



MINNESOTA JUDICIAL TRAINING UPDATE



CHILD SUPPORT: FIVE (5) TAX RULES EVERY JUDGE SHOULD KNOW

QUESTION: When drafting or reviewing a final divorce decree involving an order of child support, what five (5) tax rules should every judge (and attorney) be aware of?

CHILD SUPPORT – DEPENDENCY EXEMPTION – FIVE (5) RULES

- 1) **TAXABLE v. DEDUCTIBLE** Receipt of child support is not reported as taxable income and child support payments are not tax deductible by the payor. IRC § 71 (C)(1).
- 2) **GENERAL (IRS) RULE – DEPENDENCY EXEMPTION** The custodial parent (*defined as the parent having actual custody of a child for the greater portion of a year*—IRC § 152 (c)(3)(A)) is entitled to claim the child as a dependent unless the custodial parent affirmatively waives the right to claim the exemption in writing and the writing is attached to the noncustodial parent's tax return. Internal Revenue Code § 152(e)(2). This rule encompasses both married parents and parents who never married each other. *King*, 121 T.C. 24 (2003).
- 3) **IRS WAIVER FORM 8332** The waiver must be written and can be for a single year, a number of years, or permanent. A signed IRS Form 8332, “Release of Claim to Exemption for Child of Divorced or Separated Parents” must be attached to the non-custodial parent’s tax return. Subject to a grandfather provision for older decrees, the IRS will strictly enforce this requirement. Reg. sec. 1.152.
- 4) **JUDICIAL AUTHORITY – ALLOCATING EXEMPTION TO THE NONCUSTODIAL PARENT**
In Minnesota, the Supreme Court has recognized that a district court may, at its discretion, “allocate tax dependency exemptions to a noncustodial parent incident to

the determination of child support and physical custody” provided that the district court finds such allocation is in the best interests of the child. *Rogers v. Rogers*, 622 N.W.2d 813, 823 (Minn. 2001). In exercising its discretion, the district court may consider the relative resources of the parties and the financial benefits that will accrue from such a transfer. *Crosby v. Crosby*, 587 N.W.2d 292, 298 (Minn. App. 1998); *Hall v. Hall*, (FA-05-544, Unpublished, December 18, 2007).

ALTERNATING EXEMPTION BETWEEN CUSTODIAL AND NONCUSTODIAL PARENT

In appropriate cases (i.e. best interest of the child), the Court may order or approve an agreement that allocates the exemption to the non-custodial parent on alternating years. Such provisions are usually accompanied by a requirement that the non-custodial parent be current with all child support payments by December 31st of the year the exemption is to be claimed. For enforcement purposes, some judges include provisions that require the custodial parent to cooperate in the signing of IRS form 8332 (see #3 above) allowing the non-custodial parent to claim the exemption.

5) **OTHER TAX BENEFITS AVAILABLE DESPITE WAIVER OF EXEMPTION** Even if the dependency exemption is awarded to the non-custodial parent, certain tax benefits are still available to the custodial parent: For example:

- a. **Medical Expense Deduction:** A child of parents who are.....divorced.....or separated.....or lived apart for more than the past 6 months.....is treated as the dependent of both parents for purposes of the medical expense deduction. Accordingly, a child’s medical expenses paid by a parent can be claimed as an itemized deduction even if the exemption for that child has been waived or awarded to the other parent. Internal Revenue Code § 213 (d)(5).
- b. **Child Care Credit and Earned Income Credit:** The custodial parent can claim the child care credit and the Earned Income Credit even if he/she has relinquished the dependency exemption under Sec. 152(e). IRS Notice 2006-86, 2006-2 CB 680 (9/20/2006).
- c. **Head of Household Filing Status:** If the dependency exemption is waived, the taxpayer can still claim the lower “head of household” rates, so long as the taxpayer has custody of the dependent for more than half the year. IRC § 1(B).

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