



The Tax Consequences of a Divorce

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It's said that there are only two things that are certain—death and taxes. When it comes to a divorce, the taxes part of that saying is definitely true. Almost all aspects of a divorce—the property settlement, child support, and spousal support—can have implications for you come April 15.¹ This article is a very general survey of how the outcomes of a divorce can affect tax liability. For a more detailed view, one should consult with a family lawyer, a tax lawyer, and/or a certified public accountant.

Alimony

The Internal Revenue Code (IRC) defines alimony as a cash payment received by or on behalf of a spouse under a divorce or separation agreement which is not designated as non-alimony and is not child support, paid when the parties are not members of the same household, and for which the obligation to pay does not survive the payor's death. Whew! So, from that mouthful, what have we learned?

- *Paid by cash or check.* Transferring property will not count as alimony.
- *Received by or on behalf of a spouse.* Required payments to a third party, such as medical expenses or mortgage payments may qualify as alimony.
- *Pursuant to a divorce or separation agreement.* Any “extra” payments above the amount required by the divorce decree will not count as alimony.
- *Not designated as non-alimony.* The IRC allows what would otherwise be considered alimony to be treated as non-alimony by including a provision to

¹ While I am only licensed to practice law in Mississippi, this article is concerned primarily with the effects of a divorce on federal income taxes. For more information than this article contains, see [IRS Pub 504](#).

that effect in a divorce decree or settlement agreement. (Incidentally, you cannot transform non-alimony into alimony by agreement).

- *Not for the support of a child.* If payments are modified or terminated upon child-related events, such as the attainment of a certain age, than the payment will be considered child support and not alimony.
- *Not survive the payor's death.* Any payment that would survive the death of the paying spouse would not be alimony. So, any life insurance benefits that may be received upon the death of a dying spouse would not count as alimony.² (Some forms of alimony, under Mississippi law as described below, do not meet this criteria.)

Traditional alimony, that which is paid every month, fits the IRC's definition of alimony. On the other hand, lump sum alimony does not, mainly because the obligation to pay lump sum alimony can survive the death of the paying spouse.

Generally, alimony is considered income to the receiving spouse. This means the paying spouse can deduct the alimony payments on his or her taxes.

Child Support & Child-Related Payments

Overall, the code sections regarding child support are much more simple than those regarding alimony. Like alimony, child support can come in many forms. It can simply be money that is paid to a custodial parent, it can be

² Generally, life insurance benefits are not considered taxable income under the IRC. A full discussion of the taxability of life insurance benefits is outside the scope of this article.

insurance payments, college expenses, or any other number of payments on behalf or benefitting a child.

Unlike alimony, however, child support is not considered income by the Internal Revenue Code (IRC), and it is not deductible by the payor. Some types of child support payments, such as medical expenses, may be deductible under other provisions of the IRC.

As you may know, there are a number of child-related deductions available to those filing federal income taxes. These include the child tax credit, dependency exemptions, and educational credits. These deductions and credits belong to the custodial parent, but a method does exist for transferring these to the non-custodial parent through the use of [IRS Form 8332](#). Medical expense deductions can be claimed by either parent.

Property Transfers

A divorce usually involves some transfer of property, whether it be an interest in a house or other real property, a business interest, or even an investment. Contrary to the stereotype of the IRS, most of these transfers do not incur any tax liability.

As long as the property transfer is “incident to divorce,” there is no gain or loss associated with the transfer. A transfer is “incident to divorce” if it occurs within one year of the date of the divorce or is “related to the cessation of the marriage.” If the transfer occurs within six years of the date of divorce and is made pursuant to a divorce decree or separation agreement, then the IRS considers the transfer to be related to the cessation of the marriage.

When dividing property between spouses, attorneys and courts should consider the basis of the property.³ Property transfers incident to divorce have a carryover basis. That is, the basis is carried over from the original purchaser to the person who receives the property in the transfer.

There may be capital gains, which may be taxed, upon the later sale of the property. The lower the basis, the more capital gains may have been earned, and the more tax that may be due upon the sale of the property.

For example, it is possible for both a husband and wife to receive property worth \$100,000 in the divorce, but because of the basis, one spouse's distribution is worth more than the other. If the wife's property has a basis of \$70,000 and the husband's has a basis of \$10,000, then it can be seen that the wife's property may be considered more valuable even though both pieces of property have an equal fair market value. The husband has \$90,000 of capital gains (and may have to pay tax on those gains should he sell the property), but the wife has only \$30,000 of gains. From a tax perspective, the wife has received the better bargain.

Other Considerations

Attorney Fees. A divorce decree may call for one spouse to pay the attorney fees of the other. Unfortunately, the Internal Revenue Code considers such payments to not be deductible. There are two exceptions, though. (You really didn't expect the tax code to be that simple, did you?)

³ "Basis," in a nutshell, is what the property originally cost.

First, if the attorney fees are paid by an alimony recipient and were incurred to secure alimony, some or all of the fee may be deductible. Second, to the extent that an attorney fee was paid for advice or assistance in determining the taxable consequences of child support, alimony, or property division, the fee may be deductible.

Status as of December 31. As with all factors affecting tax status, it is the status of the spouses as of December 31 that is determinative of how they may file. If the divorce is not final by December 31, then the couple must file as married. If it is final, they must file as single or head of household. Normally, only one of the spouses may file as head of household.

Refunds. The parties may decide who will receive a tax refund if the divorce is pending at that time. If the refund is not addressed by agreement, the refund belongs to the spouse whose tax payment created the refund. The IRS provides a formula to make this determination.

About Timothy J. Evans



Tim attended the University of Mississippi on a Naval ROTC scholarship. After graduating and receiving his commission, Tim served three years in the U.S. Navy. While working as a high school teacher, Tim decided to attend law school, and was admitted to Mississippi College School of Law in Jackson, Mississippi.

Tim's professional experience ranges from serving as a judicial law clerk to a judge on the Mississippi Court of Appeals, to representing persons injured by asbestos, to working at one of the largest firms in Hattiesburg, Mississippi, to opening his own firm. Tim prides himself on his ability to explain complicated legal concepts in everyday language and keeping his clients well-informed.

Tim is married to the former Laura Day of Hattiesburg. We have two children, Wesley and Sara, and we are members of Crosspoint Community Church of Hattiesburg.