

IN THE SUPREME COURT OF FLORIDA

IN RE: AMENDMENTS TO FLORIDA SUPREME COURT

APPROVED FAMILY LAW FORMS

SC13-352

FILED
THOMAS D. HALL
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BY _____

COMMENTS TO SC13-352

The undersigned respectfully wishes to comment on two items in the above referenced proposed forms:

1. Section II. Spousal Support (Alimony)

1.1 In paragraph 3 it provides "other provisions relating to alimony, including any tax treatment and consequences."

1.2 Unfortunately, in Section 71 of the Internal Revenue Code the only provisions that can be made by the parties or the court is that the spousal support or a separate stream of payments are designated as not taxable/deductible. Designating the payments as taxable/deductible add nothing unless all of the provisions of Section 71 of the Internal Revenue Code are in compliance.¹

2. Section III. Parenting Plan

2.1 Paragraph 6 provides "IRS Income Tax Deductions."

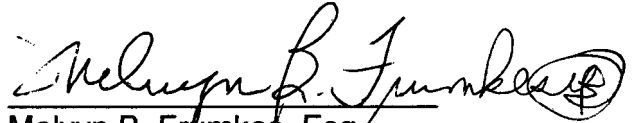
2.2 The correct wordage should be "Income Tax Exemptions" not "Deductions."²

¹ See attached Sections 3.4.3.7 and all of Section 3.5 of Frumkes on Divorce Taxation, Ninth Edition, James Publishing Co., 3505 Cadillac Avenue, Bldg. P, Costa Mesa, California 92626.

² See IRS Form 8332 attached.

DATED this 8th day of October 2013.

Respectfully submitted,

A handwritten signature in cursive script, reading "Melvyn B. Frumkes", followed by a circled "F" monogram.

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agreement were held to be taxable to the former wife, the court stating:

The general rule is that a contract unenforceable under state law can still be a valid "written separation agreement" for purposes of the Tax Code. . . . State laws governing fraud, unconscionability and duress are simply different ways to prove that an agreement is legally unenforceable. The purpose of a statute and regulation is uniformity of tax consequences notwithstanding variations in state law. The regulation and statute it interprets are aimed at uniform results, a goal that would be thwarted by making tax consequences under §71 turn on the states' various laws governing contract enforceability.

The Court, in *Dato-Nodurft v. Comm.*, T.C. Memo 2004-119, held that a payment "may be alimony under section 71 even though the agreement may not be an enforceable instrument under State law."

A stipulation between the parties accepted by the court and reduced to a transcript by a court reporter was at issue in Priv. Ltr. Rul. 88821069, issued May 27, 1988. It was found to constitute a written instrument under §71(b)(2)(A) of the Code.

In *Crompton v. Commissioner*, T.C. Summ. Op. 2008-102, the Delaware Final Judgment provided for alimony payments for ten years. Nothing was written as to wife's remarriage, which under Delaware law would cause payments to cease. Wife remarried, unbeknownst to husband, who continued to make payments. The court held that the payments after the wife's remarriage were to be deductible alimony, notwithstanding Delaware law, ruling that state law is looked to only to determine cessation of liability in the event of death.

§3.4.3.7 TAX CONSEQUENCES CANNOT BE CHANGED

An agreement between the parties cannot, other than as explained in Section 3.5 hereof, change the tax consequences of the Code. Where the Code and regulations mandate a certain tax treatment, taxpayers cannot change that tax treatment by mere expression of a contrary intent. This was articulated by the Internal Revenue Service in Priv. Ltr. Rul. 9251033

(September 21, 1992), released December 18, 1992. There, the parties had agreed that payments of alimony and child support should be unallocated notwithstanding that the payments are reduced as each child reaches the age of 18 years. The agreement provided that all of the payments should be included in the wife's gross income and be deductible by the husband. This was ruled to be impermissible.

§3.4.3.8 ESTIMATE AMOUNT OF ALLOWABLE ALIMONY

The court, in *Maher v. Commissioner*, T.C. Memo 2003-85, in approving one-half of automobile insurance attributable to the wife as a deduction, said, "When a taxpayer establishes that he has incurred a deductible expense but is unable to substantiate the exact amount, we can estimate the deductible amount, but only if the taxpayer presents sufficient evidence to establish a rational basis for making the estimate."

§3.4.4 A DECREE (ORDER OR JUDGMENT) REQUIRING SUPPORT

It is generally understood that the "C" type of divorce or separation instrument includes an order for temporary or pendente lite support, e.g., "any type of court order or decree (including an interlocutory decree of divorce or a decree of alimony pendente lite) that is not a decree of divorce or separate maintenance."⁷¹

For further discussion, see Chapter 4 hereof, "Pendente Lite (Temporary) Support."

§3.5 Designation as Not Taxable, Not Deductible (Alimony Can Be Made Non-Taxable)

§3.5.1 INTRODUCTION

If all other criteria of I.R.C. §71 are met⁷² payments will be taxable to the payee and deductible to

⁷¹ Temp. Treas. Reg. A-8 §1.71-1T.

⁷² Cash received by or on behalf of a spouse (or former spouse) under a divorce or separation instrument, not living in the same household (where the status of the marriage has changed), with no liability for payment after the death of the payee and not fixed as to child support.

the payor,⁷³ unless the payments are designated in the divorce or separation instrument as not taxable/deductible.⁷⁴ In other words, the parties or the court can cause a stream of payments to be opted out from being taxable/deductible "alimony."

As stated by the Florida Supreme Court in *Rykiel v. Rykiel*, 828 So.2d 508, (Fla. 2003):

[T]he [Internal Revenue] Code may be paraphrased as follows:

- Gross income includes alimony.
- Alimony includes monetary payments made to a spouse pursuant to a divorce instrument unless that instrument says that the payments are not includible in gross income and not allowable as a deduction.
- If the divorce instrument says that the payments are not includible in gross income and not allowable as a deduction, then the payments are not "alimony," are not included in gross income, and are not taxable.

There are three types of divorce or separation instruments. The term "divorce or separation instrument" is defined in I.R.C. §71(b)(2) as:

- (A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,
- (B) a written separation agreement, or
- (C) a decree [not described in subparagraph (A)] requiring a spouse to make payments for the support or maintenance of the other spouse.

The court in *Richardson v. Commissioner*, 125 F.2d 551, 556 (7th Cir. 1997), in footnote 3 observed:

Surprisingly, the Commissioner has not promulgated any regulations describing

what a divorce or separation instrument must say, or what a divorce court must do, to "designate" the tax treatment to be afforded inter-spousal payments.

In *Richardson*, the court stated that in common usage, the term designate means "to make known directly" (quoting from Webster's Third New International Dictionary) and "to mark out and make known; to point out, to name; indicate" (quoting from Black's Law dictionary).

The court in *Clarence v. Commissioner*, T.C. Memo 2000-214, held that "the instrument must contain a clear and explicit designation . . . although it need not refer expressly to section 71 or section 215."

An election can therefore be made to keep the payments out of "alimony" treatment under the Code and thus be non-taxable to the payee and non-deductible to the payor. A designation that payments are taxable/deductible is meaningless as the payments will be taxable/deductible only if the criteria of the Code are met, not if designated as such.⁷⁵

Language in an order, decree or agreement that the payor "shall be responsible for income taxes due" on the payments was held, in *Jaffee v. Commissioner*, T.C. Memo 1999-196, to be insufficient to constitute a designation of non-taxability/non-deductibility. Thus, the payee, Ms. Jaffee was required to include payments to her as taxable income.

In *Goldman, Estate of v. Commissioner*, 112 T.C. 317 (1999) (aff. without published opinion sub non *Shutter v. Commissioner*, 242 F.3d 390 (10th Cir. 2000)), the court held that "in ascertaining the applicability of subparagraph (B) of section 71(b)(1), we believe the divorce or separation instrument need not mimic the statutory language of the subparagraph (e.g., the instrument need not specifically refer to sections 71 and 215). Rather, in our opinion, the divorce

73 In *Rashotsky v. Rashotsky*, 782 So.3d 542 (Fla. 3d DCA 2001), the court observed that "the usual treatment of alimony is to make the alimony taxable to the recipient and deductible by the payor. If the trial court wanted to avoid burdening the former wife with the tax consequences of the alimony payments the court has the discretion to provide that the payor [former husband] will not deduct the alimony payments so that the payee [former wife] may then exclude the payments from gross income."

74 I.R.C. §71(b)(1)(B) provides that payments are alimony (and thus taxable/deductible), if:
(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under Section 215.

75 *McKelvey v. McKelvey*, 524 So.2d 801 (Fla. 3d DCA 1988). See also, *Morreale v. Morreale*, 286 Ill. 256, 813 N.E. 2d 313 (Ill. App. 2004) (the provision in a Marital Settlement Agreement that payments which did not cease on death of the payee would be taxable/deductible did not entitle the husband to damages because he couldn't deduct).

or separation instrument contains a nonalimony designation if the substance of such a designation is reflected in the instrument.”

It was not a sufficient designation of non-taxability/non-deductibility, the United States Tax Court ruled in *Baker v. Commissioner*, T.C. Memo 2000-164, that the parties agreed only that the payments were for property settlement.⁷⁶

A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's tax return (Form 1040) for each year in which the designation applies.⁷⁷

Since a court should take into consideration the net after-tax amount of alimony to a payee spouse,⁷⁸ thought should be given to designating the payments as non-taxable to the payee and non-deductible to the payor. Such a designation could accomplish the court's purpose of providing for all of the impecunious spouse's needs, which needs may not be fully met unless the amount of taxes on the alimony is taken into consideration in determining that amount.

§3.5.1.1 SEPARATE STREAMS OF PAYMENT, DIFFERENT TAX EFFECTS

Under the Code, separate streams of payment under a judgment, agreement or order for support can have different tax effects; that is, one stream of payment can comply with the alimony rules and qualify as deductible/taxable while another stream of payments can be designated as non-deductible and non-taxable.⁷⁹

§3.5.1.2 NO DESIGNATION NEEDED THAT PAYMENTS ARE INCLUDIBLE NOR DEDUCTIBLE

The Court in *Cosby v. Commissioner*, T.C. Summ.Op 2007-8 rejected the IRS argument that the deduction was disallowed because “the payments are not designated as includible in the income to the payee and deductible by the payor.”

The court gave the Commissioner's argument a short consideration, stating:

76 The agreement between the parties provided, under the heading “property settlement,” that the husband shall pay the wife 50% of his monthly gross military retirement pay from the U.S. Army each month “as a property settlement until such time as she remarries or cohabits with another person or until her death.” The Tax Court rejected the wife's argument that because the payments were delineated as property settlement that it was a designation by the parties that the payments were to be non-taxable/non-deductible; finding that “the labeling of the payments as ‘property settlement,’ with nothing more, is not a clear, explicit and express direction that the payments are not includible in the wife's gross income and not deductible by the husband.” The court stated:

If the payments fit within the definition of alimony for federal income tax purposes, the intended purpose of the payments is of no consequence. Thus, we find that the parties' intent in this case, except as reflected in the divorce or separation instrument itself is moot Statutory language of section 71(b)(1)(B) does not allow designations by attenuated implications. The instrument must contain a clear, explicit and express direction that the payments are not to be treated as income.

77 Temp. Treas. Reg. §1.71-1T A-8.

78 See *Lutger v. Lutger*, 362 So.2d 58 (Fla. 2d DCA 1978) (Trial court erred in not considering income tax consequences to the wife on her alimony award because the net amount (after taxes) to the wife “would not sustain the wife in any semblance of the standard of living which she enjoyed during the marriage”); *Zeide v. Zeide*, 719 So.2d 919 (Fla. 4th DCA 1998) (By failing to take into account the tax implications of the sourcing of much of the income which the court anticipated appellant would receive, the trial court substantially overestimated the spendable income appellant would have. As a result, the former wife's spendable income is not nearly the amount the court determined she needs); *Sharon v. Sharon*, 862 So.2d 789 (Fla. 2d DCA 2003) (When evidence of tax impact of an alimony award is presented, it is error for the trial court to fail to consider the consequences).

79 *Springer v. Comm.*, T.C. Memo 2003-221, wherein the Court stated:

Generally, different types of payments made pursuant to a divorce decree are not treated as part of a single stream of payments, but rather each type of payment is analyzed separately to determine its proper characterization.

Respondent's designation argument is easily dismissed. A careful reading of the statute clearly demonstrates that the definition of "alimony" does not include a requirement that the divorce or separation instrument "designate" the payment as includible in the gross income of the payee spouse and allowable as a deduction to the payor spouse.

If a payment is to be treated as alimony for purposes of sec. 215, then, in addition to the other requirements noted above, the divorce or separate maintenance instrument must not designate that the payment is not includible in the income of the recipient spouse and not allowable as a deduction to the payor spouse. Sec. 71(b)(1)(B). Respondent's designation argument, in effect, converts the requirement that certain conditions not be included in a divorce or separation instrument into a requirement that certain conditions be included. We are aware of no principle of statutory construction or logic (at least from an Aristotelian standpoint) that would allow such a conversion.

§3.5.2 DESIGNATION BY THE PARTIES

The designation of nontaxable/nondeductible must be made pursuant to a divorce or separation instrument, one of which, by its definition, is a written separation agreement. This, of course, is an agreement between the parties.⁸⁰

Temp. Treas. Reg. §1.71-1T,Q-8 inquires: "How may spouses designate that payments otherwise qualifying as alimony or separate maintenance payments shall be excludible from the gross income of the payee and nondeductible by the payor?"

The answer in A-8 is: "The spouses may designate that payments otherwise qualifying as alimony or separate maintenance payments shall be nondeductible by the payor and excludible from gross income by the payee by so providing in a divorce or separation instrument (as defined in section 71(b)(2)). If the spouses have executed a written

separation agreement (as described in section 71(b)(2)(B)), any writing signed by both spouses which designates otherwise qualifying alimony or separate maintenance payments as nondeductible and excludible and which refers to the written separation agreement will be treated as a written separation agreement (and thus a divorce or separation instrument) for purposes of the preceding sentence."

§3.5.2.1 LUMP SUM SETTLEMENT OF ON-GOING MONTHLY ALIMONY OBLIGATIONS

The settlement of a monthly permanent periodic taxable/deductible spousal support obligation by a lump sum payment designated as a non-taxable/nondeductible will, in fact, be a non-taxable, nondeductible lump sum payment.⁸¹

§3.5.2.2 REPORTING DESIGNATION

A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee's first filed tax return (Form 1040) for each year in which the designation applied.⁸²

§3.5.3 TEMPORARY SUPPORT ORDER, DESIGNATION BY COURT

An order for temporary support is a "C" type of divorce or separation instrument: i.e. "a decree [not a decree of divorce or separate maintenance] requiring a spouse to make payments for the support or maintenance of the other spouse."

The designation of non-taxability or nondeductibility can be made in an order or decree for temporary or *pendente lite* support or maintenance. Temp. Treas. Reg. §1.71-1T A-8 so contemplates when it articulates that "if the spouses are subject to temporary support orders (as described in section 71(b)(2)(C), the designation of otherwise qualifying alimony or separate payments as nondeductible and excludible must be made in the original or a subsequent temporary support order."⁸³

⁸⁰ See §3.4.2 hereof for a discussion of a written separation agreement.

⁸¹ Priv. Ltr. Rul. 200127039 (July 6, 2001), which ruling went on to provide that it is "contingent upon the proposed stipulation being approved by the divorce court."

⁸² Temp. Treas. Reg. 1.71-1T Q&A 8.

⁸³ See also *McKelvey v. McKelvey*, 534 So.2d 801 (Fla. 3d DCA 1988).

§3.5.4 FINAL DECREE OF DIVORCE OR SEPARATE MAINTENANCE, DESIGNATION BY COURT

A final decree of divorce or separate maintenance also comes within the definition of a divorce or separation instrument in which the designation of non-taxability/non-deductibility can be made.

As articulated by the Florida Supreme Court in *Rykiel v. Rykiel*, 838 So.2d 508 (Fla. 2003):⁸⁴

[A] divorce decree may provide that alimony payments are to be excluded from the gross income of the payee and not deducted by the payor. In such a case, the payments do not constitute "alimony" for tax purposes, are not included in the gross income of the recipient, and are nontaxable to the recipient.

In *Lowe v. Lowe*, 622 N.Y.S.2d 26 (App. Div. 1st Dept. 1995), it was held that "it is within the sound discretion of the court, pursuant to I.R.C. §71(b)(1)(B), to provide in its order that the maintenance payments be neither income to the plaintiff [wife] nor deductible to the defendant [husband]."

An Ohio appellate decision has recognized that the trial court, even over the objection of one of the parties, can designate a stream of payments as "non-taxable spousal support."⁸⁵ In *Roddy v. Roddy*, 1999 WL 22589 (Ohio 4th Dist. 1999), the court said:

Not all court-ordered alimony and separate maintenance payments, however, fall within the federal statutory definition of "alimony or separate maintenance payment" . . . Pursuant to [I.R.C. §71(b)(1)(A)] if a court designates a payment as not includible in the payee's gross income pursuant to Section 71 and not deductible from the payor's gross income pursuant to Section 215, then the payment, by definition, is not "alimony or separate maintenance."

In answering the question of whether the court may order a party, over his objection, to allocate the tax burden to him, a Virginia trial court held that

I.R.C. §71 contains no prohibition of such court action "and no conflict between state and federal law would be created." *Hamilton v. Hamilton*, 19 Va.Cir. 241, 1990 WL 751116 (Cir. Ct. of Va. 1990).

In *Almodovar v. Almodovar*, 754 So.2d 861 (Fla. 3d DCA 2000), the appellate court observed:

The usual treatment of alimony is to make the alimony taxable to the recipient and deductible by the payor. If the trial court wanted to avoid burdening the former wife with the tax consequences of the alimony payments the court has the discretion to provide that "the payor [former husband] will not deduct the alimony payments so that the payee [former wife] may then exclude the payments from gross income."⁸⁶

§3.5.4.1 MODIFICATION OR CORRECTION OF FINAL JUDGMENT

Nunc pro tunc orders correct clerical errors in written orders to conform them to the court's actual judgment; *nunc pro tunc* orders cannot be used to alter the court's judgment.

In *Morreale v. Morreale*, 286 Ill. 256, 813 N.E. 2d 313 (Ill.App.2004) the dismissal of Husband's petition to the trial court to amend the final judgment *nunc pro tunc* was affirmed, the appellate court stating:

Contrary to Carmen's allegation that the settlement agreement 'inadvertently' fails to state that the payments will end upon Mary Ellen's death, the agreement specifically provides that, upon her death, any remaining payments will be deposited into a trust fund to benefit the parties' children. We therefore agree with Mary Ellen that Carmen sought to amend the judgment.

See also Section 4.9 hereof, "Modification or Correction of Temporary Orders," the statements therein being similarly applicable to final judgments.

84 Thus quashing the portion of the 5th DCA's pronouncement in *Rykiel v. Rykiel*, 795 So.2d 90 (Fla. 5th DCA 2000) which incorrectly held that a trial court could make a nontaxable designation only if the parties agree.

85 The payments that were designated as non-taxable/non-deductible were an award of attorneys' fees as "non-taxable spousal support." The fees were ordered to be paid in three equal monthly installments.

86 See also *Rashotsky v. Rashotsky*, 782 So.2d 542 (Fla. 3d DCA 2001).

§3.5.5 RATIONALE FOR DESIGNATION OF NON-TAXABLE/ NON-DEDUCTIBLE ALIMONY

The following are among the reasons to consider a non-taxable/non-deductible designation:

(a) Temporary (pendente lite) Alimony

Many times there is scant time for hearings for temporary support.⁸⁷ To avoid tax calculations and considerations the court can simply provide for non-taxable/non-deductible streams of payment rather than dealing with the extra amount necessary to cover the tax implications.

(b) Alimony May Not be Deductible to the Payor

Lolli-Ghetti v. Lolli-Ghetti, 165 A.D.2d 426, 568 N.Y.S.2d 29 (1st Dept. 1991), gives a good example of why the court exercised its discretion by awarding the wife "tax-free maintenance" (i.e. designated the maintenance award as non-taxable). There the husband was a resident of Monaco and the bulk of his income was therefore not subject to federal, state and local income taxes. The court said that the husband "would not derive a substantial benefit if the maintenance payments were deductible by him and therefore taxable to [the wife]."

(c) Avoid Recapture

If alimony decreases by an impermissible amount in the first three post separation years⁸⁸ there can be Draconian results to the payor who will be taxed on the recaptured amount as phantom

income. If alimony is awarded for less than 3 years or if the payor has fragile health conditions⁸⁹ a designation of non-taxability/non-deductibility will avoid such recapture exposure. The support payment might be adjusted by reducing the amount by that which represents the tax that would have had to be paid had the designation not been made, thus compensating the payor for any loss of a deduction.

§3.6 Different Households

If the spouses are separated under a decree (judgment) of divorce or legal separation, they must not be members of the same household at the time payment is made. This contemplates more than the institution of an action for separate maintenance or the entry of an order or judgment for same. It entails a judgment, order or decree that actually alters the parties' marital status, i.e., a *legal* separation or a divorce (dissolution of marriage).

Before DRTRA, the regulations provided that a husband and a wife must be "separated and living apart" at the time support payments are made pursuant to an order for such payments to qualify under the statute. Treas. Reg. §1.71-1(b)(3)(i). Under DRTRA, the admonition goes even further, providing in I.R.C. §71(b)(1)(C) that "in the case of an individual legally separated . . . under a decree of divorce or separate maintenance, the payee spouse and the payor are *not members of the same household* at the time such payment is made" (emphasis supplied).⁹⁰

87 After approving the trial court expending one hour and forty minutes on a hearing for temporary relief over the Husband's complaint for more time, the appellate court, in *Jaffee v. Jaffee*, 854 So.2d 285, (Fla. 4th DCA 2003), observed:

A court has wide latitude in controlling the testimony at temporary relief hearings; otherwise, these hearings would expand into the invasion of Normandy, consume the court's time, produce judicial gridlock, and prevent it from disposing of the many other cases in the family division.

88 I.R.C. §71(f).

89 See *Wooters v. Wooters*, 42 Mass. App.Ct. 929, 677 N.E. 2d 704 (Mass.App.Ct. 1997), for an example of relief granted to avoid recapture where the husband payee's health was in jeopardy, albeit by granting a percentage award of taxable alimony. Instead of a percentage award, an adjusted award of non-taxable/non-deductible alimony would likewise have avoided recapture. Recapture can be a distinct possibility where the payor has serious health problems.

90 See *Bertram W. Colman, Jr. v. Commissioner of Internal Revenue*, T.C. Memos 1991-127 for an interesting pre-DRTRA fact pattern and as affected by the DRTRA modification.

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.