

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[TD 9408]

RIN 1545-BD01

Dependent Child of Divorced or Separated Parents or Parents Who Live Apart

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to a claim that a child is a dependent by parents who are divorced, legally separated under a decree of separate maintenance, or separated under a written separation agreement, or who live apart at all times during the last 6 months of the calendar year. The regulations reflect amendments under the Working Families Tax Relief Act of 2004 (WFTRA) and the Gulf Opportunity Zone Act of 2005.

DATES: Effective Date: These regulations are effective July 2, 2008.

Applicability Date: For date of applicability, see §1.152-4(h).

FOR FURTHER INFORMATION CONTACT: Victoria Driscoll (202) 622-4920
(not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with

the Paperwork Reduction Act (44 U.S.C. 3507(d)) in connection with OMB Control Number 1545-0074. This control number is assigned to all information collections associated with individual tax returns (series 1040 and associated forms and schedules, and related regulatory information collections). Information collections associated with control number 1545-0074 are subject to annual public comment and approval by OMB in accordance with the Paperwork Reduction Act.

The collection of information in these final regulations is in §1.152-4(e). The information will help the IRS determine if a taxpayer may claim a child as a dependent when the parents of the child are divorced or separated or live apart at all times during the last six months of a calendar year. The collection of information is required to obtain a benefit. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget.

The information will be reported on IRS Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form. The time needed to complete and file this form will vary depending on individual circumstances. The estimated burden for individual taxpayers filing this form is included in the estimates shown in the instructions for their individual income tax return.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, SE:W:CAR:MP:T:T:SP, Washington, DC 20224, and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to a collection of information 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 26 U.S.C. 6103.

Background

This document contains final amendments to the Income Tax Regulations, 26 CFR part 1, relating to section 152(e) and the entitlement of divorced or separated parents or parents who live apart at all times during the last 6 months of the calendar year to claim a child as a dependent.

On May 2, 2007, a notice of proposed rulemaking (REG-149856-03) was published in the **Federal Register** (72 FR 24192). Written and electronic comments responding to the notice of proposed rulemaking were received. A public hearing was requested and held on April 3, 2008, however, the hearing was adjourned after no speakers appeared. After consideration of all the comments, the proposed regulations are adopted as amended by this Treasury decision. The comments and revisions are discussed in the preamble.

Explanation of Revisions and Summary of Comments

1. Scope of Section 152(e)
 - a. Custodial parent's failure to release exemption

For taxable years beginning before January 1, 2005, section 152(e)(1) provided that a custodial parent generally was entitled to claim the dependency exemption. Thus, if (1) parents of a child were divorced, legally separated, or lived apart during the last 6 months of the taxable year, (2) the child was in the custody of one or both parents

for more than one-half of the taxable year, and (3) the child received over one-half of the child's support during the calendar year from one or both parents, the child was treated as receiving over one-half of the child's support from the custodial parent unless an exception applied. Section 152(e)(2) provided an exception treating the child as receiving over one-half of the child's support from the noncustodial parent if the custodial parent released the claim to the exemption.

In contrast, as amended by WFTRA (Public Law No. 108-311, 118 Stat. 1166) for taxable years beginning after December 31, 2004, section 152(e) includes no general rule allowing the custodial parent to claim an exemption for a child. It provides that a child is treated as the qualifying child or qualifying relative of the noncustodial parent if (1) the parents are divorced, legally separated, or live apart during the last 6 months of the taxable year, (2) the child receives over one-half of the child's support during the calendar year from one or both parents, (3) the child is in the custody of one or both parents for more than one-half of the calendar year, and (4) the custodial parent releases the claim to the exemption. Thus, under current section 152(e), the custodial parent's release of the claim is not an exception to a general rule, but is a condition precedent to the application of section 152(e). The proposed regulations include an example illustrating that section 152(e) does not apply if the custodial parent does not release the claim, in which case entitlement to the exemption is determined under section 152(c) or (d).

Commentators suggested that the final regulations should reverse the conclusion of this example. The commentators opined that the final regulations should interpret section 152(e) as if it included the pre-WFTRA general rule and provide that the

custodial parent is entitled to the exemption if the custodial parent does not release the claim. The final regulations do not adopt this suggestion because it is inconsistent with the language of section 152(e) as amended by WFTRA.

b. Definition of custody

Section 152(e) includes two provisions relating to the concept of “custody:” (1) section 152(e) applies only if a child is in the custody of one or both parents for over one-half of the calendar year; and (2) in the absence of a qualified pre-1985 agreement, the noncustodial parent may claim the exemption only if the custodial parent (defined as the parent having custody for the greater portion of the calendar year) releases the claim to the exemption. The proposed regulations do not define the term custody.

The lack of a definition of the term custody in the proposed regulations may create ambiguity in determining whether section 152(e) applies. For example, a commentator suggested that the final regulations clarify whether a child who has attained the age of majority and is emancipated under state law is in the custody of one or both parents. The final regulations provide that a child is in the custody of one or both parents for more than one-half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year. However, a child is not in the custody of either parent for purposes of section 152(e), for example, when the child reaches the age of majority under state law. *See Boltinghouse v. Commissioner*, T.C.M. 2007-324. The final regulations include an example that illustrates that a child is not in the custody of a parent after the child attains the age of majority and is emancipated under state law.

c. Application of section 152(e) to child residing with third party

Section 152(e)(1) provides that, if specified conditions are met, section 152(e) applies notwithstanding the principal place of abode test of section 152(c)(1)(B) and the tiebreaker rule of section 152(c)(4) for a qualifying child, or the support test of section 152(d)(1)(C) for a qualifying relative. A commentator requested that the final regulations clarify whether section 152(c), rather than section 152(e), applies when a child resides with someone other than a parent for more than one-half of the year because of a parent's lengthy absence. The final regulations include additional examples illustrating when section 152(e) applies to determine the right to claim a child as a dependent, and how the nights during which the child resides with a third party may be allocated to a parent.

d. Coordination of section 152(e) and other provisions

The proposed regulations provide that a child who is treated as the qualifying child or qualifying relative of a noncustodial parent under section 152(e) is treated as a dependent of both parents for purposes of sections 105(b), 132(h)(2)(B), and 213(d)(5). Consistent with the statutory language of those provisions, the final regulations clarify that, if section 152(e) does not apply, then this rule treating the child as a dependent of both parents does not apply. Thus, if a custodial parent does not release the claim to the exemption, only the taxpayer who is entitled to claim the child as a dependent under section 152(c) or (d) may treat the child as a dependent for purposes of sections 105(b), 132(h)(2)(B), and 213(d)(5).

2. Definition of Custodial Parent

The proposed regulations define custodial parent as the parent with whom the child resides for the greater number of nights during the calendar year (the counting

nights rule) and include rules for allocating nights when the child resides with neither parent.

a. Counting nights rule

A commentator requested that the final regulations clarify that the counting nights rule applies to determine where a child resides under the tiebreaker rule of section 152(c)(4)(B) as well as to identify the custodial parent for purposes of section 152(e). The tiebreaker rule of section 152(c)(4)(B) is outside the scope of these regulations and therefore is not addressed.

Commentators requested clarification of the term night for purposes of the counting nights rule. A commentator noted that the rule does not address how the child's residence for a night is determined (for example, by the child's physical location at a given time such as midnight, or by where the child sleeps) and for which year the night of December 31 to January 1 is counted.

In response to this comment, the final regulations provide that, for purposes of section 152(e), a child resides for a night with a parent if the child sleeps (1) at the parent's residence (whether or not the parent is present), or (2) in the company of the parent when the child does not sleep at a parent's residence (for example, if the parent and child are on vacation). Under this rule, the time that a child goes to sleep is irrelevant. The final regulations provide that a night that extends over two taxable years is allocated to the taxable year when the night begins. Thus, the night that begins on December 31, 2008, is counted for taxable year 2008.

Commentators suggested that the counting nights rule may be inequitable in certain situations, for example if a parent works nights and cares for the child during the

day, and the other parent works days and cares for the child at night. Under the counting nights rule, the parent who cares for the child at night is the custodial parent although the other parent may spend more time with the child. A commentator opined that the counting nights rule should create only a rebuttable presumption regarding which parent is the custodial parent.

Defining custodial parent by means of a rebuttable presumption would add complexity and uncertainty and increase the potential for controversy. As a “bright-line” test, the counting nights rule is easy to understand and apply. The statute and regulations provide flexibility by allowing the custodial parent to release the claim to the exemption. Nonetheless, the final regulations allow an exception for cases in which a child resides for a greater number of days but not nights with a parent who works at night.

b. Allocation of nights

The proposed regulations provide that a child who resides with neither parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence. However, if a child would not have resided with either parent (for example, because a court awarded custody of the child to a third party for the period of absence), the child is treated as not residing with either parent for the night of the absence.

A commentator suggested that the final regulations omit the language “for example” and provide that an award of custody to a third party is the exclusive circumstance in which a night is not allocated to either parent. The final regulations do not incorporate this suggestion, as other situations may occur in which a child would not

have resided with either parent for a night. However, the final regulations omit the parenthetical and illustrate this situation in the examples. Other commentators noted additional circumstances in which it would be difficult to determine the parent with whom a child would have resided for the night. Therefore, the final regulations provide that a night is not counted for either parent if the child would not have resided with either parent for the night or it cannot be determined with which parent the child would have resided for the night.

Commentators requested that the final regulations address how nights are allocated in additional situations involving a child's absence. The final regulations provide additional examples in response to these comments.

A commentator asked how a night is allocated in situations involving the absence of a parent, for example, if a child spends the night in a parent's residence in the care of a third party, but the parent is absent. Another commentator requested clarification on how a night is allocated if a child is scheduled to reside with one parent but, because of unexpected circumstances (such as that parent's unplanned absence) the child resides with the other parent for that night. These comments are addressed by the addition in the final regulations of the rule, discussed earlier in this preamble, that a child resides with a parent for a night if the child sleeps (1) at the residence of the parent (whether or not the parent is present), or (2) in the company of the parent, when the child does not sleep at a parent's residence.

3. Release of Exemption and Revocation of Release

a. Release of claim to exemption

Section 152(e)(2) provides that a custodial parent may release a claim to an

exemption for a child by signing a written declaration that he or she will not claim the child as a dependent. The proposed regulations provide that the written declaration may be made on Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent, or successor form, and any declaration not on Form 8332 must conform to the substance of that form. The proposed regulations also provide that a court order or decree may not serve as the written declaration.

A commentator asserted that the final regulations should allow a noncustodial parent to claim a child as a dependent if a divorce decree allocates the exemption to that parent, whether or not the custodial parent releases the right to claim the child. Another commentator suggested that presumptions in favor of the custodial parent in the proposed regulations unfairly burden the noncustodial parent.

A state court may not allocate an exemption because sections 151 and 152, not state law, determine who may claim an exemption for a child for Federal income tax purposes. Section 152(e) provides for the unilateral release of an exemption by a custodial parent. Therefore, the final regulations do not adopt these comments.

Commentators suggested that the final regulations should specify that a written separation agreement may not serve as the written declaration. One commentator recommended that the final regulations provide that the release must be on Form 8332 or that the release may be on either Form 8332 or a document that is executed for the sole purpose of releasing the claim. Other commentators opined, however, that the final regulations should provide specifically that a separation agreement that includes an unconditional release or a divorce decree may serve as a written declaration. A commentator suggested that a divorce settlement agreed to by both parents should

determine the right to claim a child as a dependent without regard to which parent is the custodial parent and without requiring a separate written declaration.

Divorce decrees, separation agreements, and similar instruments are complex documents that may be subject to differing interpretations governed by state law. Allowing these documents to serve as a written declaration creates complexity and uncertainty. Therefore, the final regulations retain the rule that a written declaration not on Form 8332 (or successor form) must conform to the substance of Form 8332, and further provide that a release not on a Form 8332 must be a document executed for the sole purpose of releasing the claim. The final regulations provide specifically that a court order or decree or a separation agreement may not serve as the written declaration. These rules will improve tax administration and reduce controversy.

The proposed regulations provide that if a release of a claim to a child is for more than one year, the noncustodial parent must attach the original written declaration to the parent's return for the first taxable year for which the release is effective and a copy of the written declaration for later years. A commentator requested that the final regulations allow a taxpayer to attach a copy of a declaration (rather than the original) to a tax return in the first year the release is effective as well as subsequent years. The final regulations adopt this comment.

b. Revocation of release of exemption

Under the proposed regulations, Form 8332 or a substitute document may be executed for multiple years. Further, to provide flexibility to parents whose circumstances change, the proposed regulations allow a custodial parent to revoke a release, but the revocation may be effective no earlier than the taxable year that begins

in the first calendar year after the calendar year in which the parent revoking the release provides notice of the revocation to the other parent. Commentators objected to the custodial parent's broad discretion to revoke a release under the proposed regulations. A commentator recommended that the final regulations provide that a taxpayer may revoke a release only if both parents agree. Section 152(e) provides for the unilateral release of an exemption by a custodial parent. The final regulations retain the rule allowing unilateral revocation by the custodial parent as consistent with the statute.

A commentator suggested that a revocation should take effect in the taxable year that the parent signs the revocation. The final regulations do not adopt this comment, which could result in insufficient notice of the revocation to the noncustodial parent and increase controversies.

The proposed regulations also provide that the taxpayer revoking the release must attach the original or a copy of the revocation to the taxpayer's tax return for any taxable year the taxpayer claims the exemption as a result of the revocation, and keep a copy of the revocation and evidence of delivery of written notice of revocation to the noncustodial parent. A commentator recommended that the final regulations require the custodial parent to send a copy of the written revocation to the noncustodial parent at the last known address or at an address reasonably calculated to ensure receipt. The commentator opined that proof of mailing by certified mail or other tracked delivery should suffice as evidence of notification. Another commentator expressed concern that a parent whose location is unknown may not receive notice of a revocation.

To retain flexibility but increase the likelihood that a noncustodial parent will receive notice of a revocation, the final regulations require that the parent revoking the

release notify, or make reasonable attempts to notify, in writing, the other parent of the revocation. What is a reasonable attempt is determined under the facts and circumstances, but mailing a copy of the written revocation to the noncustodial parent at the last known address or at an address reasonably calculated to ensure receipt satisfies this requirement.

A commentator recommended that the final regulations provide that a release may be revoked only on a Form 8332. Consistent with the requirements for a release, the final regulations provide that (1) a revocation may be made on Form 8332, or successor form designated by the IRS, (2) a revocation not on the designated form must conform to the substance of the form and be in a document executed for the sole purpose of revoking a release, and (3) a taxpayer revoking a release may attach a copy rather than an original to the taxpayer's return for the first taxable year the revocation is effective, as well as for later years.

c. Releases predating applicability date

The proposed regulations do not address whether the rules for releasing a claim to an exemption and for revoking a release apply to a written declaration that is effective for multiple years and that was executed before the applicability date of the regulations. The final regulations apply prospectively, but clarify that a multiple year written declaration executed in a taxable year beginning on or before July 2, 2008, that satisfies the requirements for the form of a written declaration in effect at the time the written declaration is executed is treated as satisfying the requirements for the form of a release under the final regulations. However, the final regulations provide that the rules for revoking a release of a claim to an exemption apply without regard to whether a

custodial parent executed the release in a taxable year beginning on or before July 2, 2008. Thus, a release executed in a taxable year beginning on or before July 2, 2008, may be revoked.

5. Effective/Applicability Date

These final regulations apply to taxable years beginning after July 2, 2008.

Special Analyses

This Treasury decision is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. Section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations and, because the regulations do not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking that preceded these final regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Victoria J. Driscoll of the Office of Associate Chief Counsel (Income Tax and Accounting). However, other personnel from the IRS and Treasury Department participated in their development.

List of Subjects in 26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

Amendment to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 is amended by adding an entry to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 1.152-4 also issued under 26 U.S.C. 152(e) * * *

Par. 2. Section 1.152-4 is revised to read as follows:

§1.152-4 Special rule for a child of divorced or separated parents or parents who live apart.

(a) In general. A taxpayer may claim a dependency deduction for a child (as defined in section 152(f)(1)) only if the child is the qualifying child of the taxpayer under section 152(c) or the qualifying relative of the taxpayer under section 152(d). Section 152(c)(4)(B) provides that a child who is claimed as a qualifying child by parents who do not file a joint return together is treated as the qualifying child of the parent with whom the child resides for a longer period of time during the taxable year or, if the child resides with both parents for an equal period of time, of the parent with the higher adjusted gross income. However, a child is treated as the qualifying child or qualifying relative of the noncustodial parent if the custodial parent releases a claim to the exemption under section 152(e) and this section.

(b) Release of claim by custodial parent--(1) In general. Under section 152(e)(1), notwithstanding section 152(c)(1)(B), (c)(4), or (d)(1)(C), a child is treated as the qualifying child or qualifying relative of the noncustodial parent (as defined in paragraph (d) of this section) if the requirements of paragraphs (b)(2) and (b)(3) of this section are met.

(2) Support, custody, and parental status--(i) In general. The requirements of

this paragraph (b)(2) are met if the parents of the child provide over one-half of the child's support for the calendar year, the child is in the custody of one or both parents for more than one-half of the calendar year, and the parents--

(A) Are divorced or legally separated under a decree of divorce or separate maintenance;

(B) Are separated under a written separation agreement; or

(C) Live apart at all times during the last 6 months of the calendar year whether or not they are or were married.

(ii) Multiple support agreement. The requirements of this paragraph (b)(2) are not met if over one-half of the support of the child is treated as having been received from a taxpayer under section 152(d)(3).

(3) Release of claim to child. The requirements of this paragraph (b)(3) are met for a calendar year if--

(i) The custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for any taxable year beginning in that calendar year and the noncustodial parent attaches the declaration to the noncustodial parent's return for the taxable year; or

(ii) A qualified pre-1985 instrument, as defined in section 152(e)(3)(B), applicable to the taxable year beginning in that calendar year, provides that the noncustodial parent is entitled to the dependency exemption for the child and the noncustodial parent provides at least \$600 for the support of the child during the calendar year.

(c) Custody. A child is in the custody of one or both parents for more than one-

half of the calendar year if one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year.

(d) Custodial parent--(1) In general. The custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent. A child is treated as residing with neither parent if the child is emancipated under state law. For purposes of this section, a child resides with a parent for a night if the child sleeps--

- (i) At the residence of that parent (whether or not the parent is present); or
- (ii) In the company of the parent, when the child does not sleep at a parent's residence (for example, the parent and child are on vacation together).

(2) Night straddling taxable years. A night that extends over two taxable years is allocated to the taxable year in which the night begins.

(3) Absences. (i) Except as provided in paragraph (d)(3)(ii) of this section, for purposes of this paragraph (d), a child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as residing with the parent with whom the child would have resided for the night but for the absence.

(ii) A child who does not reside (within the meaning of paragraph (d)(1) of this section) with a parent for a night is treated as not residing with either parent for that night if it cannot be determined with which parent the child would have resided or if the child would not have resided with either parent for the night.

(4) Special rule for equal number of nights. If a child is in the custody of one or both parents for more than one-half of the calendar year and the child resides with each

parent for an equal number of nights during the calendar year, the parent with the higher adjusted gross income for the calendar year is treated as the custodial parent.

(5) Exception for a parent who works at night. If, in a calendar year, due to a parent's nighttime work schedule, a child resides for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as residing at the primary residence registered with the school.

(e) Written declaration--(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.

(2) Attachment to return. A noncustodial parent must attach a copy of the written declaration to the parent's return for each taxable year in which the child is claimed as a dependent.

(3) Revocation of written declaration--(i) In general. A parent may revoke a written declaration described in paragraph (e)(1) of this section by providing written notice of the revocation to the other parent. The parent revoking the written declaration must make reasonable efforts to provide actual notice to the other parent. The revocation may be effective no earlier than the taxable year that begins in the first calendar year after the calendar year in which the parent revoking the written declaration provides, or makes reasonable efforts to provide, the written notice.

(ii) Form of revocation. The revocation 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 whether or not the written declaration was made on a form designated by the IRS. A revocation not on that form must conform to the substance of the form and must be a document executed for the sole purpose of serving as a revocation under this section. The revocation must specify the year or years for which the revocation is effective. A revocation that specifies all future years is treated as specifying the first taxable year after the taxable year the revocation is executed and all subsequent taxable years.

(iii) Attachment to return. The parent revoking the written declaration must attach a copy of the revocation to the parent's return for each taxable year for which the parent claims a child as a dependent as a result of the revocation. The parent revoking the

written declaration must keep a copy of the revocation and evidence of delivery of the notice to the other parent, or of the reasonable efforts to provide actual notice.

(4) Ineffective declaration or revocation. A written declaration or revocation that fails to satisfy the requirements of this paragraph (e) has no effect.

(5) Written declaration executed in a taxable year beginning on or before July 2, 2008. A written declaration executed in a taxable year beginning on or before July 2, 2008, that satisfies the requirements for the form of a written declaration in effect at the time the written declaration is executed, will be treated as meeting the requirements of paragraph (e)(1) of this section. Paragraph (e)(3) of this section applies without regard to whether a custodial parent executed the written declaration in a taxable year beginning on or before July 2, 2008.

(f) Coordination with other sections. If section 152(e) and this section apply, a child is treated as the dependent of both parents for purposes of sections 105(b), 132(h)(2)(B), and 213(d)(5).

(g) Examples. The provisions of this section are illustrated by the following examples that assume, unless otherwise provided, that each taxpayer's taxable year is the calendar year, one or both of the child's parents provide over one-half of the child's support for the calendar year, one or both parents have the right under state law to physical custody of the child for more than one-half of the calendar year, and the child otherwise meets the requirements of a qualifying child under section 152(c) or a qualifying relative under section 152(d). In addition, in each of the examples, no qualified pre-1985 instrument or multiple support agreement is in effect. The examples are as follows:

Example 1. (i) B and C are the divorced parents of Child. In 2009, Child resides with B for 210 nights and with C for 155 nights. B executes a Form 8332 for 2009 releasing B's right to claim Child as a dependent for that year, which C attaches to C's 2009 return.

(ii) Under paragraph (d) of this section, B is the custodial parent of Child in 2009 because B is the parent with whom Child resides for the greater number of nights in 2009. Because the requirements of paragraphs (b)(2) and (3) of this section are met, C may claim Child as a dependent.

Example 2. The facts are the same as in Example 1 except that B does not execute a Form 8332 or similar declaration for 2009. Therefore, section 152(e) and this section do not apply. Whether Child is the qualifying child or qualifying relative of B or C is determined under section 152(c) or (d).

Example 3. (i) D and E are the divorced parents of Child. Under a custody decree, Grandmother has the right under state law to physical custody of Child from January 1 to July 31, 2009.

(ii) Because D and E do not have the right under state law to physical custody of Child for over one-half of the 2009 calendar year, under paragraph (c) of this section, Child is not in the custody of one or both parents for over one-half of the calendar year. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of D, E, or Grandmother is determined under section 152(c) or (d).

Example 4. (i) The facts are the same as in Example 3, except that Grandmother has the right to physical custody of Child from January 1 to March 31, 2009, and, as a result, Child resides with Grandmother during this period. D and E jointly have the right to physical custody of Child from April 1 to December 31, 2009. During this period, Child resides with D for 180 nights and with E for 95 nights. D executes a Form 8332 for 2009 releasing D's right to claim Child as a dependent for that year, which E attaches to E's 2009 return.

(ii) Under paragraph (c) of this section, Child is in the custody of D and E for over one-half of the calendar year, because D and E have the right under state law to physical custody of Child for over one-half of the calendar year.

(iii) Under paragraph (d)(3)(ii) of this section, the nights that Child resides with Grandmother are not allocated to either parent. Child resides with D for a greater number of nights than with E during the calendar year and, under paragraph (d)(1) of this section, D is the custodial parent.

(iv) Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and E may claim Child as a dependent.

Example 5. (i) The facts are the same as in Example 4, except that D is away on military service from April 10 to June 15, 2009, and September 6 to October 20, 2009. During these periods Child resides with Grandmother in Grandmother's residence. Child would have resided with D if D had not been away on military service. Grandmother claims Child as a dependent on Grandmother's 2009 return.

(ii) Under paragraph (d)(3)(i) of this section, Child is treated as residing with D for the nights that D is away on military service. Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and E, not Grandmother, may claim Child as a dependent.

Example 6. F and G are the divorced parents of Child. In May of 2009, Child turns age 18 and is emancipated under the law of the state where Child resides. Therefore, in 2009 and later years, F and G do not have the right under state law to physical custody of Child for over one-half of the calendar year, and Child is not in the custody of F and G for over one-half of the calendar year. Section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of F or G is determined under section 152(c) or (d).

Example 7. (i) The facts are the same as in Example 6, except that Child turns age 18 and is emancipated under state law on August 1, 2009, resides with F from January 1, 2009, through May 31, 2009, and resides with G from June 1, 2009, through December 31, 2009. F executes a Form 8332 releasing F's right to claim Child as a dependent for 2009, which G attaches to G's 2009 return.

(ii) Under paragraph (c) of this section, Child is in the custody of F and G for over one-half of the calendar year.

(iii) Under paragraph (d)(1) of this section, Child is treated as not residing with either parent after Child's emancipation. Therefore, Child resides with F for 151 nights and with G for 61 nights. Because the requirements of paragraphs (b)(2) and (3) of this section are met, section 152(e) and this section apply, and G may claim Child as a dependent.

Example 8. H and J are the divorced parents of Child. Child generally resides with H during the week and with J every other weekend. Child resides with J in H's residence for 10 consecutive nights while H is hospitalized. Under paragraph (d)(1)(i) of this section, Child resides with H for the 10 nights.

Example 9. K and L, who are separated under a written separation agreement, are the parents of Child. In August 2009, K and Child spend 10 nights together in a hotel while on vacation. Under paragraph (d)(1)(ii) of this section, Child resides with K for the 10 nights that K and Child are on vacation.

Example 10. M and N are the divorced parents of Child. On December 31, 2009, Child attends a party at M's residence. After midnight on January 1, 2010, Child

travels to N's residence, where Child sleeps. Under paragraph (d)(1) of this section, Child resides with N for the night of December 31, 2009, to January 1, 2010, because Child sleeps at N's residence that night. However, under paragraph (d)(2) of this section, the night of December 31, 2009, to January 1, 2010, is allocated to taxable year 2009 for purposes of determining whether Child resides with M or N for a greater number of nights in 2009.

Example 11. O and P, who never married, are the parents of Child. In 2009, Child spends alternate weeks residing with O and P. During a week that Child is residing with O, O gives Child permission to spend a night at the home of a friend. Under paragraph (d)(3)(i) of this section, the night Child spends at the friend's home is treated as a night that Child resides with O.

Example 12. The facts are the same as in Example 11, except that Child also resides at summer camp for 6 weeks. Because Child resides with each parent for alternate weeks, Child would have resided with O for 3 weeks and with P for 3 weeks of the period that Child is at camp. Under paragraph (d)(3)(i) of this section, Child is treated as residing with O for 3 weeks and with P for 3 weeks.

Example 13. The facts are the same as in Example 12, except that Child does not spend alternate weeks residing with O and P, and it cannot be determined whether Child would have resided with O or P for the period that Child is at camp. Under paragraph (d)(3)(ii) of this section, Child is treated as residing with neither parent for the 6 weeks.

Example 14. (i) Q and R are the divorced parents of Child. Q works from 11 PM to 7 AM Sunday through Thursday nights. Because of Q's nighttime work schedule, Child resides with R Sunday through Thursday nights and with Q Friday and Saturday nights. Therefore, in 2009, Child resides with R for 261 nights and with Q for 104 nights. Child spends all daytime hours when Child is not in school with Q and Q's address is registered with Child's school as Child's primary residence. Q executes a Form 8332 for 2009 releasing Q's right to claim Child as a dependent for that year, which R attaches to R's 2009 return.

(ii) Under paragraph (d) of this section, Q is the custodial parent of Child in 2009. Child resides with R for a greater number of nights than with Q due to Q's nighttime work schedule, and Child spends a greater number of days with Q. Therefore, paragraph (d)(5) of this section applies rather than paragraph (d)(1) of this section. Because the requirements of paragraphs (b)(2) and (3) of this section are met, R may claim Child as a dependent.

Example 15. (i) In 2009, S and T, the parents of Child, execute a written separation agreement. The agreement provides that Child will live with S and that T will make monthly child support payments to S. In 2009, Child resides with S for 335 nights and with T for 30 nights. S executes a letter declaring that S will not claim Child as a dependent in 2009 and in subsequent alternate years. The letter contains all the

information requested on Form 8332, does not require the satisfaction of any condition such as T's payment of support, and has no purpose other than to serve as a written declaration under section 152(e) and this section. T attaches the letter to T's return for 2009 and 2011.

(ii) In 2010, T fails to provide support for Child, and S executes a Form 8332 revoking the release of S's right to claim Child as a dependent for 2011. S delivers a copy of the Form 8332 to T, attaches a copy of the Form 8332 to S's tax return for 2011, and keeps a copy of the Form 8332 and evidence of delivery of the written notice to T.

(iii) T may claim Child as a dependent for 2009 because S releases the right to claim Child as a dependent under paragraph (b)(3) of this section by executing the letter, which conforms to the requirements of paragraph (e)(1) of this section, and T attaches the letter to T's return in accordance with paragraph (e)(2) of this section. In 2010, S revokes the release of the claim in accordance with paragraph (e)(3) of this section, and the revocation takes effect in 2011, the taxable year that begins in the first calendar year after S provides written notice of the revocation to T. Therefore, in 2011, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of S or T is determined under section 152(c) or (d).

Example 16. The facts are the same as Example 15, except that the letter expressly states that S releases the right to claim Child as a dependent only if T is current in the payment of support for Child at the end of the calendar year. The letter does not qualify as a written declaration under paragraph (b)(3) of this section because S's agreement not to claim Child as a dependent is conditioned on T's payment of support and, under paragraph (e)(1)(i) of this section, a written declaration must be unconditional. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of S or T for 2009 as well as 2011 is determined under section 152(c) or (d).

Example 17. (i) U and V are the divorced parents of Child. Child resides with U for more nights than with V in 2009 through 2011. In 2009, U provides a written statement to V declaring that U will not claim Child as a dependent, but the statement does not specify the year or years it is effective. V attaches the statement to V's returns for 2009 through 2011.

(ii) Because the written statement does not specify a year or years, under paragraph (e)(1) of this section, it is not a written declaration that conforms to the substance of Form 8332. Under paragraph (e)(4) of this section, the statement has no effect. Section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of U or V is determined under section 152(c) or (d).

Example 18. (i) W and X are the divorced parents of Child. In 2009, Child resides solely with W. The divorce decree requires X to pay child support to W and requires W to execute a Form 8332 releasing W's right to claim Child as a dependent. W fails to sign a Form 8332 for 2009, and X attaches an unsigned Form 8332 to X's return for 2009.

(ii) The order in the divorce decree requiring W to execute a Form 8332 is ineffective to allocate the right to claim Child as a dependent to X. Furthermore, under paragraph (e)(1) of this section, the unsigned Form 8332 does not conform to the substance of Form 8332, and under paragraph (e)(4) of this section, the Form 8332 has no effect. Therefore, section 152(e) and this section do not apply, and whether Child is the qualifying child or qualifying relative of W or X is determined under section 152(c) or (d).

(iii) If, however, W executes a Form 8332 for 2009, and X attaches the Form 8332 to X's return, then X may claim Child as a dependent in 2009.

Example 19. (i) Y and Z are the divorced parents of Child. In 2003, Y and Z enter into a separation agreement, which is incorporated into a divorce decree, under which Y, the custodial parent, releases Y's right to claim Child as a dependent for all future years. The separation agreement satisfies the requirements for the form of a written declaration in effect at the time it is executed. Z attaches a copy of the separation agreement to Z's returns for 2003 through 2009.

(ii) Under paragraph (e)(1)(ii) of this section, a separation agreement may not serve as a written declaration. However, under paragraph (e)(5) of this section, a written declaration executed in a taxable year beginning on or before July 2, 2008, that satisfies the requirements for the form of a written declaration in effect at the time the written declaration is executed, will be treated as meeting the requirements of paragraph (e)(1) of this section. Therefore, the separation agreement may serve as the written declaration required by paragraph (b)(3)(i) of this section for 2009, and Z may claim Child as a dependent in 2009 and later years.

Example 20. (i) The facts are the same as in Example 19, except that in 2009 Y executes a Form 8332 revoking the release of Y's right to claim Child as a dependent for 2010. Y complies with all the requirements of paragraph (e)(3) of this section.

(ii) Although Y executes the separation agreement releasing Y's right to claim Child as a dependent in a taxable year beginning on or before July 2, 2008, under paragraph (e)(5) of this section, Y's execution of the Form 8332 in 2009 is effective to revoke the release. Therefore, section 152(e) and this section do not apply in 2010, and whether Child is the qualifying child or qualifying relative of Y or Z is determined under section 152(c) or (d).

(h) Effective/applicability date. This section applies to taxable years beginning after July 2, 2008.

§1.152-4T [Removed]

Par. 3. Section 1.152-4T is removed.

Linda E. Stiff

Deputy Commissioner for Services and Enforcement.

Approved: June 23, 2008

Eric Solomon

Assistant Secretary of the Treasury (Tax Policy).