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COURT OF APPEALS
STATE OF NEW YORK

IN THE MATTER OF TINA LEGGIO,

Appellant,

-against-

No. 9

DEVINE, et al.

Respondents.

20 Eagle Street
Albany, New York
January 9, 2020

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

BETH C. ZWEIG, ESQ.
NASSAU/SUFFOLK LAW SERVICES COMMITTEE, INC.
Attorney for Appellant
1757 Veterans Highway
Suite 50
Islandia, NY 11749

ANDREW W. AMEND, ASG
ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
28 Liberty Street
New York, NY 10005

Sharona Shapiro
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, everyone.
2 The first appeal on this afternoon's calendar is Matter of
3 Leggio v. Devine.

4 Counsel?

5 MS. ZWEIG: May it please the court. I am Beth
6 Zweig from Nassau/Suffolk Law Services Committee, and I am
7 appearing on behalf of the appellant, Tina Leggio.

8 I would like to reserve two minutes of my time
9 for rebuttal, please.

10 CHIEF JUDGE DIFIORE: You may, of course.

11 MS. ZWEIG: Thank you.

12 This is a case about a struggling family who lost
13 their food stamps or SNAP benefits for one reason and one
14 reason only, two of the children in the household started
15 college.

16 JUDGE GARCIA: Counsel, can you look at the
17 regulation, right, 273.9, and it's the support and alimony
18 payments, right? So it seems you agree on - - - on this
19 point, that it depends on where this income - - - this - -
20 - this child support is going. Is it income of - - -
21 unearned income of the mother or is it unearned income of
22 the child?

23 And the problem or the issue I have with your
24 interpretation of this regulation, forgetting deference,
25 for - - - for a second, is it says "support or alimony



1 payments made directly to the household from nonhousehold
2 members". And if I take out "directly to the household",
3 your argument doesn't change at all. I mean, it seems to
4 me you're reading this part of the reg to say "support or
5 alimony payments made from nonhousehold members", because
6 then I would look, as I do with every other subdivision
7 here, like wages, and say whose is it? Is it the mom's?
8 Is it - - - is it the student's? So what does "directly to
9 the household" mean, assuming we apply the rule that it has
10 to mean something?

11 MS. ZWEIG: We are not proceeding on the argument
12 of 273.9 which discusses the payments made on behalf of
13 nonhousehold members used exclusively for the care and
14 maintenance of nonhousehold members, rather 273.5(d)
15 specifically states that the income of ineligible college
16 students shall be treated as handled in 273.11(d). So that
17 provision is not governing - - -

18 JUDGE GARCIA: Assuming this wasn't an ineligible
19 student, for a minute, this provision I just read would
20 apply?

21 MS. ZWEIG: Correct.

22 JUDGE GARCIA: So it doesn't really matter
23 household, nonhousehold member, what this provision is
24 talking about is who is the income going to. So it seems
25 that argument is just a backdoor way of avoiding this



1 provision, but this provision seems directly related to
2 child-support payments and how you are going to allocate
3 them. So once you figure out that, and I think your
4 adversary concedes, if it's income of the student, it goes
5 to (d) and it's income of the student.

6 But first we have to get by, I think, what does
7 "directly to the household" mean because it seems there is
8 a very good argument, to me, that it means directly - - -
9 where is it directly going? It's going directly to the
10 mother in this case.

11 MS. ZWEIG: The provision talks about - - - if
12 it's directly to the household, the question is whether
13 it's used exclusively - - - according to that provision,
14 whether it's used exclusively for the care and maintenance
15 of nonhousehold members.

16 JUDGE GARCIA: But where do you find that?

17 MS. ZWEIG: I - - - I believe that's in the
18 direct language of the provision. 273.9 specifically says
19 that monies received and used for the care and maintenance
20 of a third-party beneficiary who's not a household member.
21 However, we aren't proceeding - - -

22 JUDGE STEIN: But that's a - - -

23 JUDGE GARCIA: Yeah, that's a - - -

24 JUDGE STEIN: That's a different subdivision.

25 That - - -



1 JUDGE GARCIA: Yeah.

2 JUDGE STEIN: That's sort of going, I think, to
3 your alternative argument.

4 JUDGE GARCIA: Right.

5 JUDGE WILSON: Can I ask you about, in the record
6 there's a child support order, right?

7 MS. ZWEIG: Correct.

8 JUDGE WILSON: And that directs the payment be
9 made to the SCU; is that right?

10 MS. ZWEIG: It - - -

11 JUDGE WILSON: As a factual matter, are the
12 payments being made to the SCU?

13 MS. ZWEIG: That would be the knowledge of the
14 State respondent. My understanding is that the SCU has
15 been involved to some degree. However, I - - -

16 JUDGE WILSON: So you don't know whether - - -

17 MS. ZWEIG: - - - believe in this case we're not
18 - - -

19 JUDGE WILSON: I'm just asking a factual
20 question.

21 MS. ZWEIG: Yeah, I - - -

22 JUDGE WILSON: Do you know whether the payments
23 are going to the SCU or not?

24 MS. ZWEIG: I can't answer that. I don't know.
25 And that's the key provision in this case, more so than



1 273.5, even, is the Social Services Law 111-h(4), which
2 expressly resolves the dispute as to whether child support
3 is income to the parent or the child because that - - -

4 JUDGE WILSON: That's why I asked the question -
5 - -

6 MS. ZWEIG: Right.

7 JUDGE WILSON: - - - because that's dependent on
8 whether it's going to the SCU. And you just told me you
9 don't know whether it is.

10 MS. ZWEIG: That would be information that the
11 State - - -

12 JUDGE WILSON: So - - -

13 MS. ZWEIG: - - - respondent would have.

14 JUDGE STEIN: But when it goes from SCU, then it
15 goes from there to someone else, right? And - - - and - -
16 - are you familiar with? So then the - - - the support
17 order would say it's payable to so and so through the - - -
18 through the support collection unit, right?

19 MS. ZWEIG: My - - - I believe the SCU has been
20 involved, to some degree, in this case, but I don't - - - I
21 can't answer - - -

22 JUDGE STEIN: But my point is that SCU - - -

23 MS. ZWEIG: Yeah.

24 JUDGE STEIN: - - - then doesn't - - - well, the
25 order probably would say, like, it might be in a - - - it



1 might be in a support proceeding between two parents, and
2 it would say it would be payable to the other parent
3 through the support collection unit, right? Do - - - is
4 that - - -

5 MS. ZWEIG: It may say that in - - - it might say
6 that in the order, if that were the case. I - - - again,
7 my understanding is that the primary method of collection
8 and distribution of the child support funds in this case
9 has been from the custodial - - - noncustodial parent to
10 the custodial parent, but that's just a mechanism of
11 collection. And for the case to hinge on whether the funds
12 go through the support collection unit and then to the
13 custodial parent and then to the child, or directly from
14 the noncustodial parent to the custodial parent, in our
15 view, would be an arbitrary distinction.

16 JUDGE WILSON: Well, I thought that's why you
17 directed us to 111-h(4).

18 MS. ZWEIG: Correct, because in 111-h(4) it means
19 that in New York the State legislature has already
20 determined that, for purposes of Social Services Law, child
21 support is countable as income to the child instead of to
22 the parent.

23 JUDGE GARCIA: But let's say that conflicted with
24 this, and the federal regulations said no, that we're going
25 to do it this way, who wins?



1 MS. ZWEIG: If the federal regulations were
2 absolutely clear on who the child support income is
3 countable to, then - - - then the federal regulation would
4 win out and - - -

5 JUDGE STEIN: Do you know how it's treated for
6 purposes of taxes or anything of that nature?

7 MS. ZWEIG: For purposes of taxes, it's not
8 countable - - - it's not deductible for the payee spouse.

9 JUDGE STEIN: Right, but would it go - - - do you
10 - - - so all right, so it wouldn't go on anybody's tax
11 returns.

12 MS. ZWEIG: Correct.

13 JUDGE STEIN: Are you familiar with the child
14 support formula?

15 MS. ZWEIG: To some degree.

16 JUDGE STEIN: Okay. Well, it's been awhile since
17 I've practiced family law, but - - - but to my
18 understanding, it's still the case that there is a formula,
19 and that formula directs the noncustodial parent to pay a
20 certain percentage of that parent's income as - - - you
21 know, it's got a lengthy definition of how you define
22 income, but once you get to that income number, you pay a
23 certain percentage. And for one child, that percentage is
24 or was seventeen percent. For two children, it was twenty-
25 five percent. For three children it was twenty-nine



1 percent, and so on and so forth.

2 So it - - - that - - - for purposes of that
3 formula, it's not a direct pro rata allocation that you can
4 divide a child support payment, if there are four children,
5 four equal ways. Does - - - does that make sense? So - -
6 - so how does that affect your argument that it should be
7 pro rata

8 MS. ZWEIG: Yeah.

9 JUDGE STEIN: - - - divided?

10 MS. ZWEIG: So I understand that - - - that it's
11 a, sort of, complicated, to some degree, formula. But at
12 no point in the course of this litigation has the State
13 respondent argued that the two-fifth's deduction is
14 inappropriate. And the Appellate Division did find that it
15 was appropriate to pro rate the funds out by using a two-
16 fifths formula.

17 JUDGE FEINMAN: I see that the red light's on,
18 but if I may.

19 CHIEF JUDGE DIFIORE: Yes, you may.

20 JUDGE FEINMAN: There - - - putting aside whether
21 it's the child or the parent, what about the issue of
22 deference to OTDA's position? Why shouldn't we give
23 deference to that position?

24 MS. ZWEIG: The reason why deference is not
25 appropriate in this case is if - - - there are a few



1 different arguments. First of all, 111-h(4)'s Social
2 Services Law gives an answer in this question. It says the
3 New York State legislature has made a determination that
4 child support is to be deemed, for all purposes, to be the
5 property of the person for whom such money is paid; that
6 would be the child. In addition, the OTDA hasn't had a
7 policy - - -

8 JUDGE STEIN: My understanding of that, by the
9 way, is that it was the import - - - that the sig - - - the
10 reason for that determination was that it was as between
11 the payor and the payee parent, not as between the parents
12 and/or the child.

13 MS. ZWEIG: The word - - -

14 JUDGE STEIN: Could that be the case?

15 MS. ZWEIG: I - - - you know, the plain language
16 of it, "the property for whom such money is paid", that
17 would be the child's property, because that's the property
18 of the person for whom such money is paid to - - - so
19 that's the plain meaning of the word - - - that phrasing,
20 "to whom such money is paid".

21 And beyond that, the State has not had a policy
22 on this - - - on this issue. It seems to be a bit of an
23 after-the-fact rationalization. There is a case from 2013,
24 a fair hearing decision, where the agency found that child
25 support income is - - - in a similar circumstance to this,



1 is excluded from - - - from being countable as income to
2 the food stamp household.

3 So there hasn't been a consistent policy of the
4 agency. In addition, there's no administrative directive
5 or informational letter or any other policy on this
6 subject. So deference is not appropriate when there is an
7 answer in Social Services Law and there's no pre-existing
8 policy.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. ZWEIG: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. AMEND: Thank you very much. Andrew Amend
13 for the commissioner.

14 JUDGE STEIN: Counsel, are you familiar with the
15 decision to which your adversary just referred?

16 MR. AMEND: The November 2013 Decision After Fair
17 Hearing?

18 JUDGE STEIN: Yes, is that inconsistent with your
19 position here?

20 MR. AMEND: It is, to a limited extent. We
21 conceded below that that decision was incorrect. And by
22 the way - - -

23 JUDGE RIVERA: Is that the only decision that's
24 contrary to the current position?

25 MR. AMEND: That is the only one, with the



1 debatable exception of two decisions cited in my friend's
2 reply brief that we responded to in our response to the
3 amicus brief. Both of those decisions post-date the 2018
4 decision by the Second Department and apply the income
5 attribution rule proscribed by the Second Department.

6 JUDGE STEIN: But the 2013 decision, wasn't the -
7 - - the ineligible student there also the parent?

8 MR. AMEND: There was a different 2013 - - -

9 JUDGE STEIN: Oh, okay.

10 MR. AMEND: - - - decision.

11 JUDGE STEIN: I'm sorry then - - - then I'm
12 confused.

13 MR. AMEND: - - - which was also cited in - - -

14 JUDGE STEIN: Okay.

15 MR. AMEND: - - - their reply and - - - and in
16 our response to the amicus brief.

17 JUDGE WILSON: So could I ask you to address my
18 two questions - - -

19 MR. AMEND: Yes.

20 JUDGE WILSON: - - - about 111-h. First - - -

21 MR. AMEND: Sure.

22 JUDGE WILSON: - - - the factual question of
23 where these monies are paid. Are they paid in the support
24 housing - - - support collection unit or not, and second,
25 what your understanding of 111-h is.



1 MR. AMEND: So our understanding is that the
2 money is paid by check to the parent. That is what she
3 alleged. She's never claimed that - - -

4 JUDGE WILSON: The order, you realize, says
5 something different.

6 MR. AMEND: I do realize that.

7 JUDGE WILSON: Okay.

8 MR. AMEND: But sometimes arrangements on the
9 ground, parents can agree. In any event, 111-h does not
10 apply here, and even if it did - - -

11 JUDGE WILSON: Because?

12 MR. AMEND: Well, because there's no - - -
13 there's no allegation that she has ever made. She's never
14 disputed that she gets the check directly. She's never
15 asserted the involvement of the collection unit. And in
16 any event - - -

17 JUDGE RIVERA: Directly from the person
18 responsible for paying the support; is that what you mean?

19 MR. AMEND: Correct. She's never - - - she said
20 I get a check - - -

21 JUDGE RIVERA: There's no intermediary.

22 MR. AMEND: - - - a check from my husband.

23 JUDGE RIVERA: - - - is cutting that check or
24 passing the check onto her.

25 MR. AMEND: Correct.



1 JUDGE RIVERA: Okay.

2 MR. AMEND: But she has said I get a check from
3 my husband.

4 JUDGE FAHEY: So is it correct that both sides
5 agree that the pro rata approach is a correct approach?

6 MR. AMEND: We agreed that it would be the
7 correct approach if this were money under Section 7 C.F.R.
8 273.9(d)(6). That applies for payments that are in fact
9 used for the care and maintenance of a third-party
10 beneficiary who is not a household member. That - - -

11 JUDGE FAHEY: But this isn't a third-party
12 beneficiary, so - - -

13 MR. AMEND: It's also not someone who is not a
14 household member.

15 JUDGE FAHEY: You know what I wonder is,
16 underlying this all is an accepted - - - we defer because
17 it's rational.

18 MR. AMEND: Correct.

19 JUDGE FAHEY: Right? So in - - - in our
20 deferring because it's rational, the pro rata approach to
21 the calculation of household income which, if I have it
22 correctly, exempts that - - - it counts the household
23 income that the college students receive, but then it's
24 deducted for food stamp purposes, right?

25 MR. AMEND: If they actually received income;



1 say they were working ten hours a week instead of twenty.

2 JUDGE FAHEY: There's a special provision for
3 college students.

4 MR. AMEND: Yes, their wages - - - right.

5 JUDGE FAHEY: So what it says to me, though, so
6 for the calculation it says that we take these - - - the -
7 - - the pro rata section of their child support income,
8 that the college students would receive, out. And of
9 course that seems totally irrational to me. I know of no
10 household in America that actually operates that way where
11 the money comes in and then it's divided by four or five,
12 whatever the number is, and then you - - - you say, okay,
13 this is for this child, and this is for this child, and
14 this amount is for this child.

15 That's not how rationally - - - how things
16 actually operate. And it - - - it seems to - - - to argue
17 that a child support percentage assigned to each child is -
18 - - is, on its face, irrational, and particularly in light
19 of the effect of it all, because the effect of this, of
20 course, is that in - - - in 2018, I believe, sixty-nine - -
21 - according to the Bureau of Statistics, sixty-nine percent
22 of high school students went on to college. Of those
23 sixty-nine percent that went onto college, seventy-one
24 percent of them come from nontraditional households,
25 households with one parent say, in that form. Those are



1 the bulk of people that are on food stamps.

2 So what we're saying is everybody who's on food
3 stamps is - - - is a family that genuinely needs it. It
4 makes some sense. And we've devised what seems to be a
5 formula that, I don't really fault the agency, but it
6 appears, through the regulations that are totally
7 irrational, and I'm wondering, in this calculation that
8 ends up with this, in my mind, unfair and absurd result, is
9 there anything that the State of New York could do about
10 it, or are we stuck with this calculation?

11 MR. AMEND: The State of New York is stuck with
12 this calculation only insofar as there is a child support
13 payment that is in fact directed to someone who is not
14 living in the household.

15 JUDGE FAHEY: I see.

16 MR. AMEND: That's the only purpose - - -

17 JUDGE STEIN: So then to you, does it make a
18 difference - - - I just want to understand your position -
19 - - if the noncustodial parent makes the payment directly
20 to the child, you say that's easy; that's the child's
21 income, right?

22 MR. AMEND: Correct.

23 JUDGE STEIN: What if the noncustodial parent
24 makes the payment to the custodial parent, and then the
25 custodial parent gives the child some pro rata share of



1 that money every week or every month and says, this is
2 yours and you take care of your needs. What's - - -

3 JUDGE FEINMAN: Or a further hypothetical, puts
4 it in a bank account that is only controlled by the child.

5 MR. AMEND: The dispositive fact in all of those
6 scenarios is: Is the child living at home? If the child
7 is living at home, then the exception for money used for
8 the care of third parties who are not in the home doesn't
9 apply.

10 What - - - what does apply and what matters is
11 ,for the reasons Judge Fahey intimated, this child support,
12 whether it comes through the SCU or directly from the
13 petitioner's ex-husband, is money in her pocket that is
14 available to her to use for food and other expenses for the
15 household.

16 JUDGE STEIN: If she - - -

17 JUDGE RIVERA: So I think, in part, these
18 hypotheticals are asking if - - - if what you all have done
19 is adopt a presumption, and the presumption has proved, at
20 least in a particular case, to have been rebutted, which I
21 think there's an argument which may have done that, but
22 would the presumption still hold? Does the court have to
23 say the presumption still holds in the face of contrary
24 evidence in an individual case?

25 MR. AMEND: I'm not sure I understand where the



1 presumption has been rebutted?

2 JUDGE RIVERA: Well, the presumption, as I
3 understood it, that you represented, was that the money
4 goes to the parent who's controlling it, and therefore they
5 can use it for the benefit of the household, and so it's
6 household income. If I've misunderstood what you
7 represented, please clarify.

8 MR. AMEND: That's correct.

9 JUDGE RIVERA: Okay. So then if, again, the
10 parent puts forth evidence that there's a factual finding
11 that is credible, and rebuts that underlying presumption,
12 are we bound to recognize the presumption? That's what I'm
13 saying to you.

14 MR. AMEND: Well, first - - -

15 JUDGE RIVERA: I'm asking.

16 MR. AMEND: - - - they - - - the presumption
17 would still apply in this case because there's been no
18 evidence of a transfer of funds directly to the children.
19 Second - - -

20 JUDGE RIVERA: Well, I know the hypotheticals
21 wanted to present a case where the parent has released all
22 control, but it's clear in this case that her position has
23 been I only use it for this child; I know you presume
24 otherwise, but I only use it for this child. And I can't
25 find anything but a fact-finding that agrees that that is



1 what - - - that has accepted that representation.

2 MR. AMEND: What matters in this case is that
3 these are children in her home, and she retains discretion,
4 absolute discretion - - -

5 JUDGE STEIN: And isn't the purpose of the rule -
6 - -

7 MR. AMEND: - - - as a matter of law to use it
8 for the household.

9 JUDGE STEIN: - - - that the State doesn't want
10 to have to go into the household and - - - and try to
11 enforce and figure out, okay, what's really going on here,
12 is the - - - is the mother - - - she has the discretion,
13 and she may exercise that discretion to give the money to
14 the child, or she may not, or maybe one month she does and
15 another month she doesn't. And - - - and the State is
16 looking for a hard and fast rule that says, unless that
17 money goes directly from the other parent to the child,
18 this parent is - - - still has discretion for what that
19 parent wants to do with it.

20 MR. AMEND: Yes.

21 JUDGE STEIN: Isn't that - - -

22 MR. AMEND: Yes.

23 JUDGE STEIN: Okay.

24 MR. AMEND: That is the essence of our position.

25 JUDGE STEIN: That's the point of the rule.



1 MR. AMEND: Yes.

2 JUDGE WILSON: And I think you answered this
3 before; I just want to make sure I understood - - -

4 MR. AMEND: Um-hum.

5 JUDGE WILSON: - - - the answer correctly.
6 Assume all of these children are living in the home, but
7 the noncustodial parent here, the father, decides to write
8 five separate checks, he does the pro rata himself, and
9 sends them directly to each child. What happens, in your
10 view, to the SNAP benefits?

11 MR. AMEND: If the - - - the money that is
12 received directly by the ineligible student children and
13 bypassing the custodial parent altogether - - -

14 JUDGE WILSON: Right, it goes straight to the
15 child. They're living in the household, though.

16 MR. AMEND: That - - - right, but that would be
17 excluded under - - -

18 JUDGE WILSON: And so the household would be
19 SNAP-eligible, under that circumstance?

20 MR. AMEND: Yes, and I'd like to just respond to
21 the idea that there is any unfairness or irrationality in
22 the result that this household, unfortunately, was unable
23 to qualify for SNAP. There is nothing unfair, irrational,
24 or unreasonable about a regulatory interpretation that
25 reflects the reality on the ground that mom is the one



1 receiving this money and retaining discretion over how to
2 use it, and applying that rationale in a way that provides
3 an inducement for all of the members of the household to
4 become eligible for SNAP. An overall programmatic goal
5 that's very important here is - - -

6 JUDGE RIVERA: Counsel, your light is off, so
7 before you have to sit down - - - because I think you've
8 got the meat of your point out there - - - I'm not so clear
9 why we have to decide whether or not the mother is the
10 recipient of the child support or the child is a recipient
11 of the child support. Given, I - - - I read the federal
12 statute and the regs to mean child support counts. If
13 you're a member of the household, even if you're
14 ineligible, child support counts. Tell me what
15 interrelationship of these provisions requires us to
16 actually figure out this other question?

17 MR. AMEND: The other question comes into play
18 only if there is a child who is living outside of the
19 household, who is not a household member, because there's a
20 specific income exclusion in the SNAP act and the state and
21 federal regulations.

22 JUDGE RIVERA: Which is not this case.

23 MR. AMEND: Which is not this case. And in an
24 effort to be generous as much as possible to parents,
25 custodial parents receiving child support, OTDA has



1 recognized that if a parent actually transfers the money to
2 a student who is outside the home, then that deduction
3 should apply.

4 JUDGE RIVERA: But that's not this case, so again
5 - - -

6 MR. AMEND: That is not this case.

7 JUDGE RIVERA: - - - why do we have to resolve
8 this question of whether it's the child's support or the
9 custodial parent or the person who's responsible for
10 receiving it and has control over it?

11 MR. AMEND: Oh, sorry. The reason that it would
12 matter in this case is that if the child support is truly
13 deemed to be income of the - - - the supported child, and
14 even if 111-h would make it otherwise the child's property,
15 there's no dispute that the parent is the one to whom it's
16 payable. The support order referenced by Judge Wilson says
17 that.

18 That money, if it is their income, if they went
19 out and got a job and worked ten hours a week, they got
20 their paycheck, they were controlling how they used their
21 paycheck, then the federal regulations say that, for an
22 ineligible student, that money would be excluded.

23 JUDGE RIVERA: But I understood the regs to mean
24 that a student like the children in this case - - -

25 MR. AMEND: Um-hum.



1 JUDGE RIVERA: - - - right? If they're not
2 participating in - - - in a work program, as explained and
3 defined in the federal statute and the regs, you count
4 child support in that household. It doesn't matter whether
5 it's the person who is receiving it, the adult or the
6 child. Am I misreading something?

7 MR. AMEND: The misreading would be if there is a
8 child support check - - - and this is exceedingly rare.
9 This - - - I mean, these are already kind of unicorn cases,
10 but you know, this would be a unicorn with sparkles or
11 something.

12 JUDGE RIVERA: Okay. Two unicorns.

13 MR. AMEND: In that rare case, the child support
14 would be treated as income to the child because the parent
15 never exercises - - - who's the head of the household never
16 exercises control over it.

17 JUDGE GARCIA: Counsel, before you sit down, with
18 the chief Judge's permission - - -

19 CHIEF JUDGE DIFIIORE: Yes.

20 JUDGE GARCIA: - - - I'd just like to go back to
21 deference for a minute.

22 MR. AMEND: Sure.

23 JUDGE GARCIA: You know, I agree with Judge
24 Rivera; I believe there is a way to read these clearly.
25 But if we were going on - - - on deference, we've already



1 discussed that the agency, arguably, has one or - - - or
2 more potentially inconsistent interpretations. It seems to
3 me, in the examples you cite of other states, the position
4 of the state agency isn't codified in a manual, at least,
5 right? And you do not seem to have that.

6 MR. AMEND: We have not reduced that position to
7 a - - - an administrative directive - - -

8 JUDGE GARCIA: Right.

9 MR. AMEND: - - - at this time. We could - - -

10 JUDGE GARCIA: And you also didn't write these
11 regs, right? The - - -

12 MR. AMEND: We - - - well - - -

13 JUDGE GARCIA: - - - federal government wrote
14 them.

15 MR. AMEND: We - - - the fact that this is
16 derived and largely controlled by federal regs doesn't, in
17 itself, defeat agency deference to - - -

18 JUDGE GARCIA: It doesn't defeat it, but we've
19 said - - -

20 MR. AMEND: And if you - - - sorry.

21 JUDGE GARCIA: - - - one of the reasons to defer
22 to a state agency is that they wrote the regs.

23 And lastly, we have a case, this court, Rodriguez
24 v. Perales, where there's kind of a tie with the federal -
25 - - similar - - - not this program, a different program,



1 but joint, federal government saying one thing, agency
2 saying one thing, state saying another. We say, look, the
3 feds wrote these regs; we're going with a deference to the
4 federal agency. That, at least by trial courts, has been
5 interpreted to mean no deference to the state agency in
6 interpreting a regulatory scheme controlled and written by
7 the federal government.

8 So if you combine all of those factors here, an
9 inconsistent position, lack of a formal statement, you
10 didn't write the regulations, and you're a state agency
11 interpreting federal program and regulations, what level of
12 deference should we give to the agency here?

13 MR. AMEND: There are a number of issues here
14 with assuming that OTDA should not get deference. There is
15 the fact that while this is a federal regulatory scheme
16 that's implemented by the states, the states are given
17 discretion, including - - - and this is by the federal
18 government - - - over the particular area of how to
19 allocate child support as income.

20 JUDGE GARCIA: Where is that? Where is that
21 delegation found of discretion?

22 MR. AMEND: It's discussed in - - - in our brief.
23 I - - -

24 JUDGE GARCIA: But it's a federal reg? How is it
25 delegated to the state agency to interpret what's child



1 support, how it's allocated?

2 MR. AMEND: There's a general delegation by
3 congress and then by FNS, to the states to implement - - -
4 to adopt and implement reasonable interpretations, as
5 necessary, to carry out the - - -

6 JUDGE RIVERA: That don't otherwise conflict with
7 the statute and the federal regs, correct?

8 MR. AMEND: Correct, Your Honor. So - - -

9 JUDGE RIVERA: May I ask: Did you include it in
10 the State plan, this interpretation?

11 MR. AMEND: We have - - -

12 JUDGE RIVERA: The state plan you have to submit
13 to the feds for approval?

14 MR. AMEND: The state has otherwise - - - has
15 otherwise made FNS aware of its position. FNS has not - -
16 - they haven't said we're wrong. They haven't said we're
17 auditing you. They haven't said give us the money back.

18 JUDGE RIVERA: How did you make them aware? What
19 does that mean?

20 MR. AMEND: In this case, it was an email
21 communication with representatives at FNS.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MR. AMEND: Sorry, there's just one more - - -

24 CHIEF JUDGE DIFIORE: Of course.

25 MR. AMEND: - - - point I could respond to - - -



1 CHIEF JUDGE DIFIORE: Please.

2 MR. AMEND: - - - Judge Gar - - -

3 CHIEF JUDGE DIFIORE: Garcia.

4 MR. AMEND: Yeah, thank you - - - Judge Garcia's
5 question.

6 JUDGE GARCIA: Still having trouble with my name.

7 MR. AMEND: We have not written this down in an
8 administrative directive. We could, and we might after
9 this case. But there is - - - there has been one
10 inconsistent Decision After Fair Hearing out of thousands
11 and thousands of such decisions that get issued every year.
12 And nine - - -

13 JUDGE WILSON: Wait, I thought these were unicorn
14 cases.

15 MR. AMEND: They are, but if you - - -

16 JUDGE WILSON: I mean, my daughter does have a
17 thousand sparkly unicorns, but - - -

18 MR. AMEND: Right.

19 JUDGE WILSON: - - - I didn't assume you did.

20 MR. AMEND: Well, that point is actually relevant
21 to the last thing that I just wanted to say, which is that
22 they have identified one case that goes the other way, and
23 we have identified ten, the amended Decision After Fair
24 Hearing here and nine other decisions cited in our brief
25 that consistently apply the rationale we have articulated



1 in this case. And in any event, that is a reasonable
2 interpretation of the regulations which is worthy of at
3 least some modicum of deference by the courts.

4 CHIEF JUDGE DIFIORE: Thank you, sir.

5 MR. AMEND: Thank you very much.

6 CHIEF JUDGE DIFIORE: Counsel?

7 MS. ZWEIG: Just to bring up a few issues that
8 were brought up. So the issue here is that the child
9 support, and this was - - - this was brought up, to some
10 degree, the State acknowledged that the pro rata share at
11 the two-fifths was used exclusively for the care and
12 maintenance of the college students. And counting the
13 child support against the four remaining household members,
14 that is, the mother, Tina Leggio, and the sixteen, twelve,
15 and nine-year-old children, that's a problem because, in
16 essence, the household ends up being doubly punished.

17 JUDGE RIVERA: Counsel, let me just - - -

18 JUDGE STEIN: But all they have to do is - - -

19 JUDGE RIVERA: I'm sorry.

20 JUDGE STEIN: - - - is comply with the
21 eligibility requirements for students; isn't - - - isn't
22 that true? And then - - - then that changes the whole
23 thing.

24 MS. ZWEIG: It is true that they would no longer
25 be ineligible students, and it is true that 273.5(d),



1 combined with 273.11, makes it absolutely clear that the
2 income of the ineligible college student, that is, the
3 college student who is invisible to the SNAP household,
4 that income is excluded from the SNAP household income.

5 JUDGE RIVERA: Okay.

6 MS. ZWEIG: It is true that - - -

7 JUDGE RIVERA: So let me just - - -

8 MS. ZWEIG: Yeah.

9 JUDGE RIVERA: - - - understand. So you agree
10 that if child support is going to - - - let's just use this
11 phrase for right now, the custodial adult - - - adult who's
12 responsible to get, right, by court order, the - - - that
13 that would count, right? That - - - that's an individual
14 in the household. That would count towards the household
15 income, correct?

16 MS. ZWEIG: Not if it's used exclusively for the
17 care and maintenance of the ineligible college student.
18 But - - - but even - - -

19 JUDGE RIVERA: No, no, no.

20 MS. ZWEIG: I'm sorry.

21 JUDGE RIVERA: I don't think you understand.

22 MS. ZWEIG: I'm sorry.

23 JUDGE RIVERA: The child support is going to this
24 individual, right, and they use it for the household. Let
25 me try it that way. You - - - you agree it counts?



1 MS. ZWEIG: They - - -

2 JUDGE RIVERA: And - - - let me try it this way.

3 MS. ZWEIG: Yeah.

4 JUDGE RIVERA: And if the child support is going
5 to the college student, the at least minimum part-time
6 college student, who then is not complying with the work
7 requirements set out in the federal statute and regs, that
8 that would also count if they're part of the household. Do
9 you agree with that statement?

10 MS. ZWEIG: No.

11 JUDGE RIVERA: Why not?

12 MS. ZWEIG: Unless I - - - I might have
13 misunderstood what you said.

14 JUDGE RIVERA: No, I'm sure I'm getting it wrong,
15 but that's why I'm asking.

16 MS. ZWEIG: The income of the ineligible college
17 student, as long as it's countable to the ineligible
18 college student, is not countable, is excluded - - -

19 JUDGE RIVERA: And ineligible student is a member
20 of the household, not - - - not that they're a nonmember, a
21 member of the household who doesn't comply with the work
22 requirements that - - - that such college student would be
23 subject to. Doesn't that child support count towards the
24 household?

25 MS. ZWEIG: No, college students are not subject



1 to work requirements. There are specific eligibility
2 guidelines laid out in 273.5.

3 JUDGE RIVERA: Well, they cannot be eligible if
4 they don't satisfy work requirements unless they're
5 otherwise excluded.

6 MS. ZWEIG: They - - - there are a number of ways
7 that students can become eligible for food stamps, but if
8 they're ineligible, it's as if they're treated as though
9 they're invisible to the household. That's the way I look
10 at it. So it - - - it's as if they don't exist in the
11 household.

12 So that would mean, in our estimation, that not
13 only - - - so the household size actually decreases. In
14 this case the household size decreased from six members of
15 the household to four members of the household as a result
16 of - - - and what that actually meant is the income
17 eligibility levels and the maximum possible benefit level
18 decreased accordingly.

19 But then the income that was used exclusively for
20 the care and maintenance of those children then counted
21 against the four remaining household members. So what it
22 did is it, in essence, doubly punished the kids for going
23 to college.

24 JUDGE RIVERA: Could the adult who receives the
25 child support use it for everyone but the child?



1 MS. ZWEIG: If - - -

2 JUDGE RIVERA: Would that be permissible?

3 MS. ZWEIG: If the - - - if it was used for
4 everyone but the child - - - I - - - I actually do believe
5 it would be permissible because of the Social Services Law
6 - - -

7 JUDGE FAHEY: Let me - - -

8 MS. ZWEIG: - - - 111-h(4).

9 JUDGE FAHEY: Can I - - -

10 JUDGE STEIN: But money's fungible, so this child
11 support is coming in, and I think this is part of it too.
12 And - - - and let's just say, for the moment, that - - -
13 that mom and maybe, who knows, some other family member,
14 has - - - has their own earned income or other income, it
15 all goes together and it all goes to pay for stuff, right?
16 So how do you say whether that child support income is
17 going directly to the child or not going directly to the
18 child or is being used for everybody else and not the
19 child? How - - - how can you even make that determination?

20 MS. ZWEIG: Well, in this case, it was a state
21 respondent who made the determination that the funds were
22 being used exclusively for the care and maintenance of the
23 ineligible students. And it was brought up over the course
24 of the hearing, but the State's amended decision made it
25 absolutely clear that the - - - that the pro rata share of



1 the child support income was in fact used exclusively for
2 the care and maintenance of the ineligible students. And
3 by counting it against the four remaining household
4 members, that child support income, what that means is that
5 these students really should not be using the money for
6 their own benefit, for their own food needs, if they aren't
7 eligible for food stamp benefits, for SNAP benefits, and so
8 the parents and the three children can use it on
9 themselves.

10 JUDGE RIVERA: Isn't that about a policy choice,
11 though, that we are not able to ignore?

12 MS. ZWEIG: Well, it's - - - that - - - that
13 could be a policy choice, but we're saying that it
14 shouldn't be.

15 JUDGE FAHEY: Can I ask you this? Is there a way
16 that the college students in this case could have been
17 eligible for food stamps and in having - - - and raise the
18 divisor from four to six in this case?

19 MS. ZWEIG: There is - - -

20 JUDGE FAHEY: How would that have been done?

21 MS. ZWEIG: There is a mechanism.

22 JUDGE FAHEY: Tell me; how would it be done?

23 MS. ZWEIG: If they had participated in a work-
24 study program - - -

25 JUDGE FAHEY: So a work-study program. Something

1 that amounted to twenty hours a week; is that right?

2 MS. ZWEIG: Twenty hours a week is another
3 provision. Some of these provisions are easier said than
4 done in terms of - - -

5 JUDGE FAHEY: I understand that, yeah.

6 MS. ZWEIG: But there are ways that are laid out
7 in 273.5, for students to become household members.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 JUDGE FAHEY: Thank you.

10 MS. ZWEIG: Thank you.

11 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of Matter of Tina Leggio v. Devine, et al., No. 9, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: January 15, 2020

