
I. Why are we talking about the ACA and family court orders?

A. Eligibility for ACA subsidies has its basis in the tax code.

B. The more individuals there are in a person’s household, the higher the subsidies for assistance with purchasing insurance through the federal marketplace.

C. The size of an applicant’s household is determined not by who is living with them, but how many dependants they claim on their taxes.

D. Family courts can order either parent to claim a child as a dependant and must assign responsibility for a child’s health-care expenses.
II. **BadgerCare Plus**

A. **What is it?** – BadgerCare Plus (BC+) is Wisconsin’s health care program for children and families. BC+ helps pay for routine doctor visits, prescription drugs, lab tests and x-rays, mental health care, hospital care, and other types of health care. Elderly, blind, and disabled persons who are not eligible for BC+ may be eligible for Medical Assistance under a different set of rules.

B. **Who is eligible?**
   1. U.S. Citizens or qualified immigrants.
   2. Beginning April 1, 2014, all adults who meet the BC+ income limits are eligible.

C. **2015 Income limits**
   1. **Young adults after leaving foster care (up to age 26):**
      No income limit.
   2. **Children 18 and under**
      Up to 306% of federal poverty level (FPL).
   3. **Pregnant women**
      Up to 306% of the federal poverty level (FPL).
   4. **Adults (19-64)**
      Under 100% of the federal poverty level (FPL).

<table>
<thead>
<tr>
<th>Household Size</th>
<th>100% FPL</th>
<th>306% FPL</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$980.83/month</td>
<td>$3,001.35/month</td>
</tr>
<tr>
<td>2</td>
<td>$1,327.50/month</td>
<td>$4,062.15/month</td>
</tr>
<tr>
<td>3</td>
<td>$1,674.17/month</td>
<td>$5,122.95/month</td>
</tr>
<tr>
<td>4</td>
<td>$2,020.83/month</td>
<td>$6,183.75/month</td>
</tr>
<tr>
<td>5</td>
<td>$2,367.50/month</td>
<td>$7,244.55/month</td>
</tr>
<tr>
<td>6</td>
<td>$2,714.17/month</td>
<td>$8,305.35/month</td>
</tr>
</tbody>
</table>

For a family that includes adults and children, the children will be eligible if the family’s household income is 306% FPL or less. The adult(s) will be eligible if the family’s household income is less 100% FPL or less. If the family includes a pregnant woman, she will be eligible if the family's household income is 306% FPL or less.
D. **Does access to other health insurance matter?** – Depending on their age and the family’s income, some children may be ineligible for BC+ if they have access to “affordable” health insurance through a parent’s employer. “Affordable” generally means that the employer pays at least 80% of the insurance premium.

E. **Cost**
   1. There are minimal co-pays for most services, usually under $3.00.
   2. There is a monthly premium for children if the household’s income is more than 201% FPL. If premiums for children are not paid, the children will lose BC+ coverage and may not be allowed to re-enroll for three months unless they meet certain exceptions.
   3. There are no premiums for eligible adults.

F. **Who is included in the household of separated parents?**
   1. **Only one parent has more than 40% placement**
      A child will be included in one parent’s household for purposes of determining BC+ eligibility and is included in that parent's BC+ group, **without regard to which parent claims the child as a dependent.**
      42 C.F.R. §§ 435.603(f)(2)(iii) and (f)(3)(ii)
      BC+ Handbook 2.3.2.1 - 2.3.2.3
   
   2. **Both parents have more than 40% placement**
      A child is included in household of parent who has at least 40% placement for purposes of determining BC+ eligibility. This means a child may be included in both parents’ households to determine eligibility, however, the child will be placed in only one BC+ group for purposes of receiving benefits for the child.
      BC+ Handbook 2.2.1.2

      If a child has access to affordable employer-provided insurance (employer pays at least 80% of premium) through one but not both parents, the child is placed in the BC+ group of parent who does not have access to affordable employer-provided insurance.
      BC+ Handbook 2.2.1.2
In case of reasonably equal placement where a premium may be required based on income, parents may choose the BC+ group in which child will be placed. The child may be placed in the BC+ group with the lower premium or no premium.

BC+ Handbook 2.2.1.2

If shared placement is with parent who lives in another state, the child must reside in Wisconsin at least 50% to be eligible for BC+.

BC+ Handbook 2.2.1.2

G. Family court orders can impact a parent’s BC+ eligibility because household size is based on the placement schedule and where the child is residing.

III. Affordable Care Act

A. **What is it?** – The ACA requires most persons to have health insurance coverage. Uninsured individuals and families may buy health insurance through the Federally Facilitated Marketplace. Low-income individuals and families are eligible for advance premium tax credits, which reduce the cost of purchasing insurance. Deductibles and co-pays are also reduced for low-income individuals and families. There are five types of Qualified Health Plans: Bronze, Silver, Gold, Platinum, and catastrophic.

B. **Who is eligible?**
   1. Reside in the US.
   2. US Citizen or lawfully present in US.
C. **Income Limits** – Limit for reduced cost-sharing is 250% FPL.
These are the limits for the 2014-15 open enrollment period. The Federal Poverty Level is updated early in the year, so the limits for the 2014-15 open enrollment period are based on the FPL released in early 2014.

<table>
<thead>
<tr>
<th>Number of people in your household</th>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
<th>6</th>
</tr>
</thead>
<tbody>
<tr>
<td>You may qualify for lower premiums on a Marketplace insurance plan if your yearly income is between...</td>
<td>$11,670 - $46,680</td>
<td>$15,730 - $62,920</td>
<td>$19,790 - $79,160</td>
<td>$23,850 - $95,400</td>
<td>$27,910 - $111,640</td>
<td>$31,970 - $127,880</td>
</tr>
<tr>
<td>You may qualify for lower premiums AND lower out-of-pocket costs for Marketplace insurance if your yearly income is between...</td>
<td>$11,670 - $29,175</td>
<td>$15,730 - $39,325</td>
<td>$19,790 - $49,475</td>
<td>$23,850 - $59,625</td>
<td>$27,910 - $69,775</td>
<td>$31,970 - $79,925</td>
</tr>
<tr>
<td>If your state is expanding Medicaid: You may qualify for Medicaid coverage if your yearly income is below...</td>
<td>$16,105</td>
<td>$21,707</td>
<td>$27,310</td>
<td>$32,913</td>
<td>$38,516</td>
<td>$44,119</td>
</tr>
<tr>
<td>If your state isn’t expanding Medicaid: You may not qualify for any Marketplace savings programs if your yearly income is below...</td>
<td>$11,670</td>
<td>$15,730</td>
<td>$19,790</td>
<td>$23,850</td>
<td>$27,910</td>
<td>$31,970</td>
</tr>
</tbody>
</table>

Source: www.healthcare.gov/how-can-i-save-money-on-marketplace-coverage-chart

D. **What is considered income?** – Income is defined for health care eligibility the same as it is for tax purposes – it is the “Modified Adjusted Gross Income” (MAGI).
Taxable income is the only income counted for purposes of eligibility for subsidies. Non-taxable income such as child support or SSI is not counted for purposes of eligibility for subsidies. Maintenance is considered income. Family support may or may not be considered income depending on how the support order is structured.

E. Does access to other health insurance matter? – An employer’s plan qualifies as minimal essential coverage if the plan is affordable and the plan provides minimum value. The affordability test is met for both the employee and related individuals if the portion of the premium the employee may pay for employee-only covered is no more than 9.5% of the employee’s household income. If a person is eligible for affordable minimal essential coverage through their spouse’s employer, they are not eligible for a premium tax credit. The same is true for the couple’s children. In many cases, a person who is separated from their spouse will remain eligible for insurance through the spouse’s employer as long as they are married and will therefore be ineligible for the premium tax credit. The children will also be ineligible for a premium tax credit as long as they are eligible for “affordable” insurance through the other parent’s employer.


F. Cost – Varies depending on household size, income, and the plan someone chooses.

G. Who is included in the household?
1. Family size and income for purposes of the health insurance marketplace, including premium tax credits and reduced cost-sharing, is based on MAGI rules, which in turn are based on income tax rules. The general rule is the family size is determined by the number of persons for whom a taxpayer claims a deduction for the tax year.

26 U.S.C. § 36B(d)(1), 26 C.F.R. § 1.36B-1(d)

2. An individual who is claimed as a dependent by another taxpayer is not eligible for premium tax credits except as a member of household of the tax filer who claims the individual as a dependent.

26 U.S.C. § 36B(c)(1)(D), 26 C.F.R. § 1.36B-1(d),
26 C.F.R. § 1.36B-2(b)(3).
3. **Married couples** – Taxpayers who are married at the close of the tax year must file a joint return to qualify for premium tax credits and reduced cost-sharing. A same sex married couple that was legally married in a state that permits same sex marriage may file joint tax return.


There is one exception to this rule: A person who is separated from their spouse and who files a separate tax return may only qualify for the premium tax credit if they satisfy all three of the following elements:

1) Maintains a household which for more than half the year is the principal place of abode of a child (under 26 U.S.C. § 152(f)(1)) who the person may claim as a dependent for the year under 26 U.S.C. § 151 or 26 U.S.C. § 152(e);
2) Pays over half the cost of maintaining the household during the year; and
3) The person’s spouse was not a member of the household during the last 6 months of the year

26 C.F.R. § 1.36B-2(b)(2)

If a person does not meet this exception, but expects a divorce to become final before the end of the year may apply for the advance tax credit based on their anticipated divorced status and the family size they expect following the divorce. However, it is critical that the divorce be finalized before the end of the year. Otherwise the person may have a tax liability for the entire advance credit or will have to file a joint return with their spouse in the hopes of qualifying for a credit.

45 C.F.R. § 155.320(c)(3)(i)(3)

4. **Tax law regarding who may be claimed as a dependent remains the same.** This means that children may be claimed as qualifying children (under 19, under 24 if full time students or any age if totally disabled) 26 U.S.C. § 152(c),(f) or as qualifying relatives if they meet certain other conditions. 26 U.S.C. § 152(d).
IV. Examples – All of the following examples use premium estimates the premium estimate calculator available at [www.healthcare.gov/find-premium-estimates/](http://www.healthcare.gov/find-premium-estimates/). These examples are designed to illustrate how the dependancy exemption can impact eligibility. These examples are not designed to demonstrate the exact costs for health insurance, as these vary greatly depending on which plans are available in which area of the state. The costs below are based on estimates of plans available in Milwaukee County during the 2014-15 open enrollment period which started on November 15, 2014, and ends February 15, 2015.

A. **Separated family # 1**
   Two adults, two children, shared placement, no maintenance
   Both parents work full-time at $10/hour.
   Neither parent’s employer offers affordable health insurance.
   Parents are not eligible for BC+ – Income more than 100% FPL
   Children are eligible BC+ – Income less than 306% FPL

   **Option 1 – One parent claims both children**
   Household size: **One** – One adult with no dependants
   Annual Income: **$ 20,800** (178% of FPL)
   Parent is eligible for a $ 207 per month tax credit and plans costing:
   - $ 27-118 per month for bronze plan
   - $ 82-193 per month for silver plan

   Household size: **Three** – One adult and two children as dependants
   Annual Income: **$ 20,800** (105% of FPL)
   Parent is eligible for $ 266 per month tax credit and plans costing:
   - $ 0-59 per month for bronze plan
   - $ 23-134 per month for silver plan

   -or-

   **Option 2 – Each parent claims one child**
   Household size: **Two** - Each parent claims one child as a dependant
   Annual Income: **$ 20,800** (132% of FPL)
   Both parents are eligible for $ 248 per month tax credit and plans costing
   - $ 0-77 per month for bronze plan
   - $ 41-140 per month for silver plan
B. **Separated family # 2**  
Two adults, two children, shared placement, no maintenance  
One parent works full-time at $20/hour.  
One parent works full-time at $10/hour.  
Neither parent’s employer offers affordable health insurance.  
Children are eligible BC+ – Income less than 306% FPL  
Parents are not eligible for BC+ – Income more than 100% FPL  

**Option 1 – Parent with lower income claims both children**  
Household size: **One** – One adult with no dependants  
Annual Income: **$ 41,600** (356% of FPL)  
Parent is not eligible for tax credit, but can purchase plans costing:  
$ 234-325 per month for bronze plan  
$ 289-400 per month for silver plan  

Household size: **Three** – One adult and two children as dependants  
Annual Income: **$ 20,800** (105% of FPL)  
Parent is eligible for $ 266 per month tax credit and plans costing:  
$ 0-59 per month for bronze plan  
$ 23-134 per month for silver plan  

- or -  

**Option 2 - Parent with higher income claims both children**  
Household size: **Three** – One adult and two children as dependants  
Annual Income: **$ 41,600** (210% of FPL)  
Parent is eligible for $ 67 per month tax credit and plans costing:  
$ 167-258 per month for bronze plan  
$ 222-333 per month for silver plan  

Household size: **One** – One adult with no dependants  
Annual Income: **$ 20,800** (178% of FPL)  
Parent is eligible for a $ 207 per month tax credit and plans costing:  
$ 27-118 per month for bronze plan  
$ 82-193 per month for silver plan  

- or -  

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Option 3 - Each parent claims one child
Household size: Two - Each parent claims one child as a dependant
Annual Income: $41,600
Federal Poverty Level: 264%
Parent is eligible for a $3 per month tax credit and plans costing:
  $231-322 per month for bronze plan
  $286-397 per month for silver plan

Household size: Two - Each parent claims one child as a dependant
Annual Income: $20,800
Federal Poverty Level: 132%
Parent is eligible for $248 per month tax credit and plans costing
  $0-77 per month for bronze plan
  $41-140 per month for silver plan

C. For the above examples there is no one “right” answer about how the dependancy exemption should be distributed. Other factors to consider may be child support, maintenance, the benefits of any particular health insurance plan, or the costs of any given plan.

V. How should courts allocate the dependancy exemption?

A. Eligibility for dependancy exemption in the tax code
  1. 26 U.S.C. § 152(e)
     (1) In general.--Notwithstanding subsection (c)(1)(B), (c)(4), or (d)(1)(C), 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 6 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 the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.
     (2) Exception where custodial parent releases claim to exemption for the year.--For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if--
        (A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and
... (B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

(4) Custodial parent and noncustodial parent.--For purposes of this subsection--
(A) Custodial parent.--The term “custodial parent” means the parent having custody for the greater portion of the calendar year.
(B) Noncustodial parent.--The term “noncustodial parent” means the parent who is not the custodial parent.

2. Treas. Reg. § 1.152-4
(a) In general. A taxpayer may claim a dependency deduction for a child (as defined in section 152(f)(1)) only if the child is the qualifying child of the taxpayer under section 152(c) or the qualifying relative of the taxpayer under section 152(d). Section 152(c)(4)(B) provides that a child who is claimed as a qualifying child by parents who do not file a joint return together is treated as the qualifying child of the parent with whom the child resides for a longer period of time during the taxable year or, if the child resides with both parents for an equal period of time, of the parent with the higher adjusted gross income. However, a child is treated as the qualifying child or qualifying relative of the noncustodial parent if the custodial parent releases a claim to the exemption under section 152(e) and this section.
(b) Release of claim by custodial parent--
(1) In general. Under section 152(e)(1), notwithstanding section 152(c)(1)(B), (c)(4), or (d)(1)(C), a child is treated as the qualifying child or qualifying relative of the noncustodial parent (as defined in paragraph (d) of this section) if the requirements of paragraphs (b)(2) and (b)(3) of this section are met.
(2) Support, custody, and parental status--
(i) In general. The requirements of this paragraph (b)(2) are met if the parents of the child provide over one-half of the child's support for the calendar year, the child is in the custody of one or both parents for more than one-half of the calendar year, and the parents--
(A) Are divorced or legally separated under a decree of divorce or separate maintenance;
(B) Are separated under a written separation agreement; or
(C) Live apart at all times during the last 6 months of the calendar year whether or not they are or were married.
(ii) Multiple support agreement. The requirements of this paragraph (b)(2) are not met if over one-half of the support of the child is treated as having been received from a taxpayer under section 152(d)(3).
(3) Release of claim to child. The requirements of this paragraph (b)(3) are met for a calendar year if--
(i) The custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for any taxable year beginning in that calendar year and the noncustodial parent attaches the declaration to the noncustodial parent's return for the taxable year; or
(ii) A qualified pre–1985 instrument, as defined in section 152(e)(3)(B), applicable to the taxable year beginning in that calendar year, provides that the noncustodial parent is entitled
to the dependency exemption for the child and the noncustodial parent provides at least $600 for the support of the child during the calendar year.

c) Custody. A child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.

d) Custodial parent--

(1) In general. The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent. A child is treated as residing with neither parent if the child is emancipated under state law. For purposes of this section, a child resides with a parent for a night if the child sleeps--

(i) At the residence of that parent (whether or not the parent is present); or

(ii) In the company of the parent, when the child does not sleep at a parent's residence (for example, the parent and child are on vacation together).

(2) Night straddling taxable years. A night that extends over two taxable years is allocated to the taxable year in which the night begins.

(3) Absences.

(i) Except as provided in paragraph (d)(3)(ii) of this section, for purposes of this paragraph (d), a child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence.

(ii) A child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as not residing with either parent for that night if it cannot be determined with which parent the child would have resided or if the child would not have resided with either parent for the night.

(4) Special rule for equal number of nights. If a child is in the custody of one or both parents for more than one-half of the calendar year and the child resides with each parent for an equal number of nights during the calendar year, the parent with the higher adjusted gross income for the calendar year is treated as the custodial parent.

(5) Exception for a parent who works at night. If, in a calendar year, due to a parent's nighttime work schedule, a child resides for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as residing at the primary residence registered with the school.

e) Written declaration—

(1) Form of declaration—

(i) In general. The written declaration under paragraph (b)(3)(i) of this section must be an unconditional release of the custodial parent’s claim to the child as a dependent for the year or years for which the declaration is effective. A declaration is not unconditional if the custodial parent’s release of the right to claim the child as a dependent requires the satisfaction of any condition, including the noncustodial parent’s meeting of an obligation such as the payment of support. A written declaration must name the noncustodial parent to whom the exemption is released. A written declaration must specify the year or years for which it is effective. A written declaration that specifies all future years is treated as specifying the first taxable year after the taxable year of execution and all subsequent taxable years.
(ii) Form designated by IRS. A written declaration may be made on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form designated by the IRS. A written declaration not on the form designated by the IRS must conform to the substance of that form and must be a document executed for the sole purpose of serving as a written declaration under this section. A court order or decree or a separation agreement may not serve as a written declaration.

Since 2008, if a non-custodial parent seeks to claim a child as a dependant they must use Form 8332. For a discussion of the law on dependancy exemptions, see *Armstrong v. C.I.R.*, 745 F.3d 890, (8th Cir. 2014). For an even more detailed discussion of the legislative history of the tax code on the dependancy exemption, see *Armstrong v. C.I.R.*, 139 T.C. 468, (Tax Court 2012).

B. Statutory authority to allocate the dependancy exemption

1. Wis. Stat. § 767.511(1)(b)

   (1) When ordered. When the court approves a stipulation for child support under s. 767.34, enters a judgment of annulment, divorce, or legal separation, or enters an order or a judgment in a paternity action or in an action under s. 767.001(1)(f) or (j), 767.501, or 767.805(3), the court shall do all of the following:
   ...
   (b) Ensure that the parties have stipulated which party, if either is eligible, will claim each child as an exemption for federal income tax purposes under 26 USC 151(c)(1)(B), or as an exemption for state income tax purposes under s. 71.07(8)(b) or under the laws of another state. If the parties are unable to reach an agreement about the tax exemption for each child, the court shall make the decision in accordance with state and federal tax laws. In making its decision, the court shall consider whether the parent who is assigned responsibility for the child’s health care expenses under s. 767.513 is covered under a health insurance policy or plan, including a self-insured plan, that is not subject to s. 632.897(10) and that conditions coverage of a dependent child on whether the child is claimed by the insured parent as an exemption for purposes of federal or state income taxes.

   This section was created by 1989 Wis Act 31, which went into effect in the fall of 1989.

2. Wis. Stat. § 767.89(3)(d)

   (3) Content of judgment or order. A judgment or order determining paternity shall contain all of the following provisions:
   ...
   (d) A determination as to which parent, if eligible, shall have the right to claim the child as an exemption for federal tax purposes under 26 USC 151(c)(1)(B), or as an exemption for state tax purposes under s. 71.07(8)(b).
C. Wisconsin case law on the dependancy exemption

1. *Pergolski v. Pergolski*

143 Wis. 2d 166, 420 N.W.2d 414, (Wis. Ct. App. 1988)

The court can award the exemption to a non-custodial parent and can order custodial parent to sign the paperwork necessary to carry out the award. This case was decided prior to the enactment of the current statute on the exemption.

Most states have adopted the same position as the Wisconsin courts. Georgia and South Dakota are two notable exceptions of states which do not allow the court to allocate the dependancy exemption to a non-custodial parent. See *Blanchard v. Blanchard*, 261 Ga. 11, 401 S.E.2d 714 (GA 1991) and *Brandriet v. Larsen*, 442 N.W.2d 455, (S. D. 1989).

Sharon also argues that the court did not have authority to order execution of consent forms assigning George an income tax dependency exemption. We disagree. 26 U.S.C.A. § 152(e) (West Supp.1987) automatically allocates dependency exemptions to the custodial parent unless he or she signs a waiver that the noncustodial parent attaches to his or her tax return. The legislative history indicates that congress provided for automatic allocation to alleviate the burden on the IRS caused by fact-finding determinations. *Fudenberg v. Molstad*, 390 N.W.2d 19, 21 (Minn.Ct.App.1986). *Fudenberg*, 390 N.W.2d at 21, upheld the trial court’s authority to allocate the exemption because it “does not interfere with Congressional intent. It does not involve the IRS in fact-finding determinations. State court involvement has no impact on the IRS.” Similarly, *Lindsey v. Lindsey*, 140 Wis.2d 684, 412 N.W.2d 132 (Ct.App.1987), authorizes trial courts to order a spouse to make a specific election regarding a retirement system payout option even though the system may not allow the court to enter an order directed to the administrator of the plan. We conclude that the court properly exercised its discretion by ordering Sharon to execute the consent giving the tax exemption to George.
2. **Burger v. Burger**

144 Wis. 2d 514, 424 N.W.2d 691, (Wis. 1988)

The court needs to articulate a rational basis for allocating the exemption. This case was decided prior to the enactment of the current statute on the exemption.

Burger contends a fourth error in the circuit court’s modification occurred because it failed to grant him the ability to claim both children as dependents for tax purposes. There is no specific statute in Wisconsin which controls disposition of tax exemptions upon judgment of divorce or its modification. The Internal Revenue Code, sec. 152(e) (1988), makes an assumption that the custodial parent should be permitted to claim children as dependents for tax purposes unless the noncustodial parent has provided more support than the custodial parent or the original divorce decree awarded the tax exemption to the noncustodial parent. Neither of these showings is supported by the record in this action.

... Burger claims that since Koos has no earnings, she is not entitled to a tax exemption. The tax exemption determination is not presumed to be awarded to a particular parent or on the basis of earning under the modification of judgment statute, sec. 767.32. The circuit court articulated a rational basis for finding that Burger should not be rewarded with both tax exemptions because of his continued arrearages. We conclude no abuse of discretion occurred in making this ruling.

3. **Peters v. Peters**

145 Wis. 2d 490, 427 N.W.2d 149,(Wis. Ct. App. 1988)

For modification of the exemption, there needs to be a substantial change in circumstances. This case was decided prior to the enactment of the current statute on the exemption.

A provision in a divorce judgment awarding exemptions for the minor children of divorced persons is an aspect of child support. The right to claim the exemptions has an ascertainable financial impact. If the spouse obligated to pay child support possesses the right, the support that spouse pays is effectively reduced by the income tax saved through utilizing the exemptions. If the spouse receiving child support possesses the right, support is effectively increased by the tax saved through claiming the exemptions. **Whether support provisions should be modified is discretionary with the trial court, but may be ordered only if a substantial change of circumstances has occurred.**

*Poehnelt v. Poehnelt*, 94 Wis.2d 640, 650, 289 N.W.2d 296, 301 (1980). The same rule should apply when it is proposed to modify provisions in a divorce judgment regarding tax exemptions.
4. *Sommerfield v. Sommerfield*
154 Wis. 2d 840, 454 N.W.2d 55, (Wis. Ct. App. 1990)

Court needs to articulate basis for allocating decision. This case was decided after the enactment of the current statute on the exemption.

Next, Judy complains that the trial court erred in awarding Patrick the income tax dependency exemption for Shelly. She asserts that the better reasoned decisions of other jurisdictions require the child and the exemption to go hand in hand.

... However, this court has already held that dependency exemptions may be awarded to noncustodial parents. *Pergolski v. Pergolski*, 143 Wis.2d 166, 173, 420 N.W.2d 414, 417 (Ct. App. 1988). We cannot disregard that precedent. The published decisions of any Wisconsin court of appeals panel have binding effect on all panels of this court. *In re Court of Appeals*, 82 Wis.2d 369, 371, 263 N.W.2d 149, 149-50 (1978).

... The award of the dependency exemption lies within the trial court’s discretion. See *Pergolski*, 143 Wis.2d at 173, 420 N.W.2d at 417. Judy complains that the award here constitutes an abuse of that discretion but we disagree. We will not find an abuse of discretion if there exists a reasonable basis for the trial court’s determination. *McCleary v. State*, 49 Wis.2d 263, 277, 182 N.W.2d 512, 520 (1971). Here, the trial court awarded the exemption to Patrick because Judy will receive the child support moneys tax free. We see nothing inherently abusive in splitting the tax advantages of supporting children between the parents.

5. *Fowler v. Fowler*
158 Wis. 2d 508, 463 N.W.2d 370 (Wis. Ct. App. 1990)

Court needs to articulate basis for allocating decision. This case was decided after the enactment of the current statute on the exemption.

Emily contends that the circuit court abused its discretion in awarding the income tax dependency exemption to Booth because the court’s determination was based on a mistake of fact. A trial court abuses its discretion when it makes a mistake with respect to the facts upon which its decision is based. *Rommelfanger v. Rommelfanger*, 114 Wis.2d 175, 177, 337 N.W.2d 851, 852 (Ct.App.1983).

... The circuit court stated, “As to the question of who takes Benjamin as an income tax deduction, Dr. Fowler will be allowed to claim him as an income tax deduction. He's paying the majority of the bills. He’s entitled to that benefit.” At the hearing, Booth was asked the following question and gave the following answer:

Q: Do you acknowledge that all things considered, with the 40-plus weeks period that [Emily] has with Ben, that she is contributing up to 50% of his needs?
A: Yes.

However, the question asked of Booth dealt with the pre-divorce situation and did not include the court’s award of child support. Taking into consideration Booth’s child support obligation and Benjamin’s placement with Booth seventy-seven days a year, the circuit court’s finding that Booth will contribute more than fifty percent of the child’s support is not clearly erroneous.

... We conclude that the trial court did not abuse its discretion in awarding the income tax dependency exemption to Booth.


191 Wis. 2d 67, 528 N.W.2d 477 (Wis. Ct. App. 1995)

The court cannot make a decision on the exemption by “default.” The court must engage in some sort of analysis of the consequences of the exemption. This case was decided after the enactment of the current statute on the exemption. The Wisconsin Supreme Court overruled part of this decision on another issue, but affirmed without discussing the Court of Appeal’s ruling on the dependancy exemption.

Michael appeals the family court's ruling allowing Angelina the right to claim the two children as dependents for income tax purposes.

... At the close of the evidence, the family court directed the parties to submit simultaneous memorandums on the disputed issues. In his memorandum, Michael implicitly acknowledged that under the Internal Revenue Code, Angelina would be entitled to claim the children as exemptions because she had placement of the children for a slight majority of the placement time. However, Michael noted that current tax law gradually phased out a taxpayer's right to take the full dependent exemption as adjusted gross income progressively increased above a floor of $125,000. Since Angelina's income exceeds this floor, Michael observed that Angelina could not take full advantage of the exemption credit, whereas he could. On this basis, he asked the court to allow him to claim the children as dependents. Angelina's memorandum did not expressly address this issue.

... The family court's initial decision did not address the phase-out provisions of the Internal Revenue Code. Instead, the court disposed of this issue in two sentences: “I will not alter the assignment of the tax exemptions for the children prescribed by the Internal Revenue Code. The parties are encouraged, however, to bargain between themselves as circumstances may dictate so that the maximum tax savings can be achieved.”

The family court further addressed this issue in its clarification decision. The court acknowledged that under current tax law, “the dependency exemption is phased out and ultimately becomes valueless.” Nonetheless, the court confirmed its earlier ruling awarding the exemptions to Angelina. We quote the court in some detail:
Accordingly, I feel that the best course is to award [the exemptions], by default to the custodial parent, as the Internal Revenue Code provides. I suggested that the parties bargain in the future regarding the child dependency exemption, since if [Angelina] achieves nothing or very little as a consequence of her entitlement to it, it is senseless for her to claim it, and it seems to me that there is some compromise amount upon which she and [Michael] could agree as to a market value for it, and it could then be allowed to him by court order. I did not intend ... to allow the parent who would most benefit from the dependency exemption to be allowed to claim it. There are a variety of reasons why I did not do this, including the fact that I did not wish to invite the Internal Revenue Service to challenge the validity of the exemption to either parent and also because I did not wish to have a situation where each of the parties would be making a good faith claim to the same exemption, thereby triggering a probable audit of each of their returns.

While we understand the family court’s good intentions on this matter, we conclude that the reasons stated by the court do not constitute an acceptable basis for awarding the exemptions to Angelina. Essentially, the court said that the Internal Revenue Code would control the issue until the parties had agreed otherwise. The court did so without engaging in any analysis of the real economic effect of its decision on the parties. In so doing, the court sidestepped its decision-making role on a point over which the litigants disagreed. If the parties could not agree as to who could most benefit by taking the exemptions, it was the court’s duty to rule on the matter based on the evidence and the applicable law. By its own words, the court acknowledged that it did not perform this function. Instead, the court candidly acknowledged that its ruling on this issue was by “default.” We reverse the family court’s ruling on this issue.

7. Since 1995, there have been no published or citable unpublished decisions which have any significant discussion of the allocation of the dependency exemption. All of the cases decided before 1989 were decided when the current statute was not in place. The current statute on the dependency exemption went into effect in the fall of 1989.

D. Practical considerations for attorney and the courts

1. Consider whether the dependency exemption will or will not have an impact on a parent (or child’s) ACA eligibility. Ask your client whether they have health insurance for themselves and their children.

2. Show your work in orders and stipulations. Explain what is (or is not) being considered in awarding the dependency exemption. If either party later alleges there is a change in circumstances, then court can then figure out whether there is actually a change.
3. For *pro se* cases, the courts should inquire as to whether the parties understand what they are agreeing to regarding the dependancy exemption. Do they understand the ramifications?

4. For cases in which both parents have insurance available through their employer, the dependancy exemption will likely not impact health care coverage. It is recommended the stipulation or order on the dependancy exemption explicitly state health care coverage is not a factor in awarding the dependancy exemption.

5. For cases in which one or both parents do not have insurance available through their employer, the dependancy exemption will likely impact health care coverage. There is no one “rule” of how best to award the exemption. Explain how and why the exemption is being awarded in the stipulation or order.

6. Just as eligibility for subsidies has its basis in the tax code, so do the penalties for not having insurance. If one parent is ordered to provide health insurance for a child, the other parent claims the child as a dependancy exemption, and neither parent provides health insurance for the child, then the parent who claims the child will face a penalty. That parent may, however, be eligible for a hardship exemption for the penalty and could also have remedies in family court for the other parent’s failure to provide health insurance for the child.

**VI. Additional resources and links**

A. [www.healthcare.gov](http://www.healthcare.gov)

B. [www.dhs.wisconsin.gov/badgercareplus](http://www.dhs.wisconsin.gov/badgercareplus)

C. IRS Publication 5187 – Health Care Law: What’s New For Individuals and Families
   IRS Publication 5201 – The Health Care Law and Your Taxes

D. Volunteer Income Tax Assistance (VITA) and Taxpayer Counseling for the Elderly (TCE) programs – [www.revenue.wi.gov/vita/](http://www.revenue.wi.gov/vita/)