

# Eligibility for tax allowance for child if parents live separately 2/3/23



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Family disputes are often a complicated emotional process affecting several areas of law. One of the questions that parents living separately often disagree on is who is eligible for statutory tax allowances for a child in their custody. The answer is not so clear-cut, yet the case law sheds light on criteria to be assessed.

## The regulatory framework

Section 177 of the Civil Code states that the parents have custody of a child until they reach majority. Custody is the parents' right and obligation to care for the child and their property and to represent the child in their personal and financial relations. Section 178 of the Civil Code states that if the parents live separately, their joint custody continues. Care and supervision are carried out by the parent with whom the child lives. Matters that may substantially affect the child's development are decided by the parents jointly. Accordingly, the parent with whom the child does not live daily still has the right and obligation to care for them.

Section 13(3.2) of the Personal Income Tax (PIT) Act states that the allowance for maintaining a minor child is awarded to the taxpayer that has separate single-parent custody under a parental agreement or a court ruling. If the parents have joint custody and are unable to agree on which of them is eligible for the dependant allowance, this will be awarded to the taxpayer/parent that is named in the operative part of a ruling made by the Orphans' Court on the settlement of a parental disagreement.

So, apart from the settled question of awarding the allowance to the parent with separate single-parent custody, in other cases of joint custody, both parents (including divorced) have equal rights to claim the child maintenance allowance. The parents may mutually agree on which of them will claim this. Over time, if the situation changes, the parent having previously signed up as the recipient of the allowance may voluntarily give up this right in the other parent's favour. If the parents have joint custody and are unable to agree on which of them should claim the child allowance, this dispute will be decided by the Orphans' Court.

## Criteria to be assessed

For parents living separately, the Orphans' Courts tend to award the allowance to the parent with whom the child lives. In hearing disputes over this issue, the courts have adhered to the conclusion that the parent with whom the child lives and who cares for them daily, always incurs greater expenses compared with the other parent. So the parent with whom the child lives is the one that needs additional support in the form of a tax allowance.

At the same time, the Supreme Court's case law implies that the goal of awarding the child allowance under section 13(3.2) of the PIT Act is to ensure the parent is left with more available funds to use for child maintenance and satisfy the child's needs. The beneficiary of the allowance is the child, so the funds

acquired in this way should be applied towards the child's needs, rather than improving the parent's financial position. The decision to award the allowance must be made in the child's best interests and it must be ascertained which of the parents will make the best use of funds coming from the allowance to fulfil the child's needs. The fact that the child lives with a parent and that parent carries out (which does not always mean paying for) childcare, cannot be the only circumstance to be considered when it comes to finding out which of the parents should receive the child allowance. We should also bear in mind that this approach would not always secure the child's best interests. That would be the case, for instance, where the parent with whom the child lives and who carries out daily childcare is not a PIT payer and is therefore unable to claim the allowance, or where two or more children live with a parent but the parent's low income prevents them from claiming allowances for all the children.

The Supreme Court has stated that life situations and ways parents take care of child maintenance may vary widely. This includes cases where the child lives with one parent, while child maintenance expenses are basically paid by the other parent. So, even though the parent with whom the child lives is the one that actually carries out daily childcare, the other parent incurs expenses to supply that care. There may also be cases where the child lives with each parent alternatively for an equal amount of time, with both parents doing childcare equally.

So each case where the parents have joint custody and are unable to agree on the tax allowance award should be assessed on its merits, considering information on the parents' income, amounts paid in child maintenance and maintenance expenses, as well as the role of parents in raising, educating and socialising their children. Assessing all these circumstances may lead to the conclusion as to which parent spends more on childcare and to correctly decide on the more useful award of the tax allowance to ensure the resulting extra funds are used more efficiently to meet the child's needs.