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CUSTODIAL PARENT DEPENDENCY EXEMPTIONS: *HUGHES V. HUGHES*

In 1984, Congress amended Internal Revenue Code (I.R.C.) Section 152(e)¹ to create an unambiguous presumption in favor of the custodial parent receiving the dependency exemption(s). The language of Code Section 152(e) expressly provides that the custodial parent may release his/her presumptive right to the non-custodial parent if the custodial parent signs a written declaration to that effect.² On its face, however, Section 152(e) does not provide a state domestic relations court with the power to order the custodial parent to execute the release. Yet, it is this very power which the domestic relations courts of several states, including Ohio, are exercising on a daily basis.³ Was this the intent of Congress when it amended the federal law? The state courts are at polar ends of the spectrum on this question.⁴ Adding to this confusion, is the fact that the United States Supreme Court has not yet addressed the issue.

In *Hughes v. Hughes*,⁵ the Ohio Supreme Court held that Section 152(e), as amended by the Tax Reform Act of 1984, did not prohibit a state domestic relations court from awarding federal dependency exemption(s) to the noncustodial parent. Moreover, the majority found that the lower court's action did not infringe on congressional power to lay and collect taxes on income.⁶ The Ohio Supreme Court based its decision upon an analysis of Section 152(e) and its regulations, the legislative history behind the amendment and stated concerns of the Internal Revenue Service.⁷

SECTION 152(E)

Prior to the 1984 amendments, Sections 151 and 152(e) provided that a divorced or separated custodial parent was entitled to the dependency exemption.⁸ However, two exceptions were recognized. First, a noncustodial parent could claim the exemption if the divorce decree or separation agreement so specified, and that parent contributed at least \$600 toward the support of the dependent during the year.⁹ This pre-amendment statute clearly acknowledged the jurisdiction of state courts to award the exemption to the noncustodial parent. Second, a non-

¹ Tax Reform Act of 1984, 26 U.S.C. § 152(e)(1) (1984). These provisions became effective January 1, 1985.

² 26 U.S.C. § 152(e)(2) (1986).

³ See, *infra* notes 33-34, 43-47, 51-65.

⁴ *Id.*

⁵ 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988).

⁶ *Id.* at 168.

⁷ *Id.* at 166-168.

⁸ I.R.C. §§ 151, 152(e) (1982); See, e.g., *McGuire v. Commissioner*, 77 T.C. 765 (1981).

⁹ I.R.C. § 152(e)(2)(A)(i)(ii) (1982). See, *Grider v. Grider*, 376 SO.2d 1103 (Ala. Civ. App. 1979); *Greeler v. Greeler*, 368 NW2d 2 (Minn. App. 1985); *Hiland v. Hiland*, 467 NE2d 1253 (Ind. Ct. App. 1984); *Hoyle v. Hoyle*, 473 NE2d 653 (Ind. Ct. App. 1985); *Kolb v. Kolb*, 479 SW2d 81 (Tex. Civ. App. 1972); *MacDonald v. MacDonald*, 122 H.D. 339, 443 A2d 1017 (1982); *Morphew v. Morphew*, 419 NE2d 770 (Ind. Ct. app. 1981); *Niederkorn v. Niederkorn*, 616 SW2d 529 (Mo. App. 1981); *Pettitt v. Pettitt*, 261 SO2d 687 (La. App. 2d Cir 1972); *Roberts v. Roberts*, 553 SW2d 305 (Mo. App. 1977); *Ruiz v. Ruiz*, 668 SW2d 866 (Tex. App. 1984).

custodial parent was entitled to the exemption if he/she provided \$1200 or more per child per year, and the custodial parent could not establish that he/she provided more for the support of the child.¹⁰

Amended Section 152(e), as did its predecessor, provides a two-prong test.¹¹ If a child receives over half his support during the year from his divorced or separated parents, and the child is in the custody of one or both parents for more than half the year, then the child is deemed to be the dependent of the custodial parent.¹² In this context, the term custodial parent is defined as the parent having custody for a greater portion of the year.¹³ This presumption in favor of the custodial parent, however, is rebuttable.

Section 152(e) affords three exceptions to the general rule.¹⁴ First and foremost, the noncustodial parent will be deemed to have provided over one-half the child's support for the year if the custodial parent releases his/her claim to the exemption.¹⁵ A release is accomplished in two steps. The custodial parent must sign a written declaration stating that he/she will not claim the child as a dependent for that year.¹⁶ Second, the noncustodial parent must attach this declaration to his/her federal income tax return.¹⁷ (Form 8332, provided by the Internal Revenue Service to accomplish this task, is found in Appendix A.)

The 1984 amendments to Section 152(e) were made primarily because the Internal Revenue Service became involved in a multitude of disputes wherein each parent claimed the exemption(s).¹⁸ The costs to the Government and the parties to litigate these disputes was substantially higher than the amount of the exemption(s) and tax revenue at stake.¹⁹ Congress believed that the Internal Revenue Service would be less burdened if the law became more objective.²⁰ As a result, Congress provided the custodial parent with the exemption(s) unless he/she expressly waives that right.²¹

¹⁰I.R.C. § 152(e)(2)(B)(i)(ii) (1982).

¹¹I.R.C. § 152(e)(1)(A)(B) (1986).

¹²*Id.*

¹³I.R.C. § 152(e)(1)(B) (1986).

¹⁴I.R.C. § 152(e)(2)(3)(4) (1986). Section 152(e)(3) provides an exception for multiple-support agreements. Section 152(3)(4) provides an exception for certain pre-1985 instruments. See, *Struck v. Struck*, 417 N.W.2d 382(S.D. 1987); *Seip v. Seip*, 725 S.W.2d 134 (Mo. App. 1987).

¹⁵I.R.C. § 152(e)(2) (1986).

¹⁶I.R.C. § 152(e)(2)(A) (1986).

¹⁷I.R.C. § 152(e)(2)(B) (1986). See, e.g., Treas. Reg. § 1.152-4T (1987).

¹⁸*Hughes, supra* at 166-167 citing Deficit Reduction Act of 1984, Pub. L. No. 98-369, §§ 424, 427, ____ Stat. ____, 1498-1500 (1984) (codified at I.R.C. §§ 151, 152(e) (1984)).

¹⁹*Id.* at 1498-00.

²⁰*Id.* at 1498.

²¹26. U.S.C. § 152(e)(1) (1986).

SURVEY: STATE COURT CONSTRUCTION OF SECTION 152(E)

As written, Section 152(e) does not explicitly recognize the discretion of a domestic relations court to award the dependency exemption to the noncustodial parent.²² However, the language of Section 152(e)(2)(A) has been read to imply authority upon a state trial court to order a custodial parent to execute an exemption release.²³ The Minnesota Court of Appeals has recently undergone an unusual metamorphosis in its legal analysis of the issue.²⁴

In 1986, the Minnesota court held that the allocation of dependency exemptions was still within the trial court's discretion under the amended statute.²⁵ Hence, the court held that a custodial parent may be ordered to execute the necessary waiver of exemption in favor of the noncustodial parent.²⁶ The court reasoned that state court allocation of the exemption(s) does not interfere with Congressional intent, nor does it affect the Internal Revenue Service.²⁷ However, the court noted that the custodial parent's execution of the waiver should be conditional upon the receipt of support payments.²⁸ Moreover, an indirect effect of such an award will be an increase in income to which the child support guidelines apply.²⁹

In 1987, the Minnesota Court of Appeals distinguished this reasoning and held that the dependency exemption for children could not be allocated by the trial court.³⁰ The court held that federal law requires a custodial parent to intentionally waive his/her claims to the exemption before it can be awarded to the noncustodial parent.³¹ In another case, the court held that a trial court is without authority to award the exemptions to the parents for alternating years absent a clear waiver by the custodial parent.³²

In Arizona, a custodial parent may be ordered to execute the necessary waiver of exemption in favor of a noncustodial parent who is paying child support.³³ More-

²² See 26 U.S.C. § 152(e)(2)(A)(B) (1986).

²³ See, *supra* note 3.

²⁴ See *Valento v. Valento*, 385 N.W.2d 860 (Minn. Ct. App. 1986); *Fudenberg v. Molstad*, 390 N.W.2d 19 (Minn. Ct. App. 1986); *Gerady v. Gerady*, 406 N.W. 2d. 10 (Minn. Ct. App. 1987); and *Theroux v. Boehmler*, 410 N.W.2d.354 (Minn. Ct. App. 1987).

²⁵ *Fudenberg v. Molstad*, 390 N.W.2d 19,21.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Theroux v. Boehmler*, 410 S.W.2d 354, 358 (Minn. Ct. APP. 1987). *Fudenberg* was not overruled. *Rather*, in *Theroux*, the court held that the exemption may be awarded to the noncustodial parent when the trial court deems "it necessary to involve its equitable powers to require a waiver to safeguard the economic well-being of the family." *Id.*

³¹ *Id.*

³² *Gerady v. Gerady*, 406 N.W.2d 10,14 (Minn. Ct. App. 1987). However, § 1.152-4T of the regulations to section 152(e) provides that the release may apply "for a number of years (for example, alternate years)." Treas. Reg. § 1.152-4T (1987).

³³ *Lincoln v. Lincoln*, 746 P.2d 13, 17 (Ariz. Ct. App. 1987). 155 Ariz. 272.

over, the Arizona Court of Appeals held it was an abuse of discretion for the trial court to refuse to allocate the dependency exemption(s).³⁴

The Texas Court of Appeals held that a noncustodial parent who sought an order modifying a pre-1985 decree to provide him with the dependency exemptions did not fall within one of the three exceptions to the general rule granting the custodial parent the exemption(s).³⁵ Hence, Texas strictly construed the amended sections.³⁶

The Oregon Court of Appeals held that section 152 applies only to parents who are or have been married.³⁷ When parents have never been married, a trial court lacks authority to designate which parent will receive the exemption based on a prediction that the parent would provide over one-half of the child's support.³⁸ Whether an unwed parent may claim the federal income tax exemption depends upon the application of federal tax law to the actual facts.³⁹

In Michigan, the Court of Appeals held that a trial court no longer has the authority to determine which parent is entitled to the exemption.⁴⁰ The court held that the Internal Revenue Code clearly states that the custodial parent received the exemption.⁴¹ However, in the future, if the custodial parent ever requests the court for an increase in child support, the exemption will be a factor in that decision.⁴²

On the other hand, the West Virginia Supreme Court of Appeals recently held that an order to the custodial parent to execute the required waiver of dependency was an integral part of awarding *child support*.⁴³ (Emphasis added.) The court noted that the new provision is entirely silent as to whether a trial court can require a custodial parent to execute a waiver.⁴⁴ This silence demonstrates Congress's indifference as to how the exemption is allocated, so long as the determination is not left to the Internal Revenue Service.⁴⁵ If Congress had intended to forbid

³⁴ *Id.*

³⁵ *Davis v. Fair*, 707 S.W.2d 711, 715 (Tex. Ct. App. 1986). The original divorce decree and prior modification were silent as to who could claim the exemption. There was no multiple support agreement between the parties. Lastly, the custodial parent had not signed a written declaration waiving her right to the exemptions. *Id.*

³⁶ See, *infra* notes 66-68. The dissent in *Hughes* cited *Davis* as a proper interpretation of the amendments to section 152. *Hughes*, 35 Ohio St. 3d at 170 n.2.

³⁷ *Gleason v. Michlitsch*, 728 P.2d 965, 967 (Or. Ct. App. 1986). 82 OR App 688 citing *Dillard v. Commissioner*, 47 T.C. Memo.919 n.3 (1984).

³⁸ *Gleason* at 967.

³⁹ *Id.*, citing *Davis v. Fair*, 707 S.W.2d 711.

⁴⁰ *Strickradt v. Strickradt*, 401 N.W.2d 256, 258 (Mich. Ct. App. 1986) 156 Mich App. 141.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Cross v. Cross*, 363, S.E.2d 449, 458 (W.VA. 1987). The Ohio Supreme Court in *Hughes* held that the allocation of the dependency exemption(s) was part of the marital property division. See, *infra* note 62.

⁴⁴ *Id.* at 457.

⁴⁵ *Id.*

state courts from allocating the exemption it would have said so.⁴⁶ Thus, the court held that state court has the equitable power to order the custodial parent to sign the waiver.⁴⁷

What this means for the custodial parent is that he/she is given a bargaining chip which may be very valuable in voluntary settlements.⁴⁸ Moreover, the court noted that execution of the waiver is dependent upon a noncustodial parent's having paid his court-ordered child support.⁴⁹ In the event of non-payment, the custodial parent may lawfully refuse to execute the waiver.⁵⁰

HUGHES V. HUGHES

In *Hughes v. Hughes*, the plaintiff-wife filed for divorce against the defendant-husband in August of 1985.⁵¹ The couple orally settled most issues prior to the trial.⁵² During these pre-trial negotiations, Mr. Hughes offered to pay \$45 per child per week to support the couple's five children in exchange for the four dependency exemptions.⁵³ Mrs. Hughes, however, refused to release her claim to the exemptions.⁵⁴ Subsequently, the court resolved the issue and awarded all four exemptions to Mr. Hughes, the noncustodial parent.⁵⁵ The judgment entry stated that it ". . . shall operate and have the full force and effect of the law, of rendering the Plaintiff's consent to the Defendant's taking such minor children as dependent deductions on [his yearly Federal, State and local income tax] returns."⁵⁶

The Ohio Supreme Court weighed several factors before reaching its decision in *Hughes*. First, the court examined Section 152(e) and the legislative reasoning behind the amendments to that section.⁵⁷ The court also looked to its decision in *Cherry v. Cherry*⁵⁸ which held that a domestic relations court has broad discretion to determine the proper allocation of marital assets and property rights in

⁴⁶ *Id.* at 458.

⁴⁷ *Id.*

⁴⁸ *Id.* at 459. The value of this bargaining chip depends upon the amount of income; the higher the income the more valuable exemptions become due to the progenerivity of the federal income tax. *Id.*

⁴⁹ *Id.* at 460.

⁵⁰ *Id.*

⁵¹ *Hughes v. Hughes*, 35 Ohio St. 3d 165 (1988).

⁵² *Id.* The plaintiff sought custody of the couple's five minor children, a division of marital property, alimony, child support, attorney fees and court costs. The only issues the couple could not settle prior to trial were child support, the dependency exemptions and the disposition of a utility bill.

⁵³ *Id.* One child was near emancipation.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* The Lucas County Court of Appeals affirmed the trial court holding that nothing in the Internal Revenue Code prohibits a state court from awarding tax exemptions to the noncustodial parent as part of the marital property division. *Id.* The Lorain County Court of Appeals was presented with the same issue and held that the noncustodial parent could not lawfully claim the exemption as federal law did not allow such a result. *Leuenberger v. Leuenberger*, C.A. No. 4415, slip op. at 7 (9th Dist. Ohio, April 15, 1987).

⁵⁷ *Id.* at 166-67. See, *supra* notes 11-21.

⁵⁸ *Id.* at 167, citing 66 Ohio St. 2d 348, 421 N.E.2d 1293 (1981).

a divorce proceeding. The court noted that nowhere in the legislative history of the 1984 Tax Reform Act is an intent to curb this discretion expressed.⁵⁹ Moreover, the court was influenced by the fact that the Treasury Department has acknowledged the power of a domestic relations court to award dependency exemptions through its decrees.⁶⁰ Their rationale being that most disputes can be readily resolved simply by looking at the divorce decree or separation agreement.⁶¹

Based upon the foregoing, the Ohio Supreme Court reasoned that Section 152 did not preclude the action of the lower court in awarding the exemptions to the noncustodial parent as part of the *marital property division*.⁶² (Emphasis added.) However, the majority limited its holding by stating that the courts do not have the power to force the custodial parent to release his/her claim to the exemption(s).⁶³ Nor may the noncustodial parent simply attach a copy of the divorce decree or separation agreement to his/her tax return in lieu of the required written declaration.⁶⁴ Nevertheless, the noncustodial parent would have a contempt of court action against the custodial parent if he/she decided to ignore the court's order.⁶⁵

At the heart of the dissent is the thought that the term "release" as used in Section 152(e)(2), means "a custodial parent is entitled to an exemption for a child in all cases, unless he or she *voluntarily* relinquishes or gives up that exemption."⁶⁶ (Emphasis added.) A court ordered release is not a voluntary act. Hence, a domestic relations court is without jurisdiction to order a custodial parent to release his/her dependency exemption(s) in a divorce proceeding.⁶⁷ According to Justice Wright, any other reading of the federal tax code ignores its express language.⁶⁸

CONCLUSION

The states which have been presented with the issue are clearly split as to whether a state domestic relations court has the power to assign the dependency exemption(s) to the noncustodial parent absent a waiver. Of these states, two camps are readily emerging; those who read between the lines and those who read the lines. In the first camp, the courts are finding they have an equitable power to order the custodial parent to release his/her statutory right to the dependency exemp-

⁵⁹ *Id.* at 167.

⁶⁰ *Id.* quoting Treasury Statement on H.R. 3475, Ronald Pearlman, Dep. Asst. Secy., Tax Policy, Before the House Ways and Means Comm. (July 25, 1982). *Id.* at n.2.

⁶¹ *Id.*

⁶² *Id.* at 168.

⁶³ *Id.* at 167.

⁶⁴ *Id.* at 167-68.

⁶⁵ *Id.* at 168.

⁶⁶ *Id.* at 169.

⁶⁷ *Id.*

⁶⁸ *Id.* at 169-70. See, *supra* note 36.

tion(s). These courts are essentially relying on the fact that the Internal Revenue Code does not expressly forbid such action. The latter camp, however, believes the noncustodial parent may claim the exemption(s) only if the custodial parent freely waives his/her right to it, or one of the other exceptions applies.

Ohio has found itself in the first camp as a result of the *Hughes* decision. Whether the Ohio courts will boldly venture into the new frontier of section 152(e) and then shy away, as Minnesota did, remains to be seen. One fact which should be noted is that of the two Ohio appellate courts which ruled on the issue so far, each decided it differently. Hence, troubled waters may lie ahead.

If the state courts continue along the paths they have initially chosen, defining the parameters of section 152(e) will quickly become a ripe issue for the United States Supreme Court. Perhaps, the best approach is the strict constructionist approach, whereby the custodial parent receives the exemption unless he/she chooses to relinquish it. Given the general neglect of noncustodial parents to pay child support, it is the custodial parent who would benefit most from the exemption.

Furthermore, in many instances, the alleged incentive to pay created when the custodial parent postpones executing the waiver is negligible. If a noncustodial parent hesitates to make monthly support payments, the reluctance to make a lump sum arrearage payment on or before April 15, for sake of the exemption, will be even greater. Lastly, under the "implied power" approach, the Internal Revenue Service will inevitably become entangled with future litigation when the Congressional intent behind the amendments was to avoid such involvement all together. One issue already surfacing is whether a noncustodial parent can attach a divorce decree or separation agreement to his/her return in lieu of Form 8332.

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