. N.J.S. opposed this Motion at the March 25, 2013 Trial Court Motion hour. [VR 52:3/25/13: 9:10:00 to 9:14:00]. At that time, N.J.S. represented that she was to get the money, but did not have it. C.D.G. asked that the money be escrowed. [Id]. The Trial Court having just held the March 13, 2013 Hearing, indicated that it would take the matter under submission. [R 714].

Just *three* (3) days later, on *March 28, 2013*, N.J.S. filed her Supplemental Memorandum In Opposition to C.D.G's Motions. [R 715-17]. In her Supplement, she declared that: "[N.J.S.] has received the \$23,780 payment and has expended that payment for the current and future needs of [the Child]." [R 716]. N.J.S. failed to present any information to the Trial Court of just what the monies had been used for and why. [R 715-17]. At that time, N.J.S. was well aware of all of the Motions regarding recoupment, overpayment, and to escrow the funds. She knew that the monies she received were in dispute, and amounted to double payment to her. She knew that the Trial Court would soon issue an Order regarding the funds. N.J.S. knew that she had already

received \$775.00 in child support from C.D.G for the entire twenty-two (22) month challenged period, and as the recipient of funds for the same period, she had been overpaid benefits in the amount of \$17,050. N.J.S.'s direct knowledge of the dispute, her delay actions, combined with her subsequent intentional attempt to deceive the Trial Court constitutes bad faith and must not be tolerated or rewarded.

The Trial Court's Findings

On April 23, 2013, the Trial Court issued its Order setting out in compliance with CR 52.01 its findings of fact and order. The Court found and held, in relevant part, that:

Respondent is the biological father of the child, with paternity having been established in the parties' agreed order of April 17, 2008. Under the same order, Respondent is to pay child support of \$775.00 per month. Respondent is current in his obligation.

While Respondent is the biological father of the child, he has no parent-child relationship with her. Rather, Petitioner's ex-husband, Joseph Schook, to whom she was married at the time of the child's birth is listed on the birth certificate as the child's father. Mr. Schook has maintained a loving father-daughter relationship with the child since her birth. Petitioner and Mr. Schook were divorced on April 17, 2007, when the child was four (4) years old. At the time of the divorce, Petitioner and Mr. Schook agreed Petitioner would have sole custody of the child, but that Mr. Schook would be able to have parenting time with the child under the same parenting schedule he and Petitioner use for the three (3) biological children in common. Under that schedule Mr. Schook is entitled to parenting time with [the Child] every Monday and Tuesday overnight and every other weekend. Since the entry of the agreement, the parties have verbally modified their agreement so that the child resides with Mr. Schook on school nights and with Petitioner on weekends and school breaks.

Respondent would like his obligation to pay child support terminated as of May 2011, based upon the child receiving Social Security Administration ("SSA") benefits of \$1256.00 per month. These benefits are paid as a result of Respondent's Social Security entitlement benefits, which accrued through his employment. . . .

. . . . Beginning in April 2012, Petitioner attempted to obtain the benefits for the child. Petitioner faced some difficulties with the SSA due to the child receiving benefits of \$175.00 per month through Mr. Schook's Social Security retirement

benefits, as well as issues as to who should be the representative payee for the child.

. . . . The Court concludes Respondent is entitled to a dollar for dollar credit against his monthly child support obligation for any monies the child receives as a result of his Social Security retirement benefits. The Court believes this is the most equitable outcome in this situation and sees no reason why Respondent's Social Security retirement benefits should not be treated in the same manner as a parent's Social Security disability benefits, given that they are both earned and distributed based on the parent's employment history.

. . . . The Court concludes Petitioner has the funds available for repayment as a result of the lump sum payment from Social Security for retroactive benefits. . . . Under *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986), . . . it would be unfair and unjust to Respondent for this Court to deny him the ability to recoup his overpayment . . . [R 740-43] [attached marked, **Exhibit F**].

It was not until, May 6, 2013, after the Trial Court submitted its Order requiring N.J.S. to refund the overpaid child support, that N.J.S. revealed what she had *allegedly* "spent" the lump sum benefits. [R 744-95]. In this submission, N.J.S. failed to provide any information regarding the *actual* source of the funds used to pay these expenditures. The proposed expenditures came from two different checking accounts, and some were credit card charges. [Id.]. It is very likely that such payments were made from her regular income of over \$156,000 per year. [R 686-700].

N.J.S.'s claims are not credible. N.J.S.'s post ruling payment ledger indicates that she is willing to claim that she was spending the retroactive lump sum funds *before* she received them. [R 753-754]. The letter from Social Security is dated March 20, 2103, and she did not actually receive the funds until after March 25, 2013. Yet, she claims credits from spending moneys nearly a month before the funds were received. [R 781-82]. She submitted a payment for the 2012 tax bill for the home of Mr. Schook. This bill was her sole obligation as part of her divorce Agreement with Mr. Schook. [R 784]. She provided a copy of a check for a \$7,955.00 payment made for the schooling of the Child and her siblings, for the school year 2013-14, an amount not

due for many months. [R 766].³ She spent \$4,000 for “educational accounts” for 2012 and 2013, all of which was available for withdrawal the day after the deposit. [R 763-64].

N.J.S.’s post ruling affidavit and the payment ledger she presented after the April 25, 2013 Order reflect that she allegedly spent the money as quickly as humanly possible. She did so with actual knowledge that the issues were being litigated and under submission with the Trial Court. Her actions were premeditated and calculated to preempt the Court and claim that the funds were “unavailable”. The Trial Court, seeing N.J.S.’s actions for what they were, and having the evidence before it sufficient to support recoupment, properly exercised its discretion to deny her request to overturn its decision. [R 812][Order Denying Motions to Alter Amend and Vacate, attached at **Exhibit G**].

N.J.S. filed her Notice of Appeal. [R 816]. The Court of Appeals reversed the Trial Court, holding that C.D.G was not entitled to a credit under KRS 403.211(15), and remanded the matter to the Trial Court for review. [See Exhibit A]. C.D.G. filed his Petition for Rehearing which was denied. Thereafter, he filed his Motion for Discretionary Review which was granted. N.J.S. filed a Cross Motion for Discretionary Review which was granted on October 15, 2014.

ARGUMENT

I. An Abuse of Discretion Standard Should Apply In this Matter, Ensuring That Trial Courts of this Commonwealth have discretion to fashion appropriate and equitable child support orders.

C.D.G. respectfully submits that the Court of Appeals erred when it vacated and remanded the decision of the Trial Court without applying the abuse of discretion review standard. The Court of Appeals determined that it must review the case *de novo* due to the provisions of KRS 403.211(15). However, the Trial Court did not base its decision on the

³ N.J.S. had previously provided evidence to the Trial Court that the amount of the tuition for the Child was \$5,865, and due in July 2013, and that she received an additional discount there from due to having multiple children attend the same school. [R 566].

provisions of KRS 403.211(15) or an interpretation thereof. Instead, the Trial Court issued its Order based upon the evidence provided at the March 13, 2013 hearing, and its long standing authority to fashion appropriate and equitable child support orders.

This Court has applied an abuse of discretion standard under CR 52.01 to review child support decisions. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986); *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980). The trial courts of this Commonwealth have long exercised broad discretion in dealing with and fashioning child support orders. *Jones v. Hammond* 329 S.W.3d 331, 334 (Ky. App. 2010); *Marshall v. Marshall*, 15 S.W.3d 396 (Ky. App. 2000); *Brown v. Brown*, 952 S.W.2d 707 (Ky. App. 1997). In *Brown*, the Court held that a trial court has broad discretion to fashion child support orders for situations not addressed by the statutory scheme.

The standard of review in this case, is therefore, governed by CR 52.01. Under CR 52.01, a trial court's findings of fact should not be set aside unless clearly erroneous. A trial court's findings are only clearly erroneous when there is an absence of substantial evidence in the record to support the findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). In this case, the Trial Court had substantial evidence to support its decision. N.J.S. failed to show that the findings are clearly erroneous and, in fact, failed to address the evidence supporting the decision at any point at the Trial Court level or in her appeal of this matter.

The Trial Court made two key findings in this case. The Trial Court found that the \$1,256.00 in SSA benefits was due to C.D.G.'s earnings and employment record, and should be applied against his child support obligation. This is a finding unchallenged by N.J.S. Nor, could she reasonably challenge that the retirement dollars are based upon C.D.G's employment and mandatory contributions to the SSA. As a result, the unchallenged finding is that C.D.G's

employment contributions, paid upon retirement, are more than satisfying his current child support obligation. It is the same as if C.D.G. had deposited funds into a separate account and is now using them to satisfy a current payment obligation.

The Trial Court, after considering all of the evidence, also found that N.J.S. had sufficient funds to repay the overpaid child support. The Trial Court found that to deny C.D.G. recoupment would be unjust and inequitable. This too is a matter subject to the Trial Court's discretion. See *Van Meter v. Smith*, 14, S.W.3d 569 (Ky. App. 2000); *Clay v. Clay*, 707 S.W.2d 352 (Ky. App. 1986). N.J.S. failed to challenge the sufficiency of the evidence supporting her ability to provide recoupment. Instead, she appealed the Trial Court's decision without bond and paid the Judgment to C.D.G.

There is nothing in case law or the statute that deprives the Trial Court of the discretion to make either finding. The Court of Appeals decision limiting the question to one section of the statute (KRS 403.211(15)), places an impossible burden upon trial courts dealing with any child support issue. With a child support structure that is essentially outdated, and unaddressed by the General Assembly, restricting the trial courts of this Commonwealth to the strict language of the KRS 403.211(15) (especially when other provisions apply) will result in increased litigation, increased appeals, and potentially unjust outcomes for both children and their parents, especially those that are at retirement age. C.D.G. respectfully requests that this Court apply an abuse of discretion standard to the matter, and uphold the well reasoned, supported, and unchallenged findings of the Trial Court.

II. In Deciding Child Support Matters, the entire statutory scheme, including KRS 403.212(2)(b) which mandates that Social Security retirement dollars are income, must be considered.

The Court of Appeals based its decision on the provisions of KRS 403.211(15) without taking into consideration all of the subsections of KRS 403.211, or the full child support statutory scheme. Limiting the decision to one subsection of the statute, fails to consider the existence of KRS 403.211 (3)(d), KRS 403.211 (3)(g), KRS 403.211(4), KRS 403.212(2)(b), and numerous other statutory provisions relating to child support.

Even if this matter is one of statutory construction, requiring a *de novo* review, the Court of Appeals Opinion does not address the full statute, or follow the “cardinal rule of statutory construction.” *Jefferson Co. Bd. Of Educ., et al v. Fell*, 391 S.W.3d 713, 718-19 (Ky. 2012). “The cardinal rule for statutory construction” requires the Court to give effect to the intent of the General Assembly, and to “.... presume that the General Assembly intended for the statute to be construed as a whole, for all of its parts to have a meaning, and for it to harmonize with related statutes....” *Id, citing Shawnee Telecom Resources, Inc v. Brown*, 354 S.W.3d 542, 551 (Ky. 2011).

The Court of Appeals failed to review the statute as a whole, considering all subsections, to determine whether Social Security Retirement dollars serve the same function as dollars from another source, and are thus entitled to be credited against a child support obligation. This is the analysis that the Trial Court undertook, and that the majority of the jurisdictions in the United States take in applying a credit.

The concept of statutory construction requires that the “... particular word, sentence or subsection under review must also be viewed in context rather than in a vacuum; other relevant parts of the legislative act must be considered in determining the legislative intent.” *Fell, supra* at 719, *citing Petitioner F. v. Brown*, 306 S.W.3d 80 (Ky. 2010), *citing Democratic Part of Ky. v.*

Graham, 976 S.W.2d 423 (Ky. 1998). This Court has repeatedly held that a statute should be construed as a whole and in context with the other statutes surrounding it. *Fell*, supra at 721-22; see also *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 466 (Ky. 2004), citing *Commonwealth v. Louisville Taxicab & Transfer Co.*, 210 Ky. 324, 275 S.W. 795 (1925); see also *George v. Scant*, 346 S.W.2d 784, 789 (Ky. 1961) (holding that the construction of an Act requires consideration not of a few words, but of the whole Act).

KRS Chapter 403 has many sections that address setting and paying child support. KRS 403.110 provides that Chapter 403 as a whole "... shall be liberally construed and applied to promote its underlying purposes...." KRS 403.211(3)(d) and (3)(g) permit the trial court to consider any financial resource of a child, or other "extraordinary" fact when setting child support amounts. KRS 403.211(4) permits the trial court the discretion to determine what is "extraordinary" as used in the child support statute. KRS 403.212(2)(b) absolutely requires that a trial court include as part of "gross income," the amount of *all* income from any source, including, "retirement ..., Social Security benefits, ..., [and] disability insurance benefits"

In this case, C.D.G. brought these statutory provisions to the attention of the Trial Court in his pre and post hearing submissions in support of his credit request. [See **Exhibit H**, attaching C.D.G.'s March 13, 2013, Reply In Support of His Credit Motion.] After reviewing all of the evidence and the submissions of the parties, the Trial Court properly found that the SSA benefits were based upon the employment earnings record of C.D.G., and that he was entitled to a credit.

The statute read as a whole confirms five things: (1) SSA retirement dollars are income; (2) SSA retirement benefits are a financial resource; (3) the trial court has discretion to determine the application of the statute to the facts of each case; (4) the trial court has discretion to consider

extraordinary factors; and (5) the chapter is to be liberally construed. To fail to apply the credit is to ignore the full statutory scheme. To hold that subsection (15) controls the payment status of *all* social security dollars (whether by death benefit, or retirement) is to ignore the full statute declaring such dollars as income.

If retirement social security benefits are income, they are also a source of satisfaction of a child support obligation. In holding that the retirement benefits paid are not a credit against child support, the Court of Appeals decision negates the provisions of KRS 403.212(2)(b). To fail to apply the credit is to view subsection (15) of KRS 403.211 in a vacuum. C.D.G. respectfully requests that this Court reverse the Court of Appeals decision and declare that parents who have dutifully paid into the retirement system are entitled to seek a credit for the payments before the trial court. A trial court would retain the discretion to apply the credit on a case by case basis, as has been the practice in the Commonwealth.

III. The Decision of the Court of Appeals Conflicts with the Decisions of *Board v. Board* and *Van Meter v. Smith*.

The Court of Appeals decision refuses to apply a credit for SSA benefit dollars actually paid to a child. This holding is in conflict with prior Court holdings applying a credit for benefit dollars paid. In *Board v. Board*, 690 S.W.2d 380, 381 (Ky. 1985), this Court held that Kentucky follows the “prevailing view of most jurisdictions in the United States in that government benefits in the form of social security for child support may be credited against the parent’s liability” *Id.* Further, the *Board* Court held that Social Security death benefits should be credited, and confirmed that a “[t]he trial judge’s finding that the social security benefits were a set-off against child support was within the court’s discretion.” *Id.* Finally, . . . the Court held that there is a distinction between crediting an obligation with payment made from another

source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount. *Id.*

Likewise, in *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000), the Court fully discussed the concept that social security benefits are like income received from an insurance policy or trust. *Id at 573.* The Court held that “. . . contributions to the social security system and [an]employer’s contributions on [an employee’s] behalf are an analogous transfer of assets...,” the conclusion being that the SSA benefits are payouts from the insurance policy or trust purchased by the employee, and therefore, are payments from the obligor parent. *Id.* It is undisputed in this matter that the SSA benefits in question are earned benefits based upon the work history of the C.D.G. *See 42 U.S.C. § 402(a) and (d).* It follows that the payout of these same benefits must be a credit against child support.

It is important to note that this is a credit case, not a modification. Child support is and has been paid at the agreed upon amount from May 2011 to date. It is being paid with an additional bonus of \$481.00 per month with C.D.G’s SSA dollars. C.D.G correctly filed a motion for credit of his SSA payments against his child support obligation. The obligation to pay anything over and above the credit portion is properly terminated as of the start date for the credit dollars. *See Board v. Board*, 690 S.W.2d 380 (Ky 1985)(providing a credit without modification of child support). In this matter, the Trial Court did not abuse its discretion, did not modify the child support obligation, and its findings are not clearly unreasonable. *Board, supra at 382, Van Meter, supra at 573-74.* C.D.G respectfully submits that a failure of the Court of Appeals to apply a credit and terminate his child support obligation is against *Board* and *Van Meter*.

IV. There Is No Statutory Prohibition Against Applying SSA Retirement dollars to Satisfy a Child Support Obligation

The Court of Appeals decision holds that “we are compelled to presume [from the omission in KRS 403.211(15) of retirement benefits] that the legislature did not intend to permit a credit for retirement benefit dollars.” [Opinion at p. 8]. It is true that KRS 403.211(15) does not specifically address a credit for Social Security retirement benefits. The statute states in part, “A payment of money received by a child as a result of a parental disability shall be credited against the child support obligation of the parent.” KRS 403.211(15) is a codification of the Kentucky Court of Appeals' decision in *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 2002). This Court reaffirmed the holding in *Miller v. Miller*, supra through its interpretation of KRS 403.211(15) in *Artrip v. Noe*, 311 S.W. 3d 229, 231 (Ky. 2010). In *Artrip*, this Court recognized that:

The great weight of authority, and Kentucky courts have so held, stated the Social Security benefits received by a child for a disability sustained by the non-custodial parent may be credited against the non-custodial parent's child support obligation. [Id.].

There is nothing in either *Miller*, *Artrip*, or the statute that precludes a credit for retirement benefits. There is nothing in the law that requires the Court of Appeals to infer legislative intent where none is expressed. The statute does not declare how child support is to be paid. The statute does not define what would be a windfall to a payee parent. The statute does not mandate that child support be paid from a certain source of funds. These omissions do not and should not dictate or override a trial court's discretion. These cases do not deny the Trial Court's discretion to deal with child support matters. Instead, the statute and the current case law should be read to mandate a credit for disability benefits, and leave open the option for any other credit based upon the discretion of the trial court.

Even after the enactment of the Family Support Act, the trial courts of this Commonwealth have retained considerable discretion in child support matters. *Com. ex rel. Marshall v. Marshall*, 15 S.W.3d 396, 400 (Ky. Ct. App. 2000). The trial courts have retained broad discretion in deviating from statutory provisions when addressing child support issues. *See McFelia v. McFelia*, 406 S.W.3d 838, 839-840 (Ky 2013) (trial court's have broad discretion in domestic relations cases, and the law demonstrates the need for such discretion including the provisions of KRS 403.211 "application would be unjust or inappropriate because of an extraordinary nature."). This discretion must apply to the type of funds that may be used to satisfy a child support obligation, and the circumstances of each case. The Trial Court, here, did not act outside of its authority, or against Kentucky law. The Trial Court properly considered the evidence, the credibility of the parties, and appropriately provided a credit based upon the facts.

In *Miller v. Miller*, 929 S.W.2d 202, 204 (Ky.App.1996), *Hamilton v. Hamilton*, 598 S.W.2d 767 (Ky. App. 1980), and *Board v. Board*, 690 S.W.2d 380 (Ky 1985), the primary consideration was whether the benefit paid was as a result of the father's contribution from his earnings into the Social Security system. Of course, the benefit was so based. The same is true for retirement benefits. *See 42 U.S.C § 402(a) and (d); 42 U.S.C § 414(a)*. The benefits are not payable unless the employee has been employed and paid into the system. *Miller, supra*.

If a wealthy parent placed funds in a trust for a child, and the child received those monies at a later date, would the parent who established the trust with their own funds be required to pay additional support because the Kentucky statutory language didn't mention the trust? The answer must be, No. The trial court should have the ability to apply its discretion and weigh the equities of the matter. Both the statutory scheme, and the case law from Kentucky support this concept. *See KRS 403.211(3)(d) and (3)(g); KRS 403.212(2)(b); McFelia, supra; Artrip v. Noe,*

311 S.W. 3d 229, 231 (Ky. 2010); *Board v. Board*, 690 S.W.2d 380 (Ky 1985); *Hamilton v. Hamilton*, 598 S.W.2d 767 (Ky. App. 1980); *Miller v. Miller*, 929 S.W.2d 202 (Ky. App. 1996).

Requiring specific statutory authority for a trial court to exercise its discretion in applying a dollar for dollar credit based upon the source of the funds to pay child support would be a devastating holding. It is simply not logical to punish responsible behavior (i.e. “savings” through “employment”), and to provide a windfall to a custodial parent (or in this case, a quasi-custodial parent) who spends greater than \$20,000 in questionable expenses in three (3) days. Instead, a trial court should be required to satisfy CR 52.01, KRS 403.211 and the provisions of *McFelia*, by explaining the basis for its decision on the facts of each case. As long as the trial court does not abuse its discretion and explains why such amounts or such credits were provided, the trial court has acted appropriately. For these reasons, the decision of the Court of Appeals should be reversed.

V. The Court of Appeals decision places Kentucky in the Minority of Jurisdictions by denying a credit for social security retirement dollars paid based upon the employment record of the paying parent.

The majority of jurisdictions in the United States that consider Social Security benefits as income for purposes of setting child support also hold that such dollars are a credit for the payment of child support. The Court of Appeals Opinion in refusing to apply a credit, places Kentucky in the minority. The majority of jurisdictions in the United States hold that a credit is either automatic, or discretionary based upon the equities of the case. *See e.g. In re the Marriage of Belger*, 654 N.W.2d 902, 906-907 (Iowa 2002)(citing *Pontbriand v. Pontbriand*, 622 A.2d 482 (RI 1993), and citing other jurisdictions including *Alaska, Arkansas, California, Illinois, Mississippi, Missouri, Nebraska, New Mexico, New York, Rhode Island, Pennsylvania, and Texas*)(copy attached, see *Exhibit I*); *Right to Credit on Child Support Payments for Social*

Security or Other Governmental dependency payments made for the benefit of child, 34 A.L.R.5th 447, at §9 (1995)(attached, see *Exhibit J*).

The Iowa Court addressed the credit analysis clearly stating that:

“ . . . [T]he overwhelming majority of states that have considered this issue allow a credit for Social Security benefits paid to dependent children.” *Miller*, 890 P.2d at 576 (quoting *Pontbriand v. Pontbriand*, 622 A.2d 482, 483 (R.I. 1993). The court explained,

...[a]lthough the benefits are payable directly to the child rather than through the contributing parent, the child's entitlement to payments derives from the parent, and the payments themselves represent earnings from the parent's past contributions. *Id* at 577. . . . The *Miller* court explained that dependent benefits are the “equivalent of child support payments.” *Id* at n.6.

The Iowa Court noted that several other jurisdictions examining this issue have either held or recognized that social security retirement benefits received by a dependent child on the obligor parent's behalf should be credited toward the obligor parent's support obligation. See *In re the Marriage of Belger*, at pp 907-08 (setting out and citing cases from Alaska, Arkansas, California, Illinois, Mississippi, Missouri, Nebraska, New Mexico, New York, Rhode Island, Pennsylvania, and Texas)(copy attached, Appendix).

The Iowa Court noted that it and these other jurisdictions found that “there is no theoretical basis for distinguishing between disability and retirement benefits.” See *Belger* at 907-909. Social Security retirement benefits like disability benefits have been “earned by the obligor parent and are available funds.” *Id*. If they are to be considered as income to the obligor, it is clear that they are also an offset. The Iowa Court held that it is equitable to treat the benefits as a substitute for child support. *Belger* at 907-909.

In *Childerson v. Hess*, 555 N.E.2d 1070, 1073 (Ill. App. 1990), the Illinois Court considered that “. . . the reasons for the credit are plain. . . .” holding that:

. . . Because the law had created a contributory insurance system, the employee, who throughout his working life has contributed part of the premiums in the form of deductions from his wages or salary, has earned the benefits, and they are not a gift. Since the amount of child support required to be paid is determined largely by income, this court can see no reason why, in discharging the obligation to pay child support, social security payments should not be credited . . . [attached at Exhibit K]

Here, the Trial Court was likewise correct in finding that the benefits are based upon C.D.G.'s earnings, and should act as a credit against his child support obligation. N.J.S. failed to present any evidence or argument that required a contrary result. The Trial Court did not act outside of its authority, or against Kentucky law. The Trial Court properly considered the evidence, the credibility of the parties, and appropriately provided a credit based upon the facts of this case.

VI. The Trial Court's Holding that C.D.G. is Entitled to Recoupment of the Overpaid Child Support Amount Should be Upheld as Within its Discretion.

The Trial Court, after considering all of the evidence and filings, found that recoupment was warranted. The Trial Court found that such a result would be both equitable and just given the record. [R 742]. The Court of Appeals agreed that the equities of the situation were in C.D.G.'s favor, but limited the Opinion to KRS 403.211(15) thus denying equitable relief. The affect of the denial is to reward N.J.S. for her delay and provide her with nearly triple payment (\$775.00 monthly (or \$17,050) + the lump sum payment of \$23,780), in addition to the monies collected based upon the Social Security record of Mr. Schook as the father and custodian of the Child. C.D.G. respectfully requests that this Court reinstate the recoupment provisions of the Trial Court Order.

The specific issue of recoupment of child support payments was addressed in *Clay v. Clay*, 707 S.W. 2d 352 (Ky. App. 1986). In *Clay*, the Court held that:

Where is the recoupment to come from? If the direct recipient - the custodial parent, usually - 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, it is only fair and just that the paying parent be able to recover it. Thus, the power of a court to order or permit recoupment should not be denied. *Clay*, supra at 354. [Emphasis Added].

The Court thereafter stated that whether a trial court should grant recoupment is based on its discretion and the relevant evidence. The Court stated:

Whether, and to what extent, the receiving parent in fact used the 'overpayment' for the support of the child and has the funds from which to permit a proper recoupment without depriving the child, is a determination that must necessarily be made by the trial court, exercising its discretion upon the relevant evidence before it. The scope of the discretion, and the principles applicable to its exercise, with respect to allowing recoupment must be substantially the same as pertain to the fixing of child support in the first instance; and thus, the determination of the court will not be disturbed on appeal unless it is found to be clearly erroneous. *Clay*, supra, at 354.

Here, the Trial Court correctly determined that N.J.S. had the funds, or the equivalent and could use those funds or the equivalent for repayment.

N.J.S. argues that since (within three (3) days of receipt of the lump sum) she disbursed every penny of disputed, overpaid funds, she cannot be compelled to repay the monies she owes to C.D.G. N.J.S.'s argument is a bold attempt at a gift. The expenditure of \$23,780 in less than a week, equates to over \$1.2 Million of expenditures for the child during the course of the year. N.J.S. own affidavit and her payment ledger presented *after* the April 23, 2013 Order, are proof of a premeditated attempt to preempt the Trial Court's discretion based on a claim that the funds for recoupment were "unavailable".

The evidence before the Trial Court however, is inconsistent with the concept that N.J.S. had no funds available to satisfy the overpayment. The Trial Court had before it an outline of how N.J.S. allegedly spent the money. It also had before it evidence of N.J.S.'s income of over \$156,000 per year. It had before it evidence of N.J.S.'s claim that in 22 months she allegedly

spent \$52,489.32 from her own funds on the Child.⁴ [R 415-524; VR 30:3/13/13 04:01:45-04:04:06].

The Trial Court had the evidence that the alleged expenditures pre-dated the lump sum award, and were made from credit cards, and, at least, two different checking accounts. The evidence included payments for toys, daycare, house payments, and taxes that were for Mr. Schook, and N.J.S.'s other *five* children. A full review of the receipts, checks and contradictory statements of N.J.S., combined with the procedural history of N.J.S.'s actions, supported recoupment. There is ample evidence in the record to affirm the Trial Court's decision.

This Court, and Courts in other jurisdictions, looking at recoupment issues, has considered the equities of each situation along with the actions of the recipient while under notice of the dispute. See *Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003); *In re Marriage of Tollison*, 566 N.E. 2d. 852, 854 (Ill. App. 1991)(recipient of an overpayment was on notice of the dispute and fairness demanded reimbursement)(attached at **Exhibit L**); *Juttelstad v. Juttelstad*, 587 N.W.3d 447, 451-2(S.D. 1998)(holding recipient of overpayment on notice of dispute would be unjustly enriched if recoupment not permitted)(*attached at Exhibit M*).

In *Connelly*, this Court noted that the policy considerations which form the basis for the *Clay* decision were not meant to protect litigants who mislead and attempt to deceive the Court. See *Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003)(holding a spouse was required to repay overpaid child care expenses despite the expenditure of the funds). A “. . . litigant cannot misrepresent the facts, attempt to hide the truth from [the other party] and the court, and avoid the consequences of those actions.” *Id.* In *Connelly*, the Court specifically considered the

⁴ C.D.G. disputes the validity of these calculations as representative of expenditures for the Child as they are grossly overstated including payments for attorney fees, for her other children, and other expenditures that are not properly considered. The fact that she would even claim these expenses completely undermines her credibility.

motive and actions of the spouse who got the overpayment, and permitted recovery. The Court found that requiring payment from *other* funds was fair and not a detriment to the Child.

The Court, in *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000), held that “. . . recoupment or repayment of dependent benefits may be appropriate to avoid double recovery or payment by either parent.” In such situations, the reimbursement merely returns the parties to the positions mandated by the support order of the Court.

Importantly, there was no showing at the March 13, 2013 hearing that the Child would be harmed in any way by the repayment. The Child is currently receiving the full amount of the child support, plus an additional \$481.00 per month. Thus, an important consideration of the *Clay* Court is met. The Child is not deprived of any benefit.

On the other hand, if recoupment was reversed, N.J.S. would be rewarded for her delay and intentional deceptive actions perpetrated against C.D.G. and the Trial Court. She receives nearly a "triple dip" of child support. Such a result would violate not only the Court of Appeals' ruling on the proper use of a trial court's recoupment powers concerning child support, but also common sense. A decision for recoupment encourages honesty and fairness, and discourages trickery and deceit.

Further, recoupment of child support from N.J.S. is supported by the decision in *Artrip v. Noe*, 311 S.W. 3d 229 (Ky. 2010), where this Court stated:

The Social Security benefits paid to a child because of a parent's disability are not a mere gratuity. Here, the benefits were generated by Noe's own earnings, with the attendant payment of Social Security taxes. Hence, the payments are properly regarded as a substitute for support payments from Noe's own earnings. *Artrip*, supra at 233.

The substitution of the payment, and the holding that the payment is not a gift supports recoupment on the facts in this present case. The Trial Court had sufficient evidence to find that

the funds for recoupment were available. The Trial Court did not abuse its discretion, or violate the underpinnings of the *Clay* decision, in requiring recoupment.

Finally, even the language of KRS 403.211(15) supports recoupment. The General Assembly stated: "An amount received in excess of the child support obligation shall be credited against a child support arrearage owed by the parent that accrued subsequent to the date of the parental disability," If a credit is allowed for a defaulting obligor (who thus has an arrearage), then the case for credit for a non-defaulting obligor is both equitable and compelling. It follows that C.D.G. should be entitled to recoup the \$775.00 per month that he paid during the same benefit period (May, 2011 to March 2013) since the Child's dependent benefits of \$1,256 per month are now effective.

VII. Appellee's Cross Appeal Should be Denied as Not Preserved or Without Merit.

A. Appellee's Cross Appeal Argument is not Preserved.

In this case, the Trial Court held that C.D.G. was entitled to a full credit for the retirement benefits against his child support obligation. The Trial Court found that the \$1,256.00 in SSA benefits was due to C.D.G.'s earnings and employment record. The Trial Court found that C.D.G.'s employment contributions, paid upon retirement, are more than satisfying his current child support obligation. The Trial Court found that N.J.S. had sufficient funds to repay the overpaid child support. The Trial Court found that to deny C.D.G. recoupment would be unjust and inequitable. N.J.S. failed to challenge the Trial Court's findings and the sufficiency of the evidence supporting the Order. Instead, she appealed without bond and paid C.D.G. the \$17,050 overpayment.

N.J.S.'s Cross Motion for Discretionary Review contains her admission that the issues presented in her Cross Motion were ". . . not ruled upon by either the Family Court or the Court

of Appeals.” [See Cross Motion at page 2, ¶4]. C.D.G. respectfully submits that this admission is fatal to review of these issues by this Court. N.J.S. did not request that either Court, in particular, the Trial Court, make specific findings under the provisions of Civil Rule 52.04 regarding the “retroactive termination” of support issue or the “legal process” issue. In fact, the Trial Court did not compel payment from the social security funds, nor did the Trial Court retroactively terminate child support. The Trial Court did not make specific findings on these issues. N.J.S. did not request that the Court make specific findings regarding these issues. When a trial court fails to make specific findings and no request was made for such, the issue is waived for appellate review. See *Kentucky Lottery Corp. v. Stewart*, 41 S.W.3d 860, 864 (Ky. App. 2001); *Pegler v. Pegler*, 895 S.W.2d 580 (Ky. App. 1995).

B. The Trial Court did not Retroactively Terminate or Modify Child Support, as of the date of the Lump Sum Back Payment

N.J.S., on her cross appeal, argues that the Trial Court “retroactively terminated” C.D.G.’s child support obligation as of the date of the lump sum back payment (May 2011). However, the Trial Court did not take such action as this is a credit case. See *Van Meter v. Smith*, 14, S.W.3d 569, 573 (Ky. App. 2000). Child support is and has been paid at the agreed upon amount from May 2011 to date. The Trial Court correctly held that a credit was warranted under the facts and equities of this case. The monthly SSA retirement dollars paid (\$1,256.00) based upon C.D.G.’s retirement record exceeded and thus satisfied the child support obligation (\$775.00). The Child actually receives an additional \$481.00 per month. The SSA benefits were retroactive to May, 2011. N.J.S. received a lump sum for the retroactive period of \$23,780.00 in late March 2013. For the same period, N.J.S. also received \$775.00 in monthly child support from C.D.G. For the period of May 2011 to March 2013 child support was paid twice by C.D.G., resulting in an overpayment of \$17,050. The Trial Court ordered the return of the overpayment from N.J.S. It

did not order the return of the funds from the SSA funds. It did not levy the SSA department or the funds.

C.D.G. correctly filed a motion for credit of his SSA payments against his child support obligation. The obligation to pay anything over and above the credit portion is properly terminated as of the start date for the credit dollars. *See Board v. Board*, 690 S.W.2d 380 (Ky 1985) (providing a credit without modification of child support). C.D.G. was not under an obligation to file a modification motion, nor was the Trial Court acting upon one. *See Board, supra, at 381*.

The *Board* Court held that:

Kentucky follows the prevailing view of most jurisdictions in the United States in that government benefits in the form of social security for child support may be credited against the parent's liability under the decree or agreement of settlement. *Citing Hamilton v. Hamilton*, 598 S.W.2d 767 (1980) (other citations omitted). . . The trial judge's finding that the social security benefits were a set-off against child support was within the court's discretion. To do so is not a "modification" [of child support]

. . . There is a distinction between crediting an obligation with payment made from another source and increasing, decreasing or terminating, or otherwise modifying a specific dollar amount. [Id.].

Here, as in the *Board* and *Van Meter* cases the Trial Court did not abuse its discretion, did not modify or terminate the child support obligation, and its findings are not clearly unreasonable.

Board, supra at 382, Van Meter, supra at 573-74.

C. Federal Law Does not Prohibit Recoupment from N.J.S.

N.J.S. claims that the Trial Court ". . . violated 42 U.S.C Chapter 7 et seq. by ordering payment to C.D.G. of retroactive child support from the child's lump sum Social Security benefits in contravention of federal law." [*Cross Motion p. 1*]. She contends that the Order

constituted “legal process against Social Security benefits” *Id.* These arguments are wholly without merit.

This Court in *Commonwealth of Kentucky, Cabinet for Health & Family Servs v. Ivy*, 353 S.W.3d 324, 338 (Ky. 2011), addressed the issue of whether 42 U.S.C. §407(a) prohibits Kentucky family courts from issuing orders affecting SSA benefits. It also addressed the concept of whether KRS 403.212 (including Social Security dollars as income for purposes of child support) was in conflict with federal law. The Court held that the provisions did not conflict, and did not violate the Supremacy Clause.

Instead, the Court confirmed that the purpose of Section 407(a) was to protect the agency from legal process, not the individual, and since the agency was not a party to the proceeding, Section 407(a) could not be seen to prevent the action. Here, the SSA is not a party to the matter and this provision cannot be seen as in conflict with or prevent the collection of the overpaid funds from N.J.S. herself.

The *Ivy* Court referring to the United States Supreme Court decision in *Rose v. Rose* 481 U.S. 619, 107 (1987), noted that:

The *Rose* Court initially addressed the general principles regarding preemption of state family law by federal law pursuant to the Supremacy Clause:

We have consistently recognized that [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has positively required by direct enactment that state law be preempted. Before a state law governing domestic relations will be overridden, *it must do major damage to clear and substantial federal interests.* 481 U.S. at 625, 107 S.Ct. 2029 (emphasis supplied; citations and internal quotation marks omitted).

Looking at the legislative history of 38 U.S.C. § 3101(a), the *Rose* Court explained that the anti-attachment provision served two purposes:

to avoid the possibility of the Veterans' Administration being placed in the position of a collection agency, and to prevent the deprivation and depletion of the means of subsistence of veterans dependent upon these benefits as the main source of their income. 481 U.S. at 630, 107 S.Ct. 2029 (citations and internal quotation marks omitted). The contempt proceeding constrained neither purpose, the Court ruled, since the Administrator "was not obliged to participate in the proceeding or to pay benefits directly to appellee," *id.*, and since the state court's exercise of jurisdiction over the recipient's benefits did not "deprive appellant of his means of subsistence contrary to Congress' intent, for these benefits are not provided to support appellant alone." *Id. Com., Cabinet for Health & Family Servs. v. Ivy*, 353 S.W.3d 324, 338-39 (Ky. 2011).

The *Ivy* Court went on to hold that 42 U.S.C § 659(a) is an exception to the provisions of Section 407 (a). The Court held that Section 659 (a) can support the garnishment of SSA benefits when "the entitlement to which is based upon remuneration for employment." Here, the SSA benefits were based upon remuneration for employment, and are thus subject to attachment.

It is important to remember that the Trial Court ordered that "funds" were available for repayment from N.J.S. This is a concept supported by *Clay v. Clay*, 707 S.W. 2d 352 (Ky. App. 1986), as discussed above. In *Clay*, it was held that ". . . it is only fair and just that the paying parent be able to recover [an overpayment], [and]... the power of a court to order . . . recoupment should not be denied." *Clay*, supra at 354. The *Clay* Court confirmed that whether a trial court should grant recoupment is based on its discretion and the relevant evidence. *See also Connelly v. Degott*, 132 S.W.3d 871, 873 (Ky. App. 2003); *In re Marriage of Tollison*, 566 N.E. 2d. 852, 854 (Ill. App. 1991)(recipient of an overpayment was on notice of the dispute and fairness demanded reimbursement); *Juttelstad v. Juttelstad*, 587 N.W.3d 447, 451-2(S.D. 1998)(holding recipient of overpayment on notice of dispute would be unjustly enriched if recoupment not permitted).

In *Connelly*, the Court noted that a ". . . litigant cannot misrepresent the facts, attempt to hide the truth from [the other party] and the court, and avoid the consequences of those actions."

Connelly v. Degott, 132 S.W.3d 871, 873 (Ky. App. 2003). The Court, in *Van Meter v. Smith*, 14 S.W.3d 569 (Ky. App. 2000), held that “. . . recoupment . . . of dependent benefits may be appropriate to avoid double recovery or payment by either parent.” The reimbursement merely returns the parties to the positions mandated by the support order of the Court. The Trial Court after considering all of the facts and equities of the situation, directed N.J.S. to make the payment. Both Federal law and Kentucky law support this holding.

N.J.S. may rely upon the holding of *Washington State Dept. of Social and Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 375 (2003). However, this is not the law in Kentucky, nor is it the holding of the *Washington* case. In *Washington*, the Court permitted recoupment. Further, *Washington* has been interpreted to hold that the term “other legal process” in 42 U.S.C. § 407(a) means, legal processes of the same nature as the specific items listed (e.g. levy or attachment actions). See *Ali v. Fed. Bureau of Prisons*, 552 U.S.214 (2008).

Importantly, C.D.G. did not seek levy or attachment. The Trial Court did not enforce or inflict levy or attachment. C.D.G. sought and received recoupment from N.J.S. for monies which he already paid to N.J.S. She chose to appeal without a bond, and paid the obligation ordered by the Trial Court from money she acquired from Mr. Zielke. [See *Court of Appeals Brief for Appellant at p.15*].

C.D.G. further submits that where issues of Child Support are concerned the provisions of 42 U.S.C § 407(a), are displaced by the provisions of 42 U.S.C § 659 (a) and (b). This Statute permits recoupment in child support matters. See *Bailey v. Fischer*, 946 So.2d 404 (Miss Ct. App. 2006) (copy attached, at **Exhibit N**). This Court has recognized that the lump sum funds are properly used for the re-payment or re-fund of child support. See *Van Meter v. Smith*, 14, S.W.3d 569 (Ky. App. 2000) (permitting use of the lump sum benefits to repay overpaid child

support). Thus, the Trial Court was within its authority to compel N.J.S. to return the overpayment from her funds *or* the lump sum funds.

CONCLUSION

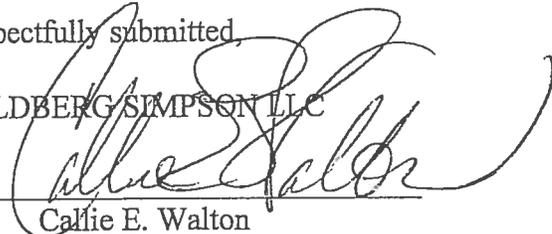
C.D.G respectfully requests that this Court reverse the Court of Appeals decision and reinstate the Trial Court's opinion. The trial courts of the Commonwealth should retain broad discretion to fashion child support decisions that meet the equities of each case. Applying a discretion standard will provide a fair result for all parents who are retired, and ensure that payment of retirement dollar benefits is not an unchecked lottery for a custodial parent.

The Trial Court's decision here is well reasoned, supported by substantial evidence and well within the Trial Court's discretion. Under the statutory and case law of this Commonwealth, N.J.S. has failed to show that the Trial Court abused its discretion, or that there is a lack of evidence to support its decision in any regard. Based on the facts and authorities discussed above, this Court should affirm the Trial Court's decision in all respects.

Dated: November 13, 2014

Respectfully submitted,

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