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THE POWER OF STATE COURTS TO AWARD THE FEDERAL DEPENDENCY EXEMPTION UPON DIVORCE

*David J. Benson**

I. INTRODUCTION

Prior to 1984, state courts had the power to award the federal dependency tax exemption to a non-custodial parent following a divorce if that parent met certain conditions.[1] In 1984, Congress amended section 152(e) of the Internal Revenue Code (the "Code") to provide that a non-custodial parent may claim the dependency exemption only if the custodial parent signed a written declaration waiving her[2] right to the exemption.[3] The Internal Revenue Service (IRS) has produced a sim-

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1. The state courts had that power pursuant to § 152 of the Internal Revenue Code. At least one state court has suggested that states had the power prior to 1967 to allocate the dependency exemption despite the absence of any reference to such power in the Internal Revenue Code. *See* Serrano v. Serrano, 213 Conn. 1, 9, 566 A.2d 413, 417 (1989). *Contra* Vinet v. Vinet, 184 So. 2d 33, 36 (La. Ct. App. 1966). In 1967, Congress expressly recognized the power of state courts to allocate the dependency exemption upon divorce with the enactment of the following provision:

> (e) Support test in case of child of divorced parents, etc.
>
> (2) Special Rule.- The child of parents described in paragraph (1) shall be treated as having received over half of his support during the calendar year from the parent not having custody if-
>
> (A)(i) the decree of divorce or 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
>
> (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 . . . 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 purpose 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.

Act of Aug. 31, 1967, Pub. L. No. 90-78, §1, 81 Stat. 191, 191-92 (amended 1984).

2. To facilitate discussion of the issues in this article, the custodial parent shall be referred to in the feminine gender. The non-custodial parent shall be referred to in the masculine gender.

3. Tax Reform Act of 1984, Pub. L. No. 98-369, § 423, 98 Stat. 494, 799 (1984) (codified as amended at 26 U.S.C. § 152(e)(4)(A)(i) (1988)). The issue of who qualifies as the custodial parent is not a simple one and is beyond the scope of this article. For a discussion of this issue, see

ple form for this purpose.[4] The custodial parent can execute the form for the present tax year or for any number of tax years in the future.[5] In order to maximize the after-tax dollars available for child support, tax planners usually prefer that a non-custodial parent claim the exemption when that person has a higher income than the custodial parent.[6] Because mothers are awarded custody in the vast majority of cases[7] and are less financially established than fathers, the non-custodial parent generally has the higher income.[8] In most divorces, the waiver form is routinely executed in conjunction with the separation agreement. Cases where the custodial parent refuses to execute the waiver raise the issue of whether the state court that grants the divorce[9] has the power to order the custodial parent to waive her right to claim the dependency exemption.[10] There is a split of authority among the courts that have considered the question.[11]

Benson, *The Child Dependency Exemption and Divorced Parents: What is "Custody"?*, 18 CAP. U.L. REV. 57 (1989).

4. I.R.S. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents (Revised September 1990).

5. Temp. Treas. Reg. § 1.152-4T, A-4 (1984).

6. For an example of the tax savings realized by awarding the dependency exemption to the parent with the higher income, see Nichols v. Tedder, 547 So. 2d 766, 774-75 (Miss. 1989).

7. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, Series P-20, No. 433, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1978, at 42, Table 9 (1989); *see also* L. WIETZMAN, THE DIVORCE REVOLUTION 227-32 (1985).

8. *See* L. WEITZMAN, *supra* note 7, at 323.

9. I.R.C. § 152(e) is limited to parents who are divorced or legally separated. It should be noted that the issue of which parent can claim the exemption also comes up with regard to parents who are never married and therefore cannot be divorced or legally separated. *See* Monterey County v. Cornejo, 217 Cal. App. 3d 632, 266 Cal. Rptr. 68 (1990). It would seem as though the issue of who can claim the exemption in either context should be resolved in the same way.

10. Since the execution of the waiver is the only statutory devise provided for the custodial parent's relinquishment of the right to claim the exemption, most courts have concluded that, if a state court does have the power to determine who gets the exemption, the only remedy available to the state court is an order directing the custodial parent to execute the waiver. *See, e.g.*, Wassif v. Wassif, 77 Md. App. 750, 551 A.2d 935, *cert denied*, 315 Md. 692, 556 A.2d 674 (1989); Nichols v. Tedder, 547 So. 2d 766, 772 (Miss. 1989); *cf.* Hughes v. Hughes, 35 Ohio St. 3d 165, 518 N.E.2d 1213, *cert. denied*, 488 U.S. 846 (1988) (suggesting that the court's allocation of the dependency exemption might be submitted to the IRS to see whether they would honor it).

11. The majority of courts have upheld the continued power of the state courts to allocate the dependency exemption upon divorce. *See* Lincoln v. Lincoln, 155 Ariz. 272, 746 P.2d 13 (1987); Monterey County v. Cornejo, 217 Cal. App. 3d 632, 266 Cal. Rptr. 68 (1990); Serrano v. Serrano, 213 Conn. 1, 566 A.2d 413 (1989); Rohr v. Rohr, 800 P.2d 85 (Idaho 1990); *In re* McGarrity, 191 Ill. App. 3d 301, 548 N.E.2d 136 (1989); *In re* Baker, 550 N.E.2d 82 (Ind. Ct. App. 1990); *In re* Walsh, 451 N.W.2d 492 (Iowa 1990); Hart v. Hart, 774 S.W.2d 455 (Ky. Ct. App. 1989); Rovira v. Rovira, 550 So. 2d 1237 (La. Ct. App.), *cert. denied*, 552 So. 2d 398 (La. 1989).; Wassif v. Wassif, 77 Md. App. 750, 551 A.2d 935 (1989); Bailey v. Bailey, 27 Mass. App. Ct. 502, 540 N.E.2d 187 (1989); Fudenberg v. Molstad, 390 N.W.2d 19 (Minn. Ct. App. 1986); Nichols v. Tedder, 547 So. 2d 766 (Miss. 1989); *In re* Milesnick, 235 Mont. 88, 765 P.2d 751 (1988); Babka v. Babka, 234 Neb. 674, 452 N.W.2d 286 (1990); Gwodz v. Gwodz, 234 N.J. Super. 56, 560 A.2d 85 (1989); Sheehan v. Sheehan, 152 A.D.2d 942, 543 N.Y.S.2d 827 (1989);

The issue is one of federal preemption: By providing that the custodial parent has the right to claim the dependency exemption unless that right is waived in writing, did Congress intend to preempt state action in that area of law so that state courts lack the power to order execution of the waiver?

II. ANALYSIS

The Supreme Court's standard for determining whether a federal law preempts state regulation in a particular area was recently articulated as follows:

> In the absence of explicit statutory language signaling an intent to preempt, we infer such intent where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for the States to supplement federal law or where the state law at issue conflicts with federal law, either because it is impossible to comply with both or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives.[12]

Thus, federal preemption can be found where the federal law expressly provides for it, where it can be implied, or where actual conflict between federal and state law exists.

A. Federal Preemption—Express

The Supreme Court has made it clear that preemption can be found where Congress has used explicit language indicating an intent to occupy an area of regulation.[13] In determining whether express pre-

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McKenzie v. Jahnke, 432 N.W.2d 556 (N.D. 1988); Hughes v. Hughes, 35 Ohio St. 3d 165, 518 N.E.2d 1213, *cert. denied*, 488 U.S. 846 (1988); Motes v. Motes, 786 P.2d 232 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).; *In re* Peacock, 54 Wash. App. 12, 771 P.2d 767 (1989); Cross v. Cross, 363 S.E.2d 449 (W. Va. 1987); Pergolski v. Pergolski, 143 Wis. 2d 166, 420 N.W.2d 41 (1988). *Contra* Villaverde v. Villaverde, 547 So. 2d 185 (Fla. Dist. Ct. App. 1989); Varga v. Varga, 173 Mich. App. 411, 434 N.W.2d 152 (1988); Eichle v. Eichle, 782 S.W.2d 430 (Mo. Ct. App. 1989); Jensen v. Jensen, 753 P.2d 342 (Nev. 1988); In re Vinson, 83 Or. App. 487, 732 P.2d 79 (1987); Brandriet v. Larsen, 442 N.W.2d 455 (S.D. 1989); Davis v. Fair, 707 S.W.2d 711 (Tex. Ct. App. 1986).

12. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989)(citations omitted). This articulation by the Supreme Court suggests an air of regularity and correctness in determining preemption which is rarely reflected in the cases. It is often difficult to determine what standard a particular court is using and the basis on which preemption is or is not found. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 296 (3d ed. 1986); L. TRIBE, AMERICAN CONSTITUTIONAL LAW 479-80 (2d ed. 1988). Despite the absence of a universally-recognized, structured approach to the issue of federal preemption, this article will use the Supreme Court's articulation of the test in *Northwest Central Pipeline* as a framework to give some order to the analysis.

13. *Northwest Cent. Pipeline*, 489 U.S. at 509; *see also* Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 203 (1983); Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977).

emption exists, courts examine the preemptive language found in the statute to determine what kind of state regulation is precluded.[14] Since the Code contains no preemptive language, no argument can be made that Congress has expressly precluded the states from ordering the custodial parent to waive her right to the dependency exemption under the Code.

B. Federal Preemption—Implied by Field Preemption

Where federal law does not contain express preemptive language, the intent of Congress to occupy an area of regulation can be implied from the enactment of legislation when the regulatory scheme is so pervasive or comprehensive that it may support the inference that Congress has left no room for the states to supplement it.[15] Likewise, Congressional intent to preempt can also be implied if the enactment involves a field in which the federal interest is so dominant that there is no room for state laws on the same subject.[16] This kind of preemption is sometimes called "field" preemption, when the intent of Congress is to occupy the entire field of regulation.[17]

For example, the federal power to tax income is shared with the states. However, in the field of federal income taxation, the federal regulatory scheme is so pervasive that it precludes state laws on the same subject. State courts are deemed powerless to determine federal income tax matters such as who gets a deduction or an exemption.[18] Indeed, even the state courts play a limited role in interpreting and applying federal income tax law.[19]

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14. *See* Mackey v. Lanier Collections Agency & Servs., Inc., 486 U.S. 825, 828 (1988) (prohibits that which federal statutes permit); Ramirez v. Inter-Continental Hotels, 890 F.2d 760, 762-763 (5th Cir. 1989) (ERISA language expressly states it supercedes any and all state laws relating to employee benefits); Illinois Corporate Travel, Inc. v. American Airlines Inc., 889 F.2d 751, 754 (7th Cir. 1989) (federal regulations expressly preempt the area of air carrier rates, routes or services regulations), *cert. denied*, 110 S.Ct. 1948 (interim ed.).

15. *See* Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

16. *Id.*

17. *See* L. TRIBE, *supra* note 12, at 497-501; *see, e.g.*, Burda v. Ecker Co., No. 89-c-8605 (N.D. Ill. July 19, 1990) (LEXIS Genfed Library, Dist. File) (under the complete preemption doctrine, challenges to federal tax laws are not actionable under state law).

18. *See, e.g.*, Hartwick College v. United States, 588 F. Supp. 926, 930 (N.D.N.Y. 1984), *aff'd.*, 801 F.2d 608 (2d Cir. 1986). The court in *Hartwick* stated:

> Congress has created an elaborate and exclusive scheme for judicial review of federal income tax liability, assigning distinct roles in that scheme to the United States District Courts and the United States Tax Courts. Without belaboring the point, that scheme suggests that a question of income tax liability may only be determined *conclusively* by the federal court invested with the authority to determine it *directly*.

Id. at 930.

19. *See* Commissioner v. National Alfalfa Dehydrating & Milling Co., 417 U.S. 134, 148-49 (1974). "The propriety of a deduction does not turn upon general equitable considerations, such as a demonstration of effective economic and practical equivalence. Rather, it 'depends upon

Based on the foregoing, federal law clearly preempts the power of state courts to decide the issue of who is entitled to claim a dependency exemption for federal tax purposes. Every court that has faced the issue has held that state courts lack the power to directly allocate the dependency exemption in a fashion that is binding on the IRS.[20] In response, state courts have indirectly allocated the exemption by ordering custodial parents to execute waivers of their rights to claim the exemption under threat of contempt.[21] The issue then becomes: Does federal regulation of the "field" of federal income tax, or of federal dependency exemptions, preempt such orders by state courts?

To determine whether federal legislation has preempted a field, courts must ascertain the congressional intent.[22] An important factor in ascertaining that intent is whether Congress acted in an area traditionally governed by the states.[23] For example, the Supreme Court has used strong language to demonstrate that matters relating to marriage are traditionally within state control and that such state control will not be preempted without a showing that Congress has positively required such preemption by direct enactment.[24] Indeed, where federal law appears to conflict with state family law, the Supreme Court has held that the state family law should prevail unless "clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied."[25]

In applying these principles to the issue of whether state courts

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legislative grace; and only as there is clear provision therefor can any particular deduction be allowed.' " *Id.* (quoting New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934)).

20. *See, e.g., In re* McGarrity, 191 Ill. App. 3d 501, 502, 548 N.E.2d 136, 138 (1989) (state court cannot award exemption to noncustodial parent without ordering custodial parent to sign the necessary waiver); Wassif v. Wassif, 77 Md. App. 750, 760-61, 551 A.2d 935, 940 (1989) (state court cannot transfer dependency exemption directly to the noncustodial parent but must order the custodial parent to sign a waiver of the exemption); *cf.* Hughes v. Hughes, 35 Ohio St. 3d 165, 168, 518 N.E.2d 1213, 1216 (state court may award dependency exemption to noncustodial parent), *cert. denied,* 488 U.S. 846 (1988).

21. *See, e.g., In re* Baker, 550 N.E.2d 82, 86 (Ind. Ct. App. 1990); *In re* Milesnick, 765 P.2d 751, 778-80 (Mont. 1988).

22. *See* Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989) (absent express or implied intent of Congress preemption does not occur).

23. *See* Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947).

24. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979). The Court in *Hisquierdo* stated:

> Insofar as marriage is within temporal control, the States lay on the guiding hand. "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.". . . On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has "positively required by direct enactment" that state law be preempted.

Id. at 581 (citations omitted) (quoting *In re* Burns, 136 U.S. 586, 593-94 (1890)); *see* Wetmore v. Markoe, 196 U.S. 68, 77 (1904).

25. United States v. Yazell, 382 U.S. 341, 352 (1966).

have the power to order the custodial parent to waive the dependency exemption, the key question is whether the allocation of the dependency exemption is a matter traditionally falling within the power of the states to control marriage, divorce and other family matters. Courts have taken two different approaches in finding that the allocation of the dependency exemption is a matter traditionally within the power of state courts.

One approach is to view the allocation of the dependency exemption as part of the ordering of economic affairs of the spouses upon divorce. This is a function that is indisputably within the traditional power of state courts over marriage and divorce. A number of courts have used this rationale to support their conclusions that state courts continue to have the power to allocate the dependency exemption.[26] The problem with this rationale is that Congress has already spoken on that aspect of divorce by specifically providing that the custodial parent shall have the dependency exemption unless waived in writing.[27] Has Congress, by granting the dependency exemption to the custodial parent, manifested its intent that the custodial parent have that financial benefit? Custodial parents have made this argument with little success.[28] Instead of finding that the intent of Congress was to confer an economic benefit on the custodial parent, most courts have determined that Congress intended to provide certainty and to free the IRS from the responsibility of ascertaining which parent should be entitled to claim the exemption.[29]

The legislative history of the 1984 amendment to section 152(e) of the Code provides strong support for the proposition that the intent of Congress was merely to relieve the IRS of the administrative burden of having to decide which parent should be entitled to claim the deduction.[30] The House Report accompanying the amendment provides:

> [t]he 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

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26. *See, e.g., In re* Milesnick, 235 Mont. 88, 93, 765 P.2d 751, 754 (1988); Cross v. Cross, 363 S.E.2d 449, 459 (W. Va. 1987); *see also* Morphew v. Morphew, 419 N.E.2d 770, 776 (Ind. Ct. App. 1981) (examining source of state courts' power to allocate the exemption).

27. I.R.C. § 152(e)(4) (1988).

28. *See, e.g., In re* Baker, 550 N.E.2d 82, 85 (Ind. Ct. App. 1990); *Cross*, 363 S.E.2d at 457.(argument rejected). *But see* McKenzie v. Kinsey, 532 So. 2d 98, 99 (Fla. Dist. Ct. App. 1988) (argument apparently accepted).

29. *See, e.g.*, Serrano v. Serrano, 213 Conn. 1, 566 A.2d 413, 417-18 (1989); Motes v. Motes, 786 P.2d 232, 236-37 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

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

> 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. *The committee wishes to provide more certainty by allowing the custodial spouse the exemption unless that spouse waives his or her right to claim the exemption. Thus, dependency disputes between parents will be resolved without the involvement of the Internal Revenue Service.*[31]

Remarks made by an official of the Treasury Department in support of the legislation also indicate that the purpose of the 1984 amendment was to relieve the IRS of the burden of deciding who can claim the deduction.[32]

The second approach taken to support the proposition that the power to allocate the dependency exemption is a matter traditionally within the power of state courts is to argue that the state courts have always allocated the exemption in divorce cases. According to this argument, Congress would have expressly stripped state courts of that power when they amended section 152(e) in 1984 if that had been its intention.[33] The difficulty with this approach is that no clear evidence exists to show that state courts allocated the dependency exemption prior to 1967 when the Code was amended to grant state courts that power in certain circumstances.[34] Despite this lack of evidence, one court stated that "state courts have been allocating the exemption for decades. Moreover, state courts developed the practice long before the Internal Revenue Code made explicit reference to it by adopting the first version of section 152(e) in 1967."[35] Nothing in the statutory history of the 1967 amendment suggests that Congress was simply codify-

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31. *Id.* (emphasis added).

32.

> Treasury strongly supports this section of the bill. In many cases, both parties to a divorce will claim adependency exemption attributable to the same child. The IRS has little choice but to deny the exemption to both taxpayers, even though it knows that one spouse or the other is entitled to the exemption. Although the tax liability involved in these disputes generally does not exceed a few hundred dollars, the parties often are willing (because of the emotional nature of the issue) to litigate the matter at a cost far in excess of the value of the exemption. This wastes judicial and other Government resources and contributes significantly to the case backlog in the United States Tax Court.

Tax Law Simplification and Improvement Act of 1983: Hearings on H.R. 3475 Before the Committee on Ways and Means, 98th Cong., 1st Sess. 150, 165 (1983) (statement of Ronald Pearlman, Deputy Assistant Secretary, Tax Policy).

33. *See, e.g.*, Cross v. Cross, 363 S.E.2d 449, 458 (W. Va. 1987). The *Cross* court stated "because state court allocation of dependency exemptions has been custom and usage for decades, it is more reasonable than not to infer that if Congress had intended to forbid state courts from allocating the exemption by requiring the waiver to be signed, Congress would have said so." *Id.*

34. *See* Act of Aug 31, 1967, Pub. L. No. 90-78, §1, 81 Stat. 191 (amended 1984).

35. Serrano v. Serrano, 213 Conn. 1, ____, 566 A.2d 413, 417 (1989).

ing a preexisting practice of the state courts.[36]

Whether the practice of state courts in allocating the dependency exemption existed prior to the 1967 amendment is a significant issue. If that was not the previous practice, then this strengthens the argument that state courts only had the power to allocate as a result of the 1967 amendment of the Code. Consequently, the deletion of that section of the Code in 1984 would signal the end of the power of state courts to allocate the exemption. Some courts have found this analysis persuasive and have used it to hold that state courts do not have the power to order the custodial parent to waive the right to claim the exemption.[37]

In determining whether federal legislation has preempted the field of child dependency allocation, courts have generally been content to limit their analysis to the narrow question of the immediate purpose of the 1984 amendment of section 152(e).[38] Thus, most courts that have considered the question have concluded that the Congressional intent was to remove the IRS from the business of deciding which divorced parent should be entitled to claim the dependency exemption. These courts did not consider the broader question of whether the federal government might have had some purpose in giving the dependency exemption to the custodial parent, a purpose other than administrative convenience for the IRS.[39]

Whether Congress had a purpose in giving the dependency exemption to the custodial parent other than the administrative convenience of the Internal Revenue Service cannot be gleaned from the legislative history of the provisions relating to divorced parents. Therefore, it is necessary to look at the purpose of dependency exemptions more generally.

Dependency exemptions for children were first established by Con-

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36. *See, e.g.*, S. REP. NO. 488, 90th Cong., 1st Sess. 3, *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 1527, 1529. This report provided that:

> [u]nder this exception it will be possible for the courts hearing divorce and separation suits to resolve this issue in many cases at the time they are considering the financial arrangements which are to apply between the parents and to take the income tax deduction directly into account in this connection.

Id.

37. *See, e.g.*, Brandriet v. Larsen, 442 N.W.2d 455, 457 (S.D. 1989).

38. *See, e.g.*, Wassif v. Wassif, 77 Md. App. 750, 759-61, 551 A.2d 935, 939-40, *cert. denied*, 315 Md. 692, 556 A.2d 674 (1989).

39. *See, e.g.*, *Wassif*, 77 Md. App. at 759, 551 A.2d 935, 939 (Md. Ct. Spec. App. 1989) ("The new statute was meant to address the desire of the IRS not to get involved in . . . factual disputes where it had very little, if anything, to gain by the outcome."); Babka v. Babka, 234 Neb. ____, 452 N.W.2d 286, 289 (1990) ("The amendment was intended to relieve the IRS of the burden of determining who was entitled to the exemption, not to interfere with state court prerogatives.").

gress in 1917.[40] At that time, the concern of Congress was that the burden of paying for World War I should be born equitably and that persons with families to support should not be unduly taxed.[41] Thus, apparently looking to the British system,[42] Congress allowed the taxpayer a deduction of $200 for each child under eighteen who was dependent upon the taxpayer.[43] The child did not have to be related to the taxpayer nor live in the taxpayer's household.[44] In 1919, the criteria were reworded to provide a deduction for each child under eighteen dependent upon "and receiving his chief support from the taxpayer."[45] These basic criteria for the child dependency deduction remained in effect until 1944. In 1944, Congress dropped the requirement that the dependent be under eighteen and added the requirements that the dependent be related to the taxpayer and that he receive over half of his support from the taxpayer.[46] Up to this point in the history of the child dependency exemption, it is clear that the purpose of the exemption was to reduce the taxes of the person bearing the principal responsibility for child support, thus enabling that person to retain sufficient funds to provide an adequate level of support.

The device of awarding the exemption to the parent providing more than half of the child's support, regardless of the marital status of the parents or the custodial rights to the child, continued from 1944 until 1967. In 1967, Congress for the first time began to distinguish between taxpayers who were married and those who were separated or divorced, for the purposes of determining eligibility to claim a child as a dependent. At that time, custody of the child also became a factor in the determination.[47] There is little doubt that the purpose of Congress in making the 1967 changes in the eligibility requirements was to relieve the IRS and the courts of the burden of deciding which of two contentious divorced parents provided more than half the support for a child.[48] While that undoubtedly was the immediate purpose of Congress, the question follows: did Congress intend to change the underlying purpose of the child dependency exemption, which was to give tax relief to the parent principally responsible for the support of the child?

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40. War Revenue Act, ch. 63, § 1203, 40 Stat. 300, 331 (1917) (amended 1919).
41. *See, e.g.*, 55 CONG. REC. H2368 (daily ed. May 15, 1917) (statement of Rep. Lunn).
42. *See* 55 CONG. REC. H2370 (daily ed. May 15, 1917) (statements of Rep. Hill and Rep. Lunn).
43. War Revenue Act, ch. 63, § 1203, 40 Stat. 300, 331 (1917) (amended 1919).
44. *Id.*
45. Revenue Act of 1918, ch. 18, § 216(d), 40 Stat. 1057, 1069 (1919) (amended 1944).
46. Individual Income Tax Act of 1944, ch. 210, § 10(b)(3), 58 Stat. 231, 239 (1944).
47. *See* Act of Aug. 31, 1967, Pub. L. No. 90-78, §1, 81 Stat. 191, 191-92 (amended 1984).
48. *See* S. REP. NO. 488, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 1527, 1528-30.

If the 1984 amendments are viewed as merely creating a presumption that the child's custodial parent is the one principally responsible for his support, a strong argument can be made that the 1967 amendments were not intended to change the underlying purpose of the child dependency exemption. This presumption would dictate who could claim the dependency exemption unless a court ordered otherwise or unless the non-custodial parent proved that he met the level of financial support required by the 1967 Act.

If the 1967 amendments are viewed in this light, then the 1984 amendments that gave the exemption to the custodial parent unless that parent executed a waiver could be characterized as merely fine-tuning the presumption created by the 1967 Act without changing the underlying purpose of the child dependency exemption. Viewed from this perspective, the implied federal preemption question becomes whether the current presumption in favor of the custodial parent so strongly reflects the underlying policy of giving the exemption to the parent principally responsible for the support of the child that it precludes any effort by state courts to tinker with that presumption.

At present, state courts considering the preemption problem have not addressed the issue from this perspective. As discussed above,[49] most courts have been content to examine the immediate purpose of Congress in passing the 1984 amendment and have ignored the underlying purpose of the dependency exemption. While not comprehensively addressing the underlying purpose of the exemption, a few courts have perceived that precluding state courts from ordering the custodial parent to execute the waiver has the practical effect of making less money available for child support where the custodial parent has no income or where the income of the non-custodial parent is substantially higher.[50] Consequently, one court stated that "[p]rohibiting state courts from allocating the available exemptions to the parent receiving the greatest economic benefit often results in the unnecessary depletion of limited family resources."[51] Other courts have engaged in some rather elaborate financial calculations to demonstrate how proper allocation of the dependency exemption maximizes the family resources available for the support of the children.[52]

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49. *See supra* text accompanying note 38.

50. *See, e.g.*, Gwodz v. Gwodz, 234 N.J. Super. 56, 61, 560 A.2d 85, 88 (1989); Cross v. Cross, 363 S.E.2d 449, 459-60 (W. Va. 1987).

51. Motes v. Motes, 786 P.2d 232, 239 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

52. *See e.g.*, Nichols v. Tedder, 547 So. 2d 766, 774-75 (Miss. 1989). The court in *Nichols* observed that where the court fails to allocate the exemption, "[t]he only real winner . . . is the federal government, while the real loser is the child." *Id.* at 775.

If the underlying purpose of the child dependency exemption is to maximize the family resources available for child support and if denying state courts the power to allocate that exemption would result in the dissipation of family resources by allowing a custodial parent without income to receive the exemption, it is hard to believe that the federal government would have intended to preempt the "field." The standard for federal preemption is that state regulation in the family law area should only be overridden where "clear and substantial interests of the National Government . . . will suffer major damage if the state law is applied."[53] A strong argument can be made that allowing state courts to allocate the federal dependency exemption in divorce cases furthers, rather than damages, a clear and substantial interest of the federal government and is a permissible supplement to the federal law.

C. *Federal Preemption—Conflict Between State and Federal Law*

Even where it is determined that Congress has not preempted a particular field, federal preemption can still be found where "the state law at issue conflicts with federal law, either because it is impossible to comply with both . . . or because the state law stands as an obstacle to the accomplishment and execution of congressional objectives."[54] This might be described as the "actual conflict" test of federal preemption.[55] As to the latter part of that test, the foregoing analysis regarding field preemption[56] would seem dispositive of the issue. If the purpose of the federal child dependency exemption is to maximize the family resources available for child support, and if state court allocation of that exemption upon divorce generally serves that purpose, then it would be difficult to argue that the state regulation stands as an obstacle to the accomplishment of the congressional objective.

However, if the purpose of the federal law is to confer a financial benefit on the custodial parent by guaranteeing availability of the exemption absent waiver, then the state court regulation would stand as an obstacle to the accomplishment of a congressional objective. The contention that Congress intended to confer an economic benefit upon custodial parents by guaranteeing them the exemption would seem to be contradicted by the fact that the exemption is only a benefit if the custodial parent has income. Blindly awarding the exemption to the custodial parent without regard to income does not necessarily confer

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53. United States v. Yazell, 382 U.S. 341, 352 (1966); *see supra* text accompanying notes 20-23.

54. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 509 (1989).

55. *See, e.g.*, English v. General Elec. Co., 110 S.Ct. 2270, 2281 (interim ed. 1990); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1982).

56. *See supra* notes 38-53 and accompanying text.

an economic benefit and is likely to operate to the detriment of the child if the custodial parent has no income or less income than the non-custodial parent. Following this analysis, several courts have rejected the argument that the federal law was intended to confer an economic benefit on the custodial parent.[57]

Custodial parents may not be able to argue that receiving the dependency exemption confers a direct benefit upon them. However, they might argue that it confers an indirect economic benefit upon them by giving them a bargaining chip in the divorce process. Now that divorce is essentially available upon demand, the custodial parent has little bargaining power to induce her former spouse to pay higher amounts of alimony or child support.[58] Giving custodial parents control over the dependency exemption enables them to trade for higher alimony, child support, or other concessions from their spouses. If a state court strips custodial parents of their power over the dependency exemption, these parents are deprived of this bargaining chip. While this argument has a logical basis, it is hard to believe that Congress created the present presumption awarding the dependency exemption to the custodial parent in order to give that parent a bargaining chip by which to extract concessions from her spouse. The legislative histories of both the 1967 and 1984 amendments are silent as to the proposition that Congress had the slightest concern for this aspect of divorce.[59]

Nonetheless, courts that have upheld the power of state courts to allocate the federal dependency exemption have been sensitive to the fact that it is a benefit to the custodial parent. The custodial parent has the benefit of using the exemption to motivate a non-custodial parent who is resistant when it comes to making child support payments.

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57. *See, e.g.*, Motes v. Motes, 786 P.2d 232 (Utah App. 1989) *cert. denied*, 795 P.2d 1138 (Utah 1990). The court stated that:

> [I]ncome tax exemptions are only valuable to persons with income and up to a certain point, the higher the income the more valuable the financial benefit, given the progressivity of the federal income tax. Prohibiting state courts from allocating the available exemptions to the parent receiving the greatest economc benefit often results in the unnecessary depletion of limited family resources.

Id. at 239 (citation omitted).

58. When most divorces were obtained on the basis of the fault of one of the spouses, the spouse not at fault could effectively keep the other spouse from obtaining a divorce by refusing to cooperate in fabricating the divorce grounds or, even if at fault, by asserting one of the many defenses recognized under prior law. *See* W. WADLINGTON, DOMESTIC RELATIONS 1026 (2d ed. 1990). However, there is some doubt as to the effectiveness of the use of the fault grounds and defenses as economic bargaining chips. *See* Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181, 1221-22 (1981).

59. *See* S. REP. No. 488, 90th Cong., 1st Sess., *reprinted in* 1967 U.S. CODE CONG. & ADMIN. NEWS 1527 (regarding the 1967 amendment); H.R. REP. No. 432, 98th Cong., 2d Sess., pt. II, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697 (regarding the 1984 amendment).

Thus, most courts which have upheld the power of the state courts to order the execution of the waiver have conditioned such orders on the non-custodial parent being current in his child support payments.[60] This approach would seem to be an adequate accommodation of any interest the custodial parent or Congress might have in the dependency exemption as a bargaining chip.

The first part of the "actual conflict" test requires a finding of federal preemption where it is impossible to comply with both federal and state law.[61] This first part is more problematic. Section 152(e) seems to contain an unequivocal grant of the right to claim the dependency exemption to the custodial parent absent written waiver of that right.[62] The obvious argument is that granting the right to claim the exemption is totally at odds with an order from a state court forcing the custodial parent to execute the waiver. If section 152(e) does require a voluntary waiver, then it would be impossible for the custodial parent to comply with both federal and state law. Thus, the order of the state court forcing execution of the waiver would be preempted.

At least one court which has held that state court action in this regard is preempted has done so on the ground that section 152(e) requires the waiver to be voluntary.[63] For the most part, courts that have upheld the power of state courts to order the execution of the waiver have been content to dismiss the voluntary-waiver argument on the basis that Congress did not care how the waiver was executed.[64] These courts held that Congress' only concern was to achieve certainty and thereby prevent IRS involvement in disputes over the exemption.[65] At least one court has suggested that it may be significant that section 152(e) is not written in terms of the custodial parent executing a "waiver," but rather refers to the custodial parent signing a written "declaration."[66]

It is certainly debatable whether signing a declaration rather than a waiver is any less voluntary on the part of the custodial parent. One

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60. *See, e.g.*, Briscoe v. Briscoe, 443 N.W.2d 221, 224 (Minn. Ct. App. 1989); Nichols v. Tedder, 547 So. 2d 766, 780 (Miss. 1989); Babka v. Babka, 234 Neb. 674, ____, 452 N.W.2d 286, 289 (Neb. 1990); Cross v. Cross, 363 S.E.2d 449, 460 (W. Va. 1987).

61. *See, e.g.*, English v. General Elec. Co., 110 S.Ct. 2270, 2281 (1990); Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 153 (1981).

62. *See* I.R.C. § 152(e) (1988).

63. *See* Brandreit v. Larsen, 442 N.W.2d 455, 459 (S.D. 1989).

64. *See e.g.*, Serrano v. Serrano, 213 Conn. 1, 566 A.2d 413 (1989); *In re* Baker, 550 N.E.2d 82 (Ind. Ct. App. 1990); Motes v. Motes, 786 P.2d 232 (Utah Ct. App. 1989), *cert. denied*, 795 P.2d 1138 (Utah 1990).

65. *Serrano*, 213 Conn. at ____, 566 A.2d at 417; *Baker*, 550 N.E.2d at 86; *Motes*, 786 P.2d at 236-37.

66. *Motes*, 786 P.2d at 238.

has to wonder whether Congress gave any thought at all to the distinction when the 1984 amendment was passed.[67] An argument could be made that if Congress had intended the signing of the declaration to be something that could be brought about involuntarily through the order of a state court, Congress would have provided for the attachment of a copy of the state court order to the non-custodial parent's income tax return. This would be a less expensive task than requiring the non-custodial parent to maintain a contempt action against his former spouse in order to force execution of the declaration.

Since it is usually in the custodial parent's interest to execute the waiver where it would maximize the income available for child support, it is likely that Congress never even contemplated the possibility that courts would need to coerce execution of the declaration. This thinking supports a literal reading of section 152(e) which suggests that the declaration is something that the custodial parent executes voluntarily. If a literal reading of the statute requires the waiver to be executed voluntarily, then the purpose Congress had in mind may be irrelevant. That purpose may indicate what Congress intended to do, but the language of the statute indicates what Congress actually did. What Congress actually did may well preempt state courts from ordering the execution of the waiver.

D. Tempest in a Teapot?

Nearly every court which has concluded that state courts lack the power to allocate the federal dependency exemption has also held that the inability of the non-custodial parent to claim the exemption is a factor in determining the amount of alimony or child support.[68] Therefore, one has to wonder whether the whole controversy over whether federal law has preempted state court allocation of the exemption is a "tempest in a teapot." At least one court has suggested as much.[69] This

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67. It is interesting to note that while § 152(e) does refer to a declaration, the House Report giving the reasons for the 1984 amendment provided that the custodial parent is allowed to claim the exemption "unless that spouse *waives* his or her *right* to claim the exemption." H.R. REP. NO. 432, 98th Cong., 2d Sess., pt. II, at 1499, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 697, 1140 (emphasis added).

68. *See* Varga v. Varga, 173 Mich. App. 411, 419, 434 N.W.2d 152, 156 (1988); Eichle v. Eichle, 782 S.W.2d 430, 440 (Mo. Ct. App. 1989); Jensen v. Jensen, 104 Nev. 95, 99, 53 P.2d 342, 345 (1988); Brandriet v. Larsen, 442 N.W.2d 455, 459 (S.D. 1989); Davis v. Fair, 707 S.W.2d 711, 718 (Tex. Ct. App. 1986).

69. *See* Brandriet v. Larsen, 442 N.W.2d 455, 459 (S.D. 1989). The court in *Brandriet* stated that "there is a wide distinction in the approach; but, in the long run, the result may be the same." *Id.*; *see also* Jensen v. Jensen, 104 Nev. 95, 99, 753 P.2d 342, 345 (1988). The court in *Jensen* held that coercing the custodial parent was inappropriate. "[T]he lower court could have achieved a similar economic result, as a matter of law, by merely adjusting the amount of alimony." *Id.*

raises the issue of whether lowering the non-custodial parent's alimony or child support obligation when the custodial parent refuses to execute the waiver achieves the same result as ordering the custodial parent to execute the waiver under a threat of contempt.

From an economic standpoint, the two approaches are different. Granting the parent with the greater income the right to claim the exemption generally results in more after-tax dollars being available for child support.[70] As several courts have noted,[71] even if the non-custodial parent's alimony or child support obligations are adjusted to reflect the unavailability of the exemption, the net result is a waste of family resources and less money being available for child support. Although the economic impact of the two approaches is theoretically different, the practical implication may be the same. Once the custodial parent sees that the non-custodial parent's contribution is being lowered and less money will be available because of the refusal to execute the waiver, it is likely that she will be motivated to execute that waiver.[72] While that may be likely, it must be remembered that the issue is often being decided in the context of an acrimonious divorce where reason does not always prevail.

The economic impact of the two approaches is only one aspect of the issue of how the dependency exemption is treated. Another consideration is the chaotic state of affairs caused by states taking two different approaches. A non-custodial parent could obtain an award of the dependency exemption in a state that orders the custodial parent to execute the waiver and be faced with a custodial parent who has moved to a jurisdiction where the courts hold that they lack the power to order the execution. In such a case, the non-custodial parent will probably have to convince the court in the custodial parent's state to give full faith and credit to the award of the dependency exemption by the original court in order to claim the exemption.[73] This is necessary because the extraterritorial effect of a state court's contempt powers is limited.[74] In addition, such awards are usually subject to changes in the economic conditions of the parties[75] and custody of the child,[76] as well

70. *See* Nichols v. Tedder, 547 So. 2d 766, 774-75 (Miss. 1989).

71. *See, e.g., id.* at 773; Cross v. Cross, 363 S.E.2d 449, 458-460 (W. Va. 1987).

72. One court suggested that it could force the custodial parent to execute the waiver by reducing child support. *See Brandreit*, 442 N.W.2d at 459.

73. *See* German v. German, 122 Conn. 155, 188 A. 429 (1936) (suggesting that full faith and credit does not extend to a remedy provided by an out-of-state court). In addition, some courts hold that the original court must reacquire personal jurisdiction over the absent spouse in order to have the power to hold them in contempt. *See* Frankel v. Frankel, 158 A.D.2d 750, 551 N.Y.S.2d 608 (1990).

74. *Frankel*, 158 A.D.2d at 753, 551 N.Y.S.2d at 611.

75. *See generally*, H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §

as conditioned on the non-custodial parent's child support payment.[77] Thus, it is likely that such an award will not be deemed a final order subject to full faith and credit.[78] As a result, whether the non-custodial parent can claim the child dependency exemption on his federal income tax return may turn on the fortuity of the custodial parent's presence in a state not following the majority rule with regard to the federal pre-emption issue. Such a lack of uniformity would seem undesirable with regard to something as national in scope as one's ability to claim a dependent exemption.

E. A Legislative Solution?

Because there is a split of authority on the issue, and because the different approaches to the issue have different economic impacts, it would seem desirable to have a single, well-reasoned resolution of the issue. The Supreme Court had an opportunity to resolve the issue in *Hughes v. Hughes,*[79] but refused to grant certiorari.[80] One court viewed this refusal as an indication of the Supreme Court's approval of the Ohio court's finding that state courts do have the power to order the execution of the waiver.[81] Of course, it is dangerous to read anything into the Supreme Court's denial of certiorari,[82] but this at least indicated the Court's unwillingness to decide the issue at that time. It also suggests that if it is desirable to achieve uniformity on the issue, the impetus may have to come from Congress rather than from the Supreme Court.

In this regard, a uniform standard could easily be achieved by a simple amendment of section 152(e) to make it clear that state courts

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17.2 (2d ed. 1988).

76. *See e.g.*, Rock v. Rock, 265 A.2d 640 (R.I. 1970).

77. *See e.g.*, Lincoln v. Lincoln, 155 Ariz. 272, 746 P.2d 13 (1987).

78. *See* Sistare v. Sistare, 218 U.S. 1 (1910) (established finality as a prerequisite to the application of full faith and credit to a foreign decree).

79. 35 Ohio St. 3d 165, 518 N.E.2d 1213 (1988), *cert. denied,* 109 S. Ct. 124 (interim ed. 1988).

80. *Id.*

81. Motes v. Motes, 786 P.2d 232, 238 n.7 (Utah Ct. App. 1989), *cert. denied,* 795 P.2d 1138 (Utah 1990).

82. The long-standing rule is that nothing can be read into the fact that the Supreme Court has denied certiorari in a case. *See* Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912 (1950), in which Justice Frankfurter stated:

> Inasmuch . . . as all that a denial of a petition for a writ of certiorari means is that fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

Id. at 919; *see also* C. WRIGHT, FEDERAL COURTS § 108, at 757 (1983); Linzer, *The Meaning of Certiorari Denials,* 79 COLUM. L. REV. 1227, 1251 (1979).

either have or do not have the authority to allocate the exemption. At first blush it would seem more desirable for the state courts to be able to directly allocate the exemption rather than having to go through the circuitous route of ordering the execution of the waiver subject to the contempt power of the court. The law could require that the non-custodial parent attach a copy of the court order to his federal income tax return. The biggest drawback of such an approach is the difficulty in dealing with the non-custodial parent who is not current in support payments. If the custodial parent were able to contest the right of the non-custodial parent to claim the exemption because of a contingency in the state court's order, then the IRS would once again be dragged back into making case-by-case determinations of who is entitled to claim the exemption. The concerns raised by the state court's allocation of the exemption as subject to the non-custodial parent's being current in support payments may be strong enough[83] to justify using a process whereby state court-ordered executions of the waiver are made annually. Under this approach the state courts, rather than the IRS or the federal courts, would be responsible for determining whether the non-custodial parent was eligible to claim the dependency exemption under the terms of the state court's order. This approach, however, carries with it the problem of a state court enforcing a contempt order regarding a custodial parent who may no longer be in its jurisdiction. This problem could be solved by a provision in the federal legislation mandating state court recognition of out-of-state contempt orders regarding execution of the waiver as a matter of federal law.

III. CONCLUSION

Judging from the state court action in this area,[84] the issue of whether state courts have the power to allocate the federal dependency exemption in divorce actions is a frequently recurring one. A literal reading of section 152(e) suggests that a conflict exists between that section and a state court order purporting to award the exemption. It is not a "tempest in a teapot" because the different approaches have differing economic impacts, and national uniformity on the issue is desirable. Since the Supreme Court has not shown any indication that it will resolve the matter in the near future, Congress should amend section 152(e) of the Code to settle the issue.

In doing so, Congress should recognize that the underlying purpose of the dependency exemption for children is to maximize the family income available for child support. Thus, section 152(e) should be

83. *See supra* note 57 and accompanying text.

84. *See* cases cited *supra* note 11.

amended to specifically authorize state courts to determine eligibility for the exemption.[85] The resulting economic impact of the exemption can then be fully explored in each case to assure the maximization of family income.

85. Congress should also amend § 152(e) to deal with the dependency exemption in the case of parents who were never married, since the same underlying purpose would need to be served in that context.