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## **Divorce, Child Custody and Taxes**

A frequent question for parents involved in a divorce or child custody dispute is which parent is going to claim the IRS tax exemption for the children. The issue is typically dictated by issues of child custody and child support.

The New Mexico courts will generally follow the IRS rules regarding the exemption, which can be somewhat complicated. Generally, the custodial parent is entitled to claim the tax exemption for a dependent child. The IRS defines the custodial parent as the parent with whom the child lived for the greater part of the tax year, which makes the other parent the non-custodial parent.

However, a noncustodial parent can be allowed to claim the exemption for a dependant child if all of the following circumstances exist: 1) the child must receive more than half of his support for the tax year from one or both of the parents (i.e. TANF does not count as support by the parents); 2) the child must be in the custody of one or both of the parents for more than half of the year; and 3) either the custodial parent agrees not to claim the child or the parties have a written divorce or separation document entered prior to 1985 granting the non-custodial parent the right to claim the child.

Thus, if the parties agree, they can enter into an agreement as to who claims the tax exemption. There are many variables that go into the decision to allow the non-custodial parent to take the exemption including the income of the parties, child support and perhaps most importantly, the parties ability to make rational financial decisions despite the stresses of a divorce.

Assuming the custodial parent agrees, the non-custodial parent may claim the exemption. In the case of a single child, parents often agree to alternate claiming the child every other year. If the parents have more than one child, they may agree that each claim a specific child in order to both benefit from the tax exemption.

However, it advisable to consult with an experienced family law attorney when drafting such a agreements so that the proper language required by the IRS is included in the divorce pleadings or parenting plan and so that the proper IRS forms are completed every year.

### **DISCLAIMER**

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