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## Taxation--Dependency Exemptions--Lodging Deemed Furnished by Divorced Parent Who Is Entitled to Exclusive Use and Occupancy

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The *Blue Chip* decision illustrates that the Supreme Court will not grant standing to a plaintiff in a 10b-5 action without more than lip service to the purchaser-seller requirement of *Birnbaum*. While not specifically rejecting the lower court exceptions to the *Birnbaum* doctrine, the Court indicated an unwillingness to continue the prior trend of relaxing standing requirements. If this reasoning is followed, the decision will provide the field of securities regulation with a much-needed semblance of national uniformity, while at the same time provide most deserving plaintiffs redress in the courts.

WILLIAM E. EVANS

## TAXATION-DEPENDENCY EXEMPTIONS-LODGING DEEMED FURNISHED BY DIVORCED PARENT WHO IS ENTITLED TO EXCLUSIVE USE AND OCCUPANCY

### *Pugel v. Commissioner*<sup>1</sup>

At the time of Jean and Stanley Pugel's divorce, they owned a family residence as community property. The divorce decree merely ordered the sale of the residence and the division of the proceeds between the Pugels.<sup>2</sup> Ms. Pugel was awarded custody of their three minor children. Subsequent to the divorce, the house was occupied by Ms. Pugel, her three children, and her sister. Ms. Pugel claimed dependency exemptions for her three children on her federal income tax return.<sup>3</sup> The Commissioner determined that the children were not her dependents because she had not furnished over one-half of their support.<sup>4</sup> The determinative issue was which parent was to receive credit for furnishing the lodging for the dependent children.<sup>5</sup> The Commissioner took the position that each parent had provided one-half of the housing support. The Tax Court held that Ms. Pugel was entitled to a dependency exemption for each of the three children because: (1) she had the exclusive right to the use and occupancy of the home; (2) such right meant that the lodging would be deemed to have been furnished entirely by her; and (3) the value of the lodging was sufficient to carry her over the requisite level of support.<sup>6</sup>

Subject to certain conditions, a taxpayer can claim an exemption for

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to expenses and attorney's fees by court award although no other relief is granted and no settlement is reached.

1 A. BROMBERG, *supra* note 13, at § 4.7.

1. 34 CCH Tax Ct. Mem. 43 (1975).

2. *Id.* at 44.

3. The current exemption is \$750 for each qualified dependent. INT. REV. CODE OF 1954, § 151.

4. 34 CCH Tax Ct. Mem. at 44.

5. *Id.*

6. *Id.* at 46.

a dependent child.<sup>7</sup> The Internal Revenue Code provides special rules when the parents are divorced.<sup>8</sup> The general rule is that the parent who has custody of the child for over one-half of the year is entitled to the exemption. Two important exceptions qualify this general rule. First, the noncustodial parent is entitled to the exemption if he contributes at least \$600 to the child's support during the year and the divorce decree or agreement provides that he is to receive the exemption. Second, the noncustodial parent is entitled to the exemption if he provides at least \$1,200 for the support of the child during the calendar year, unless the custodial parent "clearly establishes"<sup>9</sup> that she provided over one-half of the support of the child.

The Internal Revenue Code does not define specifically what is included in "support." Regulations<sup>10</sup> and case law<sup>11</sup> have clearly recognized lodging as an element of support. A more difficult issue is how to determine the value of lodging as support. In two 1955 decisions<sup>12</sup> the Tax Court held that the fair rental value of the room furnished the dependent is the proper measure of value. This is now the accepted standard.<sup>13</sup> The reasoning is that the value of the dependent's lodging must be measured by the amount he would have had to pay on the open market for similar housing.<sup>14</sup>

In determining which divorced parent furnishes the lodging, courts have declared that the owner of the property should be credited with the value of the lodging because he has the right to its use and possession.<sup>15</sup> When divorced parents are equal owners of the property, each parent is deemed to have furnished one-half of the lodging.<sup>16</sup> However, if the divorce decree provides *expressly* that one parent shall have the exclusive right to the use and occupancy of the premises, then the lodging is deemed to have been furnished entirely by that parent.<sup>17</sup>

In *Pugel* the divorce decree did not expressly award Ms. *Pugel* the

7. To be eligible for this exemption, the taxpayer must furnish over one-half of the dependent's total support for the calendar year in which the taxable year begins. INT. REV. CODE OF 1954, § 152 (a).

8. INT. REV. CODE OF 1954, § 152 (e).

9. This term has been construed to mean a clear preponderance of the evidence. *Labay v. Comm'r*, 450 F.2d 280 (5th Cir. 1971).

10. Treas. Reg. § 1.152-1 (1971).

11. *O'Connor v. Comm'r*, 32 CCH Tax Ct. Mem. 156 (1973); *Haynes v. Comm'r*, 23 T.C. 1046 (1955).

12. *Emil Blarek*, 23 T.C. 1037 (1955); *Haynes v. Comm'r*, 23 T.C. 1046 (1955).

13. *O'Connor v. Comm'r*, 32 CCH Tax Ct. Mem. 156 (1973); *Delbert D. Bruner*, 39 T.C. 534 (1962).

14. *Emil Blarek*, 23 T.C. 1037, 1039 (1955).

15. *O'Connor v. Comm'r*, 32 CCH Tax Ct. Mem. 156, 158 (1973).

16. *Gilliam v. Comm'r*, 429 F.2d 570, 571 (4th Cir. 1970) (joint tenancy); *P.J. Sciortino*, 31 CCH Tax Ct. Mem. 1073, 1076 (1972) ("equally owned" property); *Lindberg v. Comm'r*, 46 T.C. 243, 247 (1966) ("jointly owned" property).

17. *Wood v. United States*, 287 F. Supp. 90 (D. Ore. 1968); *Frick v. Comm'r*, 22 CCH Tax Ct. Mem. 1161 (1963); *Delbert D. Bruner*, 39 T.C. 534 (1962); see 5 J. MERTENS, LAW OF FEDERAL INCOME TAXATION, § 32.14d (1969).

exclusive right to use and occupancy. The decree simply directed that the home be sold and specified the manner in which the proceeds were to be divided between the parties. Findings of fact and conclusions of law accompanying the decree made it clear that Ms. Pugel would not be required to pay rent pending sale. The Tax Court, in holding that Ms. Pugel was entitled to exclusive use and occupancy, emphasized that she was not required to pay rent and that Mr. Pugel had been barred from entering the premises by several restraining orders.<sup>18</sup> Thus, *Pugel* expanded the exclusive use and occupancy exception to situations in which the divorce decree does not provide expressly for such use and occupancy.

The impact of *Pugel* upon the allocation of lodging support can be illustrated by five situations. Under the new Missouri dissolution act,<sup>19</sup> which allows the court to divide marital property,<sup>20</sup> it is probable that each of these situations will occur frequently. The first situation is when the parties have equal ownership interests in the property, and they intend that the custodial parent and the noncustodial parent receive equal credit for furnishing the lodging. *Pugel* dictates that the decree clearly indicate this intent, perhaps by emphasizing that the custodial parent is not entitled to exclusive use and occupancy of the property. If the decree does not indicate such intent, the court may conclude that the custodial parent was to have the exclusive use and occupancy.

The second situation is when the parties have equal ownership interests in the property, but intend that the custodial parent receive full credit for furnishing the lodging. The best way to assure this result is to direct specifically in the decree that the custodial parent is entitled to exclusive use and occupancy of the property. Even if the decree fails to so direct, however, *Pugel* establishes that a court will look beyond the divorce decree to determine if an exclusive right of use and occupancy exists.

The third situation is when the noncustodial parent has complete legal title to the property, and the parties intend that he receive full credit for furnishing the lodging. This situation was only indirectly dealt with by the court in *Pugel*. The court cited *Carter v. Commissioner*,<sup>21</sup> a case involving Oklahoma law. The divorce decree in *Carter* awarded the noncustodial parent complete legal title to property that had been owned previously as joint tenants. Use of the premises was awarded to the cus-

18. 34 CCH Tax Ct. Mem. at 44, 46.

19. §§ 452.300-415, RSMo 1973 Supp.

20. Section 452.330, RSMo 1973 Supp., provides:

[T]he court . . . shall divide the marital property in such proportions as the court deems just after considering all relevant factors including . . .

. . . .  
(3) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children. . . .

21. 62 T.C. 20 (1974).

todial parent during the minority of the children, but the terms of the decree indicated that this right of occupancy was solely a benefit to the children and not a recognition of the custodial parent's ownership rights.<sup>22</sup> Such a provision is allowed by Oklahoma law.<sup>23</sup> The court held that the noncustodial parent had furnished the entire lodging support for the dependent children.<sup>24</sup>

Dictum in *Pugel* declared that *Carter* only qualified the ordinary "use and occupancy" rule within the specific confines of Oklahoma law.<sup>25</sup> The court in *Carter* recognized that property rights are determined by the law of the jurisdiction which grants the divorce.<sup>26</sup> Therefore, it appears that any similar law of another state could compel the same result. This result seems especially likely under the new Missouri dissolution act because it allows the parties to enter into agreements concerning property owned by either of them.<sup>27</sup> This agreement is binding on the court, provided that it is not unconscionable.<sup>28</sup> Thus, if the parties agree that the noncustodial parent is to receive title to the family home and the custodial parent is to have the use and occupancy of the premises solely as a benefit to the children during their minority, the noncustodial parent will be deemed to have furnished the entire housing support to the children. The same result can be reached by a decree which provides that possession by the custodial parent is solely a benefit to the children.

The fourth situation is when the decree awards title to the noncustodial parent, but awards exclusive use and occupancy to the custodial parent in recognition of her property rights. Although no case law has dealt with this situation, the custodial parent would apparently receive full credit for furnishing lodging. The Tax Court has consistently held that the question of lodging support depends on who has the sole right to use and occupancy and not on the parents' respective legal interests in the residence.<sup>29</sup> Although these cases involved property in which the parents had equal ownership interests, the rationale is equally applicable to property owned solely by the noncustodial parent.

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22. The divorce decree contained the following provision with respect to the house:

That the legal title to the real estate of the parties hereto is hereby vested in F.M. Carter. That plaintiff shall be entitled to the use of the premises, rent free, during the minority of the children, to wit: Foy Montez Carter and Karen Marsette Carter, provided, however, that this portion of the decree shall be effective only so long as the plaintiff remains in the house, and lives in said house alone with the children, and remains single. Upon majority of the children, possession shall revert to F.M. Carter.

*Id.* at 24-25.

23. OKLA. STAT. ANN. tit. 12, § 1278 (1961).

24. 62 T.C. at 26.

25. 34 CCH Tax Ct. Mem. at 45.

26. 62 T.C. at 25.

27. § 452.325, RSMo 1973 Supp.

28. § 452.325(2), RSMo 1973 Supp.

29. *Wood v. United States*, 287 F. Supp. 90 (D. Ore. 1968); *Delbert D. Bruner*, 39 T.C. 534 (1962).