The rationale that the deduction for child support payers automatically requires inclusion as income by the recipient does not hold water. While they were married the father's support of the children was not income to the mother. While they were married the father's support of the children was not deductible. Likewise, now that they are divorced the custodial mother does not get to deduct what she spends on the children. The parents have now gone their separate ways. Why should the father's support of his children now become taxable income to the mother?

Child support payments were not income to the custodial mother prior to the 1940s because they did not fit the income tax concept of income. The Oxford Dictionary defines income as money received during a certain period as wages or salary. Child support in the custodial mother's hands is not new wealth from the production of labour or capital. It is simply the father's payment for his share of his children's expenses.

• (1805)

The most important rationale for the reduction–inclusion treatment is that it will encourage higher support payments by shifting income from a higher tax paying parent to a lower tax paying parent. This is expected to cause a surplus tax saving available to increase child support payments.

The policy expects that the father's tax savings will always be greater than the mother's tax liability. Because of this the non–custodial parent should be able to pay the custodial parent's increased taxes through what is commonly referred to as a tax gross–up added to the child support payment. Then the policy assumes there will still be an additional surplus tax saving which can also be used to increase child support.

However, as we all know, theory and reality do not always produce the same end results and this is definitely the case with the deduction–inclusion policy.

First, although the father's tax saving may be greater than the mother's tax liability, neither the Income Tax Act or family law legislation requires the father to pay the mother increased tax liability. The report of the federal–provincial–territorial family law committee of May 1992 entitled "The Financial Implications of Child Support Guidelines" noted that while tax consequences should be an element of every child support determination, there is evidence to suggest that these calculations are not routinely made. If the father does not use his tax savings to pay the mother's tax liability, the consequences are very serious.

Let us use another example. A support order has determined that the father's fair share of the children's expense is $10,000 for the year. Under family law principles, this determination is based on both parents sharing the cost of raising the children. The mother is also independently contributing to the children's support.

This $10,000 child support award should be grossed up by about $2,600 to reflect the mother's increased federal and provincial taxes. The grossed–up award then to the father should be $12,600 for the year. The father can pay the extra $2,600 because he has a tax savings from the deduction. The custodial mother needs the extra $2,600 to cover her tax increase from having to include the support in her income.

Let us consider what will happen if the gross–up is not added to the award. The mother still must pay the $2,600 in taxes. She will now be left with only $7,400 from the father's support payment. There will be a shortfall from the original $10,000 that the judge has awarded her. The onus for this shortfall is on the custodial mother and this causes hardship for the children. The father, on the other hand, still gets the benefit of the full tax savings.

A further flaw in the deduction–inclusion policy is the use of tax bracket differentials to deliver overall tax savings. This perspective is examined in great detail in a report entitled "Child Support Policy: Income Tax Treatment and Child Support Guidelines" by Ellen Zweibel and Richard Shillington.

Zweibel and Shillington note that there is an overall tax saving only when the non–custodial father's tax savings on support exceed the custodial mother's liability on support. The Zweibel and Shillington report found that a tax saving only occurs in 51 per cent of the cases and no saving occurs in 49 per cent. Furthermore, when a saving was realized, that saving was minimal.

The study revealed another troubling effect of the deduction–inclusion provisions. So far in this discussion we have been assuming that the non–custodial parent's tax savings will be greater than the custodial parent's tax liability thus creating a surplus tax saving. What happens if this is not the case?

If the mother's increased tax liability is greater than the father's tax savings, the system works against the separated family. The father can no longer pay the mother's increased tax liability from his tax savings.

In the Zweibel and Shillington report, 20 per cent of the cases fell into this category. Not only did the system fail to produce the possibility of a higher award, the system actually worked against them to decrease their already scarce resources.

The final rationale holds that the savings that occurs through the deduction–inclusion gross–up policy is supposed to benefit the children by generating further revenues for their support. Again reality must step in. Even when the saving is realized, the money sits in the hands of the father parent and there is nothing to say that he will forward that money to his ex–wife for the children.

This policy ignores that child support is a very contentious issue and that non–custodial fathers seeking to minimize their