Washington and Lee Law Review

Volume 29 | Issue 1 Article 3

Spring 3-1-1972

The Burden of Proof Required of a Parent Claiming Child Exem ption

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr

Part of the Taxation-Federal Commons

Recommended Citation

The Burden of Proof Required of a Parent Claiming Child Exem ption, 29 Wash. & Lee L. Rev. 29 (1972), https://scholarlycommons.law.wlu.edu/wlulr/vol29/iss1/3

This Note is brought to you for free and open access by the Washington and Lee Law Review at Washington & Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington & Lee University School of Law Scholarly Commons. For more information, please contact lawref@wlu.edu.

NOTES

THE BURDEN OF PROOF REQUIRED OF A PARENT CLAIMING CHILD EXEMPTION

One of the most common recurring tax problems which arises following the dissolution of marriage[1] relates to the determination of which parent is entitled to claim a dependency exemption[2] for minor children of the marriage.[3] Although the exemption is normally allowed to the custodial parent,[4] difficult problems are presented where the non-custodial parent seeks to claim the exemption based on the fact that he[5] paid $1200 or more for the support of such children. Questions arise as to which parent has the burden of proof, and what standard of proof is required in order to substantiate the claim.[6]

The determination as to which parent satisfies the support test for the dependency exemption under section 152(e) of the Internal Revenue Code of 1954 may have broad consequences. The classification of a child as a dependent under section 152 is essential in order for a parent to claim deductions of medical and dental expenses under section 213,[7] and for child care expenses under section 214.[8] Consequently, a favorable determination is particularly important for the father without custody who has defrayed large hospital bills for his child,[9] and for the mother with custody

---

[1]The Internal Revenue Service estimated that during a recent year, 5 percent of all income tax cases handled at the informal conference level of the administrative process involved child dependency claims as the principal issue. H.R. REP. NO. 102, 90th Cong., 1st Sess. (1967), *reprinted in* 1967-2 CUM. BULL. 590, 592 [hereinafter cited as HOUSE REPORT].

[2]INT. REV. CODE OF 1954, § 151(e) authorizes an exemption of $650 per dependent for taxable years beginning January 1, 1971, and $700 per dependent for taxable years beginning January 1, 1972 and thereafter. If passed by Congress, the Revenue Bill of 1971, H.R. 10947, 92d Cong., 1st Sess. (1971), will increase the value of the dependency exemption to $675 for 1971, with a further increase to $750 after 1971.

[3]The determination of which parent is entitled to the dependency exemption under section 152(e) has no bearing on "head of household" status. Thus, the custodial parent may not qualify for the dependency exemption, but that parent may still qualify for the favorable "head of household" tax rates under section 1(b) as long as the taxpayer at the close of his taxable year is not married, is not a surviving spouse, and maintains his home as the principal place of abode for a son or daughter. INT. REV. CODE OF 1954, § 2(b)(1).

[4]INT. REV. CODE OF 1954, § 152(e)(1).

[5]For semantic convenience, the father will be treated as the non-custodial parent.

[6]There may be problems as to what items constitute support, but consideration of such aspects is beyond the scope of this note. *See* Glassberg, *Who Is a Dependent and How to Support Him Taxwise*, N.Y.U. 26TH INST. ON FED. TAX. 1 (1968); 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 32.14d (rev. vol. 1969).

[7]INT. REV. CODE OF 1954, § 213(a)(1).

[8]INT. REV. CODE OF 1954, §§ 214(a), (d)(1).

[9]The father, as non-custodial parent, may seek to avoid problems related to deductibil-

who has paid considerable sums for child care in order that she might work.

Prior to 1967, the tax exemption was allowed to the parent who furnished more than half of the total support of the child.[10] In order to qualify for the exemption, the parent had the burden of proving not only the amount of support he had given the child, but also the total amount of support provided from all sources. The task could be rendered difficult and often impossible for the parent not having custody by the refusal of the other parent to furnish figures on the child's total cost of support.[11] In response to the administrative problems created by the patent unfairness of the law,[12] Congress in 1967 passed a new law applicable to years beginning after 1966.[13]

THE EFFECT OF THE 1967 AMENDMENT UPON THE SUPPORT TEST

As under the prior law, the exemption will be granted to the parent who provides the greater amount of support for the minor children.[14] It is no longer necessary, however, for the taxpayer to prove he provided over half the total support for the dependent. Presently, as long as the child receives over half of his total support from the combined expenditures of his parents,[15] the parent who provides the larger portion will qualify for the dependency exemption.[16]

An additional purpose of the new legislation is to provide each parent with information as to the other parent's contributions to support.[17] This

---

ity of child support by including such support in alimony payments without designation as child support. Under this arrangement, the full sum is deductible by the father and is income to the mother. Treas. Reg. § 1.71-1(e) (1957).

[10]T.D. 6231, 1957-1 CUM. BULL. 77 provides in part:

> For purposes of the income taxes imposed on individuals by the Internal Revenue Code of 1954, the term "dependent" means any individual described in . . . section 152(a) over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer.

Id. at 83.

[11]In *Robert I. Brown*, 48 T.C. 42 (1967), the taxpayer was denied the exemption due to his failure to prove total support. The court noted: "[W]e are constrained to comment that the ends of justice are not served by the present situation and to express our hope that . . . ameliorating legislation will be enacted." 48 T.C. at 44.

[12]HOUSE REPORT, *supra* note 1, at 591.

[13]Act of Aug. 31, 1967, Pub. L. No. 90-78, H.R. 6056, *amending* INT. REV. CODE OF 1954 § 152(e).

[14]INT. REV. CODE OF 1954, § 152(e).

[15]INT. REV. CODE OF 1954, § 152(e)(1)(A).

[16]Thus, under the present law, should the combined expenditures of the parents equal 51% of the child's total support, then the exemption would be granted to the parent who paid the greater amount of support, or as little as 26% of the child's total support.

[17]In the event that both parents intend to or actually do claim a child as a dependent, Treas. Reg. § 1.152-4(e) (1971) provides that each parent must deliver to the other parent

exchange of information serves to prepare the ground for an early administrative disposition should both parents assert conflicting exemption claims.[18] Moreover, in the event of litigation, the parent petitioning for the child exemption is able to prepare his case in advance. At trial, the petitioner will thus be able to attack any amounts claimed by the other parent which he believes to have been improperly attributed to support.

The new provisions are stated in terms of a number of statutory presumptions.[19] The general rule of section 152(e) provides that the parent

---

or to an internal revenue officer an itemized statement upon which each parent's claim is based. The statement must list the amounts expended for medical and dental care, food, shelter, clothing, education, recreation and transportation, and the total amount of support furnished the child. The regulation provides that if the required statement is not furnished pursuant to the instructions of the internal revenue officer, the claim of support of the parent failing to comply with such requirement may be disallowed by the Internal Revenue Service.

[18]The Internal Revenue Service's procedure in isolating conflicting exemption claims is generally dependent upon the segregation of 1040 forms which indicate that a claimed dependent is not living with the taxpayer. If an agent audits the father's return, he will, as a matter of course, inquire as to the location of the dependents and will obtain the mother's return from the service center with which the mother filed her return. The agent will compare the two forms to determine whether both taxpayers are claiming the same dependents. If both are in fact claiming the same dependents, the agent will normally seek an agreement wherein duplication of the exemptions is eliminated. If that fails, the Internal Revenue Service generally will disallow both claims. Letter from Moshe Schuldinger, Director of the Tax Legislation Division of the Treasury Department, to the *Washington & Lee Law Review*, Oct. 22, 1971, on file in Washington & Lee Law Library.

[19]INT. REV. CODE OF 1954, § 152(e) provides:

(1) General Rule.—If—

(A) a child (as defined in section 151(e)(3)) receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorce or separate maintenance, or who are separated under a written separation agreement, 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 unless he is treated, under the provisions of paragraph (2), as having received over half of his support for such year from the other parent (referred to in this subsection as the parent not having custody).

(2) Special Rule.—The child of parents described in paragraph (1) shall be treated as having received over half his support during the calendar year from the parent not having custody if—

(A)(i) the decree of divorce or of separate maintenance, or a written agreement between the parents applicable to the taxable year beginning in such calendar year, provides that the parent not having custody shall be entitled to any deduction allowable under section 151 for such child, and

with custody of the child shall be treated as having given over half of the child's support for the purposes of the dependency exemption.[20] There are two exceptions to the general rule: the first allows the exemption to the non-custodial parent if a decree of divorce or separation, or a written agreement between the parents, assigns the deduction to the non-custodial parent, and that parent contributes a minimum of $600 annual support per child;[21] the second exception provides that if the parent not having custody supplies $1200 or more for support of the child, the burden of producing evidence is shifted,[22] and the exemption is conferred on the non-custodial parent. Nevertheless, if the parent having custody can clearly

---

(ii) such parent not having custody provides at least $600 for the support of such child during the calendar year, or

(B)(i) the parent not having custody provides $1,200 or more for the support of such child (or if there is more than one such child, $1,200 or more for all of such children) for the calendar year, and

(ii) the parent having custody of such child does not clearly establish that he provided more for the support of such child during the calendar year than the parent not having custody.

For the purposes of this paragraph, amounts expended for the support of a child or children shall be treated as received from the parent not having custody to the extent that such parent provided amounts for such support.

(3) Itemized statement required.—If a taxpayer claims that paragraph (2)(B) applies with respect to a child for a calendar year and the other parent claims that paragraph (2)(B)(i) is not satisfied or claims to have provided more for the support of such child during such calendar year than the taxpayer, each parent shall be entitled to receive, under regulations to be prescribed by the Secretary or his delegate, an itemized statement of the expenditures upon which the other parent's claim of support is based.

(4) Exception for multiple-support agreement.—The provisions of this subsection shall not apply in 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).

[20]INT. REV. CODE OF 1954, § 152(e)(1).

[21]INT. REV. CODE OF 1954, § 152(e)(2)(A).

[22]The statutory presumptions of section 152(e) might be termed "counter-presumptions." For example, the general rule which provides that the parent with custody shall be treated as having given over half of the child's support has the effect of placing upon the non-custodial parent the burden of establishing the nonexistence of that fact. That is, the burden of going forward with the evidence rests upon the non-custodial parent. However, he may overcome that presumption by producing contrary evidence; if by his evidence he establishes that he provided $1200 or more for support, he shall succeed in creating another presumption which now imposes the same duty on the custodial parent, who may in turn be able to dispose of it satisfactorily. *See, e.g.*, 9 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2493 (3d ed. 1940).

establish that she in fact provided more support than the parent not having custody, she will be entitled to the dependency exemption.[23]

The effect of the presumption under section 152(e) will vary depending upon the context in which it is asserted. Prior to litigation, the rules serve to facilitate disposition of the issue at the administrative level[24] by determining which parent bears the risk of non-persuasion and the burden of producing evidence. However, if administrative attempts to settle the issue fail and the question goes to court, the petitioner bears the burden of proof, *i.e.* the risk of non-persuasion, regardless of which parent has benefit of the presumption.[25] At trial, the effect of the presumption is to determine which party has the burden of producing evidence, and the level of proof required in order to substantiate claimed expenditures.

For example, in the event that the mother petitions the Tax Court for a determination that she may claim her children as dependents, she would have the burden of establishing that she spent more for the support of the children than did her former husband. As petitioner, she bears the burden of proof from the start; under no circumstances does the risk of non-persuasion shift to the Commissioner. Generally, the Internal Revenue Service, as respondent, will rely upon the testimony of the father either as witness or by affidavit to establish that he provided his claimed expenditures in support of the dependents, and that the mother did not exceed that amount.[26] If the father's expenditures fall below $1200, then the mother must prove by only a mere preponderance of the evidence that her expenditures exceeded those of her former husband.[27] On the other hand,

---

[23] INT. REV. CODE OF 1954, § 152(e)(2)(B)(ii).

[24] The court in Allen F. Labay, 55 T.C. No. 2 (Oct. 5, 1970), stated:

> We think section 152(e)(2)(B) was not designed primarily with litigation in mind, but rather to provide rules to facilitate the administrative disposition by the Internal Revenue Service of dependency exemptions claimed for children of divorced parents. Congress obviously wanted to encourage the finality of administrative action taken by the Commissioner in such disputes.

55 T.C. at 11.

[25] The issue is determined in an adversary proceeding between petitioner (the parent claiming the exemption) and the Commissioner (respondent). Rule 32 of Rules of Practice of the Tax Court provides:

> The burden of proof shall be upon the petitioner, except as otherwise provided by statute, and except that in respect of any new matter pleaded in his answer, it shall be upon the respondent.

T.C.R. PRAC. 32.

[26] Letter from Moshe Schuldinger, *supra* note 18.

[27] In Marjorie F. Ford, P-H TAX CT. MEM. DEC. ¶ 71-255 (Sep. 30, 1971), the dependency exemption was allowed the custodial mother. The father, as witness for the Commissioner, was unable to prove he contributed $1200 which would have raised the level of proof required of the mother.

if the father as non-custodial parent proves support in excess of $1200, then the presumption of section 152(e)(2)(B) comes into effect raising the mother's required level of proof to a higher standard, *i.e.* a clear preponderance of the evidence.

THE POSSIBILITY OF DOUBLE EXEMPTIONS AND THE USE OF THIRD PARTY PRACTICE PROVISIONS AS A REMEDY

In view of the fact that only one of the parents is an actual party to the Tax Court proceeding,[28] it is entirely possible under present law for both parents to qualify for the dependency exemption for the same children. The converse, whereby neither would qualify, is also possible.[29] For instance, in the event that the mother residing in Virginia is granted the exemption by the Tax Court, the father, living in Illinois, is nevertheless free to institute a refund action in the federal district court or the Court of Claims asserting that he should be allowed the exemption for his child.[30] Since he was not a party to the Tax Court action, the doctrine of collateral estoppel would not prevent him from making such an assertion.[31] If the court accepts his position, he can recover even though the mother has been upheld in the Tax Court action. Thus, both parents may qualify for the dependency exemption for the same child.

A possible solution to this dilemma lies in bringing both parents before the court as parties in the same action whenever possible. This may be accomplished by varying means depending upon whether a parent brings

---

[28]Of fourteen cases decided by the Tax Court applying section 152(e), only one involved joinder of both parents' claims before the same court. Herbert Wieder, P-H TAX. CT. MEM. DEC. ¶ 71-246 (Sep. 27, 1971).

[29]Louis Adler, 19 P-H Tax Ct. Mem. 545 (1950). Petitioner's former wife had previously been denied exemptions for her two children since she had failed to prove payment of over one half of their support. In this action, the husband was denied the exemptions for the same reason although, admittedly, both parents had contributed the full support of the children.

[30]28 U.S.C. § 1346(a)(1) (1970) gives federal district courts and the Court of Claims concurrent original jurisdiction of any civil action against the United States for recovery of illegally assessed or collected internal revenue tax.

[31]RESTATEMENT OF JUDGMENTS, Explanatory Notes § 93, comment *b* at 463-64 (1942) provides:

> The parties to a valid personal judgment are concluded by findings of law or of fact upon litigated issues . . . . These findings do not, however, affect persons who are not parties or privies to the action and the judgment . . . . This is true although such persons were . . . witnesses or participated in a representative capacity for the benefit of one of the parties. They are not bound by the determination . . . .

the action before the federal district court, the Court of Claims,[32] or the Tax Court.

In the event that both parents bring separate claims before the same court, the actions may be consolidated in a single trial. The federal district courts have authority to consolidate under Rule 42(a) of the Federal Rules of Civil Procedure.[33] The Court of Claims has the same power under Rule 131(a) of the Rules of the Court of Claims.[34] Although there is no similar rule applying to actions pending before the Tax Court, consolidation for purposes of trial has been permitted in a recent case regarding conflicting claims of parents for the dependency exemption.[35]

If the parents bring separate actions before the Tax Court and the federal district court respectively, the Government as defendant in the district court proceeding may implead the other parent as a third-party defendant.[36] Rule 14(a) of the Federal Rules of Civil Procedure[37] authorizes the defending party, as a third-party plaintiff, to cause a summons

---

[32]In the situation where one parent brings a suit for refund before the Court of Claims, rule 41 of the Rules of the United States Court of Claims authorizes the court to summon any third person against whom the United States may be asserting a claim or contingent claim in respect of the issue which constitutes the subject matter of the suit. Rule 62 of the Rules of the Court of Claims also provides that persons having a joint interest adverse to the United States shall be made parties and joined on the same side as plaintiffs or, if need be, made involuntary plaintiffs.

[33]FED. R. CIV. P. 42(a) provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

[34]Rule 131(a) of the Rules of the Court of Claims provides:

> (a) Consolidation: When actions involving a common question of law or fact are pending, the commissioner may order a joint trial of any or all the matters in issue in the actions, or he may order the actions consolidated, or he may make such other orders concerning the proceedings therein as may tend to avoid unnecessary costs or delay.

U.S. CT. CL. R. 131.

[35]Herbert Weider, P-H TAX CT. MEM. DEC. ¶ 71-246 (Sep. 27, 1971). For a discussion on consolidations before the Tax Court see 2 CASEY, FEDERAL TAX PRACTICE § 7.37 (1955).

[36]As an alternative measure, rule 19 of the Federal Rules of Civil Procedure authorizes joinder of a person if he claims an interest relating to the subject of the action. In addition, he must be so situated that the disposition of the action in his absence may leave any of the persons already parties subject to a substantial risk of incurring double or inconsistent obligations by reason of his claimed interest.

[37]FED. R. CIV. P. 14(a) provides in part:

> (a) At any time after commencement of the action a *defending party*, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him.

and complaint to be served upon a person who is or may be liable to him for all or part of the plaintiff's claim against him. Indeed, there have been a number of suits against the Government by taxpayers for refunds in which the courts have allowed impleader when the underlying purpose of the procedure, the avoidance of circuity of actions, would be furthered by bringing in a third party.[38]

Jurisdiction over the third-party defendant must be obtained in accordance with Rule 4 of the Federal Rules of Civil Procedure.[39] In the case where the Government as defendant in an Illinois refund action seeks to implead a Virginia resident, Rule 4(e) authorizes service of process upon a party not found within the state whenever a statute of the forum state so provides. Illinois' long arm statute, like those of a number of states, has been construed to encompass the area of domestic relations.[40]

For purposes of federal jurisdiction and venue, the claim by the Government against the non-resident parent is treated as ancillary so that there need be no independent jurisdictional basis to support the claim, and venue requirements for an independent action need not be met.[41]

Any decision rendered by one court involving the same parties, facts, and law at a time that an action is pending in another court is res judicata as to those issues and parties. For example, in *I. Balanovski*,[42] a Tax

---

[38]In Crompton-Richmond Co., Factors v. United States, 273 F. Supp. 219 (S.D.N.Y. 1967), the government had assessed and collected a penalty against a corporation for failure to pay over withheld taxes. In a refund action, the United States was allowed to implead four officers of the corporation under rule 14(a) on the ground that one or more or all of them might be liable to defendant for all or part of plaintiff's claim against the defendant. The court stated, "While the addition of new parties may, of course, add somewhat to the length and complexity of discovery procedures, the price is small compared to the alternative prospect of separate, largely repetitious, and potentially inconsistent adjudications." 273 F. Supp. at 221. *Accord*, Wilkie v. United States, 279 F. Supp. 671 (N.D. Tex. 1968); Dunham v. United States, 42 F.R.D. 169 (D. Conn. 1967); Gardner v. United States, 36 F.R.D. 453 (S.D.N.Y. 1964).

[39]As to residents of the forum state, rule 4(f) of the Federal Rules of Civil Procedure authorizes service of process anywhere within the territorial limits of the forum state, and with regard to non-domiciliaries, at all places outside the state but not more than 100 miles from the place in which the action is commenced.

[40]*See* Note, *Domestic Relations: The Role of Long Arm Statutes*, 10 WASHBURN L.J. 487 (1971). *See also* Friedman, *Extension of the Illinois Long Arm Statute: Divorce and Separate Maintenance*, 16 DEPAUL L. REV. 45 (1967).

[41]In construing rule 14(a), the court in United States v. Acord, 209 F.2d 709 (10th Cir.), *cert. denied*, 347 U.S. 975 (1954), commented:

> While the question is not free from doubt, we are of the opinion that the reasons which give the court jurisdiction over an ancillary proceeding by virtue of its jurisdiction over the principal action, likewise support the conclusion that venue in the ancillary proceeding may depend or rest upon the venue in the main proceeding.

209 F.2d at 714.

[42]28 P-H TAX CT. MEM. 197 (1959).

Court action was put on the reserve calendar while a case involving the same issues and parties was decided in the Court of Claims. When an unfavorable decision was returned against the petitioner in the Court of Claims, he sought to revive his claim in the Tax Court. The Tax Court held, however, that the issue was res judicata and that he was bound by the decision in the Court of Claims.[43]

THE SECOND EXCEPTION AND THE BURDEN OF PROOF

The House Reports[44] do not disclose the policy reasons which guided the drafters of the legislation in setting that expenditure level which shifts the burden of producing evidence to the custodial parent. In fixing the figure at $1200, they may have been influenced by the fact that while the husband is required to make a cash contribution for the support of his minor children, the wife, who in most cases retains custody, contributes her personal services. The value of personal services, however, may not be included in computing support expenditures.[45]

Nevertheless, the provision which confers the presumption upon the noncustodial parent may have arbitrary results. The burden of producing evidence is shifted upon payment of $1200 towards child support, whether the amount is for one child or several.[46] Thus, as the number of children involved increases, the per capita contribution required to shift the burden of producing evidence decreases. For example: 1 child—$1200; 2 children—$600; 3 children—$400; 4 children—$300; etc. This provision appears somewhat inconsistent with the first exception which requires a minimum expenditure of $600 per child by the parent without custody.[47]

---

[43]There remains, however, one situation where both or neither of the parents may receive the dependency exemption. In the event that the mother (or the father) brings an action before the Tax Court, and the father pays the tax but delays in bringing the suit for refund until the mother's case has been decided, then the possibility exists that either the Government or the taxpayers would receive inconsistent obligations. Since the Tax Court has no rules authorizing joinder of third parties, it is not possible in this example to join both parents in the same proceeding.

[44]See note 1 *supra.*

[45]*E.g.*, Frank Markarian, 42 T.C. 640 (1964), *aff'd* 352 F.2d 870 (7th Cir. 1965). In the appellate opinion, the court said:

> It is true that the present regulation [Treas. Reg. § 1.152-1(a)(2)(i)] contains elements of unfairness. For example, those who can afford to or do pay for the care of a dependent may include their expenses in computing the support furnished, while those who, because of necessity or for other reasons, personally furnish identical services may not include the fair market value of such services. This unfairness, however, must be balanced against the difficulty, if not the impossibility, of determining fairly the value of such services and of deciding what services constitute support.

352 F.2d at 873.

[46]INT. REV. CODE OF 1954, § 152(e)(2)(B)(i).

[47]INT. REV. CODE OF 1954, § 152(e)(2)(A)(ii).

In any case, regardless of the per capita contribution, the burden is placed upon the custodial parent to "clearly establish" that she in fact paid more in child support than he.[48] The harshness of this exception created by the arbitrary level of support expenditure will depend to a large extent upon the degree of proof required in order to overcome the presumption.

THE STANDARD OF PROOF CONTROVERSY

The meaning of the phrase "clearly establish"[49] and the degree of proof required to rebut the presumption in the second exception favoring the noncustodial parent has been the subject of recent controversy. In *Allen F. Labay*,[50] the petitioner, having provided over $1200 in child support in 1967, sought deductions for dependency exemptions for his two minor children in the custody of his former wife. The Internal Revenue Service denied the claim deductions on the basis that his former wife had provided more support. At the trial, she, as respondent's witness, was able to produce groups of checks to substantiate many of the support items to which she testified;[51] however, she could give no more than estimates on a few support items which were unsubstantiated by checks in hand. She also had difficulty in identifying certain checks as representing specific expenditures for a particular child. Consequently, the question of whether the petitioner's former wife had provided over half of the children's support depended upon the court's acceptance or rejection of her estimates.[52] The court accepted her calculations and held that she had provided a greater amount for the children's support than the petitioner.[53]

In reaching this result, the Tax Court was forced to ascertain the statutory meaning of "clearly establish."[54] Although the court looked initially to the legislative history, it rejected the interpretation suggested by the House Committee Reports, which state:

> [T]he parent having custody remains entitled to the deduction with respect to a particular child, if he establishes that he, in fact,

[48]INT. REV. CODE OF 1954, § 152(e)(2)(B)(ii).

[49]*Id.*

[50]55 T.C. No. 2 (Oct. 5, 1970), *aff'd*, No. 71-1224 (5th Cir. Nov. 2, 1971).

[51]Petitioner's former wife had been employed by the Internal Revenue Service during the years of 1966 and 1967 as a taxpayer's representative. Part of her job consisted of advising taxpayers as to what documents might be required of them to substantiate claimed deductions.

[52]INT. REV. CODE OF 1954, § 274(d), which denies deductions for certain unsubstantiated expenditures, is directed specifically at business expenses under sections 162 and 212, and not at the support test under section 152(e).

[53]55 T.C. at 14.

[54]55 T.C. at 13.

> furnished a greater portion of that child's support than did the parent not having custody, but only if he establishes this fact by *clear and convincing evidence.*[55]

The court was dissatisfied with the "clear and convincing"[56] standard because it demanded from the custodial parent the sort of strong proof required of the Internal Revenue Service in civil tax fraud cases.[57] The unjustness of such a standard was evident in that it might be virtually impossible for the custodial parent to keep documentary records of many kinds of child support expenditures.[58] The *Labay* court acknowledged that proof in dependency exemption cases does not lend itself to precision or exactness,[59] and to impose upon the Commissioner (and indirectly upon the parent having custody) such an extraordinary burden would defeat the general rule that the parent with custody should have the exemption. The court resolved this dilemma in favor of the custodial parent. It held that the common import of the words "clearly establish" requires only that it be shown by a *clear preponderance*[60] of the evidence that the parent having custody of the children provided a greater amount for their support than the parent not having custody. The court reasoned that any other construction would be impractical and at variance with the general policy of the statute as a whole.

In dissenting, Judge Irwin was joined by five other members of the Tax Court in arguing that Congress had made its intention apparent that "clear and convincing" was the proper evidentiary standard to be applied.[61] The underlying policy behind such a heavy burden, he stated, was that the parent with custody is in a far better position to furnish informa-

---

[55]HOUSE REPORT, *supra* note 1, at 592 (emphasis added).

[56]The dissent, relying on Cross v. Ledford, 161 Ohio St. 499, 120 N.E.2d 118 (1954), defined "clear and convincing" evidence as:

> [T]hat measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established. It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases.

55 T.C. at 16.

[57]*E.g.*, Henry S. Kerbaugh, 29 B.T.A. 1014, *aff'd* 74 F.2d 749 (1st Cir. 1935); *cf.* 9 J. MERTENS, LAW OF FEDERAL INCOME TAXATION § 50.67, n.70 (rev. vol. 1965).

[58]Items such as food and entertainment are often cash expenses which are not easily substantiated; indeed, the fair rental value of lodging is necessarily an estimate. *E.g.*, Emil Blarek, 23 T.C. 1037 (1955); Treas. Reg. § 1.152-1(a)(2)(i) (1971).

[59]55 T.C. at 13.

[60]The court defined "clear preponderance" of the evidence as "[s]omething more positive and explicit, as opposed to inferences to be drawn from ambiguous and equivocal proof." 55 T.C. at 13.

[61]55 T.C. at 14.

tion as to the total support of the children. The dissent concluded that "if . . . the requirement of 'clear and convincing' evidence, which Congress states is meant by 'clearly establish,' leads to harsh . . . results, it is the . . . function of Congress . . . to redefine it."[62]

Inasmuch as section 152(e)(2)(B) applies only to claimed dependency exemptions after 1966,[63] *Labay* was a case of first impression before the Tax Court applying the 1967 amendment. Those cases which have since discussed the support test have uniformly applied the *Labay* court's standard of "clear preponderance."[64] However, several cases have applied the support test but avoided any discussion of the meaning of "clearly establish."[65] Adding to the confusion, the Treasury on March 20, 1971, adopted new regulations amplifying section 152(e).[66] These regulations defined the standard of proof required by the custodial parent in terms of the "clear and convincing" standard previously repudiated by the Tax Court.

At this time, it appears that the Internal Revenue Service is willing to accept the *Labay* rationale. On August 17, 1971, the Treasury proposed to amend paragraph (d)(3) of section 1.152-4 of the Regulations to replace the "clear and convincing" evidentiary standard with "clear preponderance."[67] The proposal became law on October 12, 1971.[68] The apparent result of this change is to resolve the ambiguity surrounding the support test in favor of a lower evidentiary standard.

USE OF ESTIMATES IN PROOF OF SUPPORT WHEN DOCUMENTED PROOF HAS NOT BEEN AVAILABLE

Proof of support items such as food, shelter, clothing, medical and dental care, education, recreation, and the like does not always lend itself to precision and exactness. When documented evidence has not been available, the petitioner has had to resort to the use of estimates with frequently

---

[62] 55 T.C. at 16.

[63] Treas. Reg. § 1.152-4(a) (1971).

[64] Richard M. Blake, P-H TAX CT. MEM. DEC. ¶ 71-189 (Aug. 3, 1971); Elsie Bush Richardson, P-H TAX CT. MEM. DEC. ¶ 71-100 (May 10, 1971); John S. Robinson, P-H TAX CT. MEM. DEC. ¶ 71-078 (Apr. 21, 1971); Aron Alvin Holley, P-H TAX CT. MEM. DEC. ¶ 71-064 (Apr. 7, 1971).

[65] Elwood J. Muldoon, P-H TAX CT. MEM. DEC. ¶ 71-213 (Aug. 25, 1971); Richard D. Stanton, P-H TAX CT. MEM. DEC. ¶ 71-202 (Aug. 18, 1971); Betty Clarice Bosher, P-H TAX CT. MEM. DEC. ¶ 71-061 (Apr. 5, 1971); Donna Jo Campbell, P-H TAX CT. MEM. DEC. ¶ 71-051 (Mar. 25, 1971).

[66] Treas. Reg. § 1.152-4(d)(3), T.D. 7099 (1971), INT. REV. BULL. No. 16, at 10.

[67] *Id.*

[68] T.D. 7145, *cited at* 36 FED. REG. 20039 (1971).

unsuccessful results. Over the years, no obvious pattern of consistency has evolved in the Tax Court as to the use of estimates in proof of support.

In *E.R. Cobb*,[69] a case arising under the pre-1967 legislation, the taxpayer was unable to establish the precise amount which his former wife had contributed to the support of their two children. However, his evidence as to her income and the manner in which she lived was sufficient to convince the court that he had furnished more than half the cost of the two children's support.

The taxpayer in *Bernard C. Rivers*[70] was faced with a similar problem in proving total support. He contended that under the rationale of *Cohan v. Commissioner*[71] the court might estimate his wife's expenditures and thus arrive at a figure for total support. The court denied his request and held:

> We are not at liberty to do as petitioner contends. The burden is upon him to establish clearly his right to the dependency exemptions. No factor relating to his right to such exemptions is here disputed except the crucial factor which is the total amount expended from all sources for the support of [the children] during the year . . . . *Cohan* does not authorize or require a conjecture by this court as to that total amount.[72]

Thus, estimates have been disfavored by the Tax Court as proof of support in child dependency cases.

In *Commissioner v. Mendel*,[73] the taxpayer testified as to his own substantial contributions toward support but was unable to obtain expense information from his wife. He did establish that his children had not been seriously ill, and that they had attended public school and dressed modestly. Nevertheless, the Tax Court, reaffirming its holding in *Rivers*, refused to accept the taxpayer's estimates. On appeal, however, the Fourth Circuit reversed the Tax Court and granted petitioner the exemptions, holding that he had sustained his burden of proof as to support.

Most recently, the Tax Court allowed the inference of the *Cohan* principle in a case which followed the *Labay* interpretation of the support test. The petitioner, the custodial parent in *Elsie Bush Richardson*,[74] was

---

[69] 28 T.C. 595 (1957).

[70] 33 T.C. 935 (1960).

[71] 39 F.2d 540 (2d Cir. 1930). Here, the court held that once a taxpayer's right to a deduction was established, the amount of the deduction could be determined by approximation.

[72] 33 T.C. at 937-38.

[73] 351 F.2d 580 (4th Cir. 1965).

[74] P-H TAX CT. MEM. DEC. ¶ 71-100 (May 10, 1971).

unable to offer documentary evidence as to her expenditures in clothing her three children.[75] Rather than deny the full amount of the claimed expenditures, the Tax Court allowed amounts which paralleled United States Department of Agriculture statistics on the cost of raising a child in the South in 1967.[76]

The implications of the *Labay* and *Richardson* decisions tend to indicate a retreat from the Tax Court's earlier position that it would refuse to conjecture in matters of support.[77] Thus, in future cases, where a parent is unable to substantiate a class of expenditures by documented proof, he might seek to introduce into evidence statistics bearing on amounts normally expended for such items, whether for clothes, meals, recreation, or education.[78]

CONCLUSION

The strength of the present legislation lies in its effectiveness as an administrative procedure. In the event that the non-custodial parent provides $1200 or more support for the child and the custodial parent disputes this, or claims she provided more support, the law now provides that each parent is entitled to an itemized statement of the other's claim. The result is that each parent is able to make an informed decision as to whether to litigate or reach an agreement at the administrative level.

One weakness of the 1967 legislation has been the uncertainty surrounding the level of proof required of the mother when the father has provided over $1200 in support for the dependents. However, the recent amendment to the regulations implementing the *Labay* court's interpretation of the standard of proof has resolved this ambiguity in favor of a lower evidentiary standard. Since few persons have the time, the patience, or the knowledge to attempt the documentation required to prove every expenditure by "clear and convincing" evidence, the standard of "clear preponderance" should have the effect of softening the harshness of this provision.

---

[75]Petitioner, nevertheless, failed to prove that she had provided more for the support of her children than her former husband despite the fact that the court allowed a portion of her unsubstantiated figures.

[76]For example, in 1969 the estimated cost of raising an urban child under a low-cost food plan varied from $930 to $1550 depending upon the age of the child, the region in which the family lived, and the size of the family. The cost of food varied from $210 to $500; the cost of clothing varied from $60 to $250; the cost of housing varied from $330 to $460; the cost of medical care averaged $60; the cost of transportation varied from $130 to $240. AGRICULTURE RESEARCH SERVICE, UNITED STATES DEPARTMENT OF AGRICULTURE, COST OF RAISING A CHILD (1970).

[77]Bernard C. Rivers, 33 T.C. 935, 937-38 (1960).

[78]U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 346-47, Tables 525-27 (91st ed. 1970).