

Dependency Status for a Child of Divorced or Separated Parents

By: **Dennis J. Gaffney, Ph.D., CPA**
John T. Geekie, J.D., LL.M., M. Acc.
Maureen H. Smith-Gaffney, Ph.D.

For at least a generation, divorce has been part of the social landscape in the United States, so much so that the conventional wisdom is that 50% of all marriages end in divorce.¹ Because minor children are often involved in divorce or separation, the question of which parent is entitled to any available dependency exemptions can arise. Only one dependency exemption is allowed for a qualifying child and, since a single exemption cannot be shared, only one parent may claim it.² As a result, there is often confusion and/or conflict between the parents.

Prior to 1985, Sec. 152(e) provided that the child of divorced or separated parents generally was treated as having received over half her or his support from the custodial parent; thus, the custodial parent was entitled to claim the dependency exemption for the child provided all other requirements were met. However, the noncustodial parent would be entitled to the exemption if he or she provided at least \$1,200 of support for the child and the custodial parent could not “clearly

establish” that he or she provided more support than the noncustodial parent.³

This statutory language often placed the IRS in the middle of emotional conflicts that presented difficulties of proof and substantiation. To ease the administrative burden on the Service and promote consistent enforcement in the area, Sec. 152(e) was amended in 1984 to award the dependency exemption to the custodial parent unless that parent waived the right to the exemption in favor of

1 It is difficult to estimate with accuracy the number of U.S. marriages that end in divorce, but some experts feel that the commonly cited 50% rate is too high and that it is somewhere around 40–45%. See Crary, “U.S. Divorce Rate Falls to Lowest Level Since 1970, but Why?” Associated Press article on *DenverPost.com* (May 10, 2007), available at www.denverpost.com/ci_5867870. Regardless of the exact percentage, the number of divorces in the United

States is significant.

2 Sec. 152(e). Under Sec. 151(c), a taxpayer may claim an exemption for each individual who is the taxpayer’s dependent. The exemption amount for tax years beginning in 2009 is \$3,650 (Rev. Proc. 2008-66, 2008-45 I.R.B. 1107).

3 See Sec. 152(e) immediately prior to amendment by the Deficit Reduction Act of 1984, P.L. 98-369, §423(a).

EXECUTIVE SUMMARY

- A taxpayer is allowed to claim a dependency exemption for his or her child if the child is a qualifying child (or qualifying relative) of the taxpayer. In the case of parents that are divorced or separated, a child is generally treated for a particular tax year as the qualifying child of the parent with whom the child resides for a greater number of nights during the tax year (the custodial parent).
- Under Sec. 152(e), the non-custodial parent of a child may only claim a dependency exemption for the child if (1) the child's custodial parent signs a written declaration releasing his or her claim to the exemption for the tax year and (2) the noncustodial parent attaches the declaration to his or her return for that tax year.
- In Regs. Sec. 1.152-4, Treasury provides detailed rules on how to determine the amount of time a child spends with each parent, how to properly prepare a written declaration releasing the custodial parent's claim to the dependency exemption, and how to revoke such a declaration.

the noncustodial parent. The Tax Court deemed this amended version of Sec. 152(e) rationally related to the legitimate government interests of resolving factual disputes between former spouses.⁴

For tax years beginning after December 31, 2004, significant changes to Sec. 152(e) were again effected, this time by the Working Families Tax Relief Act of 2004 (WFTRA)⁵ and the Gulf Opportunity Zone Act of 2005 (GO Zone Act).⁶ These amendments eliminated the general rule that entitled the custodial parent to the dependency exemption for a child when all other requirements were met.

Proposed regulations explaining amended Sec. 152(e) were issued in May 2007. After taking comments from interested parties, Treasury promulgated a final regulation in July 2008. Regs. Sec. 1.152-4 specifies the rules that a custodial parent must follow to grant a noncustodial parent the right to claim the dependency exemption for a child. Regs. Sec. 1.152-4 contains 20 useful examples, and it is generally logical and well written.⁷ This article discusses the major features of new Regs. Sec. 1.152-4.⁸

One thing not affected by the WFTRA and GO Zone Act amendments is the need for the custodial parent to cooperate with the noncustodial parent if the benefits of a dependency exemption for a child are to be transferred to the noncustodial parent. Given the nature of marital discord and dissolution, the necessary cooperation is often not possible.⁹ In any event, whatever "power" that

surrounds a dependency exemption for a child of divorced or separated parents belongs to the custodial parent.

Special Rule for a Child of Divorced or Separated Parents or Parents Who Live Apart

Simply stated, for tax years that began before January 1, 2005, pre-WFTRA Sec. 152(e) allowed the custodial parent to claim the dependency exemption for a qualifying child and provided an exception to this general rule if the custodial parent released his or her claim to the noncustodial parent.¹⁰ The WFTRA amended Sec. 152(e) for tax years beginning after December 31, 2004, to eliminate the general rule allowing the custodial parent to claim the dependency exemption.

As a result of the WFTRA amendment, Sec. 152(e)(2), the provision involving the release of the exemption's claim to the noncustodial parent, is no longer an exception to a general rule but is instead a condition precedent for the operation of Sec. 152(e)(1).¹¹ Once Sec. 152(e)(1) controls, the following three provisions are negated and have no significance:

1. Sec 152(c)(1)(B), which involves a dependent's principal place of abode;
2. Sec. 152(c)(4), which sets forth a special rule when two individuals are claiming a qualified child as a dependent; and
3. Sec. 152(d)(1)(C), which specifies the need for an individual to provide over half of a dependent's support.

⁴ *Caputi*, T.C. Memo. 2004-283.

⁵ Working Families Tax Relief Act of 2004, P.L. 108-311. One purpose of the WFTRA was to simplify the tax law by creating a more uniform definition of a "child" for tax purposes and, in the process of doing that, Congress provided some brighter lines for claiming a dependency exemption for a child of divorced or separated parents. However, there were some oversights in the WFTRA amendments and Congress cured them in the Gulf Opportunity Zone Act of 2005.

⁶ Gulf Opportunity Zone Act of 2005, P.L. 109-135. The GO Zone Act clarified the waiver rules for the release of a dependency exemption for a child by a custodial parent to a noncustodial parent. Under the post-WFTRA, pre-GO Zone

Act statutes, the absence of a divorce decree or written separation agreement precluded the release of a dependency exemption for a child by the custodial parent in favor of the noncustodial parent.

⁷ The examples are located at Regs. Sec. 1.152-4(g).

⁸ Because there could not be many parent-taxpayers affected, Sec. 152(e)(3), involving certain pre-1985 documents, is ignored in this article.

⁹ See the box on p. 93 for a discussion of some of the conflicts that arise in dependency exemption disputes.

¹⁰ See T.D. 9408 and Sec. 152(e)(2) prior to amendment by the WFTRA.

¹¹ *Id.*

Dependency Exemption Situations Carry Potential for Conflict

Many tax professionals have encountered intense conflict between former or estranged spouses, and their anger is sometimes directed at the tax professional.

A noncustodial taxpayer-client may have a divorce decree awarding her the dependency exemption for a child but not know about the need for a properly executed Form 8332 from the former or estranged spouse. Or a noncustodial taxpayer-client may have a recently executed Form 8332 from a former spouse, but when the taxpayer files his or her return electronically, the return is rejected because the former spouse has already claimed the dependency exemption for the child in question.

Another conflict-generating situation involves children who receive most or all their support from a grandparent. In these cases, any potential dependency exemption would likely belong to the grandparent, not a parent. In many situations like these, the taxpayer-client is extremely upset when informed of the proper tax treatment and expects or demands that the tax professional “do something” (and do it “immediately”).

It is important to recognize that if Sec. 152(e) does not apply, dependency status is usually determined under Secs. 152(c) and 152(d).

The final regulation, Regs. Sec. 1.152-4, differs from the proposed version in several ways, so professionals advising former and estranged spouses with minor children need a good working knowledge of post-GO Zone Act Sec. 152(e) and Regs. Sec. 1.152-4. Regs. Sec. 1.152-4 has numerous specific requirements, and a failure to recognize one of them could prove costly. As discussed below, the parents together must meet both a support requirement and a custody requirement. Regs. Sec. 1.152-4 includes:

1. The rules to determine which parent is the custodial parent;¹²
2. A description of how the custodial parent must declare his or her intention to grant the exemption to the noncustodial parent;¹³ and
3. The requirements for revoking the original declaration.¹⁴

Application of Regs. Sec. 1.152-4
Regs. Sec. 1.152-4 interprets Sec. 152(e), “Special rule for divorced parents, etc.,”

and is limited to situations involving a custodial parent’s release to the noncustodial parent of the claim for a dependency exemption for a child. Generally, “[a] taxpayer may claim a dependency deduction for a child . . . only if the child is the qualifying child of the taxpayer under section 152(c) or the qualifying relative of the taxpayer under section 152(d).”¹⁵ A child is usually treated as the qualifying child of the parent with whom the child resides for the longer period of time.¹⁶ However, the child may be treated as a qualifying child or relative of a noncustodial parent if the custodial parent releases his or her claim to the exemption.¹⁷

Custodial Parent’s Release of Claim to the Exemption

For the requirements of Sec. 152(e) to be met, both parents of the child must together provide more than half of the child’s support.¹⁸ The child must also be in the custody of one or both parents for more than half of the calendar year.¹⁹ Furthermore, the parents must meet one of the following criteria:

1. Be divorced or legally separated under a decree of divorce or separate maintenance;
2. Be separated under a written separation agreement; or
3. Live apart at all times during the last six months of the calendar year whether or not they are or were married.²⁰

The requirements of Regs. Sec. 1.152-4 are not met if more than half of the child’s support is treated as being provided by another taxpayer under a multiple support agreement.²¹ Examples (3) and (4) in Regs. Sec. 1.152-4(g) illustrate these rules (and are paraphrased here).

Example 1: *D* and *E* are the divorced parents of child *C*. Under a custody decree, *G*, *C*’s grandmother, has the right under state law to physical custody of *C* from January 1 to July 31, 2009. Because *D* and *E* do not have the right under state law to physical custody of *C* for more than one-half of the 2009 calendar year, *C* is not in the custody of one or both parents for more than one-half of the calendar year. Therefore, Sec. 152(e) and Regs. Sec. 1.152-4 do not apply, and whether *C* is the qualifying child or qualifying relative of *D*, *E*, or *G* is determined under Sec. 152(c) or (d).

Example 2: The facts are the same as in Example 1, except *G* has the right to physical custody of *C* from January 1 to March 31, 2009, so *C* resides with *G* during this period. *D* and *E* jointly have the right to physical custody of *C* from April 1 to December 31, 2009. During this period, *C* resides with *D* for 180 nights and with *E* for 95 nights. *D* executes a Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, for 2009 releasing *D*’s right to claim *C* as a dependent for that year, which *E* attaches to his 2009 return. *C* is in the custody of *D* and *E*

12 Regs. Sec. 1.152-4(d).

13 Regs. Sec. 1.152-4(e)(1).

14 Regs. Sec. 1.152-4(e)(3).

15 Regs. Sec. 1.152-4(a).

16 Sec. 152(c)(4)(B) and Regs. Sec. 1.152-4(a).

17 Sec. 152(e)(2) and Regs. Sec. 1.152-4(a).

18 Sec. 152(e)(1)(A) and Regs. Sec. 1.152-4(b)(2).

19 Sec. 152(e)(1)(B) and Regs. Sec. 1.152-4(b)(2).

20 Sec. 152(e)(1)(A) and Regs. Sec. 1.152-4(b)(2).

21 Regs. Sec. 1.152-4(b)(2)(ii) citing Sec. 152(d)(3).

for more than one-half of the calendar year because *D* and *E* have the right under state law to physical custody of *C* for more than one-half of the calendar year. The nights that *C* resides with *G* are not allocated to either parent. *C* resides with *D* for a greater number of nights than with *E* during the calendar year, so *D* is the custodial parent. Sec. 1.152-4(e) and Regs. Sec. 1.152-4 apply, and *E* may claim *C* as a dependent.

Which Parent Is the Custodial Parent?

To comply with Regs. Sec. 1.152-4, the custodial parent must sign a written declaration that he or she (the custodial parent) will not claim the child as a dependent for any tax year, beginning in the calendar year the declaration is signed.²² The noncustodial parent must attach a copy of the declaration to his or her return for the tax year.²³ According to Regs. Sec. 1.152-4(c), “[a] child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.”

With this definition in mind, it is important to determine which parent is the custodial parent and which is the noncustodial parent. A parent is considered to be the custodial parent if the child resides with that parent the greater number of nights during the tax year.²⁴ This is a bright-line rule. In *Harris*,²⁵ a taxpayer was denied the dependency exemption for his minor child because the child resided with the ex-spouse for 226 days and with the taxpayer for only 139 days. This was true notwithstanding the fact that the taxpayer provided about 77% of the child’s support.

Under Regs. Sec. 1.152-4(d)(1), the noncustodial parent is the parent who is

not the custodial parent, and a child is the child of neither parent if the child is emancipated under state law. A child is considered to reside for a night with a parent if the child sleeps at the parent’s residence.²⁶ This is true whether or not that parent is present²⁷ or whether the child and the parent sleep somewhere else, such as at a hotel when they are on vacation together.²⁸ When considering the circumstance of a night that includes two tax years (the child goes to bed on the evening of the taxpayer’s last day of the tax year and wakes up on the first day of the following tax year), that night is counted toward the tax year in which the night begins.²⁹ Thus, for calendar-year taxpayers, the night of December 31–January 1 counts in the year ending December 31.

Child Absences

Even if a child is absent (the child did not sleep in the home of either parent), the child will be treated as having resided with a parent for the night if that child would have been considered as having resided for the night with the parent but for the absence.³⁰ Example (11) in Regs. Sec. 1.152-4(g) clarifies this rule:

Example 3: *O* and *P*, who never married, are the parents of child *C*. In 2009, *C* spends alternate weeks residing with *O* and *P*. During a week that *C* is residing with *O*, *O* gives *C* permission to spend a night at the home of a friend. Under Regs. Sec. 1.152-4(d)(3)(i), the night *C* spends at the friend’s home is treated as a night that *C* resides with *O*.

If it cannot be determined which parent the child would have resided with or if the child would not have resided with either parent, the child is considered to have resided with neither parent for the night.³¹ The proposed regulation included

an example (omitted from the final regulation) of a child residing with a third party under a court order.³² Example (13) in Regs. Sec. 1.152-4(g) describes a situation in which the child is away at camp for six weeks. “Child does not spend alternate weeks residing with *O* and *P*, and it cannot be determined whether Child would have resided with *O* or *P* for the period that Child is at camp. [Under Regs. Sec. 1.152-4(d)(3)(ii)], Child is treated as residing with neither parent for 6 weeks.”³³ However, if an agreement were in place that stated, for example, that *O* and *P* would each have custody of the child in alternate weeks, then the child would have been presumed to reside with *O* for three weeks and with *P* for three weeks.³⁴

Special Rules for Determining Custody Equal Number of Nights

If the child resided with each parent for the exact same number of nights during a calendar year (and the parents met all the other criteria discussed above), the custodial parent would be the parent with the greater adjusted gross income for the calendar year.³⁵

From a planning standpoint, if it appears that a child might spend approximately the same number of nights with a parent-taxpayer as she does with the other parent, the taxpayer might attempt to structure the custody arrangement so that the child will spend a few more nights with the taxpayer during the year than with the other parent. If the parent-taxpayer can achieve this, the taxpayer should maintain detailed contemporaneous records of the nights spent with the child so as to be able to demonstrate the actual number of nights spent with the child. Unfortunately, the ability to structure a favorable custody arrangement may not exist in many cases.

22 Regs. Sec. 1.152-4(b)(3)(i).

23 *Id.*

24 Regs. Sec. 1.152-4(d)(1).

25 *Harris*, T.C. Memo. 2007-239. Furthermore, in *Harris* the taxpayer was not given a written release conforming to the substance of Form 8332, discussed below. On this point, see also *Powers*, T.C. Memo. 2005-152.

26 Regs. Sec. 1.152-4(d)(1)(i).

27 *Id.*

28 Regs. Sec. 1.152-4(d)(1)(ii).

29 Regs. Sec. 1.152-4(d)(2).

30 Regs. Sec. 1.152-4(d)(3)(i).

31 Regs. Sec. 1.152-4(d)(3)(ii).

32 See Prop. Regs. Sec. 1.152-4(c)(2).

33 Presumably there is no custody agreement or order that specifies precise custody requirements for the parents.

34 See Regs. Sec. 1.152-4(g), Example (12).

35 Regs. Sec. 1.152-4(d)(4).

As to claiming a dependency exemption, the custodial parent has the power; the noncustodial parent has no claim to the dependency exemption unless the custodial parent releases that claim in a proper fashion. The noncustodial parent's claim to the dependency exemption for the child is entirely dependent on the custodial parent's willingness to release it.

Custodial Parent Works at Night

Regs. Sec. 1.152-4(d)(5) provides an exception for a parent who works at night, a provision that was not included in the proposed regulation. If a child does not reside with a particular parent for as many nights as the other parent because of a nighttime work schedule, that parent will still be considered the custodial parent if the child resides with that parent for more days.³⁶ When applying this exception, on school days the child is considered to reside at the residence that is the primary residence registered with the child's school.³⁷ This portion of the final regulation has the potential to create confusion between the parents. Example (14) in Regs. Sec. 1.152-4(g) provides a good illustration of these rules (and is summarized here).

Example 4: *Q* and *R* are the divorced parents of child *C*. *Q* works from 11 PM to 7 AM Sunday through Thursday nights. Because of *Q*'s nighttime work schedule, *C* resides with *R* Sunday through Thursday nights and with *Q* Friday and Saturday nights. Therefore, in 2009, *C* resides with *R* for 261 nights and with *Q* for 104 nights. *C* spends all daytime hours when not in school with *Q*, and *Q*'s address is registered with *C*'s school as *C*'s primary residence. *Q* executes a Form 8332 for 2009 releasing *Q*'s right to claim *C* as a dependent for that year, which *R* attaches to *R*'s 2009 return.

Q is the custodial parent of *C* in 2009. *C* resides with *R* for a greater number of nights than with *Q* due to *Q*'s nighttime work schedule, and *C* spends a greater number of days with *Q*. Therefore, Regs. Sec. 1.152-4(d)(5) applies rather than Regs. Sec. 1.152-4(d)(1). Because the requirements of Regs. Sec. 1.152-4(b)(2) and (3) are met, *R* may claim *C* as a dependent.

Written Declaration

For Regs. Sec. 1.152-4 to apply, the custodial parent must give the noncustodial parent a written declaration of unconditional release of his or her claim to the deduction.³⁸ "A declaration is not unconditional if the custodial parent's release of the right to claim the child as a dependent requires the satisfaction of any condition, including the noncustodial parent's meeting of an obligation such as the payment of support."³⁹ The written declaration must name the noncustodial parent who is to claim the exemption and must specify the year or years for which it is to be effective.⁴⁰

Form 8332

The written release may be made on Form 8332.⁴¹ It is not required that the written declaration be made on Form 8332; however, the substance of the release must conform to the substance of Form 8332.⁴² The document must also be "executed for the sole purpose of serving as a declaration under this [regulation]."⁴³ As an example, a court order or decree or a separation agreement may not serve as a written declaration.⁴⁴ This is a departure from the proposed regulations, in which a signed separation agreement containing an explicit release of the dependency exemption in favor of the noncustodial parent by the custodial parent was deemed a valid declaration.⁴⁵

Practice tip: It is advisable to use Form 8332. When noncustodial parents fail to secure a dependency exemption for their children under Sec. 152(e), it is often because there is no written declaration conforming to the requirements of Form 8332.⁴⁶ Form 8332 is extremely simple and requires only the noncustodial taxpayer's name and social security number, the name and social security number of the child, tax year(s) for the released exemption, and the signature of the custodial parent. Form 8332 ensures that the written release is properly declared. For each tax year, the noncustodial parent must attach a copy of the written declaration to his or her return in order to claim the deduction.⁴⁷

Example (17) in Regs. Sec. 1.152-4(g) describes a situation in which a written statement is ineffective because the release does not conform to the substance of Form 8332 (and is paraphrased here).

Example 5: *U* and *V* are the divorced parents of child *C*. *C* resides with *U* for more nights than with *V* from 2009 through 2011. In 2009, *U* gives *V* a written statement declaring that *U* will not claim *C* as a dependent, but the statement does not specify the year or years it is effective. *V* attaches the statement to *V*'s returns for 2009 through 2011. Because the written statement does not specify a year or years, it does not conform to the substance of Form 8332. Thus, the statement has no effect. Sec. 152(e) and Regs. Sec. 1.152-4 do not apply, and whether *C* is the qualifying child or qualifying relative of *U* or *V* is determined under Sec. 152(c) or (d).

Revocation of the Written Declaration

In most cases, the custodial parent may revoke his or her written declaration

36 Regs. Sec. 1.152-4(d)(5).

37 Id.

38 Regs. Sec. 1.152-4(e)(1)(i).

39 Id.

40 Id.

41 Regs. Sec. 1.152-4(e)(1)(ii).

42 Id.

43 Id.

44 Id.

45 For an example of this situation, see *Boltinghouse*, T.C. Memo. 2003-134.

46 See *Chamberlain*, T.C. Memo. 2007-178; *Duby*, T.C. Memo. 2003-33; *Brissett*, T.C. Memo. 2003-310; and *Miller*, 114 T.C. 184 (2000).

47 Regs. Sec. 1.152-4(e)(2).

granting the exemption to the noncustodial parent.⁴⁸ Great care is required in this area because it would be easy to overlook one of the several requirements.

The revoking parent must make a reasonable effort to provide actual notice to the other parent.⁴⁹ “The revocation may be effective no earlier than the taxable year that begins in the first calendar year after the calendar year in which the parent revoking the written declaration provides, or makes reasonable efforts to provide, written notice.”⁵⁰

The revocation may be made on Form 8332 (or a successor form) even if the original declaration (written release) was not made on Form 8332 (or successor form).⁵¹ As with the original written release, if Form 8332 is not used, the substance of the revocation must be the same as if Form 8332 had been used; it also must be a document created for the sole purpose of revoking the original declaration.⁵² The written revocation must specify the year or years in which the revocation is effective.⁵³

Ineffective Declaration or Revocation

If a written declaration fails to meet any of the requirements of Regs. Sec. 1.152-4(e), it has no effect.⁵⁴ The parent revoking the declaration must attach a copy of the written revocation to his or her return for each year that the revocation is effective.⁵⁵ If the revoking parent fails to meet the requirements to properly revoke the original written declaration, then the revocation has no effect.⁵⁶

Written Declarations Made Prior to the Final Regulation

Written declarations executed in a tax year beginning on or before July 2, 2008 (e.g., calendar 2008), that satisfy the requirements in effect at the time the written declaration was executed will be treated as meeting the requirements of

Regs. Sec. 1.152-4(e)(1).⁵⁷ Example (19) in Regs. Sec. 1.152-4(g) illustrates this rule as follows:

Example 6: Y and Z are the divorced parents of child C. In 2003, Y and Z enter into a separation agreement, which is incorporated into a divorce decree, under which Y, the custodial parent, releases Y’s right to claim C as a dependent for all future years. The separation agreement satisfies the requirements for the form of a written declaration in effect at the time it is executed. Z attaches a copy of the separation agreement to Z’s returns for 2003–2009.

Because the separation agreement was executed before July 2, 2008, and met the requirements for a written declaration at the time it was executed, it may serve as the written declaration required by Regs. Sec. 1.152-4(b)(3)(i) for 2009, and Z may claim C as a dependent in 2009 and later years.

Dependency Status and Other Tax Benefits

In August 2008, the Service issued Rev. Proc. 2008-48,⁵⁸ taxpayer-friendly guidance in which the IRS announced it would treat a child of parents who are divorced, separated, or living apart as the dependent of both parents for purposes of various tax benefits when the custodial parent has not released the claim to the dependency exemption for the child in accordance with Sec. 152(e)(2).⁵⁹ Rev. Proc. 2008-48 will unquestionably be welcomed by noncustodial parents who are unable to claim a dependency exemption for their children because the custodial parent has not released his or her claim to the exemption under Sec. 152(e)(2).

In order for Rev. Proc. 2008-48 to apply, §3 of the revenue procedure requires that the parents:



- Are divorced, legally separated under a decree of divorce or separate maintenance or under a written separation agreement, or living apart at all times for the last six months of the calendar year; and
- Are the parents of a child who:
 - Receives over half of his or her support during the calendar year from the parents;
 - Is in the custody of one or both parents for more than half the calendar year; and
 - Qualifies under Sec. 152(c) or Sec. 152(d) as a qualifying child or qualifying relative of one of the child’s parents.

Assuming these conditions are met, both parents may treat the child as a dependent for purposes of:

- Sec. 105(b), involving an exclusion from an employee’s gross income for certain employer-provided medical expense reimbursements;
- Sec. 106(a), involving an exclusion from an employee’s gross income for certain employer-provided coverage under an accident and health plan;
- Sec. 132(h)(2)(B), involving an exclusion from an employee’s gross income for certain employer-provided fringe benefits;
- Sec. 213(d)(5), involving a deduction for medical expenses;
- Sec. 220(d)(2), involving an exclusion from gross income for certain distributions from an Archer medical savings account (MSA); and

48 Regs. Sec. 1.152-4(e)(3)(i).

49 Id.

50 Id.

51 Regs. Sec. 1.152-4(e)(3)(ii).

52 Id.

53 Id.

54 Regs. Sec. 1.152-4(e)(4).

55 Regs. Sec. 1.152-4(e)(3)(iii).

56 Regs. Sec. 1.152-4(e)(4).

57 Regs. Sec. 1.152-4(e)(5).

58 Rev. Proc. 2008-48, 2008-36 I.R.B. 586.

59 Rev. Proc. 2008-48, §1.

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- Sec. 223(d)(2), involving an exclusion from gross income for certain distributions from a health savings account (HSA).

It is important to note that Rev. Proc. 2008-48 does not extend to a number of other tax benefits related to a taxpayer's child and that these items are available only to the parent who is entitled to claim the dependency exemption for the child. These other tax benefits include the Sec. 25A Hope scholarship and lifetime learning credits, the Sec. 24 child tax credit, and the Sec. 135 savings bond interest exclusion for qualifying higher education expenses.

Conclusion

The question of which parent is entitled to a dependency exemption for a child is often not an easy one when the parents are divorced or separated. In the process of promoting greater simplicity in the tax law

by creating a more uniform definition of a child, Congress created brighter lines in the area of dependency exemptions in 2004 and 2005. One amendment to the tax law involved Sec. 152(e), the special rule under which the dependency exemption for a child of divorced or separated parents can be released by the custodial parent in favor of the noncustodial parent. The amendments to Sec. 152(e) are effective for tax years beginning after December 31, 2004.

Regs. Sec. 1.152-4 was issued in July 2008 to interpret Sec. 152(e), as amended in 2004 by the WFTRA and in 2005 by the GO Zone Act. This new final regulation is well written and contains 20 examples, most of which are very instructive. Since it is generally preferable to be regarded as a custodial parent or to be the beneficiary of a properly executed Form 8332, those who advise the divorced or separated parents of a child

must have a good working knowledge of Sec. 152(e) and Regs. Sec. 1.152-4.

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EditorNotes

Dennis Gaffney is a professor of accounting at Cleveland State University. John Geekie is an adjunct professor of accounting at Cleveland State University. Maureen Smith-Gaffney is an associate professor of accountancy at the University of Wisconsin-La Crosse. For more information about this article, please contact Prof. Gaffney at dgaff0478@aol.com.