Office of Chief Counsel
Internal Revenue Service

memorandum

CC:SB/SE:DEN:2:TL-N-1431-01
SJBarkley

date:

to: Susan Cunningham, Appeals Team Manager

from: Associate Area Counsel (SB/SE), Denver

Subject: Validity of Form 8332
Taxpayer: [redacted]

This responds to your request for advice as to whether Form 8332, Release of Claim to Exemption for Child of Divorced or Separated Parents is valid where the signature of the custodial parent on the Form 8332 is made by the Clerk of the [redacted] County District Court acting pursuant to the authority contained in Rule 70 of the Colorado Rules of Civil Procedure.

As we understand the facts, taxpayers [redacted] and [redacted] (hereinafter "taxpayer") claimed 3 exemptions on their [redacted] federal income tax return as non-custodial parents of children of taxpayer [redacted] from a prior marriage. This was consistent with the order of the divorce court dated [redacted]. Nevertheless, taxpayer's former spouse (hereinafter "spouse") claimed these exemptions on her own [redacted] federal income tax return as custodial parent. Taxpayer did not attach Form 8332 to the [redacted] tax return.

Taxpayer is now at appeals contesting the disallowance of the exemptions. He has presented a Form 8332, dated [redacted], which is executed on behalf of spouse by the Clerk of Court apparently pursuant to Rule 70 of the Colorado Rules of Civil Procedure. That rule provides as follows:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment against the property of the disobedient party to compel obedience to the judgment. The court may also in

> proper cases adjudge the party in contempt. If real or personal property is within the district, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in the form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

It appears that the Court had the authority to order the Form 8332 to be signed by the Clerk of the Court on behalf of taxpayer's former spouse.

But the inquiry does not stop there. The question of intent must be carefully examined. In a relatively recent case, the Tax Court ruled that "[s]atifying the signature requirement is critical to the successful release of the dependency exemption within the meaning of section 152(e)(2)." Miller v. Commissioner, 114 T.C. 184, 190 (2000). The court went on to say this: "The signature requirement of section 152(e) demands more than simply an acknowledgment regarding form; the signature of the custodial parent must confirm the custodial parent's intention to release the dependency exemption to the noncustodial parent and signify her agreement not to claim the dependency exemption herself." 114 T.C. at 193. Thus, the noncustodial parent must intend to waive the exemption. Since in this case, the noncustodial parent has refused to sign the waiver, even in the face of a court order, she obviously does not intend to waive the exemption. Also, according to the court, signing the form signifies the custodial parent's agreement not to claim the exemption. We believe that is what the Service is looking for - not a way to decide between competing claims, but a way to avoid completing claims altogether. If a custodial parent actually signs the form, then it's not likely he or she will then claim the exemption.

In this case, we believe that the custodial parent also claimed the exemptions despite having been ordered to sign the Form 8332 and despite the fact that the Clerk of the District Court signed the Form on her behalf pursuant to Rule 70 of the Colorado Rules of Civil Procedure. Consequently, we do not believe the signature of the Clerk of the District Court can serve to confirm the custodial parent's intention to release the dependency exemption to the noncustodial parent and signify her agreement not to claim the dependency exemption herself. Miller v. Commissioner, 114 T.C. 184, 193 (2000). There was no intent on the part of the custodial parent in this case to release her claim to the exemptions for the three children to the noncustodial parent.

Please contact attorney Sara J. Barkley at 844-2214, Ext. 265 if you should have any questions.

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