

Divorce

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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 of importance that continuously evolves legislatively and judicially. Proper tax advice should be obtained as soon as possible within the course of a divorce to help prevent unwanted tax consequences to the divorcing spouses.

In addition, there are various tax attributes of the parties that are viewed as marital assets. Early and prudent tax advice will uncover these additional “tax marital assets” and ensure that the parties maximize the value of these assets under applicable Code provisions. Early advice can also prevent unforeseen tax consequences from frustrating the intention of the parties or the divorce court.

TAX RETURN ISSUES

FILING STATUS

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

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 MFS. If a spouse’s death occurs, marital status on the date of death determines whether joint filing status is appropriate.⁵ In addition, both spouses must be U.S. citizens or U.S residents to file jointly.⁶

Note. A couple in a **common-law marriage** is considered married under tax rules and **can** file jointly as long as their common-law marriage began in a state recognizing common-law marriages⁷ or if they live in one of these states at the end of the tax year. Although there is common-law marriage 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.

¹. Rev. Rul. 58-56, 1958-1 CB 60.

². IRC §6013(a).

³. IRC §6013(a)(2).

⁴. Ibid.

⁵. IRC §6013(d)(1)(B).

⁶. IRC §6013(a)(1).

⁷. These states are: Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, New Hampshire (for inheritance purposes only), Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah and the District of Columbia. These laws vary from state to state. The laws of each state should be referenced for specific limitations or dates that may be relevant to specific situations.

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. 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.

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. Many state courts use judgments nisi for divorce. 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. Phil and Dolores, a married couple, have the same calendar tax year. They file for divorce in January 2012. A final decree of divorce is issued by the court on December 15, 2012. On the last day of their respective tax years, December 31, 2012, Phil and Dolores are not married. They ceased being married on December 15, 2012. They cannot file MFJ for the 2012 tax year.

Example 2. Use the same facts as **Example 1**, except the final divorce decree is issued February 23, 2013. Because Phil and Dolores are still considered married until the final decree and therefore are still married on December 31, 2012, they may file MFJ for the 2012 tax year.

Example 3. Use the same facts as **Example 1**, except the court order issued on December 15, 2012, is a judgment nisi with a 30-day nisi period. Phil and Dolores are still considered married on December 31, 2012, and can file jointly for the 2012 tax year.

Invalid Divorce Judgment. If a state court later finds a final divorce judgment invalid, the IRS will disregard the divorce.⁸ However, there is a split of authority among tax cases in federal courts involving invalid divorce decrees. The 2nd Circuit⁹ decided it would not recognize a state court’s determination that a divorce is invalid. The 9th Circuit, however, ruled that such a determination by a state court must be recognized.¹⁰ The IRS indicated that a foreign jurisdiction divorce for the sole purpose of avoiding the “marriage penalty” 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.¹¹

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 4th 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.¹² However, in states where an appeal delays finality, a joint return may be permitted.

Annulment. When spouses filed a joint return and a state court, holding that there never was a valid marriage, annulled the marriage in the following year, the IRS required amended returns using the single filing status.¹³ Amended returns are required for all tax years affected by the annulment that are not closed by the statute of limitations. In addition, the Tax Court held that a taxpayer whose marriage was annulled had a right to amend returns from joint to single status.¹⁴

⁸ Rev. Rul. 67-442, 1967-2 CB 65.

⁹ *Est. of H. Borax v. Comm’r*, 349 F.2d 666 (Jul. 30, 1965), *cert. denied*, 383 U.S. 935; *H.E. Wondsel v. Comm’r*, 350 F.2d 339 (Aug. 2, 1965), *cert. denied*, 383 US 935.

¹⁰ *H.K. Lee v. Comm’r*, 550 F.2d 1201 (Mar. 29, 1977).

¹¹ Rev. Rul. 76-255, 1976-2 CB 40.

¹² *K.T. Sullivan v. Comm’r*, 256 F.2d 664 (4th Cir. 1958); Rev. Rul 79-330, 1979-2 CB 391.

¹³ Rev. Rul. 67-442, 1967-2 CB 65.

¹⁴ *W.R. Wilson v. Comm’r*, TC Memo 1976-285 (Sep. 8, 1976).

Filing Status after Divorce

After a divorce is finalized, the taxpayer may have the option of choosing single or head of household (HoH) status. However, if the divorced taxpayer remarries, that taxpayer may jointly file with the new spouse if the taxpayer and new spouse are married on or before December 31 of the tax year.

Note. A taxpayer may qualify to file as HoH even before the divorce is final. For more information on the requirements to file HoH, see 2012 Volume A, Chapter 3: Individual Taxpayer Topics, as well as IRS Pub. 17, *Your Federal Income Tax (For Individuals)*.

DEPENDENCY EXEMPTION

Custodial Parent

A custodial parent may claim a dependency exemption for a child. The custodial parent is the parent in whose home the child sleeps for the greater number of nights during the year. This is the case even if that parent is not present in the home when the child is there. Overnight stays with the parent that occur outside that parent's home count as nights with that parent. If the child spends an equal number of nights with each parent during the year, the custodial parent is the parent with the higher adjusted gross income. Neither parent is considered a custodial parent of a child that has attained the age of majority under state law.¹⁵

Special Rule for Parents Working Nights. A child may spend days instead of nights with a parent due to the parent's nighttime work schedule. In this case, days are counted instead of nights. The parent with whom the child spends the greater number of days is the custodial parent. However, on school days, the child is deemed to reside at the primary residence that is registered with the child's school.

Transferring the Dependent Child Exemption

IRC §152(e) provides for the transfer of the dependent child exemption from the custodial to the noncustodial parent. This can only be accomplished if **all four** of the following requirements for §152(e) are satisfied.

1. The parents:
 - a. Are either divorced or legally separated under a decree of divorce or separate maintenance,
 - b. Are separated under a written separation agreement, or
 - c. Lived apart at all times for the last six months of the year, whether married or not.¹⁶
2. The parents provide over half of the child's support for the year.¹⁷
3. One or both parents had legal custody of the child under state law for more than half of the year.¹⁸
4. The custodial parent provides **qualifying documentation** to waive the claim to the dependent child's exemption and transfer the right of that claim to the noncustodial parent.

¹⁵ Treas. Reg. §1.152-4(d).

¹⁶ IRC §§152(e)(1)(A)(i)-(iii); Treas. Reg. §§1.152-4(b)(2)(i)(A)-(C).

¹⁷ IRC §152(e)(1)(A); Treas. Reg. §1.152-4(b)(2)(i).

¹⁸ Treas. Reg. §1.152-4(c).