**Who gets the dependency exemption?**

**Dependency Exemption.**

**Section 423 of the 1984 Amendments to the Internal Revenue Code, entitled "Dependency Exemption in the Case of the Child of Divorced Parents, Etc." amended $ 152(e) of the Internal Revenue Code to provide for taxable years beginning after 1984, that the custodial parent is entitled to the dependency exemption in all cases unless he or she expressly waives in writing the right to claim it. The Tax Reform Act of 1984 ("1984 Act") (PL 98-369) $ 423, amending IRC $ 152. In Bennett v Bennett (1988, 2d Dept) 140 App Div 2d 400, 528 NYS2d 103, the Appellate Division affirmed that part of an Order of Supreme Court that denied the husband's motion to modify the judgment by awarding him a tax exemption for the child of the marriage and changing the provision directing him to maintain life insurance for the son and awarded counsel fees to the wife. Under the Tax Reform Act only the custodial parent is entitled to claim a child as a dependent unless a written declaration is signed by that parent.**

**However, see Mahon v Mahon (1987, 2d Dept) 129 App Div 2d 684, 514 NYS2d 446; Madori v Madori, NYLJ, May 13, 1991, p. 33, col. 2 (Sup. Ct., Westchester Co.) (Donovan, J.) where the court awarded the tax dependency exemption to the payor spouse.**

**The Internal Revenue Code now provides that if a child receives over half of his support during the calendar year from his parents, who are divorced or are legally separated under a decree of divorce or separate maintenance, who are separated under a written separation agreement, or who live apart at all times during the last 6 months of the calendar year, and if the child is in the custody of one or both of his parents more than half of the calendar year, the child is treated as receiving more than half of his support during the calendar year from the parent having custody for a greater portion of the calendar year. However, such a child will be treated as having received more than half of his support during a calendar year from the noncustodial parent if 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 such calendar year, and the noncustodial parent attaches the written declaration to the noncustodial parent's return for the year beginning such calendar year.**

**The 1984 amendment does not apply in the case of multiple support agreements.**

**The 1984 amendment established a new general rule that provides that to determine whether a parent has contributed more than half of the child support during a calendar year, support furnished by a remarried parent's spouse is to be treated as furnished by that parent. The only way that a noncustodial parent may claim an exemption for a child after 1984 is for the custodial parent to waive his or her right to the exemption in writing.**

**The general rule does not apply (i) if a multiple support agreement is in effect. See IRC $ 152(c). (ii) if a decree or agreement executed prior to January 1, 1985 provides that the custodial parent has agreed to release his or her claim to the dependency exemption to the noncustodial parent, and the noncustodial parent provides at least $600 of support to the child; See IRC $ 152(e)(4).or (iii) if the custodial parent relinquishes the exemption. Reg. $ 1.152-4T, Q-2.**

**A noncustodial parent may claim the exemption for a dependent child only if the noncustodial parent attaches to his/her income tax return for the year of the exemption a written declaration from the custodial parent stating that he/she will not claim the child as a dependent for the taxable year beginning in such calendar year. Reg. $ 1.152-4T, Q-2. IRS form 8332 may be used for this purpose.**

**The exemption may be released for a single year, for a number of specified years (for example, alternate years), or for all future years, as specified in the declaration. If the exemption is released for more than one year, the original release must be attached to the return of the noncustodial spouse and a copy of such release must be attached to his/her return for each succeeding taxable year for which he/she claims the dependency exemption. Reg. $ 1.152-4T, Q-4.**

**Custodial Parent.**

**Neither the Internal Revenue Code nor the regulations issued since 1984 define the word custody or custodial parent. However, the regulations in effect prior to the 1984 Act define the custodial parent as that parent designated as such in the most recent divorce decree, decree of separate maintenance, written separation agreement or court order. Where there is joint custody or where legal custody of the child is not determined by a court, the custodial parent, for purposes of the dependency exemption, is the parent who has physical custody of the child for the greater portion of the year. Reg. $ 1.152-4(b).**