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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001639-ME

MADELAINE PRZESTWOR — APPELLANT

v.

APPEAL FROM KENTON CIRCUIT COURT
HONORABLE CHRISTOPHER J. MEHLING, JUDGE
ACTION NO. 12-CI-01940

BRADLEY BUCKLER — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Madelaine Przestwor appeals from orders of the Kenton Family Court regarding child support and the ability to claim a dependent minor child as a personal exemption for purposes of an income tax deduction. We find the trial court erred and reverse and remand.

Appellant and Bradley Buckler[1] are the parents of a minor child. The parties were never married. Most of the facts in this case are not in dispute. Facts will be discussed as they become relevant.

Appellant's first argument on appeal is that the trial court's calculation of her monthly income was incorrect. On July 19, 2013, the trial court awarded the parties joint custody of the minor child. The court found that Appellant's monthly income was $2,468. The court included in this calculation the ability of Appellant to earn five to six hours of overtime per week. Appellant claims this amount is incorrect because she does not work that much overtime. We agree with Appellant's argument.

"As are most other aspects of domestic relations law, the establishment, modification, and enforcement of child support are prescribed in their general contours by statute and are largely left, within the statutory parameters, to the sound discretion of the trial court. This discretion is far from unlimited." *Van Meter v. Smith*, 14 S.W.3d 569, 572 (Ky. App. 2000)(citations omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001)(citation omitted).

As of February, 2013, Appellant began working at 5/3 Bank earning $12 an hour. The court found that she earned $2,078 a month. The court then concluded that she was averaging 5 hours a week in overtime which would

[1] Bradley Buckler did not file a brief in this matter.

increase her monthly income $390, for a total of $2,468. During the child support hearing, Appellant introduced her paystubs. Appellant was paid every two weeks and these paystubs showed how many hours of overtime she worked. She submitted five paystubs for the periods of February 25, 2013, through May 5, 2013. These show that she worked the following amounts of overtime per two-week period: 0 hours, 0.8 hours, 1.85 hours, 0 hours, and 1.10 hours. During her testimony, she stated that she had just started working five to six hours of overtime per week, but that this amount was not constant and could not be counted on.

It appears as though the trial court only took into consideration her testimony when calculating the amount of overtime to include in her monthly income. The paystubs she submitted into evidence paint a drastically different overtime picture. We believe it would be unfair to impute to Appellant five to six hours of overtime per week when her paystubs showed she only worked an average of 0.375 hours per week from February to May. This calculation is an abuse of discretion. On remand, Appellant should be able to submit further paystubs to show how much overtime she has earned since the hearing. Since the court will be privy to a further year's worth of paystubs, the overtime calculation should be more accurate.

Appellant's second argument on appeal is that the trial court abused its discretion in allowing each parent to alternate years in which he or she could use the dependent minor child for tax deduction purposes. Appellant makes two arguments on this issue. First, she claims that the federal tax code only allows the

"parent with whom the child resided for the longest period of time during the taxable year" to claim the child as a dependent for tax purposes. 26 U.S.C. § 152(c)(4)(B)(i). She also claims that the trial court abused its discretion on this issue because it announced at the opening of the hearing that it was going to allow the parents to alternate years in using the child as a tax deduction and that it did not want to hear any evidence on the issue.

> The issue before us is what effect, if any, does 26 U.S.C. § 152(e)[2] 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 consideration of the exemption issue. *See Fullmer v. Fullmer,* 761 P.2d 942 (Utah App. 1988), and *Stickradt v. Stickradt,* 401 N.W.2d 256 (Mich. App. 1987). However, other jurisdictions have decided that state court allocation of the exemption is proper and 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 (App. 1987); *Fleck v. Fleck,* 427 N.W.2d 355 (N.D. 1988). We find the reasoning in the latter cases to be more persuasive.
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> 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 (App. 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.

[2] This is a previous numbering of 26 U.S.C. § 152(c)(4)(B)(i) cited to previously. The text is similar in both versions.

> 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.

Hart v. Hart, 774 S.W.2d 455, 456 - 457 (Ky. App. 1989).

As can be seen from the *Hart* citation, the issue of Kentucky courts being able to allocate the tax exemption as part of child support as been examined and permitted for more than 20 years. However, in this case, the trial court refused to take any evidence on this issue even though it "should allocate the exemption so as to maximize the amount available for the care of the children." *Id*. at 457. Without taking some evidence, the trial court abused its discretion by making an arbitrary decision; therefore, we reverse and remand on this issue.

We want to bring to the trial court's attention the case of *Adams-Smyrichinsky v. Smyrichinsky*, 2013 WL 6037306 (Ky. App. 2013)(2013-CA-000181-ME). That case has an identical argument regarding the ability to assign the child tax exemption as part of child support. That case has been granted discretionary review by the Kentucky Supreme Court, 2013-SC-000812-DE, and the oral argument will be held on August 13, 2014. The trial court may find it prudent to postpone ruling on the tax issue until after the Kentucky Supreme Court rules on the *Smyrichinsky* case.

For the foregoing reasons we reverse and remand for further proceedings.

ALL CONCUR

BRIEF FOR APPELLANT:

Michael A. O'Hara
Florence, Kentucky

NO BRIEF FOR APPELLEE.