

**THE FAMILY COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY**

<b>L</b>	<b>M</b>	,	)	
			)	
		Petitioner,	)	
			)	File No.: CN20-02690
	v.		)	Petition Nos.: 20-11857 (Ancillary Matters)
			)	
<b>B</b>	<b>M</b>	,	)	
			)	
		Respondent.	)	

**ORDER ON MATTERS ANCILLARY TO DIVORCE**

Date Submitted: September 30, 2021

Date Decided: October 9, 2021

Keith M. Horner, Esquire; HORNER LAW, LLC, Wilmington, DE 19899; *Attorneys for Petitioner*

David C. Gagne, Esquire; GIORDANO, DELCOLLO, WERB & GAGNE, LLC, Wilmington, DE 19808; *Attorneys for Respondent*

**ARRINGTON, Judge.**

The value of exemptions and tax credits has increased such that it is more frequently raised in Property Division cases in the Family Court. Case law in the Family Court has attempted to address the assignment requests, but it appears that the Supreme Court of Delaware has not ruled on the matter. In this case, the parties have raised the issue and the Court addresses it with consideration of the Court's authority and prior persuasive precedent.

On September 30, 2021, the Court conducted a hearing regarding matters ancillary to divorce. Present in Court<sup>1</sup> were L M (“Wife”), represented by Keith M. Horner, Esquire; and Brandon M (“Husband”), represented by David C. Gagne, Esquire. At the outset of the hearing, Counsel submitted a Partial Stipulation and Order Resolving Ancillary Matters (“Partial Stipulation”). Reserved for decision are: (1) the parties’ requests to divide the tax exemptions for the parties’ two children; and (2) division of marital personal property. This Order decides the first issue. The second issue is referred to mediation with a mutually selected mediator.

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<sup>1</sup> Consistent with the direction of the Chief Justice of the Delaware Supreme Court, this case was heard on the Zoom platform. All parties and counsel were visible during the hearing.

## PROCEDURAL HISTORY

The parties were married on July 7, 2012 and separated on March 5, 2020. A decree of divorce was issued on December 19, 2020.

The Partial Stipulation, in essence, divides the non-retirement assets 55% to Husband and 45% to Wife.

The parties have two minor children: C M , born / /2014, and A M , born / /2016 (collectively, “Children”). The parties have shared residential placement of the Children pending mediation of an uncontested Petition for Custody filed by Wife.

## ISSUES REMAINING FOR DECISION

### **A. Division of Marital Personal Property**

The identification and classification of personal property has been an ongoing issue for the parties. Husband claims certain items are premarital or non-marital. Other items, such as high end stereo equipment, may or may not have significant value that is difficult to assess. Wife has prepared two lists of personal property and Husband has selected one of the lists. However, prior to division of the personal items, the parties hired a company to “remove the junk,” as they phrased it, and some of the items removed are on the two lists. Neither party was prepared to present evidence establishing which items are non-marital, which items were removed, or where the items are to be found.

Inasmuch as the parties were not in a position to introduce testimony concerning their personal property, the Court ordered the parties to participate in Alternative Dispute Resolution with a mediator mutually selected by Counsel. If the parties cannot agree upon a mediator, Counsel shall each submit three names from which the Court shall select one. **The parties shall report back to the Court by December 6, 2021** on whether the matter has been resolved or if a brief hearing is required.

**B. Division of Child Dependency Exemption Between Parties**

The parties identified “Dependent tax exemptions” as an asset in dispute on the pretrial stipulation.

Husband’s position is that Wife claimed both children in 2020 and Husband seeks permission to claim both children in 2021. Husband further suggests that after 2021, each party should claim a child and alternate the youngest when there is only one remaining deduction so long as they have shared residential placement. In support of the request, Husband relies on *L.S. v. L.R.S.*, 2007 WL 4793935 (Del.Fam.Ct., Jan. 17, 2007).

Wife’s position was that the request is premature because there is no final custody order in place. Wife further asserts that the exemption is controlled by IRS regulations. In support of her position, Wife relies on *S. v. S.*, 2012 WL 1560401 (Del.Fam.Ct., Mar. 26, 2012).

**1. Child Tax Exemption and Tax Credit**

**a. Legislative Initiation and Modifications.**

Prior to recent changes in the tax code, parties were able to claim a dependent child as an exemption on their federal tax return thereby reducing their tax obligation. In 1997, a child tax credit was created by the Taxpayer Relief Act, Public Law 105-34, to provide a \$500 per child non-refundable credit in tax relief to middle- and upper-middle income families.<sup>2</sup>

In 2001, passage of the Economic Growth and Tax Relief Reconciliation Act, Public Law 107-16, increased the credit over time to \$1,000 per child and made it partially refundable under the earned income formula. The refundable portion is referred to as the “Additional Child Tax Credit.”<sup>3</sup>

Legislation passed in 2003 and 2004 accelerated implementation of the child tax credit. The Emergency Economic Stabilization Act in 2008,<sup>4</sup> and the American Recovery and Reinvestment Act in 2009,<sup>5</sup> expanded the amount given to taxpayers whose income was too low to qualify for the credit or to be eligible for the full credit. The “refundability threshold” was lowered to \$3,000 for 2009 and 2010. These

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<sup>2</sup> Public Law 105-220.

<sup>3</sup> Public Law 107-16.

<sup>4</sup> Public Law 110-343.

<sup>5</sup> Public Law 111-5.

changes were made permanent by the Protecting Americans from Tax Hikes Act in 2015.<sup>6</sup>

By 2017, the maximum credit per child had risen from \$400 for 1998 to a permanent \$1,000 with a maximum refundable credit per child of \$1,400. Additionally, the “phaseout threshold” for a head of household filer increased from \$75,000 in 1997 to \$400,000 in 2017.<sup>7</sup>

In 2018, the tax reform bill doubled the credit to \$2,000 per qualifying child. In 2019, the credit again increased to \$3,600 for children under six and to \$3,000 for children between six and seventeen.<sup>8</sup>

In 2021, the United States Treasury and Internal Revenue Service announced that families of nearly 60,000,000 children would receive \$15,000,000,000 in the first payments of an expanded and newly advanceable child tax credit. In Delaware alone, the Treasury Department identified 169,000 children for payments totaling \$42,628,000.<sup>9</sup>

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<sup>6</sup> Public Law 114-113, Division Q.

<sup>7</sup> Publication 972, Child Tax Credit for use in preparing 2017 Returns, Department of Treasury, Internal Revenue Service, Cat No. 26584R – OMB No. 1545-0074, Jan. 23, 2018.

<sup>8</sup> 26 U.S.C. § 24.11022.

<sup>9</sup> See <https://home.treasury.gov/news/press-releases/Treasury-and-IRS-Announce-Families-of-Nearly-60-Million-Children-Receive-%2415-Billion-Dollars-in-First-Payments-of-Expanded-and-Newly-Advanceable-Child-Tax-Credit>.

## **b. IRS Regulation on Claiming Child Exemption**

The Internal Revenue Service (“IRS”) issued a publication for Divorced or Separated Individuals for use in preparing 2020 tax returns. The document, Publication 504, contains twenty-nine pages of explanation of who can claim children under what circumstance and in what amounts. Newly divorced individuals are often baffled by the regulations as well as the unexplained logic in the document.<sup>10</sup>

Essentially, a person eligible to file as a head of household can claim a “qualified child” as an exemption on his or her tax return. If the child lived with the filing person more than half the year, and the child is single, the child is a “qualifying person.”<sup>11</sup> However, there are additional tests for Children of Divorced or Separated Parents (or Parents Who Live Apart) covered in a separate section of Publication 504.

Divorced parents, the only parties to which Property Division applies, have a set of rules to determine whether their child is “qualified” to be claimed as a dependent. The governing law, 16 U.S.C. § 152(e), as with the entire tax code, starts with general considerations and narrows the issues as the statute progresses. In

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<sup>10</sup> Publication 504, Department of the Treasury, Internal Revenue Service, Cat. No. 150061, Feb. 16, 2021.

<sup>11</sup> *Id* at \*5.

general, a child is qualified to be claimed by a filing person if:

(A) a child receives over one-half of the child's support during the calendar year from the child's parents –

- (i) who are divorced or legally separated under a decree of divorce or separate maintenance,
- (ii) who are separated under a written separation agreement, or,
- (iii) who live apart at all times during the last six months of the calendar year, and

(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being a qualifying child [ ] of the non-custodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.<sup>12</sup>

Exceptions to this general requirement apply which allows custodial parents to release claims to exemptions for a tax year. In order to invoke the exception, the general rule for qualifying must apply, and

- a. The custodial parent signs a written declaration [ ] that he or she won't claim the child as a dependent for the year, and the non-custodial parent attaches this written declaration to his or her return....<sup>13</sup>

Additionally, there are IRS defaults as to which person is considered to be the “custodial” parent and “non-custodial” parent. A person is treated as the custodial parent when the child lived with the parent for the greater number of nights during

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<sup>12</sup> 26 U.S.C. § 152(e)(1).

<sup>13</sup> Publication 504(2020) at \*8.

the year. If the parents are divorced or separated, the “overnight rule” becomes more complicated. A child is treated as living with a parent for a night if the child sleeps at the home whether or not the parent is present, or if the child is in the company of the parent while vacationing together. If the number of overnights is equal, the exemption is given to the parent with the higher adjusted income.<sup>14</sup>

**c. Division of Child Tax Exemption in Delaware.**

Family Court has wrestled with this issue for decades. In 1989, Judge Wakefield declined to divide the exemptions in a child support case but noted, in *dicta*, that it may be possible in Property Division cases to direct parties to execute documents granting or waving tax benefits.<sup>15</sup>

In 1995, Judge Keil held that

[I]f the Court finds the allocation of the dependent exemptions to the non-custodial parent to be equitable in the individual case, then the Court is permitted by statute to allocate said exemptions...

In such cases where the non-custodial parent is providing for the overwhelming majority of the children’s financial support, the dependency exemption may be equitably allocated to the non-custodial parent. This result comports not only with Delaware public policy, but also with federal tax policy. The duty to support children rests equally on both parents. 13 *Del.C.* § 501(c). Where the sharing of the burden does not result in equal percentages under the Melson formula, the Court should consider the appropriateness

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<sup>14</sup> *Id* at 9-10. Additional requirements apply to divorce decrees and separation agreements that went into effect after 1984 but before 2009. The requirements would not apply to this case.

<sup>15</sup> *Hancock v. Winter*, 1989 WL 240079 (Del.Fam.Ct., May 5, 1989).

of allocating the dependent tax exemption as a means of balancing the duty of support between the parents.<sup>16</sup>

In 1997, Judge Nicholas identified a conflict between *Hancock* and *Dryer*, and sided with Judge Wakefield's decision that the Family Court was not authorized to divide exemptions in child support cases. Judge Nicholas found, with respect to child support cases,

[T]he Delaware Family Court is a statutory court, its powers and authority are conferred solely by statute. The Family Court is not a general court of equity and the Delaware Supreme Court has cautioned the court from overextending its authority stating, "[a]lthough the Family Court has succeeded to certain of the equitable powers of the Court of Chancery, that authority may be exercised only in aid of, or to implement[,] its statutory authority."<sup>17</sup>

However, Judge Nicholas did agree with Judge Wakefield that the equitable powers granted to the Court in Property Division cases is distinct, stating

*Unlike 13 Del.C. Chapter 15, pertaining to marital dissolution, as Judge Wakefield correctly noted in Hancock, nowhere in the list of powers conferred on the Family Court in [the child support statute] is the authorization for this Court to take into consideration the tax consequences of the parties.*<sup>18</sup>

In 1999, Judge Buckworth followed the logic of Judges Wakefield and Nicholas in assigning the child tax exemption "*in certain years*" in the context of a Property

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<sup>16</sup> *Dryer v. Osgood*, 1995 WL 788170 at \*4 (Del.Fam.Ct., May 19, 1995).

<sup>17</sup> *Hamilton v. Morning*, 1997 WL 295686 at \*2 (Del.Fam.Ct., April 4, 1997)(quoting *M.T.L. v. T.P.L.*, 414 A.2d 510, 511 (Del. 1980)).

<sup>18</sup> *Id* at \*3 (emphasis added).

Division case.<sup>19</sup> The Court, in its Order on Motion for Reargument, analyzed these prior cases as well, referencing decisions from the Supreme Court of Ohio and the Ohio Court of Appeals in reaching the conclusion that “it does not take away the court’s authority to issue the exemption in property division cases.”<sup>20</sup>

In 2007, (now-Chief) Judge Newell provided further analysis finding that “the dependency exemption is not unlike other benefits or liabilities that arise solely by reason of the tax laws which the Court allocates between the parties on a regular basis.”<sup>21</sup> Judge Newell noted that the Court has ordered parties to be individually responsible for their portion of capital gains for their homes, tax liability from a spouse’s investment in a tax shelter, and *the marital portion* of each party’s tax refund, the dependency exemption, and mortgage interest payments. At the same time, Judge Newell identified a warning, so to speak, that “should the Court decide to allocate the exemption, it may not thereafter modify the allocation in the

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<sup>19</sup> *Fallon v. Fallon*, CN98-08336, Petition No. 99-05101, Del.Fam.Ct., Buckworth, J. (Oct. 25, 1999)(emphasis added).

<sup>20</sup> *Id.*

<sup>21</sup> *L.S. v. L.R.S.*, 2007 WL 4793935 at \*4 (Del.Fam.Ct., Jan. 17, 2007).

future.”<sup>22</sup> Recognizing that the parties had essentially divided the marital property equally, the Court similarly divided the child tax exemption.<sup>23</sup>

In the following year, Judge Cooper agreed that the Court has the authority to assign the tax exemption but declined to divest Husband of the benefit when both children resided with Husband. The Court noted that no evidence was presented on child support paid, visitation time, or any other equitable or financial reason to divide an exemption that “is obviously intended to benefit the parent who has custody for at least one-half of the year and provides over one-half of the children’s support.”<sup>24</sup>

In 2012, Judge Hitch found that the Court may allocate the tax exemption but declined to do so noting the permanency of the decision and that “the evidence should plainly show that allocating the exemption, as opposing to allowing the federal law to control, furthers the ‘equitabl[e] divi[sion], distribut[ion], or assign[ment] [of] the marital property.’”<sup>25</sup> In reaching her decision, Judge Hitch considered additional non-statutory factors, including the age of the children, apparent finality of residential placement, additional expenditures of time or money

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<sup>22</sup> *Id.*

<sup>23</sup> *Id. at* \*5.

<sup>24</sup> *S.L.W. v. J.T.W.*, 2008 WL 2898331 (Del.Fam.Ct., Apr. 30, 2008).

<sup>25</sup> *S. v. S.*, 2012 WL 1560401 at \*2 (Del.Fam.Ct., Mar. 26, 2012)(Citing 13 *Del.C.* § 1513(a)).

by either party with the children, and the tax benefit that each parent is likely to receive if awarded the exemption.

The Supreme Court of Delaware has not taken up the issue. The sole reported case appears to be *Moyer v. Moyer*<sup>26</sup> in which the appellant challenged an alleged separation agreement that failed to give him the right to claim a dependency tax exemption on at least one of his children. The Court affirmed the trial court's finding that no agreement had been reached.

**d. Family Court Authorization in Ancillary Matters**

The Family Court is granted exclusive jurisdiction under Title 13, Chapter 15 over all proceedings relative to divorce and annulment.<sup>27</sup> However, the Court's exercise of its authority in Property Division is limited to disposition of marital property.<sup>28</sup>

Marital property is generally defined as all property acquired by the parties subsequent to marriage.<sup>29</sup> There are statutory exceptions including inheritances, gifts from persons other than spouses, property acquired in exchange for premarital property, property excluded by valid agreement, and increase in value of premarital

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<sup>26</sup> *Moyer v. Moyer*, 602 A.2d 68 (Del. 1992).

<sup>27</sup> 10 *Del.C.* § 921(11).

<sup>28</sup> 13 *Del.C.* § 1513(a).

<sup>29</sup> 13 *Del.C.* § 1513(b).

property.<sup>30</sup> A non-statutory exception for property acquired “in contemplation of marriage” had been applied by the Family Court with increasing liberality, but was recently clarified by the Supreme Court as being limited to real property.<sup>31</sup>

The statute allows the Court to consider “all relevant factors” and identifies eleven specific areas of inquiry. The final designated consideration is “tax consequences.”<sup>32</sup> It is this “tax consequences” factor that underlies the various Family Court decisions on authority to assign the child tax exemption.

The Court’s equitable powers extend to post-divorce issues but is limited to the marital extent of those assets and liabilities. By way of example and not limitation, the Court restricts its division of retirement funds to the marital portion of those funds and any appreciation thereon. Pensions are divided using the marital years of work in the Cooper Formula. Retained marital earnings are divisible under certain circumstances.<sup>33</sup> Tax refunds issued after divorce are subject to division of the marital portion of the refund.<sup>34</sup>

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<sup>30</sup> *Id.*

<sup>31</sup> *Garrison v. Downing*, 226A.3d 195 (Del. 2020).

<sup>32</sup> 13 *Del.C.* § 1513(a)(11).

<sup>33</sup> *Ramon v. Ramon*, 963 A.2d 128 (Del. 2008).

<sup>34</sup> *See In re Marriage of J.D.S. & L.D.S.*, 2000 WL 33200990 (Del.Fam.Ct., Oct. 2, 2000).

**e. Assignment of Child Tax Exemptions for Post-Divorce Years.**

There is no question that any tax exemptions and credits accrued during the marriage are divisible in property division. The question is whether the Court has the ability to assign the tax credits for post-divorce years during the divorce proceedings.

In *Fallon*, the Court divided the exemption “in certain years.”<sup>35</sup> In *L. S.*, the Court did, in fact, divide future tax credits but did so in conjunction with the agreed equal division of marital property.<sup>36</sup> In *S.L. W.*, the Court chose not to divest a parent with primary residential placement of the tax exemption in the absence of any evidence to invoke the equitable relief.<sup>37</sup> In *S. v. S.*, the Court again declined to assign the exemption after consideration of that Court’s additional factors.<sup>38</sup> With the exception of *L.S.*, which was consistent with the parties’ agreement, there is no clear precedent for assigning the post-divorce years credits.

There may be instances in which equitable assignment of a post-divorce exemption may be warranted. However, a blanket application of the equitable

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<sup>35</sup> *Fallon* (slip op.) at \*5. The Order does not specify whether the “certain years” were marital years or the residential placement of the children.

<sup>36</sup> *L.S. v. L.R.S.* at \*5.

<sup>37</sup> *S.L.W. v. J.T.W.* at \*3.

<sup>38</sup> *L.S. v. L.R.S.* at \*2.

assignment of a non-marital asset could result in great inequity. Consider a situation where one parent after being irrevocably assigned the exemption no longer spends time with the children. Children's wishes on residential placement can change resulting in a primary placement from a prior shared placement. Parental alienating behavior after the divorce could estrange the parent from the children leaving the residential parent with the overwhelming burden of financial responsibility. In such instances, considering the tax exemption as a "vested marital asset" in post-divorce years could result in extreme inequity should the post-marital exemption be assigned irrevocably.

At the same time, the IRS Code is not able to address the multitude of possible placements in just applying a rule based on overnights. In three of every four years, there are an odd number of days and nights. One parent would always be the residential parent under those rules. The Family Court decides residential placement and, all other factors being equal, tends toward shared placements wherever possible. Setting the "rules" for parents should reduce conflict between them and would also benefit of their minor children.

The Court concurs with the prior cases that it has the ability to assign the tax exemptions for all marital years under the property division statute. It also has the ability, with significant restraint, to equitably assign the exemptions in post-divorce years provided that compelling reasons, supported by evidence, can make the case

for why extraordinary relief is required. Absent the supporting evidence, the IRS regulations should govern who claims the children in post-divorce years.

**f. Child Tax Exemptions in this case.**

Wife claimed both Children as exemptions on her tax returns in 2020, the year of separation and the year of divorce. Inasmuch as the parties have divided their assets 55% to Husband and 45% to Wife, the Court will order that Husband be entitled to claim both children on his 2021 tax return as a division of the marital assets.

The parties' two children are ages five and seven. There are at least nine more years of two exemptions and an additional two years for the final exemption. While the parties have currently *agreed* to shared placement of the children at present, there is approximately a decade during which the children's best interests can change. As in *S.L.W. v. J.T.W.*, there is no evidence in this case to allow the Court to irrevocably divide an exemption that "is obviously intended to benefit the parent who has custody for at least one-half of the year and provides over one-half of the children's support."<sup>39</sup> However, for purposes of reducing potential conflict, the Court will require that *so long as the parties have shared residential placement under a Family Court Order*, the parties shall each claim one child in 2022 and in each subsequent year until there is only one qualifying child exemption. At such time as

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<sup>39</sup> *S.L.W. v. J.T.W.* at \*3.

there is only one child exemption remaining, the parties shall alternate claiming the child with Husband having the first year. Should residential placement change, the IRS regulations shall apply.

### **ORDER**

**IT IS HEREBY ORDERED** this 9<sup>th</sup> day of October 2021, that

A. The Partial Stipulation and Order Resolving Ancillary Matters is approved.

B. The parties shall attempt to agree on a mediator. If the parties do not reach agreement by October 18, 2021, Counsel shall each submit three names from which the Court shall select the mediator.

C. Counsel shall report to the Court by December 6, 2021, whether the division of personal property has been resolved or whether a brief hearing is required.

D. Husband shall claim both Children as tax exemptions on his 2021 tax return.

E. SO LONG AS THE PARTIES HAVE SHARED RESIDENTIAL PLACEMENT OF THE CHILD(REN), each party shall claim one child tax exemption commencing 2022 and each subsequent year. At such time as there is only one qualifying child remaining, the parties shall alternate claiming the exemption with Father having the first year.

F. In the event that Shared Residential Placement of the Child(ren) ends, the IRS regulations shall apply without modification.

**IT IS SO ORDERED.**

*/s/Michael W. Arrington*  
MICHAEL W. ARRINGTON  
Judge

Date E-mailed to Counsel: October 9, 2021