

Chapter 5: Divorce

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Please note. Corrections for all of the chapters are available at www.TaxSchool.illinois.edu. For clarification about acronyms used throughout this chapter, see the Acronym Glossary at the end of the Index.

For your convenience, in-text website links are also provided as short URLs. Anywhere you see uofi.tax/xxx, the link points to the address immediately following in brackets.

About the Author

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While a divorce proceeding may involve several important issues, the impact of tax law on the parties to a divorce is an area that continuously evolves legislatively and judicially. **Tax professionals can help divorcing couples prevent unfavorable tax consequences when they are involved early in divorce planning discussions.** However, beware of the potential for conflicts of interest.

TAX RETURN ISSUES

FILING STATUS

The IRS acknowledges that state law controls whether an individual is considered married.¹ Only persons considered married are allowed to file joint returns.² Marital status is determined on the last day of the tax year.³ Spouses must have the same tax year in order to qualify for filing a joint return.⁴ However, a joint return can be filed if a difference in tax years exists because one or both spouses died.⁵ Therefore, a joint return can be filed if a spouse's death occurred prior to the time a divorce is finalized.

If a spouse's death occurs, marital status on the date of death determines whether joint filing status is appropriate.⁶ In the year a spouse dies, if the surviving spouse remarries before the end of that tax year, the surviving spouse can file jointly with the new spouse but cannot file jointly with the deceased former spouse. The deceased former spouse's filing status is married filing separately (MFS).⁷ Generally, both spouses must be U.S. citizens or U.S. residents to file jointly.⁸

Note. A couple in a common-law marriage is considered married under tax rules. As such, they can file jointly as long as their common-law marriage began in a state recognizing common-law marriages or if they live in one of these states at the end of the tax year.⁹ Although common-law marriage is recognized in these states, there is no such thing as a "common-law divorce." Common-law couples must use the same formal divorce procedures in their state that married couples must use to obtain a divorce.¹⁰

Same-Sex Marriage

For federal tax purposes, same-sex marriages are treated the same as opposite-sex marriages. However, persons who have entered into a registered domestic partnership, civil union, or other similar relationship that is **not considered** a marriage under state laws are not considered married for federal tax purposes.¹¹

¹ Rev. Rul. 58-66, 1958-1 CB 60.

² IRC §6013(a).

³ IRC §6013(d)(1)(A).

⁴ IRC §6013(a)(2).

⁵ *Ibid.*

⁶ IRC §6013(d)(1)(B).

⁷ *Filing Status*. IRS. [apps.irs.gov/app/vita/content/globalmedia/4491_filing_status.pdf] Accessed on Oct. 4, 2017.

⁸ IRC §6013(a)(1), but for exceptions see §§6013(g) and (h).

⁹ *Filing Status*. IRS. [apps.irs.gov/app/vita/content/globalmedia/4491_filing_status.pdf] Accessed on Oct. 4, 2017.

¹⁰ *How do we end a common law marriage?* NOLO. [www.nolo.com/legal-encyclopedia/question-end-common-law-marriage-28053.html] Accessed on Oct. 4, 2017.

¹¹ IRS Pub. 504, *Divorced or Separated Individuals*.

Separation, Divorce, and Filing Status

A married couple can file jointly even though the spouses did not live together during part or all of the tax year. In addition, when a married couple lives apart for the last six months of the year, the custodial parent of a dependent child can file as head of household (HoH) and the other spouse can file MFS. However, spouses legally separated under a decree of separate maintenance are not considered married and **cannot file jointly**. Divorced spouses are no longer considered married once the divorce is final. If the divorce decree is interlocutory, the spouses are considered married until the decree is final.¹²

An “interlocutory” divorce decree (sometimes called a “judgment nisi”), is a decree that is issued by the court but is considered incomplete or temporary until after the expiration of a period of time (such as 30, 60, or 90 days), when it automatically becomes final.¹³ During the waiting (nisi) period after entry of the judgment for divorce, the spouses are still considered married and are officially divorced only after the expiration of the nisi period.

Example 1. Michael and Juanita, a married couple, have the same calendar tax year. They filed for divorce in January 2017. The court issued a final decree of divorce on December 15, 2017. On the last day of their respective tax years, December 31, 2017, Michael and Juanita were not married. They ceased being married on December 15, 2017. They cannot file a joint return for the 2017 tax year.

Example 2. Use the same facts as **Example 1**, except the final divorce decree was issued February 23, 2018. Because Michael and Juanita are considered married until the final decree and are therefore still married on December 31, 2017, they may file a joint return for the 2017 tax year.

Example 3. Use the same facts as **Example 1**, except the court order issued on December 15, 2017, is a judgment nisi with a 30-day nisi period. Michael and Juanita are considered married on December 31, 2017, and may file jointly for the 2017 tax year.

Invalid Divorce Judgment. If a state court later finds a final divorce judgment invalid, the IRS disregards the divorce.¹⁴ However, there is a split of authority among tax cases in federal courts involving invalid divorce decrees. The Second Circuit¹⁵ decided it would not recognize a state court’s determination that a divorce was invalid. The Ninth Circuit, however, ruled that such a determination by a state court must be recognized.¹⁶ The IRS indicated that a foreign jurisdiction divorce for the sole purpose of tax avoidance is not recognized. If a divorce becomes effective at the end of a tax year with a subsequent remarriage at the beginning of the following tax year, intent to avoid tax may be inferred.¹⁷

Appeal of Divorce Judgment. State law determines whether a divorce decree remains final if it is appealed. If an appeal makes the divorce judgment interlocutory, the spouses are considered married until the divorce judgment is final after the appeal is resolved. The Fourth Circuit held that a joint return could not be filed in a year in which a Maryland divorce was appealed because the divorce remained final despite the appeal.¹⁸ However, in states where an appeal delays finality, a joint return may be permitted.

¹² Ibid.

¹³ *Interlocutory Decree*. Encyclopedia Britannica. [www.britannica.com/topic/interlocutory-decree] Accessed on Oct. 4, 2017.

¹⁴ Rev. Rul. 67-442, 1967-2 CB 65.

¹⁵ *Est. of H. Borax v. Comm’r*, 349 F.2d 666 (2nd Cir. 1965); *H.E. Wondsel v. Comm’r*, 350 F.2d 339 (2nd Cir. 1965), *cert. denied*, 383 U.S. 935.

¹⁶ *H.K. Lee and Louise Geise v. Comm’r*, 550 F.2d 1201 (9th Cir. 1977).

¹⁷ Rev. Rul. 76-255, 1976-2 CB 40.

¹⁸ *K.T. Sullivan v. Comm’r*, 256 F.2d 664 (4th Cir. 1958).

Annulment. A taxpayer who obtains a decree of annulment (which holds that no valid marriage ever existed) must file amended returns for all tax years affected by the annulment that are not closed by the statute of limitations. The taxpayer generally must use the single filing status on the amended returns, unless they meet the requirements to file as HoH.¹⁹

Itemized Deductions on Separate Returns. If spouses file MFS and one of them itemizes deductions, the other spouse **must** also itemize. In this situation, the standard deduction amount is zero for the non-itemizing spouse.

Taxpayers who file using the MFS status may be able to claim itemized deductions on their separate return for certain expenses they paid separately or jointly with their spouse. The following table from IRS Pub. 504, *Divorced or Separated Individuals*, shows which deductions can be claimed on a separate return.

IF you paid ...	AND you ...	THEN you can deduct on your separate federal return...
medical expenses	paid with funds deposited in a joint checking account in which you and your spouse have an equal interest	half of the total medical expenses, subject to certain limits, unless you can show that you alone paid the expenses.
state income tax	file a separate state income tax return	the state income tax you alone paid during the year.
	file a joint state income tax return and you and your spouse are jointly and individually liable for the full amount of the state income tax	the state income tax you alone paid during the year.
	file a joint state income tax return and you are liable for only your own share of state income tax	the smaller of: <ul style="list-style-type: none"> the state income tax you alone paid during the year, or the total state income tax you and your spouse paid during the year multiplied by the following fraction. The numerator is your gross income and the denominator is your combined gross income.
property tax	paid the tax on property held as tenants by the entirety	the property tax you alone paid.
mortgage interest	paid the interest on a qualified home ^a held as tenants by the entirety	the mortgage interest you alone paid.
casualty loss	have a casualty loss on a home you own as tenants by the entirety	half of the loss, subject to the deduction limits. Neither spouse may report the total casualty loss.

^a For more information on a qualified home and deductible mortgage interest, see Pub. 936, *Home Mortgage Interest Deduction*.

Note. Beginning with the 2018 tax year, provisions in the Tax Cuts and Jobs Act (TCJA) affect various categories of itemized deductions. For more information, see the 2018 *University of Illinois Federal Tax Workbook*, Volume A, Chapter 1: New Legislation — Individual Concerns.

¹⁹ IRS Pub. 504, *Divorced or Separated Individuals*.