



DEPENDENCY EXEMPTIONS FOR DIVORCED OR SEPARATED PARENTS

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At this time of year, questions often arise as to which of two parents—recently divorced or presently separated—is entitled to the dependency exemption for a child of the marriage.

General Rule under IRC Section 152(e)

IRC Section 152(e) provides a special rule for the right to claim an exemption of a child of divorced or separated parents who, for the year in question:

- Are divorced or separated under a decree of divorce or separate maintenance at year end; or,
- Are separated under a written separation agreement at

year end; or,

- Have lived apart at all times during the last six months of the year.
- And, on a combined basis, had custody of the child for more than half the year; and,
- On a combined basis, provided more than half the child's support for the year (support received from a new spouse of a remarried parent is considered provided by that parent).

If these conditions are satisfied, the custodial parent (defined as the parent having physical custody for more than half the year) is automatically entitled to the exemption for a child

regardless of:

- of what the decree or agreement provides
- which parent furnished more than half of the child's support.

Waiver Exception to General Rule

For any specified year, or years, or for all future years, the custodial parent may release his or her right to claim the exemption for a child to the noncustodial parent.

- This is done by the custodial parent executing IRS Form 8332 (copy following this article).
- The noncustodial parent must attach this form to his or her income tax return.

The custodial parent may wish to use the exemption waiver as a lever to provide incentive to the noncustodial parent to make required child support payments in full and on time. Although Form 8332 does not directly accommodate such contingent waivers of the exemption, the same effect can be achieved by the custodial parent executing Form 8332 on an annual basis provided that the noncustodial parent has timely fulfilled his/her support obligation.

Nevertheless, the noncustodial parent may wish to provide a remedial provision in the governing instrument in the event the custodial parent refuses to execute Form 8332 without good cause, similar to the following:

"In the event that [custodial parent] fails to provide [noncustodial parent] IRS form 8332, as required by the terms of this agreement, [custodial parent] shall be liable for all damages, including taxes, penalties and interest as well as related expenses, including but not limited to attorney and accountant fees, which may result because of [noncustodial parent's] inability to claim dependency exemptions for subject children on his/her tax returns."

The custodial parent can revoke a previously granted multiple year waiver by completing Part III of Form 8332. The revocation is effective for the next succeeding tax year. The custodial parent must make a good faith effort to timely provide the revocation to the noncustodial parent.

"Phase Out at High Income Levels"

The 2017 personal exemption for federal tax is \$4,050. However, the tax benefit of an exemption is eliminated for certain high income taxpayers. Two percent (2%) of the personal

exemption is "phased out" – or reduced – for each \$2,500 – or part of \$2,500 – a taxpayer's adjusted gross income (AGI) exceeds the statutory threshold for subject filing status, as follows:

Filing Status	Phase-Out Begins at AGI of:	Phase-Out Completed at AGI of:
Single	\$261,500	\$384,000
Married Filing Jointly	\$313,800	\$436,300
Head of Household	\$287,650	\$410,150

These amounts are indexed by inflation annually.

It is important not to award an exemption to a taxpayer for whom the benefit would go down the drain and/or be severely reduced.

Michigan Trial Courts Have Authority to Award Dependency Exemptions

In a series of decisions in the 1980s, the Michigan Court of Appeals (Court) adopted the minority position of state courts nationwide that, following the enactment of the 1984 Tax Reform Act, held that state courts lack authority to award the dependency exemption as part of a divorce settlement. (*Stickradt v. Stickradt*, 156 Mich App 141; 401 NW2d 256 (1986); *Lorenz v. Lorenz*, 166 Mich App 58; 419 NW2d 770 (1988); and *Varga v. Varga*, 173 Mich App 411; 434 NW2d 152 (1988)).

However, in its 1994 *Fear v. Rogers* decision (207 Mich App 642; 526 NW2d 197 (1994)), the Court joined the majority of state appellate courts across the country by declaring that state divorce courts do in fact have the authority to award dependency exemptions. The Court reaffirmed its *Fear v Rogers* decision by ruling that a mediator had authority to award the exemption. *Frain v Frain*, 213 Mich App 509, 540 NW2d 741 (1995).

It should be noted that parties to a divorce are free to agree in a settlement as to which shall be entitled to claim exemptions for children. Of course, this only needs to be specified where the noncustodial spouse is to claim the exemptions via execution by the custodial parent of waiver Form 8332 (otherwise they automatically go to the custodial spouse).

About the Author

Joe Cunningham has over 25 years of experience specializing in financial and tax aspects of divorce, including business valuation, valuing and dividing retirement benefits, and developing settlement proposals. He has lectured extensively for ICLE, the Family Law Section, and the MACPA. Joe is also the author of numerous journal articles and chapters in family law treatises. His office is in Troy, though his practice is statewide.

Release/ Revocation of Release of Claim to Exemption for Child by Custodial Parent

OMB No. 1545-0074

Attachment
Sequence No. **115**

▶ Attach a separate form for each child.

Name of noncustodial parent _____

Noncustodial parent's
social security number (SSN) ▶ _____

Part I Release of Claim to Exemption for Current Year

I agree not to claim an exemption for _____
Name of child

for the tax year 20____.

Signature of custodial parent releasing claim to exemption

Custodial parent's SSN

Date

Note. If you choose not to claim an exemption for this child for future tax years, also complete Part II.

Part II Release of Claim to Exemption for Future Years (If completed, see Noncustodial Parent on page 2.)

I agree not to claim an exemption for _____
Name of child

for the tax year(s) _____
(Specify. See instructions.)

Signature of custodial parent releasing claim to exemption

Custodial parent's SSN

Date

Part III Revocation of Release of Claim to Exemption for Future Year(s)

I revoke the release of claim to an exemption for _____
Name of child

for the tax year(s) _____
(Specify. See instructions.)

Signature of custodial parent revoking the release of claim to exemption

Custodial parent's SSN

Date

General Instructions

What's New

Post-2008 decree or agreement. If the divorce decree or separation agreement went into effect after 2008, the noncustodial parent cannot attach certain pages from the decree or agreement instead of Form 8332. See *Release of claim to exemption* below.

Definition of custodial parent. New rules apply to determine who is the custodial parent and the noncustodial parent. See *Custodial Parent and Noncustodial Parent* on this page.

Purpose of Form

If you are the custodial parent, you can use this form to do the following.

- Release a claim to exemption for your child so that the noncustodial parent can claim an exemption for the child.
- Revoke a previous release of claim to exemption for your child.

Release of claim to exemption. This release of the exemption will also allow the noncustodial parent to claim the child tax credit and the additional child tax credit (if either applies). Complete this form (or sign a similar statement containing the same

information required by this form) and give it to the noncustodial parent. The noncustodial parent must attach this form or similar statement to his or her tax return each year the exemption is claimed. Use Part I to release a claim to the exemption for the current year. Use Part II if you choose to release a claim to exemption for any future year(s).

Note. If the decree or agreement went into effect after 1984 and before 2009, you can attach certain pages from the decree or agreement instead of Form 8332, provided that these pages are substantially similar to Form 8332. See *Post-1984 and pre-2009 decree or agreement* on page 2.

Revocation of release of claim to exemption. Use Part III to revoke a previous release of claim to an exemption. The revocation will be effective no earlier than the tax year following the year in which you provide the noncustodial parent with a copy of the revocation or make a reasonable effort to provide the noncustodial parent with a copy of the revocation. Therefore, if you revoked a release on Form 8332 and provided a copy of the form to the noncustodial parent in 2010, the earliest tax year the revocation can be effective is 2011. You must attach a copy of the revocation to your tax return each year the exemption is claimed as a result of the revocation. You must also keep for your records a copy of the revocation and evidence

of delivery of the notice to the noncustodial parent, or of reasonable efforts to provide actual notice.

Custodial Parent and Noncustodial Parent

The custodial parent is generally the parent with whom the child lived for the greater number of nights during the year. The noncustodial parent is the other parent. If the child was with each parent for an equal number of nights, the custodial parent is the parent with the higher adjusted gross income. For details and an exception for a parent who works at night, see Pub. 501.

Exemption for a Dependent Child

A dependent is either a qualifying child or a qualifying relative. See your tax return instruction booklet for the definition of these terms. Generally, a child of divorced or separated parents will be a qualifying child of the custodial parent. However, if the special rule on page 2 applies, then the child will be treated as the qualifying child or qualifying relative of the noncustodial parent for purposes of the dependency exemption, the child tax credit, and the additional child tax credit.

Special Rule for Children of Divorced or Separated Parents

A child is treated as a qualifying child or a qualifying relative of the noncustodial parent if all of the following apply.

1. The child received over half of his or her support for the year from one or both of the parents (see the *Exception* below). Public assistance payments, such as Temporary Assistance for Needy Families (TANF), are not support provided by the parents.

2. The child was in the custody of one or both of the parents for more than half of the year.

3. Either of the following applies.

a. The custodial parent agrees not to claim an exemption for the child by signing this form or a similar statement. If the decree or agreement went into effect after 1984 and before 2009, see *Post-1984 and pre-2009 decree or agreement* below.

b. A pre-1985 decree of divorce or separate maintenance or written separation agreement states that the noncustodial parent can claim the child as a dependent. But the noncustodial parent must provide at least \$600 for the child's support during the year. This rule does not apply if the decree or agreement was changed after 1984 to say that the noncustodial parent cannot claim the child as a dependent.

For this rule to apply, the parents must be one of the following.

- Divorced or legally separated under a decree of divorce or separate maintenance.
- Separated under a written separation agreement.
- Living apart at all times during the last 6 months of the year.

If this rule applies, and the other dependency tests in your tax return instruction booklet are also met, the noncustodial parent can claim an exemption for the child.

Exception. If the support of the child is determined under a multiple support agreement, this special rule does not apply, and this form should not be used.

Post-1984 and pre-2009 decree or agreement. If the divorce decree or separation agreement went into effect after 1984 and before 2009, the noncustodial parent can attach certain pages from the decree or agreement instead of Form 8332, provided that these pages are substantially similar to Form 8332. To be able to do this, the decree or agreement must state all three of the following.

1. The noncustodial parent can claim the child as a dependent without regard to any condition (such as payment of support).

2. The other parent will not claim the child as a dependent.

3. The years for which the claim is released.

The noncustodial parent must attach all of the following pages from the decree or agreement.

- Cover page (include the other parent's SSN on that page).
- The pages that include all of the information identified in (1) through (3) above.
- Signature page with the other parent's signature and date of agreement.



The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.

The noncustodial parent can no longer attach certain pages from a divorce decree or separation agreement instead of Form 8332 if the decree or agreement was executed after 2008.

Specific Instructions Custodial Parent

Part I. Complete Part I to release a claim to exemption for your child for the current tax year.

Part II. Complete Part II to release a claim to exemption for your child for one or more future years. Write the specific future year(s) or "all future years" in the space provided in Part II.



To help ensure future support, you may not want to release your claim to the exemption for the child for future years.

Part III. Complete Part III if you are revoking a previous release of claim to exemption for your child. Write the specific future year(s) or "all future years" in the space provided in Part III.

The revocation will be effective no earlier than the tax year following the year you provide the noncustodial parent with a copy of the revocation or make a reasonable effort to provide the noncustodial parent with a copy of the revocation. Also, you must attach a copy of the revocation to your tax return for each year you are claiming the exemption as a result of the revocation. You must also keep for your records a copy of the revocation and evidence of delivery of the notice to the noncustodial parent, or of reasonable efforts to provide actual notice.

Example. In 2007, you released a claim to exemption for your child on Form 8332 for the years 2008 through 2012. In 2010, you decided to revoke the previous release of exemption. If you completed Part III of Form 8332 and provided a copy of the form to the noncustodial parent in 2010, the revocation will be effective for 2011 and 2012. You must attach a copy of the revocation to your 2011 and 2012 tax returns and keep certain records as stated earlier.

Noncustodial Parent

Attach this form or similar statement to your tax return for each year you claim the exemption for your child. You can claim the exemption only if the other dependency tests in your tax return instruction booklet are met.



If the custodial parent released his or her claim to the exemption for the child for any future year, you must attach a copy of this form or similar statement to your tax return for each future year that you claim the exemption. Keep a copy for your records.

Note. If you are filing your return electronically, you must file Form 8332 with Form 8453, U.S. Individual Income Tax Transmittal for an IRS e-file Return. See Form 8453 and its instructions for more details.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Internal Revenue Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.