

[4830-01-p]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-149856-03]

RIN 1545-BD01

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

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

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

DATES: Written or electronic comments or a request for a public hearing must be received by **[INSERT DATE 90 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to CC:PA:LPD:PR (REG-149856-03), room 5203, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to CC:PA:LPD:PR (REG-149856-03), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively,

taxpayers may submit comments electronically via the IRS internet site at www.irs.gov/regs or via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-149856-03).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Victoria Driscoll (202) 622-4920; concerning the submission of comments and/or a request for a hearing, Regina Johnson (202) 622-3175 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The IRS and the Department of the Treasury, as part of their continuing efforts to reduce paperwork and respondent burden, invite the general public to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data are provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents is properly assessed. The IRS and the Department solicit comments on the information collection request (ICR) included in this proposed regulatory action. A copy of the ICR may be obtained by contacting the OMB Unit, SE:W:CAR:MP:T:T:SP, Internal Revenue Service, Room 6406, 1111 Constitution Ave. NW., Washington, DC 20224.

The collection of information in this proposed rule is being reviewed by the Office of Management and Budget (OMB) in accordance with the Paperwork Reduction Act of 1995 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 proposed regulations is in §1.152-4(d). 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 lived apart at all times during the last six months of a calendar year. The collection of information is required to obtain a benefit. The information will be reported on IRS Form 8332. 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.

The public is invited to provide comments on this information collection, particularly comments that:

Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the IRS, including whether the information will have practical utility;

Evaluate the burden of the proposed collection of information, including how the burden on those who are to respond may be minimized, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, such as permitting electronic submission of responses; and

Enhance the quality, utility, and clarity of the information to be collected.

Comments should be sent to the Office of Information and Regulatory Affairs, OMB, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Department of the Treasury. Comments may be submitted through **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Background

This document contains proposed amendments to 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.

Under section 151, a taxpayer may deduct an exemption amount for a dependent. Section 152, as amended by section 201 of WFTRA (Pub. L. No. 108-311, 118 Stat. 1166), defines dependent in general as a qualifying child or a qualifying relative.

Section 152(c), which defines qualifying child, states that the qualifying child must have the same principal place of abode as the taxpayer for more than one-half of the taxable year. Section 152(c)(1)(B). Section 152(c)(4)(B) provides that, if both parents of a child claim the child as a qualifying child and do not file a joint return together, the child is treated as the qualifying child of the parent with whom the child resides for the longer period of time during the taxable year. If the child resides with both parents for an equal amount of time during the taxable year, the child is treated as the qualifying child of the parent with the higher adjusted gross income. As part of the definition of a qualifying relative, section 152(d)(1)(C) requires that the taxpayer provide

over one-half of the individual's support for the calendar year. The principal place of abode requirement of section 152(c)(1)(B), the tie-breaking rule of section 152(c)(4)(B), and the support rule of section 152(d)(1)(C), do not apply if section 152(e) applies.

Section 152(e), which was amended by section 404 of GOZA (Pub. L. No. 109-135, 119 Stat. 2577), provides rules for parents who (1) are divorced or legally separated under a decree of divorce or separate maintenance, (2) are separated under a written separation agreement, or (3) live apart at all times during the last 6 months of the calendar year. Under section 152(e)(1), a child of parents described in section 152(e) is treated as the qualifying child or qualifying relative of the noncustodial parent if the child receives over one-half of the child's support during the calendar year from the child's parents, the child is in the custody of one or both of the child's parents for more than one-half of the calendar year, and the requirements of section 152(e)(2) or section 152(e)(3) are met.

The requirements of section 152(e)(2) are met if the custodial parent signs a written declaration that the custodial parent will not claim a child as a dependent for a taxable year and the noncustodial parent attaches the declaration to the noncustodial parent's tax return. The requirements of section 152(e)(3) are met if a qualified pre-1985 instrument allocates the dependency exemption to the noncustodial parent and the noncustodial parent provides at least \$600 for the support of the child during the calendar year.

Section 152(e)(4) defines custodial parent as the parent having custody for the greater portion of the calendar year and noncustodial parent as the parent who is not the custodial parent.

If a child is treated as the qualifying child or qualifying relative of the noncustodial parent under section 152(e), then that parent may claim the child for purposes of the dependency deduction under section 151 and the child tax credit under section 24, if the other requirements of those provisions are met. Whether a child is a qualifying child for purposes of head of household filing status, the child and dependent care credit, or the earned income credit, is determined without regard to section 152(e). See sections 2(b)(1)(A)(i) (head of household), 21(e)(5)(dependent care credit), and 32(c)(3)(earned income credit).

The special rule of section 152(e)(1) for parents living apart during the last six months of the calendar year was added by section 423(a) of the Deficit Reduction Act of 1984 (Public Law No. 98-369, 98 Stat. 494) (the 1984 Act). The 1984 Act also amended the exceptions in section 152(e)(2). Regulations under section 152(e)(1) and (2) (§1.152-4 of the Income Tax Regulations) were published on March 20, 1971, and amended on October 15, 1971, and August 20, 1979. Temporary regulations reflecting the amendments made by the 1984 Act (§1.152-4T) were published on August 31, 1984.

Explanation of Provisions

These proposed regulations update §1.152-4 by deleting obsolete provisions, revising language to improve clarity, and incorporating the provisions of §1.152-4T. The proposed regulations also provide guidance on issues that have arisen in the administration of section 152(e).

1. Definition of Custodial Parent

Under the proposed regulations, the custodial parent is the parent with whom the child resides for the greater number of nights during the calendar year. The noncustodial parent is the parent who is not the custodial parent. The proposed regulations further provide that, if a child is temporarily absent from a parent's home for a night, the child is treated as residing with the parent with whom the child would have resided for the night. However, if the child resides with neither parent for a night, for example because another party is entitled to custody of the child for that night, the child is treated as not residing with either parent for that night. Comments are requested specifically on alternative methods of allocating nights when a child resides with neither parent and whether nights residing with neither parent should not be allocated to either parent. The proposed regulations provide a tie-breaking rule that, if a 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. Cf. section 152(c)(4)(B).

Sections 151 and 152, not state law, determine whether a divorced or separated parent may claim an exemption for a child for Federal income tax purposes. A state court order or decree does not operate to allocate the federal exemption between parents.

2. Requirements for Release of the Right to Claim a Child

Section 152(e)(2) provides that a custodial parent may release a claim to an exemption for a child by signing a written declaration (in such form and manner as the Secretary may prescribe by regulations) that he or she will not claim the child as a dependent. The noncustodial parent must attach the written declaration to the tax

return to claim a dependency exemption for the child. Section 1.152-4T, Q&A-3, states that the written declaration may be made on a form developed by the IRS. Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents, currently is used for this purpose. The temporary regulations further provide that any declaration not made on that form must conform to the substance of the form. Section 1.152-4T, Q&A-4, states that a claim to an exemption may be released for a single year, for a number of years, or for all future years, as specified in the declaration.

The proposed regulations incorporate these rules and further provide that a written declaration must include an unconditional statement that the custodial parent will not claim the child as a dependent for the specified year or years. A statement is unconditional if it does not expressly condition the custodial parent's waiver of the right to claim the child as a dependent on the noncustodial parent's meeting of an obligation such as the payment of support. The written declaration must specify the year or years for which the release is effective. A written declaration that does not specify a year or years has no effect. A written declaration that specifies all future years is treated as specifying the first taxable year after the taxable year the release is executed and all subsequent taxable years. A court order or decree may not serve as the written declaration required by section 152(e)(2).

3. Revocation of Release of Claim

The proposed regulations provide that a custodial parent who released the right to claim a child may revoke the release for future taxable years by providing written notice of the revocation to the other parent. The revocation may be made on a form designated by the IRS, such as Form 8332, which may be revised for this purpose, or

by a written declaration that conforms to the substance of that form, whether or not the release was made on the form, and must specify the year or years for which the revocation is effective. A revocation that does not specify a year or years has no effect. 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. 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. The parent revoking the release must attach the original or a copy of the revocation to the parent's tax return for any taxable year the parent 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.

4. Never Married Parents

In King v. Commissioner, 121 T.C. 24 (2003), the United States Tax Court decided that section 152(e) applies to parents who had never married each other. The parents lived apart for the years at issue, and each had claimed a dependency deduction for the same child. In concluding that the Form 8332 executed by the custodial parent released her claim to the deduction, the court determined that section 152(e)(1)(A)(iii), which refers to parents who "live apart at all times during the last 6 months of the calendar year," encompasses both married parents and parents who never married each other. The proposed regulations follow the decision in King v. Commissioner.

5. Effective Date

The regulations are proposed to apply to taxable years beginning after the date the regulations are published as final regulations in the **Federal Register**.

Special Analyses

This notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It has also been determined that 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, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written (a signed original and eight (8) copies) or electronic comments that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying. A public hearing may be scheduled if requested in writing by any person who timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the public hearing will be published in the **Federal Register**.

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.

Proposed Amendment to the Regulations

Accordingly, 26 CFR part 1 is proposed to be 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 * * *

§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 the qualifying child of the parent with whom the child resided for a longer period of time during the taxable year or, if the child resided 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 the 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)(B), and (d)(1)(C), a child is treated as the qualifying child or qualifying relative of the noncustodial parent (as defined in paragraph (c) of this section) if the requirements of paragraphs (b)(2) and (b)(3) of this section are met.

(2) Support, custody, and parental status. 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--

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

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

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

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

(i) The custodial parent signs a written declaration that the custodial parent will not claim the child as a dependent for the 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), effective for 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) Custodial parent--(1) In general. The custodial parent is the parent with whom the child resides for a greater number of nights during the calendar year, and the noncustodial parent is the parent who is not the custodial parent.

(2) Absences. For purposes of this paragraph (c), when a child resides with neither parent for a night, the child is treated as residing with the parent with whom the child would have resided for the night but for the absence. However, if the child would have resided with neither parent for a night during an absence (for example, because a court awarded custody of the child to a third party for the period of absence), the child is treated as residing with neither parent for the night of the absence.

(3) 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.

(d) Written declaration--(1) Form of declaration--(i) In general. The written declaration under paragraph (b)(3)(i) of this section must constitute the custodial parent's unconditional release of the parent's claim to the child as a dependent for the year or years for which the declaration is effective. A declaration is unconditional if it does not expressly condition the custodial parent's release of the right to claim the child as a dependent on 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 does not specify a year or years has no effect. 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. A court order or decree may not serve as the written declaration.

(ii) Form designated by IRS. A written declaration may be made on a form designated by the IRS (currently Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents). A written declaration not on the form designated by the IRS must conform to the substance of that form.

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

(3) Revocation of written declaration--(i) In general. A written declaration described in paragraph (d)(1) of this section may be revoked by providing written notice of the revocation 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 the written notice.

(ii) Form of revocation. The revocation may be made on a 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. The revocation must specify the year or years for which the revocation is effective. A revocation that does not specify a year or years has no effect. 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 custodial parent must attach the original revocation to the parent's return for the taxable year for which the custodial parent claims a child as a dependent. If a revocation is for more than one year, the custodial parent must attach the original revocation to the parent's return for the first taxable year for which the revocation is effective and a copy of the revocation to the parent's return for each subsequent taxable year for which the custodial parent claims the child as a dependent. The custodial parent must keep a copy of the revocation and evidence of delivery of written notice of the revocation to the noncustodial parent.

(e) Coordination with other sections. A child who is treated as the qualifying child or qualifying relative of the noncustodial parent under section 152(e) and this section is treated as a dependent of both parents for purposes of sections 105(b), 132(h)(2)(B), and 213(d)(5).

(f) Examples. The provisions of this section are illustrated by the following examples which assume 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, the child is in the custody of one or both parents for more than one-half of the calendar year, and the child otherwise meets the requirements of a qualifying child under section 152(c). In addition, in each of the examples, there is no qualified pre-1985 instrument in effect. The examples are as follows:

Example 1. (i) B and C, the parents of Child, are divorced. In 2007, Child resides with B for 7 months and with C for 5 months. B signs a Form 8332 for 2007 allowing C to claim Child as a dependent for that year.

(ii) Under paragraph (c) of this section, B is the custodial parent of Child in 2007 because B is the parent with whom Child resides for the greater number of nights in 2007. Because B signs a Form 8332, under paragraph (b) of this section, Child is treated as the qualifying child of C if C attaches the Form 8332 to C's 2007 return.

Example 2. (i) D and E, the parents of Child, are divorced. In 2007, Child resides with D for 7 months and with E for 5 months. D, the custodial parent, does not execute a Form 8332 or similar declaration for 2007.

(ii) Because D does not execute a Form 8332 or similar declaration for 2007, section 152(e) and this section do not apply to determine whether Child is treated as the qualifying child of D or E. Instead, whether Child is the qualifying child of D or E is determined under section 152(c).

Example 3. F and G, who never married, are the parents of Child. In 2007, Child spends alternate weeks residing with F and G. During a week when Child is residing with F, F gives Child permission to spend a night at the home of a friend. Under paragraph (c)(2) of this section, the night Child spends at the friend's home is treated as a night in which Child resides with F for purposes of determining whether Child is residing with F or G for the greater number of nights in the calendar year.

Example 4. J and K are the divorced parents of Child. In 2007, Child spends alternate periods residing with J or K. In August of 2007, J and Child spend 10 nights together in a hotel while on vacation. Under paragraph (c) of this section, the 10 nights when J and Child are on vacation are treated as nights in which Child resides with J for purposes of determining whether Child is residing with J or K for the greater number of nights in the calendar year.

Example 5. (i) In 2006, L and M, the parents of Child, execute a written separation agreement. The agreement provides that Child will live with L and that M will make monthly child support payments to L. The agreement further provides that L will not claim Child as a dependent in 2007 and in subsequent alternate years. The agreement does not expressly condition L's agreement not to claim Child as a dependent on M's payment of child support or any other condition. The agreement contains all the other information requested on Form 8332. M attaches the agreement to M's tax returns for 2007 and 2009.

(ii) In 2008, M fails to provide child support for Child, and L signs a Form 8332 revoking the release of L's right to claim Child as a dependent for 2009 and delivers a copy of the Form 8332 to M. L attaches the Form 8332 revoking the release to L's tax return for 2009 and keeps a copy of the revocation and evidence of delivery of written notice to M.

(iii) M may claim Child as a qualifying child for 2007 because L releases the right to claim Child as a dependent under paragraph (b)(3) of this section by executing the separation agreement, and M attaches the separation agreement to M's tax return in

accordance with paragraphs (d)(1) and (d)(2) of this section. The separation agreement qualifies as a written declaration under paragraph (d)(1) of this section because L's agreement not to claim Child as a dependent is not conditioned on M's payment of support or meeting of any other obligation, and the agreement otherwise conforms to the substance of Form 8332. For 2009, only L may claim Child as a qualifying child because in 2008 L revokes the release of the claim in accordance with paragraph (d)(3) of this section, and the revocation takes effect in 2009, the taxable year that begins in the first calendar year after L provides written notice of the revocation to M.

Example 6. The facts are the same as Example 5, except that the agreement expressly states that L agrees not to claim Child as a dependent only if M is current in the payment of support for Child at the end of the calendar year. The separation agreement does not qualify as a written declaration under paragraph (d)(1) of this section because L's agreement not to claim Child as a dependent is conditioned on M's payment of support. Therefore, M may not claim Child as a qualifying child in 2007 or 2009.

Example 7. (i) N and P are the divorced parents of Child. Child resides with N for ten months and with P for two months in each year 2007 through 2009. In 2007, N provides a written statement to P that provides that N will not claim Child as a dependent but does not specify a year or years. P attaches the statement to P's returns for 2007 through 2009.

(ii) Because the written statement provided by N does not specify the year or years for which P may claim Child as a qualifying child, under paragraph (d)(1) of this section, the written statement is not a written declaration that conforms to the substance of Form 8332. Therefore, P may not claim Child as a qualifying child in 2007 through 2009.

Example 8. (i) R and S are the divorced parents of Child. Child resides solely with R. The divorce decree requires S to pay child support to R and requires R to execute a Form 8332 to release the right to claim Child as a qualifying child to S. R fails to sign a Form 8332 for 2007, and S attaches an unsigned Form 8332 to S's return for 2007.

(ii) Child is the qualifying child of R for 2007. The order in the divorce decree requiring R to execute a Form 8332 is ineffective to allocate the right to claim Child as a qualifying child to S. Furthermore, under paragraph (d)(1) of this section, the unsigned Form 8332 does not conform to the substance of Form 8332. Therefore, S may not claim Child as a qualifying child in 2007.

(iii) If, however, R executes a Form 8332 for 2007 and S attaches the Form 8332 to S's return, then S may claim Child as a qualifying child for 2007 under paragraph (d)(1) of this section.

(g) Effective date. This section applies to taxable years beginning after the date these regulations are published as final regulations in the **Federal Register**.

Deputy Commissioner for Services and Enforcement.