FILED
MAY 1 5 2014
CLERK
SUPREME COURT

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

RACHEL ADAMS-SMYRICHINSKY APPELLANT

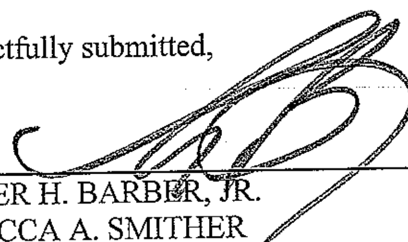
v.

BRIEF FOR APPELLEE
PETER T. SMYRICHINSKY

PETER T. SMYRICHINSKY APPELLEE

APPEAL FROM
KENTUCKY COURT OF APPEALS
OPINION NO. 2013-CA-00181-ME

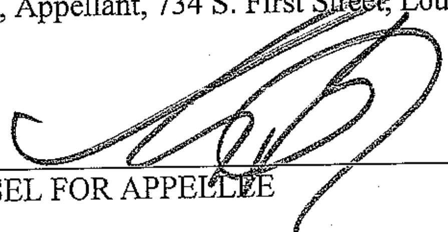
Respectfully submitted,



OLIVER H. BARBER, JR.
REBECCA A. SMITHER
THOMAS J. BANASZYNSKI
BARBER, BANASZYNSKI & HIATT, PSC
802 Lily Creek Road, Suite 101
Louisville, Kentucky 40243
(502) 585-2100
Counsel for Appellee Peter T. Smyrichinsky

CERTIFICATE OF SERVICE

I hereby certify that the original and nine copies of the foregoing Brief for Appellee, Peter T. Smyrichinksy, were mailed, postage prepared, Susan Stokley Clary, Clerk, Supreme Court of Kentucky, State Capitol, Room 209, 700 Capital Avenue, Frankfort, KY 40601-3488, and a copy each to Sam Givens, Clerk, Kentucky Court of Appeals, 360 Democrat Dr., Frankfort, KY 40601, Honorable Timothy Feeley, Oldham Circuit Court, Family Division, Oldham County Courthouse, 100 W. Main Street, LaGrange, Kentucky 40031, and Michael R. Slaughter, Attorney for Rachel Adams-Smyrichinsky, Appellant, 734 S. First Street, Louisville, Kentucky 40202, this 14th day of May, 2014.



COUNSEL FOR APPELLEE

STATEMENT CONCERNING ORAL ARGUMENT

The Appellee does not believe that oral argument will aid the Court in this case, but will gladly present oral argument if the Court believes that it is necessary.

STATEMENT OF POINTS AND AUTHORITIES

Page

STATEMENT CONCERNING ORAL ARGUMENT i

STATEMENT OF POINTS AND AUTHORITIES ii

Uniform Child Custody Act and Indiana Code Chapter 31-21 1

KRS Chapter 407 3

ARGUMENT 4

I. KRS 407.5613 WAS PROPERLY INVOKED BY THE TRIAL COURT TO MODIFY THE CHILD SUPPORT OF THE MINOR CHILDREN 4

KRS 403.213(3) 4

Uniform Interstate Family Support Act 5

KRS 407.5101 – 407.5902 5

KRS 407.5207(2)(a) 5

KRS 407.5611 5

Nordike v. Nordike, 231 S.W.3d 733, 736 (Ky. 2007) 5

KRS 407.5613 6

Koerner v. Koerner, 270 S.W.3d 413 (Ky. 2008) 7

Roberts v. Bedard, 357 S.W.3d 554, 556 (Ky.App. 2012) 7

KRS 407.5205 8

Ballard v. American Hemp Co., 30 Ky.L.Rptr. 1080, 100 S.W. 271 (1907) 9

II. THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, HAD JURISDICTION OVER THE PARTIES AND PROPERLY APPLIED KENTUCKY STATUTES AND GUIDELINES 9

Wahlke v. Pierce, 392 S.W.3d 426 (Ky. App. 2013) 9

State, ex rel. Harnes v. Lawrence, 140 N.C. App. 707; 538 S.E.2d 223 (N.C. App. 2000) 12

Holbrook v. Cummings, 750 A.2d 724 (Md. App. 2000) 13

N.Y. Fam. Ct. § 413 (McKinney 1999) 13

Cavallari v. Martin, 169 Vt. 210, 732 A.2d 739 (1999) 14

Robdau v. Commonwealth, ex rel Robdau, 543 S.E.2d 602 (Va. App. 2001) 15

Commonwealth v. Chamberlain, 31 Va. App. 533, 536-37, 525 S.E.2d 19, 21 (2000) 15

III. THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, HAD EQUITY JURISDICTION AND AUTHORITY TO ORDER RACHEL TO EXECUTE THE IRS FORMS NECESSARY FOR PETER TO CLAIM THE DEPENDENCY EXEMPTIONS FOR THE TWO CHILDREN FOR TAX YEARS 2009 THROUGH 2011 15

26 U.S.C. §151(a) 16

26 U.S.C. §152(e) 16

Knochelmann, Jr., v. Commissioner of Internal Revenue, 455 Fed. Appx. 536, 541 (6th Cir. 2011) 17

IRS Form 8332 17

Armstrong v. Commissioner, 745 F.3d 890, 2014 U.S. App. LEXIS 4693, 2014-1 U.S. Tax Cas. (CCH) P50, 211; 113 A.F.T.R.2d (RIA) 1301 (8th Cir. 2014) 17

Deficit Reduction Act of 1984 17

Miller v. Commissioner, 114 T.C. 184, 190 (2000)." 745 F.3d at ___, Slip Op. 4-5 18

United States v. Mitchell, 403 U.S. 190, 197, 91 S.Ct. 1763, 29 L.Ed. 406 (1971) 18

Hart v. Hart, 774 S.W.2d 455 (Ky.App. 1989) 18

Marksberry v. Riley, 889 S.W.2d 47 (Ky. App. 1994) 19

Pegler v. Pegler, 895 S.W.2d 580 (Ky. App. 1995) 19

Fullmer v. Fullmer, 761 P.2d 942 (Utah App. 1988) 19

Stickradt v. Stickradt, 156 Mich. App. 141, 401 N.W.2d 256 (Mich. App. 1987)............19

Fudenberg v. Molstad, 390 N.W.2d 19 (Minn. App. 1986) 19

Lincoln v. Lincoln, 155 Ariz. 272, 746 P.2d 13 (1987)..19

Fleck v. Fleck, 427 N.W.2d 355 (N.D. 1988)...19

Pergolski v. Pergolski, 143 Wis. 2d 166, 420 N.W.2d 414 (1988)....................................19

Brausch v. Brausch, 265 S.W.3d 837 (Ky. App. 2008)...20

Merrick v. Merrick, 2012 Ky. App. Unpub. LEXIS 578,
(August 20, 2012, Rendered)...20

Spence v. Spence, 2013 Ky. App. Unpub. LEXIS 83,
(February 1, 2013, Rendered) 20

Franklin v. Franklin, 2011 Ky. App. Unpub. LEXIS 226,
(March 18, 2011, Rendered) 20

Surratt v. Surratt, 2011 Ky. App. Unpub. LEXIS 684,
(September 23, 2011, Rendered) 20

Geddies v. Geddies, 43 So. 3d 888 (Fla. 1st DCA 2010)...20

Miller v. Miller, 744 A.2d 778 (Pa. Super 1999)..20

Babka v. Babka, 234 Neb. 674, 452 N.W. 2d 286 (1990)...20

El-Hajji v. El-Hajji, 67 So.3d 256 (Fla. App. 2d 2010)...20

Cross v. Cross, 178 W.Va. 563, 363 S.E.2d 449 (1987)..20

Ritchy v. Ritchy, 556 N.E.2d 1376 (Ind. App. 1990)...20

Singer v. Dickinson, 63 Oh. St. 3d 408, 588 N.E.2d 806 (1992) 20

Monterey County v. Cornejo, 53 Cal.3d 1271, 812 Pac. 2d 586 (Cal. 1991)....................20

Hudson v. Hudson, 530 S.E.2d 400 (S.C. App. 2000)...20

Rohr v. Rohr, 118 Id. 689, 800 Pac. 2d 85 (Id. 1990) 20

Reichert v. Hornbeck, 2010 Md. App. 282, 63 A. 3d 76 (2013) 20

Macias v. Macias, 968 Pac. 2d 814 (N.M. App. 1998) 20

In Re Marriage of Rogliano and Rogliano, 555 N.E. 2d 1114 (Ill. App. 5th Dis. 1990)....20

McCarthy v. McCarthy, 760 A.2d 977 (Conn. App. 2000) 20

Voshen v. Voshen, 801 S.W.2d 789 (Mo. App. 1991) 20

Gambill v. Gambill, 562 So. 2d 1343 (Ala. App. 1990) 20

Pritchard v. Floyd, 867 So.2d 83 (La. App. 2004) 20

Phalla Iv v. Samath Hang, 83 Mass. App. 598, 988 N.E. 2d 1 (Mass. App. 2013) 20

Frazier v. Frazier, 280 Ga. 687, 631 S.E.2d 666 (Ga. 2006) 20

Durden v. McClure, 281 S.W.3d 137 (Tex. App. 2008)] 20

Fullmer v. Fullmer, 761 P.2d 942 (Utah App. 1988) 20

Stickradt v. Stickradt, 156 Mich. App. 141, 401 N.W.2d 256 (Mich. App. 1987) 20

IV. THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, PROPERLY CONSIDERED THE BEST INTERESTS OF THE CHILDREN IN AWARDING CHILD SUPPORT AND ALLOCATING TAX DEDUCTION 21

CONCLUSION 21

APPENDIX

COUNTER STATEMENT OF MATERIAL FACTS

Appellant Rachel Adams-Smyrichinsky (hereafter "Rachel" or "Appellant") incorrectly states a number of material facts in her Brief. Appellee Peter T. Smyrichinsky (hereafter "Peter" or "Appellee") offers his Counter-Statement of Material Facts for this Court's review.

Rachel and Peter were married on June 2, 1995. Two children were born of the parties' union, namely, Peter Logan Smyrichinsky, born in 1994, currently 20 years of age; Maverick Adam Smyrichinksy, born in 1997, currently 17 years of age. Peter filed a Petition for Dissolution of Marriage in the Harrison Circuit Court, Harrison County, Indiana, on or about September 10, 2003, Harrison County Court Cause No. 31-C01-0309-DR-174. After litigious proceedings, not relevant here, the Harrison Circuit Court, Harrison County, Indiana, entered a Decree of Dissolution of Marriage on or about February 4, 2005. Between 2005 through 2011, the Harrison Circuit Court presided over matters concerning custody, support and visitation of the parties' two children. The parties would relocate to Kentucky.

By 2010, the parties and the children had all been resident in Kentucky for more than six (6) months. On January 10, 2011, Peter petitioned the Harrison County, Indiana, Court to transfer personal and subject matter jurisdiction over the case pursuant to the Uniform Child Custody Act and Indiana Code Chapter 31-21 *et. seq.,* to the Oldham Circuit Court, Family Court. On March 8, 2011, the Harrison County, Indiana, Circuit Court transferred personal and subject matter jurisdiction of the matter to Oldham County Circuit Court, Family Division. The Indiana Court found that the parties had been non-

residents of Indiana for more than 6 months and that the "home state" of the children was likely Kentucky.[1]

The Indiana Court further found because it was no longer the home state of the child(ren), and since the new "home state" of Kentucky had not declined jurisdiction, the Indiana Court no longer had jurisdiction to modify its previous custody orders under the UCCJA. Id.

Pursuant to the dissolution proceedings in Harrison County, child support was payable by Peter at $53.00 per week, or $230.00 per month.

Jurisdiction was subsequently accepted by the Oldham Family Court (hereafter "Trial Court"). Thereafter, the Trial Court entertained various motions, and issued Orders, regarding child support and visitation of the parties' minor children.

On September 22, 2011, the Trial Court entered an Order modifying Peter's child support obligation payable to Rachel.[2] Pursuant to the Kentucky Child Support Guidelines, child support was ordered payable by Peter to Rachel in the amount of $1,791 per month effective September 1, 2011. The Trial Court also found that Peter was incurring an expense of $350.00 per month in health insurance coverage on behalf of the children; that beginning with 2010, and for all subsequent years, Peter could take both children as tax exemptions against his significantly greater income.

On February 28, 2012, the trial court reaffirmed the child support payable to Rachel in the amount of $1,791 per month effective September 1, 2011,[3] entered an

---

[1] Tab. 1 03/08/2011 *Order*
[2] *Order,* Record on Appeal ("RA") pp. 325-326
[3] *Order*, RA pp. 381-83

Order that child support was fair and equitable.[4] Rachel did not object or take any other action as a result of the February 28, 2012 Order, nor the earlier September, 2011 Order.

Thereafter, on April 6, 2012, Peter petitioned the Court pursuant to KRS Chapter 407 to modify the child support due to a material change in circumstances.[5] On April 17, 2012, the trial court entered an order modifying and reducing Peter's child support obligation payable to Rachel to $1,100 effective April 1, 2012.[6] This child support calculation and order was entered based upon Kentucky Child Support Guidelines. Rachel accepted the decision.

Next, on July 19, 2012, upon the parties' oldest child, Logan, reaching the age of majority and having graduated high school, Peter moved the trial court to modify his child support obligation to reflect the fact that there was only one minor child in need of financial support. Rachel objected. The Trial Court ordered the parties to submit briefs in support of their respective positions regarding this proposed child support modification. After hearing the respective positions of the parties, the Trial Court entered an Order on January 9, 2013, modifying child support pursuant to the Kentucky Child Support Guidelines reflecting that the oldest child, Logan, had reached the age of majority, and had graduated high school. It is this Order modifying child support which Rachel appealed.

In its Order of January 9, 2013, the Trial Court ordered Peter to pay child support, pursuant to the Kentucky Child Support Guidelines, the sum of $875.00 per month, retroactive to September 1, 2012, as well as maintaining insurance for Maverick, the parties' minor child. Unreimbursed medical expenses which might be incurred on behalf

[4] *Order,* RA p 391
[5] *Motion to Modify,* RA pp. 392-97
[6] *Order,* RA pp. 398-99

of Maverick were to be paid, after the first $100.00, 80% by Peter and 20% by Rachel. Id.

The trial court, further, reiterated its previous Order that Peter was entitled to take child custody exemptions and deductions for tax years 2009, 2010 and 2011, as ordered in the court's Order of September 22, 2011. Rachel was authorized to take both children as exemptions for tax year 2012. Rachel never moved the Trial Court to alter, amend or vacate its Order of September 22, 2011 wherein Peter was initially granted the ability to claim both children as exemptions. Further, she never appealed that Order.

Now, Rachel has appealed the Trial Court's Child Support Order of January 9, 2013. The Opinion of the Court of Appeals properly upheld the Trial Court's Order of January 9, 2013.

ARGUMENT

I.

KRS 407.5613 WAS PROPERLY INVOKED BY THE TRIAL COURT TO MODIFY THE CHILD SUPPORT OF THE MINOR CHILDREN.

The Trial Court correctly held, and the Court of Appeals affirmed, that it had jurisdiction over the parties and properly applied Kentucky statutes and guidelines as it had been doing in all of its prior modification orders. Utilizing the Kentucky Child Support Guidelines, the Court appropriately calculated the child support modifications.

In modifying the child support, the Trial Court utilized the language of KRS 403.213(3) which states:

> **Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of the child shall be terminated by emancipation of the child unless the child is a high school student when he reaches the age of eighteen (18).** (Emphasis added).

One of the issues present in this appeal is addressed under the Uniform Interstate Family Support Act (UIFSA). The UIFSA was adopted by Kentucky in KRS 407.5101 – 407.5902. Where there are two or more child support orders issued by this state or another state with regard to the same obligor and child, a tribunal of this state shall apply the following rules in determining which Order to recognize for purposes of continuing, exclusive jurisdiction:

> (a) If only one (1) of the tribunals would have continuing, exclusive jurisdiction under KRS 407.5101 to 407.5905, **the order of that tribunal controls and shall be recognized.**

KRS 407.5207(2)(a) (Emphasis added).

The Harrison County Circuit Court of Indiana relinquished personal and subject matter jurisdiction when it transferred this matter to the Commonwealth of Kentucky upon all parties being residents of Kentucky.[7] The Trial Court in Kentucky has continuing and exclusive jurisdiction over child support orders, including modification orders. The January 9, 2013, Order of the Trial Court controls and is to be recognized. The Court of Appeals correctly agreed.

Rachel continues to mislead the Court with her argument that KRS 407.5611 controls in this instance. This is inaccurate. KRS 407.5611 would allow modification of a foreign child support order that has been registered in Kentucky **only** where the parties have consented in writing in the issuing state to modification of the decree by the courts of this state, or where, among several other requirements, the petitioner is a non-resident. *See Nordike v. Nordike*, 231 S.W.3d 733, 736 (Ky. 2007). KRS 407.5611 has no applicability in this case.

---

[7] Tab 1, 03/08/2011 *Order*

The controlling statute in this matter is KRS 407.5613, which governs the power to modify support decrees where all parties are Kentucky residents. KRS 407.5613 provides that jurisdiction to modify a child support order of another state exists if "all parties who are individuals reside in this state and the child does not reside in the issuing state." Here, all parties, including their two sons, were residents of Kentucky. Rachel is attempting to argue law that would apply only if Indiana still retained continuing, exclusive jurisdiction over child support, and one party or the other was a non-resident of Kentucky. That is not the situation.

KRS 407.5613 governs the power of a Kentucky court to modify child support orders or decrees, which may have been issued in another state, where all parties and the child or children are Kentucky residents, resided in the issuing state.

> "If all of the parties who are individuals reside in this state and the child does not reside in the issuing state, a tribunal of this state has jurisdiction to enforce and to modify the issuing state's child support order...." KRS 407.5613(1).

Here, the parties, along with their two sons, resided in Kentucky at all times pertinent to this proceeding. They so resided more than six (6) months prior to the Harrison Circuit Court in Indiana declining to further exercise its jurisdiction, and transferring jurisdiction to Kentucky.

Rachel's argument that Peter purposely transferred jurisdiction to Kentucky in an effort to 'forum shop' and perhaps save money is absurd! To the contrary, Peter was only required to pay $53.00 per week in child support pursuant to the court Orders from the Harrison Circuit Court. In Kentucky, he has been required to pay child support in an

amount as much as $1,791.00 per month, when both children were minors. At present he is required to pay $766.00 per month for the support of Maverick.[8]

The Court of Appeals correctly noted that Kentucky now has, and continues to have, exclusive jurisdiction over matters related to child custody and child support related to Rachel, Peter, and their children. The Trial Court properly could and did modify the child support order that had been originally issued by Indiana.

In Koerner v. Koerner, 270 S.W.3d 413 (Ky. 2008), this Court specifically noted that "KRS 407.5613 provides that jurisdiction to modify a child support order of another state exists if 'all of the parties who are individuals reside in this state and the child does not reside in the issuing state….'." Id., at 416.

In Koerner, "at the time of the dissolution of their marriage in 2000, Cheryl Koerner, William (Bill) Koerner and their two minor children resided in Georgia." Cheryl and the two minor children later moved to Oldham County, Kentucky. This court determined that the Oldham Family Court lacked jurisdiction to modify the Georgia child support order, pursuant to the Uniform Interstate Family Support Act (UIFSA).[9] Mr. Koerner still resided in Georgia. KRS 407.5613 may not be invoked to modify child support in such a circumstance. The Koerner Court joined those states that have concluded that "under UIFSA, the issuing state has continuing, exclusive jurisdiction

---

[8] The Trial Court again modified child support payable by Peter to Rachel, to the amount of $766 per month, pursuant to Kentucky Child Support Guidelines, by Order entered on December 19, 2013. Rachel has not appealed this Order.

[9] "The Kentucky Supreme Court addressed the issue of jurisdiction related to UIFSA in *Nordike v. Nordike*, 231 S.W.3d 733 (Ky. 2007). Therein, the Court described jurisdiction as follows: '[j]urisdiction, broadly defined, is the power of the court to decide an issue in controversy.' *Id.* at 737, citing *Black's Law Dictionary* 867 (8th ed. 2004)." Roberts v. Bedard, 357 S.W.3d 554, 556 (Ky.App. 2012).

over its child support order if the obligor or the obligee continues to reside in that state." Id., at 417. This conclusion is distinctly different from the present matter. Here, all parties, Rachel, Peter and the children, were and continue to be residents of Kentucky. No one has continued to reside in Indiana, the issuing state.

In the present matter, KRS 407.5613 has been properly applied. All parties and both children were residents of Kentucky. Rachel's reliance on Koerner for a contrary proposition is misplaced. KRS 407.5205 specifically provides for continuing exclusive jurisdiction involving support matters.[10]

The Trial Court noted that it was undisputed by the parties that it maintains jurisdiction over child support and enforcement.[11] The Court of Appeals further noted that "Although Rachel charges that Peter is forum shopping, she did not object to the application of Kentucky law **until the third time** that the court modified the child support order. Arguably, her failure to object sooner constitutes a waiver at this juncture.

---

[10] (1) A tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:

(a) As long as this state remains the residence of the obligor, the individual obligee, or the child for whose benefit the support order is issued; or

(b) Until all of the parties who are individuals have filed written consents with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

[11] (1) After a child support order issued in another state has been registered in this state, **the responding tribunal of this state may modify that order only if KRS 407.5613 does not apply** and if after notice and hearing it finds that:
(a) The following requirements are met:
1. The child, the individual obligee, and the obligor do not reside in the issuing state;
2. A Movant who is a nonresident of this state seeks modification; and
3. The respondent is subject to the personal jurisdiction of the tribunal of this state; or
(b) The child, or a party who is an individual, is subject to the personal jurisdiction of the tribunal of this state and all of the parties who are individuals have filed written consent with the issuing tribunal for a tribunal of this state to modify the support order and assume continuing, exclusive jurisdiction over the order. However, if the issuing state is a foreign jurisdiction that has not enacted a law or established procedures substantially similar to the procedures under this chapter, the consent otherwise required of an individual residing in this state is not required for the tribunal to assume jurisdiction to modify the child support order. (Emphasis added).

See Ballard v. American Hemp Co., 30 Ky.L.Rptr. 1080, 100 S.W. 271 (1907)."

Opinion, p. 4.

The Court of Appeals goes on to note that it is also undisputed that the older child, Logan, had graduated from high school in 2012 and turned 18 years of age in July, 2012. As a result, consistent with Kentucky statutes, the child support obligation of Peter Smyrichinsky terminated as to Logan.

> "Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of the child shall be terminated by emancipation of the child unless the child is a high school student when he reaches the age of eighteen (18)." KRS 403.213(3).

There is no separate agreement of the parties. The Trial Court ordered that child support should not extend beyond the age of 18, which was properly affirmed by the Court of Appeals.

II.

THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, HAD JURISDICTION OVER THE PARTIES AND PROPERLY APPLIED KENTUCKY STATUTES AND GUIDELINES.

Since 1998, jurisdiction to determine child support matters has been governed by KRS Chapter 407, modeled after the Uniform Interstate Family Support Act (UIFSA). In Wahlke v. Pierce, 392 S.W.3d 426 (Ky. App. 2013), the Court of Appeals addressed a trial court's continuing, exclusive jurisdiction over a child custody matter. In Wahlke, that Court of Appeals succinctly stated, "a family court's jurisdiction is exclusive and continuing until one of two circumstances are determined by a court to have occurred – neither the child nor a parent of the child has a significant connection with the state and substantial evidence regarding the child is lacking, or neither the child nor the parents of the child reside in that state." Id., at 430. The Wahlke court favorably cited to the

comments to §202 of the Uniform Child Custody Jurisdiction and Enforcements Act of 1997 (model act).

Kentucky Revised Statute 407.5205(1) provides the guidelines for continuing, exclusive jurisdiction, stating that a tribunal of this state issuing a support order consistent with the law of this state has continuing, exclusive jurisdiction over a child support order:

> (a) as long as this state remains the residence of the obligor, the individual oblige, or the child for who benefit the support order is issued; or
>
> (b) until all of the parties who are individuals have filed written consents with the tribunal of this state for a tribunal of another state to modify the order and assume continuing, exclusive jurisdiction.

In the present action, the original order of support was issued in Indiana. Jurisdiction was later transferred to Kentucky. Here, Rachel waived any right to contest the jurisdiction of the Kentucky court when she failed to object to the transfer of the case and entered her appearance in the Kentucky Court. For over two (2) years after the entry of the Order transferring jurisdiction, Rachel appeared before the Trial Court, Oldham Family Court, and voluntarily and willingly participated in the Kentucky proceedings. Further, Rachel received child support payable by Peter pursuant to the Kentucky support guidelines.

Rachel consistently motioned the Trial Court to utilize the Kentucky Child support guidelines. Rachel did not seek to revoke the jurisdiction of Indiana or its child support guidelines until Peter filed his motion, pursuant to KRS 403.213(3), to modify child support on the basis that the parties' oldest child had attained the age of majority and graduated high school.

The significance of whether Kentucky or Indiana has jurisdiction over the child support matter is that, contrary to Kentucky law, Indiana law provides for the continued payment of child support beyond the age of eighteen, upon satisfying specific conditions.[12] Kentucky only allows child support beyond 18 years of age because a child is incapacitated, or the parties agree. KRS 403.213.[13] Now, seeking to gain future child support payments, Rachel argues that the Court should utilize the Indiana guidelines regarding the age at which child support may be terminated. Yet, she would utilize the Kentucky Child Support guidelines to determine the amount of child support to be paid, presumably higher than through the Indiana guidelines.

Indiana does not retain jurisdiction to determine the age at which child support payments may be terminated simply because it issued the original support order when the parties divorced in 2005. All the parties and children became and are residents of Kentucky. Rachel acquiesced in Kentucky's jurisdiction in this matter. Further, she has requested the Oldham Family Court, on several separate occasions, to modify child support pursuant to the Kentucky Child Support Guidelines.

If Rachel wished for the Indiana Child support guidelines to apply, she should have presented a timely appeal in her attempt to prevent the case from being transferred to Kentucky. She didn't. Now, years later, Rachel argues to this Court, a Court sitting in

---

[12] Tab 2, *I.C. 31-16-6-6*

[13] (3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child shall be terminated by emancipation of the child unless the child is a high school student when he reaches the age of eighteen (18). In cases where the child becomes emancipated because of age, but not due to marriage, while still a high school student, the court-ordered support shall continue while the child is a high school student, but not beyond completion of the school year during which the child reaches the age of nineteen (19) years. Provisions for the support of the child shall not be terminated by the death of a parent obligated to support the child. If a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum payment, to the extent just and appropriate in the circumstances. Emancipation of the child shall not terminate the obligation of child support arrearages that accrued while the child was an unemancipated minor.

the Commonwealth of Kentucky, that it should follow the laws of an out-of-state court which would result in a benefit to her – yet she claims Peter is the one forum shopping.

Rachel argues that this Court must follow the Indiana Child Support Guidelines in determining the age of child support obligation termination. Yet, she argues that this Court must also abide by the Kentucky Child support guidelines in determining the amount of child support payable. Rachel wants to "have her cake and eat it too." Rachel is asking this Court to take two aspects of the law from two separate states and somehow meld them together so as to permit her to have the greatest monetary result. This is not justifiable.

In her brief, Rachel has provided various case law citations which she claims support her position. However, the facts of each cited case compel a contrary result. Rachel has not fully provided an accurate recitation of the facts of these scenarios and misapplies them to the present case.

Rachel cites to State, ex rel. Harnes v. Lawrence, 140 N.C. App. 707; 538 S.E.2d 223 (N.C. App. 2000). In Harnes, Plaintiff, Barbara Harnes, attempted to enforce a New Jersey child support order. The parties were married to each other, had one child born of the marriage and later divorced in 1979. The divorce occurred in New Jersey. The final Judgment of Divorce ordered the defendant to provide support for the couple's daughter until the age of 22, or emancipation. The Order of support was later registered in North Carolina, where one party resided. The other party continued to reside in New Jersey, the issuing tribunal. The Court found New Jersey was the child's home state and the support order of the New Jersey court was the controlling order; the trial court in North Carolina was required to recognize the New Jersey order as controlling. Id., at 227. New Jersey

retained continuing, exclusive jurisdiction over the support order. The North Carolina trial court was required to give the New Jersey order full faith and credit, enforcing the order and interpreting the order according to the law of the state of New Jersey. Id., at 228. The result might have been different if all the parties were residents of North Carolina; however they were not.

Harnes is easily distinguished from the case at hand. In Smyrichinsky, continuing, exclusive jurisdiction was relinquished by Indiana, the originating tribunal, and transferred to Kentucky. Further, in Smyrichinsky, all parties consented to the transfer of continuing, exclusive jurisdiction to Kentucky, and all parties and the children were residents of Kentucky.

Rachel next goes on to cite Holbrook v. Cummings, 750 A.2d 724 (Md. App. 2000). Once again, Rachel misconstrues the facts and findings of Holbrook in an attempt to support her position. In Holbrook, the New York Supreme Court entered a judgment of absolute divorce dissolving the marriage between appellant Thomas Holbrook and appellee Susan Cummings. The New York Order directed Mr. Holbrook to pay child support in the amount of $250 per week effective April 7, 1986 for the couple's only child, Tanner, born on October 11, 1980. The Order did not specify a date on which Mr. Holbrook's obligation to pay child support would end, although under New York law, the obligation to pay child support terminates when a child reaches the age of twenty-one. N.Y. Fam. Ct. § 413 (McKinney 1999). Prior to the entry of the New York Order, Mr. Holbrook relocated to California. Subsequently, Ms. Cummings and Tanner relocated to Maryland. In 1993, Mr. Holbrook moved to the District of Columbia." Id., at 725.

In October 1995, Ms. Cummings filed an application in Maryland for enforcement of the child support provisions of the New York Order." Id., at 725. Mr. Holbrook presented two issues for the Holbrook Court to consider:

> I. Whether the Circuit Court erred in determining that, under UIFSA, New York's age of majority governs with respect to Mr. Holbrook's obligation to provide child support; and,
>
> II. Whether the Circuit Court erred in denying Mr. Holbrook's request for a retroactive reduction in his child support obligation.

The Holbrook Court answered the above issues in the negative and affirmed, citing the *Uniform Interstate Family Support Act (1996)* Id., at 726.[14] The Court found that under UIFSA a tribunal may modify an existing child support order of another state only if certain quite limited conditions [as set out in § 42-746(a)] are met . . . . The intent [of this scheme] is to eliminate multiple support orders to the maximum extent possible consistent with the principle of continuing, exclusive jurisdiction that pervades the Act." Id., at 728. Subsection (b) of UIFSA provides that if the forum has modification jurisdiction because the issuing state has lost continuing, exclusive jurisdiction, the proceedings will generally follow local law with regard to modification of child support orders." Id., at 728.

Again, this case is readily distinguished from the Smyrichinsky matter because the issuing state (Indiana) relinquished continuing, exclusive jurisdiction. These

[14] The Court explained that under UIFSA, a state may not permit a party to proceed to obtain a second support order; rather, in further litigation the tribunal must apply the Act's provisions for enforcement of an existing order and limit modification to the strict standards of UIFSA. Id., at 727. Mr. Holbrook relies on *Cavallari v. Martin*, 169 Vt. 210, 732 A.2d 739 (1999), a case decided by the Supreme Court of Vermont, in support of his contention that Maryland law should apply to determine when his obligation to pay child support should terminate. In *Cavallari*, the father, a Vermont resident, sought to modify a New York child support decree that obligated him to pay support until his child turned twenty-one years old, on the ground that Vermont required a parent to support a child only until the age of eighteen years. The Family Court judge refused to modify the father's support obligation, but Vermont's Supreme Court reversed and held that the Family Court was required to apply Vermont law and modify the decree as requested. Id., at 727. In *Cavallari*, all of the parties resided in the same county in Vermont. Id.

proceedings properly followed the law of Kentucky with regard to the modification of child support pursuant to the Kentucky Child Support Guidelines.

Next, Rachel cites Robdau v. Commonwealth, ex rel Robdau, 543 S.E.2d 602 (Va. App. 2001). Again, the application of this case law is misplaced. In Robdau, one party remained a resident of New York, the originating tribunal of the child support order. Because the other party lived in Virginia, the State of New York, pursuant to Code §20-88.32, *et. seq.*, the Uniform Interstate Family Support Act (UIFSA), requested that the Division of Child Support Enforcement for the Commonwealth of Virginia enforce the New York child support order. Id., at 603. The Robdau Court found that the New York request would be enforced, citing *Commonwealth v. Chamberlain*, 31 Va. App. 533, 536-37, 525 S.E.2d 19, 21 (2000): "[t]he UIFSA is a model uniform law that has been enacted in all fifty states and provides a comprehensive statutory scheme to establish and enforce support obligations in proceeding involving two or more states." Id., at 605.

Robdau is completely inapposite to the Smyrichinsky matter.

The Smyrichinsky Trial Court ordered that child support should not extend beyond the age of 18, which was properly affirmed by the Court of Appeals.

III.

THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, HAD EQUITY JURISDICTION AND AUTHORITY TO ORDER RACHEL TO EXECUTE THE IRS FORMS NECESSARY FOR PETER TO CLAIM THE DEPENDENCY EXEMPTIONS FOR THE TWO CHILDREN FOR TAX YEARS 2009 THROUGH 2011.

Rachel complains that the Trial Court committed reversible error, then affirmed by the Court of Appeals, when the court ordered her to fully execute any and all IRS

forms necessary for Peter to claim the personal dependency exemptions for the minor children for tax years 2009 through 2011. "In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income." 26 U.S.C. §151(a).

26 U.S.C. §152(e) sets forth the provisions related to claiming the exemption(s) and resultant deduction(s) in the situation of divorced parents, noting in pertinent part as follows:

> (e) Special rule for divorced parents, etc.
> (1) In general. Notwithstanding subsection (c)(1)(B), c(4), or (d)(1)(C), if—
> (A) a child receives over one-half of the child's support during the calendar year from the child's parents—
> (i) who are divorced or legally separated under a decree of divorce or separate maintenance,
> (ii) who are separated under a written separation agreement, or
> (iii) who live apart at all times during the last 6 months of the calendar year, and—
> (B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.
> (2) Exception where custodial parent releases claim to exemption for the year. For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if—
> (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and
>
> (B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

Too often the Internal Revenue Service became involved in the allocation of exemptions between and among divorced or separated parents. Section 152(e), noted

above,[15] is an effort to relieve the IRS from that administrative burden. Knochelmann, Jr., v. Commissioner of Internal Revenue, 455 Fed. Appx. 536, 541 (6th Cir. 2011).[16] This IRS policy, however, does not deny to a Trial Court the ability to issue appropriate orders regarding which party in a dissolution or separation proceeding may be entitled to claim the exemption related to the minor children.

The question here is whether the Trial Court may allocate the federal tax dependency exemption and, pursuant to that allocation, order the "custodial" parent (Rachel) to sign the required waiver that allows the "noncustodial" parent (Peter) to claim the federal tax dependency exemption. May a trial court use its equitable powers to compel compliance with its dependency exemption orders?

Rachel argues that the 2008 revised version of §152(e) bars the Court from ordering her to complete IRS Form 8332 to waive her entitlement to the exemption. Her position is wrong. §152(e) requires that Form 8332 or a like writing be completed and signed by the custodial parent in order for a non-custodial parent to claim a child as a tax exemption. Form 8332 or the comparable writing must be attached to the tax return of the non-custodial parent. The Federal Statute is silent on a state trial court's ability to order one party to complete this form, or a comparable writing.

In Armstrong v. Commissioner, 745 F.3d 890, 2014 U.S. App. LEXIS 4693, 2014-1 U.S. Tax Cas. (CCH) P50, 211; 113 A.F.T.R.2d (RIA) 1301 (8th Cir. 2014), the Court explained the implementation of the dependency exemption:

> "To implement [the dependency exemption provision], the IRS issued Form 8332, the written declaration a noncustodial parent may attach to his or her

---

[15] Enacted as part of the Deficit Reduction Act of 1984.

[16] Tab 3

return to satisfy §152(e)(2). Form 8332 requires the taxpayer to provide, (1) the names of the children for [whom] exemption claims were released, (2) the years for which the claims were released; (3) the signature of the custodial parent confirming his or her consent, (4) the Social Security number of the custodial parent, (5) the date of the custodial parent's signature, and (5) the name and the Social Security number of the parent claiming the exemption. *Miller v. Commissioner*, 114 T.C. 184, 190 (2000)." 745 F.3d at ___, Slip Op. 4-5.[17]

The Court in Armstrong then went on to explain the difference in federal law and state law related to the dependency exemption.

> "'The state law creates legal interests but the federal statute determines when and how they shall be taxed.' *United States v. Mitchell*, 403 U.S. 190, 197, 91 S.Ct. 1763, 29 L.Ed. 406 (1971) (quotation omitted). Determining who is entitled to federal income tax exemptions, deductions, and credits is entirely a matter of federal law, for these are questions of 'when and how they shall be taxed.' State courts applying state law may allocate claims and property rights in the dissolution of a marriage, including federal tax advantages, and Congress can base the grant of federal tax advantages on those state court actions. But whether the taxpayers are entitled to the claimed dependency exemptions is a question of federal law."

The Kentucky Court of Appeals relied upon Hart v. Hart, 774 S.W.2d 455 (Ky.App. 1989) for the proposition that the trial court was empowered to order Rachel to complete the forms necessary to transfer the exemptions and the resultant deductions to Peter Smyrichinsky. In Hart, the Court of Appeals substantially, if not entirely, identified the issue which faces this Court. Whatever the changes in 26 U.S.C. §152(e) as of 2009, the discussion in Hart, supra, remains applicable to allocations of exemptions for minor children.[18]

---

[17] Tab 4

[18] The court in Hart observed as follows:

"The issue before us is what effect, if any, does 26 U.S.C. § 152(e) have on the trial court's ability to allocate the income tax exemptions for dependent children of divorce. This statute entitles the custodial party to claim the exemption unless that parent signs a written waiver that he or she will not claim the children as dependents. Some states have interpreted this provision of the code to preclude state court

The issue of the allocation of the dependency exemption was further addressed in Marksberry v. Riley, 889 S.W.2d 47 (Ky. App. 1994). The Marksberry Court found "the law is well settled following [its] decision in *Hart v. Hart*... that a trial court has the authority to allocate the tax exemption between the parties." Id., at 48. The Court is to maximize the benefit of the exemption and has a broad discretion in doing this. Id. As noted in Hart, the Marksberry Court noted that if the courts were bound by 26 U.S.C., § 152(e) to always allocate the tax exemption to only the custodial parent, then "any time the custodial parent was in a low tax bracket, not working, or for any reason was not required to file an income tax return, the dependency exemption and the concomitant tax savings would be lost." *Hart, supra* at 457, n.3. Id.

A trial court's discretion to allocate tax exemptions between spouses was addressed in Pegler v. Pegler, 895 S.W.2d 580 (Ky. App. 1995). Peglar stated the law if well-settled in this jurisdiction that the trial court has the discretion to allocate the tax exemption between spouses, in spite of 26 U.S.C. §152(e) which permits the deduction to be taken by the custodial parent. Id., at 581. The Court went on to explain that a "trial court is to be guided in the exercise of its discretion by making an allocation which will

---

consideration of the exemption issue. *See Fullmer v. Fullmer*, 761 P.2d 942 (Utah App. 1988), and *Stickradt v. Stickradt*, 156 Mich. App. 141, 401 N.W.2d 256 (Mich. App. 1987). However, other jurisdictions have decided that state court allocation of the exemption is proper in that the custodial parent may be required to execute the necessary waiver. See *Fudenberg v. Molstad*, 390 N.W.2d 19 (Minn. App. 1986); *Lincoln v. Lincoln*, 155 Ariz. 272, 746 P.2d 13 (1987); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. 1988). We find the reasoning in the latter cases to be more persuasive.

Clearly, in making the changes to § 152(e), Congress was attempting to extricate the IRS from the costly and time-consuming business of fact finding necessary under the former version of the statute. *Pergolski v. Pergolski*, 143 Wis. 2d 166, 420 N.W.2d 414 (1988). Congress, however, did not, expressly or by implication, prohibit state courts from allocating the exemption and did not, we believe, intend to tread into an area traditionally left to the states courts to adjudicate. The allocation of the exemption has, or at least should have, a bearing on the amount of money available as child support. A trial court should allocate the exemption so as to maximize the amount available for the care of the children. This power in no way conflicts with the intent of our U.S. Congress to avoid IRS involvement in the issue of which parent should be able to claim the exemptions. *Fudenberg v. Molstad, supra*, at 21." Id., at 457.

best maximize the benefit of the exemption and the amount available for the care of the children." Id. *See also,* Brausch v. Brausch, 265 S.W.3d 837 (Ky. App. 2008). Clearly, all of these decisions have been by the Court of Appeals.[19] This Court has not yet definitively addressed the issue.

A considerable majority of State Courts which have considered the matter allow trial courts to allocate the exemption, and to use its equitable powers to enforce the exemption.[20] The propriety of state trial courts, using their equitable jurisdiction, to allocate dependency exemptions recognize the principles of 26 U.S.C. §152. A minority of states deny trial courts the equitable power to allocate the exemption.[21]

The Court of Appeals properly relied upon provisions in Hart to affirm the order of the trial court. The cases cited by Rachel do nothing to alter the discussion in Hart, and its progeny. It should also be noted that the cases cited by Rachel predate the changes in 26 U.S.C. §152(e).

---

[19] Recent unpublished opinions of the Kentucky Court of Appeals, not cited here as authority, still, have continued to recognize the propriety of the tenet that trial courts have a broad discretion in allocating the 26 U.S.C. § 152 dependency exemption. *Merrick v. Merrick*, 2012 Ky. App. Unpub. LEXIS 578, (August 20, 2012, Rendered); *Spence v. Spence*, 2013 Ky. App. Unpub. LEXIS 83, (February 1, 2013, Rendered); *Franklin v. Franklin*, 2011 Ky. App. Unpub. LEXIS 226, (March 18, 2011, Rendered). *Surratt v. Surratt*, 2011 Ky. App. Unpub. LEXIS 684, (September 23, 2011, Rendered).

[20] *See* Geddies v. Geddies, 43 So. 3d 888 (Fla. 1st DCA 2010); Miller v. Miller, 744 A.2d 778 (Pa. Super 1999); Babka v. Babka, 234 Neb. 674, 452 N.W. 2d 286 (1990); El-Hajji v. El-Hajji, 67 So.3d 256 (Fla. App. 2d 2010); Cross v. Cross, 178 W.Va. 563, 363 S.E.2d 449 (1987); Ritchy v. Ritchy, 556 N.E.2d 1376 (Ind. App. 1990); Singer v. Dickinson, 63 Oh. St. 3d 408, 588 N.E.2d 806 (1992); Monterey County v. Cornejo, 53 Cal.3d 1271, 812 Pac. 2d 586 (Cal. 1991); Hudson v. Hudson, 530 S.E.2d 400 (S.C. App. 2000); Rohr v. Rohr, 118 Id. 689, 800 Pac. 2d 85 (Id. 1990); Reichert v. Hornbeck, 2010 Md. App. 282, 63 A. 3d 76 (2013); Macias v. Macias, 968 Pac. 2d 814 (N.M. App. 1998); In Re Marriage of Rogliano and Rogliano, 555 N.E. 2d 1114 (Ill. App. 5th Dis. 1990); McCarthy v. McCarthy, 760 A.2d 977 (Conn. App. 2000); Voshen v. Voshen, 801 S.W.2d 789 (Mo. App. 1991); Gambill v. Gambill, 562 So. 2d 1343 (Ala. App. 1990); Pritchard v. Floyd, 867 So.2d 83 (La. App. 2004); Phalla Iv v. Samath Hang, 83 Mass. App. 598, 988 N.E. 2d 1 (Mass. App. 2013).

[21] *See Frazier v. Frazier*, 280 Ga. 687, 631 S.E.2d 666 (Ga. 2006); *Durden v. McClure*, 281 S.W.3d 137 (Tex. App. 2008)]; *Fullmer v. Fullmer*, 761 P.2d 942 (Utah App. 1988), *Stickradt v. Stickradt*, 156 Mich. App. 141, 401 N.W.2d 256 (Mich. App. 1987).

The Trial Court allocated the dependency exemptions and ordered each of the parties to sign any and all necessary IRS forms so as to allow the other to claim said exemptions for the two children. This order was properly upheld by the Court of Appeals. Enforcement of these orders remains an open issue.

IV.

THE TRIAL COURT, AFFIRMED BY THE COURT OF APPEALS, PROPERLY CONSIDERED THE BEST INTERESTS OF THE CHILDREN IN AWARDING CHILD SUPPORT AND ALLOCATING TAX DEDUCTION.

Rachel makes a vague argument, unsupported by any authority or evidence that family courts are courts of equity; that "through an abuse of Judicial Discretion, Rachel has consistently seen an unbalancing of the equities in her case with Tod…" (Appellant Brief page 10). She goes on to complain that because of the Trial Court's past decisions, which were never appealed by her and are not at issue here, that she has experienced significant monetary loss. The proposition is utterly unsupported by any proof in the record. This is the same unsubstantiated argument Rachel made to the Court of Appeals.

To the contrary, the Trial Court has maximized child support for the benefit of the children. As the Trial Court noted in its Order of January 9, 2013, child support payable under the Order of the Indiana court of $230.00 per month ($53.00 per week) was increased to as much as $1,791.00 per month in September, 2011; to $1,100.00 in April, 2012; as of August, 2012, $875.00 per month, since the oldest son, Logan, had reached the age of majority; as of December, 2013, $766.00 per month. Each award and change in the child support was undertaken within the context of the Kentucky Child Support Guidelines. The Court of Appeals properly noted that the Trial Court had acted consistent with the Uniform Interstate Family Support Act (UIFSA). KRS 407.5101, et

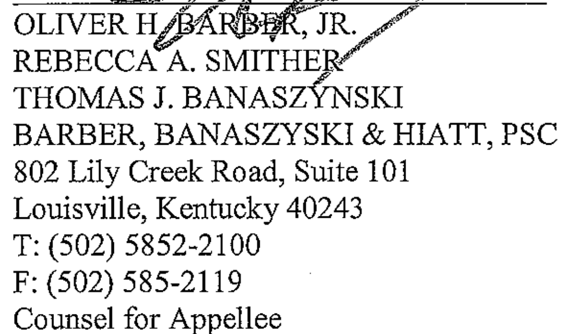
seq. This argument of Rachel is not credible, unreliable and unsupported by any evidence.

The Trial Court properly considered the best interest of the children in awarding child support and allocating the tax deductions. The order of the Trial Court was properly upheld by the Court of Appeals.

CONCLUSION

The Opinion of the Kentucky Court of Appeals, affirming the Oldham County Family Court Order of January 9, 2013, is fully supported by the facts and the law applicable to this case and should be UPHELD in its entirety.

Respectfully submitted,



OLIVER H. BARBER, JR.
REBECCA A. SMITHER
THOMAS J. BANASZYNSKI
BARBER, BANASZYSKI & HIATT, PSC
802 Lily Creek Road, Suite 101
Louisville, Kentucky 40243
T: (502) 5852-2100
F: (502) 585-2119
Counsel for Appellee

r smither\custody\smyrichinsky\supreme court\supreme court appellee brief (may 2014).docx

APPENDIX

Tab 1: Harrison County Circuit Court of Indiana Order dated 03/08/2011

Tab 2: IC 31-16-6-6

Tab 3: Knochelmann, Jr., v. Commissioner of Internal Revenue, 455 Fed. Appx. 536, 541 (6th Cir. 2011)

Tab 4: Armstrong v. Commissioner, 745 F.3d 890 2014 U.S. App. LEXIS 4693, 2014-1 U.S. Tax Cas. (CCH) P50, 211; 113 A.F.T.R.2d (RIA) 1301 (8th Cir. 2014)