The Modern Family Debacle: Bankruptcy Judges Decide that Some Debtors' Loved Ones Do Not Count as Household Members!

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Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) with the express purpose of limiting the number of consumer debtors eligible to file a Chapter 7 case, which typically lasts only a few months and eliminates the debtor's unsecured debts. Under BAPCPA, bankruptcy courts must determine the size of a consumer's household to determine whether the consumer is eligible for Chapter 7. If the consumer is ineligible, they must instead file a Chapter 13 case and commit to a five-year debt repayment plan. Because Congress failed to define the term "household" in BAPCPA, courts have developed numerous approaches to determine household size that are often applied unfairly to debtors with non-traditional families.

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For example, after filing a Chapter 13 bankruptcy case, one debtor learned that her five children—two biological children and three stepchildren—counted as only 2.59 members of her household, even though all five children lived with her at least half the year and she cared for them the same. This decrease in household size significantly reduced the debtor's allowed standardized expenses and thereby caused her projected disposable income to substantially increase. Financially distressed debtors in this position are then required to pay much more to unsecured creditors through a repayment plan and, as a result, suffer a financial penalty imposed by bankruptcy courts. The fractionalization of a debtor's underage children is just one illustration of the modern family debacle some bankruptcy courts have created as they struggle to decide which of the debtor's loved ones counts as household members under BAPCPA. In turn, this Article—in keeping with one of BAPCPA's objectives of removing judicial discretion by way of objective standards—proposes that Congress amend BAPCPA to define the term "household" to create a presumption in favor of counting typical household occupants (e.g., under-age biological and stepchildren who are part-time residents) as full household members.

INTRODUCTION

After filing a Chapter 13 bankruptcy case, Tanya Rene Johnson learned that her five children—two biological children and three stepchildren—counted as only 2.59 members of her household, even though all five children lived with her for 180 days of the year and she cared for them the same.[1] Ms. Johnson's bankruptcy case is illustrative of the modern family[2] debacle as bankruptcy

1. Johnson v. Zimmer, 686 F.3d 224, 226–27 (4th Cir. 2012).

2. In this Article, the "traditional" family consists of a husband and wife and their biological children only. The modern or non-traditional family includes all other living arrangements. *See* Richard Fry, *Young Adults in U.S. Are Much More Likely Than 50 Years Ago to be Living in a Multigenerational Household*, PEW RSCH. CTR. (July 20, 2022), https://www.pewresearch.org/fact-tank/2022/07/20/young-adults-in-u-s-are-much-more-likely-than-50-years-ago-to-be-living-in-a-multigenerational-household/ [https://perma.cc/595U-V6HG]; Richard Fry, *The Number of People in the Average U.S. Household Is Going Up for the First Time in Over 160 Years*, PEW RSCH. CTR. (Oct. 1, 2019), https://www.pewresearch.org/fact-tank/2019/10/01/the-number-of-people-in-the-average-u-s-household-is-going-up-for-the-first-time-in-over-160-years/ [https://perma.cc/USZ9-TMLW] (finding that there is an increasing number of multigenerational households in the U.S.); PEW RSCH. CTR., PARENTING IN AMERICA 16, 19 (2015), https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/ [https://perma.cc/78GA-SLP9] (noting how two-parent households continue to decrease in America and that one in six American children live in a "blended" household, or a home with a stepparent or stepsibling); *see generally* Naomi Cahn & Kim Kamin, *Adapt Old Strategies to Fit New Family Arrangements*, 47 EST. PLAN. 30, 30–35 (2020) (explaining the complexities of estate

courts struggle to calculate household size for non-traditional families under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA).

Congress enacted BAPCPA with the express purpose of limiting the number of individual debtors eligible to file a Chapter 7 case, which typically lasts only a few months and discharges the debtor's unsecured debts.[3] Central to BAPCPA's major reforms are two complex calculations: (1) the "Means Test"[4] to determine whether consumer debtors qualify to file a Chapter 7 case and obtain quick debt relief, and (2) the "Projected Disposable Income Test" (DPI Test)[5] to determine whether consumer debtors in a Chapter 13 case are required to pay part of their unsecured debts through a mandatory five-year repayment plan.

To complete either calculation, a bankruptcy court must first decide who counts as a member of the debtor's household.[6] Generally speaking, debtors with a larger household size can deduct a greater amount of standardized expenses as established by the Internal Revenue Service (IRS).[7] A larger expense deduction will, in turn, result in either a substantial decrease in the debtor's income so the debtor can pass the Means Test and be eligible for a Chapter 7 case, or a substantial decrease in the debtor's projected disposable income, which lowers the amount the debtor must pay to creditors under a Chapter 13 plan.

Because Congress failed to define the term "household" in BAPCPA, bankruptcy courts have developed four different approaches to decide who counts as a member of the debtor's household. The first approach is called the "heads-on-beds" or Census approach, which, like the U.S. Census, counts all persons who occupy the debtor's physical housing unit.[8] Second is the IRS tax dependent approach, which counts as a household member each person that can be claimed as a dependent on the debtor's income tax return.[9] The third approach is the economic unit approach, which counts each person in the home who acts as a single economic unit supporting, or being supported by, the debtor or having a financially interdependent relationship with the debtor.[10] The fourth—and most unsettling—is the fractional economic unit approach, in which a court reduces a

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family as a result of the rising number of individual clients "born through assisted reproductive technologies," coming out of "gray divorce[s]," living in blended families with stepchildren, engaging in non-marital cohabitation relationships, and being connected to other familial relationships and situations).

3. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (2005).

4. 11 U.S.C. § 707(b)(6).

5. *Id.* § 1325(b)(1).

6. *See* 4 BANKRUPTCY SERVICE, LAWYERS EDITION § 37:360 (2021) [hereinafter BANKRUPTCY SERVICE].

7. *See id.*

8. Bonney v. Shaikh, No. EO-20-012, 2020 WL 6867920, at *3 (B.A.P. 10th Cir. Nov. 23, 2020) [hereinafter *In re* Shaikh].

9. *Id.*

10. *Id.*

debtor's household size by counting only fractional portions of minor children based on the time the children spend under the same roof as the debtor and the financial realities of child custody arrangements.[11]

This Article posits that when faced with consumer debtors who have non-traditional families, bankruptcy courts often rigidly apply the various approaches to limit the number of loved ones who count as "household" members. Such applications penalize debtors with non-traditional families by requiring them to pay more to unsecured creditors than is required under BAPCPA.

Consider the application of the fractional economic unit approach by the bankruptcy court in the above-mentioned case of Ms. Johnson. Ms. Johnson claimed as members of her household: (1) her current husband who resided full-time in the home, (2) her two children (from a prior marriage) who resided with her and her current husband 204 days a year, and (3) her three stepchildren (i.e., the current husband's three children) who resided in their home 180 days of the year.[12] Ms. Johnson, her husband, and their five children functioned as a single economic unit while the children resided in the home.[13] However, the bankruptcy court decided, without providing any legal analysis based on the language of the relevant statute, to follow a fractional economic analysis in order to "adapt to dynamic economic change including various types of family structures."[14] After counting Ms. Johnson's children as a total of 2.59 persons—her two biological children counted as .56 members each and her three stepchildren counted as .49 members each[15]—the court then rounded up these figures, thereby counting the children as three whole household members.[16] In turn, to get her Chapter 13 payment plan approved by the court, Ms. Johnson had to decrease the number of people in her household from seven persons to five.[17] With such a decrease in her household size, Ms. Johnson's allowed standardized expenses were much lower—based on a household of only five persons—thereby causing her

11. Johnson v. Zimmer, 686 F.3d 224, 234–35 (4th Cir. 2012).

12. If the court had applied the heads-on-beds approach, all five children would have counted as members of Ms. Johnson's household because they physically occupied the debtor's residence, even though not on a full-time basis. *See In re* Johnson, No. 10-07244-8-JRL, 2011 WL 5902883, at *1 (Bankr. E.D.N.C. July 21, 2011). If, however, the court had followed the IRS tax dependent approach, Ms. Johnson would have been able to count only her two children as members of her household because she could claim only them as dependents on her tax return. *Id.* (stating that her biological kids lived with her the majority of the year and that her former spouse was not required to make child support payments).

13. *Id.*

14. *Id.* at *2 (quoting *In re* Robinson, 449 B.R. 473, 482 (Bankr. E.D. Va. 2011)).

15. *Id.* at *3 (holding that the debtor's two children counted as .56 members each and her stepchildren counted as .49 members each).

16. *Id.* The appellate court upheld the bankruptcy court's decision. *See Johnson*, 686 F.3d at 227–28, *cert. denied*, 133 S. Ct. 846 (2013).

17. *See In re* Johnson, 2011 WL 5902883, at *3 (denying the debtor's motion to confirm but allowing her the chance to amend her disposable income calculation based on a household size of three children, not five).

disposable income to substantially increase.[18] As a result, Ms. Johnson was required to pay substantially more to unsecured creditors through her repayment plan, suffering a financial penalty.

Part I of this Article describes four different judicial approaches to determine who counts as a household member and analyzes the weaknesses of each approach. Bankruptcy courts often rigidly and unfairly apply these various approaches to the following types of household residents: (1) underage children who are part-time residents or who are stepchildren, (2) unmarried intimate partners (i.e., the debtor's cohabitating boyfriend or girlfriend), and (3) non-intimate unrelated and related adults (e.g., the debtor's adult sibling).[19]

Part II further explains that because the various approaches to determine "household" size have become more complicated over the years,[20] judicial interpretations have undercut Congress's express intent in BAPCPA: to limit judicial discretion and provide greater uniformity.[21] Most approaches require courts to gather detailed evidence about debtors and their family members and engage in a case-by-case analysis that is time-consuming and frequently involves a hairsplitting analysis of the evidence.[22] In contrast, Congress, through BAPCPA's reforms, requires courts to use IRS-created standardized expenses when calculating the Means Test in Chapter 7 cases and the DPI Test in Chapter 13 cases.[23] Through these reforms, Congress intended that courts employ objective tests that would limit judicial discretion, which would in turn lead to uniformity and predictability in consumer bankruptcy cases and ultimately

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18. On appeal, the Fourth Circuit recognized the financial impact of the difference in household size. *Johnson*, 686 F.3d at 230 n.5 ("In making this calculation, the Debtor must use either a household size of five or seven. Whether she uses five or seven will alter her final calculation by $1,250 per month, or a total of $15,000 for the twelve-month period.").

19. *See infra* Part II.

20. *See infra* Part III.B.

21. *See, e.g.*, *In re* Rudler, 576 F.3d 37, 50 (1st Cir. 2009) (agreeing with several courts that "have in fact concluded that a specific intent to limit the bankruptcy court's discretion underlies the means test and accounts for Congress's adoption of a "'mechanical formula' for presuming abuse of Chapter 7"); *In re* Cutler, No. 08-15568-AJM-7A, 2009 WL 2044378, at *3 (Bankr. S.D. Ind. July 9, 2009) ("[R]epayment to creditors may have been one of the goals behind BAPCPA, but Congress' intent in creating the means test under § 707(b)(2) was to eliminate judicial discretion and replace it with a mechanical formula to determine abuse in [C]hapter 7 cases."); *In re* Walker, No. 05-15010-WHD, 2006 WL 1314125, at *6 (Bankr. N.D. Ga. May 1, 2006) ("The means test is . . . a mechanical estimate of the debtor's abilities to fund a Chapter 13 plan and was not intended to be a perfect indicator of ability to pay."); *see also* Marianne B. Culhane & Michaela M. White, *Catching Can-Pay Debtors: Is the Means Test the Only Way?* 13 AM. BANKR. INST. L. REV. 665, 678–80 (2005) ("'[A] *standard*, like [former] section 707(b), vests too much discretion in bankruptcy judges. . . .' What was needed instead was a clear rule, 'an algorithm purposefully designed to limit judicial discretion on the issue of consumer debtor abuse.' . . . Congress adopted rules, not discretionary standards, to govern ability to pay. Those rules are uniform and predictable, as Congress intended. They communicate to debtors and other parties in interest what is expected. Whether they are strict enough is a legislative decision.").

22. *See infra* Part II.

23. BANKRUPTCY SERVICE, *supra* note 6, § 37:357.

increase debtors' payouts to creditors.[24] However, by shunning such objective tests and embracing complex case-by-case adjudications, bankruptcy courts have (1) diminished predictability in outcomes for debtors seeking bankruptcy relief, (2) imposed an increased financial burden on consumer debtors, who now must pay their attorneys additional fees to litigate the issue of household size, (3) exposed debtors' family members to potential ridicule due to court opinions (public records) detailing their living arrangements and personal habits, (4) disrespected debtors' choices about how they create and maintain families, and (5) dehumanized debtors' children by *not* counting them *at all* or counting them only as *fractions* of a person.[25]

Part III asserts that, because several approaches to determining household size have often resulted in harsh outcomes for debtors, Congress should amend BAPCPA to define "household" in a manner that limits judicial discretion by creating presumptions that allow the debtor to count several types of occupants as household members.[26] For example, if the debtor's minor biological child or stepchild lives with the debtor at least 45 percent of the year, the child should count as a whole person.[27] This presumption would protect debtors like Mr. James Jeffrey Ford who was told that his stepson did not count as a member of his household at all, even though Mr. Ford treated his stepson and his biological daughter the same as part-time residents in his home.[28] Moreover, a presumption in favor of counting adult occupants who are financially supported by the debtor would also protect debtors like Mr. Ronald Law who was not allowed to count his live-in adult son as a household member even though the son had only a part-time job.[29]

By defining the term "household" to create presumptions in favor of debtors, Congress would further BAPCPA's purpose of limiting judicial discretion by imposing objective standards. Additionally, by amending BAPCPA this way, Congress would (1) enable consumer bankruptcy attorneys to give legal advice with certainty and predictability, (2) prevent trustees and creditors from wasting judicial resources, (3) relieve debtors from being burdened with additional attorneys' fees in litigation over household size, (4)

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24. *See id.*

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part III.A.

28. *See, e.g.*, *In re* Ford, 509 B.R. 695, 697 (Bankr. D. Idaho 2014) (holding that the stepson did not count as a household member because Mr. Ford had no legal obligation to financially support the stepson. The court chose to ignore the fact that Mr. Ford financially supported both this son (the child of his ex-wife) and Mr. Ford's daughter (the biological child of Mr. Ford and the same ex-wife) and treated them the same.).

29. *In re* Law, No. 07-40863, 2008 WL 1867971, at *7 (Bankr. D. Kan. Apr. 24, 2008) (describing the son as "minimally" employed). As explained in Part III.F, several reasons could explain Mr. Law's choice not to disclose why his son had a part-time job only. Because the son had not filed for bankruptcy relief, the courts should have respected his privacy.

protect debtors from intrusive and hairsplitting analyses of their personal lives, and (5) protect minor children from dehumanizing treatment in bankruptcy proceedings.[30]

I.
COURTS FOLLOW FOUR DIFFERENT APPROACHES WHEN DETERMINING THE SIZE OF A DEBTOR'S HOUSEHOLD

Through the enactment of BAPCPA, Congress passed major legislation that prevents *all* consumers from choosing to file a Chapter 7 case, which typically ends in a few months and wipes out general unsecured debts.[31] BAPCPA implemented a complex calculation known as the "Means Test," which courts use to determine if a consumer debtor's Chapter 7 case is an "abuse" of the bankruptcy system. If so, the court can force that "can-pay" debtor to dismiss the Chapter 7 case or convert it to a Chapter 13 case, where the debtor has to pay back a portion of unsecured debts.[32] BAPCPA also amended the "Projected Disposable Income Test" (DPI Test) to determine a consumer debtors' required payments to unsecured creditors in Chapter 13 cases, along with whether the plan duration must be five years.[33]

Under BAPCPA, determination of a debtor's household size is critical to that debtor's ultimate performance under the Means Test and the DPI Test.[34] Before conducting either the Means Test or the DPI Test, a bankruptcy court must answer a preliminary question: "Does the debtor have annualized income that is above the median income for the same household size in her state?"[35] If a debtor's annualized income is below the median income for their household size, then the debtor need not complete the Means Test calculation and is eligible for Chapter 7 relief.[36] This is good news for a below-median-income debtor; if that

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30. *See infra* Part III.

31. *See id.*

32. *See id.*; David R. Jones, *Savings: The Missing Element in Chapter 13 Bankruptcy Cases?*, 26 AM. BANKR. INST. L. REV. 243, 244–46, 251 (2018).

33. *See* Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the "Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,"* 79 AM. BANKR. L.J. 191, 225–26 (2005) (describing BAPCPA's new requirements to determine a debtor's projected disposable income and describing the length of the "applicable commitment period" in a Chapter 13 plan).

34. *See* Clifford J. White III & David A. Levine, *BAPCPA Implementation Update: Changes to the Official Means Test Forms and IRS Standards Effective Jan. 1*, 27 AM. BANKR. INST. J. 18, 68 (2008) (summarizing changes to BAPCPA and stating that the national standards for allowed expenses are "based solely on a debtor's family size, regardless of income level").

35. *See* Sommer, *supra* note 33, at 195 (describing the steps in completing the Means Test); *In re* Campbell, No. 06-60280, 2007 WL 6373777, at *2 (Bankr. S.D. Ga. Mar. 29, 2007) ("Determining whether a debtor's current income falls below or above the median income for the state in which debtor resides is a preliminary step in proposing a confirmable plan [in Chapter 13 cases].").

36. *See In re* Dumas, 608 B.R. 902, 907 n.5 (Bankr. N.D. Ga. 2019) ("Below-median debtors do not complete Form 122C-2 because the means test is not applicable to them."). A debtor whose disposable income does not exceed the statutory threshold may nevertheless have his or her

debtor files a Chapter 7 case, the debtor will resolve their case within a few months and receive a complete discharge of general unsecured debts—a true fresh start.[37]

If the consumer debtor has above-median income, that debtor must complete the Means Test, which is in part calculated based on household size. Unfortunately, Congress failed to define the term "household" as used in various relevant provisions of the Bankruptcy Code.[38] This failure has led courts to develop four main approaches to determine a debtor's household size, each of which can produce very different results for a hopeful debtor with a non-traditional household composition.[39]

A. "Heads-on-Beds" Approach Includes All Occupants of the Debtor's Physical Residence

The first approach in determining household size is often called the "heads-on-beds" approach, or the U.S. Census approach.[40] Under this approach, bankruptcy courts use the U.S. Census Bureau definition of household to determine a debtor's household size.[41] The definition is broad, as it includes all the people who occupy a housing unit without regard to familial relationship, financial contributions, or financial dependence.[42]

In re Ellringer is the leading case that uses this method. In 2006, a year after Congress enacted BAPCPA, Kimberly Ellringer filed for Chapter 7 bankruptcy relief.[43] At the time of filing, she was living with her "roommate," Pamela.[44] As the two women shared a bank account and were joint tenants of

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case dismissed based on a totality of the circumstances or if the court determines the debtor's petition was filed in bad faith. *See* 11 U.S.C. § 707(b)(3).

37. *See In re* Cunningham, 513 F.3d 318, 324 (1st Cir. 2008) ("The Supreme Court has stated that 'a central purpose of the Bankruptcy Code is to provide a procedure by which certain insolvent debtors can reorder their affairs, make peace with their creditors, and enjoy 'a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.'") (quoting Grogan v. Garner, 498 U.S. 279, 286 (1991)).

38. "The correct number of persons to use in completing means test calculations has been a source of *confusion* since the passage of the 2005 amendments to the Bankruptcy Code ('BAPCPA')." *In re* Kops, No. 11-41153-JDP, 2012 WL 438623, at *2 (Bankr. D. Idaho Feb. 9, 2012) (emphasis added).

39. *See infra* Parts I.A–D.

40. *See, e.g.*, *In re* Bostwick, 406 B.R. 867, 873 (Bankr. D. Minn. 2009); *see also In re* Ellringer, 370 B.R. 905, 910 (Bankr. D. Minn. 2007).

41. *See, e.g.*, *In re* Hayes, No. 11-83175, 2012 WL 1995538, at *1 (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. at 873; *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. at 910.

42. *In re Ellringer*, 370 B.R. at 911.

43. *Id.* at 907.

44. The court did not explicitly say that Kimberly and Pamela were intimate partners. Nevertheless, as the two were not related by blood, had the same last name, lived together, shared a bank account, and were joint tenants of the house in which they both lived, it appears that they

their shared home, Ms. Ellringer claimed her household size as two when completing the Means Test calculation.[45] A two-person household size would benefit Ms. Ellringer because her income would then be below the median income for a household size of two in her home state of Minnesota.[46] As a result, Ms. Ellringer would be eligible to obtain Chapter 7 bankruptcy relief without completing the Means Test calculation.[47]

The trustee disagreed with Ms. Ellringer's assessment of her household size and argued that the court should follow the IRS tax dependent approach, which counts as a household member any person the debtor can claim as a dependent on her federal income tax return.[48] Because Ms. Ellringer could not claim Pamela as a dependent on her tax return, the trustee argued that Ms. Ellringer's household size was one.[49] The trustee therefore contended that Ms. Ellringer needed to compare her income to the median income of a household of one in Minnesota, which would reveal that her income was above the median.[50] This, in turn, would mean that Ms. Ellringer would not qualify for Chapter 7 relief. A further analysis would reveal that her only option would to be to pay back some of her unsecured debts via a three-to-five-year plan in a Chapter 13 case.[51]

Fortunately for Ms. Ellringer, the bankruptcy court held her household size was two. Recognizing that the term household was not defined in the Bankruptcy Code, the court began its statutory analysis with 11 U.S.C. § 707, which defines the Means Test.[52] The court specifically pointed to § 707(b)(6) of that provision, which states that a debtor's annualized income, "in the case of a debtor in a *household* of 2, 3, or 4 individuals, [should be compared to] the highest *median family income* of the applicable State for a family of the same number or fewer individuals."[53] The court next reasoned that, although the Bankruptcy Code does not define "household," § 101(39A)(A) of the Code defines "*median family income*" as "the median family income both calculated and reported by the Bureau of the Census."[54] This reference led the court to the Census Bureau's

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were, in fact, a couple. *Id.* This opinion was rendered before the decision by the United States Supreme Court which legalized gay marriage. *See* Obergefell v. Hodges, 576 U.S. 644 (2015).

45. *In re Ellringer*, 370 B.R. at 908.

46. *Id.* at 912.

47. *Id.*

48. *Id.* at 911.

49. *Id.*

50. *Id.* at 907.

51. *Id.* at 907–08.

52. *Id.* at 909–10.

53. *Id.* at 910; 11 U.S.C § 707(b)(6)(B) (emphasis added). It is important to note that this clause uses "household," "family," and "individuals" interchangeably. *Id.*; *see also* 11 U.S.C. § 707(b)(6)(A) ("[I]n the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner.").

54. 11 U.S.C. § 101(39A)(A).

definition of "household," which includes "all of the people, related and unrelated, who occupy a housing unit."[55]

This statutory trail led the *Ellringer* court to hold that the Census Bureau's definition of "household"—which counts all occupants—was the most logical and appropriate for the Means Test calculation.[56] The court reasoned that if Congress had intended to limit household size to families or individuals related to each other by blood, marriage, or adoption, it could have done so in § 707(b)(6).[57] The court therefore concluded that, because Pamela was an occupant of Ms. Ellringer's physical residence, Pamela counted as a member of Ms. Ellringer's household.[58] With a household of two, Ms. Ellinger's income was below the median income for a family of two in her state and she could, therefore, file a Chapter 7 case and obtain a quick discharge of her general unsecured debts.[59]

Some courts argue that the Census approach is too broad because it allows a debtor to claim an occupying resident as a part of their household without necessarily accounting for all of that occupant's personal income.[60] For example, after increasing Ms. Ellringer's household size to two, the *Ellringer* court held that the statute did not require the court to incorporate Pamela's *entire* income into the Means Test calculation for Ms. Ellringer, because Pamela was neither the spouse nor a dependent of Ms. Ellringer.[61] Instead, the court only added to Ms. Ellringer's household income monthly payments of $260, the amount Pamela paid to Ms. Ellringer as contribution for car payments.[62]

By not including Pamela's entire income when comparing Ms. Ellringer's household income to the median income for a household size of two in the state, the court allowed Ms. Ellringer to bypass the Means Test and, thereby, obtain Chapter 7 relief, a result that may appear counterintuitive at first blush.[63] However, the *Ellringer* court was simply following the Bankruptcy Code, which requires only the inclusion of the portion of a non-debtor's income that supports

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55. *In re Ellringer*, 370 B.R. at 911 (quoting U.S. Census Bureau, Current Population Survey (2004)).

56. *Id.* at 910–11.

57. *Id.* at 911.

58. *Id.* at 910–11.

59. *Id.* at 912.

60. *See, e.g.*, *In re* Herbert, 405 B.R. 165, 169 (Bankr. W.D.N.C. 2008) (rejecting *Ellringer* as too broad).

61. 370 B.R. at 911 ("[T]he statute only requires that the debtor include income provided by a person other than the debtor for support of the *debtor or the debtor's dependents*.") (emphasis in original).

62. *Id.* at 912.

63. *See, e.g.*, *In re* Duran, No. 09-07972-JM13, 2010 WL 3947318, at *1–2 (Bankr. S.D. Cal. Oct. 1, 2010) (applying *Ellringer* and rejecting trustee's argument that the entire income of an adult daughter who resided in debtor's home should be treated the same as income from a non-filing spouse for purposes of completing the Means Test).

the debtor or the debtor's dependents.[64] Thus, the court's analysis was correct in permitting Ms. Ellringer to claim a household size of two and including only $260 of Pamela's income.

As discussed later in Part III, the Census approach is well-grounded in the text of the Bankruptcy Code. While a Congressional definition of "household" would be preferrable, the Census approach logically follows from current relevant sections of the Code.

B. IRS Tax Dependent Approach Narrows the Number of Occupants Who Count as Household Members

Although the *Ellringer* court rejected the trustee's argument that only occupants who could be claimed as dependents on the debtor's federal tax return count as household members, several courts have accepted that argument.[65] Courts that follow the IRS tax dependent approach ignore the term "household" and focus on other, more confusing, statutory language.

For example, in *In re Law*, the trustee challenged the debtor's inclusion of his adult son as a household member, and subsequently argued that the debtor's disposable income was too low for his Chapter 13 payment plan to be approved.[66] The court agreed with the trustee after conducting a complicated analysis. The court started by examining 11 U.S.C. § 1325, which discusses confirmation of a debtor's Chapter 13 bankruptcy plan.[67] Section 1325(b)(1)(B) specifies that a debtor in a Chapter 13 plan must pay the full amount of his or her *projected* "disposable income" to "unsecured creditors."[68] Subsection 1325(b)(2) further defines the term "disposable income" as "current monthly income received by the debtor . . . less amounts reasonably necessary to be expended . . ."[69] The provision then states that if the debtor's income is above the median family income for the debtor's "household" size, the debtor must

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64. *See* 370 B.R. at 911; 11 U.S.C. § 101(10A)(B)(i) (defining "current monthly income" to include "any amount paid by any entity other than the debtor (or in a joint case the debtor and the debtor's spouse), on a regular basis for the household expenses of the debtor or the debtor's dependents . . . "); *In re* Duran, No. 09-07972-JM13, 2010 WL 3947318, at *2 (Bankr. S.D. Cal. Oct. 1, 2010) (rejecting trustee's attempt to persuade "this court to rewrite the Means Test and Form B22C" to force debtor to include the entire income earned by an adult child residing in debtor's home); *In re* Roll, 400 B.R. 674, 676–77 (Bankr. W.D. Wis. 2008) (applying *Ellringer*, holding that the trustee failed to meet his burden of showing what portion of a debtor's income contributed to expenses of the other debtor, and stating that "[a] court may not simply ignore the express language of the Code and conclude that all of each debtor's income is used to pay for household expenses of the other debtor").

65. *See, e.g.*, *In re* Law, No. 07-40863, 2008 WL 1867971, at *7 (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); *see also* Frank W. Volk, *Problems in the Code, A Proposal for § 1325 to Put the "Household" Back in Order*, 31 AM. BANKR. INST. J. 22, 84 (2013).

66. 2008 WL 1867971, at *1.

67. *Id.* at *3.

68. 11 U.S.C. § 1325(b)(1)(B).

69. *Id.* § 1325(b)(2).

deduct from his or her income any amounts that constitute "reasonably necessary" expenses as determined by §§ 707(b)(2)(A)–(B).[70]

Following this review, the court then examined §§ 707(b)(2)(A) and (B), which direct a debtor to deduct national and local standardized expenses as promulgated by the IRS based on its estimate of reasonable expenses for each family size.[71] Significantly, subparagraphs (A) and (B) do not use the term "household."[72] However, by focusing on the reference to IRS expense standards in § 707(b)(2), the *Law* court interpreted the Code to allow the calculation of a debtor's expenses based on the number of family members whom the debtor or the debtor's spouse can claim on their federal income tax return.[73] The bankruptcy court thus held that Mr. Law could not count his adult son, who had a part-time job, as a household member because Mr. Law could not claim the son as a dependent on his federal tax return.[74]

The court's ruling made Mr. Law's sought-after fresh start much more difficult to achieve through his Chapter 13 plan. Mr. Law could only claim $916 as his allowed IRS standardized expenses for a household of one, instead of the $1,306 in standardized expenses granted to a two-person household.[75] As a result, Mr. Law's projected disposable income rose by $390 per month,[76] generating $23,400 in additional payments over the course of his sixty-month Chapter 13 plan.[77]

This ruling amounted to a financial penalty imposed on Mr. Law, whose adult son was described as only "minimally" employed.[78] Mr. Law clearly provided financial support to his son (e.g., a roof over his head); however, the court refused to deduct any of those expenses from Mr. Law's income. Consequently, Mr. Law likely had to restrict spending on everyday purchases, such as food, to make the larger required Chapter 13 plan payments.

Because the IRS tax dependent approach results in the imposition of a financial penalty on debtors like Mr. Law, this approach hinders—and may even prevent—some debtors from obtaining a fresh start. Chapter 13 cases already have a high rate of failure—that is, non-completion of payment plans.[79] When

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70. *In re Law*, 2008 WL 1867971, at *3; 11 U.S.C. § 1325(b)(3).

71. *In re Law*, 2008 WL 1867971, at *3; 11 U.S.C. § 707(b)(2)(A)(ii)(I).

72. 11 U.S.C. §§ 707(b)(2)(A)–(B).

73. *See* 2008 WL 1867971, at *15 (finding that Mr. Law's adult son did not count as a qualifying child or dependent relative); *see generally* 26 U.S.C. § 152 (defining the term "dependent" and setting out the requirements for qualifying as a dependent).

74. *In re Law*, 2008 WL 1867971, at *15.

75. *Id.* at *8.

76. *Id.*

77. *Id.*

78. *See id.* at *7–8.

79. *See, e.g.*, Jones, *supra* note 32, at 253 (stating that approximately two-thirds of the reported 297, 237 new Chapter 13 cases—filed for the twelve-month period ending June 30, 2017—were expected to fail).

applied to non-traditional households, the IRS tax dependent test ignores the debtor's actual living arrangements and, as a result, the debtor's actual living expenses. As exemplified by *In re Law*, the IRS tax dependent approach artificially inflates the debtor's projected disposable income, thereby increasing the likelihood that a debtor will fail to complete their Chapter 13 plan payments. As explained in Part III of this Article, the IRS tax dependent approach is not grounded in sound statutory construction and is flawed in its application; among other things, it denies debtors the ability to deduct expenses for persons they actually support financially.

C. The Economic Unit Approach Counts Occupants Who Have Financially Interdependent Relationships with the Debtor as Household Members

Several other courts, unpersuaded by *In re Ellringer* or *In re Law*,[80] have declined to follow the heads-on-beds or IRS tax dependent approaches. Instead, these courts have adopted the economic unit approach to determine household size.[81] Unlike the other two aforementioned approaches, the economic unit approach is not based on any actual words in § 707(b), § 1325(b), or any other provision of the Bankruptcy Code.[82] This judicially crafted approach focuses its analysis on two classes of individuals: household occupants who financially support the debtor, and occupants who are dependent financially on the debtor.[83] Courts using this approach usually find it requires case-by-case consideration.[84]

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80. *But see In re* Epperson, 409 B.R. 503, 507 (Bankr. D. Ariz. 2009) ("Absent Congressional direction, it is inappropriate to consider a household member's dependency on the Debtor when determining household size; accordingly, household should be understood in the ordinary sense of the word.")

81. *See In re* Jewell, 365 B.R. 796, 802 (Bankr. S.D. Ohio 2007). *See generally* Volk, s*upra* note 65, at 84 (laying out the three different approaches to defining the meaning of household).

82. *See, e.g.*, *In re* Smith, 396 B.R. 214, 218 (Bankr. W.D. Mich. 2008) (stating that while it is "rational," the economic unit approach is not based on any language in §§ 707(b) and 1325(b), and asserting that "only absurdity can excuse straying from a statute's otherwise plain meaning"); *See also* W. HOMER DRAKE JR, PAUL W. BONAPFEL & ADAM M. GOODMAN, CHAPTER 13 PRACTICE & PROCEDURE 881 (2021) (stating that "some courts use an 'economic unit' method, infused with flexibility, that involves an examination of the reality of the debtor's household situation and adjusts the size of the household to reflect that reality").

83. *See, e.g.*, *In re* Jewell, 365 B.R. at 800–01 (rejecting the "heads on beds" approach because it broadly includes an occupying person without proof of "a debtor's support of the person who puts the head on the bed," and rejecting the tax dependent approach as too narrow "inasmuch as it fails to recognize those instances when a debtor may be actually providing support for a household member"); *In re* Morrison, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011) (appearing to be the first court to use the term "economic unit" and holding that "household size should be determined by including those individuals who operate as a single economic unit with the debtor").

84. *See, e.g.*, *In re* Morrison, 443 B.R. at 388 (The court makes the economic unit approach very complicated by developing a list of factors to consider when determining whether someone is acting as an economic unit with the debtor. These factors include: "1) the 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

In re Herbert is a leading case illustrating the economic unit approach.[85] After noting that the facts of the debtor's financial support were not in dispute, the *Herbert* court allowed the debtor to claim a household size of eleven.[86] The court reasoned that the debtor had financially supported his girlfriend, their daughter, and the girlfriend's eight other children—all of whom resided in the debtor's home—for several years prior to his bankruptcy filing.[87] The court found that, rather than being "contrived or concocted for the purpose of this bankruptcy filing," the debtor's financial support of these ten individuals was "simply the fact of this debtor's life."[88] The economic unit approach, as applied by the *Herbert* court, allowed the debtor with a non-traditional family to remain in his Chapter 7 case and to thereby achieve a fresh start in a significantly shorter time than under Chapter 13.[89]

While the economic unit approach as applied in *Herbert* led to a fair result consistent with the fresh start policy, other courts have unfairly applied the economic unit approach in cases involving debtors with non-traditional families. In so doing, courts have arbitrarily denied debtors the ability to count all occupants of their homes as household members.

For example, in *In re Ford*, the debtor filed for Chapter 13 bankruptcy and claimed a household of five consisting of himself, his girlfriend, his girlfriend's child, his biological daughter, and his ex-wife's son (the debtor's "[s]tepson").[90] Mr. Ford, with his ex-wife, had raised his stepson and the pair's biological daughter—close in age to the stepson—since birth.[91] In fact, even after the divorce, Mr. Ford continued to treat both children as his own.[92] Pursuant to an informal custody agreement, Mr. Ford cared for both his daughter and stepson for the same amount of time, provided both children with the same level of financial support, and otherwise demonstrated the same level of commitment in raising both children.[93]

Nonetheless, the trustee argued that the court should not count the debtor's stepson when calculating the size of the debtor's household because the stepson was not biologically related to Mr. Ford and Mr. Ford had no legal obligation to care for the stepson.[94] Rejecting the IRS approach and purporting to adopt the

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of title; and 7) any other type of financial intermingling or interdependency between the debtor and the individual.").

85. 405 B.R. 165, 170 (Bankr. W.D.N.C. 2008).

86. *Id.* at 169–70.

87. *Id.* at 170.

88. *Id.*

89. *Id.* (denying the bankruptcy administrator's motion to dismiss the debtor's Chapter 7 case after holding that the debtor's household size consisted of eleven persons).

90. 509 B.R. 695, 697 (Bankr. D. Idaho 2014).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at 698–99.

economic unit approach, the bankruptcy court agreed with the trustee and excluded the stepson from Mr. Ford's household size.[95] In so holding, the court inexplicably misapplied the economic unit approach, which neither requires a biological connection between the debtor and the occupant nor requires a legally imposed duty to financially support the occupant.[96] The court ignored the undisputed evidence that the stepson and the daughter both lived with Mr. Ford part-time and that he provided both children with the same shelter, food, and other support.

As a result, Mr. Ford had to reduce his household size from five to four and decrease his allowed IRS standardized expenses accordingly.[97] This alteration increased Mr. Ford's projected disposable income under the Chapter 13 payment plan, which in turn increased his monthly payments from $303 to $400 and extended his plan duration from thirty-six months to sixty months.[98] Mr. Ford's payment of an additional $97 per month for five years (totaling $7,820) is a glaring example of the economic unit approach imposing a financial penalty on a debtor with a modern family composition and unfairly hindering a debtor's fresh start.

As further explained in Part III, the economic unit approach is not based on any relevant statutory language. And its incorrect application leads to unpredictable results and increased financial burdens on consumer debtors with non-traditional families.[99] Such applications should motivate Congress to amend BAPCPA to include a definition of "household" that captures the realities of modern families.

D. The Fractional Economic Unit Approach Treats Children Living Part-Time with a Debtor as a Fraction of an Occupant

Similar to the economic unit approach, the fractional economic unit approach requires a detailed analysis of the debtor's household living arrangements. But this approach counts part-time residents only as fractions of a

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95. *Id.* at 699–700.

96. *See, e.g.*, *In re* Herbert, 405 B.R. 165, 169–70 (Bankr. W.D.N.C. 2008) (allowing the debtor to count eight stepchildren as household members); *In re* Morrison, 443 B.R. 378, 378 (Bankr. M.D.N.C. 2011) (allowing debtor to count her boyfriend as a household member).

97. *See In re* Ford, 509 B.R. at 700.

98. *Compare* Chapter 13 Plan and Related Motions at 2, *In re* Ford, 509 B.R. 695 (No. 13-41415) (proposing thirty-six months of plan payments of $303 each month), *with* Amended Chapter 13 Plan and Related Motions at 2, *In re* Ford, 509 B.R. 695 (No. 13-41415) (proposing sixty months of plan payments of $400 per month). *See also* Order Confirming Chapter 13 Plan Filed 4/30/14 Docket No. 41 and Granting Related Motions at 2, *In re* Ford, 509 B.R. 695 (No. 13-41415) (confirming the amended sixty-month payment plan).

99. Although several courts have adopted the economic unit approach, several variations of this approach exist. *See, e.g.*, *In re* Kops, No. 11-41153-JDP, 2012 WL 438623, at *5 (Bankr. D. Idaho Feb. 9, 2012) (citing BLACK'S LAW DICTIONARY 503 (9th ed. 2009)) (holding that "the economic unit approach is limited to a unit consisting of a debtor and his dependents," based on a dictionary which defines a "dependent" as "[o]ne who relies on another for support").

person.[100] Unfortunately, this approach constitutes another way that courts rigidly apply the Means Test and the DPI Test to the detriment of consumer debtors with non-traditional families.

The fractional economic unit approach is used when a debtor attempts to count a minor child living part-time with the debtor as a full member of the debtor's household.[101] Adopting the economic unit approach, the bankruptcy court in *In re Robinson* was the first court to fractionalize human beings.[102] There, the debtor's four children resided with him for four days per week "on scattered nights throughout the week[,]" as described by the court.[103] The debtor counted each child as a household member for purposes of calculating his projected disposable income in his Chapter 13 case.[104] The children—split into two groups—resided with their respective mothers the other days of the week.[105]

Because the debtor's four children spent only four-sevenths of each week with him, the court held that the children "mathematically approximate, when viewed in the aggregate, two full members of the economic unit."[106] As a result, the court sustained the trustee's objection to Mr. Robinson's Chapter 13 plan and ordered Mr. Robinson to recalculate his projected disposable income using a household size of three, not five.[107]

While admitting that the Bankruptcy Code fails to define the word "household,"[108] the *Robinson* court did not articulate any statutory language to justify fractionalizing the debtor's children under the economic unit approach.[109] The court instead stated that the economic unit approach "realistically serves only as the starting point from which courts can add and subtract in order to determine the most accurate estimate of a debtor's projected disposable income."[110]

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100. *See, e.g., In re* Roch, No. 20-12792-KHK, 2021 WL 5177442 (Bankr. E.D. Va. 2021) (holding that a child who resided with debtor one-third of the time created a household size of one and one-third, and then rounding down—instead of up—to create household size of only one person). *But see In re* Kops, 2012 WL 438623, at *3 ("There is no textual or other indication in the Code, however, to show that Congress intended debtors to calculate 'fractional dependents,' or 'fractional household members,' in completing means test calculations.").

101. *In re* Johnson, No. 10-07244-8-JRL, 2011 WL 5902883, at *1–3 (Bankr. E.D.N.C. 2011); *see supra* notes 11–17 and accompanying text.

102. 449 B.R. 473, 482 (Bankr. E.D. Va. 2011).

103. *Id.*

104. *Id.*

105. *Id.* at 475.

106. *Id.* at 482.

107. *Id.* at 484. The trustee argued that the debtor's projected disposable income was understated because the debtor deducted the allowed standardized expenses based on a five-person household size instead of three-person household. *Id.* at 476. Logically speaking, the trustee's ultimate goal was to force the debtor to pay a greater amount of disposable income to his unsecured creditors through his Chapter 13 plan.

108. *Id.* at 477.

109. *See id.* at 484.

110. *Id.*

Relying on the reasoning in *In re Robinson*, a subsequent bankruptcy court in *In re Johnson* also counted five children as fractions of a person.[111] Recall that Ms. Johnson claimed that her household size was seven, consisting of herself, her husband, her two biological children from another marriage who lived with her 204 days of the year, and her current husband's three children (Ms. Johnson's stepchildren) who lived with her 180 days of the year.[112] Disagreeing with Ms. Johnson's assessment that all seven individuals functioned as one economic unit,[113] the bankruptcy court held that her two biological children counted each as 0.56 of an occupant, and each of her three stepchildren counted as 0.49 of an occupant.[114] Rounding to the nearest whole number, the court concluded that Ms. Johnson could only count her five children as three occupants, for a total household size of five.[115] This decreased Ms. Johnson's allowed standardized expenses, which increased her disposable income and thereby required her to pay more to unsecured creditors through her Chapter 13 plan.[116]

The court in *In re Johnson* did not cite to any statute or legislative history to support its decision to adopt an approach that fractionalized human beings.[117] Rather, the court reasoned that it was adopting "the best method [it could] employ . . . to adapt to dynamic economic change including various types of family structures regardless of size, shape, or composition."[118]

On appeal, the U.S. Court of Appeals for the Fourth Circuit affirmed the bankruptcy court's determination.[119] The dissent correctly pointed out, however, that this decision was neither based in legislative history nor statutory language of the Bankruptcy Code.[120] Citing § 1325(b)(3) and § 707(b)(2)(A)(ii), the dissent stated that nothing in the Bankruptcy Code requires a court to fractionalize children based on part-time co-residency with the debtor.[121]

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111. *In re* Johnson, No. 10-07244-8-JRL, 2011 WL 5902883, at *1–2 (Bankr. E.D.N.C. 2011).

112. *Id.* at *1.

113. *Id.*

114. *Id.* at *3.

115. *Id.*

116. *Id.* (denying confirmation of debtor's Chapter 13 plan and allowing debtor time to re-submit her disposable income calculation based on a household size of five, not seven); Petition for a Writ of Certiorari at 11, Johnson v. Zimmer, 133 S. Ct. 846 (2013) (No. 12-441), 2012 WL 4842977 ("A household size of less than seven would lower Johnson's deductions to income on Form B 22C and result in a higher projected disposable income resulting in Johnson paying more money into her [Chapter 13] plan. More money into the plan would ultimately benefit [ex-husband] Zimmer who is a codebtor on two of Johnson's unsecured obligations.")

117. *See* 2011 WL 5902883, at *1–3.

118. *Id.* at *2; *see also* Johnson v. Zimmer, 686 F.3d 224, 244–45 (4th Cir. 2012) (Wilkinson, J., dissenting), *cert. denied*, 133 S. Ct. 846 (2013).

119. *See* Johnson, 686 F.3d at 227–28 (majority opinion).

120. *Id.* at 242–47 (Wilkinson, J., dissenting).

121. *See id.* at 243 (citing to 11 U.S.C. § 707(b)(2)(A)(ii)(I) and 11 U.S.C. § 1325(b)(3)) ("The bankruptcy court's approach embraces the startling conclusion that the meaning of the terms 'individuals' and 'dependents' in these provisions can encompass fractional human beings.").

As a judicially constructed method that serves to dehumanize children by counting them as less than a whole person, the fractional economic unit approach exemplifies how some judges choose arbitrary and unfair methods to define a debtor's household size. This approach also financially penalizes consumer debtors with non-traditional households by requiring them to pay more money—money these debtors do not have. As discussed in Part III, Congress should amend the Code to define "household" to prevent the wide discrepancies among the alternative methods courts use to determine a debtor's household size.

II.
JUDICIALLY CREATED APPROACHES TO DETERMINE HOUSEHOLD SIZE ARE FLAWED AND FRUSTRATE THE PURPOSES OF BAPCPA

Except for the heads-on-beds or Census approach, all other approaches are judicially created and can lead courts to apply those tests incorrectly to debtors with non-traditional families. Courts thereby unfairly penalize debtors with non-traditional families by increasing the payments they must make to general unsecured creditors.

A. The "Heads on Beds" Approach Is the Only One with Express Textual Support in the Bankruptcy Code

The Bankruptcy Code's express language supports use of the Census Bureau's definition of "household." That definition includes all people, related and unrelated, who occupy a dwelling notwithstanding their relationship to the debtor, their financial contributions to the debtor, or their financial dependence on the debtor.[122] Indeed, one court relied on BAPCPA's reference to Census data for determining "median family income" as added justification for using the Census definition of household.[123] To be sure, the Census approach could permit very broad inclusion of persons as household members.[124] However, the Census approach also requires the inclusion of all occupants' income to the extent such income supports the debtor or the debtor's dependents.[125]

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122. *See supra* notes 53–56 and accompanying text (explaining the statutory language supporting the Census approach).

123. *See In re* Smith, 396 B.R. 214, 216–17 (Bankr. W.D. Mich. 2008) (stating that the Census Bureau's definition "does have relevance for purposes of interpreting Section 1325(b)(4)(A)(ii) since that agency's statistics are to be used to determine the 'median family income' also referenced in that subsection").

124. *See* Shaun Cummings, *Splitting the Baby: The Judiciary's Solution to a "Household" Problem*, 2014 ANN. SURV. BANKR. L. 10, 56 (2014).

125. *In re* Ellringer, 370 B.R. 905, 911 (Bankr. D. Minn. 2007); *supra* notes 53–56 and accompanying text (discussing the use of the Census approach in the *Ellringer* case and the Bankruptcy Code's requirements regarding the inclusion of income from non-debtors occupying the debtor's home).

Not only is there a logical statutory trail for incorporating the Census Bureau's definition of "household,"[126] but most bankruptcy courts that use the Census approach have determined the approach is consistent with both the plain meaning of the word "household" and with Congressional intent.[127] As the bankruptcy court in *In re Ellringer* noted, Congress's use of the word "household" instead of "family" in § 707(b)(6) demonstrates that it did not intend to limit household size to families or individuals related to each other by blood, marriage, or adoption.[128] Had other courts followed the Census approach, several debtors with non-traditional families would have been treated *fairly* and been allowed to count all loved ones, such as the live-in adult son in *Law*[129] and the stepson in *Ford*.[130]

B. The IRS Tax Dependent Approach Ignores the Ordinary Meaning of "Household" and Frustrates the Goals of Bankruptcy

Unlike the Census approach, the IRS tax dependent approach narrows the number of household members by only allowing the debtor to count the individual occupants the debtor can claim as dependents on their federal income tax return.[131] Because the Bankruptcy Code permits IRS-created standardized expenses to be deducted under the Chapter 7 Means Test and the Chapter 13 DPI Test, courts have reflexively concluded that the IRS's definition for dependents should be used to determine household size.[132] However, *nothing* in § 707(b) limits a debtor's expense determination to the number of individuals the debtor can claim as dependents on their federal income tax return.[133] But even aside

126. *See supra* notes 53–56 and accompanying text.

127. *In re Ellringer*, 370 B.R. at 911; *see* 11 U.S.C. § 101(39A)(A) (defining "median family income" as "the median family income both calculated and reported by the Bureau of the Census").

128. 370 B.R. at 911 (stating that, for purposes of the Means Test, Congress chose to use the term "household" instead of the term "family" because unrelated, non-dependent individuals may reside together for several reasons).

129. *See supra* notes 66–78 and accompanying text (discussing the bankruptcy court's decision in *In re Law*, where the court did not count the adult son as a household member simply because he had part-time employment and the debtor failed to explain his son's employment status).

130. *See supra* notes 90–98 and accompanying text (discussing the bankruptcy court's decision in *In re Ford*, where the court did not count the debtor's underage stepson as a household member, even though the debtor's stepson and biological daughter were siblings who stayed with the debtor the same amount of time and were treated the same both financially and otherwise).

131. *In re* Napier, No. Civ. A. 06-02464-JW, 2006 WL 4128358, at *1–2 (Bankr. D.S.C. Sept. 18, 2006); *In re* Law, No. 07-40863, 2008 WL 1867971, at *2 (Bankr. D. Kan. Apr. 24, 2008).

132. *See* 11 U.S.C. §§ 1325, 707(b); *In re* Napier, No. Civ. A. 06-02464-JW, 2006 WL 4128358, at *1 (Bankr. D.S.C. Sept. 18, 2006). 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 [C]hapter 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." (emphasis omitted). 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." *Id.*

133. *See supra* notes 67–73 and accompanying text (analyzing the statutory trails in Chapter 7 and Chapter 13 cases that led to § 707(b), where IRS-allowed expenses are referenced).

from the lack of textual support for the IRS tax dependent approach, its narrow interpretation of household size is problematic for two reasons.

First, the IRS tax dependent approach is a stretch beyond the ordinary meaning of household or family. No parent would say their adult child, who lives with them, is not a member of their household merely because the parent cannot claim that child as a dependent on their tax return. Regardless of the adult child's financial situation, that child's residency in the home means that, to some extent, the parents' expenses are higher than they would be if the child did not live with them. Accommodating an adult child usually means the parents are (1) making rental or mortgage payments on residential space large enough to allow for an extra person, (2) paying for greater electricity and water usage, and (3) paying for additional food consumption.[134] The IRS tax dependent approach completely ignores this reality.

Second, the tax dependent approach is problematic because the IRS's purpose in limiting household size is inconsistent with BAPCPA's purpose of getting "can-pay" debtors to use their disposable income to pay unsecured creditors.[135] The IRS seeks to limit household size to maximize the collection of taxes that run the federal government.[136] In contrast, the Bankruptcy Code's use of the term "household" in Chapter 13 cases aims to determine a debtor's disposable income—the "can-pay" amount the debtor must pay to *their* general unsecured creditors.[137]

Because the IRS tax dependent approach excludes actual occupants who cannot be claimed as dependents, the approach results in an artificial reduction in the debtor's expenses and, thus, amounts to an unfair penalty.[138] Although the Fourth Circuit's ultimate holding in *In re Johnson* had its flaws, the court correctly rejected the IRS tax dependent approach to determine household size. The court reasoned that the approach may inappropriately exclude underage children who live with the debtor but whom, by formal or informal agreement,

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134. Most adult children living with their parents are doing so either to save money (implying that their parents are not charging them normal rent rates if anything at all) or are somehow unable to live on their own. *See* Richard Fry, Jeffrey S. Passel & D'Vera Cohn, *A Majority of Young Adults in the U.S. Live with Their Parents for the First Time Since the Great Depression*, PEW RSCH. CTR. (Sept. 4, 2020), https://www.pewresearch.org/fact-tank/2020/09/04/a-majority-of-young-adults-in-the-u-s-live-with-their-parents-for-the-first-time-since-the-great-depression/ [https://perma.cc/A3G2-RKVA]; Debbie Pincus, *Adult Children Living at Home? How to Manage Without Going Crazy*, EMPOWERING PARENTS, https://www.empoweringparents.com/article/adult-children-living-at-home-how-to-manage-without-going-crazy/ [https://perma.cc/C242-KNE3].

135. *In re* Morrison, 443 B.R. 378, 387–88 (Bankr. M.D.N.C. 2011); *In re* Jewell, 365 B.R. 796, 801 (Bankr. S.D. Ohio 2007).

136. *See* Johnson v. Zimmer, 686 F.3d 224, 239 (4th Cir. 2012); *In re* Jewell, 365 B.R. at 800–01 ("[T]he purpose of the Internal Revenue Code is to create income for the government . . . [while t]he policy of the Bankruptcy Code is to provide the honest but unfortunate debtor with a fresh start.").

137. *See* Johnson, 686 F.3d at 239; *In re* Jewell, 365 B.R. at 801.

138. *See* Johnson, 686 F.3d at 239.

are not claimed on the debtor's tax return.[139] The court further stated that the IRS tax dependent approach could prevent a debtor from counting live-in residents, such as "step-children, a cohabitating fiancé, live-in elderly parents, and the like."[140] Ultimately, by excluding residents for whom the debtor is paying expenses from the standardized expenses determination, the IRS tax dependent approach requires debtors to pay artificially inflated projected disposable income to unsecured creditors to get a Chapter 13 plan confirmed.

The tax dependent approach puts the debtor in a precarious situation. A debtor who is forced to reduce household size must pay more money, via the Chapter 13 plan, than the debtor can realistically afford. This more expensive monthly payment increases the likelihood that the debtor will fail to complete a Chapter 13 plan, exacerbating the already high rate of non-completion of Chapter 13 plans.[141] It also leaves debtors who fail to complete their plans in the same position as they were before filing for relief—subject to the aggressive debt collection practices of their creditors. The bottom line is that the IRS tax dependent approach, when applied to modern families, imposes a financial penalty by inflating debtors' disposable income and thereby hindering debtors' achievement of a truly fresh start—a fundamental purpose of the bankruptcy system.

C. The Economic Unit Approach Has No Textual Support and Requires Intrusive Detailed Analyses

Like the tax dependent approach, the economic unit approach can also result in an unfair reduction in the debtor's household size, thereby artificially inflating the debtor's income. *In re Ford* epitomized this problem: the court refused to allow the debtor to count his stepson as a household member, but counted the debtor's biological daughter—even though the two children were siblings, lived with the debtor for the same amount of time, and received equal financial support from the debtor.[142] The court, in turn, reduced the debtor's household size and required the debtor to recalculate his disposable income, substantially increasing the amount he was required to pay via his Chapter 13 payment plan.[143]

While several courts embrace the economic unit approach,[144] their application of the approach often deviates from the customary boundaries of

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139. *Id.*

140. *Id.*

141. Ed Flynn, *Success Rates in Chapter 13*, AM. BANKR. INST. J., Aug. 2017, at 38–39 (finding that only 38.8% of Chapter 13 plans result in debtors meeting the required payments such that they get a complete discharge of remaining debts at the end of the court allotted time frame).

142. 509 B.R. 695, 697 (Bankr. D. Idaho 2014).

143. *See supra* notes 90–98 and accompanying text (describing how the court's misapplication of the economic unit approach resulted in the debtor having to pay additional $97 per month, totaling $7,820 over the course of his five-year Chapter 13 plan).

144. Volk, *supra* note 65, at 85.

statutory interpretation.[145] For instance, there is no textual basis for courts adopting an approach that requires occupants to be related by marriage or blood (as was the case in *In re Ford*).[146]

In addition to the Bankruptcy Code's silence as to blood or martial relationship, the Code does not require a debtor to prove interdependent financial relationships between the debtor and occupants in the debtor's home. In fact, one court—rejecting the economic unit approach—concluded that "[a]bsent Congressional direction, it is inappropriate to consider a household member's dependency on the [d]ebtor when determining household size; accordingly, household should be understood in the ordinary sense of the word."[147]

Some courts have made the economic unit approach even more difficult to apply by enumerating several factors to decide whether an occupant acts as a single economic unit with the debtor. For example, the court in *In re Morrison*, rejected, without explanation, the other approaches, and instead adopted and modified the economic unit approach by creating the following seven-factor test:

> 1) the 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.[148]

This multi-factor test is inconsistent with Congress's desire for the Means Test to serve as a standardized formula that limits judicial discretion. The factors instead revert to the pre-BAPCPA practice of time-consuming, unpredictable, case-by-case analyses of the finances of the debtor and the occupants in the debtor's home.[149]

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145. *Id.*

146. *See, e.g.*, *In re* Ford, 509 B.R. at 700 (holding that debtor could not count stepson as household member because the "[s]tepson is not [d]ebtor's child, and he is not legally obliged to support him").

147. *In re* Epperson, 409 B.R. 503, 507 (Bankr. D. Ariz. 2009).

148. *See, e.g.*, *In re* Morrison, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011).

149. *See, e.g.*, *In re* Skiles, 504 B.R. 871, 882, 885 (Bankr. N.D. Ohio 2014) ("Applying the fractional approach, Debtor's two children spend approximately the same amount of time with Debtor as one full-time child. For purposes of Debtor's bankruptcy household, Debtor's two children count as one member."); *In re* Reinsch, No. BK12-80748-TLS, 2013 WL 256734, at *3 (Bankr. D. Neb. 2013) (rejecting the creditor's argument that the daughter should not be included as a household member but concluding that the debtor's daughter was part of the debtor's economic unit where daughter returned home on some weekends and during college breaks). While one can argue in favor of a detailed case-by-case analysis, such an analysis goes directly against congressional intent to minimize judicial discretion in determining disposable income to avoid disparate outcomes, as highlighted in this Article. *See* Ransom v. FIA Card Servs., N.A., 562 U.S. 61, 78 (2011) (stating that standardized formulas, such as the Means Test, "are by their nature over-

Instead of interpreting the relevant provisions in light of BAPCPA's intent to require objective standards, the judicial adoption of the economic unit approach, as the dissent in *Johnson v. Zimmer* forecasted, has led to "intrusive and litigious proceedings" where bankruptcy courts seek factual certainty in disputed matters where the parties disagree about the size and structure of a "household."[150]

Similarly, another court stated, "it is only absurdity that can excuse straying from a statute's otherwise plain meaning."[151] The real absurdity flows from trustees and others advocating for approaches that punish debtors. *In re Sasse* is illustrative. There, a creditor argued that the debtor could *not* include his girlfriend as a household member,[152] but also argued for the *inclusion* of the girlfriend's income as a part of the debtor's total household income.[153] The creditor's ultimate goal was for the court to decrease the debtor's allowed expenses (by excluding the girlfriend as a household member) but increase the debtor's household income (by including the girlfriend's income). Such a result would cause the debtor to fail the Means Test and be required to file a Chapter 13 case to pay back a part of the creditor's claim.[154] Although the debtor and his girlfriend paid expenses from a joint bank account, the girlfriend apparently was responsible for, and paid, her own expenses, similar to a roommate scenario.[155] The court ultimately rejected the creditor's argument, holding that the debtor did not commit fraud by claiming a household size of one—meaning that he lawfully

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and under-inclusive," and stating that "[i]n eliminating the pre-BAPCPA case-by-case adjudication of above-median-income debtors' expenses, on the ground that it lent itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces"); David R. Hague, *Loopholes for the Affluent Bankrupt*, 94 ST. JOHN'S L. REV. 107, 121 (2020) (explaining how Pre-BAPCPA, judges exercised broad discretion in determining the reasonableness of debtors' expenses and how that led to "inconsistent determinations"); *In re* Rudler, 576 F.3d 37, 50 (1st Cir. 2009) (stating that several courts recognize Congress's specific intent to adopt a "mechanical formula" in determining whether a presumption of abuse arises from the application of the means test). The United States Supreme Court recognizes the fact that BAPCPA's mechanical formula has shortcomings. Ransom, 562 U.S. at 70 (2011) ("In eliminating the pre-BAPCPA case-by-case adjudication of above-median-income debtors' expenses, on the ground that it lent itself to abuse, Congress chose to tolerate the occasional peculiarity that a brighter-line test produces.").

150. Johnson v. Zimmer, 686 F.3d 224, 242–43 (4th Cir. 2012) (Wilkinson, J., dissenting). In a recent case, a Texas bankruptcy court adopted the economic unit approach in a fact-intensive battle between husband-and-wife debtors who argued that their family occupants of partially related individuals counted as a household of seven and a trustee that argued the occupants counted as a household of only six under the economic unit approach. *See In re* Poole, No. 21-32224, 2022 WL 5224087, at *2 (Bankr. N.D. Tex. Sept. 30, 2022) ("It is without question that the Debtors are generous and compassionate when it comes to supporting their family. However, what is at issue, particularly due to these unique facts, is how to properly measure the Debtors' household size.")

151. *In re* Smith, 396 B.R. 214, 218 (Bankr. W.D. Mich. 2008) (holding that debtor's adult daughter and her child count as household members because they lived full-time with the debtors).

152. *In re* Sasse, 438 B.R. 631, 643 (Bankr. W.D. Wis. 2010). The creditor was a law firm that had represented the debtor in a pre-bankruptcy matter, and the debtor had failed to pay the firm's legal fees.

153. *Id.*

154. *Id.*

155. *Id.*

excluded the girlfriend as a household member and lawfully excluded her income from his income calculation.[156] The court further recognized that the creditor had attempted to "have his cake and eat it too."[157]

Like the creditor in *In re Sasse*, the trustee in *In re Shaikh* argued for the application of the economic unit approach to increase the debtor's income substantially and, thereby, force him to make a much greater payout to general unsecured creditors.[158] *In re Shaikh* involved a debtor who lived with his mother and adult sister.[159] The debtor kept his finances separate from his mother and sister; the three individuals merely lived as roommates, contributing their income to shared expenses (e.g., utility bills).[160] Nevertheless, the trustee urged the court to use the economic unit approach to find that the debtor's household consisted of three individuals who functioned as one economic unit.[161] The trustee's goal was to force the debtor to add the incomes of his mother and sister to his own when completing the DPI test so that his DPI would double.[162] Fortunately for the debtor, the court rejected that argument and allowed the debtor to claim a household size of one.[163]

While the courts in a few cases, including *In re Shaikh*,[164] rejected arguments that would have arbitrarily applied the economic unit approach, these cases illustrate how trustees and creditors use the economic unit approach, which is not grounded in any statutory text, as a license to unnecessarily attack and scrutinize debtors' living arrangements and the finances of occupants residing in debtors' homes.

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156. *Id.* (observing that the debtor and the paralegal for his bankruptcy attorney "opted to list only his income and claim the single household because they believed it appropriate to do so"). The court also held that even if the debtor had included his girlfriend's income, he also would have been allowed to increase his household size to two and still would have passed the Means Test. *Id.* at 644 ("There simply is no 'fraud' in the calculation of the means test, and there is no substantive basis for dismissing the case or 'revoking' the debtor's discharge.").

157. *Id.* at 643 ("[I]t is the plaintiff who wishes to eat the cake; he wants the debtor to include all of his girlfriend's income as part of his current monthly income but ignore the reality that she is part of the resulting 'household.' It is as if the plaintiff suggests that she is little more than a phantom, existing only to supply the debtor with additional income but never actually resting her head in a physical location."). While general unsecured creditors, such as the law firm in *Sasse*, would like to receive the maximum payout, the reality is that most general unsecured creditors receive very little or nothing at all in Chapter 13 cases. *See In re* Spinks, 591 B.R. 113, 126 (Bankr. S.D. Ga. 2018) (noting that this Chapter 13 case was unusual in that the debtor's plan proposed to pay 75 percent of the debt owed to general unsecured creditors).

158. *See In re* Shaikh, No. EO-20-012, 2020 WL 6867920, at *4 (B.A.P. 10th Cir. Nov. 23, 2020).

159. *Id.* at *1.

160. *Id.* at *4.

161. *Id.*

162. *Id.* at *1 (detailing how, under the trustee's proposed plan, the debtor would pay an addition $778.56 per month on top of his monthly payments of $745 under his original Chapter 13 plan).

163. *Id.* at *5.

164. *See supra* notes 156–161 and accompanying text.

D. The Fractional Economic Unit Approach Has No Textual Support and Is Dehumanizing

The fractional economic unit approach exemplifies a tortuous expansion of the economic unit approach, as it counts occupants who are financially dependent on the debtor as fractional persons. The dissent in *Johnson v. Zimmer* noted that, much like the standard economic unit approach, the fractional economic unit approach has no grounding in the text of the Bankruptcy Code.[165] Nowhere does the Code's language hint that it is permissible to count "dependents" as less than whole persons, nor does it indicate that such was Congress's intent.[166] The *Johnson* dissent also highlighted that it is Congress's job to account for non-traditional families within the Bankruptcy Code and that the majority therefore overstepped its authority.[167] The dissent acknowledged that there may be discrepancies in not accounting for part-time living arrangements in a debtor's household but maintained that closely following the statute's text is crucial to preserving consistency among bankruptcy cases.[168] As the dissent stated, it is not the role of the courts to construct a new approach to ensure that bankruptcy law fits the changing times; rather, "bankruptcy courts have a variety of other options available that may suit the circumstances of the case without so grievous an assault upon the statutory text."[169]

The fractional economic unit approach is biased and arbitrary. For instance, courts have fractionalized underage stepchildren because they do not live full-time in the debtor's home.[170] Other analogous cases directly contradict this rationale, however. For example, courts do not fractionalize debtors' biological adult children attending college, even though (1) those adult children may reside in a debtor's home only a few days during the semester and (2) the debtor-parents have no legal obligation to support those adult children while attending college.[171] The only significant difference between underage stepchildren and adult college students is that college students are biologically related to the debtor—a factor the Bankruptcy Code does not tell courts to consider.

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165. 686 F.3d 224, 242–43 (4th Cir. 2012) (Wilkinson, J., dissenting).
166. *Id.* at 243.
167. *Id.* at 245–46.
168. *Id.* at 246–47.
169. *Id.* at 243.
170. *See In re* Ford, 509 B.R. 695, 698–99 (Bankr. D. Idaho 2014).
171. For example, in *In re Reinsch*, the court did not fractionalize a debtor's daughter who was a non-resident adult college student even though she attended an out-of-state college as a full-time student and the debtor provided only "substantial," not sole, support to the student. *See* No. BK12-80748-TLS, 2013 WL 256734, at *3 (Bankr. D. Neb. 2013) (rejecting the creditor's argument that the daughter should not be included as a household member but concluding that the debtor's daughter was part of the debtor's economic unit where daughter returned home on some weekends and during college breaks).

E. Broad Judicial Discretion Further Complicates Household Size Determination

Except for the Census approach, the current approaches to determine household size have become overly complicated since BAPCPA was enacted in 2005. In *In re Skiles*, the court purported to apply the economic unit approach, but instead applied a hybrid approach that relied on detailed presumptions and burden shifting.[172] Moreover, the court presumed that only those listed on a debtor's federal income tax return would count as a member of that debtor's household, holding it was the debtor's burden to prove otherwise.[173] The result of this made-up approach was that the debtor could count only one of his two children and one of his wife's three children as members of his household.[174] Consequently, rather than comparing his income to the median income for a household of seven, the debtor had to compare his income to a household of four.[175] The court, in essence, used a fractional economic approach to cause the debtor to flunk the Means Test.[176]

With no clear definition of "household," courts will continue to inconsistently apply whatever approach they feel is best in whatever manner they choose. In the end, debtors bear the financial burden of satisfying complex, judicially created approaches.[177]

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172. 504 B.R. 871, 882 (Bankr. N.D. Ohio 2014).

173. *Id.*

174. *Id.* at 885 ("Applying the fractional approach, Debtor's two children spend approximately the same amount of time with Debtor as one full-time child. For purposes of Debtor's bankruptcy household, Debtor's two children count as one member.").

175. *Id.*

176. *Id.* at 886.

177. *See, e.g.*, *In re* Morrison, 443 B.R. 378, 388 (Bankr. M.D.N.C. 2011) (applying an economic unit test that requires a case-by-case analysis of the seven factors). Even if a debtor gets a favorable result, a court's determination of the overcomplicated question of who counts as a member of a debtor's household results in increased attorneys' fees for the debtor and wasted judicial resources. Attorneys' fees for consumer debtors have dramatically increased post-BAPCPA, and the flat fees that lawyers charge consumer debtors typically cover only basic services—not litigation—over complex issues, such as the issue of household size discussed in this Article. *See* John W. Lucas, moderator, Very Good Debates at American Bankruptcy Institute 23rd Annual Southwest Bankruptcy Conference (Sept. 10, 2015) (stating that most lawyers in Chapter 7 and 13 cases charge a "Basic No-Look" or flat rate fees for basic services but noting that fees for adversary proceedings are not covered by the flat rate). For a detailed study discussing fees post-BAPCPA, see generally Lois R. Lupica, *The Consumer Bankruptcy Fee Study: Final Report*, 20 AM. BANKR. INST. L. REV. 17 (2012) (describing differences in fees nationwide); U.S. GOV'T ACCOUNTABILITY OFF., DOLLAR COSTS ASSOCIATED WITH THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 22–23 (2008) (finding that the average attorney fee for Chapter 7 increased by 51 percent after passage of BAPCPA). For a recent article discussing the need for reform, see generally Terrence L. Michael, *There's a Storm a Brewin': The Ethics and Realities of Paying Debtors' Counsel in Consumer Chapter 7 Bankruptcy Cases and the Need for Reform*, 94 AM. BANKR. L.J. 387 (2020) (discussing the risk of non-payment of legal fees in Chapter 7 cases and reviewing the various methods used by attorneys to get paid).

F. Most Approaches Lead to Unnecessary Disclosures

Apart from the Census approach, which counts all occupants in the debtor's home as household members, the three court-constructed approaches to determining household size often require the disclosure of intimate and embarrassing details about the lives of the occupants in the debtor's home.[178] Trustees and courts frequently engage in detailed investigations and analyses to uncover the finances and living arrangements of all occupants within a debtor's household.[179] The resulting public disclosures can subject occupants to ridicule and potentially hurt their chances of securing and maintaining full-time employment.

Consider, for example, *In re Fraleigh*, where a bankruptcy court, using the economic unit approach, had to decide whether to count a debtor's live-in boyfriend as part of her household, even though the couple intentionally kept their finances separate.[180] Applying a modified economic unit approach, the court scrutinized all financial payments that transpired between the debtor and her boyfriend.[181] The plaintiff—the debtor's ex-husband—sought this outcome because he believed it would result in the debtor, his ex-wife, failing the Means Test by forcing her to add her boyfriend's income to her total income.[182] Nevertheless, a detailed examination of the debtor's financial relationship with her boyfriend led the court to conclude that there was no financial interdependence between the two, thus allowing the debtor to exclude her boyfriend's income.[183] As a result, she passed the Means Test and obtained a discharge of her debts.[184] While ultimately good news for the debtor, this decision exemplifies how judicial resources are used to subject debtors and their families to needless scrutiny at the behest of others, such as ex-spouses and bankruptcy trustees.

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178. *See supra* notes 170–174175 and accompanying text.

179. *See, e.g.*, *In re* Shaikh, No. EO-20-012, 2020 WL 6867920, at *1, *5 (B.A.P. 10th Cir. Nov. 23, 2020) (upholding the bankruptcy court's decision not to find the debtor in bad faith for not complying with the trustee's numerous attempts to require the debtor to produce documents and holding that the debtor correctly claimed a household of one where he, his mother, and adult sister functioned merely as roommates).

180. 474 B.R. 96, 108–11 (Bankr. S.D.N.Y. 2012).

181. *Id.* at 101 (quoting *In re Morrison*, 443 B.R. at 388) (adopting an economic unit test that requires a case-by-case analysis of seven factors to determine if someone counts as member of the debtor's household).

182. In this case, the plaintiff was the defendant-debtor's ex-husband. *Id.* at 99. The ex-husband sought a court order denying the debtor a discharge of her debts on the purported basis that she had committed fraud by failing to include the boyfriend's income. *Id.* at 100–01. The court, however, held: "The Plaintiff [ex-husband] failed to meet his burden to show that the Debtor made a false oath to the Court with intent to defraud. The evidence presented at trial proves that the Debtor did not receive financial support from [her boyfriend] during the relevant pre-petition period." *Id.* at 112.

183. *Id.* at 111.

184. *Id.* at 112.

The *Fraleigh* opinion illustrates the overly intrusive examination of the personal lives of every occupant within the debtor's house. In determining whether the debtor and occupants in her home functioned as an economic unit, the court disclosed that the debtor's boyfriend forced the debtor's daughters to take regular drug tests, which the boyfriend made the debtor pay for because he did not tolerate "typical teenage behavior" in his home.[185] While cases like *Fraleigh* may read like a fascinating story and thereby catch readers' attention, they represent real details of people's personal lives. The *Fraleigh* court's excess scrutiny, in turn, appears to be an unnecessary intrusion and an inappropriate disclosure of personal information in a public record. No teenager would want the whole world to know that their mother's boyfriend demanded that the teenager submit to random drug testing. The debtors at the center of these cases are already vulnerable simply because they had to file for bankruptcy. Courts should not subject them and their families to further humiliation by revealing truly personal details about their lives.

Unfortunately, the *Fraleigh* court's intrusive revelation of intimate details of the lives of the debtor and her family is not atypical; underage children are often the innocent victims of the bankruptcy courts' scrutiny under the economic unit approach. For instance, in *In re Ford*, the court discussed the living arrangements and parentage of underage children residing in the debtor's home.[186] The court noted that the debtor "met another woman . . . who has a son . . . fathered by another man."[187]

Similarly, in *In re Stuteville*, the court disclosed unflattering details about a debtor's minor son when it decided that the son's social security check could be included in the debtor-father's calculation of disposable income for purposes of his Chapter 13 plan.[188] The *Stuteville* court's opinion is riddled with personal details about the minor child; it stated that he had been "assessed by a neurologist for essential tremor," and that he had spent "two years in seventh grade."[189] Disclosure of such details were not necessary and put the child at risk of derision. As the Stuteville family lived in a small rural New Mexico town,[190] discovering the identity of the child based on this public record would not be difficult.

A court's disclosure of embarrassing details can also occur where adult children reside in the debtor's home. For instance, *In re Law* involved a debtor-father whose live-in adult son had a part-time job, but the court described the son

185. *Id.* at 108.
186. 509 B.R. 695, 697 (Bankr. D. Idaho 2014).
187. *Id.*
188. No. 19-11085-13j, 2020 WL 6368890, at *2 (Bankr. D.N.M. Oct. 29, 2020).
189. *Id.*
190. *Id.* at *1; *see also Magdalena, New Mexico Population 2021*, WORLD POPULATION REV., https://worldpopulationreview.com/us-cities/magdalena-nm-population [https://perma.cc/VD38-MFPB] (noting that as of July 2021, the debtor's hometown has a population of 870).

as "'minimally' employed."[191] One could interpret the court's choice of words as berating when it held that the debtor could not count the son because he was not a dependent under the IRS's definition or any other definition allowed by § 707.[192] The court perhaps failed to understand that there are many reasons why an adult might live with a parent: the son could have been overcoming a drug addiction, experiencing physical or mental health issues, or getting back on his feet after a messy divorce or after getting out of jail. Even if the reason was less serious—such as inability to afford rental housing—most adults would not want this information in a public record.

If the courts in the above cases had used the Census approach, those embarrassing disclosures would never have occurred. The Census approach stands out as the superior approach, both because it is grounded in the express language of the Bankruptcy Code[193] and because it respects the privacy of debtors and their families. Because many courts use the three judicially contrived tests to determine household size, Congress must step in to protect the privacy of persons who merely reside with debtors who have sought bankruptcy relief.

III.
THE PROPOSED SOLUTION IS TO AMEND THE BAPCPA TO CREATE A HOUSEHOLD SIZE TEST

Given three of the four approaches to determining household size are often applied unfairly to debtors with non-traditional families, Congress must amend BAPCPA. As explained below, pending legislation may be an avenue for defining the term "household."

Recently, Senator Elizabeth Warren introduced the Consumer Bankruptcy Reform Act of 2022 (CBRA), which proposes major reforms but fails to include any definition for term "household."[194] CBRA would restore several protections taken from consumer debtors under BAPCPA,[195] thereby making it easier for individuals to obtain bankruptcy relief.[196] For example, the CBRA would replace

191. No. 07-40863, 2008 WL 1867971, at *2 (Bankr. D. Kan. Apr. 24, 2008).

192. *Id.* (implying that the son may be lazy: "The better question is whether Debtor's creditors should, in effect, subsidize Debtor's adult son who may well be fully capable of working and supporting himself?").

193. *See supra* notes 53–56 and accompanying text (discussing the relevant statutory provisions leading some courts to adopt the Census approach, which counts as household members all who reside in the debtor's home).

194. *See* Consumer Bankruptcy Reform Act, S. 4980, 117th Cong. (2022); Press Release, Nat'l Ass'n of Consumer Bankr. Att'ys, NACBA Encouraged by Senator Elizabeth Warren's Reintroduction of the Consumer Bankruptcy Reform Act (Sept. 28, 2022) https://nacba.org/news/617923/ [https://perma.cc/F22X-CGAA] (supporting several of the bill's components, including the provision allowing for the discharge of student loan debt). For a discussion of the 2020 version of the bill, see generally Pamela Foohey, *Consumer Bankruptcy Reform Act of 2020*, 24 J. CONSUMER & COM. L. 54 (2021) (explaining and supporting Senator Elizabeth Warren and Jerrold Nadler's Consumer Bankruptcy Reform Act of 2020).

195. *See* S. 4980, 117th Cong. (2022).

196. *Id.*

Chapter 7 and Chapter 13 with a new consumer bankruptcy chapter, Chapter 10, and provide two routes for individuals to file for bankruptcy: (1) no-payment discharge; and (2) debt-specific plans requiring a "minimum payment obligation."[197]

While CBRA sets forth a formula for calculating the "minimum payment obligation" using the term "household," CBRA fails to define "household" in its current draft. However, a clear definition of "household" would align with CBRA's goal to simplify the consumer bankruptcy system.[198] As explained below, CBRA could be amended to define "household" more narrowly than how the U.S. Census Bureau defines it, where "household" refers to "all the people who occupy a housing unit."[199] More importantly, given the numerous combinations of individuals who live with debtors, the definition should center on "*financial dependence*," which would ask whether the occupant is wholly or substantially provided for financially by the debtor, and vice versa.

A. A Household Size Test Would Create Presumptions in Debtor's Favor

In keeping with a primary objective of BAPCPA—removing discretion from judges by creating objective standards to determine a debtor's disposable income—this Article proposes a new method for defining the term "household" that creates presumptions in favor of counting a residing occupant as a household member so long as the debtor has supportive customary documentation. I refer to this as the "Household Size Test." As explained below, under the Household Size Test, anyone challenging the debtor's certification must have a reasonable basis to mount such a challenge based on *independently* obtained evidence. If the debtor prevails against the challenger, the debtor may seek an award of attorney's fees if the challenger fails to establish its actions were "substantially justified."

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197. *Id.* § 104(a)(54) (providing that the "minimum payment obligation" includes a sum of several items including "to the extent the debtor's annual income exceeds 135 percent of the sum of the median family income of the applicable State for 1 earner plus $15,000 for each individual in the *household* other than the debtor") (emphasis added). *See* ELIZABETH WARREN, CONSUMER BANKRUPTCY REFORM ACT SUMMARY 1 (Sept. 20, 2022) https://www.warren.senate.gov/imo/media/doc/Consumer%20Bankruptcy%20Reform%20Act%20Summary%20-%209.20.22.pdf (summarizing, among other things, a debtor's minimum payment obligation in debt-specific plans).

198. S.4980, 117th Cong. § 101(b) (2022) (stating that "[t]he purpose of the Act is to establish a bankruptcy system that helps individuals and families in the United States regain financial stability and protects against abusive and predatory behavior by… (1) streamlining the process of filing for bankruptcy, simplifying court procedures in bankruptcy, and lowering the cost of bankruptcy for both consumers and creditors").

199. "Householder" is defined as "the person (or one of the people) in whose name the housing unit is owned or rented (maintained) . . ." *Current Population Survey (CPS)—Definitions and Explanations*, U.S. CENSUS BUREAU (Jan. 20, 2004), https://web.archive.org/web/20040212094456/http://www.census.gov/population/www/cps/cpsdef.html [https://perma.cc/AK34-UF8H].

The Household Size Test is aimed at preventing debtors (DR) from suffering financial penalties imposed by the complicated, judicially contrived approaches discussed previously. The Household Size Test is summarized in the table below.

Type of Occupant	**Counts as Household Member**	**Does *Not* Count**
Underage child	Full-time occupant OR Part-time occupant in DR's home for 45 percent or more of the year	Occupant who resides with another parent or legal guardian at least 55 percent of the time
Intimate Partner	Occupant who has an intimate relationship with DR and who is dependent financially on DR or who provides financial support to DR	Occupant who has an intimate relationship with DR *but* who lives a financially separate life from DR
Adult relative OR adult child of DR OR DR's Spouse/Intimate Partner	Unemployed adult child, employed adult child who is NOT self-sufficient, or adult child who is a full-time college student and who lives in DR's home the majority of the year	Employed adult who is self-sufficient
Roommate – Presumption is that roommates live separate lives	Roommate counts if DR can certify with supporting records that DR and roommate are financially interdependent	Roommates do not count as household members even if they are relatives of DR

As summarized in the table, the Bankruptcy Code should be amended to define "household member" as an occupant who is either: (1) an underage child of the debtor or the debtor's spouse or intimate partner who resides in the debtor's home at least 45 percent of the year, (2) an intimate partner who is financially dependent on the debtor or who provides financial support to the debtor, (3) an adult child who is (a) unemployed, (b) a full-time college student, or (c) employed but not self-sufficient, or (4) a roommate who has a financially interdependent relationship with the debtor.[200] The discussion below provides justifications for why the Bankruptcy Code should contain presumptions that count these occupants as members of the debtor's household.

200. A debtor would be required to complete a form indicating that the occupant meets one of these criteria, certify the accuracy of the form by including her signature under the penalty of perjury, and attach documentation that would reasonably support the presumption of inclusion.

1. *Underage Children Should Count as Household Members if They Reside with the Debtor at Least 45 Percent of the Year*

The Bankruptcy Code should be amended to create a presumption in favor of allowing the debtor to count an underage child as a household member when two criteria are met. First, the child must reside in the debtor's home for at least 45 percent of the year. Second, the child must be the biological child, stepchild, or adopted child of either the debtor, the debtor's spouse, or the debtor's intimate partner. *In re Ford* is illustrative of the need for such a presumption. There, the court decided the debtor's stepson did not count as a household member, even though the debtor and his ex-wife raised his stepson since birth and had a biological daughter close in age to the stepson.[201] The debtor provided the same level care and financial support for both children and demonstrated the same level of commitment to raising them.[202] Yet the court held that that the debtor's stepchild should not be included in the debtor's household because the debtor had no legal obligation to care for the stepchild.[203] Under the Household Size Test, in contrast, the debtor could count both the stepson and the biological daughter as household members because the "legal obligation" requirement would be replaced with a standard of "actual care."

Congress should also include a presumption in favor of counting underage children as whole persons, as long as they reside at least 45 percent of the year.[204] The first reason for such a presumption is that courts have fractionalized children when applying the economic unit approach without any legal justification whatsoever.[205] Second, the typical custody agreement requires the child to reside with the non-custodial parent for at least two weekends per month and one overnight stay mid-week. This means that even when the debtor is the non-custodial parent, the debtor must always have food on hand and a room prepared for the child's occupancy on a weekly basis and cannot simply rent out the room. Therefore, it does not make sense to count the child as a fraction of a person given that the debtor-parent provides regular financial support to a child who resides in the home.

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201. *In re* Ford, 509 B.R. 695, 697 (Bankr. D. Idaho 2014) (holding that the stepson did not count as a household member because the stepson was not Mr. Ford's biological child, Mr. Ford had no obligation to financially support his stepson, even though both this son (the child of his ex-wife) and Mr. Ford's daughter (the biological child of Mr. Ford and the same ex-wife) were treated the same way by Mr. Ford).

202. *Id.*

203. *Id.* at 700 ("[T]he evidence shows that Stepson is not Debtor's child, and he is not legally obliged to support him. And although Stepson, as a matter of fact, lives with Debtor to the same extent as Daughter, and Debtor routinely supports Stepson financially while in his custody, neither of these realities are sufficient to make Stepson a part of Debtor's economic unit.").

204. I chose 45 percent because that threshold seemed indicative of a parent who must always be prepared to provide food and housing for an underage child.

205. Johnson v. Zimmer, 686 F.3d 224, 242–47 (4th Cir. 2012) (Wilkinson, J., dissenting).

A recent case involving an underage child illustrates the utility of the proposed House Size Test's 45 percent occupancy requirement. In *In re Pizzo*, a debtor filed for Chapter 13 bankruptcy relief and claimed a household size of three: herself, her spouse, and the spouse's daughter from a prior marriage.[206] The nine-year old stepdaughter did not live with the debtor.[207] Moreover, after a lengthy discussion of the relationships and interactions among the debtor's current spouses, ex-spouses, and the father of the stepdaughter, the court found that the debtor was "not legally obliged to support" the stepdaughter and, in fact, was "not allowed to interact" with the stepdaughter.[208] Applying the economic unit approach, the court held that the stepdaughter could not be counted as a member of the debtor's household, reasoning, in part, that the economic unit approach "should not be stretched so far as to include [the debtor's stepdaughter]."[209]

Under this Article's proposed Household Size Test, the *Pizzo* court would reach the same result without a detailed discussion of the personal lives of all involved parties. Because the child did not reside in the debtor's home at least 45 percent of the year, the *Pizzo* court could have easily held that the child did not count as a household member. The court would have then avoided a lengthy and intrusive investigation into the personal living situations of the debtor, the debtor's spouse, and the stepdaughter, and would have avoided disclosing apparent grievances with her stepdaughter's other parent. As *Pizzo* demonstrates, perpetuating disclosure of such intimate household details can be both embarrassing and potentially traumatizing.

2. Cohabitating Intimate Partners Would Count as Household Members

In addition to allowing the debtor to count underage children who reside part-time in the debtor's home as household members, the Household Size Test would allow the debtor to count a cohabitating intimate partner who either is financially dependent on the debtor or provides substantial support to the debtor. For example, in *In re Morrison,* the debtor lived in her boyfriend's home, and the debtor's boyfriend alone paid the mortgage.[210] The debtor's ability to live with her boyfriend "rent-free" is an example of substantial support. Therefore, not only would she have a household of two persons under the proposed Household Size Test, but she would have to include his mortgage payment as "income" that supports the debtor.[211]

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206. 628 B.R. 811, 814 (Bankr. D.S.C. 2021).

207. *Id.* at 814.

208. *Id.* at 818.

209. *Id.* at 818–19.

210. 443 B.R. 378, 380 (Bankr. M.D.N.C. 2011) (stating that debtor filed Schedule J, which stated: "Debtor lives with boyfriend, and he pays all rent").

211. *Id.* at 388 (holding that the boyfriend's mortgage payments constituted support of the debtor).

The Household Size Test's inclusion of intimate cohabiting persons recognizes the fact that an increasing number of Americans choose to cohabitate with an intimate partner and favor longer periods of cohabitation. Given that millions of Americans are living in long-term cohabitating relationships,[212] debtors should be able to easily supply documentation (e.g., joint bank accounts listing income and withdrawals sources) indicating financial interdependency or support between intimate partners. As such, debtors should be able to include their intimate partners as household members.

The Household Size Test would also prevent married and cohabiting intimate partners from abusing the bankruptcy system by artificially decreasing household size in order to artificially deflate household income. To illustrate this point, consider the debtor in *In re Oh* who attempted to reduce his household size and exclude his wife's income from the Means Test calculation.[213] The court applied the economic unit approach and found that Mr. Oh and his wife functioned as a single economic unit, and, therefore, Mr. Oh had a household size of two and had to include his wife's income in the Means Test calculation.[214] The proposed Household Size Test would prove more efficient since Mr. Oh and his wife were cohabitating intimate partners who combined incomes and expenses, Mr. Oh's wife would automatically count as a member of Mr. Oh's household.

3. Adult Children Should Count as a Household Members Only if They Are Not Self-Sufficient

Similarly, the Household Size Test would allow debtors to include adult children as household members if the debtors certify, with relevant documentation, that the live-in adult children are unemployed, full-time college students, or employed but not self-sufficient. While trustees and judges may be concerned about adult children who are unemployed or underemployed, as in *In re Law*, the Household Size Test would respect the debtors' decisions regarding whether such adult children count as household members. In general, debtors are in the best position to assess the capabilities of their adult children and can force out adult children who are capable of supporting themselves but refuse to secure full-time employment.[215] Moreover, the proposed Household Size Test would

212. *See* John J. Masselli, *Taxpayer Marital Status and the QBI Deduction*, TAX ADVISER, Dec. 2022, at 23 (stating that according to data from the U.S. Census Bureau, as of 2019, approximately eight million opposite-sex, cohabitating couples "opted to forgo legal marriage, suggesting that this subgroup of the population may . . . elevate consideration of tax/financial factors in their marriage decisions").

213. No. 21-11415-BFK, 2022 WL 994602, at *4 (Bankr. E.D. Va. Apr. 1, 2022).

214. *Id.* at *4–5.

215. *Cf.* Cara Murez, *"Boomerang Kids": When an Adult Child Moves Back Home*, U.S. NEWS (June 2, 2021), https://www.usnews.com/news/health-news/articles/2021-06-02/boomerang-kids-when-an-adult-child-moves-back-home [https://perma.cc/48NV-FRJH]

require the debtor to supply documentation regarding the adult child's income. In turn, the trustee could compare that documentation to reliable living wages data and argue, when appropriate, that the adult child is self-sufficient and should not count as a household member.

4. Roommates and Others Should Count as Household Members if They and the Debtor Are Financially Interdependent

Under the Household Size Test, debtors could count any roommate with whom the debtor is financially interdependent as a household member. As with other types of occupants, the debtor would certify, with accompanying documentation, the extent to which the debtor and the roommate are interdependent. However, the presumption would be that a roommate is not a household member, so the debtor would not have to prove a negative. This presumption would have been helpful to the debtor in *In re Shaikh*, where the trustee tried to force the debtor to include his mother and adult sister as household members and thereby include their incomes in his disposable monthly income calculation, resulting in a higher amount of unsecured debt to be paid in the debtor's Chapter 13 case. Although the occupants were related, they lived as mere roommates, each contributing only a proportionate share of their separate income sources to pay for typical bills such as utility services.

An increasing number of Americans are living together due to financial necessity for numerous reasons, including the high cost of housing.[216] It is common for two families to live under one roof, such as an elderly couple living with their adult child and their own family. The Household Size Test, in turn, would allow debtors to count only the loved ones that comprise the debtor's family unit as household members. For example, in *In re Gaut*, two different families, partially related, were living under one roof.[217] One family consisted of

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(noting that there are many reasons, from financial to emotional, why adults live with their parents, and that the recent COVID-19 pandemic has led to an increase in adult children living with their parents); Kim Parker, *Who Are the Boomerang Kids?*, PEW RSCH. CTR. (Mar. 15, 2012) https://www.pewresearch.org/social-trends/2012/03/15/who-are-the-boomerang-kids/ [https://perma.cc/K4BV-EPN7] (detailing how the number of adult children living with their parents increased during the 2008 recession).

216. *See, e.g.*, D'Vera Cohn, Juliana Menasce Horowitz, Rachel Minkin, Richard Fry & Kiley Hurst, *Financial Issues Top the List of Reasons U.S. Adults Live in Multigenerational Homes*, PEW RSCH CTR. (Mar. 24, 2022), https://www.pewresearch.org/social-trends/2022/03/24/financial-issues-top-the-list-of-reasons-u-s-adults-live-in-multigenerational-homes/ [https://perma.cc/E5CJ-7QAZ] (reporting several research findings, including that "[n]early four-in-ten men ages 25 to 29 now live with older relatives"); Heather Hahn & Margaret Simms, *Poverty Results from Structural Barriers, Not Personal Choices. Safety Net Programs Should Reflect That Fact.*, URB. INST. (Feb. 16, 2021), https://www.urban.org/urban-wire/poverty-results-structural-barriers-not-personal-choices-safety-net-programs-should-reflect-fact [https://perma.cc/U3NT-NEEZ] ("Numerous interrelated systems and structures make it more difficult for some people to provide for their families. These structures drive disparities in access to . . . affordable housing near work. . .").

217. No. 13-60603, 2014 WL 293556, at *1 (Bankr. N.D. Ohio Jan. 24, 2014) (claiming to "adopt[] the economic unit approach, [but] the court also adopted a rebuttable presumption that "'an

the debtor, his wife, and his nineteen-year-old son.[218] The other family consisted of debtor's twenty-one-year-old daughter, her husband, and their infant son.[219] The court held that the debtor's household consisted of three people, not six, by ostensibly adopting the economic unit test while also applying a presumption under the tax dependent test.[220] However, the court could have quickly come to the same result under the Household Size Test, because the debtor's family of three lived a financially independent life from the other family living under the same roof.

B. The Household Test Would Protect the Debtor from Fishing Expeditions and Baseless Lawsuits

The Bankruptcy Code should also be amended to deter a trustee or any other interested parties from frivolously challenging the debtor's completed Household Size Test form. Specifically, a trustee, ex-spouse, or other interested party would be required to provide reasonably accurate evidence to support any motion challenging the debtor's certification of household size. Without any such evidence, the challenger's motion should automatically be denied to prevent the challenger from using the motion as tool of harassment or a means to intrude into the private lives of occupants in the debtor's home.

This proposed deterrence provision is similar to an existing provision in the Bankruptcy Code that deters frivolous lawsuits challenging a Chapter 7 debtor's ability to obtain a discharge of general unsecured debts.[221] Generally, most consumer debtors cannot afford to defend against a creditor's non-dischargeability lawsuit.[222] A creditor, therefore, need "only threaten a suit or bring a baseless action in order to coerce the debtor into paying an otherwise dischargeable debt."[223]

Because such creditor lawsuits were often considered baseless, Congress added section 523(d) to the Bankruptcy Code. Contrary to the "American Rule," this provision permits debtors to receive reimbursement of costs and reasonable attorney's fees incurred in defending against non-dischargeability proceedings under certain conditions.[224] Specifically, if the creditor loses a non-

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individual [ ] listed as a dependent on the debtor or the debtor's non-filing spouse's most recent income tax return . . . is presumed to be a member of the debtor's bankruptcy 'household'").

218. *Id.*

219. *Id.*

220. *Id.*

221. *See* Nathalie D. Martin, *Fee Shifting in Bankruptcy: Deterring Frivolous, Fraud-Based Objections to Discharge*, 76 N.C. L. REV. 97, 142–43 (1997) (arguing that Bankruptcy Rule 9011 should be used to deter "frivolous or otherwise improper objections to discharge").

222. *Id.* at 97.

223. *Id.*

224. *See In re* Dizinno, 559 B.R. 400, 407 (Bankr. M.D. Pa. 2016) (quoting *In re* McCarthy, 243 B.R. 203, 208 (B.A.P. 1st Cir. 2000)) (stating that "[s]ection 523(d) is a statutory exception to the American Rule[,]" and the purpose of this provision is "to discourage creditors from filing §

dischargeability proceeding and a court finds that the creditor's proceeding was not "substantially justified," the court can award attorney's fees and costs to the debtor.[225] "'Substantially justified' means 'justified to a degree that could satisfy a reasonable person."[226] The section 523(d) standard therefore puts the focus on the creditor's conduct in order to deter unwarranted challenges to a debtor's discharge.[227]

Similar to section 523(d), the Household Size Test proposed above should include a subsection to deter ex-spouses, creditors, and trustees from bringing baseless challenges, thereby preventing them from unfairly burdening debtors with the costs of proving household size. Most debtors cannot afford additional legal fees and, therefore, may be tempted to cave in and agree to dismiss their Chapter 7 cases or to pay out more to unsecured creditors via their Chapter 13 plans. Although some debtors can afford the litigation, they should not have to foot the bill to defend against meritless challenges. For example, the *Sasse* court described the creditor's legal challenge as an attempt to "have his cake and eat it too."[228] Under this Article's proposed amendment, this debtor could have recovered his legal fees from the creditor.

In summary, Congress should include a fee-shifting provision to deter baseless legal challenges to a debtor's household size.

CONCLUSION

When Congress passed BAPCPA, its primary objective was to prevent "can pay" debtors from abusing the bankruptcy system by filing for Chapter 7 relief and receiving a quick, undeserved discharge of their unsecured debts. A determination of a debtor's household size is a critical component of two major calculations that courts are required to perform to ferret out the can-pay debtors. Unfortunately, Congress failed to define the term "household." Because of this failure, bankruptcy courts have adopted four main approaches to determining household size. The Census approach, which counts all occupants residing in the debtor's home as household members, is the only approach based on an interpretation of the express language of the relevant statute.

523(a)(2) complaints 'without first carefully reviewing the legal and factual bases for their fraud-based nondischargeability claims'").

225. *In re* Stewart, No. 17-11031, 2018 WL 909970, at *4 (Bankr. E.D. La. 2018) (holding that creditor's failure to check the law before filing non-dischargeability proceeding shows that the proceeding was not substantially justified).

226. *Id.*

227. *See* Carthage Bank v. Kirkland, 121 B.R. 496, 503 (Bankr. S.D. Miss. 1990) (noting that the creditor's conduct is the focus of section 523(d) and finding that the debtor's alleged "hostile and furtive" attitude against the creditor was not relevant in deciding whether to award attorneys' fees in favor of the debtor for the creditor's baseless non-dischargeability lawsuit).

228. *In re* Sasse, 438 B.R. 631, 643 (Bankr. W.D. Wis. 2010); *supra* notes 152–157 and accompanying text (discussing a creditor's attempt to get the court to exclude the debtor's girlfriend from being counted as a household member while simultaneously arguing that her income should be added to the debtor's income to calculate is projected disposable income).

The other three approaches are judicially created and have set bankruptcy courts on a path that is diametrically opposed to BAPCPA's goal of limiting judicial discretion through standardized, objective tests for calculating disposable income. Using flawed legal reasoning and lacking any grounding in the relevant statutory language, courts have used three different approaches to refuse to count, as household members, many loved ones who are part of a debtor's modern family. As a result, courts have imposed a financial penalty on debtors by ignoring their actual expenses incurred to care for those loved ones or by increasing unfairly the amount of income debtors must pay to unsecured creditors.

Congress needs to amend BAPCPA and define the term "household" to prevent courts from reducing the debtor's household size, and thereby prevent courts from financially penalizing consumer debtors who are already financially vulnerable. Congress should adopt this Article's proposed Household Size Test to permit a debtor to count four additional groups as household members: occupants who are (1) underage children who reside in the debtor's home at least 45 percent of the year; (2) intimate partners that are dependent financially on the debtor or who provide financial support to the debtor; (3) live-in adult children who are not financially self-sufficient; and (4) roommates who have a financially-interdependent relationship with the debtor. Congressional adoption of this Household Size Test will prevent courts from dehumanizing a debtor's loved ones and prevent courts, trustees, and creditors from hindering a debtor's financial fresh start.