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# TAXES

## Claiming Exemptions and Taking Deductions



### Can I be required by the court to file a joint tax return with my spouse?

Authorities are split on this question. Depending on the state or jurisdiction in which you are getting divorced, the court may or may not have the discretion to order you to file a joint tax return with your spouse. Indeed, while some state courts have determined that the court has the discretion to order spouses to file joint tax returns (e.g. New Jersey, Ohio, Colorado, Arkansas, New Hampshire, Kentucky, Minnesota, and Michigan), others have determined that the court does not have such discretion (e.g. Nebraska, New York, Connecticut, Oregon, and the District of Columbia). Should this issue arise in your divorce, you should consult with your attorney for a determination as to whether your state has conferred such discretion on the court.

### If my spouse consented to sign a joint tax return and later refuses to do so, what can I do?

While the answer to this question may also depend on where you are getting divorced, you will nevertheless have recourse regardless of where you live. If you reside in a state where the court has the discretion to require spouses to file a joint return, you may seek a court order compelling your spouse to sign the joint return. Alternatively, if you reside in a state where the court does not have such authority and you are forced to file a separate return, you may seek a court order compensating you for any additional tax liability incurred as a result of your spouse's refusal to comply with his or her previous agreement to file jointly.

### If I am forced to file a joint return, will I be jointly liable with my spouse?

Yes, income tax liability arising from a jointly filed tax return results in both spouses being jointly and severally liable for the taxes owed. In other words, the IRS (or local taxing authority) can seek payment from either spouse, regardless of who actually earned the income. Having said that, parties can always negotiate, or a court can order, how a joint tax liability is to be divided between the parties.

### Can the ten-percent penalty imposed for early withdrawal of funds from a retirement plan prior to age 59½ be avoided?

Yes, there are a variety of ways to avoid the ten-percent penalty for early withdrawal of funds from a retirement plan, although your ability to take advantage of those loopholes may depend on the type of retirement plan (that is, on

whether it is an IRA, a 401(k), etc.). Bear in mind, however, that dividing a retirement account, be it via what's known as a "qualified domestic relations order" (QDRO) or a rollover, will not result in a ten-percent penalty. Circumstances under which you may be able to avoid the penalty include withdrawing funds to pay for college, medical expenses, or buying a home for the first time. Other circumstances such as an IRS levy, a disability, and military service may also permit early withdrawal without a penalty. Before making any withdrawals, it is imperative that you speak with your accountant to ensure that your circumstances qualify for avoidance of the early withdrawal penalty.

### If I receive payments from my spouse's retirement plan pursuant to a QDRO, will I have to pay taxes on it?

Yes. A spouse or former spouse who receives payments from the other spouse's retirement plan pursuant to a QDRO must report the payments as income and, as a result, will have to pay taxes on the payments received. Once the QDRO is completed and approved by the court and retirement plan administrator, you are basically receiving payments from the retirement plan as if you were a plan participant yourself.

### Can I deduct fees paid to my attorney in my divorce?

No, the Tax Cuts and Jobs Act of 2017 eliminated counsel fees paid in a divorce as an itemized deduction. Prior to the enactment of the new tax law, you could deduct legal fees as a miscellaneous expense under certain conditions, but you can no longer claim this expense. However, this provision of the new tax law will sunset, or expire, on December 31, 2025.

### Can I deduct alimony payments to my spouse?

As a result of the recently enacted Tax Cuts and Jobs Act of 2017, you may no longer deduct alimony payments you make to your spouse unless your separation agreement or divorce judgment occurred on or before December 31, 2018. In other words, if you were divorced before the end of 2018, you may continue to deduct your alimony payments, but if you get divorced on or after January 1, 2019, you will not be permitted to deduct your alimony payments. One possible exception may apply to separation agreements signed on or before December 31, 2018, but not accepted by a court until on or after January 1, 2019. In this limited scenario, it is best to consult with your accountant before taking, or forgoing, any deductions for alimony payments.

### **Should I rely on my attorney for tax advice on alimony, child support, and marital asset distribution?**

While your attorney should certainly advise you as to how best to structure your alimony, child support, and asset distribution, your attorney is likely not trained as an accountant and, as a result, the better course of action is to speak with your attorney *and* an accountant. Moreover, your attorney may have other reasons, separate and apart from tax considerations, for recommending a particular approach to structuring alimony, child support, and marital asset distribution, as the three are often interconnected to some degree. In fact, you should consider speaking with both your attorney and accountant at the same time so as to eliminate any potential for miscommunication between you, your attorney, and your accountant.

### **My two minor children live with me. My ex-husband has visitation and pays all of their support. May I take both of them as dependency exemptions?**

Yes, you may take both of them as dependency exemptions, provided the children primarily reside with you, unless a court order or your separation agreement dictates otherwise. However, the Tax Cuts and Jobs Act of 2017 reduced, at least temporarily, the dependency exemptions, or personal exemptions, for minor children (and yourself, incidentally) to zero if you itemize your deductions. As a result, while you can still claim such exemptions for minor children, the exemptions are basically worthless. This particular provision, like some others discussed here, will sunset, or expire, on December 31, 2025. The new tax law does, however, increase the amount of what is known as the standard deduction, so you may obtain some tax relief through the standard deduction if you do not typically itemize deductions. Also, you may be able to claim the child tax credit if you meet the qualifying criteria. As always, it is highly advisable to consult with your accountant about your ability to take advantage of the increase in the standard deduction.

### **If I transfer property to my spouse as part of a distribution of assets, will there be tax consequences to either of us at the time of transfer?**

No, property transfers between spouses do not have tax consequences so long as the transfers are incident to divorce.

### **What makes a transfer of property “incident to divorce?”**

A property transfer is considered “incident to divorce” if such transfer occurs within one year after the date of divorce or is related to the cessation of the marriage.

### **If my spouse dies before the full buyout is made, can the balance be paid to her estate?**

Yes, if your spouse dies before you have paid the full buyout amount, the balance can be paid to the spouse’s estate.

Likewise, if your spouse dies before paying you the full buyout amount, you may also be able to seek the balance of the payment from your spouse’s estate. It is highly advisable that you consult with your attorney to ensure that provisions are made to account for how payments will be made in the event a spouse dies prior to the completion of the buyout.

### **How do the changes to the tax code impact my alimony if I entered into an agreement before December 31, 2018?**

The changes to the tax code do not apply to agreements entered into before December 31, 2018. However, the changes to the tax code may impact how much you pay in taxes on your income, which will include the amount you receive as alimony. Moreover, the changes to the tax code may potentially impact other provisions of your agreement, such as those provisions addressing dependency exemptions. Again, it is highly advisable that you consult with both your attorney and accountant to assess the potential impacts in order to determine whether you should seek any modifications to your agreement.

### **What happens if I modify an alimony order entered prior to December 31, 2018?**

So long as the modification does not explicitly state that the new tax laws apply to the modified alimony order, the tax treatment of your alimony will not change and will, therefore, remain deductible by the spouse paying the alimony and taxable to the spouse receiving the alimony. So, to avoid any unnecessary confusion, the modified order should explicitly state that the provisions of the prior tax laws continue to apply.

### **Will I receive less alimony because it is no longer tax deductible to my spouse?**

It depends. While there will inevitably be less money at the parties’ disposal as a result of the government no longer subsidizing alimony payments by way of a tax deduction, whether you will ultimately receive less alimony will depend on a number of factors, including the total amount of income at stake, as well as the factors considered by the courts in your state in determining an appropriate alimony award. Moreover, because the person paying alimony will have less net income because he or she must pay taxes on the full amount of gross income earned, it does not necessarily mean that an alimony recipient will receive less alimony. If you compare the amount of taxes on alimony the recipient would have had to pay prior to the new tax law with alimony amounts structured to account for taxes under the new law, the alimony payments under the new law could be equal to, less than, or possibly more than he or she would have received under the old law. **FA**