

THE FLIMFLAM FATHER: DECONSTRUCTING PARENT-CHILD STEREOTYPES IN FEDERAL TAX SUBSIDIES[†]

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INTRODUCTION

If you think that the shortest way to a tax break for a single dad raising his kids is a straight line, you will be disappointed. Driven largely by budget deficits, divorce tax reform in the 1980s cut many benefits available to middle- and low-income divorced fathers. The cuts were disguised by tax provisions built like a pinball game. Divorced fathers appear to have a benefit in one part of the Internal Revenue Code (Code),¹ only to flip out of compliance by an obstacle in another provision. Increasing numbers of middle- and low-income divorced fathers unwittingly start the game by claiming the dependency exemption.

The dependency exemption is a deduction from adjusted gross income for dependents of the taxpayer,² including the taxpayer's child.³ The amount of the exemption was \$2,800 in 2000—a substantially greater sum than the \$1,000 exemption in 1985, the year indexing began.⁴ Credits and deductions contingent upon the dependency

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1. All section references are to the Internal Revenue Code of 1986 as amended through 2001.

2. I.R.C. §§ 151(a), (c), 152(a), (e) (2001).

3. *Id.* § 151(c)(3) (definition of “child”).

4. See H.R. CONF. REP. 99-841, at II-1 to II-13 (1986), *reprinted in* 1986 U.S.C.A.N. 4075, 4089–101; H.R. CONF. REP. NO. 97-215, at 199–201 (1981), *re-*

exemption, such as the Child Tax Credit, may increase this amount by several thousand dollars. According to government sources, even this higher amount barely puts a dent in the estimated \$233,530 it will cost middle-income parents to support a child born in 2000 until age seventeen.⁵ Compared to the base year (1960) and adjusted for inflation, the percentage increase is thirteen percent.⁶ Although parents with only one child spend about a quarter more on their single child than parents with three or more children spend on each individual child,⁷ the amount of the exemption is constant for every child claimed as a dependent.

For middle- and low-income taxpayers,⁸ there is a significant amount of money hanging on the dependency exemption.⁹ Upper-in-

printed in 1981 U.S.C.C.A.N. 285, 289–91 (temporary indexing was revived in 1990); STAFF OF THE JOINT COMM. ON TAXATION, 106TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2000–2004 (Comm. Print 1999) [hereinafter ESTIMATES]. See generally BORIS I. BITTKER & MARTIN J. McMAHON, JR., FEDERAL INCOME TAXATION OF INDIVIDUALS ¶ 21.1 (2d ed. 1995).

5. MARK LINO, U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2000 ANNUAL REPORT 13 (2001), available at <http://www.cnpp.usda.gov./Crc/Crc2000.pdf>; see also Tamar Lewin, *The Way We Live Now*, N.Y. TIMES, May 14, 2000, § 4 (Week in Review), at 3.

6. LINO, *supra* note 5, at Foreward. In 2000, an estimated 23,901 taxpayers with income under \$200,000 will claim the child tax credit. ESTIMATES, *supra* note 4, at 29 tbl.3. The estimated cost of the tax credit for children under age seventeen in 2001 is \$17.1 billion. *Id.* at 21 tbl.1. Additionally, the dependency exemption for students between the ages of nineteen and twenty-three is estimated to be \$0.8 billion; the tax credit for child and dependent care expenses is \$2.2 billion; the exclusion of employer-provided childcare is \$0.4 billion; the exclusion of certain foster care payments is \$0.5 billion; and the adoption credit and employee adoption benefits exclusion is \$0.3 billion in 2001. *Id.* at 20–21 tbl.1.

7. LINO, *supra* note 5, at iv. The exemption does not take into account that expenses are highest in the urban West and lowest in the Midwest and rural areas. *Id.* at iii. Were the amount of the exemption to precisely take the relative per-child cost into account, the economic benefit to parents of only children would be offset by the confusion added to other taxpayers with more than one child. Thus, attempts to conform to economic reality would have high compliance costs. See I.R.C. § 32(b). This difficult distinction is part of the Earned Income Credit provision. Until the enactment of I.R.C. § 24(d), low-income taxpayers received a greater benefit from their first child than their second, and none from younger children. *Id.*

8. Since 1988, the personal exemption has been phased out for high-income taxpayers. H.R. CONF. REP. NO. 99-841, *supra* note 4, at II-1 to II-13; see H.R. CONF. REP. NO. 101-964, at 1028–44 (1990), reprinted in 1986 U.S.C.C.A.N. 2374, 2733–49. See generally MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION § 7.06 at 170–72 (7th ed. 1994) (explaining exemption's design to benefit low- and middle-income taxpayers).

9. The exemption lifts the gate to other tax benefits, such as the household and childcare credit, the adoption credit, the child tax credit, the hope and lifetime learning credit, and others. I.R.C. §§ 21(b)(1)(A), 23, 24(c)(1), 25A(f)(1)(A). These tax benefits add to the sheer volume of the tax law which has become unmanageable. According to a major tax publisher, "Federal tax laws and regulations filled 40,500 pages . . .

come parents are ineligible for the exemption, but of course the very rich¹⁰ can divide the tax burden on investment income by transferring property either directly or to trusts for the benefit of their children.¹¹ The phaseout for the exemption in 2000 is as follows: \$315,900, joint return; \$283,650, head of household; \$251,450, single; \$157,950, married couple filing separately.¹²

The combination of the dependency exemption and the standard deduction determine whether low-income taxpayers are liable to pay tax at all. This “threshold” for liability saves “the ability to pay principle” in our “relatively flat bracket structure.”¹³ The increased amount of the exemption also raises the stakes on the intra-family bat-

in 1995. . . .” David Cay Johnston, *The Tax Maze Begins Here. No, Here. No . . .*, N.Y. TIMES, Feb. 27, 2000, § 3 (Money & Business), at 1 (quoting Commerce Clearing House, Inc. (CCH)). By the year 2000, with the addition of 6,400 pages, the tax laws grew by sixteen percent. *Id.* The growth at a rate of “almost 10 percent faster than in the previous five years,” spawned major revisions of the individual tax forms. *Id.* According to published estimates by the Internal Revenue Service in 2000, it took taxpayers 35.8 hours to fill out Form 1040 and Schedules A through D, an increase of 5.2 hours in five years and 7.2 in ten years. *Id.* Many of the new provisions give benefits to taxpayers who claim their children as dependents.

10. Even without tax incentives, the rich spend fifty percent more on food, clothing, and medical care than the poor and more than double the amount on housing, child-care, and education. Lewin, *supra* note 5, at 3.

11. Income from property is taxed to the beneficial owner of the property. Income from property cannot be temporarily transferred in a way that shifts tax liability. *See Helvering v. Horst*, 311 U.S. 112 (1940) (preventing shift in tax liability pertaining to bond interest coupons); *Lum v. Comm’r*, 147 F.2d 356 (3d Cir. 1945) (preventing shift in tax liability pertaining to rent). *But see Blair v. Comm’r*, 300 U.S. 5 (1937) (involving assignment of percentage of donor’s income interest in trust established by third party); I.R.C. § 1(g) (taxing unearned income of children under fourteen at parents’ rate); I.R.C. § 682 (permitting alimony trust to temporarily shift income from property originally owned by grantor to recipient spouse).

12. *See* I.R.C. § 151(d)(3); INTERNAL REVENUE SERV., 2000 1040 INSTRUCTIONS 31 (2000). Since 1991, the exemption gradually phases out for high-income taxpayers. This increases the marginal rate of tax on high-income taxpayers with large families and no tax advisers.

13. Deborah H. Schenk, *Simplification for Individual Taxpayers: Problems and Proposals*, 45 TAX L. REV. 121, 130–31 (1989). The personal exemption and the standard deduction approximate the subsistence level of income necessary for “minimal amounts of food, clothing, and shelter” for a family. ESTIMATES, *supra* note 4, at 3. The exemption itself has been indexed for inflation for tax years beginning after 1984. I.R.C. § 151(d)(4). Collectively, these additional provisions called “tax expenditures” are comparable to unlimited “direct spending programs that have no spending limits, and that are available as entitlements to those who meet the statutory criteria established for the programs.” ESTIMATES, *supra* note 4, at 2. “A tax expenditure is measured by the difference between tax liability under present law and the tax liability that would result from a recomputation of tax without benefit of the tax expenditure provisions.” *Id.* at 12.

tlefield.¹⁴ Yet money alone does not explain the high volume of litigation between parents and the Internal Revenue Service (IRS or Service). Even when the amount at issue is relatively small (e.g. five hundred dollars), the dependency exemption provisions can cause friction between divorced parents, each of whom could claim the exemption. In 1967, when the predecessor of section 152(e) was enacted, five percent of all tax cases at the informal conference level of the administrative process pertained to the dependency exemption.¹⁵ Despite the run of provisions concerning the dependency exemption, the Service has not budged from its role as “an unwilling arbiter between the contending parents.”¹⁶

This Article examines how the tax benefits that appear to track the custody of a child go astray, and why some of the most conscientious divorced fathers may lose a lot if they tell the truth to the tax collector. The status of custody is very important under current law because the custodial parent possesses the right to claim the dependency exemption, at least if the divorced parents together provide over half of the support of their child. As a result, the right to the dependency exemption rests on an ephemeral link between custody and support—concepts that are ambiguously defined and contain complex tests for eligibility. Because the custodial parent is not automatically presumed to meet the support test, the Code provisions that award the exemption to the custodial parent apply only within narrow parameters and merely estop the noncustodial parent from claiming support. This falls short of granting the exemption to the custodial parent and applies only if the child received over half of his or her support from divorced parents and a multiple support agreement is not in effect. Other claimants such as uncles, aunts, or grandparents may have a superior right to the exemption. If so, the custodial parent cannot claim the child. The preference does not protect his right to the exemption.

Moreover, the status of the custodial parent described by the statute does not match many common divisions of childcare between divorced parents. In contrast to the Code’s presumption that only one parent assumes the care of the child, many divorced parents share sup-

14. Anecdotal evidence suggests that the significant dollar amount at issue makes the dependency exemption a major point of disagreement for low-income taxpayers negotiating a divorce agreement and encourages a great deal of *pro se* litigation.

15. H.R. REP. NO. 102 (1967), reprinted in 1967-2 C.B. 590.

16. *Id.* at 591. *But see Under the 1984 Act, The Service Is Not Involved in Allocation of the Dependency Exemption Between Custodial and Non-Custodial Parents*, 38 TAX NOTES 644, 667 (1988) (referencing potentially overly optimistic Treasury letter).

port and childcare responsibilities. When both parents share childcare duties, neither parent fits the requirements of the dependency exemption.

Part I of this Article compares the measurement of support used by the government with the real cost of caring for children. Part II examines the meaning of custody, and Part III considers judicial, regulatory, and legislative action that may correct distortions in current law.¹⁷ The Article concludes with several changes that are most likely to provide a reasonable answer to whether and when a divorced father may claim an exemption for his child.¹⁸

I

A SEARCH FOR ECONOMIC REALITY

A. *The Nelson Family Paradigm*

The root of the problem is that the allocation of the dependency exemption is at odds with the dynamic nature of divorced family life. Structurally, the dependency exemption provisions are designed for the *Ozzie and Harriet* family,¹⁹ the “nostalgic, unrealistic, one-size-fits-all familial model” that television portrayed to America in the 1950s.²⁰ Although it is unlikely that the average American family ever resembled the Nelsons,²¹ this type of fictionalized family entered the “public discourse”²² to become the foundation of certain policy decisions, including the dependency exemption.

17. This Article limits consideration of the dependency exemption to the obstacles that affect divorced fathers who have custody of their children, and only incidentally covers issues that affect all parents, noncustodial parents, or members of a child’s extended family.

18. See *infra* Part III.

19. *The Adventures of Ozzie and Harriet* (ABC television broadcast, 1952–1966). This program still appears on cable.

20. Frank Rich, *Ozzie and Harriet Unplugged*, N.Y. TIMES, June 24, 1998, at A25.

21. The real Nelson family suffered from both neglect and addiction. The children’s education was scrapped to work on the show. Ricky became addicted to drugs, was sexually active at fourteen, and virtually abandoned his own children. *Id.*; *Nelson’s Widow Says Drugs, Drink Plagued Marriage*, TORONTO STAR, Aug. 31, 1987, at B1 (releasing statement by Mrs. Nelson that she divorced Rick Nelson to protect children); *Traces of Drugs Found in Rick Nelson’s Blood*, N.Y. TIMES, Feb. 5, 1986, at A17 (revealing that traces of cocaine, marijuana, and painkillers were found in Nelson’s blood after death).

22. Rich, *supra* note 20. See generally John F. Coverdale, *Missing Persons: Children in the Tax Treatment of Marriage*, 48 CASE W. RES. 475 (1998) (asserting that children raised in stable, traditional families have better health, longer lives, and are less likely to suffer abuse). The Growth and Tax Relief Reconciliation Act of 2001 eliminated the marriage penalty for two-earner couples filing a joint return, and continued the marriage bonus for single-earner couples who file joint returns. Growth and Tax Relief Reconciliation Act of 2001, P.L. 107-16, 2001 U.S.C.C.A.N. (115

Based upon the parental and gender stereotypes²³ portrayed by the Nelson model, the federal statute postulates that a state court awards exclusive custody to one parent, whose sole function is providing childcare, and strictly limits visitation rights to the other parent, whose sole function is providing support. At one time, this structure may have typified divorced family groups.²⁴ However, it certainly is not the only style of childcare arrangement that exists today.²⁵

Mothers today are more likely to work, and fathers are more likely to share childcare responsibilities than in 1954.²⁶ The ideal of joint, equal childcare has become a staple of divorce law. For the twenty-first century, the law governing the dependency exemption is a damaging anachronism, and the consequential rancor it fuels between divorced parents has broad economic and social implications, includ-

Stat. 38) 241, 258. Forty-one percent of taxpayers filing joint returns in 1999 had marriage bonuses, while forty-eight percent had marriage penalties. NICHOLAS BULL ET AL., U.S. DEP'T OF TREASURY, DEFINING AND MEASURING MARRIAGE PENALTIES, OTA PAPER 82-REVISED 12 (1999), http://www.ustreas.gov/ota/ota82_revised.pdf.

23. See Eric Schmitt, *For First Time Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1 (noting that in last decade, single parent families headed by women increased at rate almost five times greater than that of two parent families); see also Mary Anne Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1478-83 (evaluating sexual stereotypes in immigration law).

24. "[T]he whole long-running family-values debate is framed, especially by politicians and mass culture, by clichés of little use to real people caught up in the inevitable, and perhaps infinite, permutations of family configurations in modern America." Rich, *supra* note 20; cf. Michael Asimow, *Divorce in the Movies: From the Hays Code to Kramer vs. Kramer*, 24 LEGAL STUD. F. 221, 259-66 (2000); Linda Fitts Mischler, *Personal Morals Masquerading as Professional Ethics: Regulating Banning Sex Between Domestic Relations Attorneys and Their Clients*, 23 HARV. WOMEN'S L.J. 1, 11 (2000).

25. See Thelma Adams, *Acknowledging That Early Age of Awkwardness*, N.Y. TIMES, Apr. 23, 2000, § 2 (Arts & Leisure), at 35 ("In a boom era of two-income families dominated by working mothers who have less time to decide between Cheerios or Trix, Tommy Hilfiger or Levi's, the children are making the choices."); Leslie Eaton, *Show Nanny the Money; As Economy Booms, Pay Rises for Child-Care Workers*, N.Y. TIMES, July 26, 1998, § 1 (Metro), at 27 (nanny's salary runs up to \$800 per week plus benefits; median is \$350); Carey Goldberg, *Single Dads Wage Revolution One Bedtime Story at a Time*, N.Y. TIMES, June 17, 2001, at A1 (reporting that two million single fathers are custodial parents, a rise of fifty percent in ten years); see also Cokie & Steven Roberts, *Marriage Is Back, but What Kind?*, TIMES-PICAYUNE, June 19, 1998, at B7.

26. United States Census Bureau figures for the year 1998 show both parents work in fifty-one percent of American families. AMARA BACHU & MARTIN O'CONNELL, U.S. CENSUS BUREAU, FERTILITY OF AMERICAN WOMEN: JUNE 1998 9, 11 tbl.G (2000). "On average, mothers who had a child in the last year recorded lower labor force participation rates (59 percent) than did other mothers (73 percent)." *Id.* at 8, 10 tbl.F; see also Steven Greenhouse, *Poll of Working Women Finds Them Stressed*, N.Y. TIMES, Mar. 10, 2000, at A15.

ing a great deal of *pro se* litigation. The parents' anger is exacerbated by the hair-splitting precision used to determine which of the divorced parents is entitled to claim their child as a dependent. Parents' efforts to fit their fluid living arrangements into a more rigid and socially unrealistic tax law are further frustrated by the ambiguous terminology of the statute and the lack of comprehensive regulations.

Litigation over the dependency exemption often results in a change in one part of the divorce settlement, while disregarding the economics of the total settlement,²⁷ largely because the Code, unlike the financial arrangement between divorced or separated parents, is compartmentalized. This shift in the allocation of the dependency exemption creates the perception of a windfall to one parent and an unfair loss to the other. Fragmentation of this element of the divorce settlement also encourages a reopening of the divorce process. The federal courts are in a difficult position because the whole relationship adjudicated by state courts is not before them. The fiction that the tax law simply applies to transactions that exist for reasons other than taxation does not work any better in the divorce area than it did in the corporate and partnership areas.²⁸

If, for the sake of argument, we agree that people raising children need more money than people engaged in other economic enterprises, then the subtle shades of meaning which deny some fathers the benefit of the dependency exemption indicate a degree of complexity that belies the goal of a simple and an efficient tax system: "[S]implicity is inherently important, and not merely a luxury that is nice to have once all the technical details have been solved"²⁹ The Code's complexity in this area received heightened criticism from tax practitioners and scholars because of the importance of the dependency exemption to low- and middle-income taxpayers under the current tax law.³⁰ Ironically, the gross complexity of the dependency exemption thwarted Congress's efforts to channel benefits related to the care and

27. *Rownd v. Comm'r*, 68 T.C.M. (CCH) 738 (1994) (holding that noncustodial father who proved he paid more than half of support for nineteen-year-old student was entitled to exemption).

28. See *Simplification of Entity Classification Rules*, 61 Fed. Reg. 66584 (Dec. 18, 1986) (to be codified at C.F.R. pts. 1, 301, 602); cf. *Treas. Reg. § 301.7701-1* (as amended in 1996). Prior to adoption of "check the box" regulations, courts struggled to determine with hair-splitting clarity whether a business entity's essential qualities were more like a corporation or a partnership. See, e.g., *Morrissey v. Comm'r*, 296 U.S. 344 (1935); *Barnette v. Comm'r*, 63 T.C.M. (CCH) 371 (1992); *Larson v. Comm'r*, 66 T.C. 159 (1976).

29. Charles E. McLure, Jr., *The Budget Process and Tax Simplification/Complication*, 45 TAX L. REV. 25, 93 (1989).

30. See *Schenk*, *supra* note 13, at 130-31.

education of children to low- and middle-income Americans.³¹ Plainly, both individual taxpayers and the Treasury will gain by simplifying compliance with the dependency exemption provisions.³²

In summary, the complex jurisprudence relating to the dependency exemption should be simplified and brought into accord with today's social realities. As they currently exist, dependency exemption provisions are not modeled after the economics of raising children, and have little relationship to the division of childcare responsibilities between divorced parents. As a result, the law does not match parental expectations regarding how the exemption should be allocated. Furthermore, the rules for who may claim the exemption easily undermine divorce settlement agreements.

B. *The Support Test: Measuring with Mock Precision*

In 1984, the noncustodial parent lost the primary right to claim the exemption by virtue of minimal child support payments.³³ The tax family morphed from the pre-divorce structure composed of a supporting parent and a dependent spouse and child,³⁴ to a new unit generally

31. Glenn E. Coven, *Bad Drafting—A Case Study of the Design and Implementation of the Income Tax Subsidies for Education*, 54 TAX LAW. 1, 4–5, 42–44 (2000) (emphasizing confusing interaction between dependency exemption and education credits); see Schenk, *supra* note 13, at 128 n.23; see also Michael E. Weber & Laura Y. Prizzi, *Individual Income Tax Returns for 1988: Selected Characteristics from the Taxpayer Usage Study*, SOI BULLETIN, Fall 1989, at 11, 24 (finding that 70.8% of taxpayers do not itemize).

32. See Pamela Olson, *Thoughts on the Impact of Tax Complexity on Small Businesses*, 88 TAX NOTES 1531 (2000) (“[T]he sheer volume of tax law changes has made learning and understanding these new provisions difficult for taxpayers, tax practitioners, and the IRS personnel alike.”).

33. See S. REP. NO. 90-488 (1967), reprinted in 1967 U.S.C.C.A.N. 1527, 1529. (See § 152(e) of the 1954 I.R.C. for tax years beginning after 1967 and ending before 1984). Compare I.R.C. § 152(e) (1954) (presumption that six hundred dollars per child is over half of child's support), with I.R.C. § 152(e)(4)(A)(ii) (2001) (as amended in 1984).

34. See *Comm'r v. Lester*, 366 U.S. 299 (1961) (treating combined alimony and child support as alimony). Alimony, as defined in I.R.C. § 71(b)(1), is income to the recipient and a deduction for the payor. I.R.C. §§ 71(a), 215. The view that the custodial parent and child benefit if the noncustodial parent pays less tax (as opposed to more support) continues despite the changes to the Code. For instance, a divorce court awarded the exemption to the noncustodial parent “in the best interest of the parties, but more importantly, also in the best interest of the child, which in all but exceptional circumstances would translate into an increased support level for child.” *Allred v. Allred*, 835 P.2d 974, 978 (Utah Ct. App. 1992). The overwhelming evidence that most child support is not paid, let alone adequate, did not appear to trouble the court. See generally David L. Chambers, *Fathers, the Welfare System, and the Virtues and Perils of Child Support Enforcement*, 81 VA. L. REV. 2575 (1995); Judith S. Wallerstein, Ph.D., *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 349 (1991); see also Deadbeat Par-

consisting of a custodial parent and a child. The noncustodial parent has no role in the revised tax family. When the focus of the benefit shifted from the family breadwinner to the family caregiver,³⁵ the statute created a presumption that contributions to child support made by either parent were attributable to the caregiver.³⁶

In contrast to the custody requirements, which generally separate parents according to their custodial or noncustodial status, the support provisions combine the amounts of support contributed by each of the parents and attribute all of it to the custodial parent. In other words, there is no “supporting” and “non-supporting” counterpart of the custodial and noncustodial parent.

The policy underlying the dependency exemption and the definition of dependent³⁷ grants a deduction to the person who incurs more than half of the out-of-pocket expenses needed to support a person listed in the statute, in this instance the child.³⁸ Different rules, however, apply to the child of divorced or separated parents. When children receive more than half of their support from either or both divorced or separated parents (and the other conditions of section 152(e) and section 151(c) are met), the parents as a set are entitled to the exemption.³⁹ Thus, the rule applies when either one of the parents or both parents combined provide over fifty percent of their child’s support.⁴⁰ Within that set, section 152(e) then allocates the dependency exemption between the parents. Generally, the relative value of

ents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (stating that owing back child support of over \$10,000 or being two years behind is felony); WIS. STAT. § 29.024(2g) (1999–2000) (revoking fishing license for nonpayment of support); *Marshall v. Matthei*, 744 A.2d 209 (N.J. Super. Ct. App. Div. 2000) (imprisoning parent who hid \$2.74 million overseas to avoid paying support).

35. I.R.C. § 152(e).

36. *See id.* (requiring written declaration that noncustodial parent has provided over half of child’s support for noncustodial parent to claim exemption).

37. *Id.* § 152(a) (defining “dependent”).

38. *See id.* §§ 151(a), (c), 152(a).

39. The Code also requires that dependent children be United States citizens, or residents of the United States or a contiguous country. *Id.* § 152(b)(3); *Fila v. Comm’r*, 55 T.C.M. (CCH) 32, 33 (1988) (holding that resident alien was not entitled to claim children living in Poland as dependents). The Code further requires that in order to receive the dependency exemption, parents must supply the dependant with over half of his support, and separated parents must generally refrain from filing a joint return. I.R.C. §§ 151(c)(2), 152(a), (e). In addition, parents receive the dependency deduction only if the dependant is under nineteen years of age or a student under twenty-four years of age, or if the dependant’s gross income for the calendar year is less than the exemption amount. *Id.* § 151(c)(1)(B). Finally, a child must be born alive for parents to claim the dependency exemption. *Cassman v. United States*, 31 Ct. Fed. Cl. 121, 123 (1994).

40. I.R.C. § 152(e).

the support contributed by each parent individually has no bearing on the proper allocation of the dependency exemption between them. Against noncustodial parents, custodial parents are entitled to the exemption even if they cannot prove the relative amount paid toward the support of the child, as long as they can prove that both parents together contribute over fifty percent of the child's support.⁴¹ This principle corresponds to the economics of raising children. Since single parents spend about the same amount to raise a child as would two parents, child support costs single parents a larger percentage of their income.⁴² To accommodate this difference, the Code allows the custodial parent to waive his or her right to the exemption in favor of the noncustodial parent.⁴³

The following examples illustrate the support attribution rules. Suppose that Barney, a carpenter, and Lorna, a trial attorney, have one three-year-old child, Felix.

Examples:

1. Barney and Lorna divorced in 1999 pursuant to a decree that awarded sole custody of their child, Felix, to Barney. Felix lived with Barney during the year. During the 2001 calendar year, Lorna provided 30% of Felix's support and Barney provided 40% of Felix's support. Since more than half of Felix's support (70%) was provided by both of the parents, and since Barney had physical custody of Felix for more than one-half of the calendar year, Barney met the support requirement of section 152 and is entitled to the exemption. This occurred because the support that the noncustodial parent (Lorna) actually provided was attributed to the custodial parent (Barney). Thus, under section 152(e), Barney is treated as providing 70% of the support and Lorna is treated as providing no support.
2. Assume the facts in Example 1 remain the same, except that Barney provided less than 20% and Lorna provided more than 80% of the expenses attributable to Felix's support during 2001. Again, Barney is entitled to the exemption for 2001.⁴⁴

41. *Id.* § 152(a), (e). *But see id.* § 152(c).

42. LINO, *supra* note 5, at 10. Compared to households with two children, single parents of a young child spend one third more. *Id.* On average the percentage of income to support children is divided among the following major categories of expenses: housing, 33%; food, 18%; clothing, 6%; childcare and education, 10%; and medical care, 7%. *Id.* at Foreward.

43. I.R.C. § 152 (e).

44. *Id.*

In Example 2, the fact that the child's mother, Lorna, contributed the vast majority of the child's support is irrelevant; Lorna's support is wholly attributed to Barney.⁴⁵ In the examples above, Barney may waive his right to the exemption in favor of Lorna, the noncustodial parent.⁴⁶ However, there are some cases where neither parent will be able to take the deduction.⁴⁷

In addition, a third party or the government may challenge the custodial parents' claim to the dependency exemption. The parent claiming the exemption must show that either parent or both parents together provided over fifty percent of their child's support. Thus, if challenged by a third party, or the government, the custodial parent must prove the requisite amount of support.⁴⁸

Unfortunately, the calculation of support is not straightforward. The percentage of support for a child by the custodial parent begins with amounts paid. In addition, the custodial parent's calculation formula will vary according to whether he or she is calculating support for purposes of subsections (a) and (c) or subsection (e) of section 152.⁴⁹

Example:

3. Suppose that Barney, the custodial parent, Dot, his current wife, and Felix, his son from a previous marriage, live in Dot's house. Suppose further that the percentage of the contribution for child support is divided as follows: Dot contributes 40% of the child's support, Barney contributes 30%, and Lorna contributes 30%. What percentage of Felix's support does Barney pay? If subsection (e) applies, Barney provides 100% of the child's support. According to the statutory fiction, Barney should calculate his support as follows:

Barney's actual contribution	30%
Dot's actual contribution	40%
Lorna's actual contribution	<u>30%</u>
Barney's total deemed contribution	100%

45. See *id.* See generally Cindy Lynn Wofford, *Divorce and Separation*, 515-2nd TAX MANAGEMENT (2001) (discussing income tax rules that apply in context of divorce and separation).

46. *Id.*

47. See *infra* notes 111-114 and accompanying text.

48. See *Nwachukwu v. Comm'r*, 79 T.C.M. (CCH) 1411 (2000) (requiring taxpayer to prove that he and his former spouse provided over half of his son's support).

49. See *infra* Examples 13 and 14.

Under subsection (e), Barney must count his own contribution (30%) plus his current wife's contribution (40%).⁵⁰ Barney also adds the amount that his former spouse paid, which must be attributed to Barney as the custodial parent (30%).⁵¹

The computation of support is further complicated by the statute's requirements as to what payments may constitute support. For example, late support payments made in the taxable year after they were due never count as support.⁵² On the other hand, late support checks mailed in the year they were due count in the tally of support payments. Compare the following examples, assuming that all of the statutory elements not at issue are fulfilled.

Examples:

4. During 2000, Lorna, a calendar year taxpayer, paid \$1,000 in child support monthly. Because she was low on cash in December, she paid two checks at once in January of the following year. The amount of the December payment does not count as support in either 2000 or 2001.

5. Assume the same facts as above but Lorna, the noncustodial mother, missed payments for the first six months of 2002. She makes it up by paying \$7,000 in December of that year. The entire payment counts as support.⁵³

The payment in Example 4 will never count as support.⁵⁴ The delayed payment might make both parents ineligible for the exemption, which is another unfortunate result under section 152(e). One might think the rule is intended to discourage late payments of child support, except for the very next rule. The regulations also disqualify

50. I.R.C. § 152(e)(5) (stating that child support paid by spouse of parent counts as payment by parent).

51. *Id.* § 152(e)(1).

52. Treas. Reg. § 1.152-1(a)(2)(iii)(a) (as amended in 1972) (“[A]n arrearage payment made in a year subsequent to a calendar year for which there is an unpaid liability shall not be treated as paid either during that calendar year or in the year of payment”); see *Bower v. Comm’r*, 33 T.C.M. (CCH) 875 (1974); *Casey v. Comm’r*, 60 T.C. 68 (1973); Rev. Rul. 53-220, 1953-2 C.B. 22. *But see Morris v. Comm’r*, 37 T.C.M. (CCH) 336 (1978) (minimal amounts in arrears did not affect exemption).

53. Here it is assumed that the Service will not claim that a portion of the late payment is imputed interest. *Cf. Gammill v. Comm’r*, 710 F.2d 607 (10th Cir. 1982) (concluding that I.R.C. § 483 was not applicable to installment payment of property settlement in divorce); *Fox v. United States*, 510 F.2d 1330 (3d Cir. 1975) (holding that deferred payments not subject to imputed interest where no tax consequences for recipient were intended).

54. Treas. Reg. § 1.152-1(a)(2)(iii)(a).

early payments if the payment is attributable to a future year.⁵⁵ On the other hand, payments made “from amounts set aside in trust by a parent in a prior year, shall be treated as made during the calendar year in which paid.”⁵⁶ Thus, the low- or middle-income custodial parent of a child with a trust fund will likely meet the support requirement of section 152.⁵⁷ Section 152(e) also states that alimony payments do not count as child support.⁵⁸

The regulations dealing with the dependency exemption attempt to accurately and precisely measure the amount of child support donated by the parents or third parties. This finely tuned measurement of support causes an almost comical degree of complexity. The cost of most but not every one of the items that Barney purchases for his son Felix count toward support.⁵⁹ For example, the costs of clothing, medical care, babysitters, and private school count toward support.⁶⁰ Payments that are not normally documented, such as food consumed by the child,⁶¹ are typical of items enumerated by the regulations as

55. *Id.* § 1.152-1(a)(2)(iii)(b) (including lump sum payments “in settlement of the parent’s liability for support”).

56. *Id.*

57. Custodial parents in a high-income bracket cannot use the exemption. *See* I.R.C. § 151(d)(3) (2001) (phasing out exemption for taxpayers whose adjusted gross income surpassed threshold amount after indexing for inflation); *supra* note 12 and accompanying text.

58. I.R.C. § 152(b)(4); *see id.* §§ 71(c), 682(a); *see also* Kennedy v. Comm’r, 339 F.2d 335 (7th Cir. 1964) (finding that child support order does not prove amount paid).

59. *See* Treas. Reg. § 1.152-1(a)(2)(i); *Flowers v. United States*, 57-1 U.S.T.C. (CCH) ¶ 9655 (1957) (discussing expenses for Lionel trains and track); Rev. Rul. 77-282, 1977-2 C.B. 52 (giving advice as to whether televisions and cars are includable in support); Rev. Rul. 76-184, 1976-1 C.B. 44 (giving advice as to whether wedding attire and flowers for reception are includable in support). *But see Flowers*, 57-1 U.S.T.C. (CCH) ¶ 9655 (finding that power lawnmower, speedboat, and rifle not support); *Ginsberg v. Comm’r*, 42 T.C.M. (CCH) 975 (1981) (holding that cost of carpeting for child’s room not support because it is capital expense, but equivalent of children’s portion of one year’s wear and tear allowed); Rev. Rul. 58-67, 1958-1 C.B. 62 (finding that support does not include income tax paid by dependent on his own income). Parents have litigated narrow questions including whether payments made on behalf of the child count as support. *See Sauer v. Comm’r*, 12 T.C.M. (CCH) 1377 (1953) (ruling that life insurance premiums on policy owned by parent with child as beneficiary are not support); Rev. Rul. 58-67 (finding that support includes church contributions, but not income tax paid by dependent on his own income).

60. *Nwachukwu v. Comm’r*, 79 T.C.M. (CCH) 1411 (2000) (finding that dependent’s medical expenses paid by parent’s health insurance do not count as support); *Limpert v. Comm’r*, 37 T.C. 447 (1961) (holding that cost of hiring mother as babysitter can be deducted); *Lovett v. Comm’r*, 18 T.C. 477 (1952) (finding that babysitters count as support); Treas. Reg. § 1.152-1(a)(2)(i).

61. Treas. Reg. § 1.152-1(a)(2)(i). *But cf.* I.R.C. § 274(d) (substantiation required for business meal deduction).

items of support. However, do many taxpayers separately charge the child's food purchased at the supermarket? How many save receipts? If saved, would the receipts indicate that the food was consumed by the child?⁶² "The high degree of precision needed to claim the dependency exemption requires taxpayers to report information that by its nature is difficult to verify and places an often prohibitive tax on honesty."⁶³

Although one generally measures an item of support by its out-of-pocket cost, items classified as in-kind payments have complex valuation rules. Items are first divided into in-kind property and in-kind services. To value property, a parent seeking to establish support must calculate the fair market value of the item provided rather than its actual cost—a process which necessarily creates ambiguity given the difficulty of ascertaining an item's fair market value. For example, lodging is treated as in-kind property according to the regulations. As a result, the taxpayer must count the fair market value of the child's lodging, rather than a portion of the rent or a mortgage payment.⁶⁴ Similarly, if a parent like Barney builds his child a tree house, the amount of support from the tree house is its fair market value; the cost of the wood or other materials Barney uses in its construction is irrelevant.⁶⁵ In the case of the tree house, the fair market value may be more or less than the out-of-pocket cost, depending on the parent's skill.⁶⁶ How one values a tree house is beyond the scope of this Article.⁶⁷ The bottom line, however, remains that although Barney may

62. *Kellogg's Ad Campaign* (1998) (advertising that Frosted Flakes are not only for children). Food, the second largest expense for children, accounts for fifteen to twenty percent of child support. LINO, *supra* note 5, at iii.

63. McLure, *supra* note 29, at 27 (quoting DAVID BRADFORD, UNTANGLING THE INCOME TAX 266 (1986)).

64. *Maclean v. Comm'r*, 14 T.C.M. (CCH) 117 (1955); *see Finn v. Comm'r*, 51 T.C.M. (CCH) 1654 (1986) (holding pro rata division of home's value cut to twenty percent for two children). Housing accounts for between thirty-three to thirty-seven percent of the cost of supporting a child. LINO *supra* note 5, at iii.

65. The use of fair market value is generally thought to resolve conflicts between the custodial parents and third parties in favor of the custodial parent, since it includes the value of Barney's labor as a carpenter. *See Pierce v. Comm'r*, 41 T.C.M. (CCH) 1571 (1981) (allowing mother to include in support calculation children's portion of fair rental value of house).

66. Fair market value is defined by the estate tax regulations, which state that fair market value is what a willing buyer would pay and a willing seller would accept as payment when each is aware of the material facts and neither is under a compulsion to buy or sell. Treas. Reg. § 20.2031-1(b) (as amended in 1963).

67. *Cf. Encyclopedia Britannica v. Comm'r*, 685 F.2d 212 (7th Cir. 1982) (holding that expenditures in preparation of rental property, such as paying the laborers, were capital expenditures and likening this to the labor of a carpenter paid to build rental property). Might the tree house be a capital expense so that merely the value of

include the tree house as an item of support, the amount of such an item is difficult to ascertain. This gives judges a large degree of discretion, which often results in widely varying results in similar situations.

Moreover, this valuation method differs from other items of support under section 152, as well as from the method prescribed for the same item in other sections of the Code.⁶⁸ For example, for purposes of the parent's filing status, the amount of the parent's contribution equals the parent's expenditure for rent and not the fair rental value of the dwelling.

Services provided for a child have yet another set of measurement rules. Services purchased from a third party count as support and are measured by actual cost. In contrast, services provided in kind by the parents implicitly do not count as an item of support.⁶⁹ Generally, the value of services provided by parents to their children has been treated as if the dependents provided the services for themselves.⁷⁰ Although parents are not taxed on the value of the imputed income, they similarly may not attribute the cost of providing the service to support. This holds true even if the parent should be profes-

depreciation counted as support? *See* Ginsberg v. Comm'r, 42 T.C.M. (CCH) 975 (1981) (finding that only wear and tear on new carpeting in child's room treated as support). *But see* I.R.C. § 1015 (2001) (basis of property acquired by gift is lower of fair market value or cost).

68. *See* I.R.C. § 2(b) (stating that, for tax purpose, head of household considered as maintaining household only if head furnishes over half of cost of maintaining household); Gilliam v. Comm'r, 429 F.2d 570 (4th Cir. 1970) (finding that mortgage payments are excluded from calculation of support); Goodsmen v. Comm'r, 51 T.C.M. (CCH) 64 (1985) (holding that support includes fair market rental value of house apportioned pro rata—gas, water, and sewer services, but not telephone service). *Compare* Treas. Reg. § 1.2-2(d) (as amended in 1971) (stating that cost of maintaining household includes property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on premises), *with* Treas. Reg. § 1.152-1(a)(2)(i) (measuring contribution of lodging by fair market value).

69. *See* Markarian v. Comm'r, 352 F.2d 870 (7th Cir. 1965) (finding that taxpayers caring for invalids cannot count value of nursing services or care even though payment to third party would be deductible); Bartsch v. Comm'r, 41 T.C. 883 (1964) (finding that cooking and cleaning do not count towards support); Treas. Reg. § 1.152-1(a)(2)(i) (indicating that fair market value of services provided to child is not listed); BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3][b] (explaining that regulations make no mention of uncompensated personal services); *cf.* Treas. Reg. § 1.2-2(d) (cost of maintaining household does not include value of services rendered in household).

70. BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3][a] n.26 and accompanying text. *See generally* Donald B. Marsh, *The Taxation of Imputed Income*, 58 POL. SCI. Q. 514 (1943) (explaining that economic benefits from wife's services are imputed income and not included in tax base). Imputed income is excluded from the income tax base as a matter of "administrative necessity." ESTIMATES, *supra* note 4, at 5.

sionally adept at providing the service—for example, if the parent cooking for his or her child was a chef.

The following examples illustrate the fine distinctions between services that count as support and those that do not. For this set of examples, assume that Felix is a teenager.

Examples:

6. Suppose that Lorna paid Felix's parking tickets for a car Felix owns. Lorna's payment constitutes support.⁷¹
7. Lorna, a lawyer, provided legal services resulting in the dismissal of Felix's parking tickets. Lorna's services do not count as support.⁷²
8. Assume that the facts in Example 6 remain the same, except that Barney's Aunt Kate owns the car. In this case, the payment does not contribute to Felix's support. This distinction is based upon the principles of assignment of income; because the liability for the parking violation is associated with car ownership, neither Felix nor his parents have a legal obligation to pay the ticket.⁷³
9. Lorna bought Felix a \$500 plane ticket to visit her in New York. Transportation costs of a dependent are elements of support.⁷⁴
10. Lorna spent \$500 on a ticket to visit Felix in Cle Elum, Washington. Generally, the transportation expenses of the parent to exercise visitation are not elements of support.⁷⁵

71. *Taitt v. Comm'r*, 37 T.C.M. 1140 (1978) (including parking tickets in support calculation).

72. *See* Treas. Reg. § 1.152-1(a)(2)(i) (indicating that services in-kind do not count as support).

73. Rev. Rul. 77-282, 1977-2 C.B. 52 (explaining that cost of car counts as support unless donor keeps title); *cf.* *Old Colony Trust Co. v. Comm'r*, 279 U.S. 716 (1929) (finding that payment of income taxes on behalf of employee was additional income to employee). Under *Old Colony*, Aunt Kate has income, but see I.R.C. § 102(a) (payment not income if intended as gift). However, in *Diedrich v. Comm'r*, 457 U.S. 191 (1982), the payment of a gift tax by the recipient of a gift will have the same result as if the donor sold the property for an amount equal to the gift tax. Where the amount of the gift tax exceeds the donor's investment in the property (basis), the donor realizes a taxable gain.

74. Rev. Rul. 77-282 (noting that transportation costs incurred by or for dependent are generally support).

75. *See* *Toponce v. Comm'r*, 27 T.C.M. (CCH) 499 (1968) (finding that transportation for noncustodial parent to visit child was not support); *Schluter v. Comm'r*, 444 F.2d 107 (9th Cir. 1971) (finding that automobile expenses for father's visit, phone calls, and miscellaneous gifts were not support); *Pye v. Comm'r*, 25 T.C.M. (CCH) 451 (1966) (finding that parent's travel expense for visitation was not support); *Vance v. Comm'r*, 36 T.C. 547 (1961) (finding that automobile expenses for driving children to noncustodial parent's home were not support).

In summary, the value of services is included in the measurement of support if (1) the services are purchased from a third party, or (2) they increase the value of property owned by the child. The value of services, however, are not included in support if the parent provides “pure” services. This distinction between property and services that the law presumed in the middle of the twentieth century⁷⁶ may not be as easily adapted to the realities of modern existence. For example, is information property under section 152?⁷⁷ Suppose Barney teaches his son to track bear or Nasdaq stock. Did Barney provide information—property which is counted at its fair market value for support—or merely a service which adds no economic value?⁷⁸

The deviation within the rules regarding property and services for in-kind child support causes complexity without a discernable reason save, perhaps, a kind of “tax neatness.”⁷⁹ The following table illustrates the arbitrary nature of the regulations related to how one measures child support to qualify for a dependency exemption. For purposes of the table, it is assumed that the value of homemade items such as a birthday cake is not priceless.

To review Barney’s tally so far:

76. The Code gives preferential treatment to taxpayers who trade property rather than services. *See, e.g.*, I.R.C. § 721 (nonrecognition of gain or loss on transfer of property in exchange for interest in partnership); *id.* § 1221 (defining capital asset as property held by taxpayer, with some exceptions). *But see id.* § 61(a)(1), (3) (including both wages and profits from sales of property as gross income).

77. *Cf.* George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161, 176 (1977) (describing how ideas for new Clinique and Aramis products were transferred to companies owned by children of Estée Lauder’s principal stockholder to avoid gift tax).

78. It is probably only a matter of time before the distinction between property and services disappears in postmodern society. *See* James Gleick, *Patently Absurd*, N.Y. TIMES, Mar. 12, 2000, § 6 (Magazine), at 44 (“Maybe the trajectories of culture, economics and technology have reached a point where a distinction between idea and machine can no longer be sustained . . .”); *see also* United States v. O’Hagan, 521 U.S. 642 (1997) (finding that adoption of misappropriation of information was predicate of criminal liability under security laws); United States v. Carpenter, 791 F.2d 1024 (2d Cir. 1986), *aff’d*, 484 U.S. 19, 25–27 (1987) (explaining idea that non-confidential information in pre-Internet age was property). In *Carpenter*, the Supreme Court was evenly divided on whether the misappropriation theory applied. *Id.*

79. Charles E. McLure, Jr.’s characterization of legislation dealing with tax shelters as the “vampire approach” could also describe the process of measuring support: “In order to be safe when dealing with a vampire, one drives a stake through the heart, hangs a cross around the neck, places a mirror over the eyes, and fills the coffin with wolfsbane. If this allusion conjures up visions of sucking blood, so be it.” McLure, *supra* note 29, at 62 n.114.

BARNEY'S SUPPORT	NOT BARNEY'S SUPPORT
Current child support checks ⁸⁰	Check for support due last year ⁸¹
Back child support checks due in the current calendar year ⁸²	Check for support due next year
Credit card receipts from Bloomingdale's toddler department ⁸³	Payments by Barney's uncle ⁸⁴
Check to piano teacher ⁸⁵	Transfer of Barney's mother's old Volvo to Felix ⁸⁶
Receipt from McDonald's for Happy Meal	Alimony paid to custodial parent ⁸⁷
Receipt from snowball stand ⁸⁸	Value of parent's services ⁸⁹
Value of homemade birthday cake	Cost of the cake's ingredients
Payments by one's current spouse ⁹⁰	Government or other third party payments ⁹¹
25 cents allowance	Full-time scholarship ⁹²
Value of tree house Barney built for child ⁹³	Cost of the materials for the tree house

Under section 152(e), the tally of support is relevant to parents in the aggregate, as opposed to the individual, sense. Thus, as long as the parents together provide more than half of the child's support, the amount of support is wholly attributed to the custodial parent. The priority of the custodial parent in receiving the dependency exemption, however, is complicated by other subsections of section 152 which influence the determination of support.

1. *The Backdoor Attack*

If section 152(e) does not apply, other claimants may subvert the custodial parent's right to the exemption in at least four sets of circumstances. First, payments from sources outside of the family may defeat the dependency exemption entirely. Second, noncustodial par-

80. See Treas. Reg. § 1.152-1(a)(2)(i) (as amended in 1972).

81. *Id.* § 1.152-1(a)(2)(iii)(a).

82. *Id.*

83. *Id.* § 1.152-1(a)(2)(i).

84. See *infra* note 106.

85. Treas. Reg. § 1.152-1(a)(2)(i); see *supra* note 59.

86. See *supra* note 73.

87. I.R.C. § 152(b)(4) (2001).

88. Treas. Reg. § 1.152-1(a)(2)(i).

89. See *supra* notes 69–70, 72 and accompanying text.

90. I.R.C. § 152(e)(5).

91. See cases cited *infra* note 112.

92. See cases cited *infra* note 113.

93. See *supra* notes 66–67 and accompanying text.

ents could intentionally delay support payments to prevent them from being attributed to the custodial parent. Third, if the child reaches the age of majority and neither parent is the custodian, the dependency exemption may not be claimed by either parent. Fourth, if neither parent alone provides over fifty percent of the support, a multiple-support agreement may shift priority to another claimant for the exemption.⁹⁴ Hence, third parties may defeat the custodial parent's right to the deduction. In effect, under narrow conditions, the statute merely estops the noncustodial parent from claiming support.

In the following examples, benefits provided to the child from sources outside of the family will exceed the amount spent by the parents. In this first category of cases, the child, even one without taxable income, may be entitled to the exemption.⁹⁵

Examples:

11. In the year 2001, Felix received more than half of his support from Social Security. Although Felix may claim a personal exemption, he is not a dependent as defined in section 152.⁹⁶ This holds true even if the source of his support is not taxable and the exemption is wasted. Barney may not claim the exemption even though he is the custodial parent.⁹⁷

12. In May of 2001, Felix won a coloring contest sponsored by a local mall. The value of the prizes was greater in amount than the value of his parents' support.⁹⁸ If the items Felix received are the type usually included in support—guitar lessons, summer camp, clothing, a year's worth of pizza—the child, and not the parents, is entitled to the exemption. On the other hand, if the items were not

94. I.R.C. § 152(c).

95. *Id.* § 151(b) (setting forth allowance of deductions for personal exemption).

96. Treas. Reg. § 1.152-1(a)(2)(ii) (Social Security payments to disabled child may exceed half his support); *see Jones v. Comm'r*, 76 T.C.M. (CCH) 1014 (1998) (finding that mother could not count rent as support when housing was subsidized); *Williams v. Comm'r*, 71 T.C.M. (CCH) 2423, *aff'd*, 119 F.3d 10 (11th Cir. 1997) (unpublished opinion) (finding that support provided by father was significantly less than that provided by state and federal agencies in form of Medicaid, AFDC, food stamps, and subsidized housing benefits). *But see Houtz v. Comm'r*, 25 T.C.M. (CCH) 1468 (1966) (holding that noncustodial father provided over half support, even where all of school tuition was paid by scholarship).

97. I.R.C. § 152(a); *see also Rev. Rul.* 64-223, 1964-2 C.B. 50 (explaining that payments by tortfeasor, his or her insurance company, government medical services to dependents of military personnel, or benefits from dependent's own medical insurance policy are not support). *But see id.* (explaining that premiums on medical insurance policy are included in support). *Cf. Turecamo v. Comm'r*, 554 F.2d 564 (2d Cir. 1977) (finding that Medicare did not count as dependent's own payment); *Rev. Rul.* 79-173, 1979-1 C.B. 86.

98. I.R.C. § 152(a).

for support—savings bonds, life insurance coverage—Barney’s claim has priority over Felix’s right to the personal exemption.⁹⁹

This result occurs because the law effectively presumes that an individual is self-supporting.¹⁰⁰ In contrast, taxpayers claiming another person as a dependent must prove that they provided over half of the claimed dependent’s support.¹⁰¹ The personal exemption cannot be waived.¹⁰²

The limited application of the support attribution rules creates a potential conflict between the custodial parent and an entire universe of potential claimants for the exemption, including, for example, grandparents, uncles and aunts, siblings, in-laws, and unrelated members of the household.¹⁰³

The conflict between the custodial parent and a third party generally occurs where one parent alone does not provide over fifty percent of the child’s support, and either (1) more than half of the support¹⁰⁴ of the child is provided by a third party, or (2) a multiple-support agreement takes effect.¹⁰⁵

The shifting priority rules of the dependency exemption may be expressed by the formula $a > b$, $c > a$, where the custodial parent is a , the noncustodial parent is b , and the third party is c . The following examples compare the amount of Barney’s support under subsection (e) with subsections (a) and (c) of section 152.

Examples:

13. Calculation of support under section 152(e):

Barney’s actual support	30%
Support from current spouse	10%
Support from noncustodial parent	50%
Support from third parties	10%
<hr/>	
Barney’s deemed support	90%

14. Calculation of support under subsections 152(a) and (c):

99. *Id.* § 151(d)(2).

100. *See id.* § 151(b) (rebuttable presumption that taxpayers are self-supporting).

101. *Id.* § 152(a).

102. *Compare id.* § 151(d) (personal exemption), *with id.* § 152(e)(2) (custodial parent can waive dependency exemption in favor of noncustodial parent).

103. *See id.* §§ 151(c), 152(a) (no attribution of support from relative other than spouse or former spouse). *But see* *Jelm v. Comm’r*, 34 T.C.M. (CCH) 100 (1975) (treating payments on behalf of the noncustodial father by his former spouse and others in exchange for father’s release of property rights as support from father).

104. *See* I.R.C. § 152(a).

105. *Id.* §§ 152(c), (e).

Barney's actual support	30%
Support from current spouse	10%
Support from noncustodial parent	50%
<u>Support from third parties</u>	<u>10%</u>
Barney's deemed support	30%

Without the attribution rules of subsection (e), the amount of Barney's support is limited to his actual contribution—here, thirty percent.

The “more than half the support” requirement of the dependency exemption raises a question that is not fully answered by the limited attribution of support to the custodial parent. If the parents and a third party support the child, the custodial parent must consider three following issues in calculating whether the third party provided more than half of the child's support: who contributed, what was the timing of the contribution, and was the contribution support.

2. *Poverty and Mismatched Preferences*

As shown below, these overly complicated priority rules frustrate the role of the dependency exemption as an element used to preserve “the ability-to-pay principle” in our tax law.¹⁰⁶ In the second category of examples, the late payment of child support by the noncustodial parent may cause the custodial parent to lose the exemption because a third party provided more than half of the support for the child in the interim.¹⁰⁷

Example:

15. Suppose that in the current year, Barney earned \$20,000 in wages and took the standard deduction.¹⁰⁸ Barney paid \$2,000 to

106. Schenk, *supra* note 13, at 130–31. To illustrate how the application of the current statute fails to respond to the needs of families with children, consider the following. Grandmother buys Felix his own hot air balloon and hires a pilot to transport him. This cost is greater than the amount of ordinary support items, e.g., food, provided by the parents. Barney claims the exemption for Felix. Under current law, Grandmother is entitled to the dependency exemption and cannot waive the exemption in favor of Barney. See I.R.C. § 152(a); *cf. id.* § 152(e)(2) (explaining that only custodial parent can waive exemption). See generally BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3][a] (commenting on scope of “support”). The issue that is unsettled is whether one examines the category of payment (clothing, food, education) or whether one examines the cost of the item (shoes by Manolo Blahnik compared to shoes from Payless).

107. A payment of support does not include any payment treated as alimony. I.R.C. § 152(b)(4); see also *id.* §§ 71(a), 682. Also excluded is any amount paid in the calendar year to discharge a child support arrearage from an earlier year. *Casey v. Comm'r*, 60 T.C. 68 (1973); Treas. Reg. § 1.152-1(a)(2)(iii) (as amended in 1972).

108. Barney's tax liability for the year 2000, when Felix is his dependent:

support Felix. Lorna, the noncustodial parent, paid \$6,000, and Barney's mother paid \$7,750. Of Lorna's \$6,000 payment, \$3,000 was child support owed during the prior year. In this case, the parents did not pay more than half of the child's support. Hence, section 152(e) does not apply, and Barney will not be able to take the exemption. According to the regulations, \$5,000 (not \$8,000) is the amount of support credited to Barney.

Because the grandmother paid over half of Felix's support, she may be entitled to claim the exemption under the provisions of section 152(a). Although this result is logical, it may not coincide with the expectations of the grandmother or the parents. Subsection (a) does not have a waiver provision.

The dependency exemption has a significant effect on Barney's tax liability, including his eligibility for tax benefits under other provisions of the Code.¹⁰⁹ Without the dependency exemption, Barney loses the tax credits which were only available to him if he claimed the exemption. In Example 15, Barney's tax liability will increase by \$1,228, from -\$485 to \$743 for the 2000 tax year. If the grandmother had the same income as Barney, she saves only \$920 by claiming Felix as her dependent.¹¹⁰ Thus, even if one views the benefit in relation

Adjusted Gross Income	\$20,000	
Standard Deduction	(6,450)	(Head of Household)
	<u>13,550</u>	
Dependency Exemptions	<u>(5,600)</u>	(Barney & Felix \$2800 × 2)
Taxable Income	7,950	
Tentative Tax	1,196	
Child Tax Credit	(500)	
Earned Income Credit	<u>(1181)</u>	
2000 Tax Liability (Refund)	(485)	

109. The dependency exemption is requisite to the \$500 Child Tax Credit. Parents of older children may also be eligible for education credits which, like the Child Tax Credit, depend on the exemption. Thus, for tax year 2000, a parent with Barney's income would be able to receive \$1,500 for the Hope Education Credit. On the other hand, some benefits depend upon physical custody rather than the exemption. Here, Barney files as a head of household and is eligible for the Earned Income Credit.

110. Assuming the same income as Barney, the grandmother's tax liability for the tax year 2000 would be as follows:

Adjusted Gross Income	\$20,000	
Standard Deduction	<u>(4,400)</u>	(Single)
	15,600	
Dependency Exemptions	<u>(5,600)</u>	(Grandmother & Felix)
Taxable Income	10,000	
Tax	1,504	
Child Tax Credit	(500)	
Earned Income Credit	<u>0</u>	
2000 Tax Liability	1,004	

to the extended family, Barney and the grandmother pay a combined \$308 more in taxes than if Barney were able to claim the exemption. Barney's higher tax bill¹¹¹ is not offset by the grandmother's tax savings, and the grandmother's savings do not necessarily benefit the dependent child.

Example:

16. Assume the facts in Example 15 remain the same, except that the payments came from a private children's charity rather than from the grandmother. In this situation, a charity cannot claim the exemption, although courts have split on whether the custodial parent can.¹¹² If Felix receives a scholarship for nursery school, the

The grandmother does not have the same tax benefits as Barney. Without custody, she must file as single and she does not meet the requirements for the Earned Income Credit.

111. Barney's tax liability for the tax year 2000 without the dependency exemption:

Adjusted Gross Income	\$20,000	
Standard Deduction	(4,400)	(Single)
	15,600	
Dependency Exemptions	(2,800)	(Barney)
Taxable Income	12,800	
Tax	1,924	
Child Tax Credit	0	
Earned Income Credit	(1,181)	
2000 Tax Liability	743	

Barney's loss is not equal to the grandmother's gain.

112. *Compare* Lutter v. Comm'r, 514 F.2d 1095 (7th Cir. 1975) (per curiam) (finding that support did not exist because AFDC payments exceeded noncustodial parent's contribution), *aff'g* 61 T.C. 685; Leggett v. Comm'r, 35 T.C.M. (CCH) 21 (1976) (finding that welfare payments constituted support by agency rather than by either parent); *and* Rev. Rul. 57-344, 1957-2 C.B. 112 (explaining that survivor's benefit under Social Security treated as child's own contribution), *with* Turecamo v. Comm'r, 554 F.2d 564, 576 (2d Cir. 1977) (finding that Medicare hospitalization, because of "random and contingent" nature, did not defeat dependency exemption). In *Turecamo*, the Second Circuit looked to the "established economic relationship" between the taxpayer and the dependent. *Id.* at 576. The court found, comparing the government benefits with private hospital insurance which would not have altered the taxpayer's right to the dependency exemption, that to deny the claim would be "to ignore the economic substance of . . . Medicare in deference to formal characteristics." *Id.*; *cf.* Lindauer v. Comm'r, 15 T.C.M. (CCH) 896 (1956) (finding that veteran's benefits exceeded taxpayer's support payments to son); Abbott v. Comm'r, 13 T.C.M. (CCH) 113 (1954) (finding that Medicare from public health service provided over one-half of support for dependents in 1950). *But see* Archer v. Comm'r, 73 T.C. 963 (1980) (ruling that Medicaid payments not counted against taxpayer). *See generally* Bruce I. McDaniel, Annotation, *Effect of Receipt of Governmental Welfare or Social Security Benefits by Individual Claimed as Dependent of Another on Dependency Support Requirements of 26 USCS § 152(a)*, 46 A.L.R. FED. 931 (1980) (explaining effect of receipt of governmental welfare or Social Security benefits in measuring support for individual claimed as dependent). Many of the cases appear to

treatment of the benefit is uncertain and may count against Barney.¹¹³

Where courts reject the parent's claim to the dependency exemption, the child, himself, has a residual right to the exemption.¹¹⁴ For low-income families, this usually means that no one receives the benefit from the exemption.¹¹⁵

The mismatched priorities of the current statute may cause the custodial parent to lose the exemption in other situations. For example, a lavish gift from a grandfather may defeat the custodial parent's claim to the exemption.¹¹⁶ A literal reading of the statute indicates that if the parents and a third party, such as a grandparent, each furnish exactly one-half of the child's support, none are entitled to the exemption.¹¹⁷ Moreover, although the tax consequences may not be desired by the donor grandparent, there is no waiver provision under subsec-

respond to the pre-1984 Code, where the noncustodial parent could claim the exemption even when paying the minimal \$600 support required by the statute.

113. Compare I.R.C. § 152(d) (2001) (scholarships do not count against parents), with *Manning v. Comm'r*, 29 T.C.M. (CCH) 1707 (1970) (finding that scholarship where dependent is not full-time student counts against parental support).

114. I.R.C. § 151(a) (rebuttable presumption that taxpayer is self-supporting).

115. Inflexibility is the root of the problem. In some cases, the family would benefit if the custodian were able to waive the exemption in favor of a third party. Again, the current statute frustrates the financial arrangements between the child's parents and the child's extended family. For instance, suppose Barney contributes 20%, Lorna contributes 35%, and Granny contributes 45% of support for Felix. Under current law, since Lorna and Barney contribute over half of Felix's support, Barney as the custodial parent is entitled to the exemption. He can waive the exemption in favor of Lorna but cannot waive it in favor of Granny. A broad waiver provision which would permit the custodial parent to waive the exemption in favor of another person whom the Code authorizes to claim the exemption—in this case, Granny—may increase taxpayer autonomy in family financial matters. However, it may also lead to abuse of the exemption or encourage the outright sale of the exemption—for example, by parents to their landlord. See *id.* § 152(a)(9) (“dependent” may include unrelated parties); see also James P. Holden, *ABA Recommends Simplification of Eligibility Requirements for Receiving a Dependency Exemption*, 86 TAX NOTES TODAY 48-140, at ¶ 4 (Mar. 10, 1986) (reprinting American Bar Association letter to John Colvin, Chief Counsel for Senate Finance Committee, regarding an ABA Tax Section Task Force on the dependency exemption recommending minimum support payment “to prevent tax arbitrage”), LEXIS, Taxation, Treatises & Analytical Materials, Tax Analysts.

116. See I.R.C. § 152(a) (listing children, stepchildren, and descendants among dependents); BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3][a] (stating that scope of support goes beyond necessities to include gifts, private school tuition, and vacations). Thus, because expensive gifts such as private school tuition or sports cars generally exceed conventional support items such as food, clothing, and shelter, parents may be prevented from claiming exemption when a third party provides such gifts to the child and are in excess of parental support. But see MARJORY A. O'CONNELL, *DIVORCE TAXATION* ¶ 4308 (2001) (“modest luxuries” and “nonextravagant gifts”).

117. See BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3].

tion (a).¹¹⁸ However, if the parent claims the exemption and the grandparent does not, cases under prior law indicate that at least some judges may be unlikely to interpret the statute in a way that will deny the exemption entirely. For example, under the 1967 statute, the court permitted the parent who paid some support, but less than the six hundred dollars per child required by the statute, to claim the exemption in cases¹¹⁹ where the other parent made no claim.¹²⁰

Unlike the examples of government aid or generous grandparents, which are likely to be serendipitous rather than intentional, a noncustodial parent could use the multiple-support agreement as a weapon to defeat the custodial parent's right to the dependency exemption. By statute, a multiple-support agreement will override the custodial parent's right to the exemption.¹²¹ In the third category, a noncustodial father able to prove that he paid more than half of the support for his son, a full-time college student, captured the exemption from his former spouse.¹²² Since the nineteen year old was no longer a minor under Georgia law, the state's custody decree was no longer applicable. The tax court held that a parent who lived with his or her child is no longer a "custodian" once the child reaches the age of majority. It followed that subsection (e) did not apply. Where ordinary items of support were less than college tuition, the former custodial parent would lose the exemption. For example, a decree awarding the exemption to the custodian until the child was twenty-one would ex-

118. *Cf.* I.R.C. § 152(e)(2) (only custodial parent can waive exemption). If the gift were made to the parent who then gave it to the child—in other words, if the parent acted as a conduit between grandfather and child—a court may collapse the two transactions into one with the same effect. *See Helvering v. Elkhorn Coal Co.*, 95 F.2d 732 (4th Cir. 1937) (articulating step transaction doctrine); *Morrill v. United States*, 228 F. Supp. 734 (S.D. Me. 1964) (finding that trust income used for school tuition was income to grantor father).

119. For pre-1985 divorce or separation instruments, a noncustodial parent who provides at least six hundred dollars presumptively provides more than half of the child's support. I.R.C. § 152(e) (1954); Act of July 18, 1983, Pub. L. No. 98-369, § 423(a), 98 Stat. 799 (1984).

120. *Prophit v. Comm'r*, 470 F.2d 1370 (5th Cir. 1973), *aff'g* 57 T. C. 507 (1972) (finding that although father did not pay either statutory minimum or half of each child's support, he was entitled to exemption); *Dawkins v. Comm'r*, 61 T.C.M. (CCH) 2667 (1991) (finding that father, living under same roof as former spouse and children, entitled to exemption because provided over half of support—no waiver by former spouse required).

121. I.R.C. § 152 (c)(1), (e)(3) (multiple-support agreements).

122. *Rownd v. Comm'r*, 68 T.C.M. (CCH) 738 (1994). In such cases, at the time of the divorce, the parties and the divorce court may have presumed that the custodian will continue to claim the exemption until the child completes school. *See* I.R.C. § 152(c)(1)(B) (stating that full-time student between nineteen and twenty-four can be claimed by the parent who pays more than half of support).

pire three years earlier for federal tax purposes. The fourth category of Examples demonstrates how the priority rules shift between the multiple-support provision and the divorced or separated parents provision. Assume that support is the only matter at issue, that Barney is the custodial parent of Felix, and that Lorna is the noncustodial parent.

Examples:

17. Lorna contributed 51% of Felix's support. Barney contributed 10%. Under section 152(e), the contributions of both mother and father are tallied as Barney's contribution to Felix's support. Barney receives the dependency exemption.

18. Lorna contributed 42% of Felix's support; Barney contributed 9%. Under subsection (e), Barney receives the exemption.

19. Assume the facts in Example 18 remain the same, but in addition to the contribution by the child's parents, Barney's brother, Uncle Jimmy, furnished 12% of the support for Felix. Lorna's father contributed the remaining support. In this situation, Barney's claim to the exemption is vulnerable to attack from a multiple-support agreement.

Apply subsection (c) to the facts in Example 19. Although none of the eligible individuals independently contributed more than one-half of Felix's support, they collectively provided for more than one-half of Felix's support. Any one of these persons could claim Felix as a dependent if he or she contributed more than one-half of Felix's support;¹²³ any one of these persons could still benefit from the exemption if the other third parties so agree. For example, Jimmy furnished over ten percent of Felix's support.¹²⁴ If the grandparents and Lorna file a written declaration that they will not claim Felix as a dependent,¹²⁵ Jimmy may claim Felix as a dependent under subsection (c) and thereby defeat Barney's right to the exemption under subsection (e).¹²⁶ Moreover, Uncle Jimmy is not the only third party who could wrest the dependency exemption from the custodial parent as a result of a collective waiver¹²⁷—the waiver could also favor the grandmother or the grandfather.¹²⁸ Thus, if members of the child's extended family cooperate in providing a waiver, the grandmother, grandfather, or Jimmy could benefit from the exemption. Under a

123. I.R.C. § 152(c)(2).

124. *Id.* § 152(c)(3).

125. *Id.* § 152(c)(4).

126. *Id.* § 152(e)(3).

127. *See id.* § 152(a)(6).

128. *See id.* § 152(a)(1).

carefully constructed split in percentage of support between the custodial parent (less than 10%), the noncustodial parent (less than 50% but over 10%), and other relatives, the multiple-support agreement enables the noncustodial parent to lift a tax benefit from the custodial parent.¹²⁹

Note that Lorna, herself, cannot defeat Barney's rights under subsection (e).¹³⁰ Under a multiple-support agreement, neither the contribution of the custodial parent's current spouse nor that of the former spouse is attributed to him. Here, since Barney's contribution is only nine percent, he is not a necessary party to the multiple-support agreement.¹³¹ The multiple-support agreement provision trumps subsection (e) and thereby may lend itself to machinations of the noncustodial parent.¹³²

According to the statute, Examples 17 and 19 achieve the following different results despite similar factual predicates: a noncustodial mother who contributes more than 51% of her child's support cannot affect the custodial parent's right to the deduction, but a mother who contributes less than 50% (but more than 10%) can defeat the right of the custodial father who contributes less than ten percent. Thus, Barney as the custodial parent is entitled to the exemption under subsection (e) in Example 18, but Lorna can strip him of the exemption under subsection (c) in Example 19 as a result of multiple-support agreements. The statute clearly states that subsection (c) has priority over subsection (e).¹³³ If there is a perceived risk that the custodial parent spends less than the value of the dependency exemption in support, such a risk seems more cost-effective than the audit of the infor-

129. See Treas. Reg. § 1.152-3(b) ex. 2 (as amended in 1963) (stating that family member who contributes less than ten percent of dependent's support is not required to file written declaration regarding support); cf. Holden, *supra* note 115, ¶ 5 (recommending an amendment to multiple-support provision to require participation of both parents).

130. I.R.C. § 152(e). *But see* Treas. Reg. § 1.152-1(a)(2)(iii)(a) (as amended in 1972) (stating that late payment of support may spoil custodian's right to exemption).

131. I.R.C. § 152(c)(4).

132. See *generally id.* § 152(c)(1) (stating that Service will consider over half of support received from taxpayer if no one person contributed over fifty percent of support); § 152(c)(3) (ten percent contributors may enter into multiple-support agreement); § 152(e)(3) (exception for multiple-support agreements); Treas. Reg. § 1.152-4T(a)(Q2), (A2) (as amended in 1984). The multiple support provision cut the funds presumed to be available to the person providing care for the child when the support obligations of each parent were determined.

133. The statute implicitly requires that a third party be part of a group that together contributes over fifty percent of child support. I.R.C. §§ 152(c)(2), 152(c)(4) (indicating that parent who contributes less than ten percent of support is not necessary party to agreement).

mation currently required. The amount the government risks is minimal, since only one taxpayer can claim the exemption.¹³⁴ These problems disproportionately affect low-income taxpayers because multiple-support agreements are more common among lower-income taxpayers.¹³⁵

C. *Symbols and Kidnapping*

The inconsistent methods of allocating the exemption contained in the Code cause results that are mercurial and sometimes nonsensical. Section 152 produces long-reaching and incoherent consequences that makes one wish to “pull the current income tax code out by its roots and throw it away so it can never grow back.”¹³⁶ To view the section merely as a tax deduction misses its symbolic character.

In the fall of 2000, the tax code took on the horrific coloration of a Freddy Krueger movie. The Internal Revenue Service denied parents of a kidnapped child the dependency exemption, prompting a strong public outcry that indicated the emotional response Americans felt to the denial of the exemption generally.¹³⁷ This event drew the attention of ordinary taxpayers to the inane logic of the Code’s dependency exemption provision. Initially, the IRS required the parents to prove that they provided more than one-half of the child’s support for the year of the kidnap.¹³⁸ In the aftermath of nationwide media criti-

134. *Id.* § 151(d)(2) (stating that taxpayer allowed, but not necessarily claimed, as dependent on another’s return loses personal exemption).

135. See Janet Spragens & Nina E. Olson, *Tax Clinics: The New Face of Legal Services*, 88 TAX NOTES 1525 (2000) (explaining that low-income taxpayers most likely to be audited).

136. *Replacing the Federal Income Tax: Hearings Before the House Comm. on Ways and Means*, 104th Cong. 4–5 (1995) (statement of Rep. Bill Archer, R-Tex., Chairman, House Comm. on Ways and Means).

137. I.R.S. Chief Counsel Advice No. 200034029 (July 25, 2000), <http://ftp.fedworld.gov/pub/irs-wd/0034029.pdf>; see Bonner Menking, *No Dependency Exemption for Kidnapped Child, Says IRS*, 88 TAX NOTES 1198 (2000). Technically the parents did not support the child after the kidnapping. Implicitly, the Service based their holding on the assumption that the child was dead. A different result could have been achieved under current regulations by assuming that the child was temporarily absent. Treas. Reg. §§ 1.152-1(b) (as amended in 1972) (nonpermanent absence because of illness, business, education, military service, custody agreement, or hospitalization after birth), 1.152-2(a)(2)(ii) (as amended in 1973) (temporary absences); David Cay Johnston, *I.R.S. Rules That Kidnapped Child Earns One-Year Exemption*, N.Y. TIMES, Aug. 31, 2000, at C2 (quoting Jonathan Barry Forman). *But cf.* El-Fadly v. I.R.S., 84 A.F.T.R.2d (RIA) 6478, *aff’d in part, rev’d in part*, 198 F.3d 253 (9th Cir. 1999) (unpublished opinion) (finding that son living with former spouse in Egypt was not “temporarily absent”), *cert. denied*, 530 U.S. 1264 (2000).

138. Menking, *supra* note 137 (stating that neither keeping child’s room nor searching for child counted as support).

cism, an upper-level revision of the determination presumed that the parents supported the child in the year of the kidnapping, since they alone would be entitled to the exemption. Unlike the original determination, the exemption for future years was not determined.¹³⁹

In a rush of taxpayer outrage, a bill that granted the deduction to the parents of a kidnap victim until the child was found dead or reached age eighteen¹⁴⁰ was signed into law during former President Clinton's final days in office. This notorious incident¹⁴¹ showed that the fine distinctions drawn between what is or is not an item of support—and its precise valuation—work to disadvantage all custodial parents, not only divorced and separated parents.

139. I.R.S. Chief Counsel Advice No. 200038059 (Sept. 22, 2000), at <http://ftp.fedworld.gov/pub/irs-wd/0038059.pdf>.

140. An Act of Dec. 21, 2000, Pub. L. No. 106-554, 2000 U.S.C.A.N. Appendix G (114 Stat. 2763, 2763A-634) (amending I.R.C. 151 (c)(6)) (stating that missing children treated as dependent for head of household or surviving spouse status, personal exemption, child credit, Earned Income Credit). Unlike the House bill, passed unanimously on September 26, 2000, the final legislation did not affect a case concerning parental kidnapping where a *pro se* taxpayer argued his child was income producing property under California law in order to claim a casualty loss deduction as well as the dependency exemption, head of household status and the Earned Income Credit. *Otmishi v. Comm'r*, 41 T.C.M. (CCH) 237 (1980). *But cf.* *Ginesky v. Comm'r*, 68 T.C.M. (CCH) 1122 (1994) (granting taxpayer, defrauded by Don Juan met through personal ad to whom she gave access to her bank accounts and credit cards—even after learning that he began their romance from federal prison—casualty deduction of \$120,000 when he disappeared a few months after his release). The provision does not apply to children who are kidnapped by family members, and it does not allocate the deduction between parents who divorce after the kidnapping. Parents who kidnap their children pass the relationship requirement, and nothing in the statute (including the recent kidnapping amendment) or the regulations specifically disqualifies their right to the exemption. In the case of parental kidnapping, under the current statute, when a person with the proper relationship to the child (parent) does pay the support, the question is who is more deserving of the deduction: the kidnapping parent or the parent with legal custody? *But see* *Rownd v. Comm'r*, 68 T.C.M. (CCH) 738 (1994) (holding that where custody arrangement no longer applied because daughter turned nineteen, but was still a student, court presumed that custodian would continue to claim exemption until child completed school). Kidnappers cannot claim an unrelated child as a dependent. I.R.C. § 151(c)(6) (2001) (relationship violates local law).

141. Representative Jim Ramstad of Minnesota, the author of the bill, called the Service “morally challenged” for “[a]dopting its best bean-counter attitude toward the parents of the victim.” Jim Ramstad, *P-I Opinion, Exemption Still Due Parents of Kidnapped Kids*, SEATTLE POST-INTELLIGENCER, Sept. 30, 2000, at A11, LEXIS, Nwsgrp File. “Missing children often do not return. But is a Form 1040 the place to rip hope out of parents’ hands?” Menking, *supra* note 137. On the other hand, some commentators viewed policy decision of this scale inappropriate for the IRS. “The legislation doesn’t address what happens if the marriage dissolves in the wake of the kidnapping.” Bonner Menking & Warren Rojas, *House Unanimously Backs Exemption for Kidnapped Kids; IRS Goes Along*, 89 TAX NOTES 34, 35 (2000) (quoting Virginia Williams). Additionally, there is the question of whether courts will be “able to make a custodial parent determination in the absence of the child.” *Id.*

Neither the new statute nor the Service's revised determination address the vague language of section 152 that has potentially negative effects on all parents, and not merely those whose tragically extraordinary circumstances excited the sympathy of Congress. The statute does not eliminate the cause of the problem, which is the Code's refusal to presume that parents support their children. For instance, according to the Code, the person who pays more than one-half of a child's support is entitled to claim the dependency exemption. If children then receive Social Security benefits, a scholarship to summer camp, or medical benefits which total more than the support supplied by their parents, the Service will challenge the parent's deduction on the grounds that the third-party payments exceed one-half of the amount of the child's support. As a result, the child cannot be claimed on the parents' return and will be entitled to the personal exemption.¹⁴² With irony worthy of public outrage, the child may not have taxable income, and thus receive no benefit from the parents' loss.

Under the Code, proof that the taxpayer supported a dependent is identical for children or for dependent adults such as a brother or uncle.¹⁴³ In the latter cases, because it is assumed that adults support themselves, it is reasonable to require proof that one adult is supporting another.¹⁴⁴ For adults, the presumption that the dependent is a self-supporting individual conforms to common sense. For children, it does not. The requirement that parents prove support is almost always contrary to economic reality and human intuition.¹⁴⁵ The wording of section 152 regarding dual eligibility for the dependent exemption is an unnecessary relic from the 1954 Code, when it was possible for both the dependent child and the parents to claim a personal exemption.¹⁴⁶ The statute, however, was amended to preclude more than one

142. See I.R.C. § 152(a)(1). Although payments to crime victims are not income, whether the payments to the orphans of September 11 will compromise the surviving parent's claim to the exemption is not clear. A ruling by the IRS that the payments do not count against parents will forestall another political blunder by a literal minded government employee. The payments are analogous to life insurance proceeds or tort recoveries and should be excluded from income and should not affect the dependency exemption.

143. *Id.* § 152(a).

144. See *Cotton v. Comm'r*, 80 T.C.M. (CCH) 594 (2000) (finding that taxpayers who fail to show amount of support from all sources could not prove they provided over half of that amount in claiming dependency exemption for adult family members).

145. Note, *Burnet v. Wells and Constructive Receipt of Income*, 22 IOWA L. REV. 390, 405 (1937) (stating that parents have unquestioned duty to support their children).

146. I.R.C. § 152(a).

individual from claiming the same person as a deduction.¹⁴⁷ The lingering requirement that parents prove support of their children is likely to be tested when, as in the kidnapping example, the extraordinarily dire circumstances of the denied exemption draw public attention. In more ordinary times, parents who are denied the deduction may experience private moments of anger at the lack of congressional acknowledgement.¹⁴⁸

II

CUSTODY, ANTHROPOLOGY, AND THE LINGUISTICS OF THE CODE

In theory, the tax benefits available to the family when parents live together follow the child after divorce.¹⁴⁹ This shifts the benefit of the exemption to the custodial parent, who is more likely to be in a lower tax bracket than the noncustodial parent.¹⁵⁰ As previously explained, the structure of the exemption assumes that one of the divorced parents will function as custodian of the child, and the other parent will function as the economic provider. The Code then seeks to identify the one true custodial parent. This division of functional roles

147. Where parents provide over fifty percent of their child's support, the dependency exemption precludes the child from claiming the personal exemption. I.R.C. § 151(d)(2) (stating that taxpayer allowed, but not necessarily claimed, as dependent on another's return loses personal exemption). A child with income may be required to file a return. *See id.* §§ 151(c)(3), (4) (relating definition of child to age, under nineteen, or student status between nineteen and twenty-four years). Under prior law, a child generated two exemptions. If the parent paid over half the child's support and the child had earned income, both the parent and the child were able to claim the child on their respective returns. *See* Treas. Reg. § 1.152-1(c) (as amended in 1972); H.R. REP. NO. 99-841, at II-7 to II-10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 4075; *see* H.R. REP. NO. 100-1104, Vol. II, at 142-43 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5048, 5202-03 (stating that for taxable years after 1988, students over twenty-four who have gross income over exempt amount cannot be claimed as dependents).

148. An ABA Tax Section Task Force on the dependency exemption, chaired by Prof. Deborah H. Schenk, recommended in 1986 that parents who provide an amount equal to or above the amount of the dependency exemption be presumed to support the child. If parents provided less, the parents should still be presumed to support the child as long as no third party provided support equal to or above the exemption. Holden, *supra* note 115, at ¶ 5.

149. *See* Wooten v. Comm'r, 79 T.C.M. (CCH) 1526 (2000) (finding that primary residence of children—their father's house—established him as custodian and thereby mother was not entitled to head of household status or full amount of Earned Income Credit).

150. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, MONEY INCOME IN THE UNITED STATES, 1999 xix (2000) (reporting that, based on official definition of income, households headed by single mothers earn almost forty thousand dollars less than households with married parents), <http://www.census.gov/prod/2000pubs/p60-209.pdf>.

crumples in practice.¹⁵¹ When the family's childcare arrangements contradict this statutory model, the benefit of the exemption is problematic. For example, custody is commonly awarded to both parents jointly, and often custody varies as the needs of the child or the parents change.¹⁵² In addition, courts sometimes award sole physical custody to one parent but joint legal custody to both parents, or award joint legal and physical custody.¹⁵³ Thus the term "custody" itself has multiple meanings.

A. *Carpe Diem: Why Theory Fails*

To borrow terminology from corporate law, custody may exist in both a *de facto* and a *de jure* sense.¹⁵⁴ *De facto* custody is analogous to actual physical custody, while *de jure* custody is analogous to the legal right to physical custody as determined by a writing, such as a divorce decree, or state law.

Although section 152(e) currently fails to distinguish between *de facto* and *de jure* custody, this does not always create a problem. For example, if the decree does not separate legal and physical custody, and the child lives with one parent, then the allocation of the exemption is clear. However, custody determinations in situations where the parents' actions conflict with a decree or divorce instrument or where the decree awards joint legal custody are particularly bewildering.¹⁵⁵ In joint custody situations, it may be difficult for courts and for par-

151. See *Hughes v. Comm'r*, 79 T.C.M. (CCH) 1945 (2000) (granting dependency exemption to noncustodial father where children spent weekends and school vacations with their father, and their mother did not file tax return). In *Hughes*, the I.R.S. challenged support but not custody.

152. See, e.g., LA. CIV. CODE ANN. art. 132 (West 1999) (preferring joint custody unless agreement or best interests of child otherwise). Further, there is often a gap in the time between when parents separate and when they or a court determines custody. Contested custody cases cause unbearable delays of eight months to a year for children waiting to find out where they will land. Somini Sengupta, *In Custody Battles, Children Get Unequal Time*, N.Y. TIMES, Apr. 23, 2000, § 4 (Week in Review), at 3 (referring to comments of Judge Joseph M. Lauria, New York City Family Court Administrative Judge). The delay in a state court determination of custody will in turn make the allocation of the dependency exemption under the statute difficult to apply.

153. See VA. CODE ANN. § 20-124.1 (Michie 2000) (citing three different definitions of "joint custody").

154. See *S.-Gulf Marine Co. No. 9, Inc. v. Camcraft, Inc.*, 410 So. 2d 1181 (La. Ct. App. 1982); *Cantor v. Sunshine Greenery, Inc.*, 398 A.2d 571 (N.J. Super. Ct. App. Div. 1979).

155. "In the event of so-called 'split' custody, or [the absence of a controlling decree], 'custody' will be deemed to be with the parent who . . . has the physical custody of the child for the greater portion of the calendar year." Treas. Reg. § 1.152-4(b) (as amended in 1979).

ents themselves to determine which parent had *de facto* custody for the greater part of the year. Even in cases where *de facto* custody is clear, the expectations of each of the parents may be in conflict.¹⁵⁶ The following examples illustrate how the Code applies.

Examples:

20. The parents divorced pursuant to a decree that awards sole custody of Felix to Barney, and Felix lives with Barney at all times during the year. Barney is the custodial parent, and Barney is therefore entitled to the exemption. Barney has *de jure* and *de facto* custody.

21. Barney and Lorna were divorced pursuant to a decree, effective November 30, 2000, that awarded them joint legal and physical custody of Felix and Lorna. The divorce decree provided that during the remainder of 2000, Felix would alternate living with each of the parents weekly. Custody was to change each week on Sunday night at 6 p.m. Barney's custody began on Sunday, December 1. Under the Code, it is unclear which parent may claim custody on Sundays.

22. Barney and Lorna were divorced pursuant to a decree that awards sole custody of Felix to Barney. The child, however, actually lived with Lorna for most of the year. Each parent claims to be the custodial parent and therefore entitled to the exemption. The mother is the *de facto* custodial parent, and the father is the *de jure* custodial parent. Neither the statute nor the regulations clarify the distinction between legal and physical custody. As a result, it is unclear which parent receives the exemption. The regulations refer to physical custody, but also defer to a decree establishing custody, presumably legal custody.

23. Barney and Lorna were divorced pursuant to a decree that awards joint custody of Felix to his parents. Felix alternates his time between parents, who do not keep track of the time the child spends with each. Each parent argues that he or she is the custodial parent. Here again the Code and the regulations are ambiguous.

The inherent ambiguity in section 152(e) could potentially result in outrageous tax consequences when *de facto* and *de jure* custody conflict. The following questions illustrate this uncertainty:¹⁵⁷

156. See *Peck v. Comm'r*, 71 T.C.M. (CCH) 1933 (1996) (finding that informal custody arrangements did not shift right to exemption absent waiver).

157. A preference for the legal right to custody was recommended by the Domestic Relations Committee of the American Bar Association in its draft proposal to replace *Treas. Reg. § 1.152-4*. DOMESTIC REL. COMM., AM. BAR ASS'N, REGULATION PRO-

- (1) By keeping the child for an extra day, should the noncustodial parent have the power to wrest the dependency exemption from the custodial parent?
- (2) Is the noncustodial parent who kidnaps the child entitled to the exemption?
- (3) Where the parents cooperatively care for the child to the extent that neither can prove who had custody of the child for the greater portion of the year, should neither be entitled to the exemption?

Common sense suggests that all of the answers are “no,” but a literal application of the current Code and regulations indicates otherwise.

In contrast, a regulatory change favoring the *de jure* custodian—the parent with the legal right to physical custody as opposed to informal physical custody or pure legal custody—may promote reasonable tax results where *de facto* and *de jure* custody conflict. The result: the legal right to physical custody cannot be supplanted by informal physical custody. Similarly, the right to legal custody, when separated from the right to physical custody, does not contemplate the key issues of (1) which parent has legal custody, and (2) whether there has been an effective waiver of this legal right or the right to take the exemption absent an agreement to the contrary. A default favoring the parent with the legal right to physical custody (the *de jure* custodian) should end the large number of tax cases where parents dispute the number of days of custody claimed by the other parent in litigating the dependency exemption. Such a preference may provide a clear answer in many cases to who may claim the dependency exemption. The following Example compares the outcome under current law and under the proposed change.

Example:

24. Barney and Lorna divorced in 1998 pursuant to a decree granting sole custody of their child Felix to Barney. During 1999, Barney had physical custody of Felix until April, when he became ill. He informally arranged for the child to live with Lorna for eight months of 1999.

Under current law, both Barney and Lorna have a colorable claim to the deduction. Barney has the legal right to physical custody; Lorna has informal physical custody. Although Lorna appears to have the stronger argument at first blush, the answer is not so clear. The word

“custody” has multiple meanings, but which meaning should carry more weight? Moreover, is Lorna acting as Barney’s agent?¹⁵⁸

By contrast, in a system in which *de jure* custody controls, the answer is clear. Barney would be entitled to the exemption even though Lorna had actual physical custody for the greater portion of the year. The father’s legal right to physical custody under the divorce decree trumps the mother’s actual physical custody.

At first glance, this may appear unfair. After all, Lorna provided care for her child for a majority of the year. On the other hand, allocation of the dependency exemption is part of an economic division between the parties in which one of the costs may be increased tax liability as a result of no longer being able to claim a dependency exemption. Also, a degree of unfairness in some cases, when balanced against increased certainty, may be more desirable than the current law, which guarantees neither fairness nor certainty.

Perhaps most importantly, attempted modifications in who may claim the exemption under current law may lead to conflicts between state and federal law—a result that does not occur under *de jure* construction. For example, the right to the exemption will shift to the mother if the state court modifies the parties’ divorce decree to give the mother the right to physical custody for the year 2001, or if the father waives his right to the exemption in writing.¹⁵⁹ Thus, parents who wish to transfer the tax consequences from one to the other can

158. If Lorna is Barney’s agent for purposes of childcare duties, the time Lorna spends with Felix is deemed time Felix spent with Barney. RESTATEMENT OF AGENCY § 1.01 (Tentative Draft No. 2, 2001) (defining “agency”).

159. If Form 8332 is not executed by the custodial parent, the noncustodial parent claiming the exemption must present a dated and signed statement by the custodial parent, which includes a declaration that no claim of dependency exemption will be made for the child. *McCarthy v. Comm’r*, 70 T.C.M. (CCH) 1404 (1995); *see Peck v. Comm’r*, 71 T.C.M. (CCH) 1933 (1996) (finding that waiver for subsequent year not retroactive). The form or statement must contain the custodial parent’s Social Security number and be attached to the noncustodial parent’s tax return. *Miller v. Comm’r*, 114 T.C. 184 (2000). The signature of the custodial parent is also essential. *Id.* An unsigned form together with a state decree is ineffective. *Neal v. Comm’r*, 77 T.C.M. (CCH) 1610 (1999). The waiver must also indicate the year(s) of the waiver, the names of the children, and the name and Social Security number of the noncustodial parent. *White v. Comm’r*, 72 T.C.M. (CCH) 786 (1996). A divorce decree awarding the dependency exemption to the noncustodial parent is not the equivalent of a waiver if it is not signed by the custodial parent and does not contain all of the elements of Form 8332. *But see Broughton v. Comm’r*, 76 T.C.M. (CCH) 863 (1998) (finding pre-1985 divorce orders allocating the exemption to the noncustodial parent to be sufficient); *Zion v. Comm’r*, 61 T.C.M. (CCH) 2178 (1991) (finding that letter to former husband did not modify pre-1984 decree). *See generally* O’Connell, *supra* note 116, at ¶ 4204 (analyzing on a state-by-state basis whether state courts have jurisdiction to allocate exemption).

do so knowingly by executing a simple waiver form¹⁶⁰ and filing it with their tax return.¹⁶¹ When the custodial parent does not agree to waive the exemption, however, and the other parent tries to prevail by obtaining a state court decree allocating the tax deduction to the non-custodial parent, the resultant state determination does not affect the federal tax law.¹⁶² The IRS may then reopen the issue if both parents claim the deduction. Because federal and state law conflict, even something that appears as simple as a waiver falls into the quagmire of a complicated “federal case.”¹⁶³

By contrast, under a *de jure* construction, the line between custody under state law and the waiver of the exemption under federal law is clear. Informal changes in the *de facto* custody of the child will not affect the determination of which parent is entitled to the exemp-

160. This “Miranda” approach requires a more formal or knowing shift of the tax benefits between parents. This proposal differs from other provisions of the Code, which allow alimony provisions to be amended by an “instrument” related to the divorce. I.R.C. § 71(b)(1)(A) (2001). Some practitioners feel that an instrument is too informal to determine the custody of a child and that custody issues should be court supervised, whereas the shift of tax benefits can easily be made by filing a waiver form. Telephone Interview with Cindy Lynn Wofford & Kelly Capps, Ravdin & Wofford, P.C. (Feb. 8, 2000). It is common for courts to award joint legal custody to both parents and sole physical custody to one parent.

161. See Release of Claim to Exemption for Child of Divorced or Separated Parents, I.R.S. Form 8332.

162. I.R.C. § 152(e) (stating that federal law awards dependency exemption to custodial parent).

163. It is clear that an award of the dependency exemption by a state divorce court will not be valid for federal tax purposes unless it complies with the requirements of Form 8332. State and federal courts, however, often fail to reach consistent results. Compare *Voelker v. Voelker*, 520 N.W.2d 903 (S.D. 1994), and *Nieto v. Comm’r*, 63 T.C.M. (CCH) 3050 (1992) (finding court order awarding dependency exemption to noncustodial parent ineffective absent written declaration by custodial parent), with *Blanchard v. Blanchard*, 401 S.E.2d 714 (Ga. 1991) (finding impermissible exercise of taxing power). Several states routinely order the custodial parent to execute a waiver of the exemption. *Soriano v. Soriano*, 400 S.E.2d 546 (W. Va. 1990); *Serrano v. Serrano*, 566 A.2d 413 (Conn. 1989); *Marksberry v. Riley*, 889 S.W.2d 47 (Ky. Ct. App. 1994); *Kriesel v. Gustafson*, 513 N.W.2d 9 (Minn. Ct. App. 1994); *Adelman v. Adelman*, 878 S.W.2d 871 (Mo. Ct. App. 1994); *Jones v. Jones*, 858 S.W.2d 130 (Ark. Ct. App. 1993); *Light v. Light*, 828 P.2d 447 (Okla. Ct. App. 1992); *Singer v. Dickinson*, 588 N.E.2d 806 (Ohio 1992); *Allred v. Allred*, 835 P.2d 974 (Utah Ct. App. 1992); *Ford v. Ford*, 592 So. 2d 698 (Fla. Ct. App. 1991); *Monterey County v. Cornejo*, 812 P.2d 586 (Cal. 1991); *Rohr v. Rohr*, 800 P.2d 85 (Idaho 1990); *Babka v. Babka*, 452 N.W.2d 286 (Neb. 1990); *Fleck v. Fleck*, 427 N.W.2d 355 (N.D. 1988); see also *Homan v. Homan*, 623 So. 2d 326 (Ala. Civ. App. 1993). The fact that so many divorce courts routinely award the dependency exemption to the noncustodial parent may indicate a desire to address the effect of federal taxation on divorce settlements with a concrete numerical determination, such as \$2,800 in the year 2000. On the other hand, the state action may indicate the persistence of the Nelson gender stereotype.

tion. Of course, parents are still able to ratify informal changes for tax purposes in a written waiver. Where *de jure* custody has been established by a written separation agreement or a court order, the preference effectively resolves the issue of custody. By keeping the child for an extra day, the noncustodial parent has no power to wrest the exemption from the custodial parent. Furthermore, a preference for legal custody appears to avoid the problematic results, illustrated by the following examples, that could arise if the exemption literally followed *de facto* physical custody.

Example:

25. Suppose a mother and father divorce in 1998 pursuant to a decree granting sole custody of their child to the father. The child lived with his father during 2000 until the mother kidnapped the child on May 14.

Under current law, the kidnapper might theoretically be able to wrest the exemption from the custodial parent by keeping the child for more than half of the year.¹⁶⁴

In comparison, under the proposed *de jure* preference, since the divorce decree granted physical custody to the father, it becomes clear that the mother would not be considered the custodial parent even though she had actual care and control of the child for more than half of the year. Instead, since the father has *de jure* custody, he would be entitled to the exemption for the year of the kidnapping.¹⁶⁵

To establish *de jure* custody, the Code could employ treasury regulations applicable to the pre-1984 version of the dependency exemption that explained which documentary sources are determinative

164. See *Otmishi v. Comm’r*, 41 T.C.M. (CCH) 237 (1980) (denying father with legal custody exemption for child kidnapped by mother).

165. The outcome of the award of the exemption would be clear in the case of the mother. Without a change of legal custody she never receives the exemption. In future years, the outcome is unclear. Barring legislative or regulatory changes, however, the father would have to prove that he was entitled to the exemption. Certain elements necessary for this proof would include a requirement that the child was living in the United States or a contiguous country and that the parents provided over half of the child’s support. Thus, after the first year, it is possible that neither parent would receive the exemption. *But cf.* I.R.C. § 152(b)(5) (stating that member of taxpayer’s household does not qualify as dependent if relationship violates local law). A modification of the regulations and of the Service’s position could analogize the absence as temporary and presume custody. The apparent preference for *de facto* custody in current regulations is poor tax policy. *Cf.* I.R.S. Chief Counsel Advice No. 200038059 (Sept. 22, 2000) (addressing issue in terms of support, not custody), at <http://ftp.fedworld.gov/pub/irs-wd/0038059.pdf>.

of custody.¹⁶⁶ For example, the most recent decree containing an award of custody has priority over earlier decrees.¹⁶⁷ Thus, a post-divorce decree of custody has priority over a divorce or separate maintenance decree.¹⁶⁸ In the absence of a decree, the terms of a written separation agreement determine custody.¹⁶⁹ The treasury regulation is somewhat out of harmony with section 71, which permits the informal modification of a divorce decree by a written instrument incident to divorce.¹⁷⁰ However, any differences with section 71 are appropriate since section 71 concerns alimony instruments connected to the cessation of a marriage.¹⁷¹ In the case of alimony, the fact of marriage is usually a necessary prerequisite to the right to support. In contrast, children have an independent right to support.¹⁷²

In a related way, a change in legal custody does not automatically inform the parties that they are affecting tax consequences, but a valid tax waiver attached to the claimant's tax return does provide such notice. The default provision addressing the situation of when there is not a valid decree or separation agreement or when custody is "split," places custody, and therefore the dependency exemption, with the parent who has physical (*de facto*) custody for a greater portion of the year.¹⁷³

The pre-1984 regulation has one glaring defect—it does not correspond to the state court decrees that separate legal and physical cus-

166. The sources presumably establish *de jure* custody. However, the uncoupling of legal and physical custody was clearly not considered.

167. See Treas. Reg. § 1.152-4(b) (as amended in 1979).

168. See *id.*

169. *Id.*

170. I.R.C. § 71(b)(2)(A).

171. *Id.* § 71(b)(2) (defining instruments connected to cessation of marriage).

172. See *Levy v. Louisiana*, 391 U.S. 68 (1968) (holding that state's bar to recovery by illegitimate children of tort damages for death of mother violates right of equal protection and due process under Fifth Amendment); Harry D. Krause, *Legitimate and Illegitimate Offspring of Levy v. Louisiana—First Decisions on Equal Protection and Paternity*, 36 U. CHI. L. REV. 338, 338-49 (1969); Allan E. Mayefsky & Gary von Stange, *Should Children Be Penalized Because Their Parents Did Not Marry? A Constitutional Analysis of Section 516 of the New York Family Court Act*, 26 U. TOUL. L. REV. 957 (1995) (discussing how, under Family Court Act, illegitimate children cannot seek modification of support agreement); David E. Webb, Note, *The Prodigal Father: Interstate Succession of Illegitimate Children in North Carolina under Section 29-19*, 63 N.C.L. REV. 1274, 1275 (1985); see also Rev. Rul. 54-498, 1954-2 C.B. 107 (stating that out of wedlock child cannot be claimed as dependent unless acknowledged by father). The ruling has a greater impact on low-income parents.

173. The legislative history of section 152 is silent on the questions of whether Congress desired for a custody determination not to be set informally, and of whether Congress arranged to maximize tax benefits for the parent named custodian in the instrument.

tody.¹⁷⁴ Instead, the regulation merges legal custody and physical custody. Further, when issues of agency law are considered, the fact of custody is often unclear.

There are other benefits that result from adopting the principles of *de jure* custody. *De jure* custody appears to be equitable to both parents because each has access to the same documents. For the same reason, tax consequences will be more predictable in a system giving preference to *de jure* custody than under the current practice. First, the anticipated financial arrangements established by the divorce decree cannot be changed unintentionally. Second, neither parent will gain an economic advantage by breaching the conditions of a divorce decree or custody agreement. The latter problem is illustrated by the following example.

Example:

26. Suppose Barney and Lorna divorce in 2000 pursuant to a decree granting joint physical custody of their child Felix. The divorce decree provides that in 2000, Felix will spend January with Barney and will alternate subsequent months with each parent. This would, for 2000 (a leap year), provide Barney with actual care and control of Felix for 184 days, and Lorna with actual care and control of Felix for 182 days. As a result, Barney is eligible to receive the dependency exemption for 2000.

Under current law, however, if Lorna inadvertently or purposefully keeps Felix for three extra days during the year, then she is entitled to the exemption. If *de jure* custody were adopted, Barney's right to the exemption could not be affected by Lorna's action.

In addition, by favoring *de jure* custody, the federal tax law will be less likely to conflict with either state law or with the parents' expectations. A *de jure* preference should also discourage parents from taking inconsistent positions on the dependency exemption, such as when each tries to claim the entire exemption. Thus, regulations might define the custodial parent as the one who has the legal right to physical custody of the child for a greater portion of the calendar year.¹⁷⁵

174. See Treas. Reg. § 1.152-4(b) (as amended in 1979).

175. If the parents divorced or separated midway through a calendar year, one adds the portion of custody following divorce to the period of joint custody prior to the divorce or separation. The custodial parent is the one with custody for a greater portion of the period following divorce or separation.

B. *The Half-Child Duality*

Certain situations will not neatly adapt to a preference for *de jure* custody. For instance, where the legal right to physical custody has been jointly granted, where neither parent is able to establish a grant of physical custody, or where the continuing validity of a decree or separation agreement awarding physical custody of a child is uncertain because of proceedings pending at the end of the taxable year, custody must be determined by ascertaining which parent has actual physical custody for the greater portion of the calendar year.¹⁷⁶ The parent with physical custody for a greater number of days during a calendar year is the custodial parent entitled to the exemption. This begs the question, What is a day?

What constitutes a day is not an easy question to answer when the father and mother share custody.¹⁷⁷ A day of custody may be awarded on the basis of hours (the hourly test), or on the basis of parental function (the functional test). Both tests must be supplemented by agency principles.¹⁷⁸

Under the hourly test, when the definition of a day of custody is the physical care and control of the child for more than twelve of twenty-four hours, who has custody when the parent and child separate, such as when the child is at daycare, at school, or with a babysitter? For most of the years of the child's life, his or her days will be

176. See I.R.C. § 152(e) (2001); Treas. Reg. § 1-152-4T(a)(Q1), (A1) (as amended in 1984).

177. The current regulations do not offer a clear guide for counting days. Thus, how does the parent claiming the exemption establish that he or she had more than 183 days of custody? Counting hours in a 50-50 arrangement is not workable; most parents do not keep detailed records of their children's hourly schedules. It will be unlikely that any parent claiming the exemption could prove that the child was in his or her care for more than 183 days. The problem is not merely one of hypothetical injustice but also increased litigation over relatively small sums, and can exacerbate bitterness between the parents.

178. Under current law, a mother who asks to keep custody for an extra day may shift the right to the dependency exemption away from a cooperative father. A regulatory presumption favoring *de jure* custody would make the question moot. However, in those situations where one parent does not have *de jure* custody, as when joint physical custody has been awarded, it will be necessary to count days. One somewhat complicated solution lies in agency principles, where one parent may act as the agent for the other parent. In joint custody arrangements, parents will have to agree on the mother's role as an agent of the father. Thus, in this situation, the mother is the father's agent for the purpose of counting days for the exemption. In contrast, should the *father* request that the mother keep the child for an extra day, the mother gains an extra day of custody. This proposal requires record keeping and the cooperation of the parents in allocating the exemption.

spent in the care of someone other than the parent.¹⁷⁹ Although the time that a child spends with an agent of a parent could be considered time spent in the care and control of that parent, this definition is problematic. When does the twelve hours begin, and when does the twenty-four hour period end? For whom is the third-party caregiver acting as an agent? The parent who writes the check? What if the parents contribute equally to the babysitter, the daycare provider, or the school expenses? The caregiver could then theoretically be the agent of both parents.¹⁸⁰ If the responsibility for the child shifts upon the passing of the hour, then the supervision provided is arguably accomplished within the boundaries of an agency relationship. Similarly, upon the shift of responsibility, is it not true that the principal shifts with the passage of time? One means of determining agency for purposes of custody is by allocating custody to the parent who remains responsible for the child during the time the child is temporarily with the third-party caregiver.¹⁸¹ The caregiver, however, may arbitrarily attribute responsibility to the parent who works closest to the agent, or to the mother because of social stereotypes. As a result, the agent will determine custody in a haphazard manner. Moreover, because instances in which an agent would unexpectedly depend on one of the parents to assume responsibility for the child are rare, the test of ultimate responsibility may therefore not be an adequate determining factor.

A functional test to determine custody allocates the day of custody to the parent who was responsible for the child during the previous night. Generally, it is not difficult to ascertain where a child spent the night, although it can be difficult to determine the factors involved in the twelve hour rule. While it may appear more equitable for the parents of toddlers to stick with the greater than twelve hours rule, overall simplicity dictates the overnight rule.¹⁸²

179. For an example of the problem, see *Stanford v. Comm'r*, 69 T.C.M. (CCH) 1930 (1995) (finding mother who bartered for full-time childcare entitled to exemption).

180. See generally RESTATEMENT OF AGENCY § 2.02 (Tentative Draft No. 2, 2001) (explaining scope of actual authority).

181. Cynthia Lepow, Margaret Bell Drew, & Virginia Redding Williams, Report to the Domestic Relations Committee of the Tax Section of the American Bar Association (May 12, 2000) (on file with author).

182. Anecdotal evidence suggests that the parent who tells bedtime stories, gets up in the middle of the night, and gets the child ready for the next day has a more than equal claim to custody as compared to the parent who spends the day at the zoo with the child. Yet this solution has problems as well. Agency questions will come up when children sleep over at a friend's house. Cf. *Work Week: A Special News Report About Life on the Job—and Trends Taking Shape There: Even at Night, Child-Care Workers*

Examples:

27. Suppose Barney and Lorna divorce on November 30, 2000. They share legal custody of Felix by assuming alternating weeks of childcare responsibilities, beginning on December 1, 2000. For the first week, Barney had custody until December 10, 2000. Lorna then had custody until December 17, 2000. Barney had custody of Felix until Christmas Eve, and Felix remained with Lorna from Christmas through the New Year.

Because Barney may claim seventeen days of custody and Lorna may claim only fourteen days of custody, Barney is the custodial parent and therefore entitled to the exemption. In this example, Barney would have seventeen days of custody under either the twelve hour rule or the overnight rule.

28. Assume that the facts in Example 27 remain the same, except that the divorce decree provided Lorna with visitation rights for four days in December, which she exercises. Lorna picks up Felix at seven a.m. and drops him off at eight p.m. on each of the four days. Under the twelve hour rule, Lorna has physical custody for eighteen days and thus is entitled to the exemption. In contrast, custody remains with Barney under the functional test. Current law does not define a “day” under either the functional test or the twelve hour rule.

By allocating the exemption to the “parent having custody for the greater portion of the calendar year,”¹⁸³ the law effectively foils the mandatory or optional joint custody statutes in effect in forty-three states and the District of Columbia.¹⁸⁴ Thus, the reference to one—but not both—of the parents creates a disconnect between the federal tax statute and the real lives of divorced taxpayers who conscientiously share parental responsibility. A literal reading of section 152(e) means that when separated parents equally share parenting obligations, neither is entitled to the exemption.

Are in Demand, WALL ST. J., Oct. 24, 2000, at A1 (noting that changes in childcare have resulted in childcare centers that offer twenty-four hour service for night shift parents).

183. I.R.C. § 152(e)(1) (2001); see Treas. Reg. § 1.152-4(b) (as amended in 1979).

184. See Linda D. Ellrod & Robert G. Spector, *A Review of the Year in Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 771 (1996) (surveying state custody laws). Since the Ellrod and Spector article was published, Hawaii and Washington, D.C., have adopted joint custody. Of the states that do not have statutory authority for joint custody, virtually all permit it by agreement. See Margaret F. Brinig & F. H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998). Brinig and Buckley, who tested theories favoring joint custody, hypothesized that joint custody law resulted in significantly lower divorce rates in accord with the bonding theory and higher child support payments in accord with the monitoring theory. See *id.* at 403.

C. *Low-Income Parents Who Share Custody*

To avoid the tax law's chilling effect on equal custody, many family lawyers counsel their clients to take the deduction in alternate years.¹⁸⁵ Although this advice may appear pragmatic, it has the complexity of a Rube Goldberg invention.¹⁸⁶ The payoff is an awkward conglomeration of deductions as each parent's stream of income fluctuates from year to year. Consequently, budgeting becomes more difficult, particularly for low-income parents.

Examples:

29. Suppose that Barney earned \$20,000 in wages in 2000. With custody of Felix, Barney is eligible to receive an Earned Income Credit of \$1,181 which will generate a tax refund for Barney of \$485. Lorna, who is not eligible for the Earned Income Credit, claims the dependency exemption based on custody during alternate years. Without the custody of the "qualified child," Felix, Barney's income is too high to receive the Earned Income Credit in years in which Lorna claims the dependency exemption.¹⁸⁷

30. Assume that the facts in Example 29 remain the same, except that Barney retains custody and waives the exemption every other year. In this scenario, a waiver of the exemption will not effect the Earned Income Credit.

Under the best circumstances, taking the exemption in alternate years causes large fluctuations in the respective tax liabilities of low- and middle-income parents. A significant disparity in the parents' level of income will cause a loss to the low-income parent that far outweighs the benefit to the other parent. Based on an income of \$20,000 using the standard deduction, and claiming the dependency exemption, Barney will get a tax refund of \$485 for the year 2000. If Barney waives the exemption or if Lorna claims custody of Felix, Barney's tax liability increases to \$913 or to \$1,924, respectively. Illogically, the difference in form has over a \$1,000 impact on Barney's tax liability. The connection between filing status and eligibility for vari-

185. See *Sertic v. Sertic*, 111 Nev. 1192 (1995) (affirming trial court order for custodial parent to execute waiver on alternate years). The solution of the divorce court only works if one parent clearly has a greater number of days of custody.

186. Rube Goldberg "cartoons were . . . symbols of man's capacity for exerting maximum effort to accomplish minimal results." His name means "a convoluted solution to perform a simple task." Rube Goldberg Biography, The Official RUBE GOLDBERG Web Site (2001), at <http://www.rubegoldberg.com/html/bio.htm> (on file with the *New York University Journal of Legislation and Public Policy*).

187. See I.R.C. § 32(c)(3)(A)(ii) (defining "qualifying child" as one who has had same principal place of abode as taxpayer for more than one-half of year).

ous credits causes significant fluctuation for low-income custodial parents. In contrast, Lorna's high income precludes both the corresponding benefits and the consequential fluctuations in tax liability.¹⁸⁸ Since the norm today is for both parents to share the duties of custody and support, the practice of giving one parent a deduction of a few thousand dollars and the other parent nothing understandably leaves the parent without the exemption feeling cheated.

From an ethical standpoint, it is improbable that parents who claim the exemption in odd numbered years literally keep custody of the child for an additional day in such years. Thus, the parents claiming custody in alternative years most likely lie on their tax returns—a practice that the Service does not appear to challenge. The ploy of alternating years between parents fits the way one enters the dependency exemption on the individual tax return form.¹⁸⁹ However, such a strategy undermines the integrity of the tax system by placing lawyers and clients in suspect ethical situations,¹⁹⁰ and begs the question of why we should retain a policy that encourages deception.

Examples:

31. Barney and Lorna divorced when their only child Felix was a three year old. Felix and his nanny live alternately with each of the parents. Custody changes each Friday afternoon, giving each parent a half-day of custody on Fridays. Felix attends camp for six weeks each summer. Both parents and the nanny go to the camp on visiting day. Legal and physical custody is split as close to 50-50 as is possible. Neither parent has custody of the child for more than half of the year, and thus neither qualifies to claim the exemption under section 152(e).¹⁹¹

32. Barney and Lorna were divorced in 1998 pursuant to a decree granting joint custody of Felix to both parents. In 2000, the parents cooperatively support Felix, and Felix alternates his time between

188. On a financial plane, the benefit is not always evenly divided even for middle-income parents. For instance, a child can become emancipated after an odd number of years, as is the case with Barney and Lorna. Felix, who was three at the time of the divorce, will become emancipated after fifteen years, and the tax benefit from the exemption will not be evenly divided. In turn, this may inadvertently favor one parent.

189. See I.R.S. 2000 Form 1040 line 38 (requiring taxpayers earning less than \$96,700 in adjusted gross income to multiply number of exemptions by \$2,800).

190. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1999). If each parent has exactly one-half year of custody and each executes a waiver in alternate years, the one executing the waiver is making a false claim.

191. See BITTKER & McMAHON, *supra* note 4, at ¶ 21.2[3] (describing requirement of multiple-support agreement for either parent to claim exemption); see I.R.C. § 152(c).

the parents, who do not keep accurate records of the number of days each has physical custody. The result is the same as above.

1. *Tax Practice and Aristotelian Logic*

Can parents who try to maintain a cordial relationship reasonably allocate the dependency exemption between them so that their tax consequences parallel their living arrangements? Under current practice, parents who share custody are likely to be frustrated in their effort to use the dependency exemption, in part because of advice received from their tax adviser.

The Treasury's rules regulating practice before the Service¹⁹² provide that tax advisers may not "substitute their own private speculation for authoritative judgments" such as legislative, judicial, and administrative precedents.¹⁹³ The regulations limit the meaning of law to formal state action such as a revenue ruling or a case rather than the more Aristotelian-Aquinas lens of natural law.¹⁹⁴ On the other hand, the regulations¹⁹⁵ permit advisers to use "a tax return to *raise* (as opposed to *resolve*) issues of ambiguity by reporting a position that is unsupported by 'authority,' provided the position is 'not frivolous,' and supplying a description of the legal issues presented."¹⁹⁶ Thus, where the Service has interpreted an issue, the tax adviser must follow the government's view or disclose the distinction.¹⁹⁷

Under current practice, parents who share custody are frustrated in their efforts to use the dependency exemption. Using the 2000 tax year, one parent has a deduction of \$2,800, while the other parent will not receive any deduction. In the hypothetical example below, custody and the dependency exemption are divided equally between Barney and Lorna. Although there are real life counterparts to the parents in Example 33, in reported cases, both parents claim the entire exemption rather than half of the exemption.

192. Practice before the Internal Revenue Service, 31 C.F.R. § 10 (codifying Treasury Department Circular No. 230).

193. Gwen Thayer Handelman, *Law and Order Comes to 'Dodge City': Treasury's New Return Preparer and IRS Practice Standards*, 60 TAX NOTES 1623, 1624 (1993). Advisers may not decode an "ambiguous" statutory term with "virtually any content most favorable to clients." *Id.* at 1623. According to Handelman, prior to 1991, advisers employed the "laugh-aloud" test for devining "reasonable" basis. *Id.* at 1625.

194. *Id.* at 1624.

195. Treas. Reg. §§ 1.6694-2(c)(1), (c)(2), 1.16694-3(c)(2) (as amended in 1992).

196. Handelman, *supra* note 193, at 1624 n.2.

197. *See* Handelman, *supra* note 193, at 1624-25.

Example:

33. Suppose Barney and Lorna file tax returns that claim one-half of the dependency exemption by multiplying line 38 on Form 1040 by 1.5 (personal exemption plus half of a child). The exemption is the only matter in question.

This example poses a common sense solution to the dilemma. If parents who have been granted joint custody split the exemption, each parent would have a deduction of \$1,400 in 2000. Dividing the exemption equally between parents sharing childcare responsibilities maintains pre-divorce tax benefits and bases the tax deduction on the economic reality of the custody arrangement. Where custody alternates between parents on a regular weekly basis, or where the parents agree, a split exemption appears equitable. Accordingly, parents who can agree to joint-custody schedules may also be able to agree to split the dependency exemption, whereby each will be able to claim a deduction equal to one-half of the dependency exemption.¹⁹⁸ Since ninety percent of divorce settlements follow a negotiated agreement,¹⁹⁹ the ability to split the exemption by agreement will be significant, and will more closely follow the parents' expectations. Moreover, the split exemption would not discount the important role of each parent or the concept of shared custody. The latter has been credited with promoting more contact between children and fathers²⁰⁰ who, twenty years after *Kramer vs. Kramer*,²⁰¹ are still less likely than mothers to be granted sole custody.²⁰²

An equal division of the exemption will not mirror every split custody arrangement. For example, even the half-child exemption would be an arbitrary allocation in a 60-40 split.²⁰³ At the point where custody is not more or less equal—for example, where one parent has over fifty-nine percent of the custody of the child—that parent could

198. The benefits related to both custody and the dependency exemption would need to be doubled, divided, or revised to accommodate the economics of joint custody. For instance, both parents may have increased housing costs but will divide food costs.

199. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 951 n.3 (1979).

200. Brinig & Buckley, *supra* note 184, at 401.

201. *KRAMER VS. KRAMER* (Columbia Tri-Star 1979).

202. See Asimow, *supra* note 24, at 262 n.157 (quoting LEONORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 222 (1985) (stating that mothers are awarded custody in eighty-five percent of cases)).

203. Donald H. Read, Remarks at the American Bar Association Tax Section Domestic Relations Committee Meeting in Washington, D.C. (May 12, 2000) (on file with author).

be entitled to the full exemption.²⁰⁴ A precise division of the exemption by the actual percentage of custody is more equitable than an equally divided exemption, but it presents serious pragmatic complications. The simplicity of an equally divided exemption thus outweighs a more precise division.

In addition, the wording of the Code and the Treasury's tendency to literally interpret section 152 illustrate the main weakness of the solution posed by Example 33. The statute allocates the exemption to the "parent having custody for a greater portion of the calendar year."²⁰⁵ Literally, separated parents sharing custody equally could both lose the exemption. Since Barney and Lorna have custody for exactly half of the year, the Commissioner will likely challenge the half-exemption in both cases. As a result, neither is entitled to the exemption under section 152(e).

Does Congress intend such a shocking result? Is it possible that Congress does not imagine fathers and mothers sharing both the economic and caregiving functions of parents? Or would the courts more likely than not uphold the taxpayer's interpretation of the law? What is the taxpayer's position on his or her respective return?

Even in this era of newly discovered "immunities for the states from . . . federal policy 'commandeering,'"²⁰⁶ odds of a successful constitutional challenge to the Code are remote. The power of taxation is not subject to federalism concerns, so long as its purpose is revenue generation rather than punishment.²⁰⁷ For Barney and Lorna, the power to tax produces a clumsy result where parents split custody equally in that neither parent may claim the exemption, but the result-

204. *But see* LINO, *supra* note 5, at 10 (explaining expenses noncustodial parent may have relating to child's visit, e.g. transportation, food, entertainment, and obtaining larger dwelling so as to house child during visits).

205. I.R.C. § 152(e)(1) (2001).

206. Linda Greenhouse, *Battle on Federalism: In an Era of States' Rights Debates, High Court's Ruling Limits Congress*, N.Y. TIMES, May 17, 2000, at A18; *see* United States v. Morrison, 529 U.S. 598 (2000) (holding Violence Against Women Act unconstitutional); Kimel v. Florida Bd. of Regents, 528 U.S. 62 (2000) (holding that ADEA effectively abrogated states' immunity and exceeded Congress's authority under Fourteenth Amendment); Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996) (holding that Congress cannot end state immunity regarding gaming contracts); Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (holding states exempt from federal minimum wage); Steve France, *Laying the Groundwork*, A.B.A. J., May 2000, at 40 (describing how current United States Supreme Court champions states' rights). *See generally* Roger C. Hartley, *The Alden Trilogy: Praise and Protest*, 23 HARV. J. L. & PUB. POL'Y, 323, 377 (2000).

207. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (discussing child labor tax); *Tarbet v. Comm'r*, 36 T.C.M. (CCH) 955 (1977) (finding that section 152(e) does not punish noncustodial parent).

ing harm is incidental to an archaic statute rather than a penalty.²⁰⁸ Although one may envision a constitutional challenge, pragmatically, courts are reluctant to find a revenue statute unconstitutional.²⁰⁹

2. *The Hermeneutics of Deductions*

Apart from the heady possibilities of a constitutional challenge, dare one apply the ordinary rules of statutory construction to the dependency exemption?²¹⁰ Generally, one follows the plain meaning of the statute unless there is a typographical error or unless doing so would create an absurd result.²¹¹ The search for plain meaning²¹² limits the scope of inquiry to the words of the statute.²¹³ The tax statute, notorious for its obscure prose,²¹⁴ lends itself to technical or legalistic interpretation, but courts read the Code in the context of the ordinary or colloquial usage of the terms.²¹⁵

The word “custodian,” defined in a contemporary dictionary as “[o]ne who has charge of something; caretaker,”²¹⁶ does not clearly indicate whether joint caregiving had entered the collective American

208. *Bailey*, 259 U.S. at 40.

209. See *Labay v. Comm’r*, 55 T.C. 6 (1967), *rev’d on other grounds*, 450 F.2d 280 (5th Cir. 1971); *Cole v. Comm’r*, 34 T.C.M. (CCH) 680, 682 (1975) (stating that “the fourteenth amendment does not apply to Federal tax statutes”); see also *Knight v. Comm’r*, 64 T.C.M. (CCH) 1519 (1992) (finding that grant of exemption to custodial parent does not violate Fifth Amendment). Although a less likely result, the Court may find that congressional “lawmaking authority” was usurped by the Treasury’s hypothetical insistence that the exemption be undivided in section 152(e). “[A] certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001) (quoting *United States v. Mistretta*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting)).

210. See generally Deborah A. Geier, *Interpreting Tax Legislation: The Role of Purpose*, 2 FLA. TAX REV. 492 (1995).

211. *United States v. James*, 478 U.S. 597, 606 (1986); WILLIAM N. ESKRIDGE, JR. ET AL., *LEGISLATION AND STATUTORY INTERPRETATION* 375 (2000); see also William N. Eskridge, Jr. & Philip P. Frickey, *Law As Equilibrium*, 108 HARV. L. REV. 26, 36 (describing how behavior of IRS and taxpayer prompt legislation to modify behavior which starts new cycle of change until equilibrium prevails).

212. Tax lawyers have generally ignored any suggestion to eliminate the role of legislative history because the idea seems either “silly” or “symptomatic of a power grab by the judiciary” into legislative power. William J. Turnier, *Tax (and Lots of Other) Scholars Need Not Apply: The Changing Venue for Scholarship*, 50 J. LEGAL EDUC. 189, 192 n.9 (2000).

213. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

214. See *Tax Reform: A Little List*, *ECONOMIST*, June 14, 1986, at 25 (noting “arcane pedantries” in tax statute).

215. See, e.g., *Comm’r v. Duberstein*, 363 U.S. 278, 285 (1960) (explaining that Code uses term “gift” in “colloquial sense”).

216. *AMERICAN HERITAGE DICTIONARY* 357 (2d ed. 1982).

consciousness when the Code was enacted.²¹⁷ In section 152(e), plain meaning cannot eliminate the latent ambiguity of the term “custody.”²¹⁸ Where legal custody and physical custody do not match, the statute does not clearly allocate the exemption. In addition, ambiguity will increase if federal courts look to state law for the meaning of custody.²¹⁹ “Textual canons” of statutory construction may negate the purpose of section 152(e). Under this construction, a court may decide that neither parent should receive the exemption, despite the equal division of childcare responsibility. This is a nonsensical, though plausible, result.²²⁰

In a situation where both parents equally assume childcare responsibilities, it would be arbitrary for a court to award one or the other parent the exemption, since neither parent has a greater right to custody, and hence to the exemption.²²¹ Under this rubric, if section 152(e) does not apply, the Code does not foreclose awarding the exemption to Lorna under subsection (a). Nevertheless, if one assumes that Lorna provides over fifty percent of Felix’s support, allocating the exemption to her would negate the 1984 amendment to section 152(e); this amendment allocated the exemption on the basis of custody rather than support.²²² This is another nonsensical result.²²³

217. The proponents of plain meaning divide on whether one finds appropriate usage in a dictionary published in the year of the enactment of the statute or in a current dictionary. They also divide on which publisher is correct. *See, e.g., Note, Looking It Up: Dictionaries and Statutory Interpretation*, 107 HARV. L. REV. 1437 (1994).

218. *Cf. Robinson v. Shell Oil Co.*, 519 U.S. 337, 342 (1997) (finding that word “employed” has more than one meaning in statutory context). Is joint parenting sufficiently analogous to joint ownership or community property to permit the division of the exemption in a manner similar to joint owners dividing common expenses or individual personal service earnings for tax purposes? *See Poe v. Seaborn*, 282 U.S. 101 (1930) (recognizing existence of community property for federal tax purposes).

219. *See, e.g., VA CODE ANN.* § 20-124.1 (2000 & Supp. 2001) (outlining three alternative meanings for joint custody).

220. *Cf. Brogan v. United States*, 522 U.S. 398, 419–20 (1998) (Stevens, J., dissenting) (rejecting literal interpretation of statute in favor of intent of Congress).

221. Such a result is not without precedent. *See Barnes v. Comm’r*, 50 T.C.M. (CCH) 653 (1985) (holding in situation where three children, two of whom live with their mother, one of whom divides time between parents, that mother gets two exemptions, and father gets one for half-time child). In *Barnes*, the result was a compromise verdict that was able to fit the boxes of the tax form. Unlike Barney and Lorna, the Barnes had more than one child.

222. This reasoning would likely replicate the litigation over who provided more support that precipitated the change in section 152(e). *See supra* note 15–16 and accompanying text.

223. If both support and custody are divided 50-50 between the parents, neither parent qualifies for the exemption under I.R.C. §§ 152(a), (e) (2001); *cf. id.* § 152(c) (describing multiple-support agreements).

Ideally, the Service's challenge to the half-child exemption would occur in a consolidated case against both parents. Were the cases not consolidated, the Commissioner could potentially win one case and lose one case, win against both parents, or lose against both parents.²²⁴ The variant jurisdictional requirements of trial level courts hearing tax cases²²⁵ may then create a whipsaw effect. This whipsaw effect might occur if, after both parents are denied the half-exemption, Lorna pays the tax and sues for a refund in district court, and Barney refuses to pay the tax and litigates in tax court. The potential to double the exemption for parents with split custody is undoubtedly not the intent of the legislature under all but a wanton (and absurd) deconstructionist interpretation of the statute and the power of the court. It is possible, however, that the government will lose both cases.²²⁶

In contrast to "plain meaning" is a deconstructionist interpretation of the Code. The dadist-edged opposite of plain meaning is an appealing technique for the interpretation of section 152(e).²²⁷ Absurdity is possibly the right construction of the meaning of the words and the intent of the legislature.

Parents who jointly share childcare responsibilities need a different framework by which to resolve the Code's statutory ambiguity in favor of a pragmatic solution. The half-child exemption appears to lend itself to a prescriptive theory of statutory interpretation. Purposive theories of construction²²⁸ look beyond the wording of a statute

224. *Compare* Arnes v. Comm'r, 102 T.C. 522 (1994) (deciding issue of whether redemption of wife's stock in community property corporation was dividend to husband who became one hundred percent owner, tax court held for husband against IRS), *with* Arnes v. United States, 981 F.2d 456 (9th Cir. 1992) (affirming ruling of district court that held for wife on issue of whether corporation was simply conduit used to pay off wife's property settlement in divorce). The IRS lost claims against both husband and wife.

225. Tax cases may be tried in federal district courts or the claims court, 28 U.S.C. § 1346(a)(1) (1994), or the tax court, I.R.C. § 7442. Appeals from district court and the tax court are decided by the circuit court for the region corresponding to the taxpayer's residence. Claims court appeals are heard by the federal circuit. Some tax cases are tried in bankruptcy court. *See generally* LEANDRA LEDERMAN & STEPHEN W. MAZZA, *TAX CONTROVERSIES: PRACTICE AND PROCEDURE* § 1.05 (2000).

226. *See supra* note 224.

227. *See id.*; *ESKRIDGE ET AL.*, *supra* note 211, at 243; *cf.* Rene Magritte, *LE SENSE PROPRE* (1929) (substituting words "femme triste" for pictorial subject of painting). *See generally* Gerald L. MacCallum, Jr., *Legislative Intent*, 75 *YALE L. J.* 754 (1965-66).

228. *See, e.g.*, *ESKRIDGE ET AL.*, *supra* note 211, at 220-21 (arguing that "purposivism" channels theorist towards unanticipated applications of statute by focusing on goal of 'spirit' of legislation rather than drafters' specific intent); *id.* at 236 (noting that some theories of statutory interpretation focus on 'best answer' and reflect underlying moral realities); Roscoe Pound, *Spurious Interpretation*, 7 *COLUM. L. REV.* 379,

since a statute's significance is derived from its environment.²²⁹ "The meaning of such a statute cannot be gained by confining inquiry within its four corners. Only the historic process of which such legislation is an incomplete fragment—that to which it gave rise as well as that which gave rise to it—can yield its true meaning."²³⁰ Such theories subordinate the literal wording of the statute to its general intent, or its purpose.²³¹ There is a point, however, at which interpretation of general intent becomes "that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction."²³² At some point, an abstract general intent lacks legislative authority.²³³

A court would find it difficult, if not impossible, to uncover a legislative design regarding equal custody since the split exemption was simply never mentioned.²³⁴

381 (1907) (stating that imaginative reconstruction is reenactment of "the law-making process 'by assuming' the legislator's 'position,' 'surroundings,' and from the wrong to be remedied, the legislator's 'intention with respect to the particular point in controversy'").

229. *United States v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (interpreting the meaning of the word 'made' as used in the National Firearms Act).

230. *Id.* at 516 n.8 (quoting *United States v. Monia*, 317 U.S. 424, 432 (1943) (Frankfurter, J., dissenting)). This philosophy underlies the tax maxim: "Read the statute if the committee report is unclear."

231. *See id.*; *see also* Daniel A. Farber & Philip P. Frickey, *Legislative Intent and Public Choice*, 74 VA. L. REV. 423, 426–27, 432–34 (1988) (describing models of legislative outcomes such as "Arrow's Paradox," "uncovered set," "yolk," "strong point," and "core"); Kent Greenwalt, *Are Mental States Relevant for Statutory and Constitutional Interpretation?*, 85 CORNELL L. REV. 1609 (2000) (discussing whether mental state of legislature or reader (judge) should prevail).

232. *Thompson/Center Arms Co.*, 504 U.S. at 521 (Scalia, J., concurring).

233. ESKRIDGE ET AL., *supra* note 211, at 214. On the other hand, a court favoring a "textual theory" such as those who look to the "plain meaning" of the text often reject legislative history even when it agrees with the way the court has read the statute. *Id.* at 223; *see also* James B. Lewis, *Viewpoint: The Nature and Role of Tax Legislative History*, TAXES, June 1990 at 442, 444 (explaining how former member of congressional and joint committee staffs "never saw any member of either tax writing committee consult [the committee report]").

234. *See* ESKRIDGE ET AL., *supra* note 211, at 214. The "Pragmatic Theory" considers that "our intellectual framework is not single-minded, but consists of a 'web of beliefs,' interconnected but reflecting different understandings and values. As a consequence, human decisionmaking tends to be polycentric, spiral, and inductive, not unidimensional, linear, and deductive." *Id.* at 240. However, even for the pragmatist, "the *democratic legitimacy idea* that interpreters ought to defer to decisions made by the popularly elected legislators who enact statutes," and "the *rule of law idea* that statutory meaning should be relatively predictable and accessible to the citizenry and should be neutrally applied to everyone" make the potential for such a result unlikely. *Id.* at 212.

3. *Seeking Solomon's Solution*

Not only would Barney and Lorna most likely experience the delay and expense of a court challenge if they claimed the half-child exemption, but their practical method of sharing both custody and its tax consequences may be ultimately refused because the common law does not lend itself to compromise verdicts.²³⁵ Furthermore, separation of powers²³⁶ in the federal government undermines the ability of the federal court deciding a tax case to split the exemption.²³⁷ “Even

235. Compromise verdicts have generally been discredited by common law courts, where the law assigns fault to one party and advantage to the other. For instance, damage awards which are materially less than the amount claimed imply that the fact-finder doubted the defendant's liability, yet hesitated to deny the plaintiff any compensation. Plain arithmetic indicates that the verdict is “not the judgment of the jury, but a compromise.” *Heller v. Goldberg*, 148 N.Y.S. 261, 261 (N.Y. App. Term. 1914) (reversing judgment for \$200 when plaintiff was entitled to \$960 or nothing, and ordering new trial); *see also* *Malmaskold v. Libby, McNeil & Libby*, 31 F. Supp. 958, 960–61 (W.D. Wash. 1940) (finding that jury had compromised on verdict, setting verdict aside, and remanding for new trial); *Bass v. Dehner*, 21 F. Supp. 567, 568 (D.N.M. 1937) (“The week-end was at hand” and some jurors surrendered their convictions regarding negligence, while others surrendered reasonable damages, resulting in an illegal compromise); *Clark v. Weir*, 37 Kan. 98 (1887) (remanding case for new trial because jury was allowed to disagree and essentially compromise); *Shaw v. Hughes Aircraft Co.*, 100 Cal. Rptr. 2d 446, 452 (Cal. Ct. App. 2000) (holding jury's finding of no breach of contract irreconcilable with its finding of breach of implied covenant of good faith and remanding both claims to be retried). Compromise verdicts do not determine the issues tried for purposes of *res judicata*. *Taylor v. Hawkinson*, 306 P.2d 797, 799 (Cal. 1957) (stating that evidence that special damages greatly exceed damages awarded indicate jurors' finding of liability was in exchange for awarding lower damages). The remedy for a compromise verdict is the grant of a new trial. *See, e.g., Dimick v. Schiedt*, 293 U.S. 474 (1935).

236. *See also* GAIL LEVIN RICHMOND, *FEDERAL TAX RESEARCH* 55–57, 85–86, 110–111 (5th ed. 1997) (commenting on judicial deference paid to statutes, administrative interpretations, and treasury regulations); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573 (1984). *But see* *Nixon v. Adm'r of Gen. Serv.*, 433 U.S. 425, 433 (1977) (rejecting concept of complete division of authority between three branches). *See generally* THE FEDERALIST NO. 51 (James Madison); MONTESQUIEU, THE SPIRIT OF THE LAWS (Neill H. Alford, Jr. et al. eds., Legal Classics Library 1984) (1748) (influencing those drafting Constitution to separate governmental powers among executive, legislative, and judicial branches of government, with each branch elected separately by different constituents in uneven election cycles); Malcolm Sharp, *The Classical American Doctrine of “the Separation of Powers.”* 2 U. CHI. L. REV. 385, 416 (1935) (stating that one idea underlying separation of powers is fear that government will wrongfully violate rights of individuals).

237. A court ordered division of the exemption may not be capable of administration within the tax system because the taxpayers cannot comply with their tax reporting obligations, as the individual tax return forms and the directions do not account for only one-half of a deduction. For practical purposes, without a change in the tax forms taxpayers would have difficulty meeting their obligations to file a tax return. Furthermore, tax forms are in the province of the executive branch, not the judicial branch. Unfortunately, such a solution is probably beyond the power of a court, since

Constitutional optimists must recognize that judges lack the authority to redress many species of catastrophically bad public choices.”²³⁸

According to tax practitioners and some commentators, administrative action by the Service may produce a more coherent result than a judicial solution because a revenue ruling does not have the weight or precedential value of a regulation.²³⁹ The Service, by contrast, must follow its revenue rulings where the facts at issue are substantially the same as the ruling, but is not bound by its own interpretive rulings “issued in response to requests for advice by interested individuals.”²⁴⁰ As a result, the revenue ruling faces prodigious limitations as a vehicle to effect policy changes.²⁴¹ The Service imposes

under the Constitution the executive branch is charged with the enforcement of the law. Thus, a court would be likely to award or deny the entire exemption to the parent with half-custody because the tax forms and the tax tables assume the award of a full exemption.

238. Christopher L. Eisgruber & Lawrence G. Sager, *Good Constitutions and Bad Choices*, in CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES 147 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998); see *Klaassen v. Comm’r*, 83 AFTR 2d, ¶ 99-642 (10th Cir. 1999) (holding that couple with ten adopted children and adjusted gross income of eighty-three thousand dollars was subject to alternate minimum tax).

239. See Linda Galler, *Judicial Deference to Revenue Rulings: Reconciling Divergent Standards*, 56 OHIO ST. L.J. 1037, 1037–38 (1995). Since they fit the exempt category of interpretive rules, revenue rulings avoid the elaborate notice and comment procedures designated by the Administrative Practice Act. See *id.* at 1042. Unlike the more common letter rulings which apply only to the individuals who requested them, revenue rulings have general applicability. By statute, letter rulings, which are limited to the facts presented in a particular litigation, are not precedent nor are they binding on the Service in other cases. I.R.C. § 6110(k)(3) (2001). They may, however, constitute substantial authority for purposes of determining the accuracy related penalty. See *id.* § 6662; Treas. Reg. § 1.6662-4(d)(3)(iii) (as amended in 1998).

240. BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.9 (3d ed. 1991); see I.R.C. § 6110(k)(3).

241. In addition, it is difficult to predict whether the courts will defer to administrative decisions in general, and to revenue rulings in particular. Galler, *supra* note 239, at 1037, 1042 n.16. Decisions by the various circuits “rendered during [1990–1995] indicate an ardent willingness to accede to revenue rulings.” *Id.* at 1062. But see Irving Salem & Richard Bress, *Agency Deference under the Judicial Microscope of the Supreme Court*, 88 TAX NOTES 1257 (2000) (showing how Supreme Court narrowed scope of deference to agency interpretation); Burgess J.W. Raby & William L. Raby, *Revenue Rulings and the Tax Practitioner*, 74 TAX NOTES 1445, 1447 (1997) (noting that adverse revenue rulings are often dismissed by Tax Court as “the opinion of one of the parties”). Theoretically, the Tax Court “will follow a court of appeals decision that is ‘squarely in point,’ where an appeal lies to that court of appeals.” *Golsen v. Comm’r*, 54 T.C. 742, 757 (1970), *aff’d* 445 F.2d 985 (10th Cir. 1971). On the other hand, the *Arnes* cases showed that appeals to the same circuit do not guarantee consistent outcomes. See *supra* note 224. For the Service, revenue rulings are substantial authority. Treas. Reg. § 1.6662-4(d)(3)(iii). The revenue ruling is directly responsive to the specific facts discussed. *Id.* § 601.601(d)(2)(v)(a) (as amended in 1987).

substantial user fees for issuing a private letter ruling²⁴² and exercises discretion in issuing rulings.²⁴³ If a request for a letter ruling concerns an area in which the Service does not ordinarily issue letter rulings, the Service requires “compelling reasons to justify the issuance of a letter ruling.”²⁴⁴ The IRS also provides free nonbinding advice for taxpayers by phone or at local service centers.²⁴⁵

The regulatory process may be better suited to respond to cases where parents share custody equally.²⁴⁶ The Treasury’s legislative authority²⁴⁷ and its general power to interpret the Code’s meaning²⁴⁸ may include the authority to adopt the half-child exemption through

242. Rev. Proc. 2001-1, 2001-1 I.R.B. 1, Appendix A. User fees for letter ruling requests are \$6,000. A reduced fee (\$500) may be requested where the ruling concerns a “personal tax issue” for a taxpayer with gross income under \$250,000. The fees are a considerable limitation for low- and middle-income taxpayers, particularly when the sum at issue is small compared to the user fee.

243. *Id.* § 7.

244. *Id.* at Appendix C.

245. Over-the-counter advice offered by the Service does not lend itself to policy changes. The rank and file employees cannot be expected to do more than apply the statute in a literal, occasionally guileless, manner. This is not the kind of question that lends itself to an over-the-counter answer.

246. Michael Asimow, *Public Participation in the Adoption of Temporary Tax Regulations*, 44 *TAX LAW.* 343 (1991) [hereinafter Asimow, *Public Participation*] (showing how in 1980s historical process, which included public comment, changed in response to the deluge of tax legislation). The Treasury does have legislative authority to issue regulations regarding I.R.C. § 152(e)(2)(A). However, according to the Treasury, the regulations under I.R.C. section 152 are interpretative. *Notice of Proposed Rulemaking: Treatment of Transfer of Property between Spouses, Tax Treatment of Alimony and Separate Maintenance Payments, and Dependency Exemption in the Case of Child of Divorced Parents*, 24 *TAX NOTES* 1011, 1012 (1984). *But see* Asimow, *Public Participation*, *supra*, at 360–61 (disagreeing with Treasury’s understanding of adoption of interpretive regulations where there is specific statutory delegation). *See generally* Michael Asimow, *Public Participation in the Adoption of Interpretive Rules and Policy Statements*, 75 *MICH L. REV.* 521, 523 n.11 (1977).

247. Asimow, *Public Participation*, *supra* note 246, at 350 (“Legislative rules complete an incomplete statute . . .”); *see* LEDERMAN & MAZZA, *supra* note 225, at § 9.02[A][1] (explaining that legislative regulations are those released under express delegation contained in particular section of Code).

248. I.R.C. § 7805(a) (granting general authority to issue interpretive regulations); *see* 5 U.S.C. § 553 (1988) (full notice and comment rulemaking); Galler, *supra* note 239, at 1043. The Treasury Department ordinarily employs the APA legislative notice and comment procedures with respect to interpretive regulations. *Id.* at 1044. The formal regulation process provides the opportunity for members of the bar and the public to provide the drafters with a good sense of the problems such parents face in complying with any proposed change. *See generally* LEDERMAN & MAZZA, *supra* note 225, at § 9.01–02. This was not the process used in 1984, when the temporary regulations related to divorce were promulgated in thirty days from the enactment of the statute.

regulations.²⁴⁹ The formal regulation process allows members of the bar and the public to inform drafters of problems that parents may face in complying with any proposed change.²⁵⁰

The Code is ambiguously worded, and, as evidenced by a lack of pertinent legislative history, Congress did not consider the issue of equally divided childcare where both parents share custody. Without clear statutory authority, any change in practice is subject to judicial challenge. As a result, perhaps Congress should now attempt to provide parents who share custody and childcare responsibilities with a half-child exemption by amending section 152.²⁵¹ Thus, the exemption would be equally available to divorced or separated parents, or to married parents filing separate returns.²⁵² By permitting each joint custodial parent to waive half of the exemption in favor of the other parent, the provision may provide the flexibility needed to accommodate the evolving parenting models of divorced families. In this way, tax benefits for families would become child-centered, and divorce would not create a chaotic disruption of these benefits.²⁵³

Like marriage, divorce is not solely an economic issue. Money, however, is the part of marriage and divorce affected by the tax law. The half-child exemption not only splits the tax benefit, it acknowl-

249. See Farber & Frickey, *supra* note 231, at 433 (citing fairness as legislative norm). *But see id.* at 428 (following chaos theory, legislative proposal may have unintended results (quoting WILLIAM RIKER, *LIBERALISM AGAINST POPULISM* 167 (1982)). See Irving Salem, *IRS Unwise to Assume Regs Given 'Incredible Deference,'* 15 *INS. TAX. REV.* 237 (Aug. 1998), LEXIS, Vwp (stating that tax court set aside regulations thirty-three percent of time and Supreme Court invalidated six regulations since 1954). The ambiguity of the term custody may lead the IRS to challenge the dependency exemption on the issue of support when the issue of custody appears to be in the government's favor. For instance, where a taxpayer neither filed a waiver from the children's mother, nor had custody for more than half of the year, the IRS did not raise the custody issue. The government lost its grinch-like argument that subsidized housing payments to the children's mother totaled more than half of the children's support. *Hughes v. Comm'r*, 79 T.C.M. (CCH) 1945 (2000) (noting that taxpayer's children lived with him on weekends and on vacations, and with their mother for remainder of time). In *Hughes*, the parents were separated but had never married. Here a government win would have precluded both of the parents' claim to the exemption.

250. See generally LEDERMAN & MAZZA, *supra* note 225, at § 9.01-02.

251. See generally Ellen P. Aprill, *Muffled Chevron: Judicial Review of Tax Regulations*, 3 *FLA. TAX. REV.* 51 (1996) (noting that tax regulations, as lesser forms of tax authority, bear less influential weight than Internal Revenue Code itself); Linda Galler, *Emerging Standards for Judicial Review of I.R.S. Revenue Rulings*, 72 *B.U. L. REV.* 841 (1992) (noting uncertain standards of judicial review of revenue rulings).

252. The exemption would not change in the case of parents filing a joint return.

253. This proposal is similar in spirit to the 1984 amendment permitting both parents to claim the medical deduction on behalf of their child, whether or not the parent also claims the child as a dependent. I.R.C. § 213(d)(5).

edges the contribution of both parents to the well-being of their child. Dividing the exemption forecloses some intrafamily disputes and acknowledges the dignity of both parents.

III

PROPOSALS FOR REFORM

Three changes may convert the dependency exemption from a source of litigation for divorced parents to a benefit for children. First, presume support by the custodian. It is counterintuitive to think that children support themselves and strange to require proof that children are supported by their parents. Second, define custody as the legal right to physical custody. The adoption of such a definition will prevent unintended or illegal shifts in the dependency exemption to the parent who kidnaps a child, and to the parent who simply asks if the child can spend an extra week with him or her.²⁵⁴ Third, divide the exemption between parents who share custody, whether they are married, separated, or divorced. These changes may take the form of an amendment to the Code. The first and second proposals may also be implemented by regulatory action.²⁵⁵

Under current law, the necessity of proving support is likely to arise under horrific circumstances, such as when the Service questioned whether parents of a kidnapped child could claim the dependency exemption. The economic detail required by the regulations also creates the false impression that the dependency exemption somehow tracks the cost of raising a child.²⁵⁶ In fact, any uniform number is simply arbitrary. The exemption is much less than even poor parents spend on their children. A presumption that parents support the children living with them may be a radical way to eliminate the lillipu-

254. Parents who lose custody of their children—for example, where a third party is appointed as guardian while parents complete parenting classes or are investigated for possible termination of parental rights—do not have the legal right to physical custody.

255. It seems that the Service and at least some members of Congress think that the presumption of support by custodial parents may be accomplished in the form of a regulatory action. *See supra* notes 136–140 and accompanying text. In Chief Counsel Advice (CCA), the Service presumed that the parents had provided support to the child for the year of the kidnapping and left open treatment for future years. Although the limits of custody in the existing regulations appear to refer to physical and legal custody interchangeably, the question of physical custody seems to be the focus of the determination. This proposal changes the regulation. The matter of the divided exemption has not been raised by the Service or by Congress.

256. This proposal is in accord with section 151, which denies the personal exemption to children who can be claimed as a dependent on their parents' return. I.R.C. § 151.

tian calibrations required to determine whether a taxpayer supplies over half of a dependent's support.²⁵⁷ The danger that a custodial parent may pay less in support than the value of the dependency exemption appears less expensive to the Treasury than the necessity of auditing the type of information currently required by statute and regulations. Moreover, the amount at risk is minimal since only one taxpayer can claim the exemption.

Additionally, if the custodial parent were able to waive the exemption in favor of the noncustodial parent, or in favor of another person whom the Code authorizes to claim the exemption,²⁵⁸ then the statute may preserve the benefit of a multiple-support agreement while protecting the custodial parent. If the other requirements of subsection (c) remain, the noncustodial parent who pays over ten percent of support will continue to be a necessary party to the agreement. The additional requirement of a waiver by the custodial parent would add fairness to multiple-support agreements.

When one begins with the premise that the dependency exemption ought to follow the custody of the child, then the custodian's right to the deduction supersedes the priority of other potential claimants. From this it follows that the custodial parent be presumed to support the child under subsection (a). Further, payments from governmental or charitable sources such as Social Security benefits should not defeat the right of the custodial parent to the benefit of the exemption.²⁵⁹ Similarly, multiple-support agreements should not displace the rights of the custodial parent. Allocating the benefit of the dependency exemption to the custodial parent is a radical departure from the existing law, but more fitting with current expectations of parents.

257. Alternatively, a more conventional proposal would be to amend I.R.C. section 152(d). *Id.* § 152(d) (stating that amounts received as scholarships for study at educational organization described in I.R.C. § 170(b)(1)(A)(ii) not taken into account).

258. *Compare id.* § 152(a) (no waiver provision provided), *with id.* § 152(e) (allowing custodial parent to waive exemption only for benefit of noncustodial parent). On the other hand, there is a general policy against shifting income or deductions between taxpayers. *See, e.g., id.* § 1015 (preventing donor from transferring loss to another taxpayer by gift).

259. Current law precludes "amounts received as scholarships for study at an educational organization described in section 170(b)(1)(A)(ii)" from overpowering the parents' contribution of "more than half" of the child's support. *Id.* § 152(d). Expanding the provision to exclude catastrophic loss payments by charitable organizations, the government, and insurance companies may avoid many unjust tax results. Under current law, parents who receive federal disaster aid because they lost their homes in an earthquake could also lose their dependency exemption. While expanding the provision to exclude disaster payments would be somewhat helpful, a presumption of parental support encompasses a broader range of problems.

The parent awarded legal custody should be the parent awarded the exemption, because it is difficult to determine physical custody in many cases. Children often spend a night with one parent and go home from school in the afternoon with the other parent. In this instance, who has custody for that day? Mom, Dad, or the first grade teacher? Determining the definition of a day for the purposes of custody is a daunting task. Instead, it is easier to allocate the exemption to the parent who has been awarded legal custody rather than the parent who may have physical custody, especially as physical custody may be manipulated easily. For example, physical custody often changes informally with the ages of children and the circumstances of parents. Young children may be less likely to spend many nights away from familiar surroundings, but as children get older they are more able to travel independently in order to spend time with a parent. Conversely, when one parent works late or leaves town for the weekend on business, older children may lose time with both parents because they are no longer in need of constant supervision.

In contrast to the traditional family, most children today are cared for by an agent of the parent. When the agent supervises the child, it can be difficult to determine which parent is in control of the child. Given the large number of hours spent with a non-parent, determining custody to be legal rather than physical avoids mental and legal gymnastics in making the determination of who should receive the dependency exemption.

In the case of shared equal custody of a child, the exemption should also be shared. A divided exemption may diminish litigation between parents who dispute the number of days of custody in a shared custody arrangement. It acknowledges the contribution of both parents to the well-being of their child and carries with it the symbolic weight of parental responsibility. Lastly, the divided exemption does not discourage the role of joint custody as a means of continuing the involvement of both parents in the lives of their children.

It is difficult for parents who share custody to comply with the law as it is written. Parents, judges, and lawyers are forced to make compromise decisions that are outside of the letter of the law of the dependency exemption. A judge may award one parent the dependency exemption while awarding the other the Earned Income Credit. Although this decision may decrease intra-familial tension, it is outside of the parameters of the law; the law requires a parent to have custody for more than half of the year in order to claim the dependency exemption and the Earned Income Credit. Allowing a split ex-

emption where parents equally provide childcare allows all involved to remain law-abiding.

CONCLUSION

According to the Supreme Court, custodial parents have a “fundamental right . . . to make decisions concerning the care, custody and control of their children.”²⁶⁰ When the tax law excludes tax benefits related to children from the parents’ control, Congress thus has the power to respond to social and political realities. It is time for Congress to acknowledge that “[t]he demographic changes of the past century make it difficult to speak of an average American family.”²⁶¹ If the underlying purpose of the statute is to help children, the exemption requires flexibility. Congress must facilitate broad changes in how the dependency exemption can be claimed by all parents, not just the parents of kidnapped children.

In order to facilitate custody determinations, the parent with legal, rather than physical custody, should be presumed to have custody, even when circumstances make that logistically difficult or impossible. Finally, parents who wish to continue sharing parenting responsibilities and privileges should be allowed to split the exemption. By placing unrealistic restrictions on the dependency exemption, the law exacerbates tension in an already emotionally charged situation. Amending the Code and modifying the regulations would simplify the law and bring the law into sync with the realities of the modern family.

260. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

261. *Id.* at 63. “The composition of families varies greatly from household to household.” *Id.* The United States has an “almost infinite variety of family relationships.” *Id.* at 90 (Stevens J. dissenting).

