

# *14th Annual Child Support Training Conference*

*San Francisco Airport Marriott  
September 28 to October 1, 2010*



*For Child Support Commissioners, Family Law Facilitators,  
Title IV-D Administrative and Accounting Staff,  
Paralegals, and Court Clerks*



ADMINISTRATIVE OFFICE  
OF THE COURTS

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CENTER FOR FAMILIES, CHILDREN  
& THE COURTS

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We appreciate your attendance at the 14th Annual AB 1058 Child Support Training Conference. If you have any questions or comments, please contact the editors:

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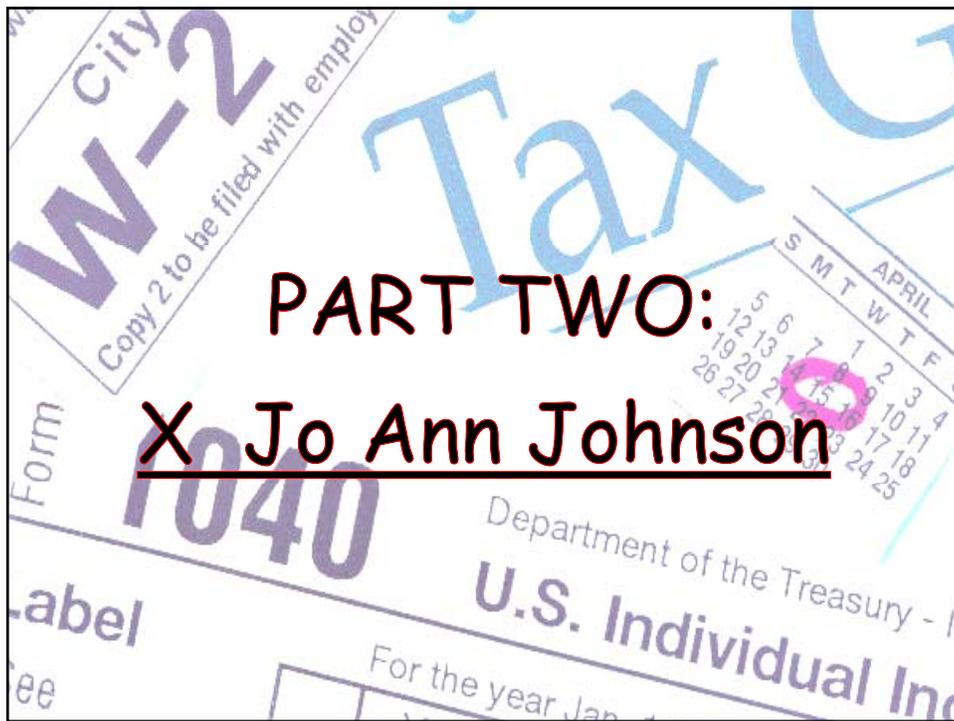
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**Tab H: Case Law Update, Part 2**

# **TAB H**

## **Case Law Update**

**Hon. JoAnn Johnson, Hon. Patrick Perry,  
and Ms. Lollie A. Roberts**



**PART TWO:**  
**X Jo Ann Johnson**

**JOSEPH F. RODKEY v COMMISSIONER**

**T.C. MEMO 2009-238**

**(Pennsylvania)**

IRS issues a deficiency against H. for 2006 = \$11,009 + \$2,201 as an 'accuracy-related' penalty.

IRS disallowed payments H made to W which he characterized as tax-deductible alimony based on parties' MSA.

H says – I did the same thing in 2005 and IRS said it was OK.

MSA incorporated into Final Judgment = H pays to W \$3,200 per month.

“Although the entire amount ...shall be tax deductible to H and includable to W, ... the allocation...is \$1700 is child support and \$1500 is alimony.”

“... or upon W’s cohabitation,  
remarriage or death, alimony shall  
terminate.”

IRS says only the part designated as  
alimony is deductible.

Husband argues collateral estoppel:

In 2005, he deducted the entire  
amount of support paid.

IRS came after him – can’t deduct the  
part allocated as child support.

IRS issued a determination that he  
owed nothing in 2005 allowing the  
deduction.

IRS says: Even if we allowed the deduction in 2005 we don't have to allow it for 2006.

Tax Court says collateral estoppel does not apply – the 2005 issue was not litigated and besides ..The IRS “may take inconsistent positions to protect the public fisc”

Tax Court looks at IRS Code Section 71(b)(1) defining alimony:

- ✓ Received pursuant to divorce decree
- ✓ Not deemed non-deductible to payor
- ✓ Parties not in same household
- No liability to make payment after death of payee spouse

Failed on this last requirement because the payments for child support, i.e. the \$1700 do not terminate on Wife's death only the alimony portion terminates.

IRS says – if this isn't enough, we have another theory:

The \$1700 is designated as child support and therefore it is not deductible.



“It appears that the parties...created a deliberate ambiguity in order to achieve two purposes: one relating to child support and one relating to tax treatment. It has long been the rule that the labels attached by the parties to an agreement... are not controlling for Federal tax purposes.”

Tax court says ‘we don’t care what you call it – if it looks like child support – it’s child support.’



Penalty – Husband says, well, I just relied on what the IRS did in 2005 so I shouldn't have to pay the penalty.

And besides, I may be an attorney but I'm not a tax attorney.



“Petitioner’s explanations do not demonstrate an honest misunderstanding of fact or law that is reasonable in light of his experience, knowledge and education.”

Penalty applies.



Mary E. Bjelland v. Commissioner  
Carl E Knochelmann v. Comm.  
Tax Court Memo 2009-297

(Kentucky)



IRS assessed a deficiency against  
both Mother and Father for tax year  
2004.

\$1,474 for mother  
\$2,092 for father

Both claimed child on separately filed  
tax returns.

## Parties were never married

Shared custody on a complicated schedule which resulted in Mother having the child 173 hours (8 nights) and Father having the child 163 hours (6 nights), bi-weekly.

Both parents claimed they are the custodial parent.

## Which parent gets:

- The child as a Dependent
- The Child Care Credit (<13)
- The Child Tax Credit (<17)
- Head of Household status



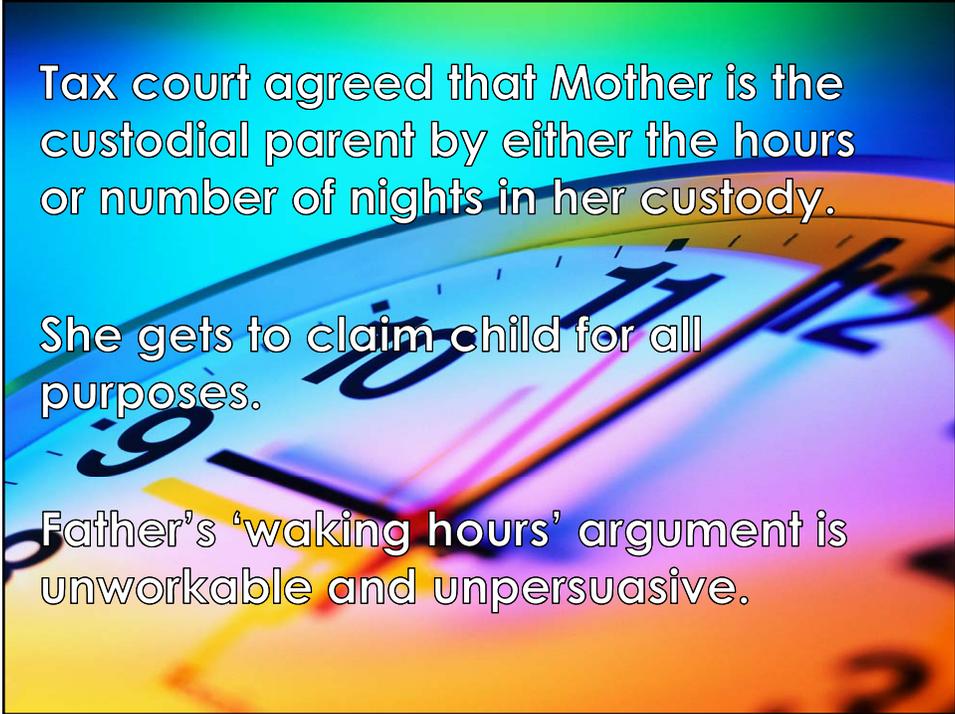
Dad argues he provided more support because he had the child during waking hours.

Mom argues child lived with her for greatest part of year.

IRS says: add up the hours, kid with mom more hours, mom is custodial parent.

Tax Court focused on Section 152(e) which defines the custodial parent as

“having custody for a greater portion of the calendar year” notwithstanding that the other parent may have contributed more to the child’s support than the custodial parent.



Tax court agreed that Mother is the custodial parent by either the hours or number of nights in her custody.

She gets to claim child for all purposes.

Father's 'waking hours' argument is unworkable and unpersuasive.

John Douglas Thomas v. Comm.  
Tax Court Memo 2010-11  
(Arizona)

Stephen S. Gessic v. Comm.  
Tax Court Memo 2010-88  
(Ohio)

Leslie and Linda Himes v. Comm.  
Tax Court Memo 2010-97  
(Nebraska)

Thomas: MSA said Dad gets to claim child in even years if current on his support.

Gessic: MSA said Dad gets to claim both children if he is current on support and Mom makes <\$20K, otherwise, he claims one child.

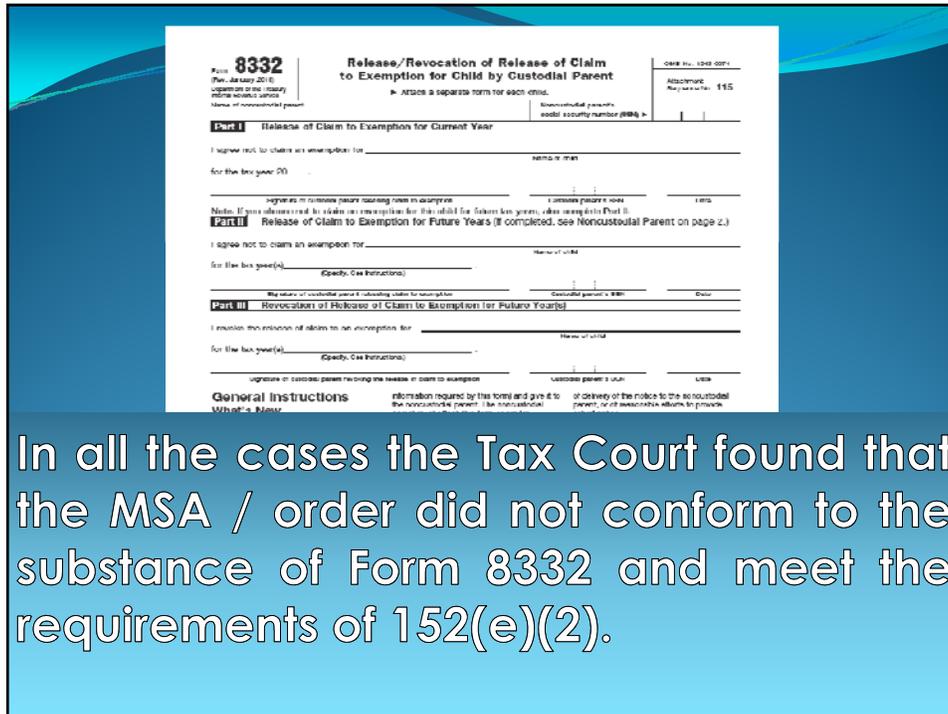
Himes: Modified order said Dad gets to claim both children if current on his support.

In all cases, the Mothers were the custodial parents.

All required the Mothers to execute IRS form 8332.

In all cases, the Mothers didn't and claimed the child/ren.

Fathers attached the MSA / order to prove entitlement to the deduction.



In all the cases the Tax Court found that the MSA / order did not conform to the substance of Form 8332 and meet the requirements of 152(e)(2).

- 8332 requires the taxpayer to furnish:
- children's names
  - years for which the release is granted;
  - the custodial parent's dated signature;
  - the custodial parent's social security number;
  - the non-custodial parent's name and social security number.

The MSA/ orders relied on by the Father's did not contain all the required information.

The releases cannot be conditional.

Even if the Fathers complied with the terms of the MSA / order, the exemption was disallowed.

Ahmed Misbah Sheikh v. Comm.

Tax Court Memo 2010-33



Father paid >\$12,000 in support for 2005 + health insurance.

Mother and children lived with her parents entire year.

Maternal Grandparents claimed children on taxes.

Father tries to do so and assessed a deficiency of \$4,635.

Issue is who actually supported the children – Father or Grandparents?

Father testifies that MGPs “have so much excess money ...they don’t have any problem...”

He could not prove he had provided more than half the support for the children.

Insel V. Gaitor, jr. v Commissioner

Tax Court Memo 2010-70

(Florida)



Father has 4 children.

3 with Mo #1 - children live with him.

1 with Mo #2 – lives with child & mom.

In 2006 he claimed 1 child from Mo#1 and the child with Mo. #2 as well as Head of Household status.

IRS disallows all.

As to the child with Mo #1:

- Fa and Mo #1 lived apart for > 6 months
- They supported the child
- Child lived with him > half the year
- Result: Child is a qualifying child

Child is < 17 = child tax credit

His home is principal place of abode for child for majority of year = HH status

As to child with Mo #2:

- Child (and mother) live with Fa.
- Mo did not claim child.
- Fa supported child.

He can claim child, get tax credit and HH status for this child also even though child born in Dec 2006.



Not that it matters -- but Father is employed by the Florida State Courts.

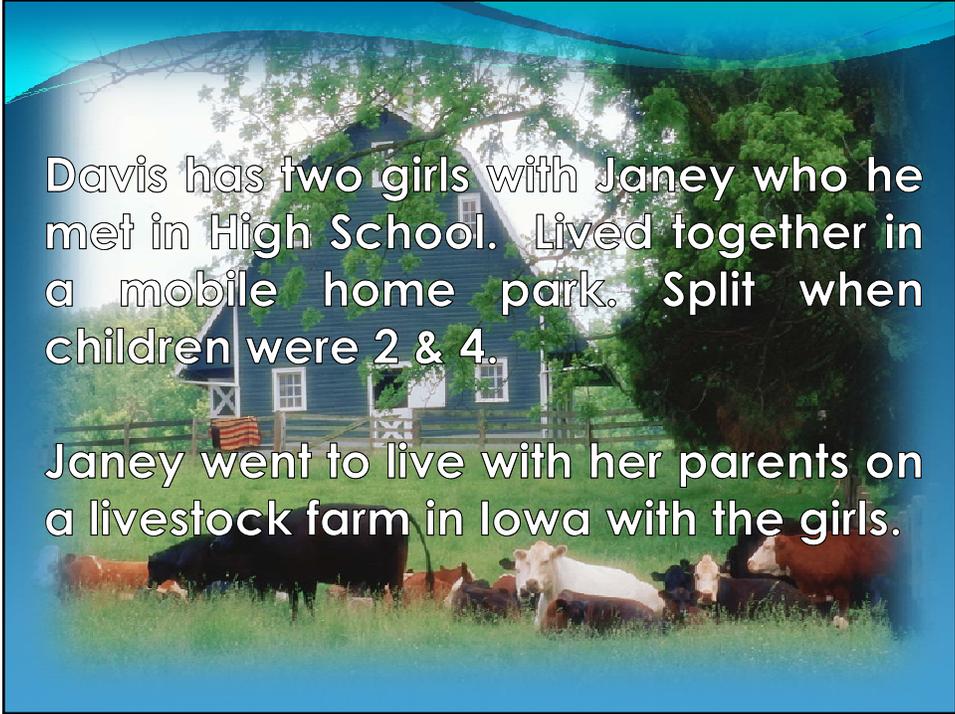


United States v. Jeffrey Joseph Davis

No. 08-3692

Davis convicted by a Federal Court for willful failure to pay his child support obligations.

18 U.S.C. 228(a)(3) and 228(c)(2).



Davis has two girls with Janey who he met in High School. Lived together in a mobile home park. Split when children were 2 & 4.

Janey went to live with her parents on a livestock farm in Iowa with the girls.

History of the case is pretty egregious:

- ▶ Ordered to pay \$723.00 in child support in 2000.
- ▶ Reduced to \$570 in 2002.
- ▶ Between 2000 and 2008 no support was voluntarily paid by Davis
- ▶ Arrears of \$52,354.75 as of July 2008.

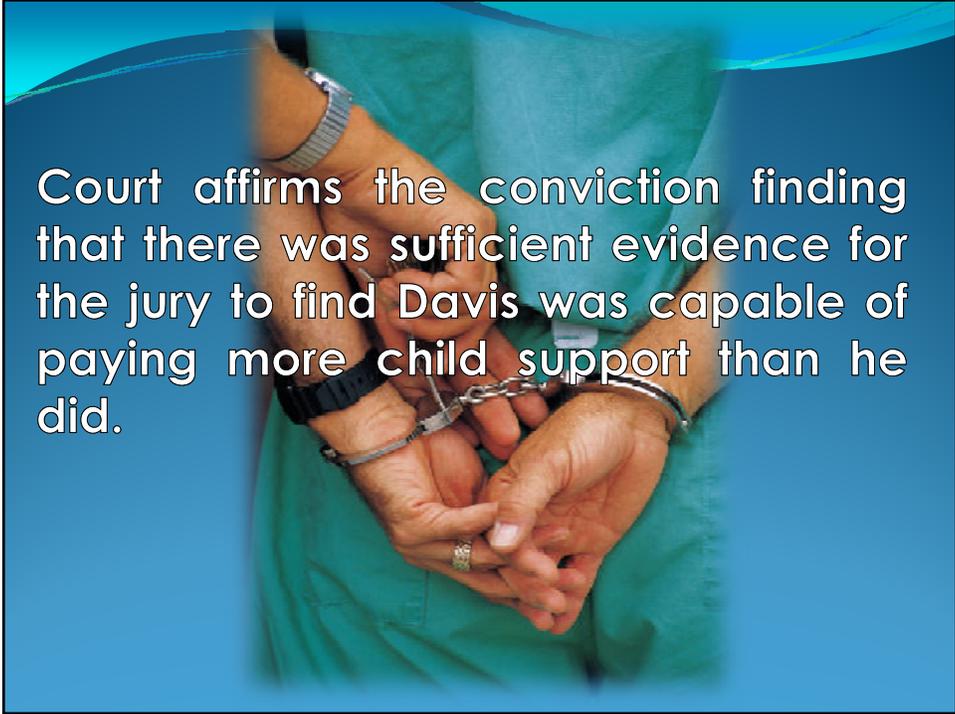
Davis is indicted by a Federal Grand Jury and prosecuted for willful failure to support.

Found guilty.

Appeals → Failed to prove failure to pay was 'willful'.

Davis claims the government had to prove that he did have the ability to pay the *entire amount* of past due support.

Court agreed with the 2<sup>nd</sup> and 5<sup>th</sup> circuit which had already addressed this issue: the government had only to show that the defendant was able to pay *some portion* of his past due support.

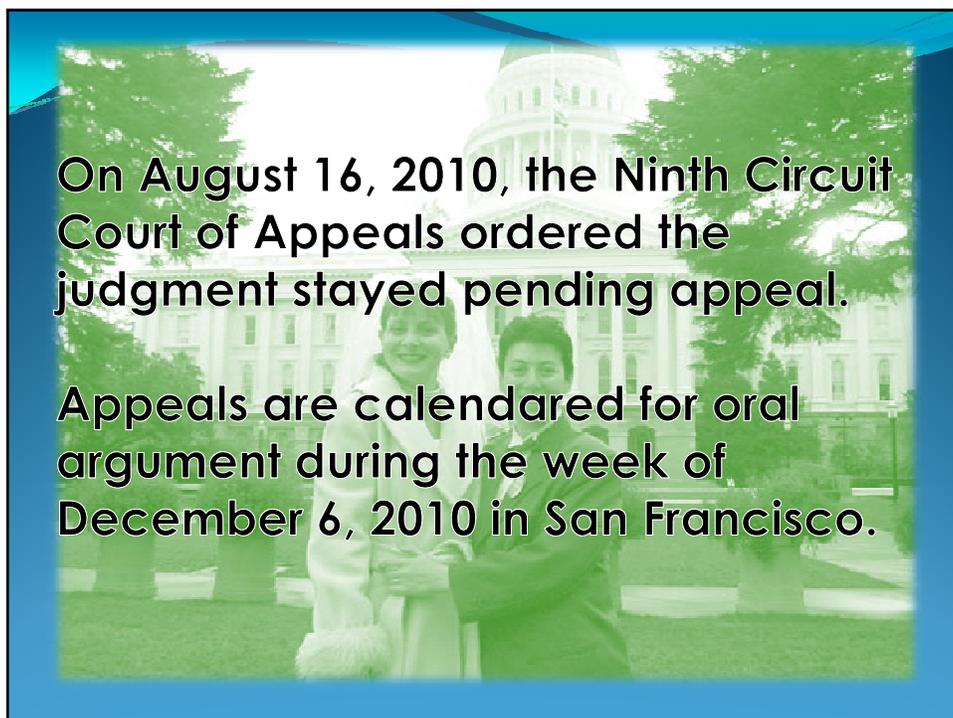
A photograph showing a person's hands in handcuffs, overlaid with text. The person is wearing a green shirt and a watch on their left wrist. The hands are positioned in front of the person, with the handcuffs visible. The background is a solid blue color.

Court affirms the conviction finding that there was sufficient evidence for the jury to find Davis was capable of paying more child support than he did.

Kristin M. Perry, et.al.  
v.  
Arnold Schwarzenegger et.al.

(Proposition 8 Challenge)

On August 4, 2010, Chief Judge Vaughn Walker ruled that Proposition 8 violated the Due Process and Equal Protection clauses of the 14<sup>th</sup> Amendment to the U.S. Constitution.





If the 9<sup>th</sup> Circuit upholds the decision, the U.S. Supreme Court is likely to take the case---although the process may take years.

Family Code 308(c):

Notwithstanding any other provision of law, two persons of the same sex who contracted a marriage on or after November 5, 2008, that would be valid by the laws of the jurisdiction in which the marriage was contracted shall have the same rights, protections, and benefits .....as are granted to and imposed upon spouses with the sole exception of the designation of "marriage."

What is this '3<sup>rd</sup>' category? What if they want a divorce in California?