

Representing the Noncustodial Parent in a Dependency Claim

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The simple claim of a dependent can quickly become complicated for a noncustodial parent. The practitioner can lay the proper groundwork to help reduce the complexity, and familiarity with the law and regulations can then expose strengths and weaknesses in a client's case. What might at first seem like a deck stacked against the noncustodial parent may quickly become a winnable situation.

When parents disagree, children sometimes get caught in the middle. This is perhaps truest in cases involving dependent claims. One parent's claim of a dependent for tax purposes when both parents are alive but no longer together can be the subject of much dispute. The right to claim the dependent often involves a great deal of negotiation before an agreement is reached. Trouble emerges when one parent breaks the agreement.

While the claim of a dependency exemption on a tax return seems to be one of the most basic acts in return filing, representing the noncustodial parent in a controversy over a claim for a dependent can be a daunting task. I liken it to rolling a boulder up a hill strewn with prejudices, perplexities, and pitfalls. The noncustodial parent is usually the father because courts favor granting custody of a child to the mother, even when the father is the better candidate for custody. The "deadbeat Dad" stereotype places practitioners in the awkward starting posture of explaining that their noncustodial client is not a deadbeat. The code shows a bias toward the custodial parent in permitting the dependency deduction. Treasury follows that predisposition in regulations and on Form 8332, "Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent," permitting the custodial parent to take the deduction for the dependent at any time and by unilateral action. Congress has amended the tax law regarding the dependency claim at least three times in just the past five years, generating vast amounts of confusing interpretative work, such as case law, regulations, and letter rulings.¹ As if all this

were not enough, the noncustodial parent is considered wrong until he proves himself right, as with the taxpayer in all tax cases. All in all, it is enough to make practitioners want to avoid these claims entirely — assuming they get noncustodial parents brave enough to bring these cases to them. Then again, the IRS may leave the noncustodial parent little choice but to fight.

Despite all this gloom, there is one bit of good news for practitioners intrepid enough to brave the task and for clients who are unwilling to accept less than what they deserve: The IRS gives honest and fair consideration to taxpayers willing to proffer the proper evidence. This article discusses the law, its relevant interpretive work, and the defense of the noncustodial parent (the taxpayer) in cases that would arise after 1985 or in cases subject to a post-1985 written agreement between the parents.

The Battle Begins

These controversies most often arise when both the noncustodial parent and the custodial parent claim the dependent in the same tax year. As a rule, the IRS does not say that the reason for the controversy is that someone else claimed the child. Instead, it usually begins by sending a letter denying the taxpayer's claim to *all* dependents, not just the dependent in dispute. This forces the taxpayer to either defend his situation regarding all dependents or face a potentially huge tax liability.

At this point, it is advisable for the practitioner to request the taxpayer's file under the Freedom of Information Act.² This often overlooked step is crucial to establishing the foundation for a civil damages claim if the case is not resolved amicably.³ A review of the file will allow the practitioner to determine whether the IRS has a valid reason for denying the claims for any of the dependents.

Once the taxpayer provides the necessary evidence to establish his claims to the dependents, the IRS will likely permit any claims for undisputed dependents but may still deny the claim for the disputed dependent. Many taxpayers are so fearful of the IRS and potential tax problems that they are relieved at this point to not have to pay the big tax liability. Now faced with the choice of spending as much money defending the claim to the disputed dependent as they would spend paying the tax and penalty, many taxpayers abandon the fight at this point. A taxpayer will likely look at the situation as one in which they either pay the tax man or pay their tax lawyer. However, it is rarely a good idea for a taxpayer to settle for less than what the law permits.

¹The section was relatively unchanged from 1984, then substantially rewritten with the 2004 Working Families Tax Relief Act, and again modified by the 2005 Tax Technical Corrections Act (Title IV of the Gulf Opportunity Zone Act of 2005). Further revisions were made by the 2008 Fostering Connections to Success and Increasing Adoptions Act.

²5 U.S.C. section 552.

³Section 7433.

(Footnote continued in next column.)

At first blush, the taxpayer may seem to be faced with two equally bad choices. If he concedes, he pays the liability but at least avoids the stress and uncertainty involved in a battle. If the taxpayer fights, however, he may win but will have to pay for professional representation and may not know the outcome for many years, particularly if the case goes to the IRS Appeals Office and possibly to the Tax Court. But if the taxpayer considers the potential recurrence of losing his rightful claim for the dependency deduction at the whim of the custodial parent, it is in the taxpayer's best interest to "fight for what's right."⁴ In so doing, the noncustodial parent cannot just secure his right to the deduction for one year, but establish precedent for future years as well.

The Law

Section 151 permits a deduction from taxable income for a taxpayer, spouse, and their dependents. Section 152(a) defines a dependent as a qualifying child. Section 152(c)(1) through (3) defines qualifying child and the age and relationship requirements. Section 152(c)(4) sets forth a special rule for when two or more individuals can claim the same qualifying child:

(A) In general. Except as provided in subparagraphs (B) and (C), if (but for this paragraph) an individual may be claimed as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is —

- (i) a parent of the individual, or
- (ii) if clause (i) does not apply, the taxpayer with the highest adjusted gross income for such taxable year.

Paragraph (A) gives the deduction first to a parent, and if none, then to the taxpayer with the greatest AGI. This subsection provides leeway when parents can agree about the dependent deduction, giving taxpayers the opportunity to organize their tax matters. Under this statute, either parent *may* claim the dependent.

Section 152(c)(4)(B) applies when more than one parent claims the dependent:

If the parents claiming any qualifying child do not file a joint return together, such child shall be treated as the qualifying child of —

- (i) the parent with whom the child resided for the longest period of time during the taxable year, or
- (ii) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.

⁴This article is limited in its scope to a disputed claim for a dependent made by a noncustodial parent under a divorce decree. This article is not meant to address noncustodial parents who were never married or who do not have a divorce agreement or other custody decree ratified by a court of competent jurisdiction.

Under this subsection, when the parents cannot agree, the dependent claim goes to the parent with whom the child resides for the longest period. Further, if the child lives with both parents for equal amounts of time, the dependent claim goes to the parent with the highest AGI.

Section 152(e) sets forth another rule under which more than one parent may claim the dependent deduction:

Special rule for divorced parents, etc.

(1) In general. Notwithstanding subsection (c)(1)(B), (c)(4), or (d)(1)(c), if —

(A) a child receives over one-half of the child's support during the calendar year from the child's parents —

- (i) who are divorced or legally separated under a decree of divorce or separate maintenance,
- (ii) who are separated under a written separation agreement, or
- (iii) who live apart at all times during the last 6 months of the calendar year, and —

(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.

(2) Exception where custodial parent releases claim to exemption for the year. For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if —

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

(3) Exception for certain pre-1985 instruments.⁵

Subsection 152(e)(2)(A) requires that the custodial parent sign a written document and declare that she will not claim the child herself. The statute does not require that the written statement give anyone the right to the exemption. Because the relationship between the custodial parent and the noncustodial parent is often contentious, it is a wise precaution for the practitioner who

⁵Section 152(e)(3) sets forth the treatment of pre-1985 instruments, which is beyond the scope of this article.

drafts such an agreement to have the custodial parent's signature notarized, thereby preventing that parent from later disavowing participation or knowledge of the agreement or this provision.

Section 152(c)(4) and section 152(e) both apply when a joint return is not being filed and more than one parent claims or can claim the child. Subsection (e) specifically overrides subsection (c)(4) and is therefore controlling. So when does section 152(e) apply?

Despite the title of subsection (e), the parents need never have been married or divorced for the noncustodial parent to qualify for the deduction. Analysis of section 152(e) reveals that it applies whenever five conditions are met.⁶ First, the parents together pay over half of the child's overall support.⁷ Second, the child lives with either of the parents for a combined period of 183 days in any calendar year. Third, there is a written agreement by the custodial parent that she will not claim the child. Fourth, there is only one support agreement in effect and it is between only the parents of the child. Lastly, the parents cannot have lived together for the last six months of the year if they were never married.

Section 152(e)(4) defines a custodial parent as the parent having custody for the greater portion of the calendar year, and a noncustodial parent as the other parent. This seemingly small point is significant. For tax purposes, it does not matter who is granted custody under a divorce decree, separation agreement, or other written agreement. The determination of the custodial parent is made by a showing of which parent the child lived with more. It is possible to have a court award custody to one parent but for tax purposes have the other parent be considered the custodial parent.

The Regulations

Section 152(e) legislatively grants the Treasury secretary the power to prescribe regulations to determine the "manner and form" of the written declaration in which the custodial parent forsakes the claim for the child. Under this legislative grant, the secretary issued reg. section 1.152-4.⁸ Elaborating on the requirement of the written declaration, reg. section 1.152-4(e) states:

(1) Form of declaration

(i) In general. The written declaration under paragraph (b)(3)(i) of this section *must be an unconditional release* of the custodial parent's claim to the child as a dependent for the year or years for which the declaration is effective. 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. A written declaration *must name the noncustodial parent* to whom the exemption is released. A written declaration *must specify the year or years* for which it is effective. A written declaration that specifies all future years is treated as specifying the first taxable year after the taxable year of execution and all subsequent taxable years.

(ii) Form designated by IRS. A written declaration *may be made* on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form designated by the IRS. A written declaration not on the form designated by the IRS *must conform to the substance of that form* and *must be a document executed for the sole purpose of serving as a written declaration under this section. A court order or decree or a separation agreement may not serve as a written declaration.* [Emphasis added.]

Under reg. section 1.152-4(e)(1)(i), the declaration must be unconditional, and it must specify the noncustodial parent and the year or years for which the dependent claim is released.⁹ Reg. section 1.152-4(e)(1)(i) therefore adds requirements that are not otherwise part of the statutory framework. Clearly, the need to have the declaration be unconditional is to prevent the situation in which state law would invalidate an agreement because of one party's default but would leave the agreement valid for federal tax purposes. However, the requirement that the noncustodial parent be named is not just outside the scope of the statute, but is also outside the scope of Form 8332, which does not require that the noncustodial parent be named.

Reg. section 1.152-4(e)(1)(ii) contains some language that I believe is vexatious. It should be noted that neither the statute nor the regulations *require* the use of Form 8332. The regulations do impose three troubling requirements for the written declaration, requirements contained nowhere in the statute.

The first requirement is that the substance of the written declaration must conform to the substance of Form 8332, which is in three parts. Part I is simply a signed agreement by the custodial parent to not claim the child as a dependent for the current tax year. Part II is a signed agreement by the custodial parent to not claim the

⁶The practitioner should also be aware of exceptions made for deductions for medical care of a dependent. Section 152(f)(7). That topic is beyond the scope of this article.

⁷Support paid for the dependent by the spouse of a remarried parent is included in that parent's payment of support. Section 152(e)(6).

⁸The statute creates a legislative grant of authority for Treasury to further define the qualifications of a "written declaration." Reg. section 1.152-4(e) is an enactment of that legislative authority. However, the remainder of reg. section 1.152-4 is simply interpretive and is not legislatively granted authority. Practitioners should be mindful of this difference.

The final regulation was issued under T.D. 9408 (July 2, 2008), *Doc 2008-14511, 2008 TNT 128-4*.

⁹This paragraph references reg. section 1.152-4(b)(3)(i), which reiterates the substance of section 152(e)(2)(A) and (B).

child as a dependent for a specific future tax year or years. Part III is a revocation by the custodial parent of a release of a claim to the child for specific tax years. The regulation is so broadly stated that no one really knows what is “the substance of Form 8332.” Therefore, drafting a written declaration to properly conform to this regulation and bind the custodial parent is troublesome at best. The claim of a dependent can be a significant point when drafting a divorce or separation agreement, especially with the prevalence of shared custody arrangements. Form 8332 is an unacceptable substitute for a legal agreement because it does not bind a custodial parent to future years, and that parent can unilaterally change that provision in the future with the stroke of a pen on another Form 8332.

The second vexing provision of reg. section 1.152-4(e)(1)(ii) is that the document executed must be for the sole purpose of serving as a written declaration under that section. This leaves open whether a divorce agreement no longer satisfies the regulation. Because a divorce agreement is not solely for the purpose of making or releasing a claim for a dependent, will it no longer suffice for tax purposes, even if signed by the custodial parent? Must a separate statement made for the sole purpose of forsaking the claim for the child be made and then incorporated by reference in a divorce agreement? Is the IRS, through this regulation, redrafting state law? Or is it just causing every future divorce agreement to be drafted in accordance with the nebulous language of “the substance of Form 8332”? Can anyone going through a divorce rely on this?

Finally, the regulation says that “a court order or decree or a separation agreement may not serve as a written declaration.” It is understandable, although not necessarily justifiable, that a court order or decree not be permissible to act as the written declaration, because it puts the IRS, a federal-level entity, in the position of having to interpret a ruling issued at the state level. However, the regulation troublingly adds “a separation agreement,” creating a question of interpretation: For purposes of the dependency exemption, does the regulation invalidate the use of a written separation agreement altogether, even one in which the custodial parent forgoes the dependency exemption and signs the agreement? If so, the regulation would clearly be contrary to the statute and make the regulation ripe for attack.

Some Interpretive Authority

For divorce agreements before the enactment of this regulation, the IRS said in *ILM 200925041* (May 11, 2009), *Doc 2009-13991*, *2009 TNT 117-22*, that it will allow “a noncustodial parent to continue to attach pages of a divorce decree executed on or before July 2, 2008, if the pages constitute a statement substantially similar to Form 8332 under the requirements in effect at the time the decree was executed.” This creates a safe haven for those who already have agreements in place and an established mechanism for filing their tax returns, on which they claim their dependents.

One of the leading cases on this topic is *King v. Commissioner*, 121 T.C. 245 (2003), *Doc 2003-21340*, *2003 TNT 188-67*. This case involved taxpayers Mr. Lopez and Mrs. King, who were never married. They did not live

together in 1998 and 1999, the years in controversy. Their child lived at all times with King and her husband, who together provided more than 50 percent of the child’s support. For the tax years in question, King had executed a Form 8332 releasing the claim for the dependency exemption to Lopez, who attached that form to his tax return. The Tax Court decided in favor of Lopez, the noncustodial parent. It found that “it was Mrs. King’s duty to make the appropriate inquiries before she signed the Form 8332 permanently releasing her claim to exemption deductions for Monique, and we will not ignore the properly executed form because she now contends that she did not intend to release her claim for the years in issue. . . . Accordingly, the Lopezes are entitled to the deductions for the years in issue.”

Consolidated cases also significant in this area are *Miller v. Commissioner* and *Lovejoy v. Commissioner*, 114 T.C. 184 (2000), *Doc 2000-9199*, *2000 TNT 59-97*. Ms. Miller and Mr. Lovejoy were divorced in 1993 under a decree. By court order, Miller was awarded custody of the children but Lovejoy was granted the right to claim the children for tax purposes. Miller never signed the divorce agreement. Lovejoy failed to pay his child support obligations but still claimed the children as dependents for tax purposes. Under Colorado law, the divorce agreement was voided by Lovejoy’s failure to pay his child support obligations. But the Tax Court did not rely on this to deny the claim to Lovejoy. The court went on to find that absent a written release signed by Miller, the custodial parent, stating that she would not claim the child, the state court’s order was insufficient to satisfy section 152. Lovejoy was denied the claim of exemption for the children. The Tax Court went to great lengths to disqualify the signature of legal representatives or the Colorado Court for this purpose.¹⁰

Final Thoughts

When representing a noncustodial parent in a claim for a dependency deduction, the practitioner must step carefully to bring about the proper conclusion. An early FOIA filing can yield important information about whether the custodial parent claimed the child for tax purposes, it can lay the groundwork for recovery of civil penalties, and it can possibly help stave off overbroad denials. If the custodial parent did not claim the child, the noncustodial parent is entitled to claim the child under section 154(c)(2)(A). If the custodial parent did claim the child (which is more often the cause of the controversy) but your client can prove that the child lived more with

¹⁰In reviewing this case, I note that Miller did not initially claim the dependent exemption. That fact should have made this a noncase because under section 152(c)(4)(a), Lovejoy, as a parent of the child, would be entitled to claim the child as a dependent. It appears that Miller made an inquiry whether she could amend her return and claim the child, and that led to the controversy. But the case smacks of a situation in which state law created a federal controversy, and great lengths were taken to step around the problem of relying on the state issues in resolving the federal tax controversy. Because this is clearly the trend, practitioners should be mindful to base their argument on federal tax law, as opposed to state law.

him than with the other parent, your client becomes the custodial parent for federal tax purposes. If the custodial parent did claim the child and the child lived with that parent more than with your client, the noncustodial parent may still be entitled to claim the child as his dependent if:

- the child was in the custody of either or both parents for more than half of the year;
- more than half of the child's support came from either or both parents;
- the parents were either married at some point or lived apart at all times during the last six months of the calendar year;
- the custodial parent signed a written declaration that she would not claim the child as a dependent for the particular tax year;

- the substance of the written declaration conforms to the substance of Form 8332;
- there is only one such agreement in effect and that agreement is between only the two parents; and
- the noncustodial parent attached the written declaration to the noncustodial parent's return for the tax year beginning during that calendar year.

The practitioner must determine whether the year in controversy preceded the enactment of the final regulations. The practitioner must also be prepared to mount a defense disputing the validity of the regulation's requirements in reg. section 1.152-4(e)(1)(ii) on the grounds of being vague, overbroad, or contrary to statute.