No. _____

IN THE SUPREME COURT OF THE UNITED STATES

WARREN J. LEVERING,

PETITIONER,

vs.

THE STATE OF NEBRASKA,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO

THE NEBRASKA SUPREME COURT

APPENDIX

Warren J. Levering, Petitioner
P.O. Box 22500
Lincoln, NE 68542-2500

FILED

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COURT OF APPEALS

IN THE SUPREME COURT OF THE STATE OF NEBRASKA

State of Nebraska on behalf of Warren B., a minor child, Appellee, v. Warren J. Levering, Appellant.	No. S-23-241. Memorandum Opinion and Judgment on Appeal

HEAVICAN, C.J., MILLER-LERMAN, CASSEL, STACY, FUNKE, PAPIK, and FREUDENBERG, JJ.

STACY, J.

In this paternity case, Warren J. Levering filed what he titled a "MOTION FOR RETURN OF EXEMPT FUNDS," seeking to challenge sums that were intercepted and applied to his child support arrears. The district court overruled the motion, and Levering appeals. Finding no merit to Levering's assigned error, we affirm.

FACTS

As of July 12, 2021, Levering owed more than $30,000 in past-due child support in a paternity case initiated by the State and filed in the Douglas County District Court. To recover the arrears, the State of Nebraska requested assistance from the federal government as part of a centralized offset program known as the Treasury Offset Program (TOP).[1] TOP is operated by the U.S. Department of the Treasury,[2] and Nebraska participates in the program.

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[1] See, generally, 466 Neb. Admin Code ch. 9, § 007 (2020).

[2] See 31 C.F.R., part 285 (2022).

In 2020, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (CARES Act),[3] creating a $1,200 tax credit for eligible individuals. The same year, Congress enacted the Consolidated Appropriations Act (CAA),[4] creating a $600 tax credit for eligible individuals. Both acts generally created tax credits for the 2020 tax year, payable either as an "advance refund" (referred to as an "Economic Impact Payment" or "EIP") or as a tax refund (referred to as a "Recovery Rebate Credit" or "RRC").

Levering did not file federal income tax returns in either 2018 or 2019. In 2020, Levering filed a federal income tax return, expecting to obtain federal stimulus credits of $1,200 under the CARES Act and $600 under the CAA. On July 23, 2021, the Department of the Treasury sent a letter to Levering, informing him that pursuant to TOP, a check totaling $1,813.51 from the Internal Revenue Service to Levering had been intercepted and applied to the delinquent child support debt owed by Levering. It is generally undisputed that the intercepted check represented Levering's tax credits under the CARES Act and the CAA. Levering characterizes the intercepted payment as his "tax refund," and the State does not contest that characterization. The Department of the Treasury letter informed Levering that if he believed the "payment was applied in error," he should contact the Nebraska Child Support Enforcement office of the Department of Health and Human Services (DHHS).

After receiving notice of the TOP offset, Levering contacted the Nebraska Child Support Enforcement office via a letter dated August 2, 2021. His letter characterized the TOP offset as "withholding my Income Tax refund," and Levering took the position that at least $600 of the intercepted payment was exempt from offset for past-due child support under federal law. It is unclear from the appellate record whether Levering received a response to this letter.

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[3] Pub. L. No. 116-136, 134 Stat. 281 (codified at 26 U.S.C. § 6428 (Supp. III 2021)).

[4] Pub. L. No. 116-260, 134 Stat. 1182 (codified at 26 U.S.C. § 6428A (Supp. III 2021)).

In January 2022, Levering filed, pro se, a motion in the Douglas County paternity case that he titled a "MOTION FOR RETURN OF EXEMPT FUNDS." The motion did not challenge the entire TOP offset amount of $1,813.51, but instead focused only on the $600 credit under the CAA, which Levering asserted was exempt from offset "as a matter of federal law" to satisfy past-due child support. His motion specifically relied on 26 U.S.C. § 6428A and a related statutory note,[5] which note states that "no applicable payment shall be subject to . . . execution . . . or other legal process."[6] The motion asserted that Levering had "a right to the $600" and further asserted that DHHS had a "duty to obey the federal law that makes [the payment] exempt from being taken for past due child support debts." The motion asked the court to "order the DHHS Child Support Agency to refund the $600 . . . to [Levering.]" It appears the district court treated this motion as a request by Levering to adjust his child support arrears,[7] and on that basis, it referred the motion to the child support referee for an evidentiary hearing. Because the State has not challenged Levering's use of a motion in the paternity case to challenge the offset, we express no opinion in that regard.

The State and Levering both appeared for the evidentiary hearing before the referee, and four exhibits were received. After analyzing the exhibits and considering Levering's arguments, the

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[5] See, generally, https://uscode.house.gov/detailed_guide.xhtml (last visited Nov. 13, 2023) (explaining statutory notes are provisions of law "set out as notes under a Code section rather than as a Code section" and that a "provision of a Federal statute is the law whether the provision appears in the Code as section text or as a statutory note" and "[t]he fact that a provision is set out as a note is merely the result of an editorial decision and has no effect on its meaning or validity").

[6] See Pub. L. No. 116-260, § 272(d)(2)(A), 134 Stat 1182, p. 1972.

[7] See, e.g., *Berg v. Berg*, 238 Neb. 527, 471 N.W.2d 435 (1991) (holding district court may, on motion and satisfactory proof, adjust child support arrears to reflect that judgment has been satisfied in whole or in part by act of parties thereto).

referee generally concluded that under federal law, the $600 CAA credit was exempt from offset for past-due child support when it was paid as an "advance refund," or EIP, but was not exempt from offset when it was paid as a "tax refund," or RRC. The referee found that Levering had not proved he received the $600 credit as an advance refund and that he therefore failed to show the offset was improper under federal law.

Levering took exception to the referee's finding and requested a hearing before the district court. The district court held a hearing on the exception and received the bill of exceptions from the hearing before the referee. Neither Levering nor the State adduced additional evidence. The parties asked to submit written argument, and the court took the matter under advisement.

In an order entered February 23, 2023, the district court overruled the exception and accepted the referee's recommendation to overrule the motion for refund. The court relied on statements appearing on the TOP website to conclude that credits under the CAA were exempt from offset when paid as an advance payment, or EIP, but were "eligible for offset/intercept" when paid as a tax refund, or RRC. The court expressly found that the $600 CAA payment intercepted in this case was "made as part of the tax return" and concluded that it was thus subject to offset under federal law.

Levering filed this timely appeal from the district court's order, and we moved it to our docket on our own motion.

ASSIGNMENT OF ERROR

Levering assigns, restated, that the district court erred when it overruled his motion and construed 26 U.S.C. § 6428A to permit offset of the $600 credit when it was "paid as a tax refund."

STANDARD OF REVIEW

Statutory interpretation presents a question of law.[8]

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[8] *Hernandez v. Dorantes*, 314 Neb. 905, 994 N.W.2d 46 (2023).

An appellate court independently reviews questions of law decided by a lower court.[9] In a filiation proceeding, a district court's determinations regarding child custody and support are reviewed on appeal de novo on the record to determine whether there has been an abuse of discretion by the trial court.[10]

ANALYSIS

Levering does not challenge the district court's finding that the $600 payment intercepted by TOP was paid as a tax refund or RRC, rather than as an advance payment or EIP. The primary question on appeal, then, is a legal one: Does the CAA permit offset of a credit paid as an RRC? To answer this question, we begin with the relevant statutory language.

A statutory note related to 26 U.S.C. § 6428A provides:

> (d) ADMINISTRATIVE PROVISIONS.—
>
> (1) EXCEPTION FROM REDUCTION OR OFFSET. — Any refund payable by reason of section 6428A(f) of the Internal Revenue Code of 1986 (as added by this section), or any such refund payable by reason of subsection (c) of this section, shall not be—
>
> (A) subject to reduction or offset pursuant to section 3716 or 3720A of title 31, United States Code,
>
> (B) subject to reduction or offset pursuant to subsection (c), (d), (e), or (f) of section 6402 of the Internal Revenue Code of 1986, or
>
> (C) reduced or offset by other assessed Federal taxes that would otherwise be subject to levy or collection.
>
> (2) ASSIGNMENT OF BENEFITS.—
>
> (A) IN GENERAL.—The right of any person to any applicable payment shall not be transferable or assignable, at law or in equity, and no applicable payment shall be subject to, execution, levy, attachment, garnishment, or other legal process, or the operation of any bankruptcy or insolvency law.

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[9] *Id.*

[10] See *Franklin M. v. Lauren C.*, 310 Neb. 927, 969 N.W.2d 882 (2022).

. . . .

(E) DEFINITIONS.—For purposes of this paragraph—

. . . .

(iii) APPLICABLE PAYMENT.—The term "applicable payment" means—

(I) any advance refund amount paid pursuant to section 6428A(f) of Internal Revenue Code of 1986 (as added by this section)[.] [11]

On appeal, Levering argues that this statutory note expressly excepts the $600 CAA benefit from reduction or offset due to past due child support. According to Levering, if the $600 payment was an advance refund or EIP, then it was excepted from offset under (d)(2) of the statutory note. And if the $600 payment was a tax refund or RRC, then it was excepted from offset under (d)(1)(B) of the statutory note. Because it is undisputed on this record that the $600 offset at issue was received as a tax refund, we limit our analysis to Levering's suggested interpretation of subsection (d)(1) of the statutory note.

In this regard, Levering argues that (d)(1)(B) expressly excepts offset based on 26 U.S.C. § 6402(c) (Supp. III 2021), which is the statute that authorizes offset of tax refunds for past due support.[12] But Levering's argument in this regard fails to account for the qualifying language in (d)(1) of the statutory note. That language expressly applies the exception from reduction or offset to "[a]ny refund payable by reason of section 6428A(f) . . . (as added by this section)". And although 26 U.S.C. 6428A(a) through (c) created the CAA's $600 tax credit, it was through § 6428A(f) that Congress authorized that credit to be paid as an advance refund, or EIP. By its explicit reference to § 6428A(f), the CAA statutory note only excepts advance refunds, or EIP, from offset.

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[11] Pub. L. No. 116-260, § 272(d)(1), 134 Stat. 1182, pp. 1972-74.

[12] Compare the CARES Act, Pub. L. No. 116-136, § 2201(d), 134 Stat 281, 338-39.