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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____



No. 34344-8-III

COURT OF APPEALS, DIVISION III

STATE OF WASHINGTON

HEIDI RACHAEL SILVER n/k/a O'DAY, Petitioner/Appellant

v.

MATTHEW BENJAMIN SILVER, Respondent

APPEAL FROM THE SUPERIOR COURT OF SPOKANE COUNTY

HONORABLE RAYMOND F. CLARY, JUDGE

BRIEF OF APPELLANT

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A. Assignments of error

1. The Court erred in allowing Mr. Silver to claim both children's tax exemptions for 2015.
2. The Court erred in allowing a court filing in violation of RCW 42.20.040 or RCW 42.20.050 to remain on the record as a final order and by failing to ensure that the written order for the February 3, 2016 hearing included instructions requiring clerk's action to implement the Court's oral order that the improperly attached signature page on the Final Order of Child Support be stricken.
3. The Court erred in failing to respond to my request for reconsideration with any response, instead holding an un-docketed Presentment Hearing, motioned for by Mr. Gobel, seventy-one days after I requested a reconsideration in writing.
4. The Court erred in continuing to defer authoring court orders to Mr. Gobel after I advised the Court of misconduct by Mr. Gobel.
5. The Court erred in upholding the decision regarding tax exemptions without discussion of whether the decision was based on law or equity, in violation of CR 52 which requires a finding of fact and conclusion of law, and in finding that the issue of tax dependency exemption was properly opened for discussion.

6. The Court erred in holding me to higher standards than those to which it held Mr. Gobel.
7. The Court erred in failing to take corrective action against Mr. Gobel for violating RCW 26.09.175(4), which requires he provide his client's financials within 20 days of receipt of the summons, by failing to provide financial information until 101 days after it was due.
8. The Court erred in failing to recuse itself.
9. The Court erred by not honoring the American Rule when it made decisions regarding the award of attorney fees.
10. The Court erred during Revision in stating it was hearing only the issue of attorney fees when my Motion for Revision also identified improper awarding of tax dependency exemption and other issues.
11. The Court erred during Revision by offering Mr. Gobel an opportunity to conduct additional research outside of the hearing and later present additional information to supplement his position.
12. The Court erred by permitting ongoing irregularities and other misconduct in the proceedings which, collectively, violated my right to due process.

Issues Pertaining to Assignments of Error

1. Did the Court err in allowing the Mr. Silver to claim both children's tax exemptions for 2015 without discussion, without considering that there are two dependent children involved in this situation, and without considering that I pay more than half of the living expenses for both children who both reside with me? What was the legislative intent of RCW 26.19.100, regarding awarding of taxes in Child Support situations? (Assignment of Error 1.)
2. Did the Court err when it failed to provide findings of fact in its oral decision or in its written order that clarified the reason for granting A.R.S.'s tax exemptions for 2015 to Mr. Silver, when Mr. Silver has already been awarded all tax exemptions for C.M.S.? (Assignment of Error 2.)
3. Did the Court err in allowing a court filing in violation of RCW 42.20.040 or RCW 42.20.050 to remain on the record as a final order when I brought this error to the attention of the Court in a written filing? (Assignment of Error 2.)
4. Did the Court err in continuing to treat a court filing in violation of RCW 42.20.040 or RCW 42.20.050 as a final order after the Court acknowledged knowing that I had not, in fact, signed the final order

and was in disagreement with the content of that order during the February 3, 2016 hearing? (Assignment of Error 2.)

5. Did the Court err in filing a document that causes me to be a party to an agreed child support modification to which I did not agree?

(Assignment of Error 2).

6. Did the Court err by leaving the improperly attached signature page attached to the final order? (Assignment of Error 2.)

7. Did the Court err in continuing to defer authoring of court orders to Mr. Gobel after being put on notice of allegations of misconduct by Mr. Gobel, after determining that Mr. Gobel had drafted orders that did not comply with the laws governing the requirements for Post Secondary Education Support compliance by the dependent child, and when Mr. Gobel engaged in hostile behavior? (Assignment of Error 4.)

8. Did the Court err in failing to respond to my request for reconsideration with written response? (Assignment of Error 3.)

9. Did the Court err in holding an un-docketed Presentment Hearing, motioned for by Mr. Gobel, seventy-one days after I requested a reconsideration with written response, when it had failed to respond to my request for reconsideration? (Assignment of Error 3.)

10. Did the Court err in failing to ensure the February 3, 2016 written order included instructions for clerk's action to implement the Court's

oral order that the improperly attached signature page on the Final Order of Child Support be stricken? (Assignment of Error 2.)

11. Did the Court err in upholding the initial decision regarding the tax dependency exemption without providing any explanation of whether the decision was based on law or equity, and without Mr. Gobel presenting an argument based on law or equity for Mr. Silver being granted the tax award, and in finding that the discussion of children's tax exemptions was presented in a manner that properly opened the matter for discussion and decision in the Court, when Mr. Gobel made an oral motion for tax dependency exemption at the end of the October 26, 2015 hearing, and did not ever make a proper written motion for such tax awards? (Assignment of Error 5.)

12. Did the Court err in holding me to higher standards than those to which it held Mr. Gobel by refusing to allow me to orally motion regarding misconduct by Mr. Gobel yet allowing Mr. Gobel to orally motion for taxes during the same hearing? (Assignment of Error 6.)

13. Did the Court err in allowing Mr. Gobel to violate RCW RCW 26.09.175(4) which requires he provide his client's financials within 20 days of receipt of the summons, by failing to take any corrective action against Mr. Gobel for failing to provide financial information to me and the Court until 121 days after they were due, interfering with

my ability to engage in meaningful discovery requests, though I had brought this to the Court's attention multiple times? (Assignment of Error 7.)

14. Did the Court err in failing to consider and take action on my Motion for Change of Judge which identified reasons that I believed the Commissioner had a bias against me? (Assignment of Error 8.)

15. Did the Court err during Revision in denying it was hearing any issues except for the granting of attorney fees when said Motion for Revision identified granting of attorney fees, improper awarding of tax dependency exemption, and other complains of misconduct as the subjects for revision? (Assignment of Error 10.)

16. Did the Court err during Revision by offering Mr. Gobel an opportunity to conduct additional research outside of the hearing and later present additional information to supplement his position regarding the award of attorney fees? (Assignment of Error 11.)

17. Did the Court err by not honoring the American Rule, which is specifically in place to prevent the Court or legal counsel from having a chilling effect on pro se litigants that causes them to be unwilling to protect their rights in the court system? (Assignment of Error 9.)

18. Did the Court err by permitting ongoing irregularities in the proceedings which, collectively, resulted in a violation of my right to due process? (Assignment of Error 12.)
19. Did the Court err in not liberally construing my allegations of an abuse of process and by disallowing me to fully present information about misconduct by Mr. Gobel during the October 26, 2015 hearing? (Assignment of Error 12.)
20. Did the Court err via its Family Law Administrator in advising me that I did not have a right to a response to my request for reconsideration, after I notified the Family Law Administrator that lack of a response to the reconsideration would interfere with my right to request a Revision? (Assignment of Error 12.)
21. Did the Court err via its Family Law Administrator in advising me that I would not be given any information about ex parte communication between the Commissioner and the Mr. Gobel and was required to file a public disclosure request to obtain such communication? (Assignment of Error 12.)
22. Did the Court err by failing to take any corrective action for ongoing misconduct? (Assignment of Error 12.)
23. Did the Court err by failing to take any corrective action for Mr. Gobel requesting I pay him \$500 in each filing he made after the

October 26, 2015 hearing, though each of my subsequent filings were an attempt to protect my rights? (Assignment of Error 12.)

B. Statement of the Case

Due to the numerous facts of the case, many specific facts with citations are included in the arguments. This statement is more general in nature to avoid an overwhelming duplication of such facts and cites. I know, based on numerous other briefs that I have reviewed, that this brief is less artfully pleaded than many others. However, I read the book recommended by the Court (“Briefing and Arguing Federal Appeals”), I read the rules of the Appeals Court, I spent many hours doing research at the law libraries, and I spent over 80 hours working on this brief. It may not compare in quality to what attorneys have drafted, though I have done my very best. I sincerely thank the Court for its consideration.

This situation stems from the dissolved marriage between me and Mr. Silver. On November 8, 2002, the Superior Court entered an Order of Child Support for the children, herein referred to as A.R.S. and C.M.S., granting federal income tax dependency exemptions (tax exemptions) for A.R.S. to me, and for C.M.S. to Mr. Silver. CP 6. A subsequent modification on July 31, 2014, awarded tax exemptions as follows: both to Mr. Silver for 2014; for 2015 and on I was to claim A.R.S. and Mr. Silver was to claim C.M.S. CP 19.

On June 3, 2015, I sought Post Secondary Education Support (PSES) for A.R.S.. CP 26-31. I did not request the action involve awarding the tax exemptions. Mr. Silver's Attorney Terry Gobel, filed a response to the action on September 10, 2015, which did not include any financial information and did not motion for tax exemptions.

On July 21, 2015, on September 9, 2015, and September 18, 2015, I put Mr. Gobel on notice that the financials were overdue. I notified the court also on September 9 and 18.

During a September 10, 2015, hearing in front of Commissioner Koyama, Mr. Gobel attempted to have the Court order me to comply with discovery he had given my right before the hearing, and threatened revision when the Court denied his motion and removed the language about discovery from his handwritten order. CP 110, CP 119, CP 39.

On multiple occasions, Mr. Gobel has attempted to obtain A.R.S.'s user name and password for her online school account, though he has been made aware that Eastern Washington University (EWU) neither provides for nor permits such third-party access to student accounts.

Mr. Gobel ultimately provided Mr. Silver's financials on October 16, 2015, "over 4 months after my initial filing, 10 days prior to the scheduled final hearing, and [on] my birthday." CP 52.

On October 26, 2015, there was a hearing for Post Secondary Education Support (PSES) modification in front of Pro Tem Commissioner Wendy Colton, who had appeared last minute as a substitute. During the hearing, the Court would not permit me to present a motion for order of sanctions for abuse of process, did not respond to my complaints about the misconduct, allowed Mr. Gobel to speak for most of the hearing, took no action when Mr. Gobel would not permit me to object to an untrue statement, and allowed Mr. Gobel to request the tax awards for Mr. Silver at the very end of the hearing without argument or prior motion.

Attached as an exhibit in the Appendix is A.R.S.'s statement about Mr. Gobel serving her directly with a packet of paperwork when she was only 17, which contained a declaration from Mr. Silver with statements about her. AP

On October 30, 2015, I filed a Notice and Objection about the tax awards based on the way the matter was handled, the facts surrounding the award, and the impact it would have on my family. In return, Mr. Gobel filed a motion requesting my Notice and Objection be stricken and that he be awarded \$500 in sanctions, calling it "frivolous and baseless."

On November 24, 2015, I discovered that an Order for Child Support for the 10/26/15 hearing, drafted by Mr. Gobel, had been filed

with my signature page attached, though I had never signed his order. I filed a Motion for Reconsideration about three issues (taxes, attendance records, increase in time for compliance) along with a notification to the Court about the erroneously attached signature page and noted that it required correction or would result in a criminal act, per RCW 42.20.040 and RCW 42.20.050. I did not get a response to my reconsideration.

On January 22, 2016, Mr. Gobel filed a Notice of Presentment for his Order Denying Motions to Strike and for Reconsideration of Post-Secondary Ed Support, in which he sought to have the Court deny of all of my pending motions; strike of My pleadings; award him \$500 attorney fees; and require pre-screening of all future pleadings I would file.

On January 29, 2016, I filed a Motion for Change of Judge, citing numerous concerns I had about the Commissioner being able to be impartial after I brought to her attention a number of issues in the court room, including that I believed that my request “for a correction of an error on the record that creates fraud will have created a level of discomfort that would result in an unfair hearing.” CP 97-98.

On February 3, 2016, there was a presentment hearing in front of Pro Tem Commissioner Wendy Colton, which was not on the Court’s docket. A-6. This improperly attached signature page was discussed, and the Court determined she knew how it had happened, and instructed that

the order would include language correcting that. The tax awards were discussed, with the Court determining that, despite facts presented about circumstances and lack of a proper motion, and despite initially stating during this hearing that the 7/31/2014 order should stand, the award of the 2015 tax benefit for A.R.S. would still go to Mr. Silver. Ultimately, neither the Court nor Mr. Gobel described a legal reason or an equitable reason for continuing to grant Mr. Silver the tax exemption. The Court indicated that she was not changing the decision because she wanted to protect A.R.S.'s right to claim herself in 2016, and made this decision in the absence of information about A.R.S.'s 2015 earnings. Furthermore, the Court imposed \$500 in attorney fees on me because she believed I had made allegations that were without merit, and Mr. Silver had to reply to additional motions. In response to attorney fees, I cited the American Rule, but Mr. Gobel then argued equity and the Court upheld the decision. The order Mr. Gobel scribed for the hearing did not include language triggering action by the Clerk to remove the improperly attached signature page on the November 18, 2015 Final Order, so the signature page remained.

On February 12, 2016, I filed a motion for revision and requested: revision of the award of \$500 attorney fees; acknowledgement that neither the law nor equity permitted imposition of attorney fees on my based on

the circumstances of the case; and revision of the award of tax dependency exemption for A.R.S. for 2015 to Mr. Silver. I also identified other major issues during the process such as financials served extremely late, improperly attached signature page, and other misconduct.

I obtained transcripts of the hearings on September 10, 2015; October 26, 2015; and February 3, 2016, which I provided to the Court for the revision hearing. I did not understand that the transcripts were also to be served on the Clerk, and the judge's judicial assistant indicated prior to the revision hearing that the transcripts would be filed, yet only filed the transcript for the hearing on September 10, 2015, in front of Commissioner Koyama. CP 109-121.

On March 3, 2016, during a Revision hearing in front of Judge Raymond Clary, the Court indicated that the award of \$500 attorney fees was the only issue before it, took no action about the improperly attached signature page, and did not address any of the other issues I raised in my filing, though ultimately the Court determined that the entire case file had been in front of the Commissioner during the 2/3/16 hearing, and the Court still did not consider the issues I brought up. The Court asked Mr. Gobel if he had case law that supported his position about the attorney fees and offered Mr. Gobel the opportunity to do research outside the courtroom and provide it to the Court. Ultimately, the Court decided that it

would “affirm the commissioner and her rationale for the parts of the motion for reconsideration that she denied, and that portion that she granted.” RP2 34:21-24. The Court revised the order for “attorney fees on the basis absence of ability to pay.” RP2 35:22-23.

D. Argument

The Court erred in allowing the Mr. Silver to claim both children’s tax awards for 2015 without discussion, without considering that there are two dependent children involved in this situation, and without considering that I pay more than half of the living expenses for both children who both reside with me. In the 2002 and 2014 orders, I was awarded tax exemptions for A.R.S. (excluding the year 2014 only). CP6, CP19. My Summons and Petition for Modification for Post Secondary Education Support (PSES) did not request awarding of tax exemptions. CP 31. Mr. Gobel’s response did not motion for tax exemptions. CP 32-33. During the October 26, 2015 hearing, the Court affirmed I pay for A.R.S.’s room and board and am “taking on more of the burden” of supporting A.R.S. RP 31:20-22. At the very end of the hearing, Mr. Gobel asked the Court to award one of the two years of tax dependency credits for A.R.S. to Mr. Silver. CP 34:21-35:2. The Court agreed without talking to me about the matter. CP 35:3-5. The Court was in error by permitting a last-minute oral

motion and granting it without discussion or consideration of all relevant circumstances. Pro Tem Commissioner Colton was not originally assigned to the case and did not have the opportunity to review and be familiar with the entire file in order to understand the dynamics and all the facts of the case. RP 3. I observed the Commissioner to enter the courthouse approximately 30 minutes prior to the hearing and tell another person that she had been called in; this certainly does not leave enough time to fully review my case, along with other cases she would hear that morning. Furthermore, RCW 26.19.100 states, “The court may divide the exemptions between the parties, alternate the exemptions between the parties, or both.” It does not state the Court can give all of the tax awards to one party. Per Scott J. Horenstein’s Washington Practice Series, “Income tax exemptions for dependent children are considered elements of child support....” This indicates that making changes to the tax awards would necessitate making changes to the child support transfer payment, which was not done. Additionally, in a Washington State Bar News article about allocation of tax exemptions, Daniel M. Warner comments that, “[the] purpose and benefit of shifting the exemption is to maximize tax savings and apply the savings to higher child-support award.” That did not happen in this case.

The legislative intent of RCW 26.19, found in RCW 26.19.001, states, “The legislature also intends that the child support obligation should be equitably apportioned between the parents.” It further states that using a statewide schedule would benefit parents and children by:” (2) Increasing the equity of child support orders by providing for comparable orders in cases with similar circumstances; and (3) Reducing the adversarial nature of the proceedings by increasing voluntary settlements as a result of the greater predictability achieved by a uniform statewide child support schedule.” The legislature intended that the obligation would be equitable and equally proportioned, and that the fairness of child support orders should be comparable in most cases. As indicated in section 3, the legislature wanted the process to be less adversarial and more predictable. This proceeding was none of the above, and I believe that this may be a loophole which is being used by attorneys to achieve a win by increasing adversarial interactions and decreasing predictability in the process. More clarity is needed regarding the award of tax exemptions to ensure uniform rulings.

The Court erred when it failed to provide findings of fact in its oral decision or in its written order that clarified the reason for granting Mr. Silver A.R.S.’s tax exemptions for 2015, when Mr. Silver has already been awarded all tax exemptions for C.M.S.. The oral ruling from the October

26, 2015 hearing does not include any legal conclusions or explanations based on equity for the tax award. CP 34:21-CP35-5.

The Court erred in allowing a court filing in violation of RCW 42.20.040 or RCW 42.20.050 to remain on the record as a final order when I brought this error to the attention of the Court in a written filing. On November 18, 2015, Commissioner Colton caused to be filed in the Court an Order for Support (CP 63) with a signature page for my own proposed order, and not a signature page for Mr. Gobel's order. CP 72; CP 83-91. On November 24, 2015, I notified the Court in my Motion for Reconsideration that the Order for Support of November 18, 2015, contained an erroneously attached signature page; that I had not signed Mr. Gobel's proposed orders; that it appeared that someone had attached my signature page from my proposed orders to Mr. Gobel's proposed orders; and that it required correction or would result in a criminal act, per RCW 42.20.040 and RCW 42.20.050. CP 73-74. No correction was made.

The Court erred in continuing to treat a court filing in violation of RCW 42.20.040 or RCW 42.20.050 as a final order after the Court acknowledged knowing that I had not, in fact, signed the final order and was in disagreement with the content of that order during the February 3, 2016 hearing. I notified the Court that the 11/18/15 Order for Support contained an erroneously attached signature page attached to Mr. Gobel's

proposed orders from my proposed orders, and that it required correction or would result in a criminal act, per RCW 42.20.040 and RCW 42.20.050. CP 73-74. During the 2/3/16 hearing, the Court stated that I had made “some pretty serious allegations of fraud and that a criminal act [had] occurred”. RP44. I stated I hoped it was a mistake and had not intended to accuse the Court of fraud. RP 44. I stated that I had provided the proposed orders with changes I requested and signed my order, which was a proposed alternative order and I stated that I had not signed Mr. Gobel’s order at any time and had quite clearly made both him and Ms. Peterson aware that I did not agree with it. RP 45. I explained that upon receipt of the final order with my signature page attached, I felt I needed to act quickly to have an error corrected, and that I did not specifically accuse her of fraud. RP 45. Mr. Gobel affirmed that he did not attach the signature page and did not know how that happened. RP 46. The Court indicated she understood what had happened with the signature page. RP 47: 10-11. This gives the appearance that the Court or the Court Administrator improperly attached my signature page to Mr. Gobel’s order. Next, the Court acknowledged that she was aware that I disagreed with the final order and had not signed off on it, and instructed that the order for this hearing was to indicate that my signature page “should not have been attached specifically to the order of child support.” RP 60:1-6.

The Court then indicated that I had made allegations that were without merit, “specifically, the allegation that there is a criminal act that occurred.” RP 60:11-14. My written document indicated that if it were not corrected, it would be a criminal act; I did not say that a criminal act had occurred, so this statement by the Court was incorrect. CP 73-74. The Court stated that she thought I had stricken that in argument. RP 60:14-15. I did not strike that in argument, so this statement was also incorrect. The order Mr. Gobel scribed for the hearing did not include language triggering action by the Clerk to remove the improperly attached signature page on the November 18, 2015 Final Order; I signed “without prejudice” because I disagreed with the outcome and the order. CP 101. Yet, the Court signed off on this order without adding any language regarding my signature page. CP 101.

The Court erred in filing a document that causes me to be a party to an agreed child support modification to which I did not agree. My signature page, improperly attached to the order (CP 73-74.), makes me a party to the agreement, yet I clearly did not agree to it (RP 60:1-6.).

The Court erred by leaving the improperly attached signature page attached to the final order. The order Mr. Gobel scribed for the hearing did not include language triggering action by the Clerk to remove the improperly attached signature page on the November 18, 2015 Final

Order; I signed “without prejudice” because I disagreed with the outcome and the order. CP 101. Though on 2/3/16 the Court had ordered Mr. Gobel to include language striking the signature page (RP 60:1-6), the Court signed off on this order without language striking my signature page. CP 101. During Revision, the Court also acknowledged that I “...advocate[d] Judge Colton... acknowledged that she may have improperly attached [my] signature to an order”. RP2 13:15-17. Yet the Court again took no action to correct this error, and it remains on the record today.

The Court erred in continuing to defer authoring of court orders to Mr. Gobel after I put the Court on notice of allegations of misconduct by Mr. Gobel, and after the Court determined during the February 3, 2016 hearing that Mr. Gobel had drafted orders that did not comply with the laws governing the requirements for Post Secondary Education Support compliance by the dependent child, and when Mr. Gobel engaged in hostile behavior. Mr. Gobel scribed the orders for all four of the hearings held, and three of those orders have had clear problems such as attempt to order discovery that the Court did not order (CP 39), improperly requiring attendance records (RP 51:14-17), and failure to include language striking the signature page (CP 101). Much of the record demonstrates Mr. Gobel engaged in hostile behavior toward me, with instances too numerous to cite.

The Court erred in failing to respond to my request for reconsideration with written response. On January 22, 2016, Mr. Gobel filed a Notice of Presentment for his Order Denying Motions to Strike and for Reconsideration of Post-Secondary Ed Support, seeking to have the Court deny of all of my pending motions and strike my pleadings; seeking \$500 attorney fees; and seeking pre-screening of all my future filings. CP 92-96. This was fifty-nine (59) days after I had requested reconsideration without receiving a response from the Court. It is a violation of due process rights for the Court to ignore my reconsideration request; not responding interferes with my right to request revision which must be done within ten days of a final order. In the least, the Court could have replied in writing that it was denied, and I could have moved forward with my revision in a reasonable time. The Spokane County Family Law Procedural Guidelines indicated that reconsideration requests will be answered in writing, and there will not be any oral testimony unless the Commissioner requests it.

The Court erred in holding an un-docketed Presentment Hearing, motioned for by Mr. Gobel, seventy-one (71) days after I requested a reconsideration with written response, when it had failed to respond to my request for reconsideration. On January 22, 2016, Mr. Gobel filed a Notice of Presentment for February 3, 2016, for his Order Denying Motions to

Strike and for Reconsideration of Post-Secondary Ed Support, in which Mr. Gobel sought to have the Court deny of all of my pending motions; strike all of my pleadings; award \$500 attorney fees; and require pre-screening of all future pleadings I would file. CP 92-96. On February 3, 2016, there was a presentment hearing in front of Pro Tem Commissioner Wendy Colton. RP 36-69. During the hearing, the Court stated, "This is the time and place set to address a number of issues that have come up in this Court file." RP 38. Later, the Court expressed appreciation for both of us coming to court and stated she believed these matters needed to be dealt with in person rather than in writing. RP 59:15-17. Such a statement gives the appearance that ex parte communication happened between the Court and Mr. Gobel. If the Court wanted the hearing, why did Mr. Gobel request a Presentment hearing instead of the Court requesting a hearing, or else notify me of ex parte communication requesting that Mr. Gobel set a presentment hearing? This hearing was not on the court docket. A-6. I believe it is improper to not respond to my reconsideration, and then hold an un-docketed hearing for the issues Mr. Gobel presented when I had asked for a reconsideration prior to this. This situation gives the appearance that the Court and Mr. Gobel planned this and attempted to interfere with my right to due process, and does not reflect that the Court, of its own decision, required oral testimony. I was forced into a hearing I

did not want to attend, where Mr. Gobel made oral testimony not officially requested by the Court, and then had attorney fees improperly imposed on me. Accordingly, this hearing was procedurally incorrect, per the Family Law Procedures, and is the equivalent of false arrest. After considerable research regarding the propriety of undocketed hearings, I was only able to find one useful reference. In *Ellis v. United States*, the note at the top of the opinion states, "...which undocketed order does not constitute an order or judgment of this Court and shall have no effect... on any subsequent proceedings." A-2.

The Court erred in failing to ensure that the written order for the February 3, 2016 hearing included instructions requiring clerk's action to implement the Court's oral order that the improperly attached signature page on the Final Order of Child Support be stricken. The order Mr. Gobel scribed for the hearing did not include language triggering action by the Clerk to remove the improperly attached signature page on the November 18, 2015 Final Order; Commissioner Colton signed off on the order. CP 101. Both were clearly aware that it was an improperly attached page that the Court ordered stricken. RP 60:1-6. Clearly both were disinterested in correcting the error on the records, since neither took the necessary action to correct it.

The Court erred During the February 3, 2016 in upholding the initial decision regarding the tax dependency exemption without providing any explanation of whether the decision was based on law or equity, and without Mr. Gobel presenting an argument based on law or equity for Mr. Silver being granted the tax award and erred in finding that the discussion of children's tax exemptions was presented in a manner that properly opened the matter for discussion and decision in the Court, when Mr. Gobel made an oral motion for tax dependency exemption at the end of the October 26, 2015 hearing, and did not ever make a proper written motion for such tax awards. On October 30, 2015, I filed a Notice and Objection stating that during the 10/26/15 hearing I was not given an "opportunity to address the awarding of the 2015 tax credit for" A.R.S. to Mr. Silver; stated that I had been granted the tax credits for A.R.S. 2015 and forward; stated that changing the tax awards so late in the year created a financial burden for me; and advised the Court that such a ruling meant Mr. Silver would "have 7 of 8 opportunities to claim the kids on his taxes" based on this decision. CP 55-56. During the 2/3/16 hearing, I advised the court of relevant facts: Mr. Silver and I have 2 children in common, and both have always lived with me (RP 48); the Court affirmed that I pay over half of A.R.S.' support even if the PSES support payment came to me (which it did not) (RP 49). The Court noted my original petition did not

request adjustment of tax awards. RP 51:19-22. Mr. Gobel then falsely stated that we had argued the taxes and therefore it was tried by consent. RP 52:2-4. The record very clearly shows that it was not argued. RP 34:21-35:5. Mr. Gobel then stated that I want some things from the July 2014 order changed and other things left the same, which is inconsistent (RP 52:8-10) but the Court had the option to change what it wanted because “[t]he modification was clearly before the Court” (RP 52:20-21). I notified the Court that Mr. Gobel had never motioned properly for the tax award, which “was sprung at the end of the hearing”, and I had not agreed to nor was prepared to discuss it. RP 56:17-22. Neither the Court nor Mr. Gobel was able to identify a motion for tax awards. RP 57:11-58:6. In response, the Court stated, “I know that you argued [the taxes] and I recall the reason why I did what I did...” RP 57:23-24. Again, we never argued the taxes; Mr. Gobel asked for it and the Court granted it with no further discussion. Furthermore, there is no explanation in this hearing of why the Court “did what it did”. RP 57-58. Next, the Court stated that the October 30, 2015, Notice and Objection I filed was not brought to her “attention until later on.” RP 59:3-4. This is clearly problematic, because at the end of the 10/26/15 hearing, the Court instructed me to note my objections. RP 35:14-19. The Court stated that “the tax exemption was argued on October 26, 2016 (sic).” RP 61:16-17. Again, this is not true, as noted above. Later

the Court stated, “I will indicate that the order from Commissioner Anderson should remain the same in that effect.” RP 62:4-5. This appears to be the only logical statement the Court or Mr. Gobel made about the matter of taxes. Then, the Court determined, after I could not provide information about A.R.S.’s wages earned for 2015, that A.R.S. would be filing her own taxes for 2015, clearly an assumption because she had no information needed to determine that A.R.S. earned enough to file. RP 62:17-21. The Court next stated that the order required A.R.S. to notify the parents in writing before January 1 if she intended to file her own taxes, and determined that had not happened. RP 63:1-6. The Court then stated, “Based on that, I’m going to leave the language the same because I do think that it would be beneficial for [A.R.S.] if she can claim herself in the 2016 year.” RP 63:21-24. This was unclear to me and led me to believe she meant she would leave Anderson’s language the same, since she had just prior said that Anderson’s order would stand. This is problematic in that the deadline for A.R.S. to notify parents had passed, yet without a final order, no one knew what actions should be taken. This essentially interfered with A.R.S.’s rights by imposing a deadline that had already passed, but was not a final order at the time it passed. During this Presentment hearing, Mr. Gobel was not asked for, and did not offer, any argument about why Mr. Silver should get the 2015 tax award for A.R.S.

RP 57-58. How can I make an argument in an appeal when no actual reason was given for the way the tax award was granted and there were no arguments for it? I believe it was purposeful to not provide a reason, in order to minimize any future litigation about this matter. And how is it proper to redistribute property which was already distributed in a prior hearing, without an explanation for the reason? Tax awards should not be handed out as a boon to represented parties, particularly in a case where the child in question will not benefit in any way from giving that parent the tax award. Mr. Silver and A.R.S. do not ever see each other, and she gains nothing from him claiming her on his taxes, yet she lives with me, and as a result, experiences the same financial hardship as I do by me losing the tax exemption. Furthermore, the Commissioner did not need to create a protection for A.R.S. to be able to claim herself on her taxes; per the IRS tax code, if A.R.S. does not qualify as my dependent, I simply cannot claim her and she has full right to claim herself. Furthermore, it is offensive that the Court would assume it needs to ensure that I do not interfere with A.R.S.'s rights to her own taxes; there is no evidence anywhere to indicate that I have not done everything in my power to provide properly for my children. If the Court believed this, the Court was seriously swayed by Mr. Gobel's false statements, to which the Court allowed me neither to object (RP 15-23:25) nor to address (RP 25:17-22).

Finally, I believe it is improper that the Court made a decision based on her assumption about missing evidence (A.R.S.'s earnings for 2015), when neither the Court nor Mr. Gobel requested that information prior to the hearing.

The Court erred in holding me to higher standards than those to which it held Mr. Gobel by refusing to allow me to orally motion regarding misconduct by Mr. Gobel yet allowing Mr. Gobel to orally motion for tax awards during the same hearing. During the hearing, the Court would not permit me to present a motion for order of sanctions for abuse of process, stating that it wasn't motioned ahead of the hearing, and said that I would have to serve him 12 days ahead of time if I want to make a motion, and that the matter should not be considered that day because it wasn't timely. RP 4. If it were true that things must be filed 12 days before the hearing, then Mr. Gobel should have served and filed the financials and declaration on October 14, 2015, instead of on October 16, 2015. At the very end of the 10/26/15 hearing, Mr. Gobel orally motioned for the Court to award one of the two years of tax dependency credits for A.R.S. to Mr. Silver. CP 34:21-35:2. The Court agreed. CP 35:3-5. The Court was in error by permitting a last-minute oral motion by Mr. Gobel yet refusing to broadly construe and consider my motion for sanctions.

The Court erred in allowing Mr. Gobel to violate RCW 26.09.175(4) which requires he provide his client's financials within 20 days of receipt of the summons, by failing to take any corrective action against Mr. Gobel for failing to provide financial information to me and the Court until 121 days after they were due, interfering with my ability to engage in meaningful discovery requests, though I had brought this to the Court's attention multiple times. On September 9, 2015, I put Mr. Gobel on notice that 84 days after receipt of the summons, he still had not provided Mr. Silver's financial information, and that on July 21, 2015, I had advised "that until the matter was resolved, it should be treated as if it would move forward and be hard (sic) in court. **That was 50 days ago.**" CP 37. On September 10, 2015, prior to the ex parte hearing, I served and filed a response to Mr. Gobel's Objection, putting the Court on notice about the lack of response and financials. CP 34. On September 18, 2015, I put the Court and Mr. Gobel on notice that Mr. Silver's financials were overdue by 73 days, and that I no longer would have opportunity to request discovery unless the scheduled hearing were to be further delayed. CP 40-41. On October 19, 2015, (erroneously dated 10/16/15 by Spokane County Clerk), I filed a response to a declaration from Mr. Silver, noting that Mr. Gobel had served my with "all of Mr. Silver's financial declarations on October 16, 2015" which was "over 4 months after my

initial filing, 10 days prior to the scheduled final hearing, and my birthday....” CP 52. During the 10/26/15 hearing, I put the Court on notice of Mr. Gobel serving me with financials when they were 101 days overdue, in the afternoon at my place of work on my birthday. RP 7:11-22. During the Presentment hearing, I also raised the issue of untimely financials served on my birthday. RP 58:10-14. During revision I also raised the issue of Mr. Gobel failing to provide financials in a timely manner (RP2 15:12-16), to which Mr. Gobel objected on the grounds that it was outside of the scope of this hearing (RP2 15:17-19), which the Court sustained (RP2 15:20) and instructed me that I could only revisit what I argued during the 2/3/16 hearing (RP2 15:22-25). I had brought this issue up in every court hearing, beginning on October 26, 2015, and the Court never took any corrective action.

The Court erred in failing to consider and take action on my Motion for Change of Judge which identified reasons that I believed the Commissioner in question had a bias against me. On January 29, 2016, I filed a Motion for Change of Judge, citing failure of the Court to consider concerns about misconduct; citing the Court’s permissive attitude toward Mr. Gobel’s failure to follow court rules; citing failure to include me in the decision about the award of tax exemptions; citing improper attachment of my signature page on the final order; and citing that I believed that my

request “for a correction of an error on the record that creates fraud will have created a level of discomfort that would result in an unfair hearing.” CP 97-98. The Court said she had read the entire Court file (RP 44:8-9) and so the request that she recuse herself had been seen, yet she did not acknowledge it or take any action. I believe the outcome of the 2/3/16 Presentment hearing demonstrate that the Court, in fact, was biased against me, as evidenced by the numerous issues in that hearing.

The Court erred during Revision in denying it was hearing any issues except for the granting of attorney fees when said Motion for Revision identified both granting of attorney fees and improper awarding of tax dependency exemption as the subjects for revision, along with other details of misconduct. On February 12, 2016, I filed a motion for revision requesting: revision of the award of \$500 attorney fees; acknowledgement that neither the law nor equity permitted imposition of attorney fees on my based on the circumstances of the case; and revision of the award of tax dependency exemption for A.R.S. for 2015 to Mr. Silver. CP 102-105. This was done according to RCW 2.24.050, and LAR 0.7, which indicate that I have the right to request revision of the order within 10 days of entry. In my request, I also identified issues during the process such as the 9/10/15 attempt by Mr. Gobel to have the Court order a reply to discovery; Mr. Gobel’s failure to provide financials until they were 101 days

overdue; Mr. Gobel engaging in harassing behavior by serving my with Mr. Silver's financials at my place of work on my birthday; Mr. Gobel obtaining outcomes by orally motioning during a hearing without proper formal motion; the Court refusing to receive my motion regarding misconduct because it wasn't properly filed 12 days prior to the hearing; failure of the Court to acknowledge my statements about Mr. Gobel's misconduct; and failure of the Court to correct the improperly attached signature page on the November 18, 2015, order. CP 105. I also asked the Court to estoppel Mr. Gobel from changing positions on his arguments because it created a moving target. CP106. Yet, during the Revision hearing, the Court indicated that the award of \$500 attorney fees was the only issue before it. RP2 11:25-12:2. Mr. Gobel and the Court discussed what was actually before the Court in the 2/3/16 hearing, and determined that the Court had "read [the] entire court file", and that therefore everything had been before the Court that day. RP2 32:23 – 34:13. Though I have repeatedly brought up the same uncorrected issues, and though the Court determined during revision that all of the file was in front of the Court for the 2/3/16 hearing, the Court still did not hear the many issues I had brought up, and decided that it would "affirm the commissioner and her rationale for the parts of the motion for reconsideration that she denied, and that portion that she granted." RP2 34:21-24. I was essentially

denied the right to due process by the Court repeatedly ignoring my complaints of misconduct and bad behavior, by the Court failing to respond timely to my reconsideration, and the Court failing to allow issues that really were within its jurisdiction.

The Court erred during Revision by offering Mr. Gobel an opportunity to conduct additional research outside of the hearing and later present additional information to supplement his position regarding the award of attorney fees. The Court asked Mr. Gobel if he had case law that supported his position about the attorney fees (RP2 25:19-21), and offered Mr. Gobel the opportunity to do research outside the courtroom and provide it to the Court (RP2 26:21-22). I was not offered the opportunity to do any additional research during that hearing, and I believe this shows that the Court favored Mr. Gobel and gave him an unfair advantage.

The Court erred by not honoring the American Rule, which is specifically in place to prevent the Court or legal counsel from having a chilling effect on pro se litigants that causes them to be unwilling to protect their rights in the court system. The Court indicated that my reconsideration was not frivolous (RP 60:1-11) but later ordered that I pay Mr. Gobel \$500 in attorney fees because I'm "held to the same standard as the attorneys" and Mr. Silver had to reply to additional motions. RP 64:18-65:1. The Court never specifically identified any motions I filed which did

not raise legitimate issues. I presented case law and cited the American Rule, asking the Court not to order me to pay because I had not made frivolous filings. RP 66:10-67:8. Mr. Gobel responded by arguing that the attorney fees were equitable. RP 67:11-15. The Court upheld the decision to award attorney fees, stating it was “based on... balancing the equities and a lack of foundation for some of the motions that Mr. Silver did have to respond to.” RP 68:11-14. During Revision, when discussing whether there was justification via case law for imposing attorney fees on me (RP2 25:19-26:20), the Court stated that it did not “want to exceed [the Court’s] authority under the statute.” RP2 26:24-27:1. This would indicate that the Court exceeded its authority during the 2/3/16 hearing. The Court also confirmed that it did not see intransigence, and that intransigence wasn’t before the prior Court. RP2 27:15-17. The Court revised the order for “attorney fees on the basis absence of ability to pay.” RP2 35:22-23. Failing to honor the American Rule and its intent to enable pro se litigants to stand up for their rights in court without fear of being made to pay attorney fees creates a chilling effect on me and results in fear that the Court would continue to attempt to punish me in future actions with Mr. Gobel, who demonstrates in the record ongoing attempts to force me back into court. CP 123-124.

The Court erred by permitting ongoing irregularities in the proceedings which, collectively, resulted in a **violation of my right to due process**, as follows:

The Court erred in not liberally construing my allegations of an abuse of process and by disallowing me to fully present information about misconduct by Mr. Gobel during the October 26, 2015 hearing. RP 4. Though I orally noted some of the issues, the Court still ignored the matter.

The Court erred via its Family Law Administrator in advising me that I did not have a right to a response to my request for reconsideration, after I notified the Family Law Administrator that lack of a response to the reconsideration would interfere with my right to request a Revision. CP 97-98. This is a violation of due process rights.

The Court erred via its Family Law Administrator in advising me that I would not be given any information about ex parte communication between the Commissioner and the Mr. Gobel and, was required to file a public disclosure request to obtain such communication. CP 97-99. According to RCW 34.05.455(5), parties should be able to receive a memorandum stating the substance of all oral communications and copies of all written communications.

The Court erred by failing to take any corrective action for ongoing misconduct. During the September 10, 2015, hearing in front of Commissioner Koyama, Mr. Gobel attempted to have the court order me to comply with discovery he had given my right before the hearing, and threatened revision when the Court denied his motion and removed the language about discovery from his handwritten order. CP 110, CP 119, CP 39. During all of the hearings, I notified the Court that Mr. Gobel had not provided Mr. Silver's financials until they were 101 days overdue, and served them on me at work on my birthday, and no action was ever taken, not even a verbal correction. Instead, the Court indicated everything was timely filed (RP 30:1-6) and there was no intransigence (RP2 27:15-17). I'm not sure how the Court could ever determine that things were timely filed and there was no intransigence with this set of circumstances.

The Court erred by failing to take any corrective action for Mr. Gobel requesting I pay him \$500 in each filing he made after the October 26, 2015 hearing, though each of my subsequent filings were an attempt to protect my rights. On November 2, 2015, Mr. Gobel filed a motion requesting the October 30, 2015, Notice and Objection be stricken and that he be awarded \$500 in sanctions, calling it a "frivolous and baseless pleading." CP 57-58. On January 22, 2016, Mr. Gobel filed a Notice of Presentment for February 3, 2016, for his Order Denying Motions to

Strike and for Reconsideration of Post-Secondary Ed Support, in which Mr. Gobel sought to have the Court order denial of all of My pending motions; striking of My pleadings; award of \$500 attorney fees; and require pre-screening of all future pleadings I would file. CP 92-96. This appears to be bullying and harassing behavior that Mr. Gobel uses in an attempt to stop me from protecting my rights.

On October 15, 2015, Mr. Gobel made a request for full access to A.R.S.'s post-secondary education records and accounts, requesting her user name and password for her college online accounts be delivered immediately. CP 50. During the 10/26/15 hearing, it was discussed and determined that A.R.S. was not required to give Mr. Silver such access because EWU did not have that option available for third parties. RP 28:20-29:11; 32:16-29. Yet Mr. Gobel continued to demand access to A.R.S.'s online account, when on March 14, 2016, his office mailed a "Demand for Disclosure of All Eastern Washington University Records" to me and A.R.S., demanding A.R.S. provide "all" records immediately, once again requesting account user name and password, and threatening immediate stoppage of support payments if she failed to comply. CP 123-137. The birthday of Mr. Silver's and my minor son, C.M.S., is March 16. Once again, Mr. Gobel targets family birthdays for serving papers, which gives the very obvious impression of harassment. I responded to Mr.

Gobel's demand for disclosure, advised that A.R.S. had provided all required information; that his request for "all... information" was so broad that I could not determine what he was requesting; suggested that Mr. Silver really request it of the university "because that will include boxes and boxes of paperwork for every piece of information available at the college"; cited RCW 26.09.225 (3), which states the records "are limited to enrollment and academic records necessary to determine, establish, or continue support..."; and stated that A.R.S. had provided her grades and registration information each quarter as ordered. CP 139-139. I further stated that Mr. Gobel was revisiting his request for access A.R.S.'s online account which had been dealt with on 10/26/15, when the Court did not grant his request for electronic access. CP 139. I also stated I had provided documentation establishing that EWU did not permit third party access in October, again attached to this letter. CP 139, CP 141. I informed Mr. Gobel that EWU had replied this time with a written statement citing the Family Educational Rights and Privacy Act, and indicating the school would not permit this access because it requires student consent each time a third party accesses information. CP 139, CP 142. I stated that it appeared Mr. Gobel was demanding unnecessary information; demanding information in an unpermitted form; and demanding A.R.S.'s user name and password that had already been dealt with and resolved during the

10/26/15 hearing. CP 139-140. I ended by stating it appeared that Mr. Gobel was threatening to take me to court, yet had failed to do so, and was making fraudulent filings in the Court “and using this as a mechanism to harass me”. CP 140. I pointed out that as I had told him before, he should simply request needed information, and advised that I had complied with discovery requests throughout the PSES action. CP 140. I stated, “THIS HARASSMENT MUST NOW STOP.” CP 140. Mr. Gobel did not respond, and I conclude the goal of this continued attempt to gain user name and password, and serving us with court documents on or immediately prior to family birthdays is simply an intent to harass, and to create a false record showing nonexistent failure to comply with the court order.

During the 10/26/15 hearing, I asserted that Mr. Silver’s declaration served on 10/16/15 was “intended to sling mud”, contained untrue information, and misrepresented some information, and I asked the Court to strike the declaration; I also asserted that this service of such papers on my birthday was abusive. RP 7:19- 8:19. I asked the Court if it believed the contents of the declaration would be considered, and stated that if so, I would like to rebut them; the Court indicated she was “really interested in the numbers” and did not allow me to rebut. RP 8:16-21. Mr. Gobel told the Court that he was trying to set the stage, and told the Court

that Mr. Silver loved “his daughter with all of his heart and [wanted] to be a part of her success and that [did] not mean writing a check to” me. RP 11:9-14. The Court later stated that she believed Mr. Silver did “care very much for” his daughter. RP 30:21-23. So, the Court did not permit me to rebut, and did not strike the declaration, and then took these statements as true. Mr. Gobel also stated that Mr. Silver had been involved with A.R.S.’s “education all along when she would permit it.” RP 15:17-19. I attempted to object to this statement, and Mr. Gobel, though phrased in the third person, told me not to interrupt his opportunity to create the record. RP 15-23:20. The Court did not interfere with Mr. Gobel’s chastisement of me for attempting to object to perjury. RP 15:21-25. This was the first and last attempt I made to object to Mr. Gobel’s statements, though his argument lasted much of the hearing, from RP 10: 20, to RP 21:18. This was an untrue statement about Mr. Silver’s involvement, and the Court did not get my position, yet seems to have factored this into her decision. Furthermore, the Court’s unwillingness to interfere in Mr. Gobel shutting me down created a chilling effect. Mr. Gobel essentially took control of the courtroom, and the Court permitted this.

During the 2/3/15 hearing, Mr. Gobel referenced settlement discussions, and stated that “the last settlement offer was rejected September 2, 2015, and for anonymity of the record, I’m just pointing out

that the 101 days that she seems very besmirched by passing, has not been idle” and further stated that Mr. Silver was “forced to ask very extensive interrogatory questions” and said the answers did not arrive until October 9, 2015. RP 16:1-7. The Court permits Mr. Gobel to make veiled references to settlement discussions, which were not presented accurately and swayed the Court.

During the 10/26/15 hearing Mr. Gobel made statements that appear to imply that I poisoned A.R.S. against Mr. Silver. RP 17:1-5. The Court also stated, “It sounds like [A.R.S.’s] relationship with her father has suffered because of this...” but she believed that he really “cared for” A.R.S. RP 30:20-23. However, earlier in the hearing Mr. Gobel had stated that Mr. Silver did not want to pay support. RP 20:23-24. Attached as an exhibit in the Appendix is A.R.S.’s statement about Mr. Gobel serving her directly with a packet of paperwork when she was only 17, which contained a declaration from Mr. Silver with misrepresented statements about her that cast her in a negative light. A-7. Mr. Gobel himself, by delivering court papers to A.R.S. when she was underage, created the initial major schism in the relationship, yet he attempts to portray that I caused this, and the Court appears to believe him.

During the 10/26/15 hearing, Mr. Gobel further states that A.R.S. spent over \$6,000 during the summer leaving her accounts empty, and that

I provided truncated bank statements to hide this. RP 17:23-18:4. Mr. Gobel accused me of partial disclosure. RP 18:14-16. These statements were blatant mistruths, and slanderous, and I informed the Court that I disagreed with much of what Mr. Gobel said and was willing to rebut it, but the Court redirected me to focus on the numbers. RP 25:17-22. Later in the hearing the Court determined that I made full disclosure, which refutes Mr. Gobel's assertion that I made partial disclosure. RP 30:5-6.

During the 10/26/15 hearing, Mr. Gobel stated that he received my response to his discovery "at the late hour on October 9"; due to the extensive nature of his request, it took me until the last day it was due in order to complete a request that wasn't asked of me until 85 days after commencement, yet he attempts to present the facts in a way that creates the appearance that I did something wrong, which I did not. RP 20:7-8.

During the 10/26/15 hearing, Mr. Gobel told the Court that because I am a Civil Rights Investigator for the State, I have "no problem making arguments and filing documents." RP 20:18-22. Mr. Gobel has no direct knowledge of what I do in my job; I do not ever draft court filings or speak in court for my work, and to attempt to lie to the Court to bias the Court is improper.

During the 10/26/15 hearing, Mr. Gobel stated that my husband, Mr. O'Day, is "voluntarily under-employed" and stated there was no

reason he could not work full-time. RP 21:9-13. The Court determined that there was no intransigence and that “people filed their documents timely...” RP 30:1-6. During the 2/3/16 hearing, I noted that Mr. Gobel had accused my husband, Mr. O’Day, of being “voluntarily under-employed”, (RP 48:13-18) but Mr. Silver has direct knowledge from me telling him that my husband has disabilities. The Court replied by instructing me to focus on the orders and took no corrective action. RP 48:22-23. This is problematic because I have pointed out to the Court that Mr. Gobel is creating a false record, and the Court has ignored me.

During the 10/26/15 hearing, the Court indicated that, per the statute, A.R.S. was to provide grades and attendance records. RP 32:4-13. During the 2/3/16 hearing, the Court chastised Mr. Gobel for including language in the order requiring attendance records, which are not required by RCW 26.19.090. RP 51:14-17. Then, Mr. Gobel responded to the matter of attendance records by stating, “you live the consequences – unlike Ms. O’Day’s apparently coaching and prompting and otherwise following up on [A.R.S.’s] issues at home.” RP 53:10-13. In this situation, the Court gave Mr. Gobel improper instructions, he followed them and failed to check the law, the Court scolds Mr. Gobel for the Court’s error, and then Mr. Gobel responds with a disparaging comment about me coaching A.R.S. in her weak areas. This is also very offensive and leaves

me wondering why the Court permitted this ongoing unprofessional behavior.

During the 10/26/15 hearing, the Court indicated that if A.R.S. did not get “passing grades”, Mr. Silver could immediately stop making support payments. RP 32:13-15. RCW 26.19.090(3) requires the child be “in good academic standing as defined by the institution” or the support would be suspended during the times the child isn’t in compliance with these requirements. This is different than the oral ruling that Mr. Silver could simply stop paying, and did not confirm that he would need to resume paying if A.R.S. were to resume compliance. This created a situation in which any failure to comply for any reason would result in me or A.R.S. having to take Mr. Silver back to court to compel him to resume payment.

During the 10/26/15 hearing, the Court stated that I did not dispute the worksheets provided by Mr. Silver. RP 33:9-10. Earlier in the hearing, I had stated that I didn’t agree with the numbers Mr. Gobel had provided, but that I would acquiesce to using them on the worksheet. RP 26:12-16. The Court ignored my statement of disagreement and mischaracterized my position on the worksheets, which is not proper.

During the 10/26/15 hearing, Mr. Gobel had stated that Mr. Silver did not want to pay support. RP 20:23-24. During the 2/3/16 hearing, I

advised the Court that during the 2014 child support modification, Mr. Silver wanted to stop paying child support because A.R.S. had turned 18, though she was still in high school. RP 48:4-8. Mr. Gobel stated that Mr. Silver was happy to pay his obligation, and that, “[he knew] that [I] went on record saying [his] client’s tried to avoid his obligation – no. [Mr. Silver] wants to pay his fair share, not what the Mother wants.” RP 53:19-23. It seems that Mr. Gobel presents his clients position on whether or not he should support A.R.S. in a continually changing fashion.

I obtained transcripts of the hearings on September 10, 2015; October 26, 2015; and February 3, 2016, which I provided to the Court for the revision hearing. I did not understand that the transcripts were also to be served on the Clerk, and the Judge’s Judicial Assistant indicated prior to the revision hearing that the transcripts would be filed, yet only filed the transcript for the hearing on September 10, 2015, in front of Commissioner Koyama. CP 109-121. If the Judicial Assistant made sure to file the 9/10/5 hearing transcript, why would she not file the others?

During Revision, Mr. Gobel stated to the Court that I was not following the rules governing reconsideration, but was actually asking the Court to re-hear the 10/26/15 and 7/31/14 hearings. RP2 17:23-18:5. In reality, I had continually brought up the same issues in each of the hearings (10/26/15 and 2/3/16) but they were ignored, and so these

complaints were ongoing. I was not asking for any re-hearing of the 7/31/14 hearing, about which I did not complain.

During Revision, Mr. Gobel stated that the only item granted from my reconsideration request was an increase in number of days for A.R.S. to provide grades. RP2 20:4-7. He misstated that the change was from 10 to 14 days, since it was actually from 7 to 14 days. CP 74-75. Also, it was untrue that I was only granted that one item, because the Court also granted correction from attendance records to registration. By portraying the outcome improperly, Mr. Gobel presented information that would sway the Court into believing that the attorney fees were justified because I only prevailed on one request and therefore would not be the prevailing party in the issue. However, the fact that the Court discussed the taxes and established that they were worthy of reconsideration, and began her decision by stated that Anderson's order should stand, it is clear that the request had merit and I did partially prevail.

In my Motion for Change of Judge, I indicated that Ms. Peterson had told me very specifically that I did not have the right to a response on my reconsideration request. CP 97-98. I BELIEVE THIS CIRCUMSTANCE RAISES MY COMPLAINT TO A HIGHER STANDARD OF REVIEW – STRICT SCRUTINY – BECAUSE CLEARLY THE STANDARD THE FAMILY LAW COURT USED

WAS TO NOT RESPOND, SINCE I DID NOT RECEIVE A RESPONSE TO MY RECONSIDERATION. It is beyond improper for the Family Law Court Administrator to tell me that I do not have a right to a response on a reconsideration.

I have a right to procedural due process, as noted in the Fourteenth Amendment of the Constitution of the United States of America. Case *Marchant v. Pennsylvania R.R.* indicates that people should not be deprived of our property because of a violation of due process rights, which is what has happened in this case.

E. Conclusion

As a result of the this matter unfolded, I have been subjected to improper proceedings and ongoing violations of my right to due process, resulting specifically in a loss of property in the form of tax dependency exemption award, which equates to approximately \$3,000, resulting in my financial obligation for PSES being twice would it should be, and Mr. Silver's obligation being offset by about half. I have experienced ongoing grief and stress, having been forced to go to multiple court hearings against my wishes, and having been forced to file numerous court documents in an attempt to protect my rights. However, I have continued on because I believe in the public interest that this case represents.

Without a clear and specific guide to how tax dependency exemption awards should be distributed in child support cases, litigants are without a resource to help them understand whether the way taxes were awarded was proper or not. It would be necessary to create a guide or ruling that is equitable, consistent, and predictable.

I seek the following relief:

Reversal of the award of A.R.S.'s 2015 tax award, so that it is granted to me;

Alternatively, if the Court prefers, granting the right to me to claim tax awards for both A.R.S. and C.M.S. for 2016 and all future years until they no longer qualify as dependents.

Issuance of statewide guidance or a ruling regarding how tax dependency exemption awards should be distributed in family law cases.

Sanctions against Mr. Gobel as the Court sees fit. Because I am not an attorney, I do not know what would be appropriate, and ask the Court to decide that. I would like this because it may be the only thing that deters future misconduct. I may decide to seek Post Secondary Education Support for my son, C.M.S., and if Mr. Gobel is not deterred from such conduct in the future, I would not be willing to go through such an experience again.

October 10, 2016

Respectfully submitted,


Heidi Rachael O'Day
Pro Se

APPENDIX

The Requirements of Due Process

PROCEDURAL DUE PROCESS: CIVIL

Generally

Due process requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.⁶⁸³

⁶⁸³ Thus, where a litigant had the benefit of a full and fair trial in the state courts, and his rights are measured, not by laws made to affect him individually, but by general provisions of law applicable to all those in like condition, he is not deprived of property without due process of law, even if he can be regarded as deprived of his property by an adverse result. *Marchant v. Pennsylvania R.R.*, [153 U.S. 380, 386](#) (1894).

<http://law.justia.com/constitution/us/amendment-14/36-procedural-due-process-civil.html>

56 of 518 DOCUMENTS

RENE ELLIS, Plaintiff-appellant, -v.- UNITED STATES OF AMERICA, Defendant-appellee.

No. 04-3016-cv

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

134 Fed. Appx. 483; 2005 U.S. App. LEXIS 11934

June 20, 2005 , Decided

* A summary order in this case was issued pursuant to Second Circuit Local Rule § 0.23 on April 1, 2005 and was posted on the website of the Second Circuit on the same day, but as a result of clerical error was not docketed or served on the parties pursuant to Fed. R. App. P. 45(b)(1) and (c). Nor was judgment entered pursuant to Fed. R. App. P. 36. This summary order vacates and supercedes the undocketed order of April 1, 2005, which undocketed order does not constitute an order or judgment of this Court and shall have no effect under 28 U.S.C. §§ 1254 and 2101 or Fed. R. App. P. 40 on any subsequent proceedings.

NOTICE: **[**1]** RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Ellis v. United States, 127 Fed. Appx. 530, 2005 U.S. App. LEXIS 5287 (2d Cir. N.Y., 2005)

COUNSEL: FOR APPELLANT: ALEXANDER J. WULWICK, of counsel to Gross Schwartz Goldstone & Campisi, LLP, New York, NY.

FOR APPELLEE: BENJAMIN H. TORRANCE, Assistant United States Attorney (David N. Kelley, United States Attorney for the Southern District of New York, Sarah S. Normand, Assistant United States Attorney, of counsel), New York, NY.

JUDGES: PRESENT: HON. SONIA SOTOMAYOR, HON. REENA RAGGI, HON. PETER W. HALL, Circuit Judges.

OPINION

[*483] UPON DUE CONSIDERATION of this appeal it is hereby ORDERED, ADJUDGED, AND DECREED that the judgment of the United States District Court for the Southern District of New York (Cote, J.), be and it hereby is AFFIRMED.

Plaintiff Ellis appeals from the judgment of the district court dismissing his claim of negligence, brought under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, for lack of subject matter jurisdiction. We assume the parties' familiarity with the underlying facts, procedural history, and specification of appellate issues. For substantially **[**2]** the reasons stated by the district court, Ellis' claim of negligence on the part of Officer Rollock is barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a). The evidence of record clearly establishes that Officer Rollock was entrusted with discretion in the enforcement of the policy barring inmates from entering housing units in which they did not reside. Like the district court, we find no conflict on this score between his deposition testimony and his later declaration; moreover, even supposing *arguendo* that his deposition testimony can be understood to indicate that he believed he was expected to check the residence of every prisoner seeking to enter a residence unit in every instance, that subjective understanding is irrelevant because uncontradicted evidence shows that no such requirement was in place. Ellis does not challenge the district court's correct determination that enforcement of the controlled movement

policy falls within the scope of the discretionary function exception. *See, e.g., Calderon v. United States*, 123 F.3d 947, 951 (7th Cir. 1997). The judgment of the district court is therefore AFFIRMED. [**3]

PROCEDURAL GUIDELINES

1. Family Law Docket Calls

- a. Begins promptly at 8:30 a.m. on Tuesday, Thursday and Friday. Any case not reported as ready for hearing at docket call will be stricken, unless prior arrangements have been made with the Family Law Coordinator.
- b. All assigned cases must be set on the correct docket day for the assigned Commissioner. If the case is unassigned, it shall be set on a Tuesday, Thursday or Friday.
- c. Documents submitted to the Court must be typed or printed legibly.
- d. Docket call may only be answered by attorneys, Rule 9 legal interns or pro se parties. In the event that counsel has a conflicting court appearance at the time of docket call, Rule 9 legal interns or registered paralegals may answer docket call. Any individual answering docket call must be able to answer the Court's questions regarding assignment of the case. If counsel does not appear, counsel must be immediately available by phone or in person if needed.
- e. All cases are presumed to be in compliance with LR 94.04: no oral testimony, argument based on the affidavits only, argument limited to 10 minutes per side.
- f. Any case which is outside the rule must be reported as such at docket call and been called in previously per local rule. All cases are expected to comply with Local Rule 94.04 regarding page limits.
- g. If the motion is for contempt with imprisonment requested, or if there is an Order allowing oral testimony, counsel/parties must so advise the Court at docket call.
- h. Cases will be set for hearing at 10:00 a.m. and 1:30 p.m. Any counsel or party requesting a specific time setting must so advise the Court at docket call, along with the reason for needing the specific time. Priority will be given to cases in which counsel or parties have conflicts with other court hearings.
- i. Any other reason for special consideration in setting the hearing must be reported at docket call.
- j. Failure to report as set forth in (d), (e), (f) and (g) above will result in the matter being set for hearing within the rule at a time specified by the Family Law Coordinator. No changes will be made without good cause and the specific approval and agreement of the Court, the Coordinator and counsel/parties
- k. If a matter involves a substantial amount of pleadings/documents to be reviewed (not subject to the page limit rules), counsel shall call the Family Law Coordinator no later than 12:00 noon the day before the hearing so that the Court may prepare for the hearing in advance. Failure to so advise the

Court may result in the matter being continued so that the Court may have enough time to appropriately review the file.

- l. Bench conference requests must be made at docket call, and will be immediately assigned to a Courtroom for argument. Requesting counsel shall pull the file; pro se parties are to ask the Clerk's office (room 300) to provide the file to the assigned courtroom. Parties/counsel should report to that courtroom as soon as they are done with their cases at docket call. Failure to appear at the bench conference may result in the bench conference proceeding as scheduled with only counsel/parties who do appear. If the Court determines that the case will proceed to hearing, counsel/parties shall notify the Coordinator immediately. Failure to notify the Coordinator may result in the matter not being heard on that day.
- m. The docket will be posted as soon as it is set. The Court, the Clerk and the Coordinator's office will not take phone inquires as to hearing time or courtroom assignment.
- n. Counsel/parties should be ready for hearing at the time the matter is set. If parties/counsel on a case are not present, the Court will go on to the next case on the docket and may strike the hearing.
- o. In the event that the number of cases reporting as ready exceeds the time that the Court has available that day, cases may be assigned to another day.
- p. The Court Administrator's or Clerk's staff will pull the court files for those cases which are set for hearing. Court files which are in the possession of parties/counsel must be handed to the Coordinator at the end of docket call.
- q. Counsel shall provide bench copies to the Family Law Coordinator.
- r. Any documents not in the Court file and which counsel wishes the Court to consider must be provided to the Coordinator at the end of docket call. Failure to do so may result in the Court not considering those documents.
- s. Any objections to any documents submitted for the Court's consideration must be outlined in the Motion Status Sheet in writing and handed to the Coordinator at the end of docket call.
- t. If some of the issues set for hearing are resolved prior to docket call, counsel/parties shall advise the Court at docket call as to which issues remain to be heard. If the issues are resolved after docket call, counsel/parties shall advise the Coordinator and clerk for the assigned Commissioner immediately. If a matter that has been set for hearing settles or continues, counsel shall immediately notify the Coordinator.
- u. Continuance orders must be entered timely so that the case will appear on the appropriate docket. If a continuance order is entered less than 7 days prior to the court date, a copy shall be furnished to the Coordinator's office prior to the court date.
- v. Any attorney or party acting in bad faith with regard to these requirements will be subject to terms and sanctions.

2. **State Parentage and Child Support Contempt Docket Calls**
 - a. Begins promptly at 8:30 a.m. Monday and Wednesday for cases filed by the State.

3. **Presentment hearings**
 - a. Counsel/parties are expected to enter orders immediately after hearing. The moving party/counsel shall bring proposed orders to the hearing.
 - b. If counsel/party is unavailable immediately after the hearing, orders must be presented to the Court by 4:00 p.m. on the day of the hearing.
 - c. No presentment hearings will be set without the specific approval of the Court.

4. **Motions for reconsideration**
 - a. The moving party must provide a copy of the motion, any supporting documents, and a proposed order (hard copy or electronic) to the Commissioner via the Family Law Coordinator and opposing party/counsel.
 - b. The responding party must provide a copy of the response and a proposed order (hard copy or electronic) to the Commissioner and opposing party/counsel within 10 days of the motion being received.
 - c. The Commissioner will enter a written decision and Orders as necessary. No oral argument will be permitted unless requested by the Commissioner.

WESTLAW

20 Wash. Prac., Fam. And Community Prop. L. § 41:5

Washington Practice Series TM

§ 41:5.Allocation of tax exemptions Family And Community Property Law with Forms
Washington Practice Series TM Family And Community Property Law with Forms (Approx. 3 pages)

Database updated December 2015

Scott J. Horenstein ¹⁰

Part VII. Dissolution of Marriage

Chapter 41. Other Relief Available in Dissolution Proceedings

§ 41:5. Allocation of tax exemptions

A statute directs the court in a dissolution proceeding to "make provision for the allocation of the children as federal tax exemptions."¹ The statute does not tie tax exemptions to custody or child support, thus permitting the court to make the determination independently of other factors.

Another statute states that the court may choose to divide the exemptions between the parties, alternate the exemptions between the parties, or both.² The authority to allocate tax exemptions is based on the premise that a child's best interests are served when the financial situations are maximized to ensure that exemptions are used effectively: the trial court should allocate them (or split them), to the party who will benefit the most from them considering tax laws, income levels, and child support obligations.³

The Washington courts have upheld the statutes as valid, rejecting the argument that they are preempted by the Internal Revenue Code.⁴

Income tax exemptions for dependent children are considered elements of child support, not marital property, and may be transferred in child support modification proceedings.⁵

A parent can be ordered to execute any waivers or other documents required by the Internal Revenue Service in order to implement the court's decision.⁶ It is good practice to include such an order in the decree of dissolution.⁷

The allocation of dependency exemptions is just one of several tax considerations that may arise in a dissolution proceeding. Other tax considerations are discussed in a subsequent chapter.⁸

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Footnotes

¹⁰ Author and Editor

¹ **A statute**
RCWA 26.09.050.

For a good discussion of the statute and its implications, see Warner, Daniel M., Judicial Allocation of the Federal Income Tax Child Exemption in Washington State, Washington State Bar News, April, 1994.

² **May choose to**
RCWA 26.19.100.

SELECTED TOPICS

Child Support
Modification
Custody and Support of Minor Children of Divorced Parents

Secondary Sources

Appendix 2. Uniform Marriage and Divorce Act 1970 Act, as amended in 1971 and 1973

21 Wash. Prac., Fam. And Community Prop. L. Appendix 2

... Adapted from 9A Uniform Laws Annotated Master Edition, © West Publishing Co. All rights reserved. Official text and comments reproduced with permission of the National Conference of Commissioners on ...

State court's authority, in marital or child custody proceeding, to allocate federal income tax dependency exemption for child to noncustodial parent under sec. 152(e) of the Internal Revenue Code (26 U.S.C.A. sec. 152(e))

77 A.L.R.4th 786 (Originally published in 1989)

...This annotation collects and analyzes the cases which involve the authority of state courts to allocate the dependency exemption for a child to the noncustodial parent as it is affected by the amendment.

APPENDIX B FEDERAL REGULATIONS

Flex Plan Hdbk. Appendix B

... (a) In general: (1) Section 21 allows a credit to a taxpayer against the tax imposed by chapter 1 for employment-related expenses for household services and care (as defined in paragraph (d) of this se...

See More Secondary Sources

Briefs

Petition for Writ of Certiorari

2012 WL 486884
Caryn J. WEBER (f/k/a Caryn J. Sall),
Petitioner, v. Duane C. SALL, Respondent
Supreme Court of the United States
Feb. 09, 2012

... 1) Caryn J. Weber (f/k/a Caryn J. Sall)
Petitioner/Appellant/Defendant 2) Duane C. Sall, Respondent/Appellee/Plaintiff The North Dakota Supreme Court's Judgment and Opinion on Weber's consolidated appe...

JOINT APPENDIX, VOL. I

2015 WL 681797
James Obergefell, et al., and Brittni Henry et al., Petitioners, v. Richard Hodges, Director, Ohio Department of Health, et al., Respondents; Valeria Tanco, et al., Petitioners, v. William Edward Bill Haslam, Governor of Tennessee, et al., Respondents Gregory Bourke, et al., and Timothy Love, et al., Petitioners, v. Steve Beshear, Governor of Kentucky, et al., Respondents
Supreme Court of the United States
Feb. 27, 2015

... FN* Counsel of Record FN* Not admitted in D.C.; supervised by Ropes & Gray partners who are members of the D.C. Bar [Filed 07/19/13] I, James Obergefell, under 28 U.S.C. §1746, declare under the penal...

Support Obligations

In re Marriage of Peterson, 80 Wash. App. 148, 156, 906 P.2d 1009, 1013 (Div. 1 1995).

Rejecting the argument

In re Marriage of Peacock, 54 Wash. App. 12, 771 P.2d 767 (Div. 3 1989) (no error in awarding exemption to noncustodial father)

In re Marriage of Peterson, 80 Wash. App. 148, 156, 906 P.2d 1009, 1013 (Div. 1 1995).

Can be ordered

RCWA 26.19.100

In re Marriage of Peacock, 54 Wash. App. 12, 771 P.2d 767 (Div. 3 1989) (custodial mother could be ordered to execute written waiver of exemption so that exception could be given to noncustodial father)

Good practice

Consideration might also be given to a provision stating that if a parent refuses to execute and deliver the necessary documents so that the other parent is unable to claim the child as an exemption, then there will be an automatic pro rata support reduction for the next year.

Other considerations

See § 42.1.

End of Document

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Petition for Writ of Certiorari

2008 WL 4948435
Jon GALLANT, Petitioner, v. Tern Lynn GALLANT, Respondent
Supreme Court of the United States
Nov. 14, 2008

...The petitioner is Jon Gallant, Jr. The parties to the state proceedings at issue were Jon Gallant, Jr., Ten Gallant, Jon Gallant, Sr., and Gallant Transport, Inc., a Michigan corporation wholly owned...

See More Briefs

Trial Court Documents

Burrows v. Degon

2014 WL 10594717
Christopher BURROWS v. Alicia DEGON
Superior Court of Washington
Oct. 30, 2014

...The findings are based on trial held before the Honorable Millie M. Judge on May 12 through May 21, 2014 in Snohomish County Superior Court, and after receipt of the Respondent's Motion for Reconsider...

Guardianship Estate of Danny KEFFELER, by Wanda Pierce, Guardian, and other persons similarly situated, Plaintiffs, v. State of Washington, Department of Social and Health Services, Defendant, Lyle Quasim, Director of the Department of Social and Health Services; and Michael R. Hobbs, Program Manager for Department of Social and Health Services, Additional, Defendants.

2000 WL 35519938
Guardianship Estate of Danny KEFFELER by Wanda Pierce, Guardian, and other persons similarly situated, Plaintiffs, v. State of Washington, Department of Social and Health Services, Defendant, Lyle Quasim, Director of the Department of Social and Health Services, and Michael R. Hobbs, Program Manager for Department of Social and Health Services, Additional, Defendants
Superior Court of Washington
May 30, 2000

... This matter came before this court pursuant to the Order on Remand issued by the Supreme Court pursuant to RAP 9.11 on December 2, 1999. The order on Remand directs this court to make findings of fact.

State of Washington, Plaintiff, v. Howard Ralph BLAKELY, Defendant.

2000 WL 35439004
State of Washington, Plaintiff, v. Howard Ralph BLAKELY, Defendant
Superior Court of Washington
Nov. 13, 2000

[]Prison []BD Clerk's action required
firearms rights revoked 5/6/11 A sentencing hearing was held present were: Defendant, HOWARD RALPH BLAKELY Defendant's Lawyer: Doug Phelps (Deputy) Prosecuting

See More Trial Court Documents

JUDICIAL ALLOCATION OF THE FEDERAL INCOME TAX CHILD EXEMPTION IN WASHINGTON STATE

by Daniel M. Warner

Allocation of federal income tax child-dependency exemption is frequently a contentious issue in dissolution and post-dissolution proceedings. The theory behind the exemption is that persons burdened with the responsibility of paying for bringing up children should not be unduly taxed—that the resources available for child support be maximized.¹

Pre-1984 Rules

Before 1984, a non-custodial parent was entitled to claim the child exemption if he based the claim on a decree or written agreement allocating the exemption to him and he paid at least \$600 for the child's support, or if he provided at least \$1200 in support and the custodial parent could not clearly establish that she provided more.²

The pre-1984 rules proved unworkable:

The present [pre-1984] rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the government to resolve these disputes is relatively high and the government has little tax revenue at stake in the outcome.³

The 1984 Amendments

In 1984 Congress amended section 152(e) of the Internal Revenue Code ("the Code") to allow the non-custodial parent a claim of dependency exemption only if the custodial parent signed a written waiver surrendering the right to the claim. "Thus," reported the Congressional com-

mittee, "dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service."⁴ IRS form 8332 is the one-page waiver; it allows the custodial parent to release her claim to a child's exemption for the "current year" or for tax years in the future, including, as the form's notes provide, "for all future years." No longer are divorced parents confronted with the task (or opportunity) of showing how much they contributed to the child's support in order to get the exemption; the custodial parent always gets the exemption, unless she has signed a waiver or the court has allocated it for her. The new rules "establish a simple, bright-line test for the IRS to use."⁵

Problems with the New Rules

While the new rules obviate arguments over which parent provided sufficient support to trigger award of the exemption, all is not settled by this "bright line test," because there is economic sense in awarding the exemption only to the parent with the larger income. So two new problems arise for ex-spouses and their practitioners. First, can the court in a dissolution proceeding award the non-custodial parent the exemption when the custodial parent has not signed the waiver (i.e., can the court assign the waiver)? Second, if the custodial parent has signed the waiver for some years in the future or for "all future years," can the court reallocate the exemption upon a showing of changed circumstances while the waiver is in effect (i.e., is the waiver irrevocable for its duration)?

Can the court award the exemption as part of the dissolution decree?

Washington law holds that a court may award the exemption as part of the dissolution decree. The Washington State Court of Appeals, Division 3, answered the first question in *Re the Marriage of Peacock*.⁶ A decree of dissolution was entered in March of 1988; in the decree,

the court awarded custody of the parties' child to Mrs. Peacock, but awarded the federal tax exemption to Mr. Peacock, conditioned on his remaining current on support payments.⁷ Since Mrs. Peacock had not signed the waiver, she argued that the court erred in granting the exemption to her ex-husband. The court noted RCW 26.09.050, which provides:

In entering a decree of dissolution of marriage . . . the court shall . . . make provision for the allocation of the children as federal tax exemptions.

And the court found that the 1984 Code amendments were designed to resolve frequent and time-consuming arguments with the IRS over which parent was entitled to the exemption (based on who provided support over the applicable thresholds), not to interfere with "domestic relations issues in which the states have particular interest."⁸ The court concluded: "RCW 26.09.050 is not preempted by federal law." This is the same conclusion reached by most courts considering the issue.⁹

IRS 1040 Instructions imply the same ability of courts to award the exemption in decrees.

Interestingly, the IRS itself, in its Instructions to Form 1040 has arrived at the same result (the instructions, of course, are not law and are not binding on the IRS). For tax year 1987, the instructions provided that a noncustodial parent could claim the exemption only if the custodial parent signed Form 8332, or if a divorce decree that was in effect before 1985 stated that the noncustodial parent should take the exemption. This is in accordance with the 1984 Code amendments. For 1988 (and these Instructions have remained unchanged), the following is provided for taxpayers who wish to claim non-custody children:

Attach Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, or similar statement. If your divorce decree went into effect after 1984 and it states that you can claim the child as your dependent, you may attach a copy of the following pages from the decree or agreement instead of Form 8332:

(1) Cover page (write the other

parent's social security number on this page), and

(2) The page that states you can claim the child as your dependent, and

(3) Signature page showing the date of the agreement.¹⁰

The requirement is not that the signature page show the consent of the custodial parent. A decree en-

tered by default or accepted by the custodial parent without full knowledge of its terms or of their importance might well contain an assignment of the exemption to the noncustodian. The IRS instructions allow this, but the regulations do not.¹¹ The instructions, then, follow the thinking of the majority of courts in allowing a court-assigned exemption.

Duration of the Award to Noncustodial Parent

In *Peacock*, the custodial parent had not signed the waiver surrendering her right to the exemption; the court of appeals affirmed the trial court's allocation of the exemption to the noncustodial parent even absent a signed waiver. When the court allocates the waiver, it should be for one year only; its annual renewal—since the waiver covers the previous year—is conditioned on the noncustodial spouse having met the support obligations for the previous year.¹² If the child support payments were not made, the exemption reverts to the custodial parent because the noncustodial parent would refuse to sign the waiver for the tax year passed.

Reallocating Waivers

Can the court reallocate an executed waiver? The second question posed above, can a state court reallocate the exemption in the face of an executed waiver, is more problematic because of the IRS's contention that the waiver is "irrevocable." As mentioned above (note 15) there are good reasons why a waiver might be executed for several years in the future or for "all future years." Here it is argued that reallocation of such a waiver is proper.

The Commissioner of the IRS has successfully argued that the custodial parent cannot repudiate a written agreement granting her husband the exemption even if she claimed "she was under extreme pressure when she signed" it.¹³ This argument, however, is untenable for all cases. It should not prevail in the face of ordinary contract law nor when considered in terms of the purpose of the 1984 Code amendments.

The application of familiar contract law could make void a written waiver of the exemption: Duress, undue influence, and so on. No further discussion of these

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Courts have broad discretion to modify divorce decrees, even absent voidable causation.

General Rule for Modification of Dissolution Decrees

In dissolution cases, where the welfare of children is at stake, courts have even more latitude to modify the parties' agreements than they do under regular contract law. The Washington Supreme Court has stated that the court's power to modify a judicial decree regarding alimony and support could not be restricted by an agreement between the parties, even if that agreement is incorporated in the decree, unless the alimony and support payments are part of the division of property.

Traditional Rule Unchanged

While the 1973 Dissolution Act made a small inroad on the courts' authority to modify maintenance awards,¹⁴ the traditional rule¹⁵ that courts could modify divorce decrees as to child support is unchanged.

In *Re Marriage of Olsen*, the Court of Appeals opined:

We are convinced that under Washington law a trial court is never absolutely bound to enforce an agreement between a husband and wife regarding support payments and may, under appropriate circumstances, [change] the obligation of the spouse who promised to make support payments.

Regarding child support provisions, the Washington court of appeals as held that "a decree drawn in compliance with the statute may always be modified if circumstances warrant."¹⁷ And more sweepingly, that "the power of the trial court to modify provisions of the decree pertaining to the children's welfare is inviolable."¹⁸ At stake is society's ever-arching "public interest in the welfare of the children."¹⁹

Significance of the Dependency Exemption

As noted above (footnote 4) the dollar amount in issue in these cases may not be great,²⁰ and by itself probably would not stir the court to consider reallocation of

a validly signed waiver of the child-support tax exemption. However, as part of a general reassignment of financial obligations owing to the children of divorced parents due to changed circumstances, the tax exemption should be taken into account.²¹ Automatically awarding the exemption to the custodial parent without regard to her income would not inure to the welfare of the children. If, to take the extreme case, the custodial parent had no income and the noncustodial parent considerable income, such an award would be unreasonable. Similarly, if the custodial parent had waived the exemption, and then her financial circumstances changed or she remarried so that the exemption would benefit her more than her ex-husband, it would be reasonable, as part of a review of support requirements, for the court to consider reallocation of the exemption.²² The purpose and benefit of shifting the exemption is to maximize tax savings and apply the savings to higher child-support award.

State domestic relations law argues in favor of reallocation of the dependency waiver in appropriate circumstances. Such

reallocation, however, would be impermissible if the IRS's contention that the waiver is "irrevocable" preempts state law.

Federal or State Law?

Federal Preemption does not apply. Whether a state court may consider reallocation of a validly signed waiver as part of a modification of the decree depends upon whether such consideration is precluded by federal preemption. The Peacock court, in determining that it could assign the waiver *ab initio*, reviewed the law of federal preemption as interpreted by the Washington courts.²³

Congressional intent is determinative in questions of federal preemption of state law. In Washington there is a strong presumption against finding preemption. Preemption may be found only if federal law "clearly evinces a congressional intent to preempt state law," or there is such a "direct and positive" conflict "that the two acts cannot 'be reconciled or stand together . . .'" Domestic relations is an area particularly with the authority of the states: insofar as marriage is within tem-

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poral control, the states lay on the guiding hand. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the law of the states and not to laws of the United States." Federal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question. On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted. A mere conflict in words is not sufficient. State family and family-property law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause will demand that state law be overridden.

The United States Supreme Court has found implied federal preemption where state law at issue conflicts with federal law, either because it is impossible to comply with both or because state law stands as an obstacle to the accomplishment and execution of congressional objectives.²⁴

Simplification Sought

As noted above,²⁵ the Congressional objective for adopting the Code amendments regarding disposition of the exemption was to reduce congestion in federal tax court caused by arguments over which spouse should get it. There was no Congressional interest in interfering with the very strong, indeed "inviolable" authority our state courts assume over provisions of divorce decrees affecting the welfare of children. So long as arguments about which spouse gets the exemption do not clog the federal system, there is no federal interest in this issue and the state is free to decide as it sees fit. "It is a matter of indifference to the IRS which parent receives the exemption, so long as only one parent claims it and the forms are in order."²⁶ It has also been observed that "the Amendment [section 152] itself contains no declaration that the declaration [waiving the exemption] be signed voluntarily and does not prohibit state courts to order the custodial parent to sign the declaration."²⁷ By this analysis there is no conflict with federal law at all: the analysis, however, rather

strains the normal conception of a "waiver" as something voluntary.

Although Washington courts have not ruled on this precise question, whether the trial court should have discretion on a petition for modification to reallocate the exemption, the matter was specifically addressed in *Ford v Ford*.²⁸ The parties were divorced; in an order on motions for rehearing the trial court ordered the former wife to assign the dependency exemptions to her ex-husband. The Florida District Court of Appeals held that such an order was appropriate, using the analysis described here.²⁹

Enforcing the Order Reallocating the Exemption

In the face of recalcitrance, a court in Washington will issue an order directing execution of the necessary IRS form. The order will be enforced by a contempt citation, or by having a representative of the court execute the form. "If a court of equity could not enforce its decrees, obviously the court would be rendered impotent and we would have neither law nor order but everyone could do as he or she

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pleased. Of course, such a situation cannot be countenanced by the courts for a moment."³⁰

The Unanswered Question

The unanswered question, and the issue following a step beyond the question of contempt proceedings in state court, assume a court, either in the decree or by reallocation after the decree, does in fact assign the exemption to the noncustodial parent. That parent then attached the involuntarily-made declaration to his or her return. Meanwhile the custodial parent also claimed the exemption in the filing. The Tax Court would again be confronted with the vexing problem Congress sought to avoid for it: which parent should get the exemption. Interestingly, this situation has not presented itself to the Tax or federal courts. Obviously Congress could clarify the law; it has not done so. Obviously, too, the Supreme Court could interpret the law to settle whether state courts are preempted from allocation or reallocation of the exemption; it has declined the opportunity to do so.³¹ Absent definitive federal solutions, the states, as noted above, have generally

allocated and reallocated the exemption.

Conclusion

Before 1984, the divorced spouse who provided more support was entitled to the federal child-support income tax exemption. Because cases in which determining who provided more support were hotly argued by ex-spouses (and with little impact on the revenue collected) and were clogging the federal Tax Court, Congress in 1984 amended the law to allow the custodial parent (most often the ex-wife) the exemption unless she signed a waiver giving it to her ex-husband. However, grant of the exemption to the custodial parent might make no economic sense and could inure to the economic harm of the children. Accordingly most jurisdictions have held that even absent a signed waiver a court may award the exemption in a divorce decree. The IRS's assertion that an executed waiver is "irrevocable" is untenable; not only might such a waiver have been signed under conditions which would render any contract voidable, but courts have broad discretion to modify divorce decrees to protect the welfare of divorced parents' children. The court may

reallocate the dependency exemption notwithstanding federal law requiring a signed waiver: the matter is of peculiar state-court concern, and the purpose of federal law is not frustrated by the exercise of such state-court discretion. The state courts—and Washington, insofar as the matter has been decided by a Washington court, have held there is no federal preemption. No clarification has been forthcoming from either Congress or the Supreme Court.

Footnotes

¹ A discussion of the history of the child-support exemption, see David J. Benson, "The Power of State Courts to Award the Federal Dependency Exemption Upon Divorce," 16 *U. Dayton L. Rev.* 29, text accompanying notes 40-48 (1990).

² For clarity in the discussion here, the custodial parent shall be considered the mother and references shall be to feminine pronouns; the noncustodial parent shall be considered the father, and references shall be to masculine pronouns.

³ Act of Aug. 31, 1967, Pub. L. No. 90-78, § 1. 81 Stat. 191, 191-92, 26 U.S.C. §

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152(e)(2)(A) and (B), amended 1984 by P.L. 98-369, § 423(a).

⁴H.R. Rep. 98-432(II) (1984) at 966-967. Ronald Pearlman, Deputy Assistant Secretary of the Treasury, testifying before the committee on Ways and Means, (Tax Law Simplification and Improvement Act of 1983, Hearings on H.R. 3475, 98th Cong., 1st Session, 150, 165, 1983) made a further observation:

Although the tax liability in these disputes generally does not exceed a few hundred dollars, the parties are often willing (because of the emotional nature of the issue) to litigate the matter at a cost far in excess of the value of the exemption. This wastes judicial and other governmental resources and contributes greatly to the case backlog in the United States Tax Court.

One commentator noted, "[T]he Tax Court was the scene of literally thousands of trials to determine whether Mom or Pop was entitled to the \$1,000 exemption for little Johnny." (Holden, "The Domestic Relations Tax Act of 1984, 34 *R.I.B.J.* 11, 12 [1986]).

⁵Section 152(e) (1) Custodial parent gets exemption...

(2) *Exception where custodial parent releases claim to exemption for the year.* [A noncustodial parent may take the exemption] . . . if—

(A) the custodial parent signs a written declaration (in such manner and as the Secretary may by regulations prescribe) that such noncustodial parent 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.

There are two other exceptions: (3) provides an "exception for multiple support agreement[s]." and (4) provides an exception for "certain pre-1985 instruments."

⁶*Id.* at 967.

⁷*Ford v Ford*, 592 So. 2d 698, Fla. Dist. Ct. of Appeals, 1991, at 702.

⁸771 P.2d 767 (Wash. Ct. App., 1989).

⁹*Id.* at 768.

¹⁰*Peacock, supra*, at 769. The court did note, however, that some state courts refused to assume authority in this area (at 766).

¹¹*See Lincoln v. Lincoln*, 746 P.2d 13 (Ariz. 1987); *Monterey County v.*

Cornejo, 266 Cal. Rptr. 68 (1990); *Serrano v. Serrano*, 566 A.2d 413 (Conn. 1989); *Rohr v. Rohr*, 800 P.2d 85 (Idaho 1990); *In re McGarrity*, 548 N.E.2d 136 (Ill. App. 1989); *In re Baker*, 550 N.E.2d 82 (Ind. App. 1990); *In re Walsh*, 451 N.W.2d 492 (Iowa 1990); *Hart v. Hart*, 774 S.W.2d 455 (Ky. App. 1989); *Rovira v. Rovira*, 550 So. 2d 1237 (La. App.), *cert. denied* 552 So. 2d 398 (La. 1989); *Wassif v. Wassif*, 551 A.2d 935 (Md. App. 1989); *Bailey v. Bailey*, 540 N.E.2d 187 (Mass. App. 1989); *Fudenberg v. Molstad*, 390 N.W.2d 19 (Minn. App. 1986); *Nichols v. Tedder*, 547 So. 2d 766 (Miss. 1989); *In re Milesnick*, 765 P.2d 751 (Mont. 1988); *Babka v. Babka*, 452 N.W.2d 286 (Neb. 1990); *Gwodz v. Gwodz*, 560 A.2d 85 (N.J. 1989); *Sheehan v. Sheehan*, 152 A.D.2d 942, 543 N.Y.S.2d 827 (1989); *McKenzie v. Jahnke*, 432 N.W.2d 556 (N.D. 1988); *Hughes v. Hughes*, 518 N.E.2d 1213 (Ohio, 1988), *cert. denied*, 488 U.S. 846 (1988); *Motes v. Motes*, 786 P.2d 232 (Utah App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990); *Cross v. Cross*, 363 S.E.2d 449 (W. Va. 1987); *Pergolski v. Pergolski*, 420 N.W.2d 41 (Wisc. 1988). *Contra Villaverde v. Villaverde*, 547

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So. 2d 185 (Fla. Dist. Ct. App. 1989) (but, *nb.*, explicitly overruled by *Ford v. Ford*, 592 So.2d 698, (Fla. Dist. Ct. App. 1991); *Varga v. Varga*, 434 N.W.2d 152 (Mich. App. 1988); *Eichle v. Eichle*, 782 S.W.2d 430 (Mo. App. 1989); *Jensen v. Jensen*, 753 P.2d 342 (Nev. 1988); *In re Vinson*, 732 P.2d 79 (Or. App. 1987); *Brandriet v. Larsen*, 442 N.W.2d 455 (S.D. 1989); *Davis v. Fair*, 707 S.W.2d 711 (Tex. App. 1986).

The *Ford* court observed, (592 So.2d at 702) regarding the minority position, "It should be noted that while Nevada and South Dakota do not allow trial courts to transfer the dependency exemption unless the custodial parent voluntarily relinquishes it, trial courts are allowed to reduce the amount of child support a custodial parent receives to balance the loss of the exemption to the noncustodial parent. It has been suggested the same result would obtain in Texas. See *Cross v. Cross*, 363 S.E. 2d 449, 457-58 (W. Va. 1987); *Davis v. Fair*, 707 S.W.2d at 718."

¹² Instructions to Form 1040, 1987 Tax Year, p. 8.

¹³ Internal Revenue Service, Instructions to Form 1040, 1988, p. 8.

¹⁴ Bender's Federal Tax Service, Section A:3.81[b], p. A:3-22 (Pub.067 BFTS 42 10.91) follows the law, not the instructions, in counselling as follows:

Comment: The waiver must be signed by the custodial parent. *A provision in a divorce decree, that is not signed by the custodial parent, would not satisfy this requirement.* [Emphasis added.]

I.R. Regulation § 1.152-4T, A-3 provides that the noncustodial parent may claim the exemption "only if the noncustodial parent attached to his/her tax return . . . a written declaration from the custodial parent stating that he/she will not claim the child" for the year.

The current Internal Revenue Manual (IR Manual), at section 513.2, for use of IRS auditors follows the regulation:

[T]he custodial parent will be deemed to provide over 1/2 the child's support, and therefore entitled the child's dependency exemption, irrespective of the amount of support provided by the noncustodial parent or the terms of any divorce or separation agreement. An exception to this rule is provided where the custodial parent signs a written declaration that he/she will not claim the exemption for the taxable year, and the noncustodial parent attaches the declaration to

his/her return for the year . . .

¹⁵ [T]he judgment should contain a provision indicating that the annual waiver of the dependency exemption is conditioned on the former husband's being current in his child support payments. *Ford, supra*, at 704. And to the same effect, see *Fudenberg v. Molstad*, 390 N.W. 2d 19 (Minn. Ct. App. 1986). Obviously, this means the custodial spouse must execute a new waiver annually; in many situations this may not be a very

satisfactory situation.

¹⁶ *Bridgett v. Comm. IRS* 1972 WL 2281 (Tax Court), 31 T.C.M. (CCH) 798, T.C.M. (P-H) 72,160 (1972); the case was—of course—decided before the 1984 amendments and was based on the previous law (see text accompanying Note 2, *supra*.) The Tax Court quoted standard contract law to the effect that a person will not be relieved from the consequences of his own improvidence, poor judgment or lack of wisdom. And it noted that then-

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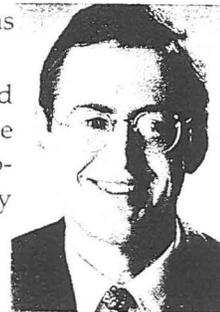
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* I have been writing, teaching or practicing in the field since 1963. See *The Law Finders: An Essay in Statutory Interpretation*, 38 So. Cal. L. Rev. (1965), *Law, Language and Ethics* (Fndtn. 1972), "First Amendment" Exemptions from the Antitrust Laws (1979). My practice has involved statutes governing antitrust, arbitration, banking, bankruptcy, civil rights, copyright, consumer protection, employee rights, family law, federal jurisdiction, insurance, motion picture competition, professional licensing, real estate, securities, taxation, trademark, zoning.

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applicable law (Public Law 90-78, 90th Congress, 1st Session, 1967, allowing the noncustodial spouse to claim the exemption if the custodial spouse signed an agreement surrendering it) was designed to relieve the IRS of a number of disputes "so great that it has cast a serious administrative burden on the Service and has tended to clog the administrative machinery involved in bringing them to a conclusion" (Senate Report No. 488, to accompany H.R. 6056, Public Law 90-78).

¹⁷ See, e.g., *Millheisler v. Millheisler*, 261 P.2d 69 (1953); *Von Herberg v. Von*

Herberg, 106 P.2d 737 (1940); *Troyer v. Troyer*, 30 P.2d 963 (1934).

¹⁸ See RCW 26.09.070(7). A decree of maintenance may be nonmodifiable if the separation contract and the decree itself so provide.

¹⁹ See, e.g., *Schaefer v. Schaefer*, 219 P.2d 114, (Wash., 1950).

²⁰ *In re Marriage of Olsen*, 600 P.2d 690, at 693

²¹ *Henry v. Russell*, 576 P.2d 908 at 909 (Wash. Ct. App. 1978)

²² *In re Marriage of Studebaker*, 677 P.2d 789, at 791 (Wash. Ct. App. 1984).

²³ *Timmons v. Timmons*, 617 P.2d 1032

(Wash, 1980).

²⁴ In 1992 the dependency exemption is \$2,300; for a taxpayer with a marginal tax rate of 15%, the tax savings are \$345; for a taxpayer with a marginal rate of 28% the savings are \$644; with a marginal rate of 31% the savings are \$713. For a non-custodial parent in the 31% tax bracket with two dependent children, the savings amount to \$1,426, that much more to use to pay child support.

²⁵ The Michigan Court of Appeals has held that while a trial court no longer has the authority to determine which parent is entitled to the exemption (differing with the Washington Court of Appeals in *Peacock*), it opined that, in the future, if the custodial parent ever requested the court for an increase in child support, the exemption would be a factor in that decision. *Strickradt v. Strickradt*, 401 N.W. 2d 256, 258 (Mich.Ct. App. 1986).

²⁶ "To deny our courts the power to allocate the exemption gives the custodial parent the power to punish the noncustodial parent by making the tax liability greater for the noncustodial parent; greater in fact than the savings the custodial parent stands to gain from claiming the exemption. The only real winner in such a situation is the federal government, while the real loser is the child." *Ford, supra*, at 703.

²⁷ *Peacock, supra*, at 768-69 (citations omitted).

²⁸ *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n.*, 489 US 493, at 509 (1989).

²⁹ Note 6.

³⁰ *Ford, supra*, at 702.

³¹ *In re Marriage of Einhorn*, 533 N.E.2d 29, 37 (Ill. Ct. App. 1988)

³² 592 So.2d 698, at 704.

³³ *Ib.*, at 704.

³⁴ *Peacock, supra*, at 769-70, quoting from *Nelson on Divorce and Annulment* (2d ed.), Vol. II, 285, section 16.01.

³⁵ *Hughes v. Hughes*, 518 N.E. 2d 1213 (Ohio, 1988), cert. denied 109 S.Ct. 124 (1988).

Daniel Warner served as public defender in Bellingham for five years and then practiced civilly. In 1989, he joined the faculty in the College of Business and Economics at Western Washington University, where he continues to teach. He served eight years as a Whatcom County Councilman, retiring from public office in January 1994. He gratefully acknowledges review and editorial suggestions from professors Ron Singleton and Zite Hutton at WWU and from attorney Daniel A. Nye of Riddell Williams, Seattle.

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