

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2228

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE PATERNITY OF FLORENCE E.F.:

STATE OF WISCONSIN AND MARTHA S.F.,

PETITIONERS-RESPONDENTS,

v.

JAMES D.B.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Green Lake County:
WILLIAM M. McMONIGAL, Judge. *Reversed and cause remanded.*

Before Brown, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. James D.B. has appealed from an order entered in the trial court on July 20, 1999, requiring him to pay \$50 per month as child support commencing April 1, 1999, plus \$25 for the annual receiving and

disbursing fee required by WIS. STAT. § 814.61(12)(b) (1997-98).¹ The order was entered following a hearing on a motion for reconsideration of an order entered on March 15, 1999, modifying the paternity judgment previously entered against James and requiring him to pay \$50 per month in child support. Although the trial court refused to set aside the child support award, it orally ruled at the hearing on the motion for reconsideration that child support could not be paid from James's Supplemental Security Income (SSI) benefits. We reverse the trial court's order and remand the matter for further proceedings.

¶2 SSI benefits are paid pursuant to Title XVI of the Social Security Act, 42 U.S.C. §1381-1383c. James argues, and the State and Martha S.F. concede, that SSI benefits cannot be considered in establishing child support and cannot be burdened with a support order. *See Langlois v. Langlois*, 150 Wis. 2d 101, 104-05, 441 N.W.2d 286 (Ct. App. 1989). This prohibition is set forth in WIS. STAT. § 49.96, which provides that "benefits under ... federal Title XVI, are exempt from ... execution, garnishment, attachment and every other process and shall be inalienable." It is also encompassed within WIS. ADMIN. CODE § DWD 40.02(13)(i), which excludes public assistance payments from gross income when calculating child support under the percentage standards. *See Langlois*, 150 Wis. 2d at 104-05.

¶3 The inalienability of James's SSI benefits was recognized by the trial court at the hearing on the motion for reconsideration when it ruled that James's child support payments could not be paid from his SSI benefits.

¹ All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

Nevertheless, the trial court ordered James to pay \$50 per month in support plus the \$25 annual fee.

¶4 The trial court's order must be reversed because nothing in the record indicates that James has any income or assets other than his SSI benefits, nor that he has the ability to work and earn income. A motion to modify child support is addressed to the sound discretion of the trial court. *See id.* at 104. In determining whether an award should be modified, the trial court is required to consider the needs of the custodial parent and child, and the ability of the noncustodial parent to pay. *See id.* In considering ability to pay, it must consider the noncustodial parent's income, assets, debts, health, age and other relevant circumstances. *See Schwantes v. Schwantes*, 121 Wis. 2d 607, 631, 360 N.W.2d 69 (Ct. App. 1984).

¶5 A trial court may order a SSI recipient to seek work. *See Langlois*, 150 Wis. 2d at 106. However, nothing in *Langlois* supports the proposition that a trial court may order the payment of child support in the absence of evidence that the SSI recipient is able to work and earn sufficient income to support the award or has other non-SSI income or assets.

¶6 The trial court made no finding that James has non-SSI income or assets, nor does the record support such a finding. There is also no evidence in the record to support a finding that James is able to work and that suitable employment is available to him. "Discretion must be exercised by a process of reasoning from the facts of record." *Schwantes*, 121 Wis. 2d at 631. Because no

facts of record support a finding that James is able to work and pay \$50 per month in child support, the trial court's order must be reversed.² *See id.*

¶7 In his brief, James requests that this court order the “restoration” of support paid by him pursuant to the child support order. This requires a determination as to whether payments made by James under the order were made from his SSI benefits. The trial court must address that issue on remand. In

² The State and Martha contend that James failed to appear at the hearing on the motion for reconsideration to present evidence that he was unable to work, and that he therefore cannot claim on appeal that the record is inadequate to support the trial court's award. We reject this argument. The motion for reconsideration requested that the March 15, 1999 child support order be vacated because James's income consisted of SSI benefits, which were not available for support. This was a legal issue which was presented by his counsel and did not require James's presence.

Most importantly, the burden of proving that James was able to pay child support was on the State and Martha, who filed the motion to modify the paternity judgment to provide for child support. If they wanted to establish that James was able to work and pay child support from non-SSI income, they were required to call him as a witness, subpoena him, or present other admissible evidence to meet their burden of proof. The record contains no evidence on these issues. “A party who carries the burden of proof cannot leave the family court in an evidentiary vacuum and then complain about the lack of evidence on appeal.” *Haeuser v. Haeuser*, 200 Wis. 2d 750, 765, 548 N.W.2d 535 (Ct. App. 1996).

addition, if the State and Martha wish to pursue their motion for a child support award, they may do so on remand by filing a renewed motion and presenting the necessary evidence to support their request.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

