Missouri Law Review

Volume 55
Issue 4 *Fall 1990*

Article 8

Fall 1990

Allocating Federal Income Tax Dependency Exemptions in Divorce Decrees

James A. Rodenberg

Allocating Federal Income Tax Dependency Exemptions in Divorce Decrees

Echele v. Echele[1]

I. INTRODUCTION

One of the responsibilities of a state trial court in a divorce proceeding is allocation of child support obligations between spouses. The federal income tax dependency exemption is an important factor in the support allocation decision.[2] After a divorce, only one parent may claim the federal income tax dependency exemption for each child[3] and the parent with the larger income benefits most from the dependency exemption(s).[4] Therefore, if the trial court can allocate the dependency exemption as part of the divorce decree, the court can effectively increase the amount of funds available for child support.[5] This raises the issue of a state court's right to allocate the federal income tax dependency exemption in a state divorce decree. In the recent case of *Echele*

---

1. 782 S.W.2d 430 (Mo. Ct. App. 1989).

2. The dependency exemption allows the claiming taxpayer to subtract, for each dependent, a specified amount from their taxable income for the tax year. This reduction in taxable income reduces the tax liability. For example, the dependency exemption deduction amount for 1989 was $2,000 per exemption. If the claiming taxpayer was in the 28% tax bracket, the $2,000 reduction in taxable income because of the federal dependency exemption would have reduced the federal income tax liability by $560 per dependency exemption. Thus, the income tax liability reduction would make an extra $46.66 per month available for child support. However, the claiming spouse must have taxable income for the exemption to produce any tax reduction. Also, the tax reduction is larger at higher income levels because of the effects of the tax brackets. For example, for a single taxpayer in 1989, taxable income under $18,550 was taxed at 15%, between $18,550 and $44,900 at 28% and over $44,900 at 33%. I.R.C. § 1 (1989).

3. Often, after a divorce, both parents feel as though they are entitled to claim the dependency exemption. Consequently, beginning with the 1988 tax year, the IRS added the social security number under the dependents section of the Form 1040 and Form 1040A. I.R.C. § 152(e) (1990). In this way, the IRS can detect when both parents attempt to claim the exemption for the child after the divorce.

4. *See supra* note 2.

5. *See infra* notes 122-23 and accompanying text.

v. Echele, the Missouri Court of Appeals, Eastern District, addressed this issue. This Note will examine the impact of the decision on allocating the federal income tax dependency exemption in Missouri divorce decrees and the resulting impact on the negotiations between the parties to the divorce.

II. FACTS AND HOLDING

A dissolution decree entered on November 12, 1985 dissolved the marriage of Paul and Sheila Echele.[6] The decree awarded primary custody of their two sons to Sheila and ordered Paul to pay one-half of the children's private school tuition and $51.50 per week per child as child support.[7] Subsequently, on March 15, 1988, Paul filed a motion to modify the original decree.[8] Paul requested that the court: (1) grant him primary custody of the children or, in the alternative, joint legal custody; (2) terminate his obligation for child support; and (3) award him reasonable attorneys' fees.[9] On April 20, 1988, Sheila answered and filed a cross-motion.[10] Sheila maintained that circumstances had changed since the original decree and requested that the court: (1) increase child support retroactive to the date of filing; (2) order Paul responsible for reasonable college education expenses for both sons; (3) modify Paul's visitation and temporary custody rights; (4) order Paul to maintain a life insurance policy for the children; and (5) award reasonable attorneys' fees.[11]

The trial court determined that circumstances had changed substantially since the original decree.[12] The court, therefore, entered an order of modification providing that: (1) Paul pay $71.50 per week, per child for support retroactive to August 1, 1988; (2) Paul, beginning with the 1989 tax year, have the right to claim the oldest son as a dependent for income tax purposes;[13] (3) Paul pay one-half the cost of post-secondary education at a

---

6. *Echele*, 782 S.W.2d at 432.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.* at 431-32. The trial court found:

> [T]he costs of maintaining and educating the two children have increased substantially; that the sons have grown and have needs 'well in excess of their needs at the time of the entry of the Decree' and the costs of supplying those needs have risen, since the sons are older, and have indicated a desire and ability to go on to post-secondary education.

Id. at 433.

13. At the hearing concerning the order to modify, Paul had requested a tax

state supported institution or one-third the cost at a private institution; and (4) each party pay their respective attorneys' fees.[14]

Both parties appealed various issues.[15] This Note will examine only Sheila's appeal from the order granting Paul a federal income tax dependency exemption for the oldest son. The Eastern District concluded that the trial court erred in granting Paul a dependency exemption for the oldest son for income tax purposes.[16] The court based its conclusion on an application and interpretation of section 152 of the Internal Revenue Code (I.R.C).[17] The

---

exemption for one of the children in the event the court ordered an increase in the child support payments. *Id.* at 432.

14. *Id.* at 433.

15. *Id.* Paul maintained the trial court erred:

> (1) in ordering him to pay one-half or one-third of the cost of post-secondary education because the order is not based on substantial evidence and is an erroneous application of the law in that the amounts (a) are dependent upon some future contingency and are indefinite and uncertain and incapable of being identified with any certainty, and (b) are void and unenforceable because the amounts require a subsequent hearing to determine the amount actually owed; (2) in ordering him to pay a portion of the college expenses without abating his obligation to pay the increased child support, and (3) in ordering him to pay an increased amount of child support because the increase is not based upon substantial evidence, or is against the weight of the evidence or is an erroneous application of the law.

Id.

Sheila cross-appealed that the trial court erred "in granting Paul the right to claim Todd as a dependent for income tax purposes and in failing to award her her [sic] reasonable attorney fees." *Id.*

16. *Id.* at 440. The court also held

> (1) that part of the trial court's order requiring the husband, Paul, to pay a portion of the costs for vocational, technical or college or university education is, in its present form, indefinite and uncertain; (2) that part of the order denying the husband any abatement of child support payments is erroneous since it is contingent upon the certainty and definiteness of that part of the order requiring the husband to pay for post-secondary education.

Id.

The court affirmed in part and reversed and remanded in part for further proceedings consistent with the opinion. *Id.* at 441.

17. I.R.C. § 152 (1988) reads in pertinent part:

> (e) SUPPORT TEST IN CASE OF CHILD OF DIVORCED PARENTS, ETC.—
>
> (1) CUSTODIAL PARENT GETS EXEMPTION.—Except as otherwise provided in this subsection, if—
>
> (A) a child (as defined in section 151(c)(3)) receives over half of his support during the calendar year from his parents—
>
> (i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and

(B) such child is in the custody of one or both of his parents for more than one-half of the calendar year, such child shall be treated, for purposes of subsection (a), as receiving over half of his support during the calendar year from the parent having custody for a greater portion of the calendar year (hereinafter in this subsection referred to as the "custodial parent").

(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR.—A child of parents described in paragraph (1) shall be treated as having received over half of his support during a calendar year from the noncustodial parent if—

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year. For purposes of this subsection, the term "noncustodial parent" means the parent who is not the custodial parent.

(3) EXCEPTION FOR MULTIPLE-SUPPORT AGREEMENT—This subsection shall not apply to any case where over half of the support of the child is treated as having been received from a taxpayer under the provisions of subsection (c).

(4) EXCEPTION FOR CERTAIN PRE-1985 INSTRUMENTS.—

(A) IN GENERAL.—A child of parents described in paragraph (1) shall be treated as having received over half his support during a calendar year from the noncustodial parent if—

(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, and

(ii) the noncustodial parent provided at least $600 for the support of such child during such calendar year. For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

(B) QUALIFIED PRE-1985 INSTRUMENT.—For purposes of this paragraph, the term "qualified pre-1985 instrument" means

court held that, unless a noncustodial parent qualifies under one of the exceptions provided in section 152(e)(4),[18] the custodial parent receives the federal income tax dependency exemption as a matter of right, and a trial court has no discretion to award the exemption to the noncustodial parent.[19] Judge Simeone, therefore, reversed and remanded so the trial court could reconsider the amount of child support since Paul could not take the dependency exemption.[20]

III. LEGAL BACKGROUND

The Kentucky Court of Appeals concisely stated the issue faced by the Eastern District in *Echele* as "what effect, if any, does 26 U.S.C. [I.R.C.] § 152(e) have on the trial court's ability to allocate the income tax exemptions for dependent children of divorce."[21] There is a split among state courts as to the power of the courts to allocate the federal income tax dependency exemption in a divorce proceeding. The legal background for this issue requires an examination of the content of I.R.C. section 152, the role of state courts in federal tax matters and the approaches taken by the various states in dealing with the issue.

---

any decree of divorce or separate maintenance or written agreement—

(i) which is executed before January 1, 1985,

(ii) which on such date contains the provision described in subparagraph (A)(i), and

(iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

I.R.C. § 152 (1988).

18. *Id.*

19. *Echele*, 782 S.W.2d at 440.

20. *Id.* The court stated that "the trial court may, in view of the tax ramifications, wish to consider the amount of child support awarded to Sheila." *Id.* For a discussion of the tax ramifications, see *supra* note 2.

21. Hart v. Hart, 774 S.W.2d 455, 456 (Ky. Ct. App. 1989). Stated another way, one commentator asked: "Do state courts have jurisdiction to determine which party to a divorce can claim the dependency exemption for a child?" Ingold, *Tax Note: Trial Court Lacks Authority to Order Parent to Waive Child Dependency Exemption*, 27-50-186 ARMY LAW. 53, 54 (1988).

A. I.R.C. Requirements

Congress has for years dealt with the dependency exemption issue for federal income tax purposes in I.R.C. section 152. The Tax Reform Act of 1984 (TRA), however, made significant changes to this section. One commentator has written that TRA brought about "the most dramatic reform for tax planning in divorce actions since Congress first passed legislation on the matter in 1942. TRA makes tax planning easier for spouses since it permits more accurate prediction of the tax consequences of their divorce."[22] Therefore, an analysis of the dependency exemption must consider the pre-TRA and post-TRA rules.

Under both pre-TRA and post-TRA rules, there are two distinct aspects to federal income tax dependency exemption allocation between divorced parents: (1) basic threshold dependency requirements, and (2) allocation rules. First, in order for either parent to claim the exemption, a couple must satisfy a three-part threshold test.[23] First, the child must be under the age of nineteen or attending school.[24] Second, the child must receive over fifty percent of his or her support for the tax year from one or both of the parents.[25] Finally, the child must be in the custody of one or both parents for more than one-half the tax year.[26] These threshold requirements did not change with TRA.

Once these threshold requirements are satisfied so that the parents are qualified to claim the exemption, section 152 contains allocation rules to determine which parent can claim the exemption. These allocation rules were changed by TRA. Before TRA, the amount of support provided by each parent determined who received the dependency exemption. The general rule was that section 152 gave the exemption to the custodial parent.[27] The noncustodial parent could take the exemption in only one of two ways: (1) if the divorce decree or the couple's written agreement gave it to them *and* they paid at least $600 in support for the child for the year; or (2) if they provided

---

22. Comment, *Tax Planning in Divorce: Both Spouses Benefit from the Tax Reform Act of 1984*, 21 WILLAMETTE L. REV. 767, 768 (1985). Actually, the Deficit Reduction Act (Pub. L. No. 98-369, §§ 421-426, 98 Stat. 793-804 (1984)), a subpart of TRA, effected the changes in divorce related tax statutes. However, TRA is universally used to refer to the 1984 changes, so this Casenote will use TRA in lieu of the subpart, DRA.

23. *Id.* at 801-02; *see also* Comment, *Domestic Relations Tax Reform Act*, 20 GONZ. L. R. 251, 276-78 (1984/85).

24. I.R.C. § 151(c)(1)(B) (1988).

25. *Id.* § 152(e)(1)(A).

26. *Id.* § 152(e)(1)(B).

27. I.R.C. § 153(e)(1) (1982).

at least $1,200 in support for the child, the decree or agreement did not assign the exemption, *and* the custodial parent could not "clearly establish" that they provided more support than the noncustodial parent.[28]

Thus, pre-TRA section 152(e) permitted the parties to control which parent would claim the federal income tax dependency exemption.[29] If the parents could not agree, however, the issue turned on who provided the most support. This factual question on the amount of support provided by each parent became a highly litigated issue.[30] One commentator characterized the situation as "the Tax Court was the scene of literally thousands of trials to determine whether Mom or Pop was entitled to the $1,000 exemption for little Johnny."[31]

In the legislative history of the TRA, Congress specifically recognized this litigation problem:

> The present rules governing the allocations of the dependency exemption are often subjective and present difficult problems of proof and substantiation. The Internal Revenue Service becomes involved in many disputes between parents who both claim the dependency exemption based on providing support over the applicable thresholds. The cost to the parties and the Government to resolve these disputes is relatively high and the Government generally has little tax revenue at stake in the outcome.[32]

---

28. *Id.* § 152(e). This section is fully explained and discussed in Comment, *supra* note 22, at 802. *See also* Comment, *supra* note 23, at 277; Ingold, *Recent Reforms in Divorce Taxation: For Better or For Worse*, 120 MIL. L. REV. 203, 216-19 (Spring 1988).

29. One commentator stated that "[s]ection 152(e) permitted a divorcing couple to negotiate between themselves as to which spouse would claim the tax exemption for their dependent child" because the divorce decree or separation agreement could specify the allocation. Comment, *supra* note 22, at 801.

30. *Id.* at 802-03. Another commentator noted that "[u]nder the old law, determining which divorced parent had provided over half the child's support, and therefore was entitled to the exemption, was difficult. The task was especially difficult without information from the other parent." Comment, *supra* note 23, at 277. *See also* Taggart, *Economic Consequences of Emotional Choices: Divorce and Separation Under TRA 84*, 15 CUM. L. REV. 341, 358 (1984-85) (many parents became embroiled in litigation involving difficult problems of proof relating to the amounts each had provided for support as a result of these two exceptions).

31. Holden, *The Domestic Relations Tax Act of 1984*, 34 R.I.B.J. 11, 12 (1986).

32. H.R. NO. 432, 98th Cong., 2d Sess., pt. 3, at 1498-99, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1140.

Congress, therefore, amended section 152 to "avoid having the IRS act as a mediator between divorced spouses rather than performing its revenue-collecting function."[33]

As a result of congressional changes, the TRA amendments to section 152 "eliminate specific dollar thresholds and thereby greatly simplify the issue of which parent is entitled to the dependency exemption."[34] The result is that the current section 152(e) limits the negotiation flexibility between the parents in order to establish greater certainty to the federal income tax dependency exemption issue.[35]

The general rule remains the same—the custodial parent is entitled to the dependency exemption.[36] The dollar threshold tests, however, have been eliminated. Instead, the custodial parent always gets the dependency exemption unless any one of three exceptions applies.[37] These exceptions are: (1) the new rules do not apply to multiple-support agreements,[38] (2) there is an exception for pre-1985 agreements in which the exemption is assigned to the noncustodial parent,[39] and (3) the custodial parent may

---

33. Lincoln v. Lincoln, 155 Ariz. 272, 276, 746 P.2d 13, 17 (Ariz. Ct. App. 1987).

34. Ingold, *supra* note 28, at 218. *See also* Taggart, *supra* note 30, at 358 (new § 152(e) considerably simplifies the handling of personal exemptions of the children of divorced parents because the new law no longer requires a parent to calculate the actual amount of support provided for a child).

35. Comment, *supra* note 22, at 804.

36. I.R.C. § 152(e)(1) (1988). A "custodial" parent is defined by the Code as the parent "having custody for a greater portion of the calendar year." *Id.* Thus, the custodial parent is the parent who physically has the child for the greater number of days during the year.

37. I.R.C. § 152(e)(2), (3), (4) (1988). *See also* Ingold, *supra* note 28, at 216-18.

38. I.R.C. § 152(e)(3) (1988). A "multiple support agreement" is defined in I.R.C. § 151(c) (1988). Basically, it is an agreement between persons who would be able to claim the exemption except that they individually did not provide more than half of the child's support, but together did provide more than half. In essence, they agree as to which one will claim the exemption and further agree as to which one will not claim the exemption.

39. I.R.C. § 152(e)(4) (1988). A commentator has explained:

> [An] exception to the rule that the custodial parent is entitled to the exemption occurs when a decree of divorce or separation or written agreement has been executed before January 1, 1985, and that decree or agreement provides that the noncustodial parent will get the exemption. Even so, the noncustodial parent must have provided at least $600 toward the child's support. A decree or agreement that is modified in 1985 or afterward will not qualify under this exception.

Comment, *supra* note 23, at 278.

expressly waive the exemption.[40] If the custodial parent waives the right to claim the exemption, the noncustodial parent must attach the written declaration of waiver to their tax return.[41] The waiver can be effective for one or more calendar years or permanently.[42]

Thus, under the current section 152(e) rules, the noncustodial parent "no longer has the opportunity to go into court and prove that he contributed $1,200 or more of the child's support and is therefore entitled to the exemption."[43] "The IRS is now only concerned with which parent is the custodial parent and whether he has signed a written declaration that he will not claim the exemption."[44] Unless there is a multiple support agreement or a pre-1985 agreement involved, the custodial parent always gets the dependency exemption for federal income tax purposes.[45] Therefore, post—TRA, the issue has become to what extent, if any, a state court can control and allocate the right to claim the dependency exemption.[46]

B. State Court Role in Federal Tax Matters

Does a state trial court have subject matter jurisdiction to determine how federal income tax dependency exemptions should be divided by divorced parents? "Unquestionably, the right of the United States to collect federal taxes exists independent of state law."[47] Domestic relations, however, is an area traditionally reserved for state law authority.[48] The issue, therefore, is

---

40. I.R.C. § 152(e)(2) (1988).

41. *Id.* The current waiver declaration is IRS Form 8332.

42. *Id. See also* Comment, *supra* note 22, at 804.

43. Comment, *supra* note 22, at 804.

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

45. "Under 26 U.S.C. § 152(e), as amended, the IRS's role in resolving such questions is eliminated by automatically allowing the custodial parent to claim the exemption unless that parent has executed a written waiver in favor of the other spouse." *Lincoln*, 155 Ariz. at 275, 746 P.2d at 16.

46. *See, e.g.*, Fleck v. Fleck, 427 N.W.2d 355 (N.D. 1988). In *Fleck*, the trial court had awarded the dependency exemption to the custodial parent and the noncustodial parent appealed. *Id.* at 357. After quoting I.R.C. § 152(e), the court explained that the resolution of the issue turned on "whether or not the trial court has the authority to allocate the income tax dependency exemption." *Id.* at 358.

47. Westerhof v. Westerhof, 137 Mich. App. 97, 100, 357 N.W.2d 820, 820-21 (1984). The court cited United States v. Union Central Life Ins. Co., 368 U.S. 291 (1961), and Leuschner v. First Western Bank & Trust Co., 261 F.2d 705 (9th Cir. 1958).

48. "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Ex parte* Burrus, 136 U.S. 586, 593-94 (1890). *See also* Magaziner v. Montemuro, 468

whether a specific federal statute preempts state authority in an area traditionally reserved for state control. When discussing the issue of preemption, one court noted "[c]ongressional intent is determinative in questions of federal preemption of state law."[49] The same court noted "[f]ederal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question."[50] State domestic law must do "major damage" to "clear and substantial" federal interests before the Supremacy Clause of the United States Constitution will demand that the state law be overridden.[51]

Traditionally, state courts have exercised broad discretion in allocating assets and property rights in a divorce proceeding.[52] This allocation right was extended by state courts to the federal income tax dependency exemption issue and courts routinely used their powers to allocate the exemption in divorce decrees.[53] In *Fudenberg v. Molstad*,[54] the court noted "[s]tate

---

F.2d 782 (3rd Cir. 1972); Buechold v. Oritz, 401 F.2d 371, 373 (9th Cir. 1968); Ruffalo v. Civiletti, 539 F. Supp. 949, 955 (W.D. Mo. 1982); Harley v. Oliver, 404 F. Supp. 450, 455 (W.D. Ark. 1975).

49. *In re* Marriage of Peacock, 771 P.2d 767, 768 (Wash. Ct. App. 1989) (preemption may be found only if federal law 'clearly evinces a congressional *intent* to preempt state law,' or there is such a 'direct and positive' conflict 'that the two acts cannot be reconciled or consistently stand together') (emphasis added).

50. *Id.* (citing Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379 (1930)).

51. *Id.* (quoting United States v. Yazell, 382 U.S. 341 (1966)).

52. *See, e.g.*, Hughes v. Hughes, 235 Ohio St. 3d 165, 518 N.E.2d 1213 (Ohio 1988), *cert. denied*, 488 U.S. 846 (1988). In *Hughes*, the Ohio Supreme Court noted that "[a] domestic relations court has broad discretion to determine the proper mix and allocation of marital assets and property rights in a divorce proceeding." *Id.* at 1215. *See also* Colabianchi v. Colabianchi, 646 S.W.2d 61, 64 (Mo. 1983) (en banc) (the Dissolution of Marriage Act leaves the division of marital property to the sound discretion of the trial court); State v. Reggins, 645 S.W.2d 111, 113 (Mo. Ct. App. 1982) (the manner of dividing marital property and the allowance of maintenance are within the sound discretion of the trial court); Thompson v. Thompson, 645 S.W.2d 79, 81 (Mo. Ct. App. 1982) (the circuit court has subject matter jurisdiction over questions of support and maintenance); Lohmann v. Lohmann, 246 S.W.2d 368, 370 (Mo. Ct. App. 1952) (this court has held many times that the primary objective of a divorce action is to dissolve the marital status; and that incidental thereto, the court is authorized, as part of its decree, to make provision respecting the custody and maintenance of children).

53. *See, e.g.*, Roberts v. Roberts, 553 S.W.2d 305 (Mo. Ct. App. 1977). In *Roberts*, the court declared that "Missouri courts have jurisdiction over the question of which party receives the federal income tax exemption." *Id.* at 307. This issues has been quoted with approval in Niederkorn v. Niederkorn, 616 S.W.2d 529, 533 (Mo. Ct. App. 1981).

54. 390 N.W.2d 19 (Minn. Ct. App. 1986).

courts, including this court, have interpreted the pre-1985 version of § 152(e) to allow state court allocation of the exemption to the noncustodial parent."[55] Since section 152 is silent regarding state court jurisdiction, the states are split as to whether a state court currently has authority to allocate a federal income tax dependency exemption.

C. Jurisdictional Approaches

Since TRA, state courts have basically taken two positions on their authority to allocate the federal income tax dependency exemption.[56] One line of authority holds that the current section 152 preempts state domestic law and prevents a state court from allocating the dependency exemption.[57] The other position is that state court allocation is not contrary to congressional intent and state courts have a responsibility to allocate the dependency exemption in divorce proceedings.[58]

In *Bailey v. Bailey*,[59] the court noted that the "majority of courts which have ruled on the question have held that the amendment to § 152(e)(2) does not prevent State courts from allocating dependency exemptions."[60] In fact, the State of Washington has a statute which requires a trial court, when entering a decree of dissolution, to "make provision for the allocation of the children as federal tax exemptions."[61] Most cases reason that the allocation

---

55. *Id.* at 20. *See, e.g.*, Morphew v. Morphew, 419 N.E.2d 770 (Ind. Ct. App. 1981); Pettitt v. Pettitt, 261 So.2d 687 (La. Ct. App. 1972); Westerhof v. Westerhof, 137 Mich. App. 97, 357 N.W.2d 820 (1984); Greeler v. Greeler, 368 N.W.2d 2 (Minn. Ct. App. 1985); Niederkorn v. Niederkorn, 616 S.W.2d 529 (Mo. Ct. App. 1981); MacDonald v. MacDonald 122 N.H. 339, 443 A.2d 1017 (1982).

56. *See* Brandriet v. Larsen, 442 N.W.2d 455, 458-59 (S.D. 1989).

57. *Id.* at 458.

58. *Id.*

59. 27 Mass. App. Ct. 502, 540 N.E.2d 187 (1988).

60. *Id.* at 504, 540 N.E.2d at 188-89. The court agreed and remanded for the trial court to allocate the exemptions. *Id.* at 504-05, 540 N.E.2d at 189. *See also In re* Marriage of Lincoln, 155 Ariz. 272, 746 P.2d 13 (Ariz. Ct. App. 1987); *In re* Marriage of Einhorn, 178 Ill. App. 3d 212, 533 N.E.2d 29 (1988); Hoyle v. Hoyle, 473 N.E.2d 653 (Ind. Ct. App. 1985); Hart v. Hart, 774 S.W.2d 455 (Ky. Ct. App. 1989); Wassif v. Wassif, 77 Md.App. 750, 551 A.2d 935 (1989); Fudenberg v. Molstad, 390 N.W.2d 19 (Minn. Ct. App. 1986); *In re* Marriage of Milesnick, 765 P.2d 751 (Mont. 1988); Fleck v. Fleck, 427 N.W.2d 355 (N.D. 1988); Hughes v. Hughes, 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988), *cert. denied*, 488 U.S. 846 (1988); *In re* Marriage of Peacock, 54 Wash. App. 12, 771 P.2d 767 (1989); Cross v. Cross, 363 S.E.2d 449 (W. Va. 1987); *In re* Marriage of Pergolski, 143 Wis.2d 166, 420 N.W.2d 414 (Wis. Ct. App. 1988).

61. *Peacock*, 54 Wash. App. at 13, 771 P.2d at 768 (the statute is WASH. REV.

does not conflict with section 152(e) and does not frustrate congressional intent for section 152(e).[62] The theory is that as long as only one parent claims the exemption(s) and the IRS is not involved in any litigation over allocation, the IRS does not care who claims the exemption(s) and it is a matter of state jurisdiction to allocate. In *Hart v. Hart*, the Kentucky Court of Appeals summarized this position by stating that:

> Congress, however, did not, expressly or by implication, prohibit state courts from allocating the exemption and did not, we believe, intend to tread into an area traditionally left to the states courts to adjudicate. The allocation of the exemption has, or at least should have, a bearing on the amount of money available as child support. A trial court should allocate the exemption so as to maximize the amount available for the care of the children. This power in no way conflicts with the intent of our U.S. Congress to avoid IRS involvement in the issue of which parent should be able to claim the exemptions.[63]

Thus, the majority view believes state courts should continue to allocate the federal income tax dependency exemption because it is a domestic relations issue and does not interfere with Congress' intent to keep the IRS out of litigation over the allocation. The majority differs, however, on how to accomplish the allocation once the decree allocates the exemption to the noncustodial parent. Some courts contend that the trial court should order the custodial parent to sign the waiver.[64] Others maintain the trial court does not

---

CODE § 26.09.050 (1986)).

62. *Peacock*, 54 Wash. App. at 16, 771 P.2d at 769. The court states that Congress has a "surpassing indifference to how the exemption is allocated as long as the IRS doesn't have to do the allocating. . . . The congressional interest in administrative efficiency is in no way affected by state court allocation of the dependency exemption. *Id. See also Fudenberg*, 390 N.W.2d at 21, where the court stated that "[s]tate court allocation of the exemption does not interfere with Congressional intent. It does not involve the IRS in fact-finding determinations. State court involvement has no impact on the IRS. Thus, allocation of the exemption is permissible."

63. *Hart*, 774 S.W.2d at 457.

64. "To effectuate the allocation, a trial court must be able to order the custodial parent to sign a declaration that he will not claim the exemption. A court order allocating the exemption without the required IRS declaration form (IRS Form 8332) is ineffective to transfer the exemption to the noncustodial parent." *Einhorn*, 178 Ill. App. 3d at 225, 533 N.E.2d at 37; *see also Lincoln*, 155 Ariz. at 276, 746 P.2d at 17; *Bailey*, 27 Mass. App. Ct. at 505, 540 N.E.2d at 189; *Fudenberg*, 390 N.W.2d at 21; *Milesnick*, 765 P.2d at 754; *Fleck*, 427 N.W.2d at 359; *Peacock*, 54 Wash. App. at 17-18, 771 P.2d at 770; *Cross*, 363 S.E.2d at 459; *Pergolski*, 143 Wis. 2d at 173, 420 N.W.2d at 417.

have the authority to order the custodial parent to execute a waiver. Instead, a possible contempt of court citation or a reduction in child support would be the remedies if the custodial parent did not voluntarily sign the waiver to allocate the exemption in compliance with the allocation in the decree.[65] Finally, some courts do not address the mechanics of the allocation and hold only that the trial court has the right to allocate the dependency exemption.[66] In reality, however, the arguments over the mechanics of the allocation are mostly semantics. They all reach the same conclusion—that is, the trial court can force the custodial parent to sign the waiver in order to effectuate the allocation in the divorce decree.[67]

The minority of courts have held that the TRA amendments to section 152(e) preclude a state court from allocating the federal income tax dependency exemption.[68] The leading case is *Davis v. Fair*.[69] In *Davis*, the noncustodial parent, Fair, sought to modify a pre-1985 divorce decree to allocate to him the dependency exemption.[70] The original pre-1985 decree had not mentioned the dependency exemptions and Fair had been claiming the exemptions under the pre-TRA section 152 rules. The court stated that the question was "whether an exception exists under the present version of Section

---

65. In *Hughes*, 518 N.E.2d at 1216, the court held that "[w]e cannot, for example, force a custodial parent to execute the requisite declaration." *Id.* However, the court stated that "one of Mr. Hughes' [noncustodial parent] options . . . would be a contempt of court action in state court against Mrs. Hughes, seeking enforcement of the court order." *Id.* In Brandriet v. Larsen, 442 N.W.2d 455 (S.D. 1989), the court stated that "the trial court may take the custodial parent's refusal to voluntarily waive the exemption into consideration and set the child support at a level low enough to induce the custodial parent to waive." *Id.* at 459. The court took this position because it could not "see how a waiver signed under threat of punishment . . . can be called 'voluntary.'" *Id.* at 460.

66. *See, e.g.*, Hoyle v. Hoyle, 473 N.E.2d 653, 656-57 (Ind. Ct. App. 1985); Valento v. Valento, 385 N.W.2d 860, 863 (Minn. Ct. App. 1986).

67. This is the position taken by the court in Brandriet v. Larsen, 442 N.W.2d 455 (S.D. 1989). After discussing the various approaches to getting the waiver executed in compliance with the decree, the court concluded "there is a wide distinction in the approach; but, in the long run, the result may be the same. . . . From either aspect, it is coercion." *Id.* at 459.

68. *See, e.g.*, Lorenz v. Lorenz, 166 Mich. App. 58, 419 N.W.2d 770 (1988); Davis v. Fair, 707 S.W.2d 711 (Tex. Ct. App. 1986); Fullmer v. Fullmer, 761 P.2d 942 (Utah Ct. App. 1988).

69. 707 S.W.2d 711 (Tex. Ct. App. 1986).

70. *Id.* at 712. He had been claiming the exemptions under the pre-TRA section 152(e) support exception in that he provided over $1,200 in support. *Id.* at 712-13.

152 which will allow Fair [the noncustodial parent] to claim the parties' children as his dependents."[71]

The *Davis* court determined that the current section 152 does not allow the noncustodial parent to claim the exemption unless one of the exceptions applies.[72] The court stated that it could find no case law, under the current version of section 152, to support the "proposition that a state court can award a parent the right to claim a dependency exemption if such parent is not entitled to the exemption under the explicit language of the Internal Revenue Code."[73] Because the noncustodial parent did not come within any of the section 152 exceptions, the court held "[t]he trial court was without authority to disregard the statute and to thereby grant the exemption to one who was not entitled to it under the law."[74]

---

71. *Id.* at 714-15.

72. *Id.* at 714. The court stated:

> When read in conjunction with the whole exception to which it applies, it is apparent that subsection (4)(B)(iii) of Section 152(e) does not grant a court the power to determine through a modification decree who shall be entitled to a dependency exemption. Subsection (4)(B)(iii) merely gives a court the power to modify a pre-January 1, 1985, instrument which already contains a provision granting the noncustodial parent the right to any deduction allowable under Section 151 of the Internal Revenue Code. The purpose of subsection (4)(B)(iii) is to continue the force and effect of pre-amendment decrees which contain an express agreement relating to a noncustodial parent's right to claim the dependency exemption. Subsection (4)(B)(iii) does not give a court the power to modify a pre-amendment decree which is void of any agreement relating to a dependency exemption.

Id. at 716.

For a discussion of the current § 152(e) rules, see *supra* notes 36-46 and accompanying text.

73. *Davis*, 707 S.W.2d at 717-18. The noncustodial parent had argued that "the power to allocate dependency exemptions has generally resided in the state courts and that such power should continue to reside in the state courts even after the amendment to Section 152." *Id.* at 717. The court distinguished the noncustodial parent's use of *Niederkorn* as authority by noting that the *Niederkorn* court found that the trial court's "award of the exemption to the wife . . . was not contrary to the provisions of the Internal Revenue Code." *Id.*

74. *Id.* at 718. "We hold that Fair does not come within any of the exceptions to the general rule of Section 152. The general rule, expressed in subsection (e)(1) of Section 152, grants the right to claim the dependency exemption to the custodial parent, Davis." *Id.*

In reaching this holding, the court answered two arguments made by the noncustodial parent. First, the parent argued that "equity and economic practicalities demand that he be granted the dependency deductions so that the status quo can be maintained." *Id.* at 717. The court stated that "economic impracticalities of a taxing

Thus, the minority position is that I.R.C. section 152(e) clearly allocates the federal income tax dependency exemption and state courts must follow its rules when awarding the exemption in a divorce decree.[75]

IV. THE *ECHELE* DECISION

In *Echele*, the court adopted the minority position on allocation of the federal income tax dependency exemption and based its decision on the rules established in I.R.C. section 152(e). Judge Simeone began his discussion by noting the importance of the pre-TRA/post-TRA distinction: "While decisions have stated that Missouri courts have jurisdiction over the question of which party receives the federal income tax exemption, . . . these pronouncements were made under previous provisions of the Internal Revenue Code prior to the adoption by Congress of the Tax Reform Act."[76]

The court next pointed to *Corey v. Corey*[77] as further authority that the current section 152 controls the issue.[78] In *Corey*, the respondent had failed to request that the trial court determine the issue and therefore did not preserve the issue concerning federal income tax dependency exemptions on appeal.[79] The *Corey* court, however, used the opportunity to "draw the trial court's attention to Title 26 U.S. Code § 152, the Internal Revenue Code, and Temporary Regulation 1.152-4T adopted August 30, 1984."[80]

---

statute and the equitable considerations urged by a taxpayer are not relevant when considering what deductions and exemptions are permissible." *Id.* Second, the parent contended that "the power to allocate dependency exemptions has generally resided in the state courts and that such power should continue to reside in the state courts even after the amendment to Section 152." *Id.* (citations omitted). The court noted that state courts have never been able to award a right to claim a dependency exemption "if such parent is not entitled to the exemption under the explicit language of the Internal Revenue Code." *Id.* at 718. Thus the court concluded that "[t]he trial court had no authority to grant Fair a deduction to which he was not entitled under the Internal Revenue Code." *Id.* at 717.

75. For example, the Utah Court of Appeals held that

> [a]lthough many state courts interpreting the predecessor provisions to section 152(e) have determined that they have discretion to award the exemption in a divorce proceeding, . . . we agree with the courts that have concluded they do not have the authority to grant the exemption contrary to the provisions of the Internal Revenue Code.

Fullmer v. Fullmer, 761 P.2d 942, 950 (Utah Ct. App. 1988) (citations omitted).

76. *Echele*, 782 S.W.2d at 439.

77. 712 S.W.2d 708 (Mo. Ct. App. 1986).

78. *Echele*, 782 S.W.2d at 439.

79. *Corey*, 712 S.W.2d at 710.

80. *Id.*

Finally, the court noted that two other recent Missouri Court of Appeals decisions also looked to section 152 to resolve the issue of allocating the federal income tax dependency exemption for income tax purposes.[81] In *Seip v. Seip*,[82] the Western District affirmed a trial court decision to allocate the dependency exemption to the custodial parent.[83] Likewise, in *Schneider v. Dougherty*,[84] the Eastern District affirmed a trial court award of the dependency exemption to the custodial parent.[85] In *Schneider*, the trial court had modified the original divorce decree to change primary custody from the mother to the father and accordingly awarded the dependency exemption to the father.[86] Because the trial court had allocated the exemption to the custodial parent, the court held that it was "not an abuse of discretion to award father, the custodial parent, the right to claim the children for tax purposes."[87]

After discussing the need to look to section 152(e), the court in *Echele* noted "[o]ur research has failed to discover any authoritative Missouri decision discussing a trial court's order granting the right of the noncustodial parent an exemption for income tax purposes in light of 26 U.S. [sic] Code § 152."[88] The court, therefore, turned to a discussion of *Davis v. Fair*[89] as authority for the proposition that, under the current section 152, the custodial parent automatically receives the dependency exemption unless one of the specific exceptions is applicable.[90]

After discussing *Davis*, the court noted:

---

81. *Echele*, 782 S.W.2d at 439.

82. 725 S.W.2d 134 (Mo. Ct. App. 1987).

83. *Id.* at 137. In *Seip*, the custodial spouse filed a motion to modify a separation agreement incorporated into a 1980 decree of dissolution of marriage. *Id.* at 135. The spouse sought increased child support payments and the right to claim the federal income tax dependency exemptions. *Id.* The 1980 separation agreement had allocated the dependency exemption to the noncustodial spouse. The court noted that section 152(e)(4)(B)(iii) allows a trial court to modify a pre-1985 agreement to allocate the dependency exemption. *Id.* at 137. The court held that the trial court had jurisdiction to modify the agreement and allocate the exemption to the custodial parent in compliance with I.R.C. section 152. *Id.*

84. 747 S.W.2d 763 (Mo. Ct. App. 1988).

85. *Id.* at 764-65.

86. *Id.* at 764.

87. *Id.* at 765 (citation omitted).

88. *Echele*, 782 S.W.2d at 439.

89. For a discussion of the case and holding in *Davis*, see *supra* notes 69-74 and accompanying text.

90. *Echele*, 782 S.W.2d at 439-40.

> The purpose of the 1984 amendments was both to remove the Internal Revenue Service from time consuming factual disputes over which parent met the threshold support requirements, and to add certainty to the process by 'allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption.'[91]

The court then applied its reasoning to the facts of *Echele*. The court first stated that none of the exceptions in section 152 applied to the facts of the case.[92] The court next noted that federal preemption prevents a state court from acting contrary to the tax statute.[93] Therefore, the court held "[s]ince Paul did not come within any of the exceptions provided in § 152, the trial court erred in attempting to grant him the privilege of taking Todd as an exemption for his income tax purposes."[94]

In conclusion, the court did note, without any elaboration or discussion, that several states have held that state courts have the authority to order the custodial parent to execute a written consent form to assign the exemption to the noncustodial parent.[95] Finally, because of the financial value of the exemption, the court suggested that the trial court, on remand, "may, in view of the tax ramifications, wish to consider the amount of child support awarded to Sheila."[96]

V. ANALYSIS

A. The Problem

Before TRA, Missouri courts generally assumed jurisdiction to allocate the federal income tax dependency exemption.[97] This was because pre-TRA

---

91. *Id.* at 440 (citing *Fullmer*, 761 P.2d at 950).

92. "It is clear in this case that none of the exceptions embodied in § 152(e) exist." *Id.* The court explained that "there was no multiple support agreement, Sheila did not sign any written declaration that she would not claim Todd as a dependent, and there is no qualified pre-1985 instrument between the parents." *Id.*

93. "Exemptions provided in the taxing statutes are not to be extended beyond the language used." *Id.* (citing *Davis*, 707 S.W.2d at 716).

94. *Echele*, 782 S.W.2d at 440.

95. *Id.* The court listed Fleck v. Fleck, 427 N.W.2d 355, 358 (N.D. 1988); Cross v Cross, 363 S.E.2d 449, 458 (W. Va. 1987).

96. *Echele*, 782 S.W.2d at 440. The trial court had awarded the amount of child support based on the assumption that the payor spouse would receive the federal dependency exemption. Since the appellate court reversed the exemption allocation, the court suggested the amount of child support may need to be adjusted downward to reflect the loss to payor due to increased tax liabilities. *Id.*

97. In Niederkorn v. Niederkorn, 616 S.W.2d 529 (Mo. Ct. App. 1981), the Saint

section 152 had an exception which allowed the noncustodial parent to claim the exemption if the decree allocated it to her and she paid at least $600 in child support.[98] Thus, the courts could allocate the dependency exemption to the noncustodial parent by including in the decree that the noncustodial parent was to get the exemption and was to pay at least $600 in support. There was no preemption issue because this could be done in accordance with the federal tax statute. If the court failed to address the dependency exemption issue, the parents were forced to litigate the issue. This litigation is what Congress sought to avoid by the TRA amendments to section 152. Even in the pre-TRA cases, however, there was no authority for allocating contrary to federal statute.[99]

Until *Echele*, Missouri cases have not clearly defined the role of the trial court in the allocation of the federal income tax dependency exemption in divorce proceedings since the TRA changes section 152. As discussed above,[100] there is a split among state courts on the right of a state court to award the dependency exemption. There does not, however, appear to be any authority for a state court to preempt federal tax statutes merely because the proceeding is a state matter. The Texas Court of Appeals aptly explained "[t]he question of income tax exemptions is clearly an area which has been preempted by the federal government and must be decided according to applicable federal statutes, rules and regulations. State courts have no power to interfere in this area."[101]

Since TRA, no Missouri case has clearly addressed the application of amended section 152(e). *Corey v. Corey*[102] is often cited as authority for the

---

Louis District Court cited Roberts v. Roberts, 553 S.W.2d 305, 307 (Mo. Ct. App. 1977), for the proposition that "Missouri courts have jurisdiction over the question of which party receives the federal income tax exemption." *Niederkorn*, 616 S.W.2d at 533.

98. For a discussion of the pre-TRA section 152 rules see *supra* notes 27-31 and accompanying text.

99. For instance, in the often cited *Niederkorn* case, the court noted that the "award of the exemption to wife in this case was not contrary to the provisions of the Internal Revenue Code." *Niederkorn*, 616 S.W.2d at 533. The Texas Court of Appeals noted that *Niederkorn* did not award the exemption contrary to IRS provisions. *Davis*, 707 S.W.2d at 718.

100. *See supra* notes 56-75 and accompanying text.

101. Ruiz v. Ruiz, 668 S.W.2d 866, 867 (Tex. Ct. App. 1984). The trial court had modified the divorce decree to award custody of the oldest of six children to the father. *Id.* However, the trial court allowed the decree to continue to give all the dependency exemptions to the mother. *Id.* The court deleted the provision in the decree awarding the exemptions to the mother because the issue is to be determined by federal statute, not state court allocation. *Id.*

102. 712 S.W.2d 708 (Mo. Ct. App. 1986).

proposition that the trial court should allocate the dependency exemption.[103] The *Corey* court, however, stated that the trial court should determine who was "entitled" to the exemption because it impacted support amounts.[104] Apparently, the court was referring to the fact that the federal statute allocates the exemption and it is the responsibility of the trial court to take note of the allocation and consider it in determining support amounts.[105]

In a 1987 post-TRA case,[106] the Western District indicated that a trial court's determination of federal income tax dependency exemption allocation must be "exercised in accord with and not contrary to the provisions of the Internal Revenue Code."[107] In the same year, however, the Eastern District awarded the federal income tax depency exemption to the noncustodial parent without a waiver from the custodial parent and stated "case law in Missouri upholds a court's jurisdiction to award tax exemptions."[108] Thus, the issue remained clouded because the cases did not specifically address the application of amended section 152(e) in allocating federal income tax dependency exemptions as part of a divorce decree.

In a case decided a month before *Echele*, the Southern District reversed the trial court's award of a dependency exemption to a noncustodial parent.[109] The court based its decision to reverse on the acknowledgement by the noncustodial parent's counsel that the award was probably contrary to current section 152(e) rules.[110]

B. Possible Solution

Cases prior to *Echele* left some confusion as to whether the trial court could allocate the federal income tax dependency exemption in a divorce

---

103. "[I]t would be appropriate for the parties, or the court in the absence of agreement between the parties, to determine and express which party is entitled to the available exemptions." *Id.* at 711.

104. *Id.*

105. In *Corey*, the trial court had refused to award the dependency exemption to the noncustodial parent and the court held that was consistent with the federal statute. *Id.* at 710-11. Thus, the *Corey* court acknowledged the preemption of I.R.C. § 152 over state court allocation.

106. Seip v. Seip, 725 S.W.2d 134 (Mo. Ct. App. 1987).

107. *Id.* at 137.

108. A.V. v. G.V., 726 S.W.2d 782, 785 (Mo. Ct. App. 1987). The case involved a paternity determination and a claim for support. The court declared that "[c]learly, the issue of tax exemptions is ancillary to an award of child support and may, at the discretion of the trial court, be addressed." *Id.* Because the case did not involve a divorce, however, there was some question as to whether § 152 even applied. *Id.*

109. *In re* Marriage of Studyvin, 779 S.W.2d 338, 340 (Mo. Ct. App. 1989).

110. *Id.*

decree without meeting the requirements of I.R.C. section 152. The lack of clarity explains the importance of *Echele*. The *Echele* court specifically held that section 152(e) controls the allocation of the federal dependency exemption and a trial court cannot award the exemption to a noncustodial parent unless one of the three specific exceptions applies. This should clear up any confusion at the trial court level on the power of a trial court to allocate the exemption contrary to section 152(e).

Since *Echele* has established the rule that the allocation of the federal dependency exemption must be in accord with I.R.C. section 152(e), the next logical issue is the mechanics of complying with the Code. Usually, the only relevant exception will be the custodial parent's waiver. Should the trial court allocate the exemption by ordering the custodial parent to sign a waiver? Section 152 does not preclude a trial court from ordering the waiver to be signed.[111] The court in *Echele* did not state any conclusion regarding this question. The court did note, however, that some state courts have held that the trial court has authority to order the custodial parent to sign a waiver.[112] The answer to this issue is, perhaps, best understood in light of its impact on the child support awarded in a divorce decree.

The trial court has the responsibility to determine the amount of child support contributed by each parent after the divorce.[113] The dependency exemption has a definite financial impact on this determination.[114] The exemption has the effect of making more money available to use to support

111. "[T]he amendment [§ 152] itself contains no requirement that the declaration must be signed voluntarily and does not prohibit state courts to order the custodial parent to sign the declaration." *Einhorn*, 533 N.E.2d at 37.

112. "However, several states have found that state courts have authority to order the custodial parent to execute consent forms assigning the federal income tax dependency exemption to the noncustodial parent." *Echele*, 782 S.W.2d at 440 (citations omitted).

113. "The manner of dividing marital property and the allowance of maintenance are within the sound discretion of the trial court." *Wachter v. Wachter*, 645 S.W.2d 111, 113 (Mo. Ct. App. 1983). *See also Lohmann*, 246 S.W.2d at 370 (the primary objective of a divorce action is to dissolve the marital status; and that incidental thereto, the court is authorized as part of its decree, to make provision respecting the custody and maintenance of children).

114. "The ability of a parent to claim his or her children as an exemption for income tax purposes is a factor in the financial resources of the parent. . . . The financial impact of the allocation of the exemption, however, is still a proper consideration of the court in a dissolution action." *Lincoln*, 746 P.2d at 17 (quoting Morphew v. Morphew, 419 N.E.2d 770, 776 (Ind. Ct. App. 1981)). The Indiana Court of Appeals noted that "the grant of tax exemptions is so clearly tied to determination of support payments." *Hoyle*, 473 N.E.2d at 656.

the child.[115] Because of the progressive nature of the tax brackets, the best use of the dependency exemption is to allocate it to the parent with the larger income.[116] The conclusion to be drawn from these facts is best summarized by the reasoning of the Supreme Court of West Virginia:

> IRC § 152(e) provides an economic benefit that is of significantly greater value to a parent with income than it is to a parent without income. Consequently, it seems only reasonable that a trial judge should allocate the dependency exemption to the parent in the highest tax bracket, and then enhance (or reduce) the value of the cash child support payments to offset the value of the exemption.[117]

Thus, because: (1) I.R.C. section 152 does not preclude ordering a waiver to be signed,[118] and (2) the trial court should maximize the amount of money available for child support, the trial court should, if the noncustodial parent has the larger income, order the custodial parent to sign the waiver.[119]

---

115. *See supra* note 2 and accompanying text. The Kentucky Court of Appeals noted that "[t]he allocation of the exemption has, or at least should have, a bearing on the amount of money available as child support. A trial court should allocate the exemption so as to maximize the amount available for the care of the children." *Hart*, 774 S.W.2d at 457.

This effect is noted by the Minnesota Court of Appeals:

> We also note that the effect of awarding the exemption to the noncustodial parent will be to increase the income to which support guidelines apply. . . . ([F]ederal income tax is subtracted from total monthly income in calculation of net income). Thus, because the dependency exemption will be a tax benefit to the obligor, decreasing his or her federal income tax, net income . . . will be increased.

Fudenberg, 390 N.W.2d at 21.

116. "The facts of life are that income tax exemptions are valuable only to persons with income, and up to a certain point, the higher the income the more valuable exemptions become because of the progressivity of the federal income tax." *Cross*, 363 S.E.2d at 459.

117. *Id.* at 460. The court held that the trial court should effectuate the allocation by ordering the custodial spouse to sign a waiver if the noncustodial parent had the larger income. *Id.* at 459.

118. "The amendment [§ 152] itself contains no requirement that the declaration must be signed voluntarily and does not prohibit state courts to order the custodial parent to sign the declaration." *Einhorn*, 533 N.E.2d at 37. *See also Cross*, 363 S.E.2d at 457 (new statute is entirely silent concerning whether a domestic court can *require* a custodial parent to execute a waiver, and this silence demonstrates Congress' surpassing indifference to how the exemption is allocated as long as the IRS does not have to do the allocating).

119. The Missouri Supreme Court seems to have established a precedent for this

In addition, the court should increase the support payments of the noncustodial parent in proportion to the tax reduction produced by the dependency exemption.[120]

An alternative to a court ordered waiver might be to have the trial court condition the amount of support due from the noncustodial parent on the signing of a waiver by the custodial parent. If the custodial parent refused to voluntarily sign a waiver, the trial court could reduce the amount of support paid by the noncustodial parent to compensate for the loss of the tax reduction generated by the dependency exemption. This would provide incentive for the custodial parent to sign a waiver to get the maximum amount of available support. This may be the approach advocated by the Eastern District in *Echele*.[121]

This approach, however, could potentially be detrimental to the child's best interest. The reality of a divorce proceeding is that the parties may not

---

in Missouri in Rule 74.07 of the Missouri Rules of Civil Procedure. Rule 74.07 provides in part that

> [i]f a judgment directs a party to execute or deliver a deed or other document or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party.

Mo. R. Civ. P. 74.07.

Thus, it would seem that the trial court has the authority to order the waiver to be signed, and to have it signed by someone else if the custodial parent does not comply.

120. This calculation could possibly be added to Form 14 of the Missouri Rules of Civil Procedure. For instance, an additional line (line 9) would allow a judge to add an amount equal to the tax reduction gained by the noncustodial parent as a result of receiving the federal income tax dependency exemption. The "Directions for Use" would contain a table to compute the amount based on the noncustodial parent's taxable income. Thus, Form 14 would permit the court to increase the child support in an amount equivalent to the tax reduction produced when the noncustodial parent has the larger income.

121.

> However, the trial court may, in view of the tax ramifications, wish to consider the amount of child support awarded to Sheila. We, therefore, remand the cause so that the court may consider and evaluate the amount of child support in view of the fact that the trial court awarded a tax exemption to Paul.

Echele, 782 S.W.2d at 440.

This seems to indicate that the court wants the trial court to reduce the amount of support owed by the noncustodial parent due to the loss of the tax reduction generated by the dependency exemption.

always act rationally in the spirit of cooperation.[122] If the amount of support is contingent on the custodial parent signing the waiver, the amount is reduced if that parent does not sign. The result is that, often, the exemption does not reduce the tax liability of the lower wage-earning custodial parent and therefore does not generate more spendable income for that parent. At the same time, the court has reduced the support obligation of the noncustodial higher wage-earning parent because of the loss of the tax reduction generated by the dependency exemption. Therefore, in this scenario, the court has effectively reduced the amount of money available to support the child because the support amounts were contingent on the custodial parent signing a waiver. The real loser, if the parents act irrationally, is the child.

Thus, when considered in relation to the tax ramifications and the best interest of the child, the best method of allocating the federal income tax dependency exemption is to order the custodial parent to sign a waiver and increase the child support obligation of the noncustodial parent. This approach and the contingency award discussed above both have the same intended result—coercion of the lower income custodial parent to sign the waiver.[123] The court-ordered waiver, however, gives greater assurance that the tax reduction benefits will be realized and the greatest possible amount of support will be available for the child.

C. Other Issues

Another issue is the potential harsh effect of a custodial parent waiving the federal income tax dependency exemption and then the noncustodial parent

---

122.

> Now, we are not so inane as to believe that the custodial spouse is going to enter into this waiver from the goodness of his or her heart. All too often, unfortunately, when marriages break up there is acrimony and distrust. It is not reasonable to expect cooperation by the spouses in all cases.

Brandriet, 442 N.W.2d at 459.

123. The Supreme Court of South Dakota pointed out this conclusion after discussing these two possible approaches:

> In the direct action cases [court-ordered waiver], the receipt of child support is contingent upon the custodial parent going along with the allocation involuntarily, while in the nonaction cases [contingent support award] the trial court may take the custodial parent's refusal to voluntarily waive the exemption into consideration and set the child support at a level low enough to induce the custodial parent to waive. From either aspect, it is coercion . . . ."

Id. at 459.

failing to make child support payments.[124] The current rules allow the custodial parent to sign yearly waivers.[125] The trial court could make the order to sign a waiver a yearly event and make it contingent on the noncustodial parent having paid the required child support for the year.[126] In this way, the right to claim the dependency exemption could be retained by the custodial parent in any year in which the noncustodial parent fails to make support payments.

Another potential problem exists in joint custody[127] situations. One possible aspect of joint custody is joint physical custody.[128] In the depen-

---

124. "The new law also seems especially harsh in the case of a permanent release by the custodial parent allowing the noncustodial parent the exemption, when the noncustodial parent fails to make child support payments." Comment, *supra* note 23, at 279.

Another commentator reasoned that "[i]f a declaration [waiver] is effective for a period of more than one year, the noncustodial parent will be able to claim the child as a dependent even in years in which the noncustodial parent pays absolutely no child support." Hjorth, *Divorce, Tax, and the 1984 Tax Reform Act*, 61 WASH. L. REV. 151, 186 (1986).

125. Treas. Reg. § 1.152-4T (1986).

126. Since the waiver covers the previous tax year, the custodial spouse would know, before having to sign the waiver, whether the noncustodial spouse had met support obligations for the previous year. The Supreme Court of West Virginia reasoned that

> execution of the waiver is dependent upon a non-custodial parent's having paid his court-ordered child support. This gives the custodial parent leverage because she can refuse to execute the waiver in the event of non-payment, which forces the non-custodial parent to take her back to court to force the execution of the waiver, at which time she may raise the back payment issue.

Cross, 363 S.W.2d at 460. One commentator concluded that "it would seem better for the parties to agree that if written declarations are to be issued they should be issued on a year-to-year basis, and on condition that all child support payments have been made." Hjorth, *supra* note 124, at 186.

127. In a recent article, one commentator noted that "[j]oint custody is sweeping the country. In 1975 only one state had a statute providing for joint custody; today, well over half do, and '[r]ecent laws have become increasingly preferential toward joint custody.'" Singer & Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497 (1988). Another commentator succinctly described joint custody: "Parents with joint custody share legal responsibility and authority to make major decisions affecting their children on such issues as education, medical care, religious practice, and other essential parental decisions." Scott & Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455 n.1 (1984).

128. Joint physical custody is "an arrangement in which the child spends a substantial amount of time residing with each parent on some regular schedule, thus

dency exemption context, the "custodial" parent is defined as the parent with physical custody for the greater number of days in the year.[129] If both parents share physical custody on an equal basis, the determination of "custodial" for dependency exemption allocation could come down to a matter of only a day or two. Thus, a parent might bend the agreement and keep the child an extra few days in order to achieve custodial status. In addition, in many cases, the parents may have fairly equal yearly incomes so that neither is a better candidate for the exemption in terms of maximizing the tax reduction benefit.

There are several possible solutions available to the trial court in a joint custody situation. One very important fact to keep in mind while structuring a satisfactory resolution is that when a custodial parent signs a waiver, he is not giving up other important tax benefits.[130] Thus, the court could structure the decree so that one parent gets enough physical custody to have "custodial" status. The custodial parent could be ordered to sign the waiver, because he or she would retain the tax benefits of head of household filing status.[131] In addition, the court could adjust the support obligation of the noncustodial parent a little higher to reflect the tax liability reduction gained from the dependency exemption. An alternative would be for the court to provide for

---

spending divided weeks, alternating weeks or some other arrangement of dividing time spent with parents." Scott & Derdeyn, *supra* note 127, at 455 n.1.

129. *See supra* note 36. A commentator explained:

> The focus of the new rules has changed from adding dollars to counting days, and, as a result, there could be disputes when custody has been shared. The probable approach to determine who the custodial parent is will be to rely on which parent actually had the child the greater number of days.

Ingold, *supra* note 28, at 219.

130.

> If the custodial parent signs a declaration to release his or her right to the dependency exemption, the release will not affect the custodial parent's status for other tax provisions. The custodial parent will still be able to file as head of household, claim the earned income credit, and claim the child and dependent care credit if he or she qualifies otherwise under these sections.

Comment, *supra* note 23, at 278-79.

131. The head of household filing status is available to an unmarried parent who provides more than half the cost of keeping up a home in which the dependent child lives for more than six months of the year. When taxable income is greater than $18,500 per year, there is a tax reduction for this filing status versus the single filing status. For example, in 1989, at a taxable income of $25,000, the tax for a single taxpayer was $4,596 as compared with $3,777 for a head of household taxpayer; a 17.8% reduction. *See* I.R.C. § 1(b)(c) (1988).

alternating "custodial" status in the divorce decree.[132] By adjusting physical custody only a few days every other year, the court could allocate the exemption.

Perhaps the most difficult problem facing a trial court is the situation where a pre-TRA divorce decree did not address the federal income tax dependency exemption issue, and the noncustodial parent has been claiming the exemption based on the $1,200 exception under the pre-TRA rules.[133] The noncustodial parent in this situation will currently lose the exemption because she cannot claim the exemption, regardless of the amount of support provided, unless the custodial parent signs a waiver.[134] The dilemma is that the new rules can potentially place a greater economic burden on the noncustodial parent because of loss of the dependency exemption. One suggested solution is for the noncustodial parent to seek a modification of the divorce decree to order the custodial parent to sign a waiver.[135] Another possibility is to have the noncustodial parent seek a modification to reduce the child support obligation commensurate to the loss in tax reduction.[136] The difficulty with these solutions is that they require the burden of additional court action. Furthermore, the reduction in support solution may not be in the best interest of the child if the custodial parent has little or no income.

---

132. "An equitable solution in a true joint-custody situation might be to alternate the entitlement to the exemption every year, particularly if both spouses are in the same tax bracket." Ingold, *supra* note 28, at 219.

133. For a discussion of the exceptions under pre-TRA § 152, see *supra* notes 37-42 and accompanying text.

134. One commentator described this situation as:

> The effect of the new tax provisions is that noncustodial parents who have been claiming a dependency exemption under the $1,200 yearly payment rule are no longer able to do so *regardless* of how much child support they pay *unless* the custodial parent agrees in writing to permit the noncustodial parent to do so. . . . There may well be more existing divorce decrees than not in which the parties failed to provide specifically for an award of the exemption in their agreement or in the court's decree. A common reason not to have so provided was the existence of the $1,200 yearly presumption delineated under the former law. The rationale would have been that the tax haw had already provided for guidelines in this area, thus removing a potential issue for divorce litigants.

Baron, *Modification of Divorce Decrees By Virtue of the 1984 Tax Amendments Relating to Dependency Exemptions*, 8 U. ARK. LITTLE ROCK L.J. 683, 684 (1985-86); *see also* Ingold, *supra* note 28, at 219-20.

135. Baron, *supra* note 134, at 687. *See also* Ingold, *supra* note 28, at 220 (a possible solution to the dilemma might be to seek a court order directing the payee spouse to execute a written assignment in lieu of lowering child support payments).

136. Baron, *supra* note 134, at 687.

Probably the best approach, when there is a disparity in incomes, is to modify the decree to order the custodial parent to sign the waiver.

The current section 152 rules give the custodial parent a better bargaining position in the child support negotiations.[137] Because the noncustodial parent cannot get the federal income tax dependency exemption unless the custodial parent signs a waiver, the custodial parent can use the right to the exemption as a means to obtain the best possible support for the child. In the negotiations, each party should be aware of the tax consequences of the dependency exemption and the new rules in I.R.C. section 152. The waiver provision allows the parties to use the dependency exemption to minimize their tax liabilities and maximize the amount of money available for child support.[138]

VI. CONCLUSION

A commentator has noted that "[d]ivorce is clearly among the most emotionally painful of life experiences, particularly if children are involved."[139] Congress, although simplifying matters for the IRS,[140] added some complexity to this situation with the TRA amendments to I.R.C. section 152 regarding allocation of the federal income tax dependency exemption. Prior to the TRA changes, a trial court could either allocate the dependency exemption in the divorce decree[141] or allow the parents to determine it by

---

137. "The custodial parent now has a greater number of bargaining chips with which to negotiate, since she is assured the exemption even if the husband provides nearly all of the child's support." *Cross*, 363 S.E.2d at 459 (the custodial parent is given a new bargaining chip that, depending upon the economic circumstances, may be of significant value); *see also* Comment, *supra* note 22, at 805; Comment, *Effect of Tax Reform Act of 1984 on Divorce Financial Planning*, 24 J. FAMILY L. 283, 296 (1985-86).

138. "The 1984 Act essentially lets the parties determine which one of them will claim the dependency exemption; they should not ignore this freedom to minimize their tax liabilities." Ingold, *supra* note 28, at 219.

139. Scott & Derdeyn, *supra* note 127, at 495.

140. One commentator asserted:

> The 1984 Domestic Relations Tax Reform Act amends section 152 of the Code to simplify treatment of the entitlement to the exemption for children of divorced parents. The new law was designed to remove from the IRS the burden of resolving factual disputes and provide more objective criteria in determining dependency exemption entitlement.

Ingold, *supra* note 28, at 216-17.

141. *See supra* notes 97-99 and accompanying text. The court accomplished this by awarding the exemption to one of the parents and requiring that parent to pay at least $600 in child support.

support level tests.[142] In effect, the court could ignore the exemption and allow the financial positions of the parents to determine which parent could claim the exemption. The recourse for the parents in case of dispute was the Tax Court. The "effect of the 1984 change [TRA] has been to cause postdivorce disputes [regarding the dependency exemption] to bypass the IRS and to channel the parties back to divorce court."[143] Thus, the trial courts can no longer ignore the tax implications of the dependency exemption in divorce proceedings. Given the importance of allocating the dependency exemption, state trial courts face the problem of what authority they currently have to allocate the exemption.

In *Echele*, the Eastern District made it clear that a Missouri trial court must adhere to the rules of I.R.C. section 152(e) when considering the federal income tax dependency exemption in a divorce decree. The custodial parent will receive the exemption unless a pre-1985 instrument allocated the exemption to the noncustodial parent or the custodial parent signs a waiver of the right to claim the exemption. The court did not, however, state a conclusion regarding a court-ordered waiver. In situations where the noncustodial parent has the larger income, it seems to be in the best interest of the child for a trial court to allocate the dependency exemption to the noncustodial parent by ordering the custodial parent to sign a waiver. The trial court should then increase the support obligation of the noncustodial parent because of the tax liability reduction brought about by the dependency exemption.

The trial courts, attorneys and parties should be aware of the tax ramifications of the dependency exemptions and the potential to increase the money available for child support in most situations. The decree should consider the tax liability reduction afforded by the exemption when calculating the support obligations. The court should determine, based on the tax brackets and annual income of the parties, which party could utilize the dependency exemption for the maximum tax reduction. If it is the custodial parent, the decree should consider the tax liability reduction for the custodial parent when establishing the support obligation of the noncustodial parent. If it is the noncustodial parent, the court should order the custodial parent to sign a waiver and increase the support obligation of the noncustodial parent commensurate with the reduction in tax liability. The decree should make the order to sign the waiver in any given year contingent upon the noncustodial parent having paid all child support during that tax year. In this way, the dependency exemption is utilized to create the largest amount of child support, the custodial parent

142. *Id.*

143. Baron, *supra* note 134, at 685.

is protected by the contingent waiver, and the noncustodial parent is protected by the possibility of contempt of court.[144]

It is not clear at this time how the Missouri appellate courts will rule on allocation of the federal income tax dependency exemption through court-ordered waiver. Because of the implications on the amount of funds available for child support, however, when the noncustodial parent has the larger income, the Missouri trial courts should adopt the approach of a majority of state courts[145] and allocate the federal income tax dependency exemption to the noncustodial parent by ordering the custodial parent to sign a section 152 waiver in lieu of increased child support payments.

JAMES A. RODENBERG

144. "Under the new law, if the custodial parent violates a court order directing him to assign the exemption to the noncustodial parent, the noncustodial parent will not get the exemption. Instead, the noncustodial parent must seek a contempt citation or damages." Taggart, *supra* note 30, at 359.

145. *See supra* notes 59-67 and accompanying text.