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Dependency, Taxes, and Alternative Families

Patricia A. Cain

I. INTRODUCTION

In her book, The Neutered Mother, 1 Professor Martha Fineman makes a plea that we stop viewing the family as consisting primarily of a husband and wife, living together with their biological children. 2 Not only does this archetypal family not exist in the majority of households any longer, but also focusing on the marriage bond obscures the more important relationships of dependency within both traditional and non-traditional households. 3 Her overarching theme is that governmental support for the family ought to support relationships of dependency rather than the adult sexual bond between husband and wife. 4

Professor Edward McCaffery has criticized the current income tax system because it is built around the concept of the traditional family—the Ozzie and Harriet family of 1950’s television where the husband works outside the home and the wife stays home and cares for the children. 5 Professor Nancy Staudt has critiqued the social security system because it, too, is based on the concept of the traditional gendered family, with the husband working outside the home and the wife staying home to raise the children. 6 Most of these critiques, however, focus primarily on the harm done to the adult female in the family, whether she is a dependent or working wife. My focus is on non-traditional families with children.

2. Id. at 1.
3. Id. at 1-2, passim.
4. Id. at 230.
Non-traditional families include unmarried heterosexual parents, sometimes living together, as well as same sex partners who co-parent children that are sometimes legally recognized as the children of both parents. In all of these non-traditional families, the children are classified as nonmarital—historically known as illegitimate or bastard. Such children clearly fall within a category that can be described as "other." Marriage, however, can improve the status of the child. If the biological parents marry, the child’s status can move from illegitimate to legitimate. If either the mother or father has custody of the nonmarital child and marries someone who is clearly not the biological parent, at least the child obtains the status of stepchild. Stepchild is a legal category and can carry benefits.

As Professor Dorothy Roberts has taught us, many of these alternative families are black families. Over half the children in foster care are black. The genetic tie that is normally recognized as the most important link between parent and child is more malleable in black families. Furthermore, the law has historically interpreted the genetic tie’s significance to parenthood in a way that preserves the patriarchal nuclear family. Cases concerning the parental rights of unwed fathers and sperm donors reveal that the law’s central objective is to protect the integrity of families founded on heterosexual marriage, while leaving women’s autonomous bonds with their children vulnerable.

Presently, state laws generally allow a mother to marry a man who is not the father and have the child legitimated so long as the man is willing to recognize the child as his own.

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8. See H. CLARK, DOMESTIC RELATIONS § 5.3 (2nd ed. 1987).
9. E.g., a stepparent can claim head of household reporting status, after divorce or death, so long as he or she retains the role of primary supporter of the stepchild. See I.R.C. § 2(b) (2001).
11. Id. at 257.
12. Id. at 269-70.
13. Id. at 252.
14. See generally CLARK, supra note 8, § 5.3. For an example of a state statute that presumes a husband to be the father of the mother’s child, see CAL. EVID. CODE ANN. § 6.11 (West 2001); CAL. FAM. CODE § 7540 (West 2001); Michael H. v. Gerald D., 491 U.S. 110, 129-30 (1989) (holding the forerunner to this statute constitutional even though it deprives a biological father of his right to a parent-child relationship); Dye v. Geiger, 554 N.W.2d 538, 541 (Iowa 1996) (holding that presumption of legitimacy cannot be rebutted at time of divorce in order to avoid obligation of child support).
There are two instances in which marriage is simply not a possibility for improving the status of a child. The man who is the father or who might be willing to claim paternity is dead, and thus marriage is impossible. The mother or father is in a lesbian or gay same sex relationship, in which case marriage is similarly impossible.

This article focuses on both sorts of nontraditional families: those in which the marital bond is not only missing, but also is impossible. I am particularly concerned about the children in these families because children are inevitably dependent. Good social policy recognizes this dependency and provides a means for government to step in and fill the void when children do not have sufficient parental support. Good social policy also supports parents who do the “right thing” in supporting their own children. In other words, support of children is a good thing and thus the government does the right thing when it supports children directly or indirectly by supporting their parents.

As it turns out, however, the government only supports some children. The children it supports most—either directly or indirectly—are children in family settings that include marriage. And however strongly the government may want to defend marriage, it seems unfair to place the burden of this pro-marriage policy on nonmarital children. It seems equally unfair to punish a child of a married couple, when after the divorce or death of the father or mother, he or she becomes a nonmarital child.

15. Even if the marriage fails to legitimate the child, the marriage creates a stepparent relationship, which is often recognized by the law. For example, some states are willing to impose child support obligations on a stepparent under an equitable estoppel theory. See, e.g., W. v. W., No. 16429, 2001 WL752703, at *4 (Conn. July 17, 2001); Miller v. Miller, 478 A.2d 351, 359 (N.J. 1984).


18. See John F. Coverdale, Missing Persons: Children in the Tax Treatment of Marriage, 48 CASE W. RES. L. REV. 475 (1998) (arguing that tax law can support children better by providing greater incentives for parents of children to be married). While one may or may not agree with Professor Coverdale’s thesis that the tax code ought to provide greater support for married couples, the focus on marriage ignores those children in households where it is impossible for the parents to marry.

19. E.g., stepchildren are often equated with children in federal statutes, such as the head of household provisions of the Internal Revenue Code. See 26 U.S.C. § 2(b). But one cannot even establish a stepparent relationship in the absence of marriage.
that ends the marital relationship, that child winds up being supported by the life partner of the surviving parent. Such “second parents,” often referred to
as “psychological parents,” are generally not recognized as parents under the law, unless they have gone through the formal steps to adopt the child.\textsuperscript{21}

The law’s failure to recognize such parent-child relationships is often detrimental to the child.

Consider, for example, the case of Sandra Rovira and her two sons, Frank and Alfred Morales.\textsuperscript{22} Marjorie Forlini and Sandra Rovira were in a committed same sex relationship for twelve years until Forlini died of cancer.\textsuperscript{23} Two years into the relationship, Rovira’s two minor children came to live with them.\textsuperscript{24} Forlini supported them for ten years, claiming them as dependents on her tax return under the provision that applies to unrelated members of the household.\textsuperscript{25} At Forlini’s death, Rovira and her sons submitted a claim to Forlini’s employer, AT&T, for a death benefit payment from her pension plan.\textsuperscript{26} The pension plan provided for benefits only to spouses, dependent children under age twenty-three, or other dependent relatives.\textsuperscript{27} Neither the partner, Rovira, nor the two sons that Forlini had supported for ten years as her own, qualified under the plan.\textsuperscript{28}

Forlini worked in New York. Under New York law, same sex partners had been recognized as family for housing purposes\textsuperscript{29} and anti-

\begin{itemize}
\item \textsuperscript{20} See \textsc{Joseph Goldstein et al., Beyond the Best Interests of the Child} 19 (1973); \textit{see also} Symposium, \textit{The Impact of Psychological Parenting on Child Welfare Decision-Making}, 12 N.Y.U. \textsc{Rev. L. \\& Soc. Change} 485 (1984).
\item \textsuperscript{21} Some states recognize the right of the second parent to adopt the child even though the state adoption statutes appear to contemplate such adoptions only when the second parent is married to the biological parent. Since marriage is impossible for same sex couples, some courts have been willing to construe adoption statutes liberally in the “best interest of the child” so as to provide the child with two legally recognized parents. \textit{See, e.g., In Re Adoption of Tammy}, 619 N.E.2d 315 (Mass. 1993); \textit{In re Jacob}, 660 N.E.2d 397 (N.Y. 1995).
\item \textsuperscript{22} \textit{Rovira v. AT&T}, 817 F. Supp. 1062 (S.D.N.Y. 1993).
\item \textsuperscript{23} \textit{Id.} at 1064.
\item \textsuperscript{24} \textit{Id.}
\item \textsuperscript{25} Under I.R.C. § 152(a)(9) (2001), a taxpayer may claim an exemption for an unrelated dependent provided the taxpayer provides over half the support for the dependent and the dependent is a member of the taxpayer’s household. A person unrelated to the taxpayer satisfies this provision if the person lives with the taxpayer for the entire year as a member of the taxpayer’s household and their relationship does not violate local laws. Certain temporary absences from the taxpayer’s home are not taken into account. \textit{See Treas. Reg.} § 1.152-1(b) (1971).
\item \textsuperscript{26} \textit{Rovira}, 817 F. Supp. at 1067.
\item \textsuperscript{27} \textit{Id.} at 1065.
\item \textsuperscript{28} \textit{Id.} at 1067.
\item \textsuperscript{29} \textit{Braschi v. Stahl Assoc. Co.}, 74 N.Y.2d 201, 211 (1989).
\end{itemize}
discrimination laws had been used successfully to gain extension of employee benefits to domestic partners. But those state law rulings were of no help to this family because Forlini was covered by a retirement plan. Almost all retirement plans are subject to the Employment Retirement Insurance and Security Act (ERISA), which pre-empts state law. Because ERISA governed the AT&T plan, New York laws and rulings that recognized alternative families could not be applied to recognize this alternative family and benefit the dependent children. In the absence of any applicable federal law to define family for purposes of retirement plans, the court relied upon Webster’s Dictionary. According to Webster’s, which is nothing more than a reflection of common word usage and does not include policy considerations, “spouse” means only those persons “married” to each other and “child” means “biological child, adopted child, or step-child.” If there is no marriage and no biological tie, then there is no parent-child relationship. Dependency is irrelevant.

This article will explore three additional examples of how current law is biased against dependent children in non-traditional families. First, it will consider the rules that govern filing status under federal income tax law. Then it will discuss the rules governing two federal income tax credit provisions, the earned income tax credit (EITC) and the more recently enacted “child tax credit.” The third example comes from state inheritance tax laws that either exempt transfers to children from the tax, or tax such transfers more lightly than other transfers. The purpose of this article is fairly narrow: to uncover these biases so that policy makers can see how

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33. Meagher, supra note 32, at 18.
34. Rovira, 817 F. Supp. at 1072 n.25.
37. See generally IOWA CODE § 450.9 (2001).

In computing the tax on the net estate, the entire amount of property, interest in property, and income passing to the surviving spouse, and parents, grandparents, great-grandparents, and other lineal ascendants, children including legally adopted children and biological children entitled to inherit under the laws of this state, stepchildren, and grandchildren, great-grandchildren, and other lineal descendants are exempt from tax.

Id.
they operate. In every case, the bias can be easily corrected by extending the benefit of the tax rule more broadly. Whether this extension also has costs that might outweigh the benefits is beyond the scope of this article.

II. FILING STATUS UNDER THE FEDERAL INCOME TAX

A. Children in Traditional Families

The joint return benefits the wage-earning spouse who supports his or her stay-at-home spouse. The benefit is provided in the form of a lower tax rate on the individual wage-earner's income. As an additional benefit to this traditional family, the value of the caretaking and domestic services provided by the stay-at-home spouse goes untaxed. She (and it usually is a she) is rewarded for her labors by the government, who has given her husband a break on his taxes under the joint return rates, and has vested her in the social security system to which her husband contributes. When children arrive in the traditional family, the parents get an additional tax deduction in the form of a dependency exemption and the child also becomes vested in the social security system in the event Dad dies before the child ceases to be dependent.

Once Dad dies, Mom, so long as she has a dependent child, can continue to file a joint return for two years, thereby reaping the benefits of

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38. This benefit occurs because the joint return rates effectively split income between the spouses. See generally Michael J. McIntyre & Olivier Oldman, Taxation of the Family in a Comprehensive and Simplified Income Tax, 90 HARV. L. REV. 1573, at Appendix I (1977).


40. Imputed income from services within the home is excluded from the tax base. For a more detailed explanation, see Ann F. Thomas, Marriage and the Income Tax Yesterday, Today, and Tomorrow: A Primer and Legislative Scorecard, 16 N.Y.L. SCH. J. HUM. RTS. 1, 50-51 (1999); see also Dorothy A. Brown, Race, Class and Gender Essentialism in Tax Literature: The Joint Return, 54 WASH. & LEE L. REV. 1469, 1481-82 (1997).

41. The current social security system is based on the concept that wives are dependent. See Jonathan Barry Forman, Making Social Security Work for Women and Men, 16 N.Y.L. SCH. J. HUM. RTS. 359, 362-65 (1999). Thus, widows tend to benefit from social security. The system, however, does not adequately distinguish between those who are the neediest and those who are not. Id. at 361; see also Karen C. Burke & Grayson M.P. McCouch, The Impact of Social Security Reform on Women's Economic Security, 16 N.Y.L. SCH. J. HUM. RTS. 375 (1999). Nancy Staudt has criticized the social security system, which appears to give the wife the benefit of her husband's work while at the same time devaluing her own work. See Staudt, supra note 6.


44. See I.R.C. § 2(a) (2001); I.R.C. § 1(a)(2).
the lower tax rates available in the joint return. After that, so long as Mom and the child remain together and the child is a dependent, Mom can file under the second best rate schedule, head of household, which provides rates slightly higher than the joint rates, but lower than single rates.

If Dad and Mom divorce, Mom will no longer be entitled to use the joint return rates—not for the two years given a surviving spouse, not for any length of time. But she may qualify for the head of household rates if she maintains a household for one or more of the children. And of course, if Mom leaves Dad and Dad ends up with the kids, Dad will get the same head of household benefits that are available to Mom. The provisions are gender neutral. A “parent” who maintains a household for a child is entitled to claim the benefit of the head of household rates. And, if there are at least two children in the family, the divorced couple can arrange their affairs so that both Mom and Dad can take advantage of the head of household rates.

The tax savings produced by the lower head of household rates are presumably justified because they inhere to the benefit of the dependent child through the person who is supporting that child. When the provision was first enacted in 1951, it was explained as follows:

It is believed that taxpayers, not having spouses but nevertheless required to maintain a household for the benefit of other

45. A person can file as “head of household” if she either maintains a household for her child (whether or not she claims the child as her dependent) or for dependents who are related to her, provided she lives in the household with the child or dependent. Alternatively, she can file as head of household if she maintains a household for a parent, whether or not she lives with the parent. I.R.C. § 2(b) (2001).

46. See I.R.C. § 1(b) (2001) (detailing head of household rates); I.R.C. § 2(b) (defining head of household).

47. I.R.C. § 2(b) defines head of household as someone who maintains a household (i.e., provides over fifty percent of the costs) for a child or other qualified relative.

48. For example, Dad could maintain his household (i.e., provide more than half the support) for one child and Mom could maintain her household for the other child. They can also agree between them as to who will be entitled to the dependency exemption for each child. See I.R.C. § 152(e).

In fact, it is theoretically possible for a divorced couple to continue to live together and both claim head of household status for tax purposes, provided their home is structured so as to constitute two households. For example, separate living spaces and kitchens might constitute two households even if they are contained in the same building. See Fleming v. Comm'r, T.C.M. (CCII) 1974-137 (1974).

49. One need not have a child to qualify as head of household for income tax purposes. It is sufficient for the taxpayer to maintain a common household in which a dependent resides, so long as the dependent is either a child of the taxpayer or related to the taxpayer through blood or marriage as provided in I.R.C. §§ 152(a)(1)–(8). If the dependent is the taxpayer’s father or mother, head of household status may be claimed even if the taxpayer maintains a separate household for the parent. Id.
individuals, are in a somewhat similar position to married couples who, because they may share their income, are treated under present law substantially as if they were two single individuals each with half of the total income of the couple. The income of a head of household who must maintain a home for a child, for example, is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child. This, it is believed, justifies the extension of some of the benefits of income splitting.  

Thus, for traditional families with one worker and children, the federal tax law provides the benefit of joint return rates for married parents. For divorced parents, the income splitting benefit can be retained if the parties take advantage of Sections 71 and 215 of the Internal Revenue Code. In addition, at least one of the divorced parents ought to be able to claim head of household filing status. And, if the couple have two children, with appropriate planning, they can both claim head of household status.

B. Children in Nontraditional Families

1. The Heterosexual Unmarried Couple

When a man and woman live together without the tie of marriage, they cannot take advantage of the lower joint return rates. Instead, they file as single persons, the highest of the three rate schedules available for individual taxpayers. Some men and women are better off filing as single


52. Note that the divorced couple might have to plan carefully to be sure that head of household filing status benefits the right person. The father who supports his ex-wife and child in the wife’s residence cannot claim head of household status because the taxpayer must occupy the same house as the child. However, the father need not have legal custody of the child to qualify. He would, however, have to maintain physical custody of the child for more than half the year. See, e.g., Priv. Ltr. Rul. 83-25-092 (Mar. 22, 1983); see also Grace, 51 T.C. at 685.


54. The highest rates in section one apply to taxpayers that are entities such as estates and
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taxpayers, but they are not the men and women who constitute the traditional family. Filing as a single taxpayer is beneficial only if both partners are working or otherwise earning income.\textsuperscript{55} Wives who enter the marketplace face the highest marginal bracket of all because their incomes will be added to that of their husbands, and thus be taxed at the highest marginal rates. If the husband has used up the lower brackets with his income, e.g., the fifteen percent and twenty eight percent brackets, then the wife’s income is taxed at the next bracket, thirty one percent.\textsuperscript{56} This bunching of income in the joint return causes a married couple with two earners to pay a higher tax than if they each filed a single return for his or her own income.\textsuperscript{57} Professor Ed McCaffery, building on the earlier work of Professor Grace Blumberg,\textsuperscript{58} has written extensively about this phenomenon.\textsuperscript{59} McCaffery, Blumberg, and many others have shown that the tax system is structured in such a way as to discourage wives from working.\textsuperscript{60} While this aspect of the tax law is beyond the scope of this article, it is certainly consistent with my broader point that the tax system is designed to benefit traditional families over nontraditional ones. Families with working wives are one additional type of non-traditional family.

\textit{a. Single-Earner Family}

Non-traditional, unmarried, heterosexual couples with children face different sorts of tax problems, depending on whether or not both parents work. Imagine a family consisting of a father, who is the primary wage-earner, and a mother and child who rely on him for support. This family cannot claim the lower joint return rates, which means that the family as a household will pay higher taxes, leaving fewer dollars behind to support the child in the home. Indeed, this family would be encouraged to enter the world of marriage and traditional families in order to minimize their tax

\textsuperscript{55} See McIntyre & Oldman, supra note 38, at App. I.
\textsuperscript{56} See I.R.C. § 1(a).
\textsuperscript{57} Compare rates in § 1(a) and § 1(e).
\textsuperscript{58} See Blumberg, supra note 5.
\textsuperscript{59} EDWARD J. McCAFFERY, TAXING WOMEN (1997).
However, if they resist the urge to marry for tax savings, then their next best option for reducing taxes is for the father to file as head of household. To claim head of household, he must:

(1) Be single, and

(2) Maintain and live in a home, and

(3) The home must be the principal abode of the child.

In the view of the IRS, this father ought to be able to claim head of household filing status so long as the child is his child. If the father is not the biological father, he may become the adoptive father in order to qualify. However, boyfriends who move in with mothers and support them and their children, no matter for how long, are not entitled to claim head of household status on their tax returns.

Thus, if the father is the biological father of this child, he may claim head of household filing status. However, he must also prove that he provided more than half the cost of maintaining the home. The fact that we have never treated the "stay-at-home wife" as though she provided economic support for the family will inure to the benefit of this father. No matter how much work this mother contributes to maintain the home, it is likely that the father will be treated as the person who maintains the home so long as he invests more cash in the maintenance than she does. If he owns the home

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61. *E.g.*, by filing a joint return.

62. Compare rate schedules in section 1(a) and section 1(b).


64. *Id.*

65. Similarly, a foster child can qualify a parent for head of household status. However, a child is not the taxpayer's foster child if the child's mother is living with them. *See* Rev. Rul. 84-89, 1984-1 C.B. 5.


67. *See supra* note 46 and accompanying text.


69. The regulations provide the following guidance concerning the types of expenses to be considered in deciding whether an individual qualifies for head of household status:

The cost of maintaining a household shall be the expenses incurred for the mutual benefit of the occupants thereof by reason of its operation as the principal place of abode of such occupants for such taxable year. The cost of maintaining a household shall not include expenses otherwise incurred. The expenses of maintaining a
or pays the rent, he should qualify. But to maintain head of household status, he might be well advised to refrain from transferring any ownership interest in the home to the mother. Nor should he pay her a wage to work in the home, lest she begin to be viewed as the person who maintains the home. The effect of this rule is to create a disincentive for the father to make wealth transfers to the mother. This imbalance in power can lead to destabilization of the home, which is not in the best interest of the child.

Thus, head of household rates provide some help to the unmarried heterosexual couple who have a child together. However, if the earning

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household include property taxes, mortgage interest, rent, utility charges, upkeep and repairs, property insurance, and food consumed on the premises. Such expenses do not include the cost of clothing, education, medical treatment, vacations, life insurance, and transportation. In addition, the cost of maintaining a household shall not include any amount which represents the value of services rendered in the household by the taxpayer or by a person qualifying the taxpayer as a head of household or as a surviving spouse.


70. While there is no explicit rule that requires the person claiming head of household to own the home or to be the primary tenant on a lease, the issue of ownership has arisen in the context of the dependency exemption under section 152(a)(9), which requires the dependent to have “as his principal place of abode the home of the taxpayer.” See, e.g., Bombarger v Comm'r, 31 T.C. 473 (1958) (denying a dependency exemption to someone who paid over half the cost of maintaining the home because the home was owned by the dependent). But see Rev. Rul. 64-41, 1964-1 C.B. 84, in which the IRS apparently reversed its position on this issue for purposes of claiming the dependency exemption.

71. To prove that he is the one who maintains the home, he will have to establish the entire cost of maintenance and show that he paid over half. See Rosen, 67 T.C.M. (CCH) at 2082. Such a proof is similar to that required to establish the validity of a dependency exemption. Taxpayers who do furnish support to a household, often as the primary wage-earner, may not be able to prove that they furnished over fifty percent. Cf. Blanco v. Comm'r, 56 T.C. 512 (1971); Jeter v. Comm'r, 82 T.C.M. (CCH) 445 (2001).

If several members of a household contribute toward expenses which are equally applicable to the support of each member of the household and there is no evidence of actual support for individual members of a household, the contributing members are presumed to have pooled their contributions to support the household, and each member of the household is considered to have received an equal part of the contributions as part of his support.

Daya v. Comm'r, 80 T.C.M. (CCH) 743 (2000) (holding that a son who could prove that he paid over half the support for his mother nonetheless could not claim head of household because he failed to prove that he paid over half the cost of maintaining the household).

72. The tax policy answer to this question may well be that the couple should marry because marriage will provide more stability. See Coverdale, supra note 18. However, for those of us who believe that the tax law should be neutral toward marriage, tax rules that support an imbalance in wealth distribution between parents are bad. Indeed, the effect of the joint return is to treat marriage as the determinative factor in income splitting rather than to require actual income splitting between the spouses. Feminists have criticized this point about the joint return for years. See Carolyn C. Jones, Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940's, 6 LAW & HIST. REV. 259 (1988).
partner in the couple is not the biological parent of the child, the benefit is
denied. And, when the benefit is available, the mechanics of qualifying for it
can discourage the male wage-earner from making wealth transfers to the
mother of his child.73

b. Two-Earner Family

The current tax rules encourage parents who both earn income to avoid
marriage. The joint return rate schedule benefits only traditional families,
i.e., those that contain a single wage-earner. For the two-earner unmarried
couple with a child, each parent might file a return based on the rates for
single persons, or they might have one parent file as head of household and
the other file as a single taxpayer. This latter arrangement will produce the
lowest tax payment.74 For this family, even in the absence of marriage, there
should be no problem showing that the child is the offspring of at least one
of the parents. That parent would then be entitled to file as head of
household, provided he or she can prove a contribution to more than fifty
percent of the household costs. Note that the requirement to provide more
than fifty percent of the household expenses can cause a problem for
households with more than two persons contributing to the family's support.
For example, if three adults equally support a household which includes a
child, the head of household filing benefit will not be available to anyone.75

2. The Same Sex Unmarried Couple: A True Story

When Helmi Hisserich and her lesbian partner of eight years, Tori,
decided to have a child together, they had no idea they would create
revolutionary precedent in the tax world.76 The two women decided that

73. Compare the effect of the current provision's incentive to the father in this hypothetical
to the requirement under the old "head of family provision" that to qualify the person must have the
"right to exercise family control." A "head of family" was "an individual who actually supports and
maintains in one household one or more individuals who are closely connected with him by blood
relationship, relationship by marriage, or by adoption, and whose right to exercise family control and
provide for these dependent individuals is based upon some moral or legal obligation." Rev. Rul.
57-415, 1957-2 C.B. 13. Qualifying as head of family entitled the individual to an additional
personal exemption. Id.

74. Compare the rates of section 1(b) with those of section 1(c).

75. See, e.g., Daya, 80 T.C.M. (CCH) at 743.

76. I met Helmi by email. When she went to a law professor in Los Angeles to ask for help
with her tax problem, she was referred to me. I listened to her story and in the end, just before the
deadline passed, I submitted an amicus brief to the California State Board of Equalization, which
was scheduled to hear arguments in her case on June 30, 2000. Helmi was represented at the oral
arguments by Shannon Minter of the National Center for Lesbian Rights in San Francisco. While I
was not Helmi's lawyer in this case, my interest as amicus stemmed from the fact that I thought she,
Tori should be the birth mother and Helmi agreed that she would support both Tori and the child until the child was old enough for Tori to go back to work. In this regard, Helmi and Tori mirror the traditional family with a stay-at-home spouse, supported by the working spouse. They visited the sperm bank together, where they were counseled about procedures and where they represented to the doctor and nurse counseling them that their intention was to go through the pregnancy together and to parent the child jointly.

On April 18, 1997, their child, Madeline, was born. The birth occurred as a result of artificial insemination by an anonymous donor. The process was supervised by a licensed physician, which meant that under California law, the semen donor was not considered a parent. Consistent with their agreement, Tori stayed home to care for the child and Helmi supported both Tori and Madeline.

When it came time to file her 1997 tax return, Helmi consulted a tax professional, read the instructions for the California return distributed by the Franchise Tax Board, and prepared her tax return relying on a widely-used computer program. She concluded that she was able to file as head of household because her child, Madeline, was a member of her household for the entire year, and because she was in the process of adopting her. The Franchise Tax Board decided otherwise and assessed a deficiency against Helmi, arguing that Madeline was not a blood relative, an adopted child, or a foster child. Relying on precedent, the Franchise Tax Board explained that simply supporting a child is not sufficient to establish head of household status for state income tax purposes. Instead, the child must be the child of the taxpayer, the child of the taxpayer's spouse, or a foster child. Each of these cases concerned a head of household claim by a boyfriend who maintained a household for his girlfriend and her child. The State Board concluded in both cases that the child was not his, nor his stepchild since he had not been married to the mother during that year, and could not be his and others like her, should be entitled to claim head of household status on their tax returns.

77. CAL. FAM. CODE § 7005(b) (West 2000).
79. Id. at 3.
82. Id.
foster child because the mother lived in the same household.\textsuperscript{83} There was no question that the boyfriend was the sole support of the child and entitled to claim a dependency exemption against his income for the year in question,\textsuperscript{84} but he could not claim head of household status since he was not sufficiently related to the child.\textsuperscript{85} Helmi decided to challenge the “boyfriend” precedent as applied to her case. Relying primarily on arguments set forth in the amicus brief I filed on her behalf, she argued that Madeline was in fact her child.\textsuperscript{86} The argument was based on a line of California surrogacy decisions that had established a principle of intentional parenthood.\textsuperscript{87} In short, the argument was that since Helmi intended the child to be her own and since, “but for” her intent the artificial insemination would never have taken place, she became an intentional parent.\textsuperscript{88} Her position can be analogized to that of Luanne Buzzanca, who, together with her husband, entered a contract with an unrelated women, who agreed to give birth to a child that the Buzzancas intended to raise as their own.\textsuperscript{89} Neither Mr. nor Mrs. Buzzanca contributed genetic material in the form of eggs or sperm.\textsuperscript{90} Thus, neither of the intentional parents had a genetic tie to the child that the surrogate agreed to bring to term.\textsuperscript{91}

When the Buzzancas divorced, Mr. Buzzanca took the position that he was not the father and not responsible for child support.\textsuperscript{92} Ultimately, the California Court of appeals held that he was an intentional parent even though he did not give birth and even though he was not genetically connected with the child.\textsuperscript{93} The court similarly held Mrs. Buzzanca to be a parent, much to her relief, since she wanted her parenthood to be recognized.\textsuperscript{94}

\textsuperscript{83} \textit{Id.}
\textsuperscript{84} \textit{Id.}
\textsuperscript{85} \textit{Id.}
\textsuperscript{87} \textit{See} Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (holding where there is both a mother by genetic consanguinity and a birth mother, the one who intended to bring about the birth is the natural mother); Buzzanca v. Buzzanca, 61 Cal. App. 4th 1410 (1998).
\textsuperscript{88} \textit{Johnson}, 851 P.2d at 782.
\textsuperscript{89} \textit{See Buzzanca}, 61 Cal. App. 4th at 1410.
\textsuperscript{90} \textit{Id.} at 1412.
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} \textit{Id.} at 1413.
\textsuperscript{93} \textit{Id.} at 1428.
\textsuperscript{94} \textit{Id.} at 1429.
Dependency, Taxes, and Alternative Families

Helmi’s parenthood had to be determined under California’s version of the Uniform Parentage Act as the Buzzancas parenthood was determined.\textsuperscript{95} If John Buzzanca could be held liable for child support for a child that he neither gave birth to nor contributed to genetically, then it was appropriate to hold Helmi responsible for the support of her daughter, Madeline. Since head of household filing is primarily intended to benefit a parent in a nontraditional family arrangement (i.e., one in which marriage is missing) for the support of a child, Helmi should be entitled to file using head of household rates. Although this argument did not convince the Franchise Tax Board, the State Board of Equalization, in a precedent-setting decision, agreed with Helmi.\textsuperscript{96} Madeline is her child, at least for tax purposes.\textsuperscript{97}

The IRS is purportedly looking into the Hisserich case\textsuperscript{98} to determine how it affects federal head of household status, but thus far there have been no published opinions or rulings.\textsuperscript{99} For California taxpayers, Hisserich ought to control the determination of head of household status for federal purposes. This is because federal law generally relies on state law to determine family relationships.\textsuperscript{100} The parent-child relationship is defined by the state law of California to include Helmi and Madeline. Thus, they are parent and child for federal tax law purposes as well as for state tax law purposes.

Although the Hisserich principle ought to prevail for California same sex parents, it may not be available to taxpayers in other states. Not every state has adopted the same provisions of the Uniform Parentage Act that California has.\textsuperscript{101} Nor have states interpreted their family law provisions


\textsuperscript{96} Id.

\textsuperscript{97} Id.

\textsuperscript{98} Eva Rosenberg, Same Sex Parents: Head of Household? (Dec. 29, 2000), at www.taxmama.com/AskTaxMama/articles/samesex.html.

\textsuperscript{99} The IRS has been notoriously silent on tax issues that affect lesbian and gay families. For example, numerous employers have begun extending domestic partner health benefits to their gay and lesbian employees. The Human Rights Campaign reports that 4,408 employers offer domestic partner benefits. See HUMAN RIGHTS CAMPAIGN, DOMESTIC PARTNER BENEFITS, at www.hrc.org/worknet/dp/index.asp (last visited Jan. 27, 2002). The IRS issued its first private letter ruling on this matter more than ten years ago. See Priv. Ltr. Rul. 90-34-048 (May 29, 1990). To date, it has never issued a public ruling or instructions that would aid employers and employees in determining what the tax effects are of such plans.

\textsuperscript{100} See, e.g., Eccles v. Comm’r, 19 T.C. 1049, aff’d 208 F.2d 796 (4th Cir. 1953) (finding marital status is determined under state law); Rev. Rul. 58-66, 1958-1 C.B. 60 (finding marital status is determined under state law); see also De Sylva v. Ballentine, 351 U.S. 570 (1956) (applying California state law to define the word “children” in a case involving the application of federal copyright laws to residents of California). The Supreme Court stated that “there is no federal law of domestic relations, which is primarily a matter of state concern.” Id. at 580.

\textsuperscript{101} The current UPA was written in 1973. Nineteen states have adopted it. See Battle
broadly enough to include same sex parents as co-parents in the absence of adoption.\footnote{102}

If head of household filing status is primarily intended to benefit an unmarried person who is raising children, then the relationship requirement is too narrow. While one can understand the reluctance to give a tax break to someone who is supporting a girlfriend or boyfriend,\footnote{103} the head of household tax break (or something similar) seems justified for single persons who are supporting children, whether or not those taxpayers are related to the children they are supporting.\footnote{104} Not only should taxpayers who mirror Tori and Helmi’s family be covered by head of household rules, but the status ought to be extended to “boyfriends and girlfriends” who are sufficiently committed to their partners (of either sex) to support them and their dependent children. One simple way to accomplish this would be to amend the definition of head of household to include any single individual who supported a minor child as a member of his or her household, whether or not the child was related to the taxpayer.

### III. Tax Credits

There are two tax credits that require the taxpayer to have a legally recognized relationship with a child in order to qualify. The two credits are the earned income tax credit (EITC)\footnote{105} and the child credit.\footnote{106}

#### A. The Earned Income Tax Credit

Certain low income taxpayers are entitled to a refundable tax credit if

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\footnote{Robinson & Susan Paikin, \textit{Who is Daddy? A Case for the Uniform Parentage Act} (2000), 19 \textit{DELAWARE LAWYER} 23, 24 n.6 (2001).}

\footnote{But see VT. \textit{STAT. ANN.} tit. 15, § 23 (2001) (requiring same sex partners in a civil union to be treated the same as spouses in a marriage). Under the statute, if Helmi and Tori had been civilly unioned in Vermont before their child was born, Helmi should be presumed to be the second parent in the same manner that husbands are presumed to be the fathers of their wives’ children.}

\footnote{See generally Angstadt v. Comm’n of Internal Revenue, 27 T.C.M. (CCH) 693 (1968) (concluding that to give a single man head of household status for supporting his girlfriend “would create a ‘tax haven’ for American bachelors never envisioned by the Congress”).}

\footnote{Even some relationships are too distant to satisfy head of household status. For example, a taxpayer who takes in her grandniece and provides her with a household and support would not qualify for head of household status unless the grandniece can be considered the taxpayer’s foster child. See I.R.C. § 1(b) (2001); I.R.C. § 151. Nor would a taxpayer qualify who provides a household for her sister-in-law’s youngest brother. I.R.C. § 151.}

\footnote{I.R.C. § 32.}

\footnote{I.R.C. § 24.}
they meet the section 32 requirements of the Internal Revenue Code.\textsuperscript{107} The amount of the credit is higher if the taxpayer has “a qualifying child for the taxable year.”\textsuperscript{108} Both married and unmarried taxpayers can claim the credit.\textsuperscript{109} The credit is phased out as income rises and is determined by calculating the “phaseout amount.”\textsuperscript{110} If two individuals marry, they must file a joint return and combine their earned income, thereby increasing their “phaseout amount.” As a result, two low-income individuals who qualify for the EITC as single taxpayers generally experience a reduction in the EITC upon marriage. The recently enacted Economic Growth and Tax Relief Reconciliation Act of 2001 reduces this aspect of the “marriage penalty” by increasing the “phaseout amount” for married couples.\textsuperscript{111}

A qualifying child is one who: (1) is a son or daughter or other lineal descendant of the taxpayer, or is a stepchild or foster child of the taxpayer; and (2) has the same principal place of abode as the taxpayer for more than half of the tax year; and (3) does not exceed certain age requirements.\textsuperscript{112} This definition requires the qualifying child to be related to the taxpayer in the same way that the head of household rules require. As demonstrated in the previous section, this limited definition is sometimes too narrow because it may exclude a low-income taxpayer who is in fact supporting a minor child unrelated to the taxpayer in any of the statutorily prescribed ways.

There is one important difference between the EITC and head of household status. To prove head of household status, the taxpayer must provide over half the support for the home that he or she shares with the child for more than half the year. By contrast, to claim the EITC, the taxpayer must merely reside with the child for more than half the year. The child, or the household, might in fact be supported by someone else. However, if that someone else also resides in the household, is related to the qualifying child in one of the ways set out in the statute (i.e., a grandparent), and has a higher income, then the qualifying child will be assigned to the higher income occupant.\textsuperscript{113}

The structure of the EITC makes it difficult to apply to nontraditional

\begin{footnotesize}
\begin{enumerate}
\item I.R.C. § 32.
\item Id.
\item Id.
\item Id.
\item Id.
\item I.R.C. § 32(c)(3) (2001). The age requirements are at subsection (c)(3)(C). The child must be under nineteen or, if a student, under twenty-four. There is no age limitation if the child is permanently disabled. Id.
\item See I.R.C. § 32(c)(1)(C).
\end{enumerate}
\end{footnotesize}
families. At times, the provision can be overinclusive in that it gives a credit to a parent with low earned income, who arguably doesn’t deserve the refund since she and the child are being supported by her unmarried partner.\textsuperscript{114} At other times, the provision can be underinclusive because the single breadwinner in the family, who supports the mother and the child, is not in fact related to the child.\textsuperscript{115} In sum, it does not seem well tailored to nontraditional families.\textsuperscript{116}

\textbf{B. The Child Tax Credit}

A taxpayer is entitled to a $500 tax credit for each qualifying child.\textsuperscript{117} The amount of the credit is reduced as income rises.\textsuperscript{118} A qualifying child is one for whom the taxpayer is entitled to claim a dependency deduction, provided the child has not yet attained age seventeen, and further provided that the child is related to the taxpayer in the same manner as is required by the EITC.\textsuperscript{119}

This credit is broadly available. It is not restricted to low-income taxpayers. Unmarried taxpayers with “modified adjusted gross income” below $75,000 are entitled to the full credit.\textsuperscript{120} Some commentators have criticized this provision because it is not sufficiently tailored to help those who experience the ever-increasing costs of childcare.\textsuperscript{121} If the primary

\begin{itemize}
\item \textsuperscript{114} E.g., assume Tori went back to work and earned $10,000 but was still supported by Helmi, who was earning $80,000. If we recognize Madeline as Helmi’s child, which I think we should, then Tori should not be entitled to an EITC. She would not be entitled to one if she and Helmi were married. But if tax law refuses to recognize Helmi as Madeline’s parent, then Tori would be entitled to the EITC despite the fact that she was being supported by Helmi. Allowing Tori to claim the EITC is, in my opinion, overinclusive.
\item \textsuperscript{115} E.g., assume Tori is not working and Helmi is attempting to support them both on a salary low enough to qualify her for the EITC. In this fact situation, we should want Helmi to take advantage of the credit because it will help her support her child.
\item \textsuperscript{116} While one would not want a passing stranger to claim any available child as his own in order to claim tax benefits, a requirement that the taxpayer maintain the household by providing over half the support would seem sufficient to justify the deduction and to limit it to worthy cases. The potential for assigning the benefit of the child to the person who can use it most is already limited by I.R.C. § 32(c)(1)(C), which provides that if a qualifying child resides in a household with more than one wage-earner, the child will be treated as the child of the higher wage-earner. This rule limits the credit since the credit decreases as income rises. See LeStrange v. Comm’r, 74 T.C.M. (CCH) 685 (1997).
\item \textsuperscript{117} I.R.C. § 24 (2001). The 2001 Tax Act increases the $500 amount to $1,000, but the increase is phased in over a ten year period. See Pub. L. No. 107-16, § 201 (2001).
\item \textsuperscript{118} Id.
\item \textsuperscript{119} I.R.C. § 24(c).
\item \textsuperscript{120} I.R.C. § 24(b)(2).
\item \textsuperscript{121} See, e.g., Sharon C. Nantell, The Tax Paradigm of Child Care: Shifting Attitudes
purpose of the provision is to help with the childcare costs of working parents, then the single parent in a non-traditional household will always get the benefit of the credit, provided she works enough to owe $500 (or the credit amount) in taxes for the year. However, to the extent the credit is provided to all families, including those that have minimal childcare expenses, and is justified on the grounds that it helps to offset the cost of raising a child generally, the impact of the relationship requirement will deprive some nontraditional families from claiming the credit (e.g., a same sex couple with a child) when it is available to similarly-situated traditional couples (e.g., the married couple with a stepchild).

IV. STATE INHERITANCE TAXES

A. In General

Relationships are pivotal in determining the amount of inheritance tax due. Not only are spousal relationships crucial, as they are under the federal estate tax, but parent-child relationships and other blood relationships are crucial as well. In Iowa, for example, there is no tax levied on transfers to spouses or lineal descendants.\(^1\) Before the recent amendments to the Iowa statute, children who received an inheritance were entitled to significant exemptions before the tax kicked in.\(^2\) Transfers to blood relatives are taxed at a lower rate than transfers to persons outside the traditional family relationship.\(^3\) The burden of the tax can fall on either the residuary taker or on the beneficiary who receives a specific bequest.\(^4\) When the tax incidence is on the beneficiary, the result is to reduce the inheritance or bequest.

Approximately one-third of the states currently have some form of inheritance tax.\(^5\) For nontraditional families in these states the absence of a

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\(^{122}\) Toward a Private/Parental/Public Alliance, 80 MARQ. L. REV. 879, 955 (1997).

\(^{123}\) See IOWA CODE § 450.9 (2001).

\(^{124}\) E.g., $50,000 for each child. IOWA CODE § 450.9 (1996).

\(^{125}\) E.g., the tax on a transfer to a niece will be lower than a transfer to a same sex committed partner of many years, who, for inheritance tax purposes, is treated as a stranger. See IOWA CODE § 450.9.

A legally recognized relationship can impose costly tax burdens at a time when they are already aggrieved. The federal estate tax, as well, punishes these families by denying them a marital deduction for property that passes between the parents at the death of the first parent. I have addressed those concerns elsewhere.

B. A Case in Point

Wooster v. Iowa Tax Commission demonstrates the harshness of the inheritance tax rules. In this case, the alleged daughter of the decedent discovered after her death that she was not in fact the daughter of the decedent. Grace, the alleged daughter, argued that the doctrine of adoption by estoppel applied. Here are the basic facts as stated by the court:

Shortly after her birth Grace came into the custody of an orphanage in New York, and in 1888, when she was about two years of age, was taken into the childless family of Samuel M. Wooster and Delia B. Wooster of Boone, Iowa, with whom she lived continuously until their deaths. During this time they treated her as their daughter, and until the year 1937, shortly prior to the death of Delia (who survived her husband), Grace supposed she was their natural child and at all times rendered to them the services of a daughter. No record of statutory adoption was found. It is conceded that insofar as Delia B. Wooster or Samuel M. Wooster, or persons claiming by, through or under them are concerned, an adoption by estoppel was created by the actions of the foster parents and child toward each other. The trial court held plaintiff to be entitled to the exemption and [the] rate [was] fixed for an adopted child. Decree was entered accordingly and the Iowa State Tax Commission has appealed.

The Iowa Supreme Court reversed, holding that the state of Iowa could

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129. 298 N.W. 922 (Iowa 1941).

130. Id.

131. Id.

132. Id. at 923.
not be estopped because the doctrine could only be applied to estop the parents, i.e., those responsible for the situation. While that holding may be an accurate application of the doctrine of estoppel, it does not directly address the statutory construction issue: who is a child for purposes of the inheritance tax? The answer to this question is even more important today because gifts to children are totally exempt from the tax.

Foster children, and children in nonmarital relationships such as in gay or lesbian families, will be treated as unrelated strangers to the decedent unless the decedent is able to complete the adoption before death. And, since there are no exemptions for unrelated parties, even if they are minor children who were dependent on the decedent, the inheritance tax will be imposed.

Iowa is not alone in making this distinction between legally recognized children and children who are part of nontraditional families, in which the parent unfortunately dies before the adoption is completed. In a 1937 Montana case, a father had begun to prepare papers for the adoption of a child, was supporting him, and paying for his education, but died before official adoption papers were completed. In his will, he left everything to the child and said that he was in the process of adopting him. Nonetheless, the court imposed an inheritance tax at the highest level, applicable to strangers, and failed to give any credit for the existing parent-child relationship.

V. CONCLUSION

These tax law examples encourage us to rethink the meaning of “child” as the term is used in statutes. In the past, adopted children, foster children, and stepchildren have all been excluded from tax law definitions of “child.” That omission has been generally remedied. However, the law continues to ignore the legal relationship between children in nontraditional families and the parents who have chosen to parent those children, even when those parents are morally, and sometimes legally, responsible for the support of such children.

133. Id. at 925.
134. IOWA CODE § 450.9 (1998).
136. See In re Clark’s Estate, 74 P.2d 401, 403 (Mont. 1937).
137. Id. at 403-07.
I believe the law’s blindness to these real relationships can discriminate against the very children that the law is generally believed to protect. The tax rules that are intended to provide benefits to households with minor dependent children should provide those benefits to all households with minor dependent children. It should do so whether the parents are married or not, and whether the parents are of the opposite or the same sex.