

COMMENTS

IT DEPENDS: PRIORITIZING FUNCTION OVER FORM TO EVALUATE A DEBTOR’S DEPENDENCY RELATIONSHIPS IN CONSUMER BANKRUPTCY

INTRODUCTION

Imagine that the character Richard O. Thornhill from *North by Northwest* found himself in personal bankruptcy. As the U.S. Trustee and the bankruptcy court examine his petition, they ask him about his income and expenses. He replies, “I’m an advertising man . . . I’ve got a job, a secretary, a mother, two ex-wives, and several bartenders dependent on me.”¹ Now the court must decide which, if any, of Thornhill’s dependency relationships are relevant to his bankruptcy petition.

Arguably, Thornhill is as dependent upon his job for income as his boss and secretary are for the work that he produces. His mother may be emotionally, financially, or physically dependent upon him. Thornhill’s ex-wives may depend on the alimony or child support they receive from him. Moreover, they may count on him to physically care for their shared children on occasion. Thornhill’s relationship with his bartenders could surely be characterized as interdependent—they rely on him for cash; he relies on them for stiff drinks. The U.S. Bankruptcy Code (“Code”) allows Thornhill to support his “dependents” in bankruptcy, but does not identify exactly who may be a dependent. Such relationships, however, may dictate the course of an individual debtor’s petition.

Without statutory instructions,² bankruptcy courts have not interpreted the word “dependent” uniformly. In some courts, a “dependent” is a person to whom the debtor owes a legal obligation of support, such as the debtor’s

¹ NORTH BY NORTHWEST (Metro-Goldwyn-Meyer 1959).

² The list of defined terms of art under the Code prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, 11 U.S.C. § 101 (2000), did not include an entry for “dependent.” The provision governing exemptions contained, and still contains, a partial definition of “dependent,” which “includes [the debtor’s] spouse, whether or not actually dependent.” *Id.* § 522(a)(1).

spouse or a minor, biological child.³ In others,⁴ a “dependent” is one who fits the *Black’s Law Dictionary* definition as “[o]ne who relies on another for support; one not able to exist or sustain oneself without the power or aid of someone else.”⁵ This dependent is someone who actually relies upon the debtor for support, but to whom the debtor may not owe a legal obligation of support, like grandchildren, godchildren, elderly parents, domestic partners, and any other dependent individuals unrelated to the debtor by blood or legal ties.⁶ Because bankruptcy courts have interpreted “dependent” differently, debtors with similarly situated dependency relationships are treated differently.

A similar pattern of inconsistent treatment arose when bankruptcy courts assessed the economic relationships in which the debtor was at least partially dependent on someone else.⁷ In some contexts, the court included as part of the debtor’s income financial support from a person upon whom she was dependent.⁸ In others, the court would not include money from a non-filing person in its assessment of the debtor’s income, even when the non-filing person contributed to the debtor’s maintenance.⁹ This different treatment regarding expenses and income did not arise from variances in state law or local practices that fall within the purview of the judges’ discretion.¹⁰ Rather, they stem from the very different biases and prejudices of different judges that dictate what each individual judge sees as a “valid” dependency relationship under the Code.¹¹

This Comment identifies these inconsistencies and offers a solution to them. Part I examines the way in which a debtor’s dependency relationships are implicated in bankruptcy law, both as it existed before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) and after. Because courts lacked a coherent paradigm to analyze dependency relationships, opinions from different courts resulted in different treatment of similarly situated debtors.¹² While BAPCPA draws some helpful distinctions to determine Congressional intent as to which dependency relationships qualify

³ See *infra* notes 93–106 and accompanying text.

⁴ See *infra* notes 107–45 and accompanying text.

⁵ BLACK’S LAW DICTIONARY 470 (8th ed. 2004).

⁶ See *infra* notes 107–45 and accompanying text.

⁷ See *infra* notes 61–62 and accompanying text.

⁸ See *infra* note 62 and accompanying text.

⁹ See *infra* note 61 and accompanying text.

¹⁰ See *infra* notes 61–62 and accompanying text.

¹¹ See *infra* notes 61–62 and accompanying text.

¹² See *infra* notes 61–62, 91–145 and accompanying text.

for protection in bankruptcy,¹³ it does not provide a complete method with which to analyze them. Thus, the treatment of dependency relationships under BAPCPA may remain unclear. Part II demonstrates Congress is not *similarly* indefinite about defining dependency relationships in other federal contexts. Part III shows relationships based on legal obligations of support are neither necessary nor sufficient to determine a debtor's actual dependency relationships. Part IV concludes, while BAPCPA attempted to make some positive changes with respect to a debtor's dependency relationships, ultimately it could perpetuate the pre-BAPCPA muddle. Thus, bankruptcy courts should take an expansive view of dependency relationships to account for a debtor's financial reality and ensure fairness.

I. ANALYZING A DEBTOR'S DEPENDENCY RELATIONSHIPS UNDER BAPCPA—THE GHOST OF BANKRUPTCY LAW PAST

Before BAPCPA went into effect, bankruptcy courts routinely evaluated the dependency relationships of individual debtors.¹⁴ They did so without statutory guidance as to the definition of “dependent” and without knowing whether Congress intended to protect the debtor's legal dependents or actual dependents.¹⁵ Thus, what may have appeared to be an uncontroversial concept when the Code was drafted—dependency—has become loaded with meaning and subject to varying interpretations depending on the biases of the judge.¹⁶ Additionally, similarly situated debtors with similar dependency relationships were treated differently in different courts. Although BAPCPA is now in effect, courts will continue to evaluate a debtor's dependency relationships without explicit statutory guidance.¹⁷

A. *The Dependency Relationships of Individual Debtors Are Implicated in Petitions Under Chapter 7 and Chapter 13*

In the course of any individual petition for bankruptcy, there are numerous instances when a court must evaluate a debtor's dependency relationships.¹⁸

¹³ See *infra* notes 32–35, 40–46, 49–51, 59, 63–91, 145–73 and accompanying text.

¹⁴ See *infra* notes 94–105 and accompanying text.

¹⁵ See *supra* note 2 and accompanying text.

¹⁶ See *infra* notes 91–145 and accompanying text.

¹⁷ See *infra* notes 63–190 and accompanying text.

¹⁸ *E.g.*, 11 U.S.C. § 101(10A) (2000) (providing the paradigm to calculate a debtor's current monthly income); *id.* § 521(g)(1)(B) (requiring the debtor to identify who, along with the debtor, contributes to the support of a dependent of the debtor); *id.* § 522(b) (allowing a debtor to exempt property from her estate if it is

This Comment will focus on the manner in which a debtor's dependency relationships are treated in the chapter 7 means test and the chapter 13 regular income and disposable income analyses.

1. *The Chapter 7 Means Test*

Chapter 7, or liquidation bankruptcy, provides relief for a debtor who cannot pay her debts as they come due.¹⁹ When she files for bankruptcy, the court appoints a trustee to collect and then liquidate the property of the bankruptcy estate.²⁰ The trustee then distributes the proceeds of liquidation to the debtor's creditors.²¹ After distribution, the court immediately and unconditionally discharges the debtor from any further liability to her creditors on her prepetition debt, regardless of whether her creditors received full satisfaction of their claims.²²

Before BAPCPA, bankruptcy courts had discretion to dismiss an individual petition for liquidation if granting such relief was a "substantial abuse" of chapter 7.²³ The old Code did not define "substantial abuse," and there was little guidance about the term in the legislative history.²⁴ The majority approach to substantial abuse examined the totality of the debtor's circumstances to determine whether a petition was filed in bad faith or with fraudulent intent.²⁵ Major components of the debtor's circumstances are (1)

used for support of a dependent); *id.* § 523(a)(2)(C)(ii)(II) (excluding from the definition of "luxury goods and services" goods or services that are reasonably necessary for the support or maintenance of a dependent of the debtor); *id.* § 524(c)(3)(B) (requiring that any reaffirmation agreement signed by the debtor not inflict an "undue hardship" upon a dependent of the debtor).

¹⁹ Ann Morales Olazábal & Andrew J. Foti, *Consumer Bankruptcy Reform and 11 U.S.C. § 707(b): A Case-Based Analysis*, 12 B.U. PUB. INT. L.J. 317, 324 (2003).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 325.

²³ 11 U.S.C. § 707(b).

²⁴ See Olazábal & Foti, *supra* note 19, at 327-29. There was, however, a statutory presumption the court should "grant[] the relief requested by the debtor." 11 U.S.C. § 707(b).

²⁵ Olazábal & Foti, *supra* note 19, at 333. Courts commonly examined factors such as

- (1) [w]hether the bankruptcy petition was filed because of sudden illness, calamity, disability, or unemployment;
- (2) [w]hether the debtor incurred cash advances and made consumer purchases far in excess of his ability to repay;
- (3) [w]hether the debtor's proposed family budget is excessive or unreasonable;
- (4) [w]hether the debtor's schedules and statement of current income and expenses reasonably and accurately reflect the true financial condition; and
- (5) [w]hether the petition was filed in good faith.

Green v. Staples (In re Green), 934 F.2d 568, 572 (4th Cir. 1991). This test applied to debtors in the First, Second, Fourth, Sixth, Seventh, and Tenth Circuits. Olazábal & Foti, *supra* note 19, at 333.

the income available to her (either her own, money contributed from someone upon whom she is dependent, or both) and (2) the cost of supporting those dependent upon her.²⁶

Under the pre-BAPCPA Code, the starting point for the substantial abuse analysis was the debtor's schedule of expenses, which she was required to file with the bankruptcy court.²⁷ The court would evaluate the expenses for "reasonableness."²⁸ Reasonableness was dictated by the nature of the expense, the amount of money claimed for it, and whom it benefited.²⁹ If the debtor claimed an expense for a dependent, the court would evaluate their relationship and the dependent's actual need for the money.³⁰ Thus, any court faced with a motion to dismiss for substantial abuse had to decide which of a debtor's dependency relationships were valid enough to recognize in bankruptcy.

Now, upon filing for chapter 7 relief, the debtor must show her petition is not an abuse—as opposed to a "substantial" abuse—of liquidation bankruptcy by demonstrating she does not have the ability to repay her debts.³¹ The debtor begins the means test calculations by identifying her current monthly income ("CMI").³² A debtor's CMI is the average of her monthly income "from all sources that the debtor receives," regardless of whether the income is taxable, and is derived during a specified six-month period.³³ It includes "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents" but excludes certain governmental benefits.³⁴ The debtor may then take certain allowed

²⁶ See *In re Green*, 934 F.2d at 572.

²⁷ 11 U.S.C.S. § 521.

²⁸ See *Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996).

²⁹ *Id.*

³⁰ *Id.*

³¹ 11 U.S.C.S. § 707(b) (2005). The relative wisdom of enacting and using a means test as a screening mechanism for liquidation petitioners, thoroughly debated in other works, will not be addressed here. Nor will this Comment describe the mechanics of calculating the debtor's income and expenses for purposes of the means test. See Eugene R. Wedoff, *Means Testing in the New 707(b)*, 79 AM. BANKR. L.J. 231 (2005), and Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191 (2005), for commentary on both topics.

³² 11 U.S.C.S. § 707(b)(2)(A).

³³ *Id.* § 101(10A)(A). If the debtor files the schedule of current income identified in § 521(a)(1)(B)(ii), the six-month period ends on the last day of the calendar month that immediately preceded her petition date. *Id.* § 101(10A)(A)(i). If she does not file the schedule, the six-month period ends on the date upon which her current income is determined by the court. *Id.* § 101(10A)(A)(ii).

³⁴ *Id.* § 101(10A)(B).

deductions.³⁵ If the debtor shows, after the deductions, her income is equal to or less than her state's median income for a family of her size, only the judge, U.S. Trustee, or bankruptcy administrator may file a motion seeking to have her petition dismissed as an abuse of chapter 7.³⁶ If the debtor shows she has insufficient disposable income under the means test to allow her to repay some or all of her debts, she may stay in liquidation bankruptcy,³⁷ absent other allegations of abuse.³⁸

Under BAPCPA, the debtor's allowed deductions from her CMI for purposes of the means test are only those items enumerated in § 707(b)(2)(A)(ii). Some expenses "shall" be included in the debtor's expenses while others are discretionary.³⁹ A debtor is entitled to deduct the allowed monthly expenses specified in the IRS-issued *National Standards and Local Standards*, as well as her actual monthly expenses for the categories identified as Other Necessary Expenses (also issued by the IRS).⁴⁰ These deductions may be taken for expenses paid to maintain "the debtor, *the dependents of the debtor*, and the spouse of the debtor in a joint case, if the spouse is not otherwise dependent."⁴¹ She may also claim, without contest, "reasonably necessary health insurance, disability insurance, and health savings account expenses for the debtor, the spouse of the debtor, or *the dependents of the debtor*."⁴² Further, the debtor may automatically deduct "reasonably necessary expenses incurred to maintain the safety of the debtor and *the family of the debtor* from family violence."⁴³

The debtor may take additional deductions if they are appropriate to her circumstances and petition. She may deduct any "actual expenses" that she has incurred and will continue to incur that are "reasonable and necessary for care and support of an elderly, chronically ill, or disabled *household member* or *member of the debtor's immediate family*" who is unable to pay for such

³⁵ See *infra* notes 39–46 and accompanying text.

³⁶ 11 U.S.C.S. § 707(b)(6). If this is the case, the means test does not apply to the debtor. *Id.* Moreover, no party has standing, except under certain circumstances, to challenge a chapter 7 petition brought by a veteran of the Armed Forces. *Id.* § 707(b)(7).

³⁷ *Id.* § 707(b)(2)(A)(i).

³⁸ *Id.* § 707(b)(3).

³⁹ *Id.* § 707(b)(2)(A)(ii)(I) (automatic deductions); *id.* § 707(b)(2)(A)(ii)(II)–(IV) (deductions that may be allowed, contingent upon the debtor's circumstances).

⁴⁰ § 707(b)(2)(A)(ii)(I).

⁴¹ *Id.* (emphasis added).

⁴² *Id.*

⁴³ *Id.*

reasonable and necessary expenses.⁴⁴ The debtor's "immediate family" includes the debtor's "parents, grandparents, siblings, children, and grandchildren of the debtor, *the dependents of the debtor*, and the spouse of the debtor in a joint case who is not a dependent."⁴⁵ The debtor may include in her expenses the "actual expenses for each *dependent child less than 18 years of age*, not to exceed \$1,500 per year per child" to attend elementary or secondary school, if the debtor documents why such expenses are "reasonable and necessary."⁴⁶

2. *The Chapter 13 Regular Income and Disposable Income Analysis*

Chapter 13, or rehabilitative bankruptcy, is available to individuals who wish to repay at least part of their debt.⁴⁷ It is also one alternative for a debtor who fails the means test.⁴⁸ To be eligible to file under chapter 13, or to convert her petition from one under chapter 7, a debtor must prove that she is an "individual with regular income."⁴⁹ An individual with regular income has an "income . . . sufficiently stable and regular to enable such individual to make payments under a [rehabilitation] plan."⁵⁰ This definition differs from the definition for CMI in that it does not explicitly include "income from all sources that the debtor receives."⁵¹ There is no indication in chapter 13 whether the "stable and regular" income accruing to the debtor must be entirely generated by the debtor alone or whether someone upon whom she is dependent can contribute.

The debtor begins the repayment process when she files a plan to adjust and reorganize her debt.⁵² That plan must pay all priority claims in full⁵³ and pay all claims within a class in full or equally on a pro rata basis.⁵⁴ Once the

⁴⁴ *Id.* § 707(b)(2)(A)(ii)(II) (emphasis added).

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* § 707(b)(2)(A)(ii)(IV) (emphasis added).

⁴⁷ Olazábal & Foti, *supra* note 19, at 323.

⁴⁸ 11 U.S.C. § 707(b)(1) (2000). If an individual debtor has more than \$307,675 in noncontingent, liquidated, unsecured debts and more than \$922,975 in noncontingent, liquidated, secured debts and fails the means test, she is ineligible to file under chapter 13 and must convert her petition to one under chapter 11. *Id.* § 109(e).

⁴⁹ *Id.* § 109(e).

⁵⁰ *Id.* § 101(30).

⁵¹ *Id.* § 101(30), (10A).

⁵² *Id.* § 1321; Olazábal & Foti, *supra* note 19, at 323.

⁵³ 11 U.S.C. § 1322(a)(2) (payment must be in full unless the claimholder agrees to lesser treatment). Section 502 governs the allowance of claims which are prioritized under § 507.

⁵⁴ *Id.* § 1322(a)(3).

debtor submits the plan, the court must hold a confirmation hearing at which any party in interest may object to its confirmation.⁵⁵

A court will confirm a plan over the objection of an unsecured creditor or the trustee if the plan requires that all of the debtor's "disposable income" be used to make payments to unsecured creditors.⁵⁶ "Disposable income," before BAPCPA, was defined in relevant part as "income which is received by the debtor and which is not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor."⁵⁷ Again without statutory guidance, the courts had to determine whether the debtor's dependents were appropriately eligible for protection in rehabilitation bankruptcy.⁵⁸

Under the revised Code, a debtor's disposable income is calculated by taking her CMI and subtracting "child support payments, foster care payments, or disability payments for a *dependent child* . . . to the extent reasonably necessary to be expended for such child" and "amounts reasonably necessary to be expended for the maintenance or support of the debtor or a *dependent of the debtor*."⁵⁹ Thus, Congress still requires the courts to evaluate a debtor's dependents as to eligibility for bankruptcy protection, but does not offer a mechanism to do so.

B. The Means Test and the Regular and Disposable Income Analyses Require a Court to Examine a Debtor's Income and Expenses in Light of Her Dependency Relationships

The amount of a debtor's income and expenses are directly related to her dependency relationships. Thus, every court evaluating a consumer bankruptcy petition must evaluate those relationships to determine the debtor's financial reality.

1. The Debtor's Income in Chapter 7 and Chapter 13 Before and After BAPCPA

An analysis of the debtor's income is fundamental to analyzing a petition under either chapter 7 or chapter 13. The old Code gave no guidance as to

⁵⁵ *Id.* § 1324.

⁵⁶ *Id.* § 1325(b)(1)(B).

⁵⁷ *Id.* § 1325(b)(2)(A).

⁵⁸ *See id.* § 1325(b)(2); *supra* note 2 and accompanying text.

⁵⁹ 11 U.S.C.S. § 1325(b)(2)(A)(i) (2005).

whether money from a source other than the debtor's own personal income could be considered part of her "regular income."⁶⁰ Some courts held the debtor's income was the money that only she generated, even if someone else upon whom the debtor was at least partially dependent made regular contributions to her living expenses.⁶¹ Conversely, other courts included such contributions as part of the debtor's income, recognizing the money was actually available to the debtor and would supplement her repayment plan.⁶²

The definition of CMI shows Congress chose to follow the court decisions that took a more realistic approach to the debtor's finances and included money available to her from an outside source in her income calculation.⁶³ The debtor's CMI is the average monthly income over the defined six-month period from "all sources that the debtor receives . . . without regard to whether such income is taxable income."⁶⁴ It includes "any amount paid by any entity other than the debtor . . . on a regular basis for the household expenses of the debtor or the debtor's dependents."⁶⁵ It is appropriate for the court to examine

⁶⁰ *E.g.*, *In re Browne*, 253 B.R. 854, 856 (Bankr. N.D. Ohio 2000).

⁶¹ *Rutherford v. William D. Ford Direct Loan Program (In re Rutherford)*, 317 B.R. 865, 876 n.6, 879 n.15 (Bankr. N.D. Ala. 2004) (rejecting parental contributions to debtor's income); *Norris v. Educ. Credit Mgmt. Corp. (In re Quarles)*, No. 02-40709-7, 2004 WL 2191608, at *1 (Bankr. D. Kan. Apr. 22, 2004); *Gulley v. DePaola*, 301 B.R. 361, 365 (Bankr. M.D. Ala. 2003) (rejecting debtor's attempt to show family members would help with repayment of debt); *In re Porter*, 276 B.R. 32, 38 (Bankr. D. Mass. 2002) (rejecting affidavits from debtor's family members, who had a financial stake in debtor's recovery, swearing to assist with repayment); *In re Browne*, 253 B.R. at 856 (rejecting income from the debtor's spouse); *In re Reese*, 236 B.R. 371, 376 (Bankr. N.D. Ohio 1999) (rejecting income from the debtor's spouse); *In re Tennis*, 232 B.R. 403, 406 (Bankr. W.D. Mo. 1999) (rejecting contribution to debtor's income made by her teenage sons); *Willey v. Willey (In re Willey)*, 198 B.R. 1007, 1015 (Bankr. S.D. Fla. 1996) (rejecting income from the debtor's domestic partner).

⁶² *Halper v. Halper (In re Halper)*, 213 B.R. 279, 284 (Bankr. D.N.J. 1997). Some decisions included income from a debtor's non-debtor spouse. *U.S. Dep't of Health & Human Servs. v. Smitley*, 347 F.3d 109, 114 (4th Cir. 2003); *Murphy v. Sallie Mae (In re Murphy)*, 305 B.R. 780, 794 (Bankr. E.D. Va. 2004); *Hall v. U.S. Dep't of Educ. Nat'l Payment Ctr. (In re Hall)*, 277 B.R. 882, 888 (Bankr. S.D. Ohio 2002) ("[T]here is no reason . . . why [the debtor's wife] cannot maintain a position as a receptionist and make a meaningful contribution to the household."); *In re Wilkenson*, 168 B.R. 626, 628 (Bankr. N.D. Ohio 1994); *In re Smith*, 157 B.R. 348, 351 (Bankr. N.D. Ohio 1993). Other decisions included income from a debtor's live-in domestic partner. *In re Crosswhite*, 148 F.3d 879, 889 (7th Cir. 1998); *Archibald v. United Student Aid Funds, Inc. (In re Archibald)*, 280 B.R. 222, 229 (Bankr. S.D. Ind. 2002); *Dennehy v. Sallie Mae (In re Dennehy)*, 201 B.R. 1008, 1010 (Bankr. N.D. Fla. 1996). Still other decisions included income supplied by a debtor's other family members. *In re Kras*, 331 F. Supp. 1207, 1208 (E.D.N.Y. 1971), *overruled on other grounds by United States v. Kras*, 409 U.S. 434 (1973); *Mannix v. Mannix (In re Mannix)*, 303 B.R. 587, 600 (Bankr. M.D. Pa. 2003); *In re Porter*, 276 B.R. at 38 (citing *In re Antoine*, 208 B.R. 17, 19 (Bankr. E.D.N.Y. 1997)); *Hoyle v. Pa. Higher Educ. Assistance Agency (In re Hoyle)*, 199 B.R. 518, 520 (Bankr. E.D. Pa. 1996); *Hill v. Hill (In re Hill)*, 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995).

⁶³ *See supra* note 62 and accompanying text.

⁶⁴ 11 U.S.C.S. § 101(10A)(A).

⁶⁵ *Id.* § 101(10A)(B).

the total monies available to the debtor filing for liquidation bankruptcy because individuals routinely pool resources with members of their household.⁶⁶ Nearly all such resources should be taken into account to maximize distribution to creditors.⁶⁷ Congress was overzealous, however, in making a debtor's CMI too inclusive by failing to define key terms and by basing the test entirely on her very recent financial history rather than on her current status and likely future.⁶⁸

While the debtor may exclude certain income under the actual means test, the initial definition of her CMI is overly broad. It captures as part of the debtor's income any child support payments for her children or the children of her spouse or partner.⁶⁹ This money is earmarked for the support of minor children who have done nothing to contribute to the debtor's bankruptcy and should not be forced to share with the debtor's creditors. Although a debtor may exclude money to support her dependent child according to certain IRS standards,⁷⁰ a child support payment is negotiated by two parents for the benefit of their child. They have already decided what is reasonably necessary for the child's support. If the court decides less money is reasonably necessary, will the obligor parent be obligated to pay less? Or will the obligor parent be forced to continue payments in the same amount as before? If the latter, part of the obligor's income will support the child and part will repay the debtor's creditors.

Further, the six-month period for averaging a debtor's income raises problems of its own because it focuses on the debtor's financial past rather than a more complete picture of her financial situation that includes her future.⁷¹ A debtor's income may not be constant and regular over the course of six months or even a year.⁷² Additionally, a debtor's CMI includes gifts of money from family members, or other supportive individuals, to help the debtor stay afloat during difficult financial times.⁷³ Such gifts may not continue, even if they were made regularly in the prior six months, if they were meant as triage for a struggling person. A postpetition debtor will have adjusted her debt, thus her benefactor might not continue the payments. The

⁶⁶ See *supra* note 62 and accompanying text; *infra* notes 202-05 and accompanying text.

⁶⁷ See DAVID G. EPSTEIN ET AL., BANKRUPTCY 2 (1993). Bankruptcy is a "debt collection system." *Id.*

⁶⁸ 11 U.S.C.S. § 101(10A)(A); see *infra* notes 71-90 and accompanying text.

⁶⁹ Wedoff, *supra* note 31, at 245.

⁷⁰ 11 U.S.C.S. § 707(b)(2)(A)(ii)(I); see *supra* notes 40-46 and accompanying text.

⁷¹ Wedoff, *supra* note 31, at 246.

⁷² *Id.*

⁷³ *Id.*

judge has no discretion to evaluate a debtor's finances in light of these circumstances, even though the debtor is required to file a declaration of any "reasonably anticipated increase in income or expenditures" during the twelve months after the filing date of her petition.⁷⁴ Additionally, if liquidation bankruptcy is a foreseeable possibility, gifts will likely be made in the form of goods purchased for the debtor rather than cash to avoid having the income counted towards a prospective debtor's CMI.⁷⁵

Moreover, a debtor who is seasonally employed, for example, has periods of high income and periods of low income over the course of a year and her CMI will reflect that variance.⁷⁶ Such a debtor may thus have an inflated CMI if she files at the end of her seasonal period of employment.⁷⁷ The same situation may arise if the debtor had a stable and regular source of income but then becomes unemployed.⁷⁸ If a seasonal worker has the ability to time to her bankruptcy petition, her CMI may be artificially low if she files at the end of her seasonal period of unemployment.⁷⁹ The same is true if a previously unemployed person finds a well-paying job close to the end of the six-month period, but files for bankruptcy anyway.⁸⁰ Because of its focus on the debtor's financial past, the six-month timeframe becomes either a trap for unwitting debtors or a bankruptcy planning tool for savvy debtors.⁸¹

Congress also neglected to define important terms within the definition of CMI. What are a debtor's "household expenses," and whose expenses are they? Under another federal paradigm, members of a "household" are those individuals living together and pooling resources.⁸² There is no requirement that they are related by blood or legal obligation.⁸³ It is also similar to the debtor's income for the purposes of CMI.⁸⁴ Is the same paradigm applicable to the "household expenses" of a bankruptcy petitioner? Who are the debtor's "dependents?" The interpretation of these terms will vary, depending on

⁷⁴ 11 U.S.C.S. § 521(a)(1)(B)(vi).

⁷⁵ See Wedoff, *supra* note 31, at 246.

⁷⁶ *Id.* at 249.

⁷⁷ *Id.*

⁷⁸ *Id.* at 250.

⁷⁹ *Id.* at 249.

⁸⁰ *Id.* at 250.

⁸¹ *Id.* at 249–50.

⁸² See *infra* notes 202-05 and accompanying text.

⁸³ See *infra* note 205 and accompanying text.

⁸⁴ 11 U.S.C. § 101(10A) (2000).

whether the judge deems the debtor's dependency relationships "valid" for purposes of bankruptcy.⁸⁵

The debtor's income is implicated in two aspects of a chapter 13 filing. First, a debtor is eligible to file for rehabilitation bankruptcy if she proves she is an "individual with regular income" that is "sufficiently stable and regular" to enable her to make payments under her rehabilitation plan.⁸⁶ Second, to be confirmed, the plan must provide that all of the debtor's projected "disposable income" be directed to repayment of her unsecured creditors.⁸⁷ Regular income and disposable income are defined differently.

The definition of "regular income" does not identify, with the specificity of the definition of CMI, whether income not generated by the debtor herself may be considered part of her regular income.⁸⁸ Do contributions from someone upon whom a debtor is dependent count? Is the test backward-looking, like the CMI analysis, or more complete and forward-looking? In contrast, the definition of "disposable income" is the debtor's CMI, which captures financial contributions from sources outside of the debtor herself, minus child support, foster care, or disability payments for a dependent child.⁸⁹ The exclusion from a debtor's disposable income of these payments for children is far more humane than the straight CMI definition.

If "regular income" does not include payments from an outside source, but "disposable income" does, a debtor might not be eligible to file under chapter 13 even though she has enough disposable income to repay her creditors.⁹⁰ To avoid such an absurd result, bankruptcy courts should require a debtor seeking to file under chapter 13 to show her "regular income" by using the "disposable income" analysis. Under this approach, her income reasonably includes cash contributions from outside sources but excludes payments earmarked for children. The courts should also take a more holistic view of the debtor's income and examine more than a six-month snapshot of the debtor's finances. This approach more realistically determines whether a debtor's income is "sufficiently stable and regular" such that she will be able to make payments under her rehabilitation plan.

⁸⁵ See *infra* notes 91–145 and accompanying text.

⁸⁶ 11 U.S.C. § 101(30); see *supra* notes 49–51 and accompanying text.

⁸⁷ 11 U.S.C. § 1325(b)(1)(B); see *supra* note 59 and accompanying text.

⁸⁸ Compare 11 U.S.C. § 101(30) with *id.* § 101(10A).

⁸⁹ *Id.* § 1325(b)(2). The debtor's chapter 13 CMI also determines the length of her repayment plan. *Id.* § 1322(d).

⁹⁰ Compare *id.* § 101(30) with *id.* § 1325(b)(2).

2. *The Debtor's Expenses in Chapter 7 and Chapter 13 Before and After BAPCPA*

Because the old Code did not define the term “dependent,” individual courts were left to apply varying definitions of the word when addressing petitions in chapters 7 or 13. Some courts held a debtor’s only valid dependents were those to whom she owed a legal obligation of support, like her biological child or spouse.⁹¹ Other courts held an individual who actually relied upon the debtor’s financial assistance was the debtor’s dependent, even if the debtor owed him no legal duty.⁹²

Some courts prioritized the debtor’s legal obligation to repay her creditors over the debtor’s relationships of actual dependency.⁹³ They focused on the debtor’s “choice” to support a person to whom she was not legally obligated.⁹⁴ They concluded a debtor’s “unsecured creditors should not be required to contribute to the voluntary support of family members who are not dependents of debtors.”⁹⁵

Cases abounded in which courts refused to allow debtors to claim as dependents those persons whom the debtors were not legally obligated to support.⁹⁶ One debtor had been caring for his four-year-old godson for two

⁹¹ *E.g.*, *In re Mastromarino*, 197 B.R. 171, 180 (Bankr. D. Me. 1996).

⁹² *E.g.*, *In re Attanasio*, 218 B.R. 180, 233 (Bankr. N.D. Ala. 1998).

⁹³ *In re Haddad*, 246 B.R. 27, 37 (Bankr. S.D.N.Y. 2000). Courts were more likely to exclude a debtor’s non-legal dependents from her budget when they found the debtor had not proved they were actually or completely dependent upon the debtor. *See, e.g.*, *In re Siemen*, 294 B.R. 276, 279–80 (Bankr. E.D. Mich. 2003); *In re Mastromarino*, 197 B.R. at 180 (observing the debtor had not been “forthcoming in assessing his personal finances”).

⁹⁴ *In re Mastromarino*, 197 B.R. at 180. Some courts narrowly construed “dependent” to include only legal dependents when a debtor petitions for discharge of educational debt or post-marital debt (under former § 524(a)(5) and (15)) because the inability-to-pay standard is higher for those obligations than it is for other forms of debt. *E.g.*, *Williams v. Educ. Credit Mgmt. Corp.* (*In re Williams*), 301 B.R. 62, 73 (Bankr. N.D. Cal. 2003) (“This Court has found no support for the notion that a minimal standard of living . . . should include voluntary assumption of non-dependent family members’ expenses without a legal obligation to do so.”); *Hall v. U.S. Dep’t of Educ. Nat’l Payment Ctr.* (*In re Hall*), 277 B.R. 882, 888 (Bankr. S.D. Ohio 2002) (voluntarily taking care of a godson does not take priority over repayment of a student loan); *see also supra* note 62 and accompanying text.

⁹⁵ *In re Richmond*, 144 B.R. 539, 542 (Bankr. W.D. Okla. 1992).

⁹⁶ *See In re Mastromarino*, 197 B.R. at 180 (prohibiting a debtor from claiming as dependents his live-in domestic partner and her four children because they were “unrelated housemates”); *Hoyle v. Pa. Higher Educ. Assistance Agency* (*In re Hoyle*), 199 B.R. 518, 521 (Bankr. E.D. Pa. 1996) (determining debtor’s adult children living at home were not her dependents); *Coveney v. Costep Servicing Agent* (*In re Coveney*), 192 B.R. 140, 144 (Bankr. W.D. Tex. 1996) (prohibiting a debtor seeking discharge of her educational loans from claiming her very ill mother as a dependent even though the debtor took full-time care of her); *In re Richmond*,

years before he filed his petition to discharge his educational debt.⁹⁷ The child's biological parents did not contribute to his living expenses.⁹⁸ The court acknowledged the debtor may have felt a moral obligation to care for his godson, but he would not be permitted to claim expenses for a child who was not his legal dependent.⁹⁹ Caring for his non-legal dependent did not take priority over the debtor's legal obligation to repay his student loan.¹⁰⁰

Although one court found a married couple filing for liquidation was actually supporting their two adult children and two young grandchildren, it dismissed their petition as a substantial abuse of chapter 7.¹⁰¹ The court called the debtors' support of their children and grandchildren "commendable," but refused to allow them to claim expenses to continue their commendable practice.¹⁰² The court speculated, without evidence, both adult children "could be contributing to the household expenses or even supporting themselves."¹⁰³

One court went so far as to deny a modification of a debtor's chapter 13 plan because of her postconfirmation marriage to a disabled man.¹⁰⁴ Despite her legal duty to support him, the court found that because she knew he was disabled before they married, she must have known that his disability would both limit his financial contribution to the household and increase her expenses.¹⁰⁵ As her choice to marry was voluntary, any difficulties she had in funding her plan payments because of their union were her own doing. Thus, she was not entitled to modification.¹⁰⁶

Other courts recognized that determining whether a person in a debtor's life is eligible for "dependent" status in bankruptcy is a "highly factual inquiry."¹⁰⁷ They understood a debtor did not act intentionally "to deprive [her] creditors or enrich [herself]" when she fulfilled a moral obligation to support a truly

144 B.R. at 542 (barring debtors from claiming grandchildren as dependents without investigating whether the grandchildren were actually dependent upon the debtors' financial contributions).

⁹⁷ *In re Hall*, 277 B.R. at 885.

⁹⁸ *Id.*

⁹⁹ *Id.* at 888.

¹⁰⁰ *Id.*

¹⁰¹ *In re Siemen*, 294 B.R. 276, 280 (Bankr. E.D. Mich. 2003).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *In re Nelson*, 189 B.R. 748, 751 (Bankr. D. Minn. 1995).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 751–52.

¹⁰⁷ *In re Bauer*, 309 B.R. 47, 50 (Bankr. D. Idaho 2004).

dependent person.¹⁰⁸ While creditors do have a legal right to be paid, bankruptcy suspends that right for some creditors because the debtor is often discharged without paying some or all of her debts in full.¹⁰⁹ An honest debtor, according to these courts, should not be punished for “providing *needed support* to ‘nonlegal’ dependents” even when such support is detrimental to her creditors.¹¹⁰ Some bankruptcy courts allowed a debtor to claim expenses for such non-legal dependents as the debtor’s parents or children peripherally related to the debtor.¹¹¹

Parents of an adult child owe her no legal duty of support.¹¹² Trustees or other parties in interest often challenged bankruptcy petitions that provided a measure of support for adult children of the debtor.¹¹³ Most courts agreed society “accepts as reasonable a parent’s own feeling of the moral imperative of assisting a willing child to obtain a higher education” and allowed debtors to budget for an adult child’s undergraduate tuition and expenses.¹¹⁴ A closer question arose when the child was over the age of majority and living at home, but not attending school.¹¹⁵ One bankruptcy court recognized the many structures of American families when it noted the historical practice and current reality that people live with and support relatives in need.¹¹⁶ The court found the debtor’s child, though over the age of eighteen, was his legitimate dependent in bankruptcy because he was a member of the debtor’s “genuine family unit.”¹¹⁷ The judge listed potential genuine family unit members to include consanguineous relatives, members “blended” in from a previous marriage of the husband or wife, foster children, or “a neighbor child escaping a bad situation at home.”¹¹⁸

¹⁰⁸ *In re Tefertiller*, 104 B.R. 513, 515 n.1 (Bankr. N.D. Ga. 1989); *see also In re Vansickel*, 309 B.R. 189, 199 (Bankr. E.D. Va. 2004).

¹⁰⁹ *In re Attanasio*, 218 B.R. 180, 233 (Bankr. N.D. Ala. 1998).

¹¹⁰ *Id.* (noting, however, “generosity to others must have limits”).

¹¹¹ *See infra* notes 113–14 and accompanying text.

¹¹² *See* HARRY D. KRAUSE ET AL., *FAMILY LAW: CASES, COMMENTS, AND QUESTIONS* 880–81 (5th ed. 2003).

¹¹³ *See Bard-Prinzing v. Higher Educ. Assistance Found. (In re Bard-Prinzing)*, 311 B.R. 219, 230 (Bankr. N.D. Ill. 2004); *In re Frank Gonzales*, 297 B.R. 143, 150–52 (Bankr. D.N.M. 2003); *In re Lee Gonzales*, 157 B.R. 604, 606 (Bankr. E.D. Mich. 1993); *In re Riegodedios*, 146 B.R. 691, 693 (Bankr. E.D. Va. 1992).

¹¹⁴ *In re Lee Gonzales*, 157 B.R. at 610. It seemed to be helpful if the child was enrolled at a “reasonably priced” state university rather than a private institution. *Id.*; *In re Riegodedios*, 146 B.R. at 693.

¹¹⁵ *In re Frank Gonzales*, 297 B.R. at 150.

¹¹⁶ *Id.* at 151.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

Some courts allowed debtors who married spouses with children from a previous marriage to provide support for their new stepchildren, although they had no obligation to do so.¹¹⁹ A court confirmed a debtor's modified chapter 13 plan because the debtor married a woman with a child from a previous marriage.¹²⁰ Suddenly his income had to provide for three people instead of one.¹²¹ The modified plan extended repayment from fifty-four to sixty months and reduced the dividend to creditors from 100% to 34%.¹²² Despite this detriment to the debtor's unsecured creditors, the court confirmed the plan.¹²³ The debtor's obligation of financial support to both his new wife and her child, which arose upon marriage, was "not intended to be superceded by the creditor's rights under the Code."¹²⁴

A decision from the Bankruptcy Appellate Panel of the First Circuit recently granted a debtor partial discharge of her educational debt in part because of her decision to care for her goddaughter and her goddaughter's brother.¹²⁵ She made the voluntary decision to assume responsibility for children whom she was not legally obligated to support.¹²⁶ The money she spent on them gave her "virtually no disposable income," thus her educational debt of over \$80,000 was discharged for undue hardship.¹²⁷ Another debtor petitioning for discharge of her educational loans lived with her three minor children and one grandchild.¹²⁸ Although the court observed she had no legal obligation to support her grandchild, it addressed the debtor's children and her grandchild collectively as her "dependents" throughout its opinion.¹²⁹

An adult child may owe her parents a legal duty of support.¹³⁰ Thus, some bankruptcy courts have honored the debtor's "choice" to care for her parent.¹³¹

¹¹⁹ Hill v. Hill (*In re Hill*), 184 B.R. 750, 755 (Bankr. N.D. Ill. 1995).

¹²⁰ *In re Walker*, 114 B.R. 847, 849 (Bankr. N.D.N.Y. 1990).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 850.

¹²⁴ *Id.*

¹²⁵ Educ. Credit Mgmt. Corp. v. Kelly, 312 B.R. 200, 208 (B.A.P. 1st Cir. 2004).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Roach v. United Student Aid Fund (*In re Roach*), 288 B.R. 437, 440 (Bankr. E.D. La. 2003).

¹²⁹ *Id.* at 437, 440-42, 447. Her petition was denied because she could not show her dire financial position would persist, but the court did not dispute the validity of the expenses she claimed for her grandchild. *Id.* at 447.

¹³⁰ Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709, 713-14 (2001).

¹³¹ Rutherford v. William D. Ford Direct Loan Program (*In re Rutherford*), 317 B.R. 865, 884 (Bankr. N.D. Ala. 2004).

This was especially true when the debtor's parent was entirely dependent upon the debtor financially or physically.¹³² The debtor in *In re Rutherford* took twenty-four hour care of her bedridden mother afflicted with multiple sclerosis.¹³³ The debtor lived with her mother and worked a minimum-wage job, returning home between shifts to feed, catheterize, and otherwise attend to her.¹³⁴ She could not get a higher paying job, for which she was qualified, because of her caretaking work.¹³⁵ The court found the debtor's mother was her dependent¹³⁶ because the debtor supported her mother directly via her modest income and indirectly by providing personal care services for which her mother would otherwise have to pay.¹³⁷

Even when a debtor's parents only partially rely upon financial contributions from her, some bankruptcy courts have allowed the debtor to claim them as her dependents.¹³⁸ One bankruptcy court confirmed a debtor's chapter 13 repayment plan when it included a monthly payment of \$199.01 to the debtor's mother who lived in another state.¹³⁹ The court concluded the amount was a reasonable expense for the debtor's dependent.¹⁴⁰ The debtor had been sending money to her mother for ten years so her mother could make payments on her mobile home.¹⁴¹ None of the debtor's siblings contributed to her mother's support.¹⁴² Similarly, in *In re Tracey*,¹⁴³ the court allowed joint debtors to continue supporting their elderly mother as a dependent in their chapter 13 plan.¹⁴⁴ She had been living in their second home in a neighboring state for thirty years, and her only other income was a modest social security check.¹⁴⁵

¹³² *Id.* at 883; *see also* Reid v. Sallie Mae Serv. Corp. (*In re Reid*), Bankr. L. Rep. (CCH) ¶ 80, 181 (Bankr. C.D. Ill. Sept. 21, 2004) (discharging educational debt in part based on a debtor's support of her eighty-five-year-old mother); Clay v. Westmar Coll. (*In re Clay*), 12 B.R. 251, 254 (Bankr. N.D. Iowa 1981) (discharging a debtor's student loans because he provided nearly all of the support for his retired parents even though they "could possibly have contributed" to household expenses).

¹³³ *In re Rutherford*, 317 B.R. at 872 n.5.

¹³⁴ *Id.* at 871–72.

¹³⁵ *See id.* at 883.

¹³⁶ *Id.*

¹³⁷ *Id.* at 882–84.

¹³⁸ *In re Bauer*, 309 B.R. 47, 53 (Bankr. D. Idaho 2004).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 49.

¹⁴² *Id.* at 51.

¹⁴³ 66 B.R. 63 (Bankr. D. Md. 1986).

¹⁴⁴ *Id.* at 67.

¹⁴⁵ *Id.* at 65.

The main expenses available to bankruptcy petitioners are listed in the *National Standards and Local Standards* published by the IRS.¹⁴⁶ IRS officers use these standards when determining the best way to collect unpaid taxes.¹⁴⁷ To determine how much of a delinquent taxpayer's income is available to pay unpaid taxes, the officers calculate the taxpayer's income and necessary living expenses.¹⁴⁸ A "necessary expense" is an expense that is "necessary to provide for a taxpayer's and his or her family's health and welfare and/or production of income. The expenses must be reasonable. The total necessary expenses establish the minimum a taxpayer and *family* needs [sic] to live."¹⁴⁹ The "Other Necessary Expenses" identified in the means test and allowed by the IRS must meet the same standard.¹⁵⁰

This definition, if imported for purposes of the Code, is still indeterminate. Who is part of a debtor's "family" for purposes of claiming expenses for them? Would a debtor's godchildren, grandchildren, and adult children count as part of her family, as they have in past bankruptcy precedent? A debtor's "family" could arguably be more narrowly construed than a debtor's "dependents." Should this definition even be used in bankruptcy? "Family" is used with respect to expenses for delinquent taxpayers—individuals who have deliberately wronged society by failing to pay taxes.¹⁵¹ Most individuals filing for bankruptcy are "honest but unfortunate debtors" who did not intend to defraud creditors.¹⁵² Thus, at a minimum, individual debtors should receive the benefit of the more expansive definition of "dependent" in § 152 of the U.S. Internal Revenue Code ("Tax Code").¹⁵³

Most enumerated deductions from a debtor's CMI in the means test mention a debtor's "dependents" or "family."¹⁵⁴ Some contain additional qualifying language to narrow the class of persons who may be a debtor's dependents.¹⁵⁵ The first listed qualifying expense is for health insurance

¹⁴⁶ 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2000).

¹⁴⁷ Wedoff, *supra* note 31, at 253.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (citing IRM § 5.15.1.7) (emphasis added).

¹⁵⁰ *Id.* at 261.

¹⁵¹ *Id.* at 253.

¹⁵² ELIZABETH WARREN & AMELIA WARREN TYAGI, THE TWO-INCOME TRAP: WHY MIDDLE-CLASS MOTHERS & FATHERS ARE GOING BROKE 79–80 (2003). Moreover, the petition will be dismissed if the court determines that it is fraudulent or filed in bad faith. 11 U.S.C. § 707(b)(3) (2000).

¹⁵³ Bankruptcy courts have used the Tax Code's definition of "dependent" to evaluate a debtor's dependency relationships in bankruptcy. See *infra* notes 193–94 and accompanying text.

¹⁵⁴ 11 U.S.C.S. § 707(b)(2)(A)(ii)(I)–(II), (IV) (2005); see *supra* notes 39–46 and accompanying text.

¹⁵⁵ 11 U.S.C.S. § 707(b)(2)(A)(ii)(I)–(II), (IV).

payments for a debtor's dependents and her spouse.¹⁵⁶ There is no indication of who may be a "dependent" of the debtor for purposes of this subsection,¹⁵⁷ but presumably the standards of the debtor's health insurance policy will govern; she cannot insure someone not permitted by the insurance company. The debtor may also exempt expenses reasonably necessary to protect her "family" from domestic violence.¹⁵⁸ Who is the debtor's "family?" Are they the same as her "dependents?" If, for example, a debtor is a woman divorced from a violent man, and she is now in a stable, committed lesbian relationship, is her partner part of her family? May the debtor claim expenses to keep her partner safe from the debtor's violent ex-husband, even though other federal, state, and local laws explicitly deny economic benefits to same-sex couples? Or is "family" restricted to the "traditional" ideal?¹⁵⁹

If the debtor's circumstances so require, she may claim as an expense her "actual expenses" that are "reasonable and necessary" to care for and support an "elderly, chronically ill, or disabled household member or member of the debtor's immediate family . . . who is unable to pay for such reasonable and necessary expenses."¹⁶⁰ The debtor's "immediate family" includes "parents, grandparents, siblings, children, and grandchildren of the debtor, the dependents of the debtor, and the spouse of the debtor in a joint case who is not a dependent."¹⁶¹ This allowance acknowledges the caretaking expenses debtors incur for dependents and, appropriately, allows them to continue to do so.

Nonetheless, the provision is flawed. While this list is the closest the Code comes to giving a complete definition of protected dependency relationships, it is still indeterminate.¹⁶² Who are the "dependents" of the debtor if not the list of individuals already enumerated in the statute? Including other "dependents" in this list of relations by blood and marriage indicates, at least for this subsection, Congress recognized individuals care for and support people who are not their legal or blood relatives. Perhaps the ever-increasing healthcare crisis spurred Congress to recognize this reality by prioritizing private subsidies of medical support over a creditor's right to be paid in full. Allowing

¹⁵⁶ *Id.* § 707(b)(2)(A)(ii)(I).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ See *infra* notes 237, 272 and accompanying text.

¹⁶⁰ 11 U.S.C.S. § 707(b)(2)(A)(ii)(II).

¹⁶¹ *Id.*

¹⁶² *Id.*

a debtor to continue medical support might just keep one more person off of the groaning rolls of Medicaid and Medicare.

This provision, however, is as backward-looking as the CMI analysis. The debtor must already be making supplemental payments to an elderly, chronically ill, or disabled person to include them as a future expense.¹⁶³ If a debtor anticipates a need to provide this type of care, the court has no discretion to take the expense into account for purposes of the means test.¹⁶⁴ The debtor might convince the court to include imminently-prospective health care payments for members of the protected class under the “special circumstances” provision in § 707(b)(2)(B).¹⁶⁵ This provision also eliminates protection for other adult relatives of a debtor who, while not elderly, disabled, or chronically ill, rely on financial contributions from the debtor to survive, and which were allowed by some courts before BAPCPA.¹⁶⁶

Next, the debtor may claim as an expense her actual expenses, up to \$1500, for the primary and secondary education of each of her dependent children under the age of eighteen.¹⁶⁷ This aspect of the Code is troublesome because it would appear to exclude any educational expenses for children over eighteen. They might not be included as a debtor’s dependents in a court that allows only legal dependents to “count.”¹⁶⁸ It would wipe out precedent allowing debtor parents to provide appropriate support for their children over eighteen who are in college.¹⁶⁹ A college education is a building block for a successful, financially stable life in the United States, and many students would not be able to afford it without financial support from their parents. If a court cuts off that support because the parents are in bankruptcy, it may unjustly punish a college student by forcing her to drop out of school.

The debtor’s disposable income in chapter 13 is decreased by the expenses she is allowed to deduct “for the maintenance or support of the debtor or for a dependent of the debtor.”¹⁷⁰ These expenses may only be deducted if they are “reasonably necessary.”¹⁷¹ If the debtor’s CMI, multiplied by twelve, is

¹⁶³ Wedoff, *supra* note 31, at 266.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* As a practical matter, debtors may attempt to use the “special circumstances” provision frequently because of the very rigid parameters of the means test.

¹⁶⁶ *See supra* notes 139–45.

¹⁶⁷ 11 U.S.C.S. § 707(b)(2)(A)(ii)(IV).

¹⁶⁸ *See supra* notes 93–106 and accompanying text.

¹⁶⁹ *See supra* notes 114–15 and accompanying text.

¹⁷⁰ 11 U.S.C.S. § 1325(b)(2)(A)(i).

¹⁷¹ *Id.* § 1325(b)(2).

greater than the median income of her state for her family size, her “reasonably necessary” expenses shall be determined according to the expenses allowed a petitioner under the means test in § 707(b)(2).¹⁷² If the debtor’s CMI, multiplied by twelve, is equal to or less than the median income of her state for her family size, however, her expenses remain those reasonably necessary for the maintenance or support of the debtor or her dependent.¹⁷³

The language of the statute applicable to a debtor at or below her state’s median income leaves open the same gap that existed before BAPCPA and leaves much to the discretion of the court.¹⁷⁴ Who may be the debtor’s dependents? What is reasonably necessary to support them? Individual judges may continue to assess a debtor’s dependency relationships according to the family structure they deem most appropriate. Because some provisions of the Code narrow the class of individuals to be considered a debtor’s dependents, the provisions that leave it unqualified should be read broadly.¹⁷⁵

II. CONGRESS PROVIDES STATUTORY INSTRUCTION ON DEPENDENCY RELATIONSHIPS IN OTHER CONTEXTS, AND COURTS APPLY THOSE INSTRUCTIONS WITHOUT RESORTING TO BRIGHT-LINE TESTS

Other federal paradigms, such as the Tax Code and jointly administered federal and state welfare programs, establish and privilege dependency relationships in different ways.¹⁷⁶ They outline different parameters of dependency relationships an applicant for benefits must show. Courts or administrative agencies are required to assess the proof offered by each applicant, according to the differing definitions, to determine whether she will receive the protection of the law or program.¹⁷⁷ BAPCPA uses some terms of art from these programs, thus evaluating a debtor’s dependency relationships in light of these paradigms is instructive to assist in filling in the gaps in the Code.¹⁷⁸

¹⁷² *Id.* § 1325(b)(3); *supra* notes 32–46, 146–69 and accompanying text.

¹⁷³ 11 U.S.C.S. § 1325(b)(2)(A)(i).

¹⁷⁴ *See supra* notes 57–58 and 91–145 and accompanying text.

¹⁷⁵ *See* 11 U.S.C.S. § 707(b)(2)(A)(ii).

¹⁷⁶ *See infra* notes 177–213 and accompanying text.

¹⁷⁷ *See infra* notes 177–213 and accompanying text.

¹⁷⁸ *See infra* notes 194–95 and accompanying text.

A. *The Tax Code*

Congress allows individuals to exempt from their taxable income certain dollar amounts for the benefit of their dependents.¹⁷⁹ A “dependent,” for the purposes of the Tax Code, is a “qualifying child” or a “qualifying relative.”¹⁸⁰ A “qualifying child” is “a child of the taxpayer or a descendant of such a child, or a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative.”¹⁸¹ “Child” itself is further defined as “a son, daughter, stepson, or stepdaughter”¹⁸² or an “eligible foster child” of the taxpayer.¹⁸³ A “qualifying relative” is a person who bears any one of the following relationships to the taxpayer:

- (A) A child or a descendant of a child.
- (B) A brother, sister, stepbrother, or stepsister.
- (C) The father or mother, or an ancestor of either.
- (D) A stepfather or stepmother.
- (E) A son or daughter of a brother or sister of the taxpayer.
- (F) A brother or sister of the father or mother of the taxpayer.
- (G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.
- (H) An individual . . . who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer’s household.¹⁸⁴

Accordingly, a taxpayer may claim as a dependent a relative or non-relative to whom she owes no legal duty of support.¹⁸⁵ Congress restricted the source

¹⁷⁹ 26 U.S.C. §§ 1, 151, 152 (2000). The income generated from individual tax returns in 2003 provided the largest share of the total gross collections for that year. Tax Stats at a Glance (2004), <http://www.irs.gov/taxstats/article/0,,id=102886,00.html> (last visited Oct. 19, 2005).

¹⁸⁰ 26 U.S.C.S. § 152(a) (2005).

¹⁸¹ *Id.* § 152(c)(2)(A)–(B). Further, the child must not have provided more than one-half of her own support in “the calendar year in which the taxable year of the taxpayer begins.” *Id.* § 152(c)(1)(D). She must have the same “principal place of abode” as the taxpayer for more than half of the taxable year. *Id.* § 152(c)(1)(B). Last, the child must be less than nineteen years old or less than twenty-four years old, if she is a student. *Id.* § 152(c)(3)(A)(i)–(ii).

¹⁸² *Id.* § 152(f)(1)(A)(i). Legally adopted children are treated as children related to their parents by blood. *Id.* § 152(f)(1)(B).

¹⁸³ *Id.* § 152(f)(1)(A)(ii).

¹⁸⁴ *Id.* § 152(d)(2). Further, the gross income earned by a qualifying relative in the calendar year in which the taxable year begins must be less than \$2000. *Id.* §§ 152(d)(1)(B), 151(d)(1). The taxpayer claiming a deduction for a qualifying relative must have provided more than one-half of the relative’s support for the calendar year in which the taxable year begins. *Id.* § 152(d)(1)(C).

of its revenue by allowing exemptions for non-traditional dependency relationships arising outside of, or in addition to, the support obligations of the traditional marital family.¹⁸⁶ Exemptions for this kind of support easily could be abused without a mechanism to prove the bona fides of the support relationship.¹⁸⁷ Providing these exemptions makes monitoring individual returns more difficult than it would be if exemptions for legal dependents were the only ones allowed.¹⁸⁸ Yet Congress recognized American families are built upon these extended-family networks, not just upon relationships that create a legal duty of support.¹⁸⁹ The Bankruptcy Code, designed to govern private relationships between creditors and debtors, should offer no less protection for such dependency relationships than the statute raising revenue for the public fisc.¹⁹⁰

When a taxpayer seeks an exemption for a dependent, she has the burden of showing that her purported dependent lived with her for the taxable year and that she provided more than half of the dependent's support.¹⁹¹ This feature of the Tax Code shows that courts and administrative bodies routinely examine the economics of relationships to determine dependency without resorting to a bright-line, "legal dependents only" test.¹⁹² One court ultimately concluded that "because the restrictive definition in 26 U.S.C. § 152 was not replicated by Congress in [the Bankruptcy Code], a debtor's inability to meet the requirements for establishing that a person is a dependant [sic] for income tax purposes is not controlling or determinative under [the Bankruptcy Code]."¹⁹³ Other bankruptcy judges, however, have used the Tax Code's definition of "dependent" to determine whether a particular debtor should be granted living expenses for an individual whom she was not obligated to support.¹⁹⁴ The Tax Code shows the kinds of relationships Congress is willing to privilege and those it will not; without similar restrictions on who may be a dependent for

¹⁸⁵ *Id.* § 152(a)(1)–(2).

¹⁸⁶ *In re Tracey*, 66 B.R. 63, 66 (Bankr. D. Md. 1986).

¹⁸⁷ *See id.*

¹⁸⁸ *Id.*

¹⁸⁹ *See* 11 U.S.C.S. § 152.

¹⁹⁰ *Cf. In re Smith*, 269 B.R. 686, 689–90 (Bankr. W.D. Mo. 2001) (permitting a debtor to claim as a dependent one who fits the Tax Code definition).

¹⁹¹ 11 U.S.C.S. § 152(d)(2)(H); *Turecamo v. Comm'r*, 554 F.2d 564, 569 (2d Cir. 1977).

¹⁹² *See Shackelford v. United States (In re Shackelford)*, 3 B.R. 42, 45 (Bankr. W.D. Mo. 1980) (allowing a single woman to claim a tax deduction for her live-in boyfriend because the facts of their relationship showed he qualified as her "dependent").

¹⁹³ *In re Bauer*, 309 B.R. 47, 52 (Bankr. D. Idaho 2004).

¹⁹⁴ *See In re Smith*, 269 B.R. at 689; *In re Tracey*, 66 B.R. 63, 66–67 (Bankr. D. Md. 1986).

purposes of bankruptcy, courts should privilege relationships of actual dependency according to broader principles.¹⁹⁵

B. Welfare Programs

The manner in which a society spends its money is as profound a statement of its values as the manner in which it collects it. Welfare initiatives share some characteristics with federal bankruptcy protection,¹⁹⁶ although bankruptcy is not normally considered public assistance.¹⁹⁷ The federal government allocates federal tax revenues to the states for social welfare initiatives.¹⁹⁸ Federal revenue is matched by each state and then distributed to eligible applicants.¹⁹⁹ Two such initiatives are the Food Stamp Program (“FSP”)²⁰⁰ and Temporary Assistance for Needy Families (“TANF”).²⁰¹ The FSP and TANF privilege different dependency relationships.

The FSP privileges the dependency relationships that arise when individuals, related or not, share a common “household.”²⁰² “Household” is a term also used in the definition of CMI²⁰³ and the provision of the means test that allows a debtor to deduct her actual expenses for a dependent’s health care.²⁰⁴ According to the FSP, “[a] household may be one person living alone, a family, or several, unrelated individuals living together who routinely

¹⁹⁵ *In re Bauer*, 309 B.R. at 51; *In re Tracey*, 66 B.R. at 67. The court expanded on the decision in *Tracey* to allow the petitioner to use the “commonly understood meaning” of “dependent” to claim her mother as a dependent. *In re Bauer*, 309 B.R. at 51.

¹⁹⁶ See *United States v. Kras*, 409 U.S. 434, 446 (1973) *superseded by statute on other grounds*, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549.

¹⁹⁷ See A. Mechele Dickerson, *Bankruptcy Reform: Does the End Justify the Means?*, 75 AM. BANKR. L.J. 243, 270–71 (2001).

¹⁹⁸ Indicators of Welfare Dependence: Annual Report to Congress, 2003 (2003), <http://aspe.hhs.gov/hsp/indicators03/ch1.htm> [hereinafter *Indicators of Welfare Dependence*] (last visited Oct. 19, 2005).

¹⁹⁹ *Food Stamp Program: Frequently Asked Questions* (2005), <http://www.fns.usda.gov/fsp/faqs.htm> [hereinafter *Food Stamp Program FAQs*] (last visited Oct. 19, 2005).

²⁰⁰ *Benefits Report*, <http://govbenefits.gov/govbenefits/benefits/report.jhtml?dispatch=federal&bid=613&oid=6> (last visited Oct. 27, 2005).

²⁰¹ See U.S. Dep’t of Health & Human Servs., *Office of Family Assistance* (2004), http://www.acf.hhs.gov/opa/fact_sheets/tanf_factsheet.html [hereinafter *Office of Family Assistance*] (“TANF provides assistance and work opportunities to needy families by granting States the federal funds and wide flexibility to develop and implement their own welfare programs.”) (last visited Nov. 14, 2005).

²⁰² *Food Stamp Program: Fact Sheet on Resources, Income, and Benefits* (2005), http://www.fns.usda.gov/fsp/applicant_recipients/fs_Res_Ben_Elig.htm (last visited Oct. 19, 2005).

²⁰³ 11 U.S.C.S. § 101(10A)(B) (2005).

²⁰⁴ *Id.* § 707(b)(2)(A)(ii)(II).

purchase and prepare meals together.”²⁰⁵ This aspect of the program recognizes individuals do not form relationships of caretaking and dependency only along the lines of traditional legal obligations. In contrast, TANF disregards “households” and instead distributes benefits based on “family” status,²⁰⁶ a term used in the IRS’s Standards for expenses adopted by the means test²⁰⁷ and the provision allowing a debtor to claim expenses to protect herself and her family from violence.²⁰⁸ “Families” in TANF are people related by marriage, blood, or adoption.²⁰⁹

The goal of the FSP is to “ensure that [low-income households] have access to a healthy diet.”²¹⁰ The budget for the FSP in fiscal year 2004 was \$27.2 billion.²¹¹ This enormous expenditure shows a Congressional commitment to providing the basic human need of food to Americans with the lowest income. TANF beneficiaries, on the other hand, receive general cash assistance for expenses other than food.²¹² TANF’s budget for fiscal year 2004 was \$10.2 billion less than the FSP’s budget in the same year.²¹³ Food is a basic necessity for survival, but additional cash assistance may not be. Thus, Congress may have provided a more expansive paradigm for assessing dependency relationships to provide the most basic need for more people.

The Tax Code, the FSP, and TANF privilege different dependency relationships according to varying mandates from Congress.²¹⁴ The Bankruptcy Code, however, uses a hodgepodge of language from these paradigms to describe dependency relationships,²¹⁵ which leads to uncertainty.

²⁰⁵ The Food Stamp Program in Georgia (2002), http://dfcs.dhr.georgia.gov/DHR-DFCS/DHR-DFCS_CommonFiles/11279235Food_Stamp_Program_in_Georgia.pdf [hereinafter The Food Stamp Program in Georgia] (last visited Oct. 19, 2005).

²⁰⁶ Indicators of Welfare Dependence, *supra* note 198, Endnotes.

²⁰⁷ 11 U.S.C.S. § 707(b)(2)(A)(ii)(I) (allowing a debtor to deduct reasonable and necessary expenses to maintain the safety of the debtor or the debtor’s “family”).

²⁰⁸ *Id.*

²⁰⁹ *See Office of Family Assistance, supra* note 201.

²¹⁰ *Food Stamp Program FAQs, supra* note 199.

²¹¹ *See id.*

²¹² *See Office of Family Assistance, supra* note 201.

²¹³ *Id.*

²¹⁴ *See supra* notes 179–211 and accompanying text.

²¹⁵ *E.g.*, 11 U.S.C.S. § 707(b)(2)(A)(ii)(I)–(II), (IV) (2000); *see supra* notes 34, 40–46, 49–51, 56, 59 and accompanying text.

III. EXISTING PATTERNS OF SOCIAL BEHAVIOR SHOW RELYING ON A PERSON'S LEGAL OBLIGATIONS OF SUPPORT TO DETERMINE HER DEPENDENCY RELATIONSHIPS IS BOTH OVER-INCLUSIVE AND UNDER-INCLUSIVE

The nature of interpersonal relationships, including marriage, cohabitation, and intergenerational living, continues to evolve.²¹⁶ Bankruptcy courts must account for both a debtor's constitutional right to marry and the reality of the changing nature of marriage and interpersonal commitments of support.

A. *The Fundamental Freedom to Marry*

Americans in opposite-sex relationships have a fundamental right to marry whom they choose.²¹⁷ The nature of the marriage, once entered, however, has shifted over time.²¹⁸ Marriage has evolved from being a legal status imposed by the state upon the couple to more closely resemble a personal agreement between two individuals.²¹⁹ In fact, some people choose to forego marriage and state intervention altogether in favor of having a purely personal committed relationship.²²⁰ Others, like same-sex couples, are forced to do so because the law will not allow them to marry.

Some bankruptcy courts have opined that ascribing some or all of a non-debtor spouse's income to the debtor for purposes of determining the debtor's income, as the definition of CMI does, might infringe on a debtor's fundamental right to marry.²²¹ The freedom to marry was first explicitly articulated in *Loving v. Virginia*.²²² Chief Justice Warren observed marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free [persons] . . . [and] fundamental to our very existence and survival."²²³ However, not every state statute relating to the "incidents of or prerequisites for marriage" infringes on that fundamental right.²²⁴ Instead, "reasonable regulations that do not significantly interfere with decisions to enter into the

²¹⁶ MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 97–108 (2004).

²¹⁷ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

²¹⁸ FINEMAN, *supra* note 216.

²¹⁹ See A. Mechele Dickerson, *Family Values and the Bankruptcy Code: A Proposal to Eliminate Bankruptcy Benefits Awarded on the Basis of Marital Status*, 67 *FORDHAM L. REV.* 69, 73–83 (1998) [hereinafter Dickerson, *Family Values*].

²²⁰ See *infra* notes 259–67 and accompanying text.

²²¹ *In re Reese*, 236 B.R. 371, 376 (Bankr. N.D. Ohio 1999).

²²² 388 U.S. 1 (1967).

²²³ *Id.* at 12.

²²⁴ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

marital relationship may legitimately be imposed.”²²⁵ Indeed, the right to marry is, and has long been, subject to definition and limitation by state law.²²⁶

Unlike statutes that infringe upon a person’s freedom to marry or divorce, there are no constitutional rights implicated by the “economic and social welfare” legislation that comprises the Code.²²⁷ In *United States v. Kras*, the Supreme Court held bankruptcy is a legislative creation,²²⁸ not a fundamental right like the freedom to marry.²²⁹ The distinction is marriage and marital dissolution are under the exclusive control of the state,²³⁰ but a petition under the Code is not the only way to resolve problematic debtor-creditor relationships.²³¹

Because the right to marry is fundamental and the right to file for bankruptcy is not, some bankruptcy courts were understandably hesitant to infringe upon a debtor’s right to marry using bankruptcy law.²³² According to one court, “requiring a new spouse to shoulder a debtor’s premarital indebtedness, by precluding the debtor from filing a chapter 7 case because of the *spouse’s* income, would create a disincentive for someone to marry an individual who has significant unsecured indebtedness,” essentially imposing a “reverse dowry” upon a debtor.²³³ The definition of CMI, however, does not infringe on a debtor’s right to marry because it does not “significantly interfere with decisions to enter into the marital relationship.”²³⁴ Rather, the CMI calculation analyzes the debtor’s economic situation without regard to her marital status by capturing income available to a debtor from all sources, not just those received from a spouse.²³⁵ Although there are other problematic

²²⁵ *Id.*

²²⁶ *Id.* at 392 (Stewart, J., concurring). Limitations and prohibitions include allowing only persons of the opposite sex to marry, prohibiting closely consanguineous persons from marrying, establishing a minimum age to marry, and criminalizing bigamy. *Id.*

²²⁷ *United States v. Kras*, 409 U.S. 434, 446 (1973) *superseded by statute on other grounds*, Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549. Further, a statute may survive Constitutional scrutiny even if it significantly interferes with the exercise of the fundamental right to marry if it “is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.” *Zablocki*, 434 U.S. at 388.

²²⁸ *Kras*, 409 U.S. at 447.

²²⁹ *Id.* at 445.

²³⁰ *Id.* at 443.

²³¹ *Id.* at 445, 450 (Burger, C.J., concurring). *But see id.* at 455 (Stewart, J., dissenting); 462 (Marshall, J., dissenting).

²³² *In re Reese*, 236 B.R. 371, 376 (Bankr. N.D. Ohio 1999).

²³³ *Id.*

²³⁴ *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978).

²³⁵ 11 U.S.C.S. § 101(10A) (2005).

aspects of the calculation of a debtor's CMI, it neither promotes nor discourages marriage.²³⁶

B. The Changing Nature of Interpersonal Relationships

Some politicians and social commentators would hold the “traditional” family (a marital couple of one man and one woman with the children of their union) to an unchanging ideal.²³⁷ Yet both history and current trends in American culture show this archetype never was a universally-accepted familial arrangement.²³⁸ Instead, it is only one of the many ways emotionally committed persons organize their relationships.²³⁹

1. The Evolution of Marriage

At early common law, the act of marriage changed the legal status of the previously individual man and woman.²⁴⁰ The law imposed upon the husband a duty to support his wife; she had the reciprocal duty to obey her husband and care for his home and children.²⁴¹ The two were considered “merged” in the eyes of the law such that the wife became the property of her husband and lost any control over her property, her income, and even her body.²⁴² The state determined and imposed the rights and obligations owed to each party upon marriage, regardless of their independent wishes.²⁴³

The state viewed marriage as a permanent commitment and would allow only fault-based divorce.²⁴⁴ “Faults” allowing dissolution were offenses committed not against a spouse, but against the marriage itself.²⁴⁵ Faults

²³⁶ See *supra* notes 234–35.

²³⁷ FINEMAN, *supra* note 216, at 81–88 (discussing William A. Galston, *A Liberal-Democratic Case for the Two-Parent Family*, 1 THE RESPONSIVE COMMUNITY 14 (1990–1991)).

²³⁸ TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000, DOCUMENT NO. CENSR-5, at 6 (Feb. 2003), available at <http://www.census.gov/prod/2003pubs/censr-5.pdf> [hereinafter SIMMONS & O’CONNELL, MARRIED-COUPLE] (noting “marriage patterns and living arrangements differ by racial and ethnic groups”); A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725, 1746 (2004); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 358 (2004) [hereinafter Polikoff, *Making Marriage Matter Less*].

²³⁹ See *infra* notes 257–72 and accompanying text.

²⁴⁰ Dickerson, *Family Values*, *supra* note 219, at 73.

²⁴¹ *Id.*

²⁴² *Id.* at 74–78.

²⁴³ *Id.* at 73.

²⁴⁴ FINEMAN, *supra* note 216, at 116.

²⁴⁵ *Id.* at 116–17.

against the marriage egregious enough for the state to grant a divorce are adultery, desertion, and cruelty.²⁴⁶ Mere marital discord, however, was not sufficient for the state to release the husband and wife from their legal duties to one another.²⁴⁷

Our laws have moved from this purely status-based, patriarchal approach to marriage to a more egalitarian model that aims to promote happiness in the marital couple.²⁴⁸ Now, the wife and husband operate as a partnership, to which any children they have are subordinate.²⁴⁹ Divorce law has changed accordingly.²⁵⁰ Now, in addition to the fault bases for divorce, every state has laws permitting no-fault divorce.²⁵¹ Some no-fault statutes require the petitioner to show that she and her spouse have lived apart for a specified period of time,²⁵² but others have no such mandate.²⁵³ No-fault divorce laws typically allow one spouse to petition for divorce with a showing that the marriage is “irretrievably broken.”²⁵⁴ Proving a marriage is irretrievably broken can be as simple as one or both parties testifying it is “no longer possible for them to live together as husband and wife.”²⁵⁵ Laws governing marriage have shifted from valuing status and permanence to valuing personal fulfillment in the marital relationship.²⁵⁶

2. *Changing Social Behavior and Support for Non-Legal Dependents*

As the law surrounding marriage and interpersonal relationships changes, so does social behavior. Since 1880, the U.S. Census Bureau has asked for information about the relationships of each person in a house to the householder.²⁵⁷ The “relationship question” has been part of the census since

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 116–17.

²⁴⁸ Dickerson, *Family Values*, *supra* note 219, at 78–79; UNIF. MARRIAGE AND DIVORCE ACT § 201 (1974) (“Marriage is a personal relationship . . .”).

²⁴⁹ FINEMAN, *supra* note 216 at 62.

²⁵⁰ *Id.* at 119.

²⁵¹ *Id.*

²⁵² *E.g.*, N.Y. DOM. REL. LAW 10 § 170 (Consol. 2004) (one year).

²⁵³ *E.g.*, WYO. STAT. ANN. § 20-2-104 (2004).

²⁵⁴ *E.g.*, GA. CODE ANN. 19-5-3(13) (2004).

²⁵⁵ *Adams v. Adams*, 232 S.E.2d 919, 920 (Ga. 1977).

²⁵⁶ *See* FINEMAN, *supra* note 216, at 119.

²⁵⁷ TAVIA SIMMONS & GRACE O’NEILL, U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2000, DOCUMENT NO: C2KBR/01-8 (Sept. 2001), *available at* <http://www.census.gov/prod/2001pubs/c2kbr01-8.pdf> [hereinafter SIMMONS & O’NEILL, HOUSEHOLDS AND FAMILIES].

the mid-nineteenth century because the Census Bureau wants “to observe the changing composition of families and households in the United States.”²⁵⁸

To better understand the “growing complexity of American households,” the 1990 census included “[u]nmarried partner” as a category of relationship to the householder.²⁵⁹ An unmarried partner of the householder is “a person who is not related to the householder, but who shares living quarters and has a close personal relationship with the householder.”²⁶⁰ The 1990 census showed 3.2 million self-identified, unmarried-partner households.²⁶¹ Unmarried-partner households comprise 3.5% of all American households²⁶² and 9% of all coupled households.²⁶³

Ten years later the number of self-identified unmarried-partner households had increased from 3.2 million to 5.5 million.²⁶⁴ They grew from 3.5% to 5.2% of all households in the United States.²⁶⁵ Around 600,000 of the unmarried-partnership households were same-sex couples.²⁶⁶ About 43% of unmarried-partner households had dependent, cohabiting children, compared with 46% of married-couple households.²⁶⁷

The 2000 Census asked citizens if their household was multigenerational.²⁶⁸ The numbers in the Census Report reflect a subset of the total number of multigenerational households in the United States because it examined only the three most common types of multigenerational households: “(1) householder-child-grandchild, (2) parent/parent-in-law of householder-householder-child, and (3) parent/parent-in-law of householder-householder-child-grandchild.”²⁶⁹ Three million, nine hundred thousand American households, 3.7% of all households, contained one of these three types of

²⁵⁸ *Id.* at 8.

²⁵⁹ *Id.* at 1.

²⁶⁰ *Id.* at 7 n.8.

²⁶¹ *Id.* at 7.

²⁶² SIMMONS & O'NEILL, HOUSEHOLDS AND FAMILIES, *supra* note 257, at 7.

²⁶³ SIMMONS & O'CONNELL, MARRIED-COUPLE, *supra* note 238, at 3.

²⁶⁴ SIMMONS & O'NEILL, HOUSEHOLDS AND FAMILIES, *supra* note 257, at 7. At one extreme, more than 20% of coupled households in Washington, D.C. were unmarried-partner households; at the other end of the spectrum, unmarried-partner households comprise little more than 5% of the coupled households in Utah. SIMMONS & O'CONNELL, MARRIED-COUPLE, *supra* note 238, at 4.

²⁶⁵ SIMMONS & O'NEILL, HOUSEHOLDS AND FAMILIES, *supra* note 257, at 7.

²⁶⁶ SIMMONS & O'CONNELL, MARRIED-COUPLE, *supra* note 238, at 3.

²⁶⁷ *Id.* at 10.

²⁶⁸ SIMMONS & O'NEILL, HOUSEHOLDS AND FAMILIES, *supra* note 257, at 7 n.10.

²⁶⁹ *Id.*

multigenerational living arrangements.²⁷⁰ The “householder-child-grandchild” was by far the most common structure, comprising 65% of all multigenerational arrangements and 2.6 million households total.²⁷¹

While some politicians fight to preserve and privilege only the traditional marital unit,²⁷² these census data show a fast-growing number of American families are organizing their personal and economically interdependent relationships according to relationships of actual dependency, not merely legal dependency. Thus, a court examining a debtor’s dependents should consider these social realities.

IV. BANKRUPTCY COURTS SHOULD EVALUATE A DEBTOR’S DEPENDENCY RELATIONSHIPS WITH AN UNDERSTANDING OF THESE SOCIAL CHANGES AND ACCORDING TO HER ACTUAL FINANCIAL REALITIES

A legally-imposed obligation of financial support is neither necessary nor sufficient to establish that a relationship between two people is permanent or economically interdependent.²⁷³ While the state still retains the power to impose terms of marriage and divorce, the future of American relationships is likely to be centered on voluntary intimate associations that resemble marriage slightly or not at all.²⁷⁴ Some subsections of the Code contain qualifying language that limits who, among the entire class of individuals who are actually dependent upon the debtor, may be a debtor’s dependent for purposes of the subsection’s specific protection.²⁷⁵ A court evaluating a debtor’s dependents for purposes of the subsections that do not have such qualifying and limiting language should thus account for the realities of a dependent’s relationships of *actual* dependency when it examines her petition.

²⁷⁰ *Id.* at 7.

²⁷¹ *Id.*

²⁷² See FINEMAN *supra* note 216 and accompanying text.

²⁷³ See *supra* notes 176–272 and accompanying text.

²⁷⁴ See UNIF. MARRIAGE AND DIVORCE ACT (1974); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 33 (2002) (“[P]arties’ failure to marry should not be understood to signify that the parties agreed that they would have no economic obligations to each other [F]amily law should be concerned about relationships that may be indistinguishable from marriage except for the legal formality of marriage.”); Dickerson, *Family Values*, *supra* note 219, at 73–83; Polikoff, *Making Marriage Matter Less*, *supra* note 238.

²⁷⁵ *E.g.*, 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2000).

Dependency is universal and inevitable as “a natural part of the human condition and is developmental in nature.”²⁷⁶ Inevitable dependents create “derivative dependents” who rely on resources from others to be able to perform necessary caretaking work.²⁷⁷ According to current American ideals, each family unit should be able to care for its own inevitable and derivative dependents.²⁷⁸ Assigning the entire cost of caretaking to the family, however, ignores the larger debt society owes to those who perform caretaking work.²⁷⁹ For society to survive, dependency needs of both inevitable and derivative dependents must be met.²⁸⁰

In spite of society’s obligation to support all of its dependents, the state privileges only some relationships of dependency and support.²⁸¹ “The status of marriage and the institution of the marital family is the way that many social goods are delivered to individuals in American political culture. The state subsidizes this form of family The family is a mediating institution, and access to it is critical for claiming social benefits.”²⁸² Not all dependent individuals, however, have access to a marital family to supply their needs.²⁸³ Therefore, social benefits should adhere instead to “caretaking units.”²⁸⁴ Caretaking units reflect moral obligations and reciprocal duties of care and support between individuals.²⁸⁵

Before BAPCPA, some bankruptcy courts privileged only dependency relationships arising from legal obligations of support.²⁸⁶ For example, relying on a debtor’s legal marital obligations to award bankruptcy benefits was administratively convenient, but created a paradigm for awards that was both over- and under-inclusive.²⁸⁷ It was over-inclusive because it assumed all marital couples were economically intertwined and interdependent.²⁸⁸ It was

²⁷⁶ FINEMAN, *supra* note 216, at 35.

²⁷⁷ *Id.* at 36.

²⁷⁸ *Id.* at 37. We assume that each family unit will have a “breadwinner” who meets the financial needs of both the caretaker and the inevitable dependent(s). *Id.* at 39.

²⁷⁹ *Id.* at 38.

²⁸⁰ *Id.* at 47–48.

²⁸¹ *See supra* Part III.

²⁸² FINEMAN, *supra* note 216, at 27–28. *But see supra* notes 202–05 and accompanying text (addressing the FSP’s alternative method of delivering social welfare).

²⁸³ FINEMAN, *supra* note 216, at 45–46.

²⁸⁴ *See id.* at 68.

²⁸⁵ *Id.* at 44–49.

²⁸⁶ *See supra* notes 61, 93–106 and accompanying text.

²⁸⁷ Dickerson, *Family Values*, *supra* note 219, at 90.

²⁸⁸ *Id.* at 91.

under-inclusive because it did not grant benefits to unmarried couples and other persons who were *actually* economically interdependent.²⁸⁹

BAPCPA has moved towards a paradigm that recognizes and protects relationships of actual dependency. It assigns costs and can be interpreted as awarding benefits “based on the economic, rather than the marital, relationship between two individuals.”²⁹⁰ Now, regardless of their legal obligations, debtors living in both traditional and nontraditional family structures are required to adduce evidence of the income they receive from those upon whom they depend and the expenses they incur from those who rely upon them for financial support.²⁹¹ Absent limiting statutory language to the contrary, courts should evaluate this evidence to determine the totality of the debtor’s circumstances and whether the dependency relationship is bona fide. If it is, the debtor should be allowed to claim a person who is actually dependent upon her as a “dependent” in bankruptcy. Similarly, if the debtor is actually dependent upon another person, that second person’s financial contribution to the debtor’s living expenses should be included in the debtor’s CMI, rather than simply including all income the debtor receives in the six months prior to her bankruptcy filing.

The most realistic way to treat a debtor’s dependency relationships draws upon an adaptation of the caretaking unit and economic unit. Bankruptcy courts should examine the totality of a debtor’s circumstances to determine the validity of her relationships of financial support. The two factors in the totality of the circumstances analysis should be (1) whether debtor and another person are actually economically interdependent and (2) whether their relationship is such that it can be expected to continue for a specific period of time or indefinitely. If they are economically interdependent and their connection shows signs of permanence, the bankruptcy court should protect their relationship of dependency.

A. A Debtor’s Dependency Relationships Must Show Economic Interdependence

Courts should evaluate economic dependency on the basis of the documents a debtor is required to file under § 521, which reflect the commingling of her assets with the non-debtor party. The documents include a

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 103.

²⁹¹ *Id.*

schedule of the debtor's current income and current expenditures; a statement of the debtor's financial affairs; a statement of the amount of the debtor's monthly income, itemized to show how it was calculated; and a statement disclosing any realistically anticipated increase in income or expenditures for the twelve months following the petition.²⁹² Instead of defaulting to a debtor's legal obligations to determine her dependents in bankruptcy and her financial history of the past six months, this method of analyzing a debtor's actual economic relationships accurately reflects the amount of money the debtor expends and receives.

B. A Debtor's Dependency Relationships Must Show Her Dependent Will Rely on Her Financial Support in the Future

The second factor in the test of a debtor's totality of the circumstances should be whether the debtor is in a relationship that shows the relationship will continue into the future, either for a specific period of time (as in the case of a dependent college student over the age of eighteen) or indefinitely. Although a debtor's marital status may reflect a current commitment to a permanent relationship between her and her dependent spouse, for example, it is not entirely reliable. The laws governing marriage, the divorce rate, and census data show that just because two people are married does not mean that will stay married.²⁹³

Alternatively, two people who have chosen not to marry, or are prohibited by law from marrying, may in fact be personally committed to support one another for life.²⁹⁴ Aspects of permanence could include the length of time one party has been supporting the other, the degree of support, whether one of the parties has a legal obligation to support the other, testimony from the parties about their level of emotional connection, testimony from friends and family about their relationship, and whether there are additional dependents who rely on support from the debtor.²⁹⁵ Congress has recognized, in the Tax Code and regulations for the FSP and TANF, debtors seek to protect their loved ones

²⁹² 11 U.S.C. § 521(a)(1)(B) (2000).

²⁹³ See *supra* notes 237–71 and accompanying text.

²⁹⁴ See *supra* notes 237–85 and accompanying text.

²⁹⁵ See PRINCIPLES OF FAMILY DISSOLUTION § 6.03 (2002) for additional factors to consider regarding a shared life between two individuals. This Comment does not adopt wholesale the factors there listed because they only apply to romantic, cohabiting “couples.” *Id.* § 6.03(1). This would preclude bankruptcy protection for adult children caring for their dependent parents and those debtors who have valid dependency relationships with individuals with whom they do not live.

even, and perhaps especially, in times of financial difficulty.²⁹⁶ Implicit in this understanding is that laws requiring a debtor to provide all of her money to her creditors at the expense of her family would lead the debtor to default and flee her financial obligations in favor of her moral ones.²⁹⁷ Moreover, family relationships benefit the debtor, and ultimately her creditors, by providing moral support to help her through her financial woes.²⁹⁸

CONCLUSION

Because Congress has not provided definitions or interpretive guidance for key words and concepts in the Code, similarly situated debtors have been treated differently, depending on which judge they are assigned. Different judges have different mental constructs of “appropriate” dependency and interpersonal relationships. They choose to reward debtors whose relationships adhere to their constructs and punish those who do not. Returning to Mr. Thornhill’s claimed dependency relationship with his mother from the Introduction illustrates this inconsistency. Suppose he proved certain facts about the substance of their relationship, the level of his support for her, and the amount of time he expected to continue to support her. Under the current state of bankruptcy law, one court assessing these facts would deny his claim she was his dependent solely because he has no obligation to support her. Another court would allow his claim because their relationship was one of actual, if not legal, dependency. Instead of allowing this inconsistency to persist, bankruptcy courts should examine the debtor’s actual relationships of dependency according to the totality of her circumstances.

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²⁹⁶ See *supra* notes 174–213 and accompanying text.

²⁹⁷ A. Mechele Dickerson, *Lifestyles of the Not-so-Rich or Famous: The Role of Choice and Sacrifice in Bankruptcy*, 45 BUFF. L. REV. 629, 675–76 (1997).

²⁹⁸ *Id.*

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