COMMONWEALTH OF KENTUCKY
SUPREME COURT
NO. 2013-SC-000812-DE

RACHEL ADAMS-SMYRICHINSKY — APPELLANT

v.

BRIEF FOR THE APPELLANT
RACHEL ADAMS-SMYRICHINSKY

PETER T. SMYRICHINSKY — APPELLEE

* *

APPEAL FROM
KENTUCKY COURT OF APPEALS
OPINION NO. 2013 CA-000181

Appellant's brief submitted by

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CERTIFICATE OF SERVICE

This is to certify that a true copy of the foregoing was this 9th day of April, 2014 mailed to the Honorable Timothy Feeley, Oldham Circuit Court, Family Division, Courthouse, 100 W. Main Street, La Grange, Kentucky 40031 and Rebecca A. Reichenbecher, Attorney for Peter T. Smyrichinsky, the Appellee, 802 Lily Creek Rd., Suite 101, Louisville, KY 40243, and to the Clerk of the Supreme Court, Room 209 State Capitol, 700 Capitol Avenue, Frankfort, Kentucky, 40601-3488

Michael R. Slaughter

INTRODUCTION

Appellant zppeals the Court of Appeals opinion which was apparently based on disregard of the plain wording of the statute regarding modification of emancipation of child from the originating tribunal and a complete disregard for the current Federal Tax Laws with regard to the Federal Children's tax deduction.

STATEMENT CONCERNING ORAL ARGUMENT

Appellant believes that the issues in this motion are straight forward and therefore does not specifically request oral argument.

STATEMENT OF POINTS AND AUTHORITIES

STATEMENT OF MATERIAL FACTS

The Appellant, Rachel Adams-Smyrichinsky, herein after Rachel, is the custodial parent of two children, one of which is 16 and the other is now 18. The Court of Appeals Opinion entered on November 15, 2013, (Exhibit 1 App. P. 1 - 5) affirmed the trial Court's reduction in child support paid by the Appellee, Peter T. Smyrichinsky, hereinafter Tod, in violation of KRS 407.5611(3) and also affirmed the Trial Court's allocated the children's tax deductions for 2009, 2010, and 2011 to Tod in violation of Internal Revenue Code CFR section 152 (e)(4)(A) and the Internal Revenue Service Regulations modified in 2008. The Trial Court's actions were to the financial detriment of the minor children. (RA 325-326, Exhibit 2 App. P. 6 -7)

The Parties were divorced in Indiana. What ensued was a long and rancorous attempt to settle the property issues, including child support. One such element of a Post Divorce Order was to say, in writing, that the judge was incapable of determining what the actual incomes of the parties were and ordered that Tod pay $53.00 per week in child support on two children. At the same time the Court ordered Rachel to pay $53.69 per week for healthcare for those same children. (Exhibit 3 App P. 8 - 12 at App. P. 10) (Document originally included in RA 81 - 231)

Soon after the divorce, Rachel moved with the children to Oldham County Kentucky and filed several motions in Indiana asking that jurisdiction be transferred to Kentucky. Tod maintained that he was still living in Indiana, using his mother's address, even though he had purchased a home in Kentucky in 2009. Finally, as the oldest child was turning 17 and about to graduate from high school, Tod filed a petition in Kentucky asking that this state accept jurisdiction.(*see* Motion RA 5 - 12) On December 20, 2010, the Trial Court (RA 12 Exhibit 4 App. P 13) recognized that motion and indicated that Tod had asked for a modification of child

support.

When the oldest child turned 18 and had graduated from high school, Tod immediately filed a motion to discontinue child support on that child and to modify his child support obligation. Rachel filed a memorandum opposed to that motion, citing KRS 407.561. The Trial Court cited the fact that the Indiana Court relinquished jurisdiction to Kentucky as part of the reason the Trial Court felt that it had the authority to eliminate the support on the oldest child.

In the original Oldham County Family Court Order of September 22, 2011 (RA 325 - 326 Exhibit 2 App. P. 6 - 7), the Trial Court, on its own motion, gave the child tax deductions for tax years 2009. 2010, and 2011 to Tod. On October 14, 2011 Rachel filed a Memorandum opposed to the Court Order. In that memorandum Rachel included her position on the Federal Tax Deduction and what the wrong date for the child support modification to begin and what that delay had cost her and the children. (RA 369-376)

Tod, later sought to enforce that Order and Rachel objected. Giving the child tax deductions to Tod detrimentally effected Rachel and the children, financially. The Court entered an Order directing Rachel to sign the necessary IRS forms to give Todd the children's tax deductions (RA 490 Exhibit 5 App. P. 14) It is important to note that neither Tod, nor Rachel had filed any taxes for the years in dispute.

ARGUMENT

I. KRS 407.5611 WAS CODIFIED TO PREVENT SUPPORT PAYERS FROM "FORUM SHOPPING" TO GAIN AN ADVANTAGE THAT THEY HAD NOT PREVIOUSLY HAD IN THE ORIGINATING TRIBUNAL.

KRS 407.5611(3) says that a tribunal of this state may not modify any aspect of a child

support order that may not be modified under the law of the issuing state. (Exhibit 6. App. P. 13) Indiana's age of emancipation, at the time of the entry of its child support Order, specified that child support must be paid until the child reaches the age of 21, if still in a school of higher learning. That element of the statute is not modifiable by the Trial Court in Indiana – just as the same element in the Kentucky statute is not modifiable by a Trial Court in Kentucky. No child support payer or payee in Kentucky may move the Courts of Kentucky to reduce or lengthen the statutory age of emancipation. No child support payer or payee in Indiana may move the Courts of Indiana to reduce or increase the statutory age of emancipation.

Section 604 of the Revised Uniform Reciprocal Enforcement of Support Act of 1986 uses the same wording as KRS 407.5611. The official commentary to part of that section explains:

> The converse is also true. If the controlling order of another state ends the support obligation at 21, the responding tribunal in a state with 18 as the maximum duration of child support must enforce the controlling order until age 21.
> (Exhibit 7 App. P. 16 - 19 at App. P. 18)

The Trial Court cited an Order from Indiana relinquishing jurisdiction to Kentucky as its authority for acting. However, the statute obviously envisions that the originating state does not have the jurisdiction to enforce its own orders any longer – otherwise there would be no need for this specific portion of the statute. Tod made the same argument in his Court of Appeals brief. The fact that none of the parties are in Indiana, alone would give jurisdiction to Kentucky to modify a support order from Indiana. This is an eventuality that the writers of the statute understood which created the need for the statute in the first place. Obviously, if one of the parties, and/or the child still lived in Indiana, Kentucky would not have any jurisdiction to modify support without the mutual agreement of the parties. See Koerner v Koerner, (Ky App

2008) 270 S.W. 3d 413.

In *State ex rel. Harnes v Lawrence*, (N. C. Ct. App 2000) 538 S.E. 2d 223 (Exhibit 8 App. P 20 - 25) the issue was exactly like the one presented here. In that case the divorce decree, including child support, was entered in New Jersey. In that final Order the father was ordered to pay support until the child reached the age of twenty-two (22) years or is emancipated. When the mother sought to enforce the New Jersey Order in North Carolina, the court in that state utilized the limitations found in its own statutes and stopped the support at age eighteen (18) and graduation from high school. The Appellate Court reversed the trial court by saying:

> "The 1995 North Carolina court order implied that because the age of emancipation in North Carolina is eighteen, then the court could modify the New Jersey support order to end support at age eighteen, not age twenty-two as required by the New Jersey order. This is not in accordance with New Jersey law, which we must apply."

Again, *Holbrook v Cummings,* (Md. Ct. App. 2000) 750 A. 2d 724, (Exhibit 9 App. P. 26 - 31) is a case that duplicates this case. In *Holbrook* the original Order was issued in New York where the age of emancipation was 21. The father had moved to California and the mother had moved to Maryland. When the child turned 18, the father moved to terminate child support under the laws of Maryland. The Court's opinion indicated that it was undeniable that the New York law requires parents to support their children until they reach 21 years of age and that the duration of the father's obligation to provide such support could not be reduced under New York Law, so it could not be reduced in Maryland.

Robdau v Commonwealth (Va. Ct. App. App. 2001) 543 S.E. 2d 602 (Exhibit 10, App. P. 32 - 35) finds that when the original order for support was entered in New York and the father sought to terminate the support according to Virginia law of emancipation, that original order

dependent under section 152 c or d may treat the child as a dependent for purposes of sections 105(d), 132(h)2(B) and 213(d)(5)" (See App. P.45).

A revision of the IRS Regulations in 2008, stated, "A state court may not allocate an exemption because sections 151 and 152, not state law, determine who may claim an exemption for a child for Federal income tax purposes." 73 Fed. Reg. 128, 37793 codified 26 CFR Part 1, at 37800 (column 1) (Exhibit 14 App. P. 46 - 49 at App. P. 49) On that same page, the Regulations say, "The final regulations provide specifically that a court order or decree or a separation agreement may not serve as the written declaration. These rules will improve tax administration and reduce controversy."

In *Blanchard v Blanchard*, 401 S.E. 2d 714 (1991) Exhibit 15, App. P. 50 - 54) the Georgia Court held Georgia Courts do not have the authority to award the Federal dependant child tax exemption to a non-custodial parent. They indicated that they had reached that conclusion because to have held otherwise would have caused Georgia to exercise taxation power it did not possess, eliminate the desirable object of certainty, one of the objects of the Federal statute in question, and add to the burdens of the Superior Courts in making case by case determination and having to police the tax paying behavior of parties by use of the contempt power. The Georgia Court reaffirmed that decision in a later case, *Bradley v Bradley,* 488 S.E. 2d 248 (1999).

The Court record will show that Tod is attempting to utilize the contempt powers of the Oldham County Family Court to require the Rachel to give up her Federally guaranteed right to the children's tax deduction. (RA 497- 489 and RA 498-500)

There are decades of reasoned opinions by the United States Tax Courts that have upheld

that the dependency exemption in joint custody situations depends NOT on the discretion of the state trial courts. The 2008 modification in the law supercedes all prior laws on that issue. One of the most recent Federal Tax Court Opinions speaks directly to this issue. In one of the most recent cases, Shenk v Commissioner, 140 T.C. No. 10 (2013) (Exhibit 16 App. P. 55 - 71 at App. P. 65) the Court wrote, ". . .ultimately it is the Internal Revenue Code and not State court orders that determine one's eligibility to claim a deduction for Federal income tax purposes, and Mr. Shenk does not meet the criteria of the code for claiming the disputed dependency exemption deductions. He is the noncustodial parent and the custodial parent did not sign the required declaration." Rachel would add – nor can the state Court force her to sign the required declaration, through its Orders or threat of contempt.

The Court of Appeals opinion affirming the Oldham County Family Court's ability to ignore Federal Law regarding the child tax deduction must be overruled.

III. FAMILY COURTS ARE COURTS OF EQUITY AND, AS SUCH, IN DECIDING CHILD TAX DEDUCTION ISSUES, SHOULD BALANCE THE EQUITIES TO DO THE MOST GOOD FOR THE CHILDREN.

Family Courts are courts of equity. Most of the guidelines for Family Courts to follow are grounded in a balancing of equities. Setting maintenance awards include not only the need for maintenance but the ability of the payer to live and make the payments. Property Settlements are to be scrutinized for not being unconscionable.

Rachel has previously testified and provided evidence that if she is denied her Federally guaranteed child deduction rights, she would experience a loss of a tax refund for the three years of $9,450.00 while at the same time have to pay additional taxes of $15,073.00. As it stands now,

Tod will get a Federal refund of $14,176.00.for tax year 2010, alone. Court records indicate that for the three years of Tod's new child tax deduction, he had only paid $14,516.00 in support. When the Court failed to set an arrearage for the child support back to the date of Rachel's motion for child support modification, the resulting loss in support was $12,488.00. (RA 69-72) Because the Trial Court eliminated the support for the Oldest Child through the improper use of the emancipation law, Rachel had an additional loss of support of $8,550.00. (RA 557-560)

Through an abuse of Judicial Discretion, Rachel has consistently seen an unbalancing of the equities in her case with Tod, including the Indiana decision to set child support by Tod of $53.00 per week for two teen aged boys. Rachel also saw a loss of thousands of dollars in arrearage when the trial court chose not to use the filing date of her motion for child support modification but rather a date nine months later after it became apparent that Tod was not going to provide realistic income information. (RA 69-72) Lastly, the Trial Court arbitrarily undid the Indiana Federal Tax child deduction Order and instead allowed Tod to claim the children for the three (3) years prior to issuance of the Oldham County Court's Order on September 11, 2012. Added together Rachel will incur a loss of over $60,000.00 if the Trial Court's Orders remain in effect. (See RA 369 - 376 Memorandum on Support and Tax deductions)

CONCLUSION

The Opinion of the Kentucky Court of Appeal, affirming the Oldham County Family Court Order, eliminating the child support obligation for the oldest child and allocating the children's tax deduction to the Tod should be OVERRULED in its entirety and the case should be returned to the Trial Court.

Respectfully Submitted

APPENDIX

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