To be argued by:
BETH C. ZWEIG
15 minutes requested

STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

No. APL-2018-00208

- against -

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

Respondents-Respondents.

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APPELLANT'S BRIEF

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Date: January 15, 2019

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PRELIMINARY STATEMENT

The issue in this appeal is whether child support payments for the maintenance of a college student who is not eligible to participate in the Supplemental Nutrition Assistance Program ("SNAP") due to his or her "ineligible college student" status are properly excluded from the calculation of household income for the purpose of determining the household's eligibility for SNAP benefits. In this case, Petitioner-Appellant Tina Leggio was improperly denied SNAP benefits for herself and three of her children because the Suffolk County Department of Social Services ("SCDSS") included support payments for two of her other children who were ineligible college students in its calculation of SNAP household income. This determination was upheld after a fair hearing by the state Office of Temporary and Disability Assistance ("OTDA"). Ms. Leggio thereafter commenced this Article 78 proceeding, which was transferred to the Appellate Division, Second Department.

In its decision, the Appellate Division agreed with the Petitioner that child support income is income to the child and not the parent, but it nevertheless upheld OTDA's determination because, in its view, a federal regulation (7 CFR § 273.11(c)) requires that the income of an ineligible college student residing in the household be counted toward the SNAP household's income. This was a clear error, because the federal regulation that specifically addresses how the income of

an ineligible student is handled for SNAP purposes expressly provides that this income "shall not be considered available to the household with whom [the student] resides." 7 CFR § 273.11(d) (as cross-referenced in 7 CFR § 273.5(d)). Thus, once the court determined that the child support payments at issue are income to the children, OTDA's determination should have been reversed.

In its decision, the Appellate Division failed to address a second ground that Petitioner had raised for reversing OTDA's determination. Specifically, Petitioner argued that the ineligible college students' pro-rata share of the child support payments must be excluded from the SNAP household's income because the SNAP regulations expressly exclude payments intended for the care and maintenance of a non-household member from counting as income to the SNAP household. 7 CFR §273.9(c)(6), 18 NYCRR §387.11(i). Here, the pro-rata share of the child support payments is indisputably intended for the care and maintenance of the ineligible students. Since the students are not part of the household for SNAP purposes, under these federal and state regulations, these child support payments must be excluded from the calculation of the SNAP household's income.

Accordingly, the judgment of the Appellate Division should be reversed, the determination annulled, and the petition granted.

LEGAL BACKGROUND

The federal food stamp program, as outlined in the Food Stamp Act, 7 U.S.C. §§ 2011-2036, was enacted "to promote the general welfare, to safeguard the health and well-being of the Nation's population by raising levels of nutrition among low-income households." 7 USC § 2011. The food stamp program, which is now known as the Supplemental Nutrition Assistance Program "SNAP" program, is a means-tested benefit program in which household size and income level generally determine eligibility for the program and the amount of the benefit received.

Determining household size for SNAP purposes is not simply taking count of the number of people who live together. For purposes of the SNAP program, a "household" is functionally a term of art, expressly defined in 7 CFR §273.1(a). The definition of the SNAP household is not solely dependent on who may reside together, but by certain relationship configurations and the requirement that food be purchased and prepared together within that household unit. The SNAP regulation designating household composition provides that households which include children under age 22 who are living with their natural, adoptive, or step parents be counted as a single SNAP household, as a general principle. 7 CFR § 273.1(b)(1)(ii). However, the regulation also provides that these household combinations will not apply where "otherwise specified." 7 CFR § 273.1(b)(1).

This regulatory section provides a list of persons not eligible to participate in the SNAP program as a separate household or as a member of any household. 7 CFR § 273.1(b)(7). This list includes ineligible students. 7 CFR § 273.1(b)(7)(i).

The guidelines for determining eligibility of college students for participation in the SNAP program are expressly laid out in 7 CFR § 273.5. Pursuant to § 273.5(a), an individual who is enrolled at least half time in an institute of higher education is ineligible to participate in the SNAP program unless that individual qualifies for an exemption laid out in § 273.5(b). Section 273.5 also directs how the income and resources of ineligible college students must be treated, providing under § 273.5(d) that the "income and resources of an ineligible student shall be handled as outlined in § 273.11(d)." Crucially, 7 CFR § 273.11(d) states that the income and resources of those nonhousehold members who qualify under this section "shall not be considered available to the household with whom the individual resides." This means that income and resources of ineligible college students are not countable to the SNAP household. State regulations also provide for the exclusion of ineligible college students' income and resources, as 18 NYCRR § 387.16(d) states that income of non-household members who have not been disqualified for an intentional program violation, ineligible alien status, failure to attest to citizenship or alien status, failure to comply with a food stamp work registration or work requirement or provide a social security number must not be

considered available to the household. This means that the income or resources of any other type of non-household member, including an ineligible college student, must be excluded from the SNAP household's income.

Moreover, federal and state regulations specifically direct that pro-rata share of child support income be excluded from SNAP household income when the intended beneficiary of the child support income is a non-household member. 7 CFR §273.9(c)(6), 18 NYCRR §387.11(i). Because federal and state regulations exclude from counting as income to the SNAP household those payments intended for the care and maintenance of a non-household member, any child support income used for the benefit of ineligible college students must be excluded from counting as income to the SNAP household.

FACTS AND ADMINISTRATIVE PROCEEDINGS

Petitioner-Appellant Tina Leggio was a recipient of SNAP benefits from Suffolk County Department of Social Services. She recertified for SNAP benefits beginning October 1, 2014. (A. 39, 89). As of the date of this application for continued benefits, Ms. Leggio resided with her six children who were ages 22, 19, 18, 16, 12 and 9 years old. (A. 39, 89). Her 22 year old son was not included in the SNAP recertification. (A. 39, 89). The SCDSS determined that Ms. Leggio's 18 and 19 year old sons were ineligible college students and were not included in her SNAP household for purposes of determining SNAP eligibility or benefit level (A.

39, 89). As a result, Ms. Leggio had a SNAP household count of four persons (including herself and the 16, 12 and 9 year old children) for the purposes of the recertification period in question. (A. 40, 89). The SNAP household's maximum monthly income level for determination of eligibility, and its potential maximum benefit level, were lowered accordingly.

Pursuant to a divorce decree, Ms. Leggio's ex-spouse was to pay for the support of the parties' unemancipated children. The divorce decree lists five of her children – aged 19, 18, 16, 12 and 9 as of October 1, 2014 – as recipients of the child support. (A. 27-30, 40, 89, 145-148). SCDSS calculated the total child support for these five children, including the two ineligible college students, as $593.75/week. (A. 40, 89).

By notice dated October 16, 2014, SCDSS advised Ms. Leggio of its determination to discontinue her SNAP benefits, effective October 1, 2014, due to excess income. (A. 40, 90, 150-155). In its SNAP budget calculation, SCDSS included the entire $2,572.92 ($593.75 x 4.33) per month received for the support of Ms. Leggio's five children as unearned income for the SNAP household. (A. 40, 90, 152). SCDSS did not exclude the two ineligible students' pro-rata share of the child support income in this calculation.

Ms. Leggio requested review of this decision, and an administrative fair hearing was held before a designee of the Commissioner of the New York State

Office of Temporary and Disability Assistance (OTDA) on December 2, 2014. In a Decision After Fair Hearing dated December 5, 2014, OTDA reversed the determination of SCDSS to discontinue the Petitioner's SNAP benefits. (A. 31-38, 81-87). However, OTDA subsequently issued an Amended Decision After Fair Hearing dated December 30, 2014 in its place. (A. 39-47, 88-97). In its Amended Decision After Fair Hearing, OTDA acknowledged that the pro-rata share of the child support was used exclusively for the care and maintenance of the Petitioner-Appellant's two sons who attended college full time. (A. 46, 96). Nonetheless, OTDA affirmed SCDSS's decision to include the ineligible students' pro rata share of the child support income in determining the remaining SNAP household's eligibility for SNAP benefits, and upheld SCDSS's determination to discontinue the Petitioner-Appellant's SNAP benefits. (A. 47, 97). Had the decision excluded the ineligible students' pro-rata share of the child support income, Ms. Leggio and the three eligible children in her household would have qualified for SNAP benefits.

PROCEDURAL HISTORY

Ms. Leggio brought this CPLR Article 78 proceeding on June 9, 2015 to annul OTDA's Amended Decision. (A. 11-26). The matter was transferred to the Appellate Division, Second Department by order of Supreme Court in Suffolk County (Hudson, J.), dated April 13, 2016, and entered on April 20, 2016. (A. 7-10).

By decision and judgment dated February 28, 2018, the Appellate Division confirmed OTDA's Amended Decision. (A. 4-6). Thereafter, Petitioner timely moved on March 16, 2018 in the Appellate Division for reargument and/or leave to appeal to this Court. On June 28, 2018, the Appellate Division denied the motion (A. 3). Petitioner then timely moved in this Court on July 24, 2018 for leave to appeal. The motion was granted by order entered November 20, 2018. (A. 1-2).

DECISION OF THE COURT BELOW

In its decision and judgment, the Appellate Division, Second Department determined that, as Petitioner argued, child support income is the income of the child, not the parent, explaining that OTDA's contention that child support payments are income to the parent is "without merit". (A. 5). The court further determined that the regulations 7 CFR § 273.9(c)(6) and 18 NYCRR 371.11(i) provide for prorating a single payment which is for the benefit of several persons, explaining that "[i]n this case, the pro rata portion of the child support award attributable to each child can be readily identified by dividing the award by the number of children". (A. 5).

But the Appellate Division then found that while the Petitioner contended that the income of college students should have been excluded pursuant to 7 CFR § 273.11(d) and 18 NYCRR § 387.16(d), in fact the "inclusion of income from

certain specific persons who shall not be considered members of the household is explicitly provided for in 7 CFR § 273.11(c)....The college students...were disqualified primarily because of their failure to comply with work requirements". (A. 6). As a result, the Appellate Division determined that pursuant to § 273.11(c), the child support income of ineligible college students is countable against the SNAP household.

While the Appellate Division referred to 7 CFR § 273.9(c)(6) and 18 NYCRR 371.11(i) in support of its determination that a single payment for the benefit of several persons may be prorated (A. 5), the court did not address Petitioner's alternative argument that these same regulations expressly exclude the pro rata share of child support used for the benefit of non-household members, such ineligible college students, from counting as income to the SNAP household.

The court concluded that because the ineligible college students "were not employed a minimum of 20 hours per week, their income was properly included in household income", and that as a result, OTDA's amended decision was correct. (A. 6).

QUESTIONS PRESENTED FOR REVIEW

This case presents two questions of fundamental importance to all SNAP applicants and recipients in this state:

1. *Is the income, including the child support income, of a college student who*

resides in the SNAP household but is ineligible for SNAP benefits countable against the SNAP household for purposes of eligibility and benefit level?

Answer: No. Federal regulations clearly provide that the income of ineligible college students residing in a household is not counted as part of household income for the purposes of SNAP eligibility and benefit level.

2. *In the alternative, are payments for the care and maintenance of a college student who resides in the SNAP household but is ineligible for SNAP benefits excluded from SNAP household income?*

Answer: Yes. The ineligible college students' pro-rata share of care and maintenance must be excluded from the SNAP household's income since SNAP regulations expressly exclude payments intended for the care and maintenance of a nonhousehold member from counting as income to the SNAP household.

JURISDICTIONAL STATEMENT

This Court has jurisdiction of this appeal pursuant to CPLR § 5602(a)(1)(i). The February 28, 2018 order of the Appellate Division was a final determination. (A. 4-6). This Court granted the Petitioner's motion for leave to appeal on November 20, 2018. (A. 1-2). The issues raised in this appeal were raised before both the Supreme Court and the Appellate Division. The issue of whether the child support income received by and used for college students who reside in the SNAP household but who are ineligible for SNAP benefits is countable against the SNAP

household for purposes of eligibility and benefit level was preserved at A. 13-26, 207-212.

ARGUMENT

I. The Income, Including the Child Support Income, of Ineligible College Students Is Excluded from the SNAP Household's Countable Income.

A. Child Support Is Countable as Income to the Child, Not as Income to the Custodial Parent.

In its decision, the Appellate Division correctly concluded that child support is the child's income and does not belong to the payee parent. The court relied on *Modica v. Thompson,* 300 AD2d 662 [2d Dept 2002], explaining that the position of OTDA, that child support was not income to the child, was "without merit". (A. 5). In *Modica*, the court held that a child's right to child support did not cease upon the death of a payee spouse, stating that "'[a] custodial parent, a foster parent or the Commissioner of Social Services are no more than conduits of that support from the noncustodial parent to the child'" (id. at 663, quoting *Matter of Commissioner of Social Servs. v. Grifter,* 150 Misc.2d 209, 212 [Fam Ct, NY County 1991]. (A. 5).

The Appellate Division decision also relied on federal and state regulations which provide for the proration of a single payment which is for the benefit of several persons (*see* 7 CFR 273.9(c)(6)]; 18 NYCRR 387.11(i)), noting that "the pro rata portion of the of the child support award attributable to each child can be readily identified by dividing the award by the number of children." (A. 5).

B. The Income of Ineligible College Students is Excluded from the SNAP Household's Income for Purposes of Eligibility and Benefit Level.

Having properly concluded that child support is income to the child, the Appellate Division then took a wrong turn in its analysis by failing to apply the federal regulations which actually address the treatment of income of ineligible college students for SNAP purposes. If the court had looked to the relevant regulations, it would not have upheld OTDA's determination.

The federal regulations are straightforward. The treatment of the income of ineligible college students is expressly addressed in §273.5(d), which states in full: "The income and resources of an ineligible student shall be handled as outlined in § 273.11(d)". In turn, § 273.11(d) clearly states that the income of those individuals who qualify under this section "shall not be considered available to the household with whom the individual resides." Thus, § 273.11(d) plainly dictates that the income and resources of ineligible students are not countable to the SNAP household. Consistent with federal regulations, the applicable state regulation at 18 NYCRR § 387.16(d) provides that income of non-household members who have not been disqualified for an intentional program violation, ineligible alien status, failure to attest to citizenship or alien status, failure to comply with a food stamp work registration or work requirement, or provide a social security number must not be considered available to the household. This means that the income or resources

of any other type of non-household member, including an ineligible college student, must be excluded from the SNAP household's income.

With only a few exceptions, college students generally are not eligible for SNAP benefits. 7 CFR § 273.5. A student who is enrolled at least half time in an institute of higher education is ineligible to participate in the SNAP program unless that individual qualifies for an exemption laid out in § 273.5(b). 7 CFR § 273.5(a). Any failure to meet an exemption specified in §273.5(b), including a failure to meet work requirements per §273.5(b)(5), makes that college student ineligible for SNAP benefits. Ineligible college students are excluded from the SNAP household composition (*see* 7 CFR § 273.1(b)(7)), and the remaining SNAP household's income limit and maximum benefit level are lowered accordingly. But federal regulations also make ineligible students' income excludable from the SNAP household under 7 CFR §273.5(d) and 7 CFR § 273.11(d). In other words, it is precisely because the college students do not meet an exemption listed under §273.5(b), such as engaging in work, that their income and resources are excluded from the SNAP household's income. This is because federal regulations treat college-aged students who are ineligible for SNAP benefits as invisible to the SNAP household, including for purposes of determining the SNAP household composition and benefit level, as well as for purposes of determining the countable income of the SNAP household. Because ineligible college students are invisible to

the SNAP household, they are not subject to any requirements of the SNAP program, including work requirements. Therefore, the Appellate Division's conclusion that the Petitioner's college aged children were ineligible for SNAP benefits due to their failure to comply with work requirements was erroneous.

Indeed, the structure of the SNAP program demonstrates a conscious decision by Congress and the U.S. Department of Agriculture to exempt college students from work requirements and exclude the income of ineligible college students from counting as income to the SNAP household. In the hereinbefore mentioned proceedings, State Respondent has expressly acknowledged and explained that the structure and history of the SNAP program shows an intent to exempt college students from work requirements discussed in 7 CFR § 273.7(a) altogether, and to have their SNAP eligibility instead determined entirely on the basis of the separate student-eligibility criteria of 7 CFR § 273.5. *See* Food Stamp Work Program: Work Provisions of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 64 Fed. Reg. 72,196, 72,199 [Dec. 23, 1999], 1999 WL 1242262 (noting statutory exemption from SNAP work requirements if an individual is 'a student,' and noting that exempted persons are 'no longer subject to the work requirements or to the attendant penalties for noncompliance'); 7 USC § 2015(d)(2)(C), (e) (exempting college students from work requirements while providing that college students are ineligible for SNAP

unless they meet separate SNAP-eligibility rules applicable only to students).

By erroneously applying 7 CFR § 273.11(c) to the income of the ineligible college student, the Appellate Division, in effect, has determined that any income of an ineligible college student, earned or unearned, child support or not, is countable against the SNAP household. This determination clearly violates federal law and also subverts longstanding policy and practice by New York State OTDA. In their own SNAP Sourcebook at Section 13, page 267, New York State OTDA expressly states: "The earned or unearned income of an individual determined ineligible as an ineligible student cannot be considered available in determining household eligibility or benefit levels." (A. 61). Throughout these proceedings, Respondents' position never has been that the income received or earned by ineligible college students is countable to the SNAP household, because such a policy or practice would violate federal law. Rather, OTDA has maintained that the child support income belongs to the parent, not the child. As shown above, the Appellate Division properly rejected this argument.

The structure of the SNAP program thus makes it clear that the income and resources of the Petitioner's two SNAP-ineligible college aged children is not countable as income to the SNAP household, which means that the Appellate Division decision is internally inconsistent. Once the Appellate Division concluded that the child support income is the ineligible college students' income, 7 CFR

§273.5(d) and 7 CFR § 273.11(d) uncontrovertibly require that the child support income of the ineligible college students in the present case be excluded from the SNAP household's income. As a result, the Appellate Division should have held that the ineligible college students' pro-rata share of child support income is not countable as income to the SNAP household.

II. In the Alternative, Payments for the Care and Maintenance of Ineligible College Students are Excluded from the SNAP Household's Income.

Federal and state regulations, at 7 CFR §273.9(c)(6) and 18 NYCRR §387.11(i) respectively, exclude from counting as income to the SNAP household those payments intended for the care and maintenance of a nonhousehold member. Specifically, 7 CFR §273.9(c)(6) states:

> If the intended beneficiaries of a single payment are both household and nonhousehold members, any identifiable portion of the payment intended and used for the care and maintenance of the nonhousehold member shall be excluded. If the nonhousehold member's portion cannot be readily identified, the payment shall be evenly prorated among intended beneficiaries and the exclusion applied to the nonhousehold member's pro rata share or the amount actually used for the nonhousehold member's care and maintenance, whichever is less.

See also 18 NYCRR §387.11(i). This regulation clearly states that payments used for the care and maintenance of nonhousehold members must be excluded as income to the SNAP household. Ms. Leggio's two SNAP-ineligible college aged children are non-SNAP household members to whom the above regulation applies. Because Ms. Leggio's two college aged children are not members of the SNAP

household, any income used for their care and maintenance must be excluded from the calculation of the SNAP household income.

In fact, New York State OTDA has already determined in another case that child support income of an ineligible college student is not countable to the SNAP household pursuant to 18 NYCRR §387.11(i). In Decision After Fair Hearing (DAFH) #6479136L, decided on November 8, 2013, the State Commissioner held that child support payments made for the benefit of a college student who is ineligible for SNAP benefits but who resides in the SNAP household must be excluded from the SNAP household's income, writing,

> ...the Appellant contended the $702.00 in child support is used exclusively by her daughter who is in college, for food, gas and other expenses. The Appellant's representative asserted pursuant to 387.11(i) [that] monies received and used for the care and maintenance of a third party beneficiary who is not a household member shall be excluded....
>
> ....The Appellant representatives' testimony and evidence presented were both credible and persuasive. There was no dispute as that the Appellant's eighteen year old daughter is an ineligible student and the Appellant is in receipt of $702.00 per month in child support on her behalf. The Appellant's daughter attends college full-time and is not employed. While the child support benefit of $702.00 per month is received by the Appellant, the Appellant established that these funds are used solely for the care and maintenance of her eighteen year-old daughter who attends college full-time. The Appellant credibly testified the child support monies in question are used exclusively for the Appellant's daughter for her expenses. Based on the foregoing, the Agency incorrectly determined to reduce the Appellant's SNAP benefits by including child support payments in the amount of $702.00 per month in its computation.

(A. 53, 103). In DAFH# 6479136L, the State Respondent concluded that 18

NYCRR § 387.11(i) requires the exclusion of child support income of an ineligible college student living in the household. (A. 53, 103). Moreover, just as the State Respondent found that the child support was used exclusively for the support of the child in DAFH# 6479136L, in the Amended Decision issued by the State Respondent in the present case, the State Respondent similarly concluded that "...[T]he Appellant established that the pro-rata share of these [child support] funds were used solely for the care and maintenance of her two sons who attend college full-time. Appellant credibly testified the pro-rata share of the child support monies in question were used exclusively for the Appellant sons' everyday expenses, such as school, clothing and food." (A. 46, 96). Because the State Respondent in the present case has acknowledged that the pro rata share of the child support payment was used exclusively for the care and maintenance of nonhousehold members, or the ineligible college students, their pro rata share of the child support income must be excluded from the calculation of SNAP household's income.

Since 7 CFR §273.9(c)(6) clearly requires that payments received by a household to be used for the care and maintenance of a nonhousehold member be excluded and since the State Respondent has already concluded in DAFH# 6479136L that child support income of an ineligible student residing in the household is excluded from the SNAP household's income, in the present case, the child support received by the household which is used to care for the ineligible

college student must be excluded from the SNAP household's countable income. The Appellate Division erred by failing to address Petitioner-Appellant's alternative argument and find that the child support used for the benefit of ineligible college students is excluded from the SNAP household's income.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Appellate Division, annul the determination of OTDA, and grant the petition.

Respectfully submitted,

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Date: January 15, 2019

STATE OF NEW YORK
COURT OF APPEALS

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In the Matter of TINA LEGGIO,

Petitioner-Appellant,

- against -

Certification Pursuant to 500.13(c)

SHARON DEVINE, as Executive Deputy Commissioner of the New York State Office of Temporary and Disability Assistance, and JOHN O'NEILL, as Commissioner of the Suffolk County Department of Social Services,

No. APL-2018-00208

Respondents-Respondents.

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As required by Rule 500.13(c)(1), I certify that the printed text of the body of the brief contains 4,336 words.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: Islandia, New York
January 15, 2019

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