

## Noncustodial Parent Rules

### Cross References

- *Hicks, Jr.*, TC Memo. 2022-10, February 23, 2022

In general, when there is a divorce or separation of parents, it is the custodial parent that claims the dependency exemption and other related benefits such as the child tax credit. An exception applies if the custodial parent allows the noncustodial parent to claim the child by signing Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, or by signing a statement conforming to the substance of Form 8332.

The taxpayer in this case had two children, but never married their mother. During 2014, the children were minors and the taxpayer and mother lived separately. The children lived with their mother and grandmother, and the taxpayer provided over one-half the children's support.

In 2006, a county court adopted a "Shared Parenting Plan" that had been signed by the taxpayer and the children's mother, which provided that the mother would claim child 1 every year and the father (the taxpayer) would claim child 2 every year for tax purposes, unless the parties reached another agreement in writing.

The state court in 2009 entered an order and judgment which adjusted the taxpayer's and the mother's child support obligations and further stated: "Effective tax year 2009, Father shall claim the dependency exemption for both minor children each year." This order and judgment was agreed to, but not signed by the mother or the taxpayer.

A state court order entered on August 26, 2010, and in effect for the 2014 tax year (the year at issue in this case) modified the periods in which each parent would have physical custody of the children. Under this arrangement, the taxpayer had physical custody of the children for less than one-half of 2014 and the mother had physical custody for more than one-half of that year. The 2010 order did not modify the 2009 order which provided that the taxpayer "shall claim" the dependency exemption for both children each year.

The taxpayer filed his 2014 federal income tax return, claiming the dependency exemption deductions and child tax credits for both children. The taxpayer did not attach any of the following to his 2014 return.

- Form 8332, *Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*,
- A written declaration or any other waiver signed by the mother, or
- A pre-2008 court decree or separation agreement.

The mother did not file a federal income tax return for 2014. However, the grandmother (whom the mother and children also lived with) claimed a dependency exemption deduction for the mother (her daughter) and for each child (her grandchildren).

The IRS denied the dependency exemption and the child tax credits claimed by the taxpayer (the father). The taxpayer subsequently provided the IRS with the Shared Parenting Plan that the mother had signed and the state court adopted in 2006.

The tax court noted that both children meet all the requirements under IRC section 152(c)(1) to be the qualifying children of both the mother and the grandmother for 2014.

- A) They are the children of the mother and grandchildren of the grandmother,
- B) They had the same principal place of abode as the mother and grandmother for more than one-half of 2014,
- C) They were minors during 2014,
- D) Each child did not provide more than one-half of his own support for 2014, and
- E) They did not file joint returns for 2014.

Since the grandmother could claim the mother as a dependent for 2014, then the children are the qualifying children of the grandmother. Since they are the qualifying children of the grandmother, they cannot be the qualifying relatives of the father (the taxpayer in this case).

The court next considered the special rules for separated parents. Under IRC section 152(e), a child may be treated as the qualifying child of a parent with whom he or she did not share a principal place of abode for a sufficient portion of the year, regardless of the usual requirement of IRC section 152(c) or the tie-breaker rules. IRC section 152(e) applies to a child who is in the custody of one or both parents for more than one-half of the year, receives over one-half of his or her support during the year from his or her parents, and whose parents are divorced, separated, or living apart throughout the last six months of the year. When IRC section 152(e) applies, a child is generally treated as the qualifying child of the "custodial parent." The custodial parent is "the parent having custody of the child for the greater portion of the calendar year," while the "noncustodial parent" is "the parent who is not the custodial parent." Thus, for purposes of IRC section 152(e), the mother was the children's custodial parent and the taxpayer was the noncustodial parent for 2014, even though the children were otherwise the qualifying children of the grandmother.

IRC section 152(e) treats a child as the qualifying child of the noncustodial parent (thus shifting the right to claim the dependency exemption and child tax credit to the noncustodial parent), if two conditions are met.

- 1) The custodial parent "signs a written declaration" stating that he or she "will not claim such child as a dependent" for the year at issue, and
- 2) The noncustodial parent "attaches" the written declaration to his or her return for that year.

The written declaration requirement may be satisfied either by a completed Form 8332 or by a statement conforming to the substance of Form 8332. The court noted that a taxpayer can meet the attachment requirement by providing the IRS with a Form 8332 or a statement conforming to the substance of Form 8332 on an amended return or directly to the IRS during an audit.

Because the taxpayer did not provide a completed Form 8332 to the IRS, he could have satisfied the written declaration requirement only by means of some other document conforming to the substance of Form 8332. The only two documents that purport to shift the right to claim the children as dependents from the mother to the father (the taxpayer) are two state court orders, the Shared Parenting Plan entered in 2006, which stated that each parent was entitled to claim one of the two children for tax purposes, and the order entered in 2009, which stated that the taxpayer shall claim the dependency exemption for both children beginning with the 2009 tax year.

The court noted that a court order or decree or a separation agreement entered after July 2, 2008, does not satisfy the written declaration requirement for any tax year beginning after that date [Reg. §1.152-4(e)(1)(ii)]. Consequently the state court order entered in 2009 cannot satisfy the written declaration requirement for the taxpayer's 2014 tax year.

However, the Shared Parenting Plan from 2006 can satisfy that requirement, as long as it meets the requirements governing written declaration for purposes of IRC section 152(e) that were in effect when the state court entered it in 2006.

In 2006, IRC section 152(e)(2)(A) provided that a custodial parent could release his or her claim to a dependency exemption deduction for a child by "signing 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." To meet this written declaration for purposes of IRC section 152(e):

- 1) It must be signed by the custodial parent,
- 2) It must not place any conditions on the custodial parent's declaration that he or she will not claim a child as a dependent, and
- 3) It must otherwise meet the manner and form requirements the Secretary has prescribed by regulation.

The tax court stated the Shared Parenting Plan meets all of these requirements. In addition to bearing the mother's signature, it grants the taxpayer unconditional right to claim one child every year for tax purposes unless the parties reach another agreement in writing. Although the state court modified the Shared Parenting Plan in its 2009 order, which neither parent signed, those modifications did not diminish the right that the mother granted to the taxpayer in the Shared Parenting Plan. Rather, the 2009 order expanded that right by allowing the taxpayer to claim both children instead of one.

The tax court stated that the agreement reflected in the Shared Parenting Plan therefore remains in effect for tax purposes, regardless of the later state court order purporting to expand on that agreement.

The Shared Parenting Plan also comports with the other manner and form requirements prescribed by the regulations that were in effect in 2006. At that time, a noncustodial parent could satisfy the written declaration requirement with either a completed Form 8332 or a statement conforming to the substance of Form 8332. The Shared Parenting Plan included:

- 1) The name of the child that the taxpayer would be allowed to claim,
- 2) The years for which the taxpayer could claim that child (every year),

- 3) The mother's signature (the custodial parent),
- 4) The state court's date stamp, and
- 5) The taxpayer's name.

The only information missing from the Shared Parenting Plan that is required on Form 8332 is the parent's Social Security Numbers. The court stated the absence of either parent's Social Security Number, standing alone, does not determine whether a document conforms to the substance of Form 8332 (*Boltinghouse*, T.C. Memo. 2003-134).

Since any claim for a dependency exemption deduction must include the claimed dependent's taxpayer identification number, the IRS's ability to identify duplicate exemption claims would not be hampered by a written declaration that lacks the parents' Social Security Numbers. Accordingly, the tax court concluded that the Shared Parenting Plan contains sufficient information to conform to the substance of Form 8332. The taxpayer was entitled to claim the dependency deduction and child tax credit for one child.