

Amend IRC § 7703(b) to Remove the Household Maintenance Requirement and to Permit Taxpayers Living Apart on the Last Day of the Tax Year Who Have Legally Binding Separation Agreements to be Considered “Not Married”

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PROBLEM

Married taxpayers must file joint returns in order to claim important tax benefits such as the Earned Income Tax Credit (EITC).¹ Marital status is determined under IRC § 7703, which permits some married taxpayers to be “considered as” not married. So long as these married taxpayers meet the other pertinent statutory requirements, they will be entitled to the tax benefits claimed on their separate returns.²

IRC § 7703(b), however, prevents taxpayers from being considered “not married” in two ways. First, the statute retains an outdated “cost of maintaining a household” test that disproportionately affects members of racial and ethnic minorities who work and have children.³ Second, it requires spouses to have lived apart for the last six months of the year even if they have a written, legally binding separation agreement by year’s end.

EXAMPLE

From January through August, a married couple with two children under the age of 13 lived together, with the husband (H) paying for all of the cost of maintaining the household. The couple became estranged and H moved out of the family home in September. The wife (W) could not afford to maintain the household on her own, so she and the children moved in with W’s mother. W enrolled in college courses to improve her chances of finding a good job. H and W entered into a legally binding written separation agreement in October. Because the couple was never legally separated under a decree of divorce or separate maintenance,⁴ and H and W were not members of separate households for the last six months of the year, neither will be considered “not married.” Neither H nor W will be

¹ These tax benefits are found in Code provisions such as: IRC §§ 21(e)(2) (child-care credit); 22(e)(elderly or disabled credit); 25A(g)(6) (Lifetime Learning, Hope Scholarship, and American Opportunity Tax Credits); 32(d) (EITC); 36C(f)(1) (adoption credit); 135(d)(3) (U.S. savings bond interest exclusion for college expenses); 137(e) (adoption exclusion); 163(h)(4)(A)(ii) (home mortgage interest deduction); and 221(e) (student loan interest deduction). Of these provisions, the EITC generally provides the largest benefit. The EITC is a refundable credit that in 2011 was potentially as high as \$3,094 for one qualifying child, \$5,112 for two qualifying children, and \$5,751 for three qualifying children. See IRS 1040 Instructions (2011) available at <http://core.publish.no.irs.gov/instrs/pdf/24811y11.pdf> (last visited Dec. 21, 2012).

² A married taxpayer who is considered as not married may file a separate return using a filing status of Single or, if the requirements of IRC § 2(b) are also met, as a Head of Household (HoH). IRC § 2(c) provides: “For purposes of this part, an individual shall be treated as not married at the close of the taxable year if such individual is so treated under the provisions of section 7703(b).”

³ See The Ohio State University Research and Innovation Communications, *Marital Separations an Alternative to Divorce for Poor Couples* (Aug. 13, 2012), describing research by Dmitry Tumin and Zhenchao Qian, available at <http://researchnews.osu.edu/archive/maritalsep.htm> (last visited Dec. 21, 2012), discussed below. As part of her 2001 recommendation to adopt a Uniform Definition of a Child (UDOC), the National Taxpayer Advocate recommended removing the “cost of maintaining a household test” in IRC § 7703(b). National Taxpayer Advocate 2001 Annual Report to Congress 78 (Key Legislative Recommendation: *Family Status Issues*).

⁴ Differently from a consensual separation agreement between the parties, a decree for separate maintenance refers to court-ordered payments by one spouse to another when they are no longer living together. *Black’s Law Dictionary*, 9th ed. (2009).

eligible to claim tax benefits such as EITC or the Lifetime Learning credit on their separate returns even if they otherwise meet the requirements for those tax benefits.

Even if H had moved out of the home in June rather than September, neither H nor W could claim tax benefits with respect to the children on their separate returns because they still would not meet the requirements of IRC § 7703 that would permit them to be considered as not married. Because the children would not be H’s qualifying children, H could not claim them as dependents on his separate return as required under IRC § 7703(b)(1).⁵ W did not furnish over half the cost of maintaining the household as required by IRC § 7703(b)(2). Thus, W would also not be considered as not married and would not be entitled to claim tax benefits such as EITC with respect to the children, or the Lifetime Learning credit, on her separate return.

RECOMMENDATION

The National Taxpayer Advocate recommends that Congress amend IRC § 7703(b) to remove the cost of maintaining a household test and permit taxpayers living apart on the last day of the tax year who have a legally binding separation agreement to be considered “not married.”

CURRENT LAW

The Dependency Exemption Provisions Have Rules for Divorced or Separated Parents that Since 1967 Have Recognized Written Separation Agreements.

As Congress noted in 1966, “[o]ne of the problems which arises most frequently under the individual income tax provisions of the Internal Revenue Code of 1954 is the question of which of divorced or separated parents is entitled to the deduction for personal exemption with respect to their children.”⁶ The general rule required a taxpayer to have provided over half the claimed dependent’s support.⁷ Section 152(e) was added to the Code to clarify how divorced or separated parents could meet this requirement.⁸ From its inception, the provision encompassed not only taxpayers who were separated under a decree of divorce or separate maintenance, but also those who were “separated under a written separation

⁵ W is the custodial parent because she had custody of the children for a greater part of the year. IRC § 152(e)(4)(A). Consequently, they will be treated as her qualifying children. IRC § 152(e)(1)(B). On her separate return, W is entitled to claim the dependency exemption for the children under IRC § 151.

⁶ H.R. Rep. No. 102, Comm. on Ways and Means, to accompany H.R. 6056, 90th Cong. 1st Sess. (Mar. 8, 1967).

⁷ Prior to its amendment by The Working Families Tax Relief Act, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169 (Oct. 5, 2004), IRC § 152(a) provided, in part, “For purposes of this subtitle, the term ‘dependent’ means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer).”

⁸ Pub. L. No. 90-78, 81 Stat. 191 (Aug. 31, 1967). The provision has been amended several times, often with the support of the National Taxpayer Advocate. See, e.g., National Taxpayer Advocate 2001 Annual Report to Congress 78 (Legislative Recommendation: *Family Status Issues*); National Taxpayer Advocate 2006 Annual Report to Congress 463 (Legislative Recommendation: *Uniform Definition of Qualifying Child*); National Taxpayer Advocate 2008 Annual Report to Congress 363 (Legislative Recommendation: *Simplify the Family Status Provisions*).

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agreement.”⁹ Section 152(e) was amended over the years, including in 2004 to reflect the passage of the Uniform Definition of a Child (UDOC), discussed below, but the notion that a written separation agreement served the same purpose as a decree of divorce or separate maintenance was left undisturbed.¹⁰ Today, only married taxpayers who have neither a court decree nor a written separation agreement are required to live in separate households for the last six months of the year in order to come within the bounds of IRC § 152(e).

A “Cost of Maintaining a Household” Test Was Indirectly Added to Tax Benefit Provisions such as EITC by a Definitional Statute.

The EITC was enacted as part of the Tax Reduction Act of 1975.¹¹ As the National Taxpayer Advocate recounted in 2001,

The Earned Income Tax Credit was to provide relief to workers with dependent children who pay little or no income taxes but were subject to the social security payroll tax on their earnings. Because it would increase their after-tax earnings, the credit, in effect, was anticipated to provide an added bonus or incentive for low income people to work, and therefore, of importance in inducing individuals with families receiving Federal assistance to support themselves. It was also expected to be effective in stimulating the economy because the low-income people were expected to spend a large fraction of their increased disposable incomes. Senate Report No. 94-36; 1st Session; H.R. 2166, March 17, 1975; II — Reasons for the Bill — Earned Income Tax Credit; Tax Reduction Act of 1975.¹²

The EITC statute requires that the qualifying child reside with the taxpayer for more than half the year at the taxpayer’s principal place of abode, which must be within the United States, and provides tie-breaker rules when the child is the “qualifying child” of more than one taxpayer.¹³ The statute has never required a taxpayer to provide more than half the cost of maintaining a household. However, as originally enacted, the EITC statute provided

⁹ IRC § 152(e)(1)(a) as enacted in 1967 applied if a child “receives over half of his support during the calendar year from his parents who are divorced or legally separated under a decree of divorce or separate maintenance, or who are separated under a written separation agreement.” In *Leggett v. Comm’r*, 329 F.2d 509, 510 (2d Cir. 1964), a decree of separate maintenance was contemplated by a Florida statute providing: “Alimony unconnected with divorce. If any of the causes of divorce set forth in § 65.04 shall exist in favor of the wife, and she be living apart from her husband, she may obtain alimony without seeking a divorce upon bill filed and suit prosecuted as in other chancery causes; and the court shall have power to grant such temporary and permanent alimony and suit money as the circumstances of the parties may render just; but no alimony shall be granted to an adulterous wife.”

¹⁰ IRC § 152(e)(1)(A)(iii). IRC § 152(e)(1) now applies if a child “receives over half of his 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.” The taxpayer with whom the child resided, or who had custody of the child, for the longest period of time during the year is generally entitled to the dependency exemption. IRC § 152(c)(4)(B)(i) (where the provisions of 152(e) do not apply); IRC § 152(e)(1)(B); (e)(4)(A).

¹¹ Pub. L. No. 94-12, § 204 (a), 89 Stat. 26, 30 (Mar. 29, 1975), adding new IRC § 43 (now IRC § 32).

¹² National Taxpayer Advocate 2001 Annual Report to Congress 78, 87 (Legislative Recommendation: *Family Status Issues*).

¹³ IRC § 32(c)(1)(A)(ii)(I) imposes the principal place of abode requirement; IRC § 32(c)(3)(A) defines “qualifying child” by cross referencing IRC §152(c), which includes tie-breaker rules that prevent the duplication of benefits.

that “in the case of an individual who is married (within the meaning of section 143), this section shall apply only if a joint return is filed for the taxable year.”¹⁴

The cited section 143, *Determination of Marital Status*, the predecessor of today’s IRC § 7703, contained the general rule that “[a]n individual legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.”¹⁵ In contrast to IRC § 152, section 143 did not contemplate a written separation agreement as serving the same purpose as a divorce decree. Section 143 also did not impose a household maintenance requirement.

In 1969, to “make provision for a family abandoned by one of the parents,” section 143 was amended by adding subsection (b), *Certain Married Individuals Living Apart*.¹⁶ Under the new rule, a taxpayer who was married but living apart from his or her spouse would be “considered as” not married if:

1. He or she filed a separate return and maintained as his or her home a household which constituted, for more than one-half of the taxable year, the principal place of abode of a dependent with respect to whom the taxpayer was entitled to a deduction for the taxable year under IRC § 151;
2. He or she furnished over half of the cost of maintaining the household during the taxable year; and
3. During the entire taxable year, his or her spouse was not a member of the household.¹⁷

Thus, the second and third requirements imposed new substantive requirements for married taxpayers to be “considered as” not married, and thereby eligible to claim tax benefits like EITC on a separate return. Section 143 was amended again in 1984 to require that the taxpayer not have been a member of the same household as his or her spouse for the last six months of the year, rather than for the entire tax year.¹⁸ The section was redesignated as IRC § 7703 in 1986.¹⁹

In the years following enactment of the EITC, other statutes provided important tax benefits, and required married taxpayers to file joint returns in order to claim them. Some

¹⁴ IRC § 43(d) (1975).

¹⁵ Section 143 was redesignated as IRC § 7703 in 1986 by Pub. L. No. 99-514, Tit. XIII, § 1301(j)(2)(A), 100 Stat. 2085, 2657 (Oct. 22, 1986).

¹⁶ Jt. Comm. on Internal Revenue Taxation, General Explanation of the Tax Reform Act of 1969, 219, 91st Cong. (Dec. 23, 1970).

¹⁷ IRC § 143, as amended by Pub. L. No. 91-172, § 802(b), 83 Stat. 487, 677 (Dec. 30, 1969).

¹⁸ Pub. L. No. 98-369, § 423, 98 Stat. 494, 799 (July 18, 1984). The rules for filing as HoH under IRC § 2 were also changed to require the taxpayer to maintain a household as the principal place of abode for a child for more than half the year, rather than for an entire year. Section 143 was then designated as IRC § 7703, which was amended over the years to reference IRC § 152 and to reflect some changes in terminology brought about by UDOC.

¹⁹ Section 143 was redesignated as IRC § 7703 in 1986 by Pub. L. No. 99-514, Tit. XIII, § 1301(j)(2)(A), 100 Stat. 2085, 2657 (Oct. 22, 1986).

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statutes contain their own “cost of maintaining a household” test.²⁰ Some, like EITC, do not have a “cost of maintaining a household” test, but like EITC, they cross reference IRC § 7703 for a definition of marital status.²¹ In this manner, the “cost of maintaining a household” test has been imposed on those provisions as well - by the definitional statute.

The Uniform Definition of a Child Simplified Five Related Code Provisions in 2004, but Did Not Affect IRC § 7703(b).

In 2004, enactment of a uniform definition of a qualifying child (UDOC) simplified five related provisions.²² The “support test,” which required taxpayers to show that they furnished more than half the support of their claimed dependents, was repealed as obsolete in most cases. Instead, a more pragmatic and less burdensome UDOC concept allowed claims as long as the “qualifying child” satisfies the three requisite tests of age, residency, and relationship to the taxpayer. The UDOC legislation applied to the dependency exemption,²³ the Child Tax Credit (CTC),²⁴ the Earned Income Tax Credit (EITC),²⁵ the Child and Dependent Care Credit (CDCC),²⁶ and Head of Household (HoH) filing status (collectively known as the “family status” provisions).²⁷ Despite a recommendation by the National Taxpayer Advocate, Congress did not apply UDOC to the determination of marital status under IRC § 7703.²⁸ Thus, the “cost of maintaining a household” test remains intact in IRC § 7703(b), even though that test and the “support” test do not now apply to most taxpayers.²⁹

²⁰ For example, IRC § 21(e)(4) requires a married taxpayer living apart from his or her spouse and filing a separate return to maintain a household and furnish over half the cost of maintaining the household to claim the child-care credit. IRC § 36C(f)(1) imposes the same requirements for the adoption credit by cross referencing to IRC § 21(e)(4), and not to IRC § 7703. IRC § 137(e) imposes the same requirement for the adoption exclusion by cross referencing to IRC § 36C(f), and not to IRC § 7703. In addition, IRC § 2(b)(1)(flush language) requires taxpayers to “maintain a household,” which means furnishing over half the cost of maintaining the household, to file as head of household.

²¹ See, e.g., IRC §§ 22(e)(elderly or disabled credit, cross-referencing IRC § 7703); 25A(g)(6) (Lifetime Learning, Hope Scholarship, and American Opportunity Tax Credits, cross-referencing IRC § 7703); 135(d)(3) (U.S. savings bond interest exclusion for college expenses, cross-referencing IRC § 7703); 221(e) (student loan interest deduction, cross-referencing IRC § 7703).

²² The Working Families Tax Relief Act, Pub. L. No. 108-311, § 201, 118 Stat. 1166, 1169 (Oct. 5, 2004). Congress made further revisions to UDOC in Pub. L. No. 109-135, § 404(a), 119 Stat. 2577, 2632 (Dec. 21, 2005), and Pub. L. No. 110-351, § 501, 122 Stat. 3949, 3979 (Oct. 7, 2008). The National Taxpayer Advocate recommended adopting UDOC in 2001. See National Taxpayer Advocate 2001 Annual Report to Congress 78 (Key Legislative Recommendation: *Family Status Issues*).

²³ IRC §§ 151, 152.

²⁴ IRC § 24(c)(1).

²⁵ IRC § 32(c)(3). The UDOC legislation also replaced the tie-breaker rules previously found in IRC 32(C)(1)(c) with those found in IRC § 152.

²⁶ IRC § 21(b)(1).

²⁷ IRC § 2(b)(1).

²⁸ IRC § 7703(b)(1).

²⁹ IRC § 2 imposes the home maintenance test. IRC §§ 152 and 21 had the child support test. See H.R. Conf. Rep. No. 108-696, accompanying H.R. 1308, the Working Families Tax Relief Act of 2004 (Sept. 23, 2004). IRC §§ 24 and 32 did not contain support tests, and the EITC requirements of age, relationship, and residency are now part of UDOC’s definition of a “qualifying child.” Under UDOC eligibility rules, a dependent must be either a “qualifying child” or a “qualifying relative.” IRC § 152(a). Because not all taxpayers’ living or family arrangements could satisfy the “qualifying child” tests, Congress retained the support and maintenance tests for satisfying the “qualifying relative” rules. See IRC § (d)(1)(C). For a more detailed description of the Qualifying Child and Qualifying Relative rules, see 2010 Annual Report to Congress 487 Most Litigated Issue: *Family Status Issues Under Internal Revenue Code Sections 2, 24, 32, and 151*.

As the National Taxpayer Advocate has observed, the new UDOC rules created winners and losers, which is a price of tax simplification.³⁰ However, IRC § 7703(b) is a definitional statute that has remained essentially unchanged since 1984, has indirectly been made a part of other statutes by virtue of cross referencing, and prevents taxpayers most in need of tax benefits from claiming them.

REASONS FOR CHANGE

Married taxpayers must file joint returns to be entitled to important tax benefits, and the provisions in IRC § 7703(b) that allow estranged taxpayers to be considered as not married may inappropriately limit the availability of those benefits to otherwise eligible taxpayers. Specifically, IRC § 7703(b) prevents a married taxpayer living apart from his or her spouse who by year-end has an enforceable separation agreement and custody of qualifying children for the greater part of the year from receiving a variety of tax benefits on a separate return. This is because IRC § 7703(b)(3), in contrast to the dependency exemption provisions, requires such individuals to live in a household separate from their estranged spouses for the last six months of the year to be considered as not married.

Even taxpayers who meet the six-month separation requirement may not be considered as “not married” because they cannot meet the “cost of maintaining a household” requirement in IRC § 7703(b)(2). This requirement disproportionately affects the very population intended to benefit from provisions such as EITC. In a long-term Ohio State University study of 7,272 people across the U.S., participants in the study were married at some point.³¹ The same people were surveyed every year from 1979 up to 1994 and every other year thereafter through 2008. Some study findings are:

- 15 percent of separations did not end in either divorce or reconciliation within 10 years;
- Couples in these prolonged separations tended to be racial and ethnic minorities, have young children, and have low family income and education;
- Those who remained separated are more disadvantaged than those who divorced;
- Those who separated without divorcing tended to have more children, compared to those who divorced.

As one of the study authors noted, “no-fault divorces reduced or eliminated separation as a prerequisite for divorce. That means people who have long-term separations now may

³⁰ National Taxpayer Advocate 2006 Annual Report to Congress 463 (Legislative Recommendation: *Uniform Definition of Qualifying Child*).

³¹ See The Ohio State University Research and Innovation Communications, *Marital Separations an Alternative to Divorce for Poor Couples* (Aug. 13, 2012), describing research by Dmitry Tumin and Zhenchao Qian, available at <http://researchnews.osu.edu/archive/maritalsep.htm> (last visited Dec. 21, 2012). The 7,272 study participants were drawn from the 12,686 participants in the National Longitudinal Survey of Youth of 1979, a nationally representative sample of men and women aged 14 to 22 in 1979.

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not have the financial or social resources to divorce.”³² U.S. Census data show that most children in mother-only or father-only households live with a parent in the labor force.³³

These working single parents who are too poor to divorce will not be eligible for tax benefits they need if they are also too poor to furnish more than half the cost of maintaining the household. For example, they may be recipients of federal or state assistance programs such as Temporary Assistance for Needy Families (TANF).³⁴ In fiscal year 2010 more than 1.8 million families on average received TANF assistance each month.³⁵ Only about 12 percent of TANF families had earned income, \$823 per month on average.³⁶ According to the U.S. Census Bureau, the median monthly housing cost is \$927.³⁷

Alternatively, some taxpayers live in multi-generational families (*i.e.*, those with two adult generations, those with three or more generations, or two skipped generations such as a grandparent and grandchild).³⁸ Members of multi-generational households pool resources and share costs as a means of meeting their economic needs.³⁹ While more than one in five young adults (ages 25 to 34) lived in multi-generational households in 2009, only 13.1 percent of whites did so, compared to 23.7 percent of blacks and 23.4 percent of Hispanics.⁴⁰

³² *Id.*, quoting Zhenchao Qian.

³³ See Julia Overturf Johnson, Robert Kominsky, Kristin Smith, and Paul Tillman, U.S. Census Bureau, *Changes in the Lives of U.S. Children: 1990-2000*, Table E4 (Nov. 2005), available at <http://www.census.gov/population/www/documentation/twps0078/twps0078.html> (last visited Dec. 21, 2012), reporting that “In 2000, a little over one-quarter of all children lived with a single parent, having increased 2.7 percentage points during the decade. A majority of children in single-parent families were living with a parent in the labor force.”

³⁴ Under the TANF program, states receive block grants to design and operate programs that accomplish one of the purposes of the TANF program: provide assistance to needy families so that children can be cared for in their own homes; reduce the dependency of needy parents by promoting job preparation, work and marriage; prevent and reduce unplanned pregnancies among single young adults; and encourage the formation and maintenance of two-parent families. See U.S. Dep’t of Health and Human Services, Office of Family Assistance, Temporary Assistance for Needy Families (TANF), available at <http://www.acf.hhs.gov/programs/ofa/programs/temporary-assistance-for-needy-families-tanf> (last visited Dec. 21, 2012). In the District of Columbia, applicants must answer “no” to all of the following questions in order to be eligible for assistance: “Will your household income be more than \$150 this month?”; “Do you have more than \$100 in cash or in the bank?”; and “Is your income this month more than your housing costs (rent and utilities)?” See Government of the District of Columbia Department of Human Services Income Maintenance Administration, *Combined Application for DC Medical Assistance Food Stamps Cash Assistance for the Disabled and Families with Children*, available at http://dhs.dc.gov/sites/default/files/dc/sites/dhs/publication/attachments/combinedform_eng1.pdf (last visited Dec. 21, 2012).

³⁵ The average monthly number of TANF families was 1,847,155 in fiscal year 2010. U.S. Dep’t of Health and Human Services, Office of Family Assistance, *Characteristics and Financial Circumstance of TANF Recipients, Fiscal Year 2010* (Aug. 8, 2012), available at <http://www.acf.hhs.gov/programs/ofa/resource/character/fy2010/fy2010-chap10-ys-final> (last visited Dec. 21, 2012). The average number of persons in TANF families was 2.4, including an average of 1.8 recipient children.

³⁶ *Id.*

³⁷ U.S. Census Bureau, 2011 American Housing Survey, table C-10-A0-Geography-United States: Housing Costs-All Occupied Units (National). Median housing costs vary by location. Within a metropolitan area in a central city, median monthly housing costs are \$924. Within a metropolitan area not in a central city, median monthly housing costs are \$1,064. Outside metropolitan areas, median housing cost are \$657 (values exclude “no-cash rent,” which the US Census Bureau describes as a housing unit owned by friends or relatives who live elsewhere and who allow occupancy without charge or rent-free units provided to compensate caretakers, ministers, tenant farmers, sharecroppers, or others. See *Definitions of Subject Characteristics*, available at http://www.census.gov/geo/lv4help/apen_bhous.html (last visited Dec. 21, 2012).

³⁸ See Rakesh Kochhar and D’Vera Cohn, *Fighting Poverty in a Tough Economy, Americans Move in with Their Relatives*, Pew Research Center 23 (Oct. 3, 2011).

³⁹ Generations United, in *Family Matters: Multigenerational Families in a Volatile Economy* 14 (2011), notes that “By pooling resources and sharing costs, multigenerational families can stretch food budgets and make big-ticket expenses such as rent and transportation.”

⁴⁰ Rakesh Kochhar and D’Vera Cohn, *Fighting Poverty in a Tough Economy, Americans Move in with Their Relatives*, Pew Research Center 23, 29 (Oct. 3, 2011).

According to Pew Research Center, while in a “traditional” household, the head of household typically accounts for 85.7 percent of income, in a multi-generational household the household head typically accounts for less than half (48.8 percent in 2009) of income.⁴¹ Just as no one family member is likely to earn more than half the household income in a multi-generational household, it may be that no one family member pays more than half the cost of maintaining the household. In that case, no member of the household would be able to meet the requirements of IRC § 7703.

Not only does IRC § 7703 not reflect the economic reality of families intended to benefit from provisions like EITC, it is not in keeping with the changes in related statutes brought about by UDOC legislation. Because the “support” test is no longer operative and tie-breaker rules prevent duplication of benefits, the additional “cost of maintaining a household” test is unnecessary and burdensome.

EXPLANATION OF PROVISION

The proposal would amend IRC § 7703 to remove the “cost of maintaining a household” test. The proposal would also amend IRC § 7703 to permit married individuals with legally binding separation agreements and who are not members of the same household by the end of the taxable year to be considered as not married. Consequently, they could file separate returns and one of them may be able to claim tax benefits such as EITC, if otherwise eligible. Removing the household maintenance test which disproportionately affects low income working parents and recognizing the validity of a written separation agreement of estranged spouses would provide greater consistency with related Code provisions. The proposal would allow one of the parents to claim important tax benefits that would otherwise be available to neither.

⁴¹ *Id.* at 46.