

RESOLUTION OPPOSING PROPOSED LEGISLATION TO REPEAL THE ALIMONY TAX DEDUCTION

Adopted by the American Academy of Matrimonial Lawyers Board of Governors on November 15, 2017.

WHEREAS, the American Academy of Matrimonial Lawyers (AAML) is a national organization with a mission “to provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law” and consists of highly regarded members who represent individuals in all facets of family law; and

WHEREAS the AAML provides leadership and guidance in family law policy matters, assisting states in evaluating, passing, and enforcing just laws for the support of families and the distribution of marital and community property; and

WHEREAS, the AAML has several times reaffirmed its position that state divorce court judges should have the authority to divide all marital or community property between the parties, and to do equity for the parties; and

WHEREAS, the AAML maintains or has historically maintained committees devoted to the study of alimony and spousal maintenance, to protecting victims of domestic violence; to writing “friend of the court” briefs on family law issues that come before the U.S. Supreme Court, and to promoting the out-of-court resolution of family law disputes through mediation, arbitration and collaborative law; and

WHEREAS, the AAML has adopted formal policies and resolutions on taxation matters that may affect divorced, separated and unmarried parents and individuals, including detailed resolutions and proposals in connection with the Tax Reform Act of 2013, the tax consequences of child-related alimony modifications; and the use of alimony guidelines;

NOW THEREFORE BE IT IS RESOLVED: that the American Academy of Matrimonial Lawyers opposes proposed Section 1309 of the House Ways and Means Committee’s version of the Tax Cuts and Jobs Bill of 2017 (H.R. 1, passed by House W&M on November 10, 2017), or any other proposed legislation that would repeal Sections 215 and 71 of the Internal Revenue Code that provide an “above-the-line” income tax deduction for individuals who pay alimony and require the recipients to declare taxable alimony income.

ANALYSIS

I. INTRODUCTION

Alimony is helpful to adjust the economic circumstances of families post-divorce. An award of alimony has the capacity to extend the time in which an equitable result can be achieved in a divorce. Frequently, the marital assets available for distribution between spouses are not sufficiently valuable or liquid to provide both spouses and their children with financial stability after a divorce. Alimony payments over a period of months or years can provide a reliable stream of income to a divorcing spouse who does not have a nest egg of savings. Alimony can help a financially-dependent spouse meet the needs of a household and maintain a semblance of the lifestyle that the family enjoyed before marital dissolution or that which will be enjoyed by the economically advantaged spouse.

Alimony can help a divorcing dependent spouse to reorganize his or her personal finances. For instance, a spouse who has taken leave from the workforce to raise children may have insufficient income and credit history to qualify for a mortgage loan to purchase or refinance a home for the dependent spouse and family. Lenders recognize alimony as a reliable source of income that may qualify a divorcing spouse for mortgage financing.

Economic security resulting from an award or agreement for alimony payments will better protect against the dependent ex-spouse having to resort to public assistance and the need for government subsidized welfare benefits.

Not surprisingly, many payor spouses are reluctant to maintain ongoing financial ties to their former spouse and resist the lawyers' advice to pay alimony. The greatest incentive that divorce lawyers can offer to their alimony-paying clients is the alimony tax deduction. Under current law, alimony and separate maintenance payments can be deductible from taxable income by the payor under I.R.C. § 215 and includable in the taxable income of the payee under I.R.C. § 71. A change in the deductibility may substantially increase litigation over alimony and child support awards under state guidelines.

The net effect of alimony is to shift taxable income, in many cases, from the higher tax bracket of the payor to the lower tax bracket of the recipient. For this reason, the Joint Committee on Taxation has labeled alimony as a "divorce subsidy." On the contrary, the purpose of the alimony tax deduction is not to encourage spouses to divorce but recognize needs of former dependent spouses. The AAML, which studies all aspects of divorce, is not aware of any survey or research showing that alimony tends to promote a higher rate of divorce or make divorce more affordable. Rather, alimony tends to soften the adverse financial effects of divorce on transitional families, which intact families do not experience.

II. PROPOSED LEGISLATION

On November 2, 2017, the Chairman of the U.S. House Ways and Means Committee Rep. Kevin Brady (R-Texas) released the Chairman's Markup of the proposed Tax Cuts and Jobs Act of 2017 (H.R.1), which is the initial House proposal to overhaul the federal tax code.

Proposed Repeal of the Alimony Tax Deduction

Among other things, the House tax proposal would eliminate the tax deduction for alimony payments.

SEC. 1309. REPEAL OF DEDUCTION FOR ALIMONY PAYMENTS.

(a) **IN GENERAL.**—Part VII of subchapter B is amended by striking section 215 (and by striking the item relating to such section in the table of section for such subpart).

(c) **EFFECTIVE DATE.**—The amendments made by this section shall apply to—

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2017, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

The proposed House tax bill was amended twice before it was passed by the House Ways and Means Committee on November 10, 2017. A Senate version was circulated on November 10, 2017, and did not contain a provision similar to Sec. 1309.

III. POSITION.

The AAML takes no position on the economic or political merits of the proposed Tax Cuts and Jobs Act of 2017. It is our understanding that the House and Senate may be seeking sources of revenue to offset the corporate and individual income tax cuts that are proposed in the bill, in order to meet the parameters of the reconciliation resolution and keep the bill from raising the national debt by more than \$1.5 trillion over 10 years.

Repealing the alimony tax deduction would only create tax revenue of \$8.3 billion over 10 years, according to the JCT report.

The proposed repeal of the alimony tax deduction concerns family lawyers, even if it does not affect existing alimony obligations, because of the chilling effect it may have on divorce settlements. In many cases, particularly in middle-class and lower income divorce cases, there may be few liquid assets to provide financial security to a spouse upon divorce. It can be difficult for a divorcing spouse to maintain sufficient cash flow to operate a separate household without alimony or spousal support. Financially-dependent spouses may be reluctant or unable to establish their own households and may be stuck in domestic violence or oppressive relationships because they cannot afford to move away without the financial benefit of alimony.

Moreover, the proposed repeal of the alimony tax deduction would eliminate the beneficial income-shifting effect. Alimony helps divorce-affected families to preserve income by shifting dollars from higher tax brackets to lower tax brackets. Alimony is not so much a “divorce subsidy” as it is a mechanism to offset the unfavorable tax rates for married couples filing separately and splitting tax deductions. The alimony tax deduction helps to soften the adverse tax impact of marital dissolution, at least during separation, when “married filing separate” rates apply.

The repeal of the alimony deduction will also create havoc on prenuptial and/or an agreement reached during the marriage that contains a specified amount of alimony in the event of a divorce. When the parties negotiated the agreement, they did so believing the payment of alimony would be deductible. Now, with the suggested change, the parties may have no recourse to change the amount of alimony they contracted to pay, thereby creating an unanticipated windfall to the recipient.

In cases where an award of modifiable alimony has been made by agreement of the parties or by court order, this proposed legislation will not permit the parties to modify and maintain the tax consequences that they currently have, after the effective date.

Based on the foregoing, the AAML, on behalf of the many families facing divorce with financial issues, opposes any modifications or repeal of the deductibility/includability of alimony.