

*In the House but out of the Household? Why Congress Needs to Codify a Substantial Support  
Test for Courts to Use When Calculating a Debtor's Household Size*

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## INTRODUCTION

Imagine this: a debtor files for relief under Chapter 7 of the Bankruptcy Code and has one minor child, one adult child who moved home after graduating from college, and an elderly mother living with her, as well as a nineteen-year-old daughter away at college. How many of these individuals are part of the debtor's household size for bankruptcy purposes? It depends. All bankruptcy courts do not use the same approach to calculate household size, but rather generally use one of three different judicially-constructed approaches to calculate household size.<sup>1</sup>

Bankruptcy courts often must scrutinize living arrangements and calculate the size of a debtor's household to determine a debtor's eligibility for relief under the Bankruptcy Code.<sup>2</sup> Accordingly, the method for determining household size must account for varied familial situations that go beyond the nuclear family, which traditionally consisted of a mother, father, and two children.<sup>3</sup> In today's society, domestic partnerships, multi-generational families, blended families, and situations in which divorced or single parents share joint custody of children are common.<sup>4</sup> The economic recession that occurred in the late 2000s left many adults turning to their aging parents for financial help, and led many young adults to move back in with their

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<sup>1</sup> Johnson v. Zimmer, 686 F.3d 224, 234-35 (4th Cir. 2012).

<sup>2</sup> *Id.* at 225, 228-29, 240-41.

<sup>3</sup> Frank W. Volk, *Problems in the Code, A Proposal for § 1325 to Put the "Household" Back in Order*, 31-11 AM. BANKR. INST. J. 22 (2012); David P. Leibowitz, *Consumer Point, How Many "Heads on Beds" are in Your Chapter 13 Household?*, 31-10 AMER. BANKR. INST. J. 36 (2012); Sandra Timmerman & Debra Caruso, *The Disappearing Nuclear Family and the Shift to Non-Traditional Households has Serious Financial Implications for Growing Numbers of Americans*, HUFF POST BLOG (Jan. 25, 2013, 6:29 AM), [http://www.huffingtonpost.com/debra-caruso/retirement-plan-the-disappearing-nuclear-family\\_b\\_2534622.html?view=screen](http://www.huffingtonpost.com/debra-caruso/retirement-plan-the-disappearing-nuclear-family_b_2534622.html?view=screen).

<sup>4</sup> Timmerman & Caruso, *supra* note 3; Daphne Lofquist, Terry Lugaila, Martin O'Connell, & Sarah Feliz, *Households and Families: 2010*, 2010 CENSUS BRIEFS, Apr. 2012, at 15. See also Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 408-10 (2010), for a discussion of various living and familial arrangements, including cohabitation, same-sex unions, and children not living with both parents.

parents after graduating from college.<sup>5</sup> In addition, the Census Bureau reported a 64% increase between 1991 and 2009 in the number of children living with their grandparents.<sup>6</sup>

Different living situations may make it difficult to determine who comprises a household. For example, should a minor child who roughly splits his time between each of his parent's homes be considered a member of each of their households? Or, is a young adult in college a member of her parents' household when she visits home frequently on weekends and spends holidays and summers with her parents?<sup>7</sup> What about a young child who lives with her grandparents, but whose mother provides roughly half of the child's financial support? Complex familial scenarios such as these plague bankruptcy courts, especially when applying Code provisions enacted through the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).<sup>8</sup>

Once courts began litigating the issue of household size, three approaches to calculating household size emerged—the Census Bureau approach, the income-tax-dependent approach, and the economic unit approach.<sup>9</sup> This Article argues that none of the three judicially-crafted approaches work well and that Congress needs to codify a definition of household in the Bankruptcy Code that includes in a household all individuals meeting certain living and relationship requirements, and for whom the debtor provides substantial support financially. Part I identifies key provisions in the Bankruptcy Code where the applicable household size affects a

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<sup>5</sup> Timmerman & Caruso, *supra* note 2; U.S. Census Bureau, *More Young Adults are Living in Their Parents' Home*, *Census Bureau Reports*, NEWSROOM, Nov. 3, 2011, [www.census.gov/newsroom/releases/archives/families\\_households/cb11-183.html](http://www.census.gov/newsroom/releases/archives/families_households/cb11-183.html).

<sup>6</sup> U.S. Census Bureau, *Census Bureau Reports 64 Percent Increase in Number of Children Living With a Grandparent Over Last Two Decades*, NEWSROOM, June 29, 2011, [www.census.gov/newsroom/releases/archives/children/cb11-117.html](http://www.census.gov/newsroom/releases/archives/children/cb11-117.html).

<sup>7</sup> See Ralph Gardner Jr., *In College, You Can Go Home Again and Again*, N.Y. TIMES, Dec. 14, 2006, [http://www.nytimes.com/2006/12/14/fashion/thursdaystyles/14nest.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/12/14/fashion/thursdaystyles/14nest.html?pagewanted=all&_r=0), for a discussion of how it is common for college students to visit and contact home often.

<sup>8</sup> Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005); *Johnson v. Zimmer*, 686 F.3d 224, 225, 228-29, 240-41 (4th Cir. 2012).

<sup>9</sup> See *infra* Part II.

debtor's bankruptcy case.<sup>10</sup> Part II discusses each of the three approaches courts use to calculate household size in bankruptcy.<sup>11</sup> Part III then proposes a model test Congress could codify in the Bankruptcy Code and argues that the test, which focuses on individuals the debtor substantially supports financially, is the best way to implement uniformity in household size determinations.<sup>12</sup>

#### I. THE IMPORTANCE OF HOUSEHOLD SIZE IN THE BANKRUPTCY CODE

The Bankruptcy Code does not define “household,” despite including the word in several key provisions.<sup>13</sup> Calculating household size primarily becomes an issue when determining whether a debtor is an above or below median income debtor.<sup>14</sup> The above or below median income inquiry involves comparing the debtor's current monthly income, multiplied by twelve, to the median family income for the debtor's household size in the state he resides.<sup>15</sup> The Bankruptcy Code uses the United States Census Bureau's median family income data for this comparison.<sup>16</sup> With each additional household member, the median income generally increases, albeit not always by the same amount.<sup>17</sup> A debtor's status as having above or below median income affects many key aspects of a debtor's bankruptcy case, including which expenses a Chapter 13 debtor may use to calculate his disposable income,<sup>18</sup> how many months a debtor's Chapter 13 plan must be,<sup>19</sup> and the applicability of the presumption of abuse in Chapter 7.<sup>20</sup>

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<sup>10</sup> See *infra* Part I.

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *infra* Part III.

<sup>13</sup> 11 U.S.C. §§ 101, 707(b), 1325(b)(3)–(4) (2006); Volk, *supra* note 3, at 22.

<sup>14</sup> A debtor's status as an above or below median income debtor affects whether a Chapter 7 debtor fails the presumption of abuse test, a Chapter 13 debtor's expense deductions, and the length of a Chapter 13 debtor's plan. 11 U.S.C. §§ 707(b), 1325(b) (2006).

<sup>15</sup> See 11 U.S.C. §§ 101(39A), 1325(b)(3) (2006); *Census Bureau Median Family Income by Family Size*, THE UNITED STATES DEPARTMENT OF JUSTICE, [http://www.justice.gov/ust/eo/bapcpa/20121101/bci\\_data/median\\_income\\_table.htm](http://www.justice.gov/ust/eo/bapcpa/20121101/bci_data/median_income_table.htm) (last updated Oct. 10, 2012).

<sup>16</sup> § 101(39A).

<sup>17</sup> *Census Bureau Median Family Income by Family Size*, *supra* note 15.

<sup>18</sup> § 1325(b)(3).

<sup>19</sup> 11 U.S.C. § 1325(b)(4) (2006).

<sup>20</sup> 11 U.S.C. § 707(b)(6) (2006). Household size also may become an issue when determining how many persons a debtor may deduct expenses for under the standardized national and local standard expenses in the means test. 11

a. Disposable Income Test in Chapter 13

In Chapter 13, if the trustee or a creditor objects to confirmation of the debtor's proposed plan, the plan must pass the disposable income test before the judge may confirm the plan.<sup>21</sup> To pass, the plan must either pay all unsecured claims in full or provide that all the disposable income the debtor will accumulate during the applicable commitment period, which is thirty-six or sixty months, will be applied to make payments to unsecured creditors under the plan.<sup>22</sup> To determine "disposable income," § 1325(b)(2) requires that the debtor engage in a formulated calculation.<sup>23</sup> The debtor must first determine his current monthly income (CMI), and then he must determine and subtract "amounts reasonably necessary to be expended" for certain allowable expenses from his CMI.<sup>24</sup>

If the debtor's CMI multiplied by twelve is greater than the median family income for his household size in his state, then his "reasonably necessary expenses" must be those used in the Chapter 7 means test.<sup>25</sup> However, if the debtor's CMI multiplied by twelve is equal to or less than the median family income for his household size in his state, then he may use his actual reasonably necessary expenses for the expenses listed in § 1325(b)(2).<sup>26</sup> Thus, whether the Chapter 13 debtor has above or below median income determines whether the debtor uses his

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U.S.C. § 707(b)(2)(A) limits such deductions to a debtor, his spouse, his dependents, and certain ill or disabled household members. 11 U.S.C. § 707(b)(2)(A) (2006). Perhaps a solution could be to amend § 707(b)(2)(A) to permit debtors to deduct expenses for all members of their household when household size is determined by the model test this Article proposes in Section III.c, *infra*. Beyond that suggestion, the issue is beyond the scope of this Article.

<sup>21</sup> 11 U.S.C. § 1325(b)(1) (2006). In Chapter 13, a debtor proposes to pay his creditors a certain amount of money for a certain period of time, all of which the debtor must describe in a written plan. The bankruptcy judge must confirm the plan and the debtor must successfully complete the plan in order to receive a discharge from bankruptcy and those debts.

<sup>22</sup> 11 U.S.C. § 1325(b) (2006).

<sup>23</sup> 11 U.S.C. § 1325(b)(2) (2006).

<sup>24</sup> *Id.*

<sup>25</sup> 11 U.S.C. § 1325(b)(3) (2006). Section 1325(b)(3) expressly references subparagraphs (A) and (B) of § 707(b)(2). If the debtor is a below median income debtor, he may use his actual expenses to calculate disposable income. 11 U.S.C. §§ 707(b)(2), 1325(b)(2) (2006).

<sup>26</sup> § 1325(b)(2).

actual expenses or the standardized expenses delineated in the Chapter 7 means test to calculate his disposable income.<sup>27</sup>

b. Applicable Commitment Period in Chapter 13

Whether a debtor is an above or below median income debtor also determines how long a debtor's plan must be for confirmation.<sup>28</sup> Section 1325(b)(4) requires a debtor's plan to be not less than five years (sixty months) if the debtor is an above median income debtor, unless a shorter plan pays all unsecured creditors in full.<sup>29</sup> If the debtor is a below median income debtor, his plan may be as short as three years (thirty-six months).<sup>30</sup> Thus, an above median income debtor must pay his unsecured creditors for a longer period of time.

c. Presumption of Abuse in Chapter 7

The above or below median income inquiry, which involves the application of household size, also affects Chapter 7 cases. If a debtor is an above median income debtor, as determined by his CMI and household size in relation to the state's median income for that household size, there may be a "presumption of abuse." A presumption of abuse means that the debtor has enough income remaining after paying his expenses each month to make payments to creditors. Accordingly, permitting the debtor to liquidate his assets and receive a discharge in Chapter 7 would be an abuse of the Bankruptcy Code.<sup>31</sup> If there is a presumption of abuse, the debtor may not receive a discharge under Chapter 7 and, thus, his only recourse is to seek relief under a different chapter.<sup>32</sup>

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<sup>27</sup> The means test expenses include several standardized expenses that apply regardless of whether they accurately reflect the debtor's actual expenses.

<sup>28</sup> 11 U.S.C. § 1325(b)(4) (2006).

<sup>29</sup> *Id.*

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

<sup>31</sup> 11 U.S.C. § 707(b)(2), (7) (2006).

<sup>32</sup> *Id.* However, there is a chance the debtor may not meet the eligibility requirements for Chapter 13, at which point the debtor would have to consider a different chapter, such as Chapter 11, for relief.

In both Chapter 7 and Chapter 13 cases, household size determines which median family income amount applies to a debtor. Thus, household size is closely linked to a debtor's status as an above or below median debtor. Whether a debtor has income that is above or below the applicable median figure affects many interested parties in both Chapter 7 and Chapter 13 cases. However, the Code does not indicate how to calculate household size, and many bankruptcy courts struggle to determine household size in contested situations.<sup>33</sup> Moreover, rather than implementing similar methods to calculate household size, bankruptcy judges are applying various approaches to determine household size.<sup>34</sup>

## II. FEDERAL COURTS ARE USING THREE DIFFERENT APPROACHES TO CALCULATE HOUSEHOLD SIZE

After BAPCPA took effect in 2005, bankruptcy courts began grappling with how to properly determine household size when interested parties could not agree on a number.<sup>35</sup> Courts crafted three different approaches to determine household size for purposes of the above or below median income inquiry in § 1325(b) and § 707(b).<sup>36</sup> The first approach uses the United States Census Bureau's definition of household, which is that a household "consists of all the people who occupy a housing unit."<sup>37</sup> The Census Bureau approach is often also referred to as the "heads on the beds" approach.<sup>38</sup> The second approach courts use is the income-tax-dependent approach, which relies on the Internal Revenue Manual and includes a person in a debtor's

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<sup>33</sup> See *Johnson v. Zimmer*, 686 F.3d 224, 234-41 (4th Cir. 2012), for a discussion of the various cases and approaches involving the determination of household sizes for Bankruptcy Code purposes.

<sup>34</sup> See *infra* Part II for a discussion of the varying approaches used by federal bankruptcy courts in determining household size.

<sup>35</sup> *Zimmer* at 226, 228.

<sup>36</sup> *Id.* at 226.

<sup>37</sup> In re *Ellringer*, 370 B.R. 905, 910-11 (Bankr. D. Minn. 2007); *Current Population Survey (CPS) – Definitions*, UNITED STATES CENSUS BUREAU, <http://www.census.gov/cps/about/cpsdef.html> (last visited Mar. 22, 2013); see *infra* Section II.a for a discussion of the courts and cases utilizing the Census Bureau definition and approach to configuring household size.

<sup>38</sup> *Zimmer* at 226.

household only if that person is a dependent of the debtor for federal income tax purposes.<sup>39</sup> The third approach is the economic unit approach, which includes in a debtor's household size all individuals who operate as a single economic unit with the debtor, in the sense that all persons are financially interdependent.<sup>40</sup> Courts using the economic unit approach have fashioned variations of the approach, and the variations do not produce uniform results.<sup>41</sup> Some courts applying the economic unit approach even use a fractional variation, which apportions part-time household members into fractional numbers.<sup>42</sup>

a. Census Bureau Approach

In the past five years, several bankruptcy courts used the Census Bureau definition of household to determine household size in relation to the Bankruptcy Code.<sup>43</sup> The U.S. Bankruptcy Court for the District of Minnesota has applied the Census Bureau's definition of household in both Chapter 7 and Chapter 13 cases.<sup>44</sup> In *In re Ellringer*, a Chapter 7 case, the debtor's household size affected whether the presumption of abuse applied.<sup>45</sup> The court had to determine the debtor's household size when another person, Pamela, shared a home and bank account with the debtor and when both were jointly liable on the home's mortgage and a vehicle.<sup>46</sup>

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<sup>39</sup> *In re Law*, No. 07-40863, 2008 Bankr. LEXIS 1198, at \*9-18 (Bankr. D. Kan. Apr. 24, 2008).

<sup>40</sup> *Zimmer* at 240.

<sup>41</sup> *Id.* at 237-42 (citing and explaining different economic unit approach cases); *In re Morrison*, 443 B.R. 378, 388 (M.D.N.C. 2011) (delineating factors to use in application of the economic unit approach).

<sup>42</sup> *Zimmer* at 240-41.

<sup>43</sup> *In re Hayes*, No. 11-83175, 2012 Bankr. LEXIS 2493, at \*2-3 (Bankr. C.D. Ill. June 4, 2012); *In re Epperson*, 409 B.R. 503, 507 (Bankr. D. Ariz. 2009); *In re Bostwick*, 406 B.R. 867, 873 (Bankr. D. Minn. 2009); *In re Baker*, No. 08-B-72480, 2009 WL 412885, at \*3 (Bankr. N.D. Ill. Jan. 30, 2009); *In re Smith*, 396 B.R. 214, 216-17 (Bankr. W.D. Mich. 2008); *In re Ellringer*, 370 B.R. 905, 910 (Bankr. D. Minn. 2007).

<sup>44</sup> *Bostwick* at 873; *Ellringer* at 910.

<sup>45</sup> 11 U.S.C. § 707(b) (2006); *Ellringer* at 907-08.

<sup>46</sup> *Ellringer* at 907. At the time the debtor filed her petition, Pamela was contributing \$600 per month to household expenses; however, shortly before the evidentiary hearing in the matter, Pamela moved out, and she and the debtor closed their joint bank account. *Id.* at 908.

As an initial matter, the court determined that in calculating household size, income, and expenses, the relevant date was the date the petition was filed. *Id.* at 910. This raises an issue that is outside the scope of this

After noting that the Bankruptcy Code does not define the word household, the court pointed out that the Code does provide a definition for “median family income,” a term used in the pertinent presumption of abuse statute, § 707(b)(6).<sup>47</sup> Additionally, the Code’s definition of median family income defers to the United States Census Bureau’s definition of that term.<sup>48</sup> Accordingly, the court found the U.S. Census Bureau’s definition of household applied because it “ensures that a household in the means test will have the same number of members as the calculation of median family income.”<sup>49</sup>

The court relied on the Census Bureau’s definition of household, which includes “all of the people, related and unrelated, who occupy a housing unit,” and noted that the Census Bureau does not limit households to families.<sup>50</sup> Nor did Congress intend to limit household size to families or individuals related to each other by blood, marriage, or adoption, since it used the word “household” instead of “family” in § 707(b)(6).<sup>51</sup> Accordingly, because Pamela and the debtor lived in the same home at the time the debtor filed her petition, the debtor had a household size of two for purposes of the “threshold question of whether a debtor has above median income.”<sup>52</sup>

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Article—the issue of at what point in time household size, income, and expenses are calculated in Chapter 7 and Chapter 13 cases.

<sup>47</sup> 11 U.S.C. § 707(b)(6) (2006); *Ellringer* at 910. The Bankruptcy Code’s definition of median family income is found in 11 U.S.C. § 101(39A)(A). Subsection (39A)(A) defines median family income as “the median family income both calculated and reported by the Bureau of the Census.” 11 U.S.C. § 101(39A)(A) (2006).

<sup>48</sup> *Ellringer* at 910.

<sup>49</sup> *Id.* at 910-11.

<sup>50</sup> *Id.* at 911.

<sup>51</sup> *Ellringer* at 911.

<sup>52</sup> *Id.* The U.S. Bankruptcy Court for the District of Arizona followed *Ellringer* in *In re Epperson*, a Chapter 7 case in which the debtor and his roommate were a cohabitating couple who lived together for many years, but kept separate finances for the most part. *In re Epperson*, 409 B.R. 503, 504 (Bankr. D. Ariz. 2009). The *Epperson* court found that “Congress does not require courts to take into account ‘financial contribution of the household member, relationship to the debtor, [and] dependency’ when determining household size.” *Id.* at 507 (citing *In re Smith*, 396 B.R. 214, 218 (Bankr. W.D. Mich. 2008)). Since there was no Congressional direction as to whether household and dependency are related, the ordinary meaning of household applied, which was the Census Bureau’s “heads on beds” approach. *Id.* Accordingly, the debtor had a household size of two because he and his roommate lived in the same house, and the debtor incurred expenses from having two persons in the home. *Id.* Restricting the debtor to a one-person household would be “inequitable” and “counterintuitive.” *Id.*

The U.S. Bankruptcy Court for the District of Minnesota also used the Census Bureau’s definition of household in a 2009 Chapter 13 case, *In re Bostwick*.<sup>53</sup> The debtor, Ms. Bostwick, shared a rental home with Mr. Weis; each of them had individual leases with the owner but were responsible for splitting utility bills.<sup>54</sup> The trustee objected to the debtor’s proposed plan under § 1325(b)(1), so the debtor had to pay all projected disposable income into her plan during the applicable commitment period.<sup>55</sup>

Under the Census Bureau approach, the court found the debtor had a household size of two since she and her roommate shared a single-family home with multiple common spaces.<sup>56</sup> The relationship of the parties did not matter, pursuant to the Census Bureau approach, which specifically includes in a household “unrelated people sharing a housing unit such as partners or roomers.”<sup>57</sup> In addition, the Census Bureau’s exception to its definition of household, which essentially provides for separate households when units are “occupied or intended for occupancy as separate living quarters; that is, when the occupants do not live and eat with any other persons in the structure and there is direct access from the outside or through a common hall,” did not apply.<sup>58</sup> The house Bostwick and her roommate shared had a few private spaces, such as their individual rooms, but they shared a “bathroom, kitchen, living room, yard, and laundry.”<sup>59</sup> In addition, the layout of the house was such that Bostwick could not enter her bedroom without

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<sup>53</sup> *In re Bostwick*, 406 B.R. 867, 872 (Bankr. D. Minn. 2009).

<sup>54</sup> *Id.* at 870.

<sup>55</sup> 11 U.S.C. § 1325(b)(1) (2006); *Bostwick* at 871.

<sup>56</sup> *Bostwick* at 872-73.

<sup>57</sup> *Id.* at 873.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

passing by their shared living spaces; there was no direct, outside access to her room.<sup>60</sup>

Accordingly, the two roommates operated as one household.<sup>61</sup>

Overall, bankruptcy courts using the Census Bureau approach—which includes in a household all the persons occupying a single housing unit—find that the inclusion of all persons under one roof gives credence to the plain meaning of the word household and is consistent with the Code’s use of Census Bureau data for median family income purposes.<sup>62</sup> Courts also insist the Census Bureau approach is not contrary to Congressional intent.<sup>63</sup> Ultimately, regardless of the reasons for choosing the Census Bureau approach to calculate household size, the use of the approach certainly permits broad inclusion of individuals living in a single household.<sup>64</sup>

#### b. Income-Tax-Dependent Approach

The second approach some bankruptcy courts use to determine household size is to include only those persons who the debtor claims as dependents on her income tax returns.<sup>65</sup> In *In re Napier*, the U.S. Bankruptcy Court for the District of South Carolina found that a married

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<sup>60</sup> *Id.*

<sup>61</sup> Household size was also important in determining the applicable commitment period in *In re Smith*, a Chapter 13 case. 11 U.S.C. § 1325(b)(4) (2006); *In re Smith*, 396 B.R. 214, 217-18 (Bankr. W.D. Mich. 2008). In *Smith*, the married debtors alleged their adult child and her son, their grandchild, were part of their household. *Id.* at 215. The trustee disagreed. The court explained that Congress did not define household in the Bankruptcy Code, and, thus, it had to give the word its “plain meaning.” *Id.* at 216. Acknowledging that the word household could have two different meanings, the court applied the Census Bureau definition, which was broader and included more individuals. *Id.* at 216-17. As such, the debtors’ adult child and her children were part of the debtor’s household. *Id.* at 217.

Moreover, the U.S. Bankruptcy Court for the Northern District of Illinois, in *In re Baker*, also defined household per the Census Bureau’s definition before holding that the debtors, who had their minor child and the husband’s child from a former marriage living with them, had a household of four for purposes of the applicable commitment period for their Chapter 13 plan. *In re Baker*, No. 08-B-72480, 2009 WL 412885, at \*2-3 (Bankr. N.D. Ill. Jan. 30, 2009). The debtors here were also expecting another child, and the court noted that the debtors could later amend to reflect a change in household. *Id.* at \*2-3.

<sup>62</sup> *Johnson v. Zimmer*, 686 F.3d 224, 235-36 (4th Cir. 2012).

<sup>63</sup> *Id.*

<sup>64</sup> In addition to courts using the Census Bureau approach, the *Collier on Bankruptcy* treatise cites to *In re Smith* and *In re Ellringer* in advising that household size should include “all persons, related or not, who reside in the same housing unit as does the debtor,” for purposes of determining applicable commitment period in Chapter 13 cases. 8-1325 COLLIER ON BANKRUPTCY ¶ 1325.11 (16th ed.) (citing *Smith* at 217; *In re Ellringer*, 370 B.R. 905 (Bankr. D. Minn. 2007)).

<sup>65</sup> *In re Law*, No. 07-40863, 2008 Bankr. LEXIS 1198, at \*25 (Bankr. D. Kan. Apr. 24, 2008); *In re Napier*, No. Civ. A. 06-02464-JW, 2006 WL-4128358, at \*1-2 (Bankr. D.S.C. Sept. 18, 2006).

couple could not include two non-dependent adults who lived with them in their household for purposes of the Chapter 13 disposable income test.<sup>66</sup> Two college students, one of which was the daughter of the debtors' close family friend, were living with the debtors while finishing college.<sup>67</sup> The other student was the girl's fiancé.<sup>68</sup> The court held that the above median income debtors could not include expenses for the non-dependents in their disposable income calculations because the debtors did not claim the two individuals on their income tax returns.<sup>69</sup>

The court found that “[t]hough § 1325(b)(3) makes reference to members of a debtor’s household for purposes of determining whether to apply the means test in a chapter 13, it must be read in conjunction with § 707(b)(2)(A)(ii)(I), which allows expenses only associated with a debtor, his spouse, and dependents.”<sup>70</sup> In addition, the court pointed out that “the legislative history for § 1325(b)(3) also does not indicate that this section is intended to alter or expand the means test calculation.”<sup>71</sup> Furthermore, the debtors could not give priority to the needs of non-dependents at the expense of their unsecured creditors, and “additional expenses incurred in boarding non-dependents are not ‘reasonable’ or ‘necessary,’ as required by § 1325(b)(3).”<sup>72</sup> Thus, the debtors could not include expenses in their means test calculations for non-dependent adults living with them.<sup>73</sup>

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<sup>66</sup> 11 U.S.C. § 1325(b)(3) (2006); *Napier* at \*1. Section 1325(b)(3) directs debtors to use the expenses delineated in the means test, found in § 707(b)(2)(A)(ii)(I) when the debtor’s current monthly income multiplied by twelve is above the median family income for that household size in their state. 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006).

While this Article focuses on calculating household size, an issue that the discussion raises is the fact that the means test, as codified, includes expenses only for the debtor, the debtor’s spouse, and dependents of the debtor. The Code creates discrepancies by using the words “household” and “dependent” in similar and related provisions, and such issues are outside the scope of this Article. *See* 11 U.S.C. § 707(b) (2006).

<sup>67</sup> *Napier* at \*1.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Napier* at \*2 (citing H.R. Rep. No. 109(31)(I), at 52, 53 (2005)).

<sup>72</sup> *Napier* at \*2.

<sup>73</sup> *Napier* at \*1-2.

Another Chapter 13 case in which a bankruptcy court gave credence to dependency status is *In re Law*.<sup>74</sup> The court found that the debtor could not include his non-dependent, adult son in his household.<sup>75</sup> As an above median income debtor, the debtor was confined to using the means-test-permitted expenses to determine his disposable income.<sup>76</sup> Because the statutory language expressly permits a debtor to claim monthly expense deductions under the IRS' National Standards "for the debtor [and] the dependents of the debtor," the court held the debtor could not include expenses for his non-dependent adult son, even though the son was living in the debtor's home.<sup>77</sup>

Courts using the income-tax-dependent approach to determine household size limit households to debtors and their dependents.<sup>78</sup> Notably, both *In re Napier* and *In re Law* involved calculating household size for purposes of means test deductions pursuant to § 707(b)(2)(A)(ii)(I), a statutory section that expressly uses the term "dependent."<sup>79</sup> Accordingly, the income-tax-dependent approach may have limited application.

### c. Economic Unit Approach

The third approach courts use to determine household size is the economic unit approach, which includes in a debtor's household all individuals who live with and operate as a single economic unit with the debtor.<sup>80</sup> While several courts have focused on financial relationships

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<sup>74</sup> *In re Law*, No. 07-40863, 2008 Bankr. LEXIS 1198, at \*25 (Bankr. D. Kan. Apr. 24, 2008).

<sup>75</sup> *Id.* Whether the debtor had a household of one or two was irrelevant in determining his status as an above or below median income debtor because either way, the debtor's income was above median. *Id.* at \*5.

<sup>76</sup> 11 U.S.C. § 1325(b)(3) directs above median income debtors to § 707(b)(2)(A)(ii)(I) to calculate disposable income. 11 U.S.C. §§ 707(b)(2)(A)(ii)(I), 1325(b)(3) (2006).

<sup>77</sup> 11 U.S.C. § 707(b)(2)(A)-(B) (2006); *Law* at \*15-16. One practitioner has also advocated for the income-tax-dependent approach, arguing it is straightforward, can be applied uniformly, would rarely require a fact-based inquiry, and is consistent with Congress' intent to "require individual debtors to pay some or all of the debt owed to their unsecured creditors, if possible." Elizabeth L. Gunn, *Consumer Counterpoint, Number of Nondependents in Household May Affect Creditors*, 31-10 AMER. BANKR. INST. J. 37 (2012) (citing 151 Cong. Rec. and H.R. Rep. No. 109-31(1), 2005 U.S.C.C.A.N. 88, 89)).

<sup>78</sup> *Napier* at \*1-2; *Law* at \*25.

<sup>79</sup> *Napier* at \*1-2; *Law* at \*15-16.

<sup>80</sup> *Johnson v. Zimmer*, 686 F.3d 224, 236-37 (4th Cir. 2012).

between the debtor and other individuals in determining household size, application of the economic unit approach has not been uniform.<sup>81</sup> Some courts use a list of factors to determine whether individuals operate as an economic unit, others use fractions to account for part-time household members, and one court limited household size to the debtor and to individuals who were financially dependent upon the debtor.<sup>82</sup> Thus, courts are applying the economic unit approach in various ways.

*i. The Emergence of an Economic Unit Approach*

*In re Jewell* was one of the first cases that moved away from the Census Bureau and income-tax-dependent approaches and instead implemented a new approach—one that considered whether those who were living with the debtors received financial assistance and support from the debtors.<sup>83</sup> When the debtors filed their Chapter 7 petition, two dependent children, an adult son, an adult daughter, Crystal, and her three minor children lived with them.<sup>84</sup> The U.S. Trustee filed a motion to dismiss the petition for abuse under 11 U.S.C. § 707(b)(2)(A), arguing that the debtors' calculations for the presumption of abuse test were improper because they included an inflated household size or, in the alternative, did not include the income from the additional household members.<sup>85</sup> The court found the Census Bureau approach was too broad and was inconsistent with the purpose of the means test.<sup>86</sup> The income-tax-dependent approach was also inappropriate because the Internal Revenue Manual's (IRM) method of determining

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<sup>81</sup> Compare *Zimmer* at 241-42, and *In re Robinson*, 449 B.R. 473, 482-83 (Bankr. E.D. Va. 2011), with *In re Morrison*, 443 B.R. 378, 387-88 (Bankr. M.D.N.C. 2011), *In re Herbert*, 405 B.R. 165, 169-70 (Bankr. W.D. N.C. 2008), *In re Jewell*, 365 B.R. 796, 802 (Bankr. S.D. Ohio 2007), and with *In re De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*18-19 (Bankr. D. Idaho Feb. 9, 2012).

<sup>82</sup> *Morrison* at 387-88; *Robinson* at 482-83; *De Bruyn Kops* at \*18-19.

<sup>83</sup> *Jewell* at 800-02.

<sup>84</sup> *Id.* at 797-98. Notably, within six months of filing their petition, both the adult daughter, her three minor children, which were the debtors' grandchildren, and the adult son moved out. *Id.*

<sup>85</sup> 11 U.S.C. § 707(b)(2) (2006); *Jewell* at 797.

<sup>86</sup> *Jewell* at 800. The means test determines who may be "pushed out" of Chapter 7 and how much money above median income debtors will pay to their creditors in Chapter 13. Jean Braucher, *Getting Realistic: In Defense of Formulaic Means Testing*, 83 AM. BANKR. L.J. 395, 416 (2009).

household, along with the purpose of the IRS—to generate income for the federal government—were inconsistent with the Bankruptcy Code’s policy of providing “the honest but unfortunate debtor with a fresh start.”<sup>87</sup> Since § 707(b) did not advise a course of action contrary to the Code’s policy, the IRM guidelines were not determinative of household size.<sup>88</sup>

Rather, the court emphasized how, at the time the debtors filed their petition, Crystal and her children were dependent on the debtors for support for the six months leading up to the date of filing.<sup>89</sup> Since CMI also centers on the six months prior to filing, the court implied that Congress’ intent had to be that the household size in the six months prior to filing was the appropriate size to use for disposable income calculations.<sup>90</sup> The evidence indicated Crystal likely did not contribute to the debtors’ household after paying her own family’s expenses, and there was no evidence Crystal or her parents “intended the living arrangement to be only temporary, or that the group did not function as an economic unit.”<sup>91</sup> Thus, Crystal’s family was part of the debtors’ household.<sup>92</sup> However, the debtor’s adult son, who was “merely a head on the bed” and “did not ask for and did not receive financial assistance from [the debtors] regularly,” was not part of the debtors’ household, and the debtors had a household of eight.<sup>93</sup>

Another Chapter 7 case in which the meaning of household was an issue is *In re Herbert*.<sup>94</sup> In *Herbert*, there was a dispute regarding household size for purposes of the means test and presumption of abuse inquiry.<sup>95</sup> The debtor lived with his girlfriend, their child, and the

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<sup>87</sup> *Jewell* at 801.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* The court also pointed out that because of the time of year that Crystal and her family lived with them, the debtors had not had a chance to file an income tax return claiming Crystal and her family as dependents. *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 801-02.

<sup>93</sup> *Id.* at 802.

<sup>94</sup> *In re Herbert*, 405 B.R. 165, 166 (Bankr. W.D.N.C. 2008).

<sup>95</sup> 11 U.S.C. § 707(b) (2006); *Herbert* at 166, 170.

girlfriend's eight other children from a prior relationship.<sup>96</sup> He supported all ten persons and had done so for several years.<sup>97</sup> The court pointed out that the Census Bureau approach "does not take into consideration financial contributions of the household member, dependency, or the relationship of the household member to the debtor," and the approach using the IRM standards failed to "account for the situation in which a debtor may be supporting an individual without declaring that person as a dependent on his tax return."<sup>98</sup> Thus, those approaches were flawed and not appropriate to use in determining household size.

Ultimately, the debtor was permitted a household size of eleven for means test purposes because the court found the *Jewell* court's approach was the most consistent with the purpose of calculating disposable income, which is to determine a debtor's ability to pay his creditors.<sup>99</sup> By primarily considering which persons a debtor financially supports, the *Jewell* approach "recognizes that debtors have a variety of different living arrangements that defy being pigeonholed into a neat formula for purposes of defining household."<sup>100</sup> In *Herbert*, the court relied on how the debtor's support of the other ten persons under his roof was consistent, long standing, and "simply the fact of this debtor's life."<sup>101</sup> Moreover, the *Jewell* approach determined household size for applicable median family income amounts in a way that was based on reality

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<sup>96</sup> *Herbert* at 166.

<sup>97</sup> *Id.* The debtor claimed as dependents on his income tax returns all nine children and had attempted to adopt his girlfriend's eight children, but the kids' incarcerated father would not consent. *Id.*

<sup>98</sup> *Id.* at 168-69.

<sup>99</sup> *Id.* at 169-70. In Chapter 7, the means test determines whether a debtor has enough income left over after his expenses such that he could pay back his creditors in Chapter 13 rather than receiving a discharge after liquidation in Chapter 7.

<sup>100</sup> *Id.* at 169.

<sup>101</sup> *Id.* at 170. See MARK LINO, U.S. DEPARTMENT OF AGRICULTURE, EXPENDITURES ON CHILDREN BY FAMILIES, 2011 (2012), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2011.pdf>, for a discussion of the average costs of expenditures for children.

rather than on an “artificial construct,” with a focus on the “actual number of people supported by the debtor.”<sup>102</sup>

The court in *In re Morrison* also used the *Jewell* and *Herbert* approach, coining it the “economic unit approach.”<sup>103</sup> Since the Bankruptcy Code did not define “household,” the court looked to rules of statutory construction, the first of which was that “[w]hen a word is not defined, a court should apply its ordinary meaning.”<sup>104</sup> In addition, the court had to consider the word in light of its statutory context and the words surrounding it.<sup>105</sup> After rejecting the Census Bureau and income-tax-dependent approaches, the court applied the economic unit approach, which “includes [in a household] any individuals living in the same economic unit as the debtor.”<sup>106</sup> Under this approach, a household, for purposes of the means test, includes “individuals who are financially dependent on a debtor, individuals who financially support a debtor, and individuals whose income or expenses are inter-mingled or interdependent with a debtor.”<sup>107</sup>

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<sup>102</sup> *Herbert* at 170.

<sup>103</sup> *In re Morrison*, 443 B.R. 378, 384, 386 (Bankr. M.D.N.C. 2011); *Herbert* at 166-67; *In re Jewell*, 365 B.R. 796, 800 (Bankr. S.D. Ohio 2007).

<sup>104</sup> *Morrison* at 384.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 384-88. The court explained that the “heads on beds” approach was inconsistent with the purposes of the means test, which are 1) to determine whether the presumption of abuse exists and 2) to calculate the debtor’s disposable income, because permitting a debtor’s household to include “individuals who operate as separate economic units” would derail the accuracy of the means test in calculating disposable income. Additionally, the Census Bureau method could “potentially skew[] the outcome of the means test by allowing individuals who share no economic nexus with the debtor to artificially raise the applicable median family income, which acts as a threshold in determining whether the remaining line-item deductions in Form B22A will be used in determining the debtor’s disposable income.” *Id.* at 387. Nor was the Census Bureau approach the most consistent with the plain meaning of household, contrary to what the court in *In re Smith* found, because “[t]he fact that several courts have arrived at different conclusions regarding the meaning of ‘household’ reveals that the term lacks a readily-apparent plain meaning.” *Id.* (citing *In re Smith*, 396 B.R. 214, 217 (Bankr. W.D. Mich. 2008)).

The income-tax-dependent approach was also inconsistent with the means test because the Internal Revenue Code is a “completely different statutory framework,” with a purpose divergent from the Bankruptcy Code. The potential for leaving persons out of a household who the debtor nonetheless supports could lead to skewed calculations for disposable income. *Id.*

<sup>107</sup> *Id.* at 386, 388.

The court found that the economic unit approach was consistent with the surrounding statutory language and that application of it required case-by-case consideration of all facts and circumstances.<sup>108</sup> In this inquiry, the *Morrison* court delineated and applied the following factors:

- (1) [T]he degree of financial support provided to the individual by the debtor;
- (2) the degree of financial support provided to the debtor by the individual;
- (3) the extent to which the individual and the debtor share income and expenses;
- (4) the extent to which there is joint ownership of property;
- (5) the extent to which there are joint liabilities;
- (6) the extent to which assets owned by the debtor or the individual are shared, regardless of title; and
- (7) any other type of financial intermingling or interdependency between the debtor and the individual.<sup>109</sup>

In *Morrison*, the Chapter 7 debtor had a household size of two, which included herself and her boyfriend.<sup>110</sup> The debtor lived in her boyfriend's home and paid for utilities, household goods, and food, while he paid the mortgage.<sup>111</sup> The court found these facts constituted financial support of each other because they "share[d] a significant amount of their income and expenses" and shared financial support and assets, thus constituting a "single economic unit."<sup>112</sup>

*ii. Some Courts Apply the Economic Unit Approach With a Fractional Variation*

After bankruptcy courts began using the economic unit approach to calculate household size, a variation developed in which the size of an economic unit and thus a household may contain fractional numbers to reflect part-time household members.<sup>113</sup> While the Fourth Circuit,

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<sup>108</sup> *Id.* at 388.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 380, 388.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 388. Other courts have applied the *Morrison* court's seven factors to determine household size. For example, the court in *In re Gaboury* used the *Morrison* factors in determining the Chapter 13 debtors' household size. *In re Gaboury*, BK No. 11-10725, 2011 Bankr. LEXIS 4434, at \*1-4 (Bankr. D.R.I. Nov. 18, 2011). The debtors' adult son lived at home, received cash "only as needed" from a jointly-owned bank account with his mother, was "employed sporadically," did not share a vehicle or liabilities with his parents, and contributed minimally to the household expenses. *Id.* at \*3-4. Based on these facts, the court found the son was not part of the debtors' household. *Id.* at \*4.

<sup>113</sup> *Johnson v. Zimmer*, 686 F.3d 224, 241-42 (4th Cir. 2012); *In re Robinson*, 449 B.R. 473, 483-84 (Bankr. E.D. Va. 2011).

in *Johnson v. Zimmer*, approved of the fractional economic unit approach, both the dissent in *Zimmer* and the U.S. Bankruptcy Court for the District of Idaho disagreed with reducing household size from whole numbers to fractions and decimals.<sup>114</sup> However, the *Zimmer* dissent and the court in *In re De Bruyn Kops* both agreed with the economic unit approach's focus on financial dependence.<sup>115</sup>

#### 1. Bankruptcy Courts Develop a Fractional Economic Unit Approach

*In re Robinson* was one of the first bankruptcy courts to fashion and use fractions with the economic unit approach.<sup>116</sup> The Chapter 13 debtor in *Robinson* was an unmarried father of four minor children, each of whom spent certain days and nights of the week with him consistently.<sup>117</sup> On average, each child spent four days and nights per week with the debtor, and the debtor had a three-bedroom apartment to accommodate his children.<sup>118</sup> The debtor's youngest son had serious medical problems, and the debtor was solely responsible for paying any and all out-of-pocket medical expenses for him.<sup>119</sup> The children's mothers had previously claimed the children as dependents on their income tax returns, but the debtor anticipated agreements to be able to claim two of them the year he filed for bankruptcy.<sup>120</sup>

In *Robinson*, the court needed to determine household size for purposes of the disposable income test in Chapter 13.<sup>121</sup> In considering all three approaches for determining household size, the court found the economic unit approach "most closely aligns with the purpose of 11 U.S.C. §

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<sup>114</sup> *Zimmer* at 241-42; *Zimmer* at 242-43 (Wilkinson, J., dissenting); *In re De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*17-20 (Bankr. D. Idaho Feb. 9, 2012).

<sup>115</sup> *Zimmer* at 245 (Wilkinson, J., dissenting); *De Bruyn Kops* at \*15-16.

<sup>116</sup> *Robinson* at 483-84.

<sup>117</sup> *Id.* at 475.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> 11 U.S.C. § 1325(b) (2006); *Robinson* at 476-77. The debtor was an above median income debtor even with a household of five, but household size was relevant for means test calculations. *Robinson* at 475-76.

1325(b).”<sup>122</sup> The court emphasized that the definition of household “must be one which is flexible and accommodating to the many and varied family structures this Court encounters on a daily basis,” especially because “[i]n modern American family life, households look increasingly different from the outmoded images of the ‘traditional family.’”<sup>123</sup> Accordingly, the bankruptcy system must be flexible and adaptable to “dynamic economic change,” such as family structures of varying “size, shape, or composition.”<sup>124</sup>

In applying the economic unit approach to the debtor, the court found it could not simply add the debtor’s four children to his household size, because the children did not spend all of their time with him.<sup>125</sup> Rather, the children spent roughly four days and nights with him, and the debtor supported them financially in a significant capacity.<sup>126</sup> Each child essentially was a “fractional member” of the debtor’s household, and since each child spent four-sevenths of each week with him, taken together, they comprised two whole members of the economic unit.<sup>127</sup> The debtor, then, had a total household of three persons.<sup>128</sup> In reflecting on its newly promulgated “functional equivalent standard” for the economic unit calculation, the court cited the Supreme Court’s *Hamilton v. Lanning* decision while explaining that “the Bankruptcy Code retains sufficient flexibility for courts to examine the reality of a debtor’s household situation and adjust

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<sup>122</sup> *Robinson* at 481. Similar to the other courts adopting the economic unit approach, the court found that the Census Bureau and income-tax-dependent approaches were inadequate and created the potential for inconclusive or flawed household sizes. *Id.* at 481. In addition, the income-tax-dependent approach “unnecessarily subordinates the Bankruptcy Code to the Internal Revenue Code.” *Id.*

<sup>123</sup> *Id.* at 482.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

household size to reflect that reality.”<sup>129</sup> Thus, a modified, fractional economic unit approach was the best way to calculate household size for purposes of § 1325(b) and the means test.

## 2. The Fourth Circuit Affirmed a Bankruptcy Court’s Use of the Fractional Economic Unit Approach

Not only have other bankruptcy courts applied the fractional economic unit approach, but the Fourth Circuit recently affirmed such use in *Johnson v. Zimmer*.<sup>130</sup> In *Zimmer*, the Chapter 13 debtor had joint custody of her two minor sons and split the cost of their expenses with her ex-husband.<sup>131</sup> The sons resided with her for 204 days each year, and the debtor’s current husband also had joint custody of three children from his prior marriage, all of whom lived with them approximately half of the year.<sup>132</sup> The bankruptcy court implemented the fractional economic unit approach and found the debtor’s two sons each constituted 0.56 members of the household, since they resided in her home 204 days each year.<sup>133</sup> Similarly, each of the debtor’s three step-children counted as 0.49 members because they resided with her 180 days each year.<sup>134</sup> Taken together, the children constituted 2.59 household members, and the court rounded the figure up

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<sup>129</sup> *Id.* at 483 (citing *Hamilton v. Lanning*, 130 S.Ct. 2464, 2470 (2010)). In *Lanning*, the Supreme Court held bankruptcy courts may take future changes in income or expenses into account in calculating projected disposable income, which moves courts away from a strictly mechanical approach of BAPCPA and 11 U.S.C. § 1325(b). *Id.* Accordingly, § 1325(b) was not necessarily considered a completely bright-line test anymore, and a bankruptcy court can adjust household size as necessary to accurately reflect a debtor’s economic situation. *Id.*

The court also acknowledged that calculating expenses may be difficult given the fact that the debtor’s expenses may vary. *Id.* However, the court pointed out that the means test provided for such varying circumstances by including provisions for other necessary expenses. 11 U.S.C. § 707(b) (2006); *Robinson* at 483. This raises the issue of determining which household members’ expenses may be included in the means test calculation, which is an issue that is outside the scope of this Article.

<sup>130</sup> *Johnson v. Zimmer*, 686 F.3d 224 (4th Cir. 2012), *aff’g* In re *Johnson*, No. 10-07244-8-LRL, 2011 Bankr. LEXIS 4636 (Bankr. E.D.N.C. July 21, 2011).

<sup>131</sup> *Zimmer* at 226.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 227.

<sup>134</sup> *Id.*

to three household members.<sup>135</sup> Added to the debtor and her spouse, the debtor had a household size of five for purposes of calculating disposable income.<sup>136</sup>

In first approaching the topic of how to calculate household size, the Fourth Circuit began with the general proposition that an undefined word is usually given its ordinary, common meaning, and the multiple dictionary definitions of household proved inconclusive because they could produce different household compositions.<sup>137</sup> Additionally, the context in which the term household appears in the Bankruptcy Code did not solve the problem because Congress used “household” in close relation to similar terms such as “family” and “dependent,” suggesting each word means something different, but not providing a clear answer as to when and how to distinguish the terms.<sup>138</sup> Overall, the varying possible interpretations of household made the term ambiguous, and the court’s duty was to find the approach for calculating household size that best corresponded with Congressional intent.<sup>139</sup>

The Fourth Circuit thus turned to the three different approaches bankruptcy courts use to determine household size, noting at the outset that the statutory language in the Bankruptcy Code did not require courts to use any one approach in particular.<sup>140</sup> Following the varying lines of reasoning promulgated by bankruptcy courts, the court pointed out several weaknesses in both

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<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 227, 230.

<sup>137</sup> *Id.* at 228-29, 232-33. The court provided the provision for “household,” as a noun, from Black’s Law Dictionary: “1. A family living together. 2. A group of people who dwell under the same roof.” *Id.* at 232 (citing BLACK’S LAW DICTIONARY 744 (7th ed. 1999)). Additionally, the definition from Webster’s was: “[T]hose who dwell under the same roof and compose a family : a domestic establishment; specif[ically] : a social unit comprised of those living together in the same dwelling place.” *Id.* at 232-33 (citing WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1096 (2002)).

Additionally, the “heads on the beds” approach was criticized for failing to satisfy the dictionary definitions, which appeared to limit household to those persons comprising a family or domestic establishment, or at least persons having some relationship outside of merely being co-residents. *Id.* at 233.

<sup>138</sup> *Zimmer* at 233. *See, e.g.*, 11 U.S.C. §§ 707(b), 1325(b)(2)-(3) (2006).

<sup>139</sup> *Zimmer* at 235.

<sup>140</sup> *Id.*

the Census Bureau and income-tax-dependent approaches.<sup>141</sup> The economic unit approach, however, was consistent with § 1325(b), BAPCPA, and the Bankruptcy Code as a whole.<sup>142</sup> The Fourth Circuit explained that focusing on financial interdependence reduced the potential for over- and under-inclusive household sizes, and was flexible in that it acknowledges how a debtor's household could include non-dependents and non-family members who affect the debtor's finances.<sup>143</sup> The most important factor was financial intermingling of income and expenses between the debtor and other persons sharing a home with him, and the inquiry into the financial interplay was consistent with the Code's focus on a debtor's finances.<sup>144</sup>

After approving the economic unit approach, the Fourth Circuit turned to whether apportioning part-time household members into fractions for purposes of calculating household size was appropriate.<sup>145</sup> The court affirmed this method because it prevented the inaccuracies that could arise from having to choose between extremes when, for example, children of parents with joint custody spend anywhere from two to seven days a week with each parent.<sup>146</sup> The fractional economic unit approach was in accord with the flexibility of the Code and reflects a debtor's

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<sup>141</sup> *Id.* at 235-36. First, the Census Bureau approach was inadequate because it could lead to over-inclusion of persons in a household. *Id.* Second, the cross-reference to the Census Bureau's median family income tables was insufficient to imply Congressional intent to incorporate Census Bureau definitions for other words. *Id.* Finally, the Census Bureau's purposes were inconsistent with and "wholly unrelated" to those of the Bankruptcy Code. *Id.*

The income-tax-dependent approach was also inappropriate. *Id.* at 238. First, no bankruptcy provision incorporates the IRS' definitions. *Id.* at 238-39. Second, the purpose of the IRM definition of "dependent" was different from the Bankruptcy Code's purpose in determining household size. *Id.* Lastly, both § 1325(b)(2) and § 707(b) use both "dependents" and "household" in their separate provisions, suggesting that Congress intended the terms to have different meanings. *Id.* The potential effects included under-inclusive household sizes and inaccurate calculations that prejudice non-married parents who cannot both claim a child as a dependent but who nonetheless both provide support for the child. *Id.* at 239.

<sup>142</sup> *Id.* at 237. The economic unit approach did not "inherently contradict" the Bankruptcy Code. *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* In particular, calculating household size for § 1325(b)(2) is primarily done to determine a debtor's financial obligations and his ability to pay. Additionally, current monthly income includes contributions from other sources, such as others who live in a debtor's home—making the addition of such persons to a debtor's household size consistent with the overall scheme of § 1325(b)(2). *Id.*

<sup>145</sup> *Id.* at 240.

<sup>146</sup> *Id.* at 241.

“true financial situation.”<sup>147</sup> Ultimately, the Fourth Circuit affirmed the bankruptcy court’s determination that the debtor had a household of five persons.<sup>148</sup>

### 3. Opposition to Using Fractions in the Economic Unit Approach

Not everyone agrees with *Zimmer*; opposition to a fractional take on the economic unit approach exists.<sup>149</sup> In *In re De Bruyn Kops*, the court disapproved of two developments in the economic unit approach—the use of a list of factors to determine financial interdependence, as the court in *In re Morrison* did, and dividing persons into fractions for purposes of calculating household size, as the court in *In re Robinson* did.<sup>150</sup> The *De Bruyn Kops* court found that the *Morrison* factors went “too far” because one should not be considered part of a debtor’s household if she supports the debtor but the debtor does not support her; this reasoning was primarily based on how the Code permits a debtor to claim means test expenses for his dependents, but not expenses for a person of whom he is a dependent.<sup>151</sup> Additionally, the court

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<sup>147</sup> *Id.* at 241-42. The Fourth Circuit also cited *Hamilton v. Lanning* for the proposition that bankruptcy courts may use flexibility in applying § 1325(b) to account for varying facts and circumstances in individual cases. *Id.* at 242 (citing *Hamilton v. Lanning*, 130 S.Ct. 2464, 2471-78 (2010)).

<sup>148</sup> *Id.* at 227, 242. The debtor’s household of five included her husband and her five part-time children and step-children.

Two subsequent cases citing *Johnson v. Zimmer* deal with an issue related to children who are part-time household members—the issue of college students. In *In re Reinsch*, the debtor’s twenty-year-old daughter who attended college full-time out-of-state was part of the debtor’s household under the economic unit approach. In *re Reinsch*, No. BK12-80748-TLS, 2013 Bankr. LEXIS 273, at \*1, \*8 (Bankr. D. Neb. Jan. 23, 2013). The court relied on the debtor’s testimony that the daughter returns home during breaks from school and on weekends occasionally, and that the debtor provides “substantial financial support to her, including college expenses, food, clothing, car insurance, and [a] cellular phone.” *Id.* at \*7. As such, she was part of the “household economic unit.” *Id.* at \*8.

Another case involving college students is *In re Johnson*, where the debtor had two daughters in college. In *re Johnson*, No. 12-81325C-13D, 2013 Bankr. LEXIS 1338, at \*1 (Bankr. M.D.N.C. Apr. 2, 2013). The court found the older daughter, who was twenty-one-years-old, was not part of the debtor’s household because she had a part-time job, an apartment she shared with roommates, paid her own rent, and did not visit home. *Id.* at \*5-6.

Conversely, the debtor’s eighteen-year-old daughter was part of the debtor’s household because the debtor provided a “high degree of financial support” for her. *Id.* at \*2, 6. The younger daughter did not work, visited home several nights each month, and the Debtor paid for many of her expenses. *Id.* at \*2. Thus, the younger daughter was dependent on the debtor’s financial support. *Id.* at \*6. Notably, the debtor paid for both daughters’ out-of-pocket medical costs, cell phones, medical, life, and automotive insurance, and car repairs. *Id.* at \*2, 6.

<sup>149</sup> *Johnson v. Zimmer*, 686 F.3d 224, 242 (4th Cir. 2012) (Wilkinson, J., dissenting); *In re De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*14-16 (Bankr. D. Idaho Feb. 9, 2012).

<sup>150</sup> *De Bruyn Kops* at \*14-16 (citing *In re Morrison*, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011) and *In re Robinson*, 449 B.R. 473, 482 (Bankr. E.D. Va. 2011)).

<sup>151</sup> *De Bruyn Kops* at \*15-16 (citing 11 U.S.C. § 707(b)(2)(A)(ii)(I) (2006)).

dismissed the fractional economic unit approach because the Code does not indicate, textually or otherwise, that Congress intended for courts to make fractional calculations.<sup>152</sup> Rather, the means test, which Congress promulgated, focuses in many areas on standardized expenses, which will sometimes be over- or under-inclusive.<sup>153</sup>

Ultimately, the *De Bruyn Kops* court applied a limited economic unit approach, which it suggested could be called the “financial dependence” approach.<sup>154</sup> The court’s financial dependence approach determines household size “based on a person’s financial dependence upon, and residence with, a debtor.”<sup>155</sup> The court held the Chapter 7 debtor could claim a household of three persons, which included himself and his two children, who resided with him for part of each month.<sup>156</sup> The debtor could claim three “whole” dependents because the court recognized that a parent with part-time custody may have some expenses that are the same as a full-time custody parent’s, such as housing and transportation costs.<sup>157</sup> Although, the standardized means test expenses the debtor could claim likely were larger than his actual expenses in some regards.<sup>158</sup>

There was also opposition to the fractional method of determining household size under the economic unit approach in the Fourth Circuit’s *Johnson v. Zimmer* case—the lone dissenter, Judge Wilkinson, vehemently disagreed with using fractions to “slic[e] a debtor’s dependents into bits and pieces.”<sup>159</sup> He argued that such a method “contravenes statutory text, allows judges

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<sup>152</sup> *Id.* at \*18-19.

<sup>153</sup> *Id.* at \*19. Congress enacted the means test as a “carefully tailored and principled mechanism to screen out the can-pays and high-income crowd who were purportedly abusing the system.” Robert M. Lawless et al., *Did Bankruptcy Reform Fail? An Empirical Study of Consumer Debtors*, 82 AM. BANKR. L.J. 349, 351 (2008) (citing 145 Cong. Rec. 8509 (1999) and H.R. Rep. No. 109-031 (I), at 92 (2005)).

<sup>154</sup> *De Bruyn Kops* at \*16.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at \*19-20.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Johnson v. Zimmer*, 686 F.3d 224, 242, 245 (4th Cir. 2012) (Wilkinson, J., dissenting).

to unilaterally update the Bankruptcy Code, and subjects debtors to needlessly intrusive and litigious proceedings.”<sup>160</sup> Just because the Code does not define “household” does not mean courts may liberally construe a meaning for the term, and the ordinary meaning of the word “individual” does not include partial people.<sup>161</sup> Nor was there any evidence of Congressional intent to permit fractional calculations of persons for purposes of household size.<sup>162</sup>

Judge Wilkinson also pointed out that Congress can revise the Code as it sees fit to accommodate changing family arrangements, and thus it was not the majority’s place to judicially adopt a fractional economic unit approach.<sup>163</sup> In conclusion, the dissenting opinion argued that the fractional approach could cause increased intrusiveness, litigation, and costs.<sup>164</sup>

### III. THE NEED FOR A UNIFORM APPROACH TO CALCULATE HOUSEHOLD SIZE

The absence of a statutory definition of household in the Bankruptcy Code has led to inconsistencies in Chapter 7 and Chapter 13 cases because bankruptcy courts do not use a uniform approach when calculating household sizes.<sup>165</sup> Courts have demonstrated that the general purpose of the economic unit approach—determining which individuals operate financially as an economic unit with a debtor—is the most flexible, realistic, and feasible approach for calculating household size.<sup>166</sup> However, rather than permitting courts to choose whichever approach they prefer to calculate household size, Congress should use the general focus of the economic unit approach to hone and codify a bright-line test for calculating

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<sup>160</sup> *Id.* at 242.

<sup>161</sup> *Id.* at 243. Courts in other contexts have found “individual” means a whole person. *Id.* at 244.

<sup>162</sup> *Id.* at 244.

<sup>163</sup> *Id.* at 244-45 (internal quotations omitted).

<sup>164</sup> *Id.* at 245-46. The judge also explained that Congress decided to permit inaccuracies that are inherent in standardized formulas when it codified the means test. Thus, permitting single parents with joint custody to claim a child as a whole member of her household would be more consistent with Congressional intent than reducing such a person to a fractional number. *Id.* at 246-47.

<sup>165</sup> Volk, *supra* note 3, at 84-85; *see also* the cases cited in Part II, *supra*.

<sup>166</sup> Johnson v. Zimmer, 686 F.3d 224, 240-42 (4th Cir. 2012); Volk, *supra* note 3, at 85.

household size. If Congress codified a test, courts would then use the same approach to calculate household size, and there would be more uniformity in application and results.

a. The Census Bureau and Income-Tax-Dependent Approaches May Lead to Inaccurate Household Sizes

The largest problem with the Census Bureau approach is that merely counting the number of heads on beds in a single dwelling place does not reflect a debtor's financial situation.<sup>167</sup> A debtor's financial situation is much more important than his living arrangements in regards to the household size issue because household size helps determine whether a debtor has above or below median income.<sup>168</sup> Accordingly, just counting the number of persons in a home without determining whether the debtor financially supports them could lead to an inflated household size, to the detriment of the debtor's unsecured creditors.<sup>169</sup>

A larger household size in Chapter 7 reduces the chances of the presumption of abuse applying and increases the chances of a debtor staying in Chapter 7.<sup>170</sup> In addition, a larger household size benefits Chapter 13 debtors because it increases the chances that they will be below median income debtors. Below median income debtors in Chapter 13 may use their own expenses to calculate disposable income, rather than the standardized means test expenses.<sup>171</sup> Also, Chapter 13 debtors with below median income only need a thirty-six-month plan for confirmation, whereas above median income debtors need a plan that provides payments to creditors for at least sixty months.<sup>172</sup>

While several bankruptcy courts have applied the Census Bureau approach, other courts are quick to point out its weaknesses—primarily, that there is no statutory basis for applying a

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<sup>167</sup> *Zimmer* at 236.

<sup>168</sup> *See supra* Part I.

<sup>169</sup> Leibowitz, *supra* note 3.

<sup>170</sup> *Id.*

<sup>171</sup> 11 U.S.C. § 1325(b)(2)–(3) (2006).

<sup>172</sup> *Id.*; *Zimmer* at 236.

Census Bureau definition in the bankruptcy context, since the purposes of the Census Bureau and the Bankruptcy Code are dissimilar, and that the reference to and use of Census Bureau median family income data is too attenuated a link on which to base such a pivotal analysis.<sup>173</sup>

Calculating household size, after all, may very well determine whether a debtor may receive a discharge in Chapter 7, whether a Chapter 13 debtor can deduct actual expenses or must deduct means test expenses, and whether a debtor in Chapter 13 must commit to a thirty-six- or sixty-month plan.<sup>174</sup> Thus, calculating household size properly is essential to accurate application of the Bankruptcy Code.<sup>175</sup>

Similarly, the income-tax-dependent approach does not align neatly with the purposes of the Bankruptcy Code. While the Bankruptcy Code's objective is to provide a fresh start for honest but unfortunate debtors, the IRS' objective is to collect money for the federal government.<sup>176</sup> Both do, however, focus on the financial situation of the debtor in terms of support for himself and others. The strongest connection between the Bankruptcy Code and the IRS is that § 707(b) references IRS tables.<sup>177</sup> However, the reference does not mandate use of the income-tax-dependent approach, especially because the Code often uses "household" and "dependent" in the same provision, which suggests that the two have separate and distinct meanings.<sup>178</sup>

Limiting household size to those individuals the debtor could or does claim on his income tax returns likely produces a household size that is smaller than it would be if, for example, the Census Bureau approach was used. A smaller household size makes a debtor more vulnerable to

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<sup>173</sup> *Zimmer* at 236; *In re Jewell*, 365 B.R. 796, 800 (Bankr. S.D. Ohio 2007).

<sup>174</sup> 11. U.S.C. §§ 707(b), 1325(b)(2)–(4) (2006).

<sup>175</sup> *Volk*, *supra* note 3, at 22.

<sup>176</sup> *Jewell* at 801.

<sup>177</sup> 11. U.S.C. § 707(b)(2)(A) (2006).

<sup>178</sup> 11 U.S.C. § 707(b)(2) (2006); *Zimmer* at 238-39.

failing the presumption of abuse test in Chapter 7.<sup>179</sup> Similarly, if a Chapter 13 debtor has a smaller household size, he is more likely to have above median income. Above median income in Chapter 13 requires the debtor to use means test expenses in his disposable income inquiry and also requires the debtor's plan to be sixty months at a minimum, compared to the thirty-six-month minimum for below median income debtors.<sup>180</sup> Accordingly, the income-tax-dependent approach tends to favor unsecured creditors because there may be more money available to them when the plan provides for more months of payments and when the payments are based on standardized means test expenses.<sup>181</sup>

Courts criticize the income-tax-dependent approach as being too narrow.<sup>182</sup> For example, if a divorced parent has joint custody of his child but a prior agreement with his ex-wife prohibits him from claiming the child on his income tax returns because she claims the child, the debtor may not be able to claim the child as part of his household despite providing substantial financial support for the child.<sup>183</sup> As such, this approach may often be under-inclusive and, thus, too narrow for uniform application.<sup>184</sup>

b. The Economic Unit Approach Also Falls Short Because of Difficulties and Inconsistencies in Application

Recognizing the potential for over- and under-inclusive household sizes when using the Census Bureau and income-tax-dependent approaches, respectively, courts applying the economic unit approach focus on financial support and are heading in the right direction.<sup>185</sup> Focusing on a debtor's individual financial situation within his economic unit will produce the

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<sup>179</sup> 11 U.S.C. § 707(b) (2006); *Zimmer* at 239, Volk, *supra* note 3, at 84.

<sup>180</sup> 11 U.S.C. § 1325(b)(2)–(4) (2006).

<sup>181</sup> Leibowitz, *supra* note 3.

<sup>182</sup> *Zimmer* at 239.

<sup>183</sup> *In re Morrison*, 443 B.R. 378, 387 (Bankr. M.D.N.C. 2011).

<sup>184</sup> *Zimmer* at 239.

<sup>185</sup> *Zimmer* at 239-40; Volk, *supra* note 3, at 85.

most accurate depiction of household size.<sup>186</sup> However, courts applying the economic unit approach have fashioned different forms of this approach, and not all variations are created equal.<sup>187</sup> The cases that apply an economic unit approach by focusing on individuals living with the debtor and for whom the debtor financially supports provide the best guidance for determining household size.<sup>188</sup>

Conversely, the practice of using fractions in the economic unit approach is flawed. As the dissenting judge in *Zimmer* noted, there is no support in the Bankruptcy Code for using fractions to calculate household size.<sup>189</sup> Nor can a household realistically include partial members because each individual person comprises one human being.<sup>190</sup> Furthermore, single debtors and their ex-spouse-creditors may often dispute how much time their children spend with each parent when fractional household size is based on time.<sup>191</sup> The fractional approach requires parties to scrutinize time spent with part-time household members and to engage in mathematical calculations.<sup>192</sup> Litigating over fractional household members wastes time and money, especially when the fractional number may have to be rounded to a whole number anyway.<sup>193</sup> Rather, a better approach is to consider the extent of significant financial support a debtor provides to other individuals living in his home.

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<sup>186</sup> *Zimmer* at 241-42; Volk, *supra* note 3, at 85.

<sup>187</sup> Compare *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007), with *Zimmer* at 239-42.

<sup>188</sup> See *Jewell* at 801-02; *In re Herbert*, 405 B.R. 165, 166-70 (Bankr. W.D.N.C. 2008); *Morrison* at 384-88; *In re De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*1, \*16 (Bankr. D. Idaho Feb. 9, 2012).

<sup>189</sup> *Zimmer* at 245 (Wilkinson, J., dissenting).

<sup>190</sup> *Id.* at 243.

<sup>191</sup> *Id.* at 245-46.

<sup>192</sup> *Id.*

<sup>193</sup> For example, if there are two children who spend roughly 50% of their time with each parent, each child would equal 0.5 of the debtor-parent's household; thus, together, they would comprise one household member, and there would be no need for rounding. However, if there is just one child who spends 50% of time with each parent, the child would be 0.5 of a member of the debtor-parent's household, and the number would have to be rounded up or down to apply the median family income tables, which provide figures for whole household numbers. See *Census Bureau Median Family Income by Family Size*, *supra* note 15.

c. Congress Should Codify a Bright-Line Test for Calculating a Debtor’s Household Size that Focuses on Individuals for whom the Debtor Provides Substantial Support

Since courts use different approaches to calculate household size, none of which provide widely workable or uniform results, Congress should codify a bright-line test for determining who may be part of a debtor’s household for bankruptcy purposes. A bright-line test would be consistent with Congress’ intent in promulgating the means test—to create a standardized, formulaic system—and would provide a general framework for addressing individuals who live with a debtor full- or part-time.<sup>194</sup> Such a test would also reduce litigation and costs because courts would have firmer guidelines from which to determine whether an individual is in or out of a debtor’s household. The bright-line test must focus on who the debtor provides significant financial support to, while also accounting for varying familial arrangements.

This Article provides a model test that focuses on individuals living with the debtor who receive substantial support financially from the debtor—a “substantial support test.” While this test is based on the general purpose of the economic unit approach, which is to ascertain which individuals operate as an economic unit with the debtor, it is more specific and provides a general framework for the types of individuals who are financially dependent upon the debtor.<sup>195</sup>

The model substantial support test is as follows:

A debtor’s household includes individuals for whom the debtor provides significant support financially. Married debtors who live together may include an individual in their joint household if the individual satisfies one of the following seven provisions in relation to at least one of the debtors.

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<sup>194</sup> Braucher, *supra* note 86, at 416.

<sup>195</sup> The court in *De Bruyn Kops* found a household should include those individuals who are financially dependent upon the debtor, and this Article’s model test expands on this idea by delineating specific requirements for this type of dependency. In re *De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*1,\*16 (Bankr. D. Idaho Feb. 9, 2012).

A debtor may include in his household an individual who satisfies any of the following seven provisions for the six months prior to the date the debtor's petition for relief was filed:

- i. The debtor
- ii. An individual who lives with the debtor full-time and who is the debtor's spouse, minor child, minor step-child, or minor grandchild
  1. If the individual is the debtor's minor grandchild, the debtor may include the grandchild in household size if the grandchild's parent does not also live with the debtor or if the majority of expenses threshold in (v) is met for the grandchild in relation to the debtor
- iii. The debtor's minor child, whom the debtor has shared, joint physical custody of with the child's other parent
  1. Shared, joint custody for purposes of this provision means the court-ordered custody arrangement provides that the debtor has physical custody of the child 40-60% of the time each year
- iv. The debtor's minor child, who does not live with the debtor at for at least 40% of each year, when the debtor's expenditures for the child amount to at least 10% of the debtor's before-tax income. If more than one of the debtor's minor children does not live with him or her for at least 40% of each year, each additional child shall raise the threshold expenditure amount by 5%.

Expenditures for the child under this provision may include, but are not limited to, the following:

1. Child support paid to the child's custodial parent
  2. Medical expenses, including health insurance premiums, deductibles, and out-of-pocket costs
  3. Housing
  4. Transportation
  5. Clothing
  6. Child care
  7. Education
  8. Recreation/miscellaneous expenses
- v. An adult child who lives with the debtor full-time; a child under 24 years old who is a full-time student; or an elderly, chronically ill, or disabled relative of the debtor who lives with the debtor full-time or for whom the debtor provides the majority of financial support. To be part of the debtor's household, the debtor must also pay the majority of the costs of at least 3 of the following items for such an individual:
    1. Housing
    2. Food

3. Utilities—at least two of the following:
    - a. Water
    - b. Energy—electricity and gas, if applicable
    - c. Cell phone service
  4. Transportation—at least one of the following:
    - a. Monthly lease or loan payment on a vehicle primarily used by the individual
    - b. Automotive insurance for the individual
    - c. Vehicle maintenance costs for a vehicle primarily used by the individual
    - d. Gas money or funds for public or other transportation
  5. Medical expenses, including health insurance premiums, deductibles, and out-of-pocket costs
  6. Undergraduate education costs not covered by the child’s financial aid
- vi. An individual who cohabitates with the debtor when the two share the majority of expenses for the following, when applicable:
1. Housing
  2. Food & Utilities
  3. Transportation
  4. Medical expenses
  5. Child care
- vii. (1) All of the above provisions regarding children also apply to minor individuals for whom the debtor is the legal guardian or custodian of, and to individuals for whom the debtor was the legal guardian or custodian of at the time the individual became 18 years of age.
- (2) All of the above provisions that use the word “child” include natural, adopted, and foster children.

As a preliminary matter, the time period used to determine whether an individual is part of a debtor’s household, six months, reflects the time period from which the debtor’s CMI is calculated.<sup>196</sup> Since both household size and CMI are used to determine above or below median income status, it is most appropriate to consider individuals who were part of the debtor’s household for the six months leading up to the debtor’s filing date. Additionally, each person the debtor wants to include in his household size must individually satisfy a provision of the test. However, if married debtors file for bankruptcy together, members of their household size only

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<sup>196</sup> 11 U.S.C. § 101(10A) (2006).

have to satisfy the test for at least one of the debtors. Moreover, the debtor has the burden of proof to show he provides substantial support financially for an individual.

*i. Comments on Provisions (i), (ii), and (iii) of the Substantial Support Test*

Sections (i) and (ii) of the test are the least controversial because a debtor, his spouse, and their minor children are most akin to the traditional notion of household.<sup>197</sup> However, the provision in (ii) that permits a debtor's household to include minor step-children and minor grandchildren who live with the debtor full-time may not be as well-received. The test includes these two categories to reflect the financial dependency of the step-children and grandchildren that likely exists if the minor lives with the debtor full-time.<sup>198</sup> Thus, a debtor who is responsible for full-time care and support of her minor grandchild may reflect her financial obligation in her household size.<sup>199</sup>

The situation is less clear, though, when debtors permit their child and grandchild to both live with them. If the debtors' adult child covers all the grandchild's expenses, then the grandchild would not be part of the debtor's household, pursuant to sub-provision (ii)(1) of the test. Conversely, if the debtors pay for some of the grandchild's expenses and the adult child pays for the remaining expenses, the grandchild has to satisfy the same test as the adult child—the substantial support threshold in provision (v)—for the debtors to be able to include both individuals in their household size.

Provision (iii) also deals with children, treating a child as part of a debtor's household when the child lives with the debtor for roughly half of each year. Opponents of this provision

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<sup>197</sup> Timmerman & Caruso, *supra* note 3.

<sup>198</sup> If the debtor has a step-child living with him, he likely is providing financial support for the child. Even if the debtor's spouse, who for purposes of this hypothetical is not a co-debtor, receives child support for the child, the debtor likely also provides for the child since they share a home full-time.

<sup>199</sup> Grandparents caring and providing support for their grandchildren full-time is not uncommon—this living situation has actually been on the rise in recent years. *See Census Bureau Reports 64 Percent Increase in Number of Children Living with a Grandparent Over the Last Two Decades*, *supra* note 6; Cherlin, *supra* note 4, at 413-14.

likely may ask why the test counts a child as a whole household member when the child is in fact a part-time member. The reason is that when parents have joint custody of a child, they essentially provide the child with two households.<sup>200</sup> The child has to have adequate housing, clothing, food, toiletries, and basic amenities at each home. Each parent has to have adequate housing and transportation for the child.<sup>201</sup> There will certainly be incidental expenses that each parent incurs as well, such as for recreational activities.<sup>202</sup> Thus, the child is part of each parent's household.

In addition, treating a child as a fraction of a household member is unworkable because the median income tables the Bankruptcy Code uses have increments of one, and each additional household member does not increase the median income by the same monetary amount.<sup>203</sup> Another point is that the test focuses on financial support, not time, so using fractions to apportion household members on the basis of time spent with the debtor may lead to inaccurate calculations.<sup>204</sup> Moreover, the court in *De Bruyn Kops* and the dissenting judge in *Zimmer* noted that Congress likely anticipated that household numbers would be estimated and there may be inaccuracies since not every situation will fit perfectly within a standardized formula such as the means test or the median income tables.<sup>205</sup>

*ii. Comments on Provision (iv) of the Substantial Support Test*

Similar to the financial focus in provision (iii), the purpose of section (iv) is to include in a debtor's household a child for whom the debtor provides substantial financial support, even if

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<sup>200</sup> Lino, *supra* note 101, at 14; Cherlin, *supra* note 4, at 410.

<sup>201</sup> The court in *De Bruyn Kops* noted that a parent with partial custody may have some expenses that are the same as a full-time-custody parent's expenses, such as housing and transportation costs. In re *De Bruyn Kops*, No. 11-41153-JDP, 2012 Bankr. LEXIS 775, at \*19-20 (Bankr. D. Idaho Feb. 9, 2012).

<sup>202</sup> See Lino, *supra* note 101, at 2, 8, for information on miscellaneous children's expenses.

<sup>203</sup> See *Census Bureau Median Family Income by Family Size*, *supra* note 15, for median family incomes based on household sizes and states.

<sup>204</sup> The focus in the substantial support test is on finances, and rightly so, because the Bankruptcy Code centers on a debtor's financial situation, not on his time spent with individuals.

<sup>205</sup> *De Bruyn Kops* at \*19; *Johnson v. Zimmer*, 686 F.3d 224, 244-45 (4th Cir. 2012) (Wilkinson, J., dissenting).

the child does not live with the debtor for half of each year. For a child to be a household member under this provision, the debtor's expenditures for the child must amount to at least 10% of his before-tax income; this threshold percentage is based on data from the 2011 Expenditures on Children by Families report published by the United States Department of Agriculture ("USDA report").<sup>206</sup> The USDA report provides various studies' data on the average percent of household expenses attributable to children in married families. For a married couple with one child, the lowest average percentage of income spent on the child was 21%.<sup>207</sup> Accordingly, dividing the figure in two to account for non-married parents would mean a debtor who pays expenses for his minor child that amount to 10% of his before-tax income would put the debtor on equal footing expenditure-wise with a married debtor.<sup>208</sup> While each spouse in a marriage does not always have the same income as the other, and while expenditures may vary, the 10% threshold amounts to substantial support because of its similarities to amounts expended by married couples. Moreover, the percentage threshold reflects how support expenditure amounts will change based on standards of living—for example, a high-income parent may spend more on a child than a low-income parent.<sup>209</sup>

The USDA report also shows average percentages from various studies for married couples with two and three children.<sup>210</sup> For two children, the lowest average percentage of household expenditures for children was 31% of before-tax income.<sup>211</sup> Divided in two, this

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<sup>206</sup> Lino, *supra* note 101, at 19. The USDA report provided the basis for the 10% threshold, the before-tax income component (as opposed to net income), and the categories of expenses listed in provision (iv). *Id.* at 2-8.

<sup>207</sup> *Id.* at 19.

<sup>208</sup> The figure, 21%, divided in two is 10.5%, but the amount was rounded down to give the debtor a better chance to meet the threshold when the support is substantial, which it would be if the debtor's expenditures for the child amount to 10% of his before-tax income.

<sup>209</sup> The amount of money parents spend on their children varies from family to family, largely because of variations in standards of living. Ira Mark Ellman & Tara O'Toole Ellman, *The Theory of Child Support*, 45 HARV. J. ON LEGIS. 107, 112 (2008).

<sup>210</sup> Lino, *supra* note 101, at 19.

<sup>211</sup> *Id.*

figure is roughly 15%, when the number is rounded down. Accordingly, the provision in (iv) states that when a debtor has more than one child not living with him, additional children raise the threshold by 5% per child. This comports with the average percentages, especially since the lowest average percentage in the USDA report for married debtors with three children is 42%.<sup>212</sup> Divided by two, each parent roughly spends 21% of his or her income on the child's expenditures. The method in provision (iv) requires that for three children to qualify as members of a debtor's household under (iv), the debtor must spend 20% of his before-tax income on their expenditures.

To clarify, these figures will not always reflect every debtor's reality, but the percentages are meant to reflect a debtor substantially supporting a minor child who does not regularly live or stay with him. A debtor may include any expenses he incurs for his child in the 10% calculation—this includes expenses such as health insurance premiums, housing costs above his own (for example, having a two-bedroom apartment so the child has a room when he spends the night), child support payments,<sup>213</sup> child care costs,<sup>214</sup> and incidental expenses such as extracurricular activity costs. A debtor who has custody of his child every other weekend could include expenses he incurs to house, feed, entertain, and provide for the child when they spend time together.

An example of a debtor with a child who may satisfy provision (iv) is a debtor who makes \$24,000 in six months, pays \$648 in child support each month, pays \$200 per month for

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<sup>212</sup> *Id.*

<sup>213</sup> Courts base child support orders on “schedules that specify dollar amounts that obligors must pay for any given combination of parental incomes and number of children.” Ellman & Ellman, *supra* note 209, at 109.

<sup>214</sup> Child care is expensive. In 2011, the average annual cost of care for school-aged children before or after school ranged from \$1,950 to \$11,000, depending on the state. CHILD CARE AWARE OF AMERICA, PARENTS AND THE HIGH COST OF CHILD CARE, 2012 REPORT (2012), *available at* [www.naccrra.org/sites/.../files/.../cost\\_report\\_2012\\_final\\_081012\\_0.pdf](http://www.naccrra.org/sites/.../files/.../cost_report_2012_final_081012_0.pdf). Additionally, the average annual cost in 2011 for a four-year-old in a child care center ranged from \$3,900 to \$11,700, depending on the state. *Id.*

after-school child care, and cares for the child two weekends per month.<sup>215</sup> The debtor's six-month expenditures for the child are at least \$5088, not including the costs to house and feed the child on weekends spent together; this amount is approximately 21.2% of the debtor's before-tax income for six months. The debtor could include the child as part of his household because he provides substantial support financially for the child under provision (iv).

Opponents of provision (iv) may argue that a non-custodial parent does not provide substantial financial support for his child and that 10% of a debtor's income may not be substantial support in terms of the child's financial needs. However, the counterargument is that the percentage is comparable to what married couples spend together to raise their children.<sup>216</sup> Others may argue the threshold amount is too high, especially for debtors with high incomes. However, the percentage threshold subjects a debtor to providing a standard of living for his child that is similar to his own standard of living. If he makes more, he can spend more. For example, a debtor who makes \$100,000 in before-tax income would have to spend \$10,000 on a child for the child to qualify under provision (iv), if the child does not qualify as a member of the household under any other provision of the test. Though, child support amounts are based on income, so the debtor with a \$100,000 before-tax salary would likely pay more per month in child support than a debtor with a \$48,000 before-tax salary.<sup>217</sup> In addition, the debtor, depending on whether he has additional members of his household and what state he lives in, likely is

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<sup>215</sup> Some states, such as California, have guideline calculators on their websites so parents can calculate estimated child support amounts. A basic calculation in California for a non-custodial parent with one child and monthly before-tax income of \$4,000 (annual before-tax income of \$48,000), not accounting for other factors in the debtor's financial situation relevant to the calculation, produces a monthly support amount of \$648 when the child spends 20% of his time with the parent and when the custodial parent makes \$1200 per month. *Calculate Child Support*, CALIFORNIA DEPARTMENT OF CHILD SUPPORT SERVICES, [HTTP://WWW.CHILDSUP.CA.GOV/RESOURCES/CALCULATECHILDSUPPORT.ASPX](http://www.childsup.ca.gov/resources/calculatechildsupport.aspx) (last visited Apr. 27, 2013) (click on "Go to Calculator"; then leave the "Number of Children" at 1 and click "Start"; leave the percentage for "Time with Parent 1 (%)" at 20.0, and enter \$4000 for Parent 1's monthly Wages/Salary and \$1200 for Parent 2's monthly Wages/Salary; then click "Calculate Guideline Support" at the bottom of the page).

<sup>216</sup> Lino, *supra* note 101, at 18-20.

<sup>217</sup> Ellman & Ellman, *supra* note 209, at 109.

already an above median income debtor, regardless of whether he can include the child as a member of his household.<sup>218</sup> Moreover, a larger income suggests the debtor can provide a higher standard of living and thus spend more on his child.<sup>219</sup>

The debtor has the burden of proving he and his child meet the 10% substantial support threshold in provision (iv). While critics of this provision may point out that parties may argue over expenses, such as how to calculate household costs a debtor accrues due to the child, the crux of (iv) is to permit a debtor to prove he provides substantial support financially for his child. The courts will have some discretion over expense amounts proffered, but ultimately the debtor's household will include a child under (iv) if he provides substantial support financially for the child and if he can offer the requisite proof.

*iii. Comments on Provision (v) of the Substantial Support Test*

Moving away from minor children, provision (v) focuses on adult individuals for whom the debtor provides substantial financial support. The first sentence lays out categories of individuals who may qualify as household members of the debtor under this provision, the first of which is an adult child who lives with the debtor full-time and for whom the debtor pays for the majority of the individual's expenses, the test for which is delineated in (v)(1)–(6). This provision is meant to include individuals the debtor substantially supports in a financial capacity, even if he is not legally obligated to do so. If an adult child moves home after college, does not have a job, and the debtor pays for the majority of expenses for the child, the child is dependent upon the debtor and is part of the debtor's household. Or, if an adult child lives at home with his debtor-parents full-time while commuting to college every day, the debtor-parents may include the child in their household size if they pay for the majority of the child's expenses. A similar

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<sup>218</sup> See *Census Bureau Median Family Income by Family Size*, *supra* note 15, for median family income amounts.

<sup>219</sup> Ellman & Ellman, *supra* note 209, at 114-15.

situation is when an adult child loses his job or moves in with his parents as a result of financial hardship and the debtor-parents pay the majority of the child's expenses.<sup>220</sup> However, if the debtor does not pay the adult child's expenses and the adult child is essentially just sleeping and showering at the debtor's home, the adult child is not part of the debtor's household because the child is not part of the debtor's economic unit.<sup>221</sup>

The second category of individuals that provision (v) includes is children of the debtor who are full-time students, under the age of twenty-four, for whom the debtor pays the majority of costs for at least three of the six expenses listed in (v)(1)–(6). This category focuses on undergraduate students who rely on their parents for substantial support financially while they are in college.<sup>222</sup> The twenty-four-year-old age cap comes from federal financial aid guidelines. A student applying for federal financial aid must complete a Free Application for Federal Student Aid (FAFSA).<sup>223</sup> The FAFSA requires the student to include information about their parents' income<sup>224</sup> unless the student is at least twenty-four years old, is a graduate student, is

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<sup>220</sup> For example, in *In re Jewell*, the debtor's adult daughter and her children moved in with the debtors because of financial hardship. *In re Jewell*, 365 B.R. 796 (Bankr. S.D. Ohio 2007).

<sup>221</sup> In *Jewell*, the debtor's adult son was not part of their household when he did not ask for or receive financial assistance from them and was "merely a head on the bed." *Id.* at 802.

<sup>222</sup> For example, the debtors in *In re Reinsch* and *In re Johnson* could include in their households their full-time-college-student daughters for whom they provided substantial financial support. *In re Johnson*, No. 12-81325C-13D, 2013 Bankr. LEXIS 1338, at \*1 (Bankr. M.D.N.C. Apr. 2, 2013); *In re Reinsch*, No. BK12-80748-TLS, 2013 Bankr. LEXIS 273, at \*1, \*8 (Bankr. D. Neb. Jan. 23, 2013). In *Reinsch*, the debtor provided for his daughter when she visited home on weekends and school breaks, and provided financial support for college expenses, clothing, car insurance, food, and her cell phone. *Reinsch* at \*8. Similarly, in *Johnson*, the debtor could include his younger daughter, for whom he provided a place to stay on some weekends and school breaks, groceries, and other expenses, but could not include his older daughter, who was also a college student, because she had her own apartment, paid her own rent, and never visited home. *Johnson* at \*5-6. The debtor paid substantial expenses for both of them, though, such as insurance costs, car repair costs, cell phone bills, and medical costs, and they may qualify as members of his household under the substantial support test if the threshold amounts are met. *Id.* at \*2, 6. See *supra* note 148 for additional facts about these cases.

<sup>223</sup> See *generally About Us*, FEDERAL STUDENT AID, AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, <http://studentaid.ed.gov/about> (last visited Apr. 27, 2013).

<sup>224</sup> If the student's parents are divorced, she only has to include information about the parent who provided her with the most financial support in the previous twelve months. FEDERAL STUDENT AID, AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, 2013-14 FAFSA ON THE WEB WORKSHEET 3, *available at* <http://studentaid.ed.gov/resources#efc>.

married, or the student fits into other limited exceptions.<sup>225</sup> If a parent refuses to provide his income information or does not support the student in any form, the student must take additional steps to try to obtain financial aid.<sup>226</sup> Accordingly, it is reasonable to consider undergraduate students under the age of twenty-four as potentially receiving substantial financial support from their parents, and such students may be included in the debtor's household if the substantial support test in provision (v) is met.

While there is no written requirement in provision (v) for the full-time students under twenty-four years of age to live with the debtor for any part of the year, if the student goes home for summer or holiday breaks, or visits on weekends, financially supporting the child during those times certainly would count towards the majority of expenses threshold. If a parent provides housing, utilities, and transportation for a child both while the child lives at school and when the child comes home, the situation would likely satisfy the substantial support threshold. However, if the child pays for her housing and expenses at school with student loans and visits home rarely, the debtor may not be providing substantial financial support and, thus, the child would not be included in his household size. Ultimately, the debtor must prove he pays the majority of expenses for at least three of the listed categories for the student.

The last category of individuals in section (v) is elderly, chronically ill, or disabled relatives of the debtor who live with the debtor full-time or for whom the debtor provides the majority of financial support. This section is modeled after § 707(b)(2)(A)(ii)(II), which permits a debtor to include reasonably necessary expenses in the means test for an elderly, chronically ill, or disabled household member or immediate family member when that person is unable to pay

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<sup>225</sup> *Id.* at 2; *Dependency Status*, FEDERAL STUDENT AID, AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, <http://studentaid.ed.gov/about> (last visited Apr. 27, 2013).

<sup>226</sup> *Filling Out the FAFSA*, FEDERAL STUDENT AID, AN OFFICE OF THE U.S. DEPARTMENT OF EDUCATION, <http://studentaid.ed.gov/about> (last visited Apr. 27, 2013).

his own expenses.<sup>227</sup> Rather than use the exact language from § 707(b)(2)(A)(ii)(II), the substantial support test is more simplistic in that the elderly, chronically ill, or disabled person merely must be a “relative” of the debtor.<sup>228</sup> As with the other two categories of individuals in (v), the elderly, chronically ill, or disabled relative must also receive financial support from the debtor amounting to at least the majority of the costs for three of the expense items listed in (v)(1)–(6). This category is meant to cover elderly or ill parents, grandparents, or other relatives for whom the debtor cares for when those persons cannot care for themselves.

The expense items listed in (v)(1)–(6) are intended to cover the major expenses most individuals have.<sup>229</sup> Thus, if a debtor pays for the majority of an adult child or relative’s expenses, that person may be included in the debtor’s household size. There will likely also be incidental expenses the debtor will incur because of the individual. While opponents of section (v) may assert that a debtor should not pay for expenses for adult children or relatives, especially at the expense of his creditors, the above or below median inquiry is based on the six months leading up to filing—it focuses on the debtor’s financial situation leading up to his bankruptcy filing.<sup>230</sup> Accordingly, the debtor’s income and household size should reflect his actual financial situation for the six months leading up to filing. If his situation included providing substantial support for other individuals, his household size in bankruptcy should reflect that support since the above or below median income inquiry is backward-looking. Additionally, the means test, which determines the debtor’s current situation and status in bankruptcy, only permits debtors to

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<sup>227</sup> 11 U.S.C. § 707(b)(2)(A)(ii)(II) (2006).

<sup>228</sup> The Bankruptcy Code defines “relative” as an “individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.” 11 U.S.C. § 101(45) (2006).

<sup>229</sup> Many of the expense categories listed in provision (v)(1)–(6) appear in the list of expenditure categories for children in the USDA report. Lino, *supra* note 101, at 2-8.

<sup>230</sup> 11 U.S.C. §§ 101(10A), 707(b), 1325(b)(2)–(3) (2006).

include expenses for their dependents.<sup>231</sup> The means test will, then, limit a debtor in bankruptcy to paying for dependents only from that point on.

*iv. Comments on Provisions (vi) and (vii) of the Substantial Support Test*

The next provision, (vi), permits a debtor to include an individual in his household if he and the individual share the majority of the costs for expenses listed in (vi)(1)–(6). This provision is meant to cover cohabitating couples who are not married, such as those in domestic partnerships, those in romantic relationships, or engaged couples. The word “share” is not as restrictive as earlier provisions, such as (iv) and (v), that require a debtor to meet threshold financial support amounts. Courts will have more discretion in deciding whether an individual meets the requirements under this category. The main focus is on whether the two individuals provide substantial support financially for each other and, thus, whether they operate as a single economic unit.<sup>232</sup>

This provision is similar to the part of (ii) that includes in a debtor’s household his spouse, when she lives with him full-time—the proof of support required to include the person in the debtor’s household size is not as extensive as that required in provisions (iv) and (v). Additionally, a debtor’s spouse who does not live with him full-time could nonetheless qualify as part of his household if the two meet the cohabitating, shared expenses threshold in (vi). While provision (vi) could potentially apply to roommates, a roommate could be part of the debtor’s household only if the two share the majority of expenses for the delineated household costs. If the roommate meets the test, then he may be part of the debtor’s household size.<sup>233</sup>

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<sup>231</sup> 11 U.S.C. § 707(b)(2)(A) (2006).

<sup>232</sup> If a debtor is a polygamist, he would not legally be married to any of his wives other than his first; thus, each additional wife would have to satisfy provision (vi) to be part of his household.

<sup>233</sup> Another issue is whether adult children could fit under this provision, as opposed to under provision (v). The answer is that since they are expressly addressed in (vi), courts likely would not, and should not, include them in a debtor’s household under (vi) unless the two truly operate as an economic unit by sharing the majority of their expenses.

The last provision, provision (vii), is meant to include in a debtor's household size those individuals for whom the debtor provides as if he was the person's parent. Such individuals may include grandchildren, nieces, nephews, or any other individual for whom the debtor is a legal guardian or custodian. These individuals may be included in a debtor's household size when they meet any of the criteria in provisions (ii)–(vi) by substituting in where the provision uses the word “child.” Provision (vii) also provides for a broad definition of “children.”

v. *General Comments on the Substantial Support Test*

Overall, the goal of the substantial support test is to provide a bright-line test for calculating household size. While the test will not fit all living arrangements, it is meant to provide the best way for determining which individuals are members of a debtor's household. The test adapts to different familial situations and covers a wide variety of potential household formulations. A bright-line test is the best way to solve the problem of bankruptcy courts applying various approaches to determine household sizes, especially in light of Congress' promulgation of the bright-line means test in 2005.<sup>234</sup> Although any bright-line test will be under- or over-inclusive to some extent, bright-line tests reduce litigation and costs, and provide bankruptcy courts with guidance and direction.<sup>235</sup> Additionally, while some may argue the test is fact-intensive, the debtor has the burden to prove substantial support. Thus, the debtor is the one who simply must proffer evidence that he supports those in his home. Moreover, courts may still use discretion when determining whether an individual fits the contours of the test.

The substantial support test is designed to exclude individuals from a debtor's household size who the debtor does not substantially support in a financial capacity. There is a threshold

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<sup>234</sup> The means test is a bright-line formula, which was what Congress intended. Accordingly, the substantial support test comports with Congress' prior implementation of bright-line formulas. Lawless et al., *supra* note 153, at 351-52; Braucher, *supra* note 86, at 416-17.

<sup>235</sup> Braucher, *supra* note 86, at 416-17.

point at which some individuals will be excluded, and thus some expenses will be excluded from consideration. However, such a result is consistent with Congress' intent to limit bankruptcy to honest and unfortunate debtors who truly cannot pay their creditors.<sup>236</sup> Such an approach evens out the playing field for both debtors and creditors.

#### d. Applying the Substantial Support Test

Since living arrangements in today's society vary, the substantial support test will benefit from hypotheticals and case facts demonstrating less-common living arrangements that are not already explained in Section III.c.<sup>237</sup> The hypotheticals address possible living situations, but do not attempt to cover every potential situation. Courts will have to determine how to apply the test on a case-by-case basis.

##### i. Hypotheticals

The first hypothetical involves a young adult who files for bankruptcy and still lives with his parents. The issue is whether the young adult, who has no children or spouse, may include his parents in his household size. The answer would likely be no, unless the parents fit section (v) of the test as elderly, chronically ill, or disabled relatives. The debtor would also have to cover his parents' expenses in a substantial manner such that the expense requirements in that provision are fulfilled. The same result would occur when there is an elderly debtor living with his adult child's family—the debtor could not include the family in his household unless each member satisfies a provision of the substantial support test.<sup>238</sup>

The next hypothetical involves married debtors who are paying their adult children's expenses when the children do not live with them. For example, this situation may exist when

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<sup>236</sup> Lawless et al., *supra* note 153, at 351-53.

<sup>237</sup> See *supra* INTRODUCTION, Section III.c.

<sup>238</sup> This result is justified because a debtor not providing financial assistance to others should not be able to include those members in his household.

debtors pay their son's mortgage but do not live with him. Can they include him in their household size? The answer is no. Merely paying their mortgage does not satisfy any of the provisions in the substantial support test. Additionally, common sense also points to the son not being part of the debtor's household—first, because he does not live with them and thus likely has his own household, and second, because they should not be paying that expense for him if their finances are on the verge of collapse.

Related to the issue of debtors paying expenses for adult children who do not live with them is the issue of a debtor with parents paying expenses for him when they do not all live together. For example, what happens if the debtor's mother pays his mortgage each month, but she does not live with him? The answer is that the mother is not part of the debtor's household unless she satisfies a provision in the substantial support test. If the payments are regular and constitute income to the debtor, he will also have to include the contribution in his CMI calculations.<sup>239</sup> However, she is not a part of the household if she does not otherwise qualify. Justification for this result hinges on how household size depends on living arrangements and a debtor's financial support of others. If the mortgage payment puts the debtor over the limit for below median income, then so be it—the payment benefits him and his disposable income amount and, thus, the result comports with the financial focus of the Bankruptcy Code.

Another hypothetical involves a debtor paying for his girlfriend's expenses when they do not live together. She would not be part of his household if they do not cohabit and share the requisite number of expenses under provision (vi) of the substantial support test. This result makes sense because they operate as an economic unit only if they live together and share a substantial amount of expenses.

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<sup>239</sup> 11 U.S.C. § 10(A) (2006).

Additional hypothetical situations involve debtors who live with others but do not substantially support others. For example, what if a debtor lost his job a year ago, supports no one, lives with his parents, and has no spouse or children? He has a household of one. Or, what if a debtor does not substantially support his spouse? In that situation, if the spouse lives with him full-time, he would have a household of two anyway, because the test presumes there is substantial support in that relationship.

*ii. Cases in Part II*

The final scenarios this Article will discuss are those from some of the cases explained in Part II.<sup>240</sup> While it would be difficult to apply the substantial support test to every case discussed in Part II, since the opinions do not include all the requisite facts necessary to apply the test, there are a few factual situations that are worth mentioning to help further explain application of the test. First, multiple cases involved debtors with their adult children and grandchildren living with them.<sup>241</sup> In such a situation, the adult children and the grandchildren would be included in the debtors' household size only if the debtors provided substantial support financially for each person. The expenses for the adult children would have to meet provision (v) of the test, and the grandchildren would have to meet provision (ii)(1), which would require them to satisfy provision (v). The key inquiry is whether the debtors are providing substantial support financially for individuals living in their home—thus, each person must satisfy the test.

An atypical situation is that found in *In re Napier*, where the debtors permitted a family friend's young adult daughter and her fiancé to live with them.<sup>242</sup> Because the two individuals were not related to the debtors, they likely would not be included in the debtors' household under

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<sup>240</sup> See *supra* Part II.

<sup>241</sup> See, e.g., *In re Smith*, 396 B.R. 214, 215 (Bankr. W.D. Mich. 2008); *In re Jewell*, 365 B.R. 796, 797-98 (Bankr. S.D. Ohio 2007).

<sup>242</sup> Under the income-tax-dependent approach, the debtors could not include the couple in their household size. *In re Napier*, No. Civ. A. 06-02464-JW, 2006 WL-4128358, at \*1-2 (Bankr. D.S.C. Sept. 18, 2006).

the substantial support test. However, the test potentially could include them if they share expenses to the extent they meet the requirements of the shared expenses provision in (vi).

Another uncommon situation is the one in *In re Herbert*, where the debtor lived with and provided for his girlfriend, their child, and his girlfriend's eight children from a prior relationship.<sup>243</sup> The girlfriend likely would be part of the debtor's household size under provision (vi), and their child would come in under (ii). The eight other children, however, do not fit the test as well. The opinion explains that the debtor previously tried to adopt the children, but their incarcerated father refused to consent.<sup>244</sup> Accordingly, a court would likely treat this situation, as well as a situation where a debtor provided for a significant other's children full-time without trying to adopt them, as a step-children situation. Thus, the children would likely be included in the debtor's household as step-children under (ii).

The step-children issue also comes up in homes where one spouse files for bankruptcy and her spouse's children from another relationship live with the couple part-time. This came up in *Johnson v. Zimmer*, where the Fourth Circuit approved of the use of fractions for part-time household members.<sup>245</sup> The debtor in *Zimmer* had two children and three step-children.<sup>246</sup> The five children lived with her and her husband for approximately half of each year.<sup>247</sup> As such, the five children comprised 2.59 household members.<sup>248</sup> However, under the substantial support test, the debtor's two children would come in under provision (ii), as would her husband, but the three step-children would not, since they did not live with the debtor full-time. This result makes sense, though, because it is the husband and the mother of his children who likely split the

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<sup>243</sup> *In re Herbert*, 405 B.R. 165, 166 (Bankr. W.D.N.C. 2008).

<sup>244</sup> *Id.*

<sup>245</sup> *Johnson v. Zimmer*, 686 F.3d 224, 241-42 (4th Cir. 2012).

<sup>246</sup> *Id.* at 226.

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 227.

expenses for their children. If the debtor and her husband had filed for bankruptcy together, the step-children would have been included in the household size because they fit provision (iii) in relation to their father.

One case that would certainly have a different result under the substantial support test is *In re Bostwick*.<sup>249</sup> In *Bostwick*, the court used the Census Bureau approach to hold that the debtor's roommate was part of her household.<sup>250</sup> The debtor and her roommate had separate leases, separate rooms, and separate food and other costs, but they shared living spaces and utility costs.<sup>251</sup> Under the substantial support test, the two individuals would not have shared substantial enough expenses to be considered a household of two.<sup>252</sup>

While the above hypotheticals do not provide answers regarding household size for any and all living arrangements, they do provide guidance as to what courts should consider in applying the substantial support test. The test and the hypotheticals clearly focus on one major inquiry—the debtor's finances. Thus, in applying the test to novel situations, courts must examine the evidence proffered by the debtor in regard to his finances and living arrangements, and determine whether the debtor meets the substantial support threshold for any given individual.

#### IV. CONCLUSION

Although this Article did not explore every potential living scenario, it fashioned a test and probed into numerous living situations to determine how best to calculate household size. The substantial support test provides the best way thus far to calculate household size, for it focuses on a debtor's finances and permits uniform application. Rather than permitting courts to

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<sup>249</sup> *In re Bostwick*, 406 B.R. 867 (Bankr. D. Minn. 2009).

<sup>250</sup> *Id.* at 872-73.

<sup>251</sup> *Id.* at 873.

<sup>252</sup> The roommate would not be part of the debtor's household under provision (vi) of the test. They had separate leases, she could have lived there even if he did not, and they shared just one expense—utilities.

use whatever approaches and facts they so desire to determine household size, Congress should codify a test like the substantial support test so that household size determinations may be more uniform and consistent from court to court and case to case.