



Consistency Begins with 2005 1040s—Uniform Definition of a Child
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Tax returns filed for tax year 2005 will be the first ones where the new uniform definition of a child applies that was enacted as part of the *Working Families Tax Relief Act of 2004*, a bill that was overshadowed for most tax professionals by the higher profile *American Jobs Creation Act of 2004* that was enacted shortly after this bill.

This week we review exactly what this means, as well as look at the potential impact. While in most cases we'll arrive at the same result under the old and new law, there are some potential "gotchas" that you will need to be aware of.

Uniform Definition of a Child

(Act Section 201, IRC §152) Congress attempted to clarify and standardize the definition of a child under the Internal Revenue Code. In doing so, Congress also made some subtle, but important changes to the system used for a noncustodial parent to be able to claim a child as a dependent. These rules are first effective for 2005.

Under the new law, there are two types of dependent—a qualifying child and a qualifying relative (who may not be a relative or could even be the taxpayer's child, but then such

definitions are nothing new in the tax law). The first test is for a qualifying child, who is a person that meets the following five tests

1. Relationship—the individual must be a child of the taxpayer or a descendant of such a child, a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative
2. Age—has not attained the age of 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, or is a student who has not attained the age of 24 as of the close of such calendar year
3. Principal residence—has the same principal place of abode as the taxpayer for more than one-half of such taxable year
4. Support—the person has not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins.

The gross income test is eliminated for a qualifying child.

If the individual meets the definition of a qualifying child for more than one person, the tie is broken by reference to the following tie breakers. You apply them in order—once the tie is broken you stop the analysis:

1. If the parents are one of the class of individuals that meet the test for an eligible child, then the parent(s) get the exemption
2. If the parents file separately, the parent with whom the child resided with the longest period of time gets to claim the exemption
3. If the tie is still not broken, then the eligible individual with the highest adjusted gross income claims the child

Note that this tiebreaker could create special problems for married couples filing separate returns—in that case, assuming the couple lived together the entire year (so that the children resided with both the same period of time), the higher earning spouse will end up with all of the dependency exemptions—even if that is not a very effective tax result.¹ However, the literal language of §152(c)(4) indicates that the tiebreaker applies if two parents both claim the exemption—meaning, apparently, that if only one actually claims it, then they may be able to assign the exemption, at least if the IRS interprets this provision similarly to how they interpreted the issue of claiming the deduction for the purpose of §25A (the education credits).

For divorced parents, there is still the ability to assign the exemption to the noncustodial parent (that is, the loser under test 2 above). But how that is done was to have been

¹ While for many preparers this may seem like an unlikely problem, there are some states that provide a break for many couples if they file separately, but require they file using the same status as the federal return. The state of Ohio is the best known example of such a state. For individuals in that situation, this law change may have a significant impact on their decision as the federal penalty for filing separate may be increased by this change in the law.

changed slightly under the new law, until Congress removed the change in the *Gulf Opportunity Zone Act of 2005*, with a retroactive effective date back to the original passage of the original law. The law was to have provided for post-1985 agreements (which will be the vast majority of those we'd be concerned about 20 years later):

152(e)(2)(A) a decree of divorce or separate maintenance or written separation agreement between the parents applicable to the taxable year beginning in such calendar year provides that --

(i) the noncustodial parent shall be entitled to any deduction allowable under section 151 for such child, or

(ii) the custodial parent will sign a written declaration (in such manner and form as the Secretary may prescribe) that such parent will not claim such child as a dependent for such taxable year...

The law would have provided that either the written declaration (Form 8332) or a divorce decree standing alone will cause the exemption to be transferred away from the custodial parent.

However, Congress had second thoughts on this one, and have now returned the law to something very similar to the old law (and raises our interest level in the analysis found in the *Oman* decision²). The newly revised §152(e)(2) reads:

152(e)(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR. --For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if --

(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

Practitioners should counsel clients that will be the noncustodial parent and who expects to receive the dependency exemption to assure that the decree requires the custodial

2 TC Summary 2005-110. Though it is a summary opinion, and therefore cannot be cited as precedent, it does show that in at least one case a taxpayer was able to persuade the Tax Court that a divorce decree by itself worked to release the exemption. However, note that the facts in this case were rather unique and put the taxpayer in a very sympathetic position (and his former spouse in a much less sympathetic light). There is an earlier podcast on this case you can download at http://ezollars.libsyn.com/index.php?post_id=18046. Just ignore the discussion of the new law, since, as noted above, Congress asked for a “do over” on this one.

parent to execute the Form 8332, since that test is very easy to demonstrate compliance with.

The references to a child for head of household filing status under §2(b)(1)(A)(i) have been updated to reference the qualifying child definitions.

The dependent care credit under §21 are modified as follows:

- if all other requirements are met, a taxpayer may claim the credit for a qualifying individual who lived with the taxpayer over ½ of the year even if he/she does not provide over ½ of the support for the qualifying individual
- a disabled dependent or spouse of the taxpayer will have to have the same principal residence as the taxpayer claiming the credit for more than ½ of the tax year and the living arrangement cannot be in violation of local law

The child credit uses the uniform definition of a child used for dependency purposes, except that the requirement the child be under 17 remains for this credit.

The earned income credit has been modified to now reference the uniform definition of a child for dependency purposes with two significant differences. First, for earned income credit purposes, the requirement that the child not provide over ½ of his/her own support is eliminated. Second, if the custodial parent has released the exemption, the child is a qualifying child of the custodial parent for earned income credit purposes.

Appendix—IRC Section 152

SEC. 152. DEPENDENT DEFINED.

152(a) IN GENERAL. —For purposes of this subtitle, the term “dependent” means —

152(a)(1) a qualifying child, or

152(a)(2) a qualifying relative.

152(b) EXCEPTIONS. —For purposes of this section —

152(b)(1) DEPENDENTS INELIGIBLE. —If an individual is a dependent of a taxpayer for any taxable year of such taxpayer beginning in a calendar year, such individual shall be treated as having no dependents for any taxable year of such individual beginning in such calendar year.

152(b)(2) MARRIED DEPENDENTS. —An individual shall not be treated as a dependent of a taxpayer under subsection (a) if such individual has made a joint return with the individual's spouse under [section 6013](#) for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.

152(b)(3) CITIZENS OR NATIONALS OF OTHER COUNTRIES. —

152(b)(3)(A) IN GENERAL. —The term “dependent” does not include an individual who is not a citizen or national of the United States unless such individual is a resident of the United States or a country contiguous to the United States.

152(b)(3)(B) EXCEPTION FOR ADOPTED CHILD. —Subparagraph (A) shall not exclude any child of a taxpayer (within the meaning of subsection (f)(1)(B)) from the definition of “dependent” if —

152(b)(3)(B)(i) for the taxable year of the taxpayer, the child has the same principal place of abode as the taxpayer and is a member of the taxpayer's household, and

152(b)(3)(B)(ii) the taxpayer is a citizen or national of the United States.

152(c) QUALIFYING CHILD. —For purposes of this section —

152(c)(1) IN GENERAL. —The term “qualifying child” means, with respect to any taxpayer for any taxable year, an individual —

152(c)(1)(A) who bears a relationship to the taxpayer described in paragraph (2),

152(c)(1)(B) who has the same principal place of abode as the taxpayer for more than one-half of such taxable year,

152(c)(1)(C) who meets the age requirements of paragraph (3), and

152(c)(1)(D) who has not provided over one-half of such individual's own support for the

calendar year in which the taxable year of the taxpayer begins.

152(c)(2) RELATIONSHIP. —For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if such individual is —

152(c)(2)(A) a child of the taxpayer or a descendant of such a child, or

152(c)(2)(B) a brother, sister, stepbrother, or stepsister of the taxpayer or a descendant of any such relative.

152(c)(3) AGE REQUIREMENTS. —

152(c)(3)(A) IN GENERAL. —For purposes of paragraph (1)(C), an individual meets the requirements of this paragraph if such individual —

152(c)(3)(A)(i) has not attained the age of 19 as of the close of the calendar year in which the taxable year of the taxpayer begins, or

152(c)(3)(A)(ii) is a student who has not attained the age of 24 as of the close of such calendar year.

152(c)(3)(B) SPECIAL RULE FOR DISABLED. —In the case of an individual who is permanently and totally disabled (as defined in [section 22\(e\)\(3\)](#)) at any time during such calendar year, the requirements of subparagraph (A) shall be treated as met with respect to such individual.

152(c)(4) SPECIAL RULE RELATING TO 2 OR MORE CLAIMING QUALIFYING CHILD. —

152(c)(4)(A) IN GENERAL. —Except as provided in subparagraph (B), if (but for this paragraph) an individual may be and is claimed as a qualifying child by 2 or more taxpayers for a taxable year beginning in the same calendar year, such individual shall be treated as the qualifying child of the taxpayer who is —

152(c)(4)(A)(i) a parent of the individual, or

152(c)(4)(A)(ii) if clause (i) does not apply, the taxpayer with the highest adjusted gross income for such taxable year.

152(c)(4)(B) MORE THAN 1 PARENT CLAIMING QUALIFYING CHILD. —If the parents claiming any qualifying child do not file a joint return together, such child shall be treated as the qualifying child of —

152(c)(4)(B)(i) the parent with whom the child resided for the longest period of time during the taxable year, or

152(c)(4)(B)(ii) if the child resides with both parents for the same amount of time during such taxable year, the parent with the highest adjusted gross income.

152(d) QUALIFYING RELATIVE. —For purposes of this section —

152(d)(1) IN GENERAL. —The term “qualifying relative” means, with respect to any taxpayer for any taxable year, an individual —

152(d)(1)(A) who bears a relationship to the taxpayer described in paragraph (2),

152(d)(1)(B) whose gross income for the calendar year in which such taxable year begins is less than the exemption amount (as defined in [section 151\(d\)](#)),

152(d)(1)(C) with respect to whom the taxpayer provides over one-half of the individual's support for the calendar year in which such taxable year begins, and

152(d)(1)(D) who is not a qualifying child of such taxpayer or of any other taxpayer for any taxable year beginning in the calendar year in which such taxable year begins.

152(d)(2) RELATIONSHIP. —For purposes of paragraph (1)(A), an individual bears a relationship to the taxpayer described in this paragraph if the individual is any of the following with respect to the taxpayer:

152(d)(2)(A) A child or a descendant of a child.

152(d)(2)(B) A brother, sister, stepbrother, or stepsister.

152(d)(2)(C) The father or mother, or an ancestor of either.

152(d)(2)(D) A stepfather or stepmother.

152(d)(2)(E) A son or daughter of a brother or sister of the taxpayer.

152(d)(2)(F) A brother or sister of the father or mother of the taxpayer.

152(d)(2)(G) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

152(d)(2)(H) An individual (other than an individual who at any time during the taxable year was the spouse, determined without regard to [section 7703](#), of the taxpayer) who, for the taxable year of the taxpayer, has the same principal place of abode as the taxpayer and is a member of the taxpayer's household.

152(d)(3) SPECIAL RULE RELATING TO MULTIPLE SUPPORT AGREEMENTS. —For purposes of paragraph (1)(C), over one-half of the support of an individual for a calendar year shall be treated as received from the taxpayer if —

152(d)(3)(A) no one person contributed over one-half of such support,

152(d)(3)(B) over one-half of such support was received from 2 or more persons each of whom, but for the fact that any such person alone did not contribute over one-half of such support, would have been entitled to claim such individual as a dependent for a taxable year beginning in such

calendar year,

152(d)(3)(C) the taxpayer contributed over 10 percent of such support, and

152(d)(3)(D) each person described in subparagraph (B) (other than the taxpayer) who contributed over 10 percent of such support files a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such person will not claim such individual as a dependent for any taxable year beginning in such calendar year.

152(d)(4) SPECIAL RULE RELATING TO INCOME OF HANDICAPPED DEPENDENTS. —

152(d)(4)(A) IN GENERAL. —For purposes of paragraph (1)(B), the gross income of an individual who is permanently and totally disabled (as defined in [section 22\(e\)\(3\)](#)) at any time during the taxable year shall not include income attributable to services performed by the individual at a sheltered workshop if —

152(d)(4)(A)(i) the availability of medical care at such workshop is the principal reason for the individual's presence there, and

152(d)(4)(A)(ii) the income arises solely from activities at such workshop which are incident to such medical care.

152(d)(4)(B) SHELTERED WORKSHOP DEFINED. —For purposes of subparagraph (A), the term “sheltered workshop” means a school —

152(d)(4)(B)(i) which provides special instruction or training designed to alleviate the disability of the individual, and

152(d)(4)(B)(ii) which is operated by an organization described in [section 501\(c\)\(3\)](#) and exempt from tax under [section 501\(a\)](#), or by a State, a possession of the United States, any political subdivision of any of the foregoing, the United States, or the District of Columbia.

152(d)(5) SPECIAL RULES FOR SUPPORT. —For purposes of this subsection —

152(d)(5)(A) payments to a spouse which are includible in the gross income of such spouse under [section 71](#) or [682](#) shall not be treated as a payment by the payor spouse for the support of any dependent, and

152(d)(5)(B) in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

152(e) SPECIAL RULE FOR DIVORCED PARENTS, ETC. —

152(e)(1) IN GENERAL. —Notwithstanding subsection (c)(1)(B), (c)(4), or (d)(1)(C), if —

152(e)(1)(A) a child receives over one-half of the child's support during the calendar year from the child's parents —

152(e)(1)(A)(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

152(e)(1)(A)(ii) who are separated under a written separation agreement, or

152(e)(1)(A)(iii) who live apart at all times during the last 6 months of the calendar year, and

152(e)(1)(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year, such child shall be treated as being the qualifying child or qualifying relative of the noncustodial parent for a calendar year if the requirements described in paragraph (2) or (3) are met.

152(e)(2) EXCEPTION WHERE CUSTODIAL PARENT RELEASES CLAIM TO EXEMPTION FOR THE YEAR. —For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if —

152(e)(2)(A) the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent for any taxable year beginning in such calendar year, and

152(e)(2)(B) the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year.

152(e)(3) EXCEPTION FOR CERTAIN PRE-1985 INSTRUMENTS. —

152(e)(3)(A) IN GENERAL. —For purposes of paragraph (1), the requirements described in this paragraph are met with respect to any calendar year if —

152(e)(3)(A)(i) a qualified pre-1985 instrument between the parents applicable to the taxable year beginning in such calendar year provides that the noncustodial parent shall be entitled to any deduction allowable under [section 151](#) for such child, and

152(e)(3)(A)(ii) the noncustodial parent provides at least \$600 for the support of such child during such calendar year.

For purposes of this subparagraph, amounts expended for the support of a child or children shall be treated as received from the noncustodial parent to the extent that such parent provided amounts for such support.

152(e)(3)(B) QUALIFIED PRE-1985 INSTRUMENT. —For purposes of this paragraph, the term “qualified pre-1985 instrument” means any decree of divorce or separate maintenance or written agreement

152(e)(3)(B)(i) which is executed before January 1, 1985,

152(e)(3)(B)(ii) which on such date contains the provision described in subparagraph (A)(i), and

152(e)(3)(B)(iii) which is not modified on or after such date in a modification which expressly provides that this paragraph shall not apply to such decree or agreement.

152(e)(4) CUSTODIAL PARENT AND NONCUSTODIAL PARENT. —For purposes of this subsection —

152(e)(4)(A) CUSTODIAL PARENT. —The term “custodial parent” means the parent having custody for the greater portion of the calendar year.

152(e)(4)(B) NONCUSTODIAL PARENT. —The term “noncustodial parent” means the parent who is not the custodial parent.

152(e)(5) EXCEPTION FOR MULTIPLE-SUPPORT AGREEMENT. —This subsection shall not apply in any case where over one-half of the support of the child is treated as having been received from a taxpayer under the provision of subsection (d)(3).

152(e)(6) SPECIAL RULE FOR SUPPORT RECEIVED FROM NEW SPOUSE OF PARENT. —For purposes of this subsection, in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

152(f) OTHER DEFINITIONS AND RULES. —For purposes of this section —

152(f)(1) CHILD DEFINED. —

152(f)(1)(A) IN GENERAL. —The term “child” means an individual who is —

152(f)(1)(A)(i) a son, daughter, stepson, or stepdaughter of the taxpayer, or

152(f)(1)(A)(ii) an eligible foster child of the taxpayer.

152(f)(1)(B) ADOPTED CHILD. —In determining whether any of the relationships specified in subparagraph (A)(i) or paragraph (4) exists, a legally adopted individual of the taxpayer, or an individual who is lawfully placed with the taxpayer for legal adoption by the taxpayer, shall be treated as a child of such individual by blood.

152(f)(1)(C) ELIGIBLE FOSTER CHILD. —For purposes of subparagraph (A)(ii), the term “eligible foster child” means an individual who is placed with the taxpayer by an authorized placement agency or by judgment, decree, or other order of any court of competent jurisdiction.

152(f)(2) STUDENT DEFINED. —The term “student” means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins —

152(f)(2)(A) is a full-time student at an educational organization described in [section 170\(b\)\(1\)\(A\)\(i\)](#), or

152(f)(2)(B) is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational organization described in [section 170\(b\)\(1\)\(A\)\(ii\)](#) or of a State or political subdivision of a State.

152(f)(3) DETERMINATION OF HOUSEHOLD STATUS. —An individual shall not be treated as a member of the taxpayer's household if at any time during the taxable year of the taxpayer the relationship between such individual and the taxpayer is in violation of local law.

152(f)(4) BROTHER AND SISTER. —The terms “brother” and “sister” include a brother or sister by the half blood.

152(f)(5) SPECIAL SUPPORT TEST IN CASE OF STUDENTS. —For purposes of subsections (c)(1)(D) and (d)(1)(C), in the case of an individual who is —

152(f)(5)(A) a child of the taxpayer, and

152(f)(5)(B) a student,

amounts received as scholarships for study at an educational organization described in [section 170\(b\)\(1\)\(A\)\(ii\)](#) shall not be taken into account.

152(f)(6) TREATMENT OF MISSING CHILDREN. —

152(f)(6)(A) IN GENERAL. —Solely for the purposes referred to in subparagraph (B), a child of the taxpayer —

152(f)(6)(A)(i) who is presumed by law enforcement authorities to have been kidnapped by someone who is not a member of the family of such child or the taxpayer, and

152(f)(6)(A)(ii) who had, for the taxable year in which the kidnapping occurred, the same principal place of abode as the taxpayer for more than one-half of the portion of such year before the date of the kidnapping,

shall be treated as meeting the requirement of subsection (c)(1)(B) with respect to a taxpayer for all taxable years ending during the period that the child is kidnapped.

152(f)(6)(B) PURPOSES. —Subparagraph (A) shall apply solely for purposes of determining —

152(f)(6)(B)(i) the deduction under [section 151\(c\)](#) ,

152(f)(6)(B)(ii) the credit under [section 24](#) (relating to child tax credit),

152(f)(6)(B)(iii) whether an individual is a surviving spouse or a head of a household (as such terms are defined in [section 2](#)), and

152(f)(6)(B)(iv) the earned income credit under [section 32](#).

152(f)(6)(C) COMPARABLE TREATMENT OF CERTAIN QUALIFYING RELATIVES. —For purposes of this section, a child of the taxpayer —

152(f)(6)(C)(i) who is presumed by law enforcement authorities to have been kidnapped by

someone who is not a member of the family of such child or the taxpayer, and

152(f)(6)(C)(ii) who was (without regard to this paragraph) a qualifying relative of the taxpayer for the portion of the taxable year before the date of the kidnapping,

shall be treated as a qualifying relative of the taxpayer for all taxable years ending during the period that the child is kidnapped.

152(f)(6)(D) TERMINATION OF TREATMENT. —Subparagraphs (A) and (C) shall cease to apply as of the first taxable year of the taxpayer beginning after the calendar year in which there is a determination that the child is dead (or, if earlier, in which the child would have attained age 18).

152(f)(7) CROSS REFERENCES. —

152(f)(7) For provision treating child as dependent of both parents for purposes of certain provisions, see [sections 105\(b\)](#), [132\(h\)\(2\)\(B\)](#), and [213\(d\)\(5\)](#).