

Comment,  
THE CHANGING LANDSCAPE OF  
SPOUSAL SUPPORT

## I. Historical Background

The concept of spousal support has its roots in the English common law system. When people married, the husband would be given control over all of the wife's property and assets that she owned prior to the marriage.<sup>1</sup> Further, the wife would also have to transfer "to her husband her ability to hold real property, sign contracts, and keep any earnings."<sup>2</sup> In exchange for the property rights from a wife, the husband had the duty to financially support her.<sup>3</sup> The duty of a husband to support his wife existed regardless of the wealth with which the wife may have come into the marriage.<sup>4</sup> This created an issue of property ownership when the couple wanted to separate, because the husband retained the property rights to not only the marital property, but also the property that the wife brought into it. The wife therefore needed to be given support in order to survive. During this time, there were two ways in which a married couple could separate.<sup>5</sup> The first, an absolute divorce, was more common among wealthy couples and was the only option to break the marital bond created.<sup>6</sup> The second, known as "divorce from bed and board," was comparable to a current day legal separation.<sup>7</sup> This allowed the couple to live apart from one another, but did not actually sever the marital bond.<sup>8</sup> Due to the marital tie still remaining, the duty of a husband to support his wife did not end with the separation.<sup>9</sup>

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<sup>1</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 36 (2001).

<sup>2</sup> Laura Lenzotti Kapalla, Comment, *Some Assembly Required: Why States Should Not Adopt the ALI's System of Presumptive Alimony Awards in Its Current Form*, 2004 MICH. ST. L. REV. 207, 211.

<sup>3</sup> Collins, *supra* note 1, at 29.

<sup>4</sup> Kapalla, *supra* note 2, 211-12.

<sup>5</sup> Collins, *supra* note 1, at 28.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Kapalla, *supra* note 2.

After bed and board separation, the husband would promise to continue paying for the wife's expenses, giving rise to the concept of spousal support.<sup>10</sup>

Later, the Married Women's Property Acts were passed which allowed for women to keep property after a separation rather than the husband retaining control.<sup>11</sup> This meant that the wife was able to get control over her assets again, which undermined the original rationale behind spousal maintenance. During this time, part of the reasoning behind spousal support appeared to be based on a breach of the marital contract because fault became a determining factor in awarding support. Payment of spousal support resembled a punishment for those who had committed some wrongdoing during their marriage, since it was only awarded to the injured spouse of the relationship.<sup>12</sup>

Beginning in the 1970's the distribution of property between husband and wife at divorce began to change. Equitable distribution became more popular in the courts. It allowed for the spouses to share property at the time of divorce regardless of who held title to it.<sup>13</sup> Additionally, around this same time women started entering the workforce in great numbers.<sup>14</sup> The women who were typically thought to be completely dependent on their husbands were now able to make their own income and support themselves.<sup>15</sup> This was another reminder that the original rationale behind the granting of spousal support was no longer valid.

The 1970's also saw another significant change in divorce law. California passed the first "no-fault" divorce law that allowed a spouse to obtain a divorce without having to allege the misconduct of the other spouse. Most states passed similar laws opting for the no-fault divorce model. This made the rationale that spousal support was used as a compensatory means for

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<sup>10</sup> Larry R. Spain, *The Elimination of Marital Fault in Awarding Spousal Support: The Minnesota Experience*, 28 WM. MITCHELL L. REV. 861, 866 (2001).

<sup>11</sup> June Carbone, *The Futility of Coherence: The ALI's Principles of the Law of Family Dissolution, Compensatory Spousal Payments*, 4 J.L. & FAM. STUD. 43, 49 (2002).

<sup>12</sup> Barbara Bennett Woodhouse, *Sex and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 GEO. L.J. 2525, 2536 (1994).

<sup>13</sup> *Id.*

<sup>14</sup> Jane Rutherford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 549 (1990).

<sup>15</sup> *Id.*

wrongdoing in a marriage inapplicable. Even though the original rationales behind the idea of making one spouse pay spousal support disappeared, courts continued to grant it in many cases, looking for additional rationales.

## II. Purposes of Spousal Maintenance Across the Country

Nationally, there are a variety of models of spousal support, and they differ in their purposes. Because divorce and spousal support is a matter of individual state law there is no universal model of alimony. After parties' divorce, they become subject to what is known as the "Divorce Gap."<sup>16</sup> The divorce gap is the concept that explains that after a divorce, women tend to see about a 20% drop in their income, while men see a rise in their income of about 30%.<sup>17</sup> This discrepancy may be explained by women either stopping work while they raise their children during the marriage, or stopping work post-divorce in order to raise the children.<sup>18</sup> This leads to a conflict with the amount of income they are receiving and their ability to support themselves, putting them in a position to need help from their former spouse to stay afloat.<sup>19</sup> The payment of spousal support is used to help bridge this gap. The most common types of alimony are referred to as permanent alimony, reimbursement alimony, compensatory alimony, and rehabilitative support.

Permanent alimony was the earliest form of support that was granted.<sup>20</sup> This is more often than not used to support a spouse who was a fulltime homemaker in a long-term marriage.<sup>21</sup> The

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<sup>16</sup> Darlena Cunah, *The Divorce Gap*, ATLANTIC (Sept. 20, 2021) <https://www.theatlantic.com/business/archive/2016/04/the-divorce-gap/480333>.

<sup>17</sup> Julia Travers, *It's All About the Divorce Gap: Ending Isolation for Divorcing Women*, PHILANTHROPY WOMEN (Sept. 22, 2019), <https://philanthropywomen.org/feminist-funding/its-all-about-the-divorce-gap-ending-isolation-for-divorcing-women/>.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29 (2004).

<sup>21</sup> Tonya L. Brito, *Spousal Support Takes on the Mommy Track: Why the ALI Proposal Is Good for Working Mothers*, 8 DUKE J. GENDER L. & POL'Y 151, 153 (2001).

amount awarded under permanent alimony was based on “the needs of the receiving spouse and the ability of the paying spouse to pay.”<sup>22</sup> This form of alimony was generally awarded until the spouse receiving the support was either remarried or died.<sup>23</sup> Permanent alimony was often the only way that the divorced wife would be able to stay afloat when the marriage ended, there were children, and she did not possess skills necessary to support herself because of her commitment to homemaking.<sup>24</sup> While it was a safety measure for the payees, the men who were paying the support resisted.<sup>25</sup> If they wished to remarry, it meant that they would still have to support their previous spouse while also trying to support their new spouse.<sup>26</sup> With the rise of no-fault divorces, permanent alimony is much less common due to the financial difficulty it imposes on the paying spouse who is trying to exit the marriage completely.<sup>27</sup>

Reimbursement alimony was based on the idea that one spouse would invest in the other spouse because it would help that spouse’s career and advance their marriage in the long-term.<sup>28</sup> When a divorce interferes with the spouse’s ability to later enjoy the return on the investment, the investing spouse is awarded spousal support in place of the benefit that spouse would have received from the advancement of the other spouse’s career.

Compensatory alimony is a newer model than the others and is based on compensation rather than the need of the spouse.<sup>29</sup> This theory of alimony is based on the idea that one spouse will work outside of the marital home and the other will

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<sup>22</sup> Kelly L. DeGance, Note, “*Savings Alimony*”: *The Struggle for Fairness in Permanent Alimony Awards*, 2 FLA. COASTAL L.J. 317, 318 (2001).

<sup>23</sup> Larkin, *supra* note 20, at 34-35.

<sup>24</sup> Jennifer L. McCoy, *Spousal Support Disorder: An Overview of Problems in Current Alimony Law*, 33 FLA. ST. U.L. REV. 502, 507 (2005).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 99 (2004).

<sup>28</sup> Michelle Murray, *Alimony as an Equalizing Force in Divorce*, 11 J. CONTEMP. LEGAL ISSUES 313, 318 (2000).

<sup>29</sup> See Christopher D. Nelson, Note, *Toward a Compensatory Model of Alimony in Alaska*, 12 ALASKA L. REV. 101, 120-21 (1995).

work inside the marital home.<sup>30</sup> Compensatory alimony works to account for the fact that the spouse who worked outside of the home is at a market advantage as compared to the spouse who worked inside the home.<sup>31</sup> The courts look to the standard of living that the couple shared, rather than the contribution that each spouse made individually.<sup>32</sup> They use this as a starting point to determine the amount that should be awarded with the idea that each spouse should be granted the opportunity to continue living as if the marriage has not ended.<sup>33</sup>

Rehabilitative support is the most commonly used at the current time.<sup>34</sup> Unlike the other theories for alimony, rehabilitative alimony is not used to compensate the receiving spouse.<sup>35</sup> Instead, it is used to give the spouse the means to obtain some sort of training or education so that he or she can be self-sufficient moving forward.<sup>36</sup> When requesting rehabilitative alimony, the receiving spouse must show a goal of self-sufficiency, have a plan in place to reach that goal, and have calculated what would be necessary to achieve it.<sup>37</sup>

### III. Recent Reforms in Spousal Maintenance

When it comes to the way that spousal support is awarded, it is often inconsistent and unpredictable. Every state has its own set of guidelines that its courts consider in awarding support. Common issues that arise include the duration of the spousal support, the effect of retirement and the formulas that should be used to determine the amount. Over the last several years, there have been substantial reform efforts to try to determine the most effective and predictable method of awarding spousal support. These are discussed below.

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<sup>30</sup> *Id.* at 45.

<sup>31</sup> *Id.* at 120.

<sup>32</sup> Frantz & Dagan, *supra* note 27, at 120.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 119.

<sup>35</sup> *Id.* at 122.

<sup>36</sup> *Id.*

<sup>37</sup> Victoria M. Ho & Jennifer L. Johnson, *Overview of Florida Alimony*, FLA. B.J., Oct. 2004, at 71.

### A. *Duration of Support*

Many states have taken the approach of attempting to put a durational limit on spousal support. In 2015 Florida attempted to eliminate the concept of permanent alimony. House Bill 943 gave a calculation for alimony that was based on the length of the marriage.<sup>38</sup> This bill established a range for marriages that lasted less than 20 years and a range for marriages that lasted 20 years or longer.<sup>39</sup> The paying spouse in a marriage that lasted less than 20 years would use the formula of “.015 x X x years of marriage,” where X would indicate the difference in the monthly gross incomes of the parties.<sup>40</sup> A paying spouse that was married for 20 years or longer would use the formula of “.020 x X x years of marriage,” with X still representing the difference in the gross incomes of the parties.<sup>41</sup> The proposed Florida bill, was designed to take into consideration the income of the parties, with the lower end being “.25 x X x years of marriage and the high end changing to .75 x X x years of marriage.”<sup>42</sup> Along with the new calculation, this bill also stated that child support payments and alimony combined could not exceed 55% of the paying spouse’s income.<sup>43</sup> On multiple occasions, the proposed legislation died or was vetoed.<sup>44</sup>

In 2010 Florida legislators reformed the law to add an additional type of alimony, referred to as “durational alimony.”<sup>45</sup> This type of support allows for alimony to be awarded on a non-permanent basis and exists for a set period of time for a short or moderate duration marriage. The statute refers to the duration of a marriage by the terms “short term,” “moderate term,” and “long-term.”<sup>46</sup> Short term is used for marriages of less than seven years, moderate is between seven and seventeen years, and long

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<sup>38</sup> S. Comm. 943, 2015 Leg., Reg. Sess. (Fla. 2015), <http://www.flsenate.gov/session/Bill/2015/0943>.

<sup>39</sup> Laura W. Morgan, *A Nationwide Review of Alimony Legislation, 2007-2016*, 51 FAM. L.Q. 39, , 43 (2017).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> S. Comm. 668, 2016 Leg., Reg. Sess (Fla. 2015), <http://flsenate.gov/Session/Bill/2016/0668>

<sup>45</sup> FLA. STAT. ANN. § 61.08(1)(2016).

<sup>46</sup> See Morgan, *supra* note 39, at 44.

term is more than seventeen years.<sup>47</sup> In addition, alimony payments are no longer appropriate for short term marriages unless special circumstances exist.<sup>48</sup>

In 2011, Massachusetts also worked to create a durational cap for alimony payments. This statute provided that alimony could not be awarded for a period of time that was greater than 50% of the length of the marriage, if the marriage was five years or less.<sup>49</sup> The statute also mandated those payments could not be awarded for a period longer than 60% if the marriage was ten years or less but more than five, 70% if between ten and fifteen years, and 80% if the marriage was fifteen to twenty years long.<sup>50</sup> This permitted Massachusetts courts to award alimony payments for an “indefinite length of time”<sup>51</sup> for marriages that lasted longer than twenty years.<sup>52</sup>

New Jersey followed suit in 2014 when it amended its alimony statute and took duration into account. This amendment included the limitation that for marriages that lasted less than twenty years alimony would not be awarded for longer than the length of the marriage unless exceptional circumstances existed.<sup>53</sup> Under the statute, exceptional circumstances for this purpose include: (1) The ages of the parties at the time of the marriage and at the time of the award, (2) Duration and degree of dependency, (3) Chronic illness or health condition, (4) Whether one spouse has given up a career or opportunity to support the other, and (5) Share of equitable distribution, among a few others.<sup>54</sup>

Even with this variety of methods these states have used in order to create a durational cap for the payor’s obligation, there is still much unpredictability when it comes to awarding spousal support. Other states have attempted to focus their reforms on methods such as guidelines to calculate the amount that may be awarded, in an attempt to increase predictability.

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> FLA. STAT. ANN. § 61.08(4) (2019).

<sup>50</sup> See Morgan, *supra* note 39, at 46.

<sup>51</sup> *Id.*

<sup>52</sup> MASS. GEN. LAWS ch. 208, §§ 48-55 (2012) (codifying the Alimony Reform Act of 2011).

<sup>53</sup> N.J. STAT. ANN. § 2A:34-23(c) (2020).

<sup>54</sup> *Id.*

## B. Amount Awarded

Colorado put a statutory cap on the amount of support that could be awarded by issuing suggested, not mandatory, guidelines in 2013. “The guideline amount is determined by taking 40% of the higher earning party’s monthly adjusted gross income minus 50% of the lower earning party’s monthly adjusted gross income.”<sup>55</sup> The guidelines also put a cap on the amount that can be awarded.<sup>56</sup> This amount should not be more than 40% of the combined monthly gross income of the parties, and if it does it must be reduced to fit into the cap restrictions.<sup>57</sup>

In 2021, Colorado is considering changes to the statute yet again to take into account the new tax change of 2019. The amended statute adds the following provisions: (1) if maintenance is not deductible for income tax of the payor and not taxable to the payee, the amount for parties with a “combined monthly adjusted gross income of ten thousand dollars or less is equal to eighty percent of the amount calculated, and (2) if maintenance is not deductible for income tax of the payor and not taxable to the payee, and the combined gross income of the parties is more than ten thousand but less than twenty thousand, then the awarded amount is equal to seventy five percent of the amount calculated.<sup>58</sup> While this change has not yet been considered final, it illustrates the efforts that states will begin making to offset the tax change that was implemented. By including percentages of the calculated amounts for spousal support obligations, it allows allowing for the additional amount to make up for the tax deductions that would have been given to the payor. It is vital for states to recognize the additional burden the tax change will be putting on those that have an obligation to pay spousal support and to try to help ease the damage this may do moving forward.

Along with the durational limits, Massachusetts attempted to give some predictability to the amount that was awarded. The guidelines mandated that alimony may not exceed the payee’s “needs,” which the guidelines determined to be 30% or 35% of

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<sup>55</sup> *Id.*

<sup>56</sup> *See Morgan, supra* note 39, at 43.

<sup>57</sup> *Id.*

<sup>58</sup> COLO. REV. STAT. § 14-10-114 (2019).

the difference in the gross income of the spouses at the time of their divorce.<sup>59</sup> The committee used the “1/3-1/3-1/3 formula” which is: “alimony payments should be one-third of the total gross income of the payor, plus the recipient spouse’s gross income, minus the recipient spouse’s gross income.”<sup>60</sup>

### C. Retirement Considerations

Throughout alimony reform efforts, states have begun to take retirement into consideration for payors and what that should mean for their obligation to continue paying their spouses. In 2014, New Jersey amended its alimony statute to include a presumption that alimony payments should end at the time of retirement.<sup>61</sup> Under the amendment, payors may look to terminate or modify their obligation to pay spousal support at the onset of actual or “prospective” retirement.<sup>62</sup> This allows the paying spouse to either terminate or modify their support obligation in two situations, either when the payor has actually retired, or when the payor is intending to retire but has not actually done so.<sup>63</sup> The statute does not define the term “prospective” which leaves open the question of how far in advance people can file to modify or terminate their obligation based on retirement.<sup>64</sup> The state has seen this issue come to light and has tried to clarify what “prospective” means for those who want to file. In *Mueller v. Mueller*,<sup>65</sup> the court held that five years prior to an anticipated retirement was too far out to file for a modification or termination of the alimony obligation.<sup>66</sup> The court noted, “the parties’ economic situations, health, and other relevant factors could radically change over such a lengthy period of time, before an actual retirement ever actually takes place.”<sup>67</sup>

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<sup>59</sup> MASS. GEN. LAWS ch. 208, §§ 48-55 (2012) (Codifying the Alimony Reform Act of 2011).

<sup>60</sup> See Linda Fidnick, Presentation at the MCLE Family Law Conference, Boston, Massachusetts (Mar. 14, 2008); see also James McCaskey, *Parsing Alimony: Deciphering the 1/3, 1/3, 1/3 Metric*, 5 FAM. MEDIATION Q. 6 (2006).

<sup>61</sup> NEV. REV. STAT. § 125.150(9)(a)-(k).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Morgan, *supra* note 39, at 48.

<sup>65</sup> 144 A.3d 916 (N.J. 2016)

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 922.

#### IV. Effect of the 2019 Tax change

Prior to January 1, 2019, spousal maintenance was considered taxable income for the spouse that was receiving the payments.<sup>68</sup> Additionally, payors were able to claim the payments as an itemized deduction on their taxes.<sup>69</sup>

After January 1, 2019, things changed for both the payor and payee of spousal maintenance. Alimony and maintenance payments are no longer deductible from the income of the payor and will not be included in the income of the payee if the terms are included in a divorce or separation agreement that was executed after December 31, 2018.<sup>70</sup> Divorce or separation agreements that are modified after this date, as well as those executed after this date, are also affected by this change. There is a caveat for the modification, however, which is that the modification must specifically state that the Tax Cuts and Jobs Act alimony treatments applies.<sup>71</sup>

This new change will continue to have a dramatic effect on people who have to pay their spouse alimony and will likely lead to a shift in the fight over alimony. Because payors are no longer able to deduct these payments, they not only will have to pay out the money to the spouse, but they will additionally still have to pay taxes on the amount paid. Payees no longer have to pay taxes for the amount that they receive, which will inevitably lead to the payee fighting for higher alimony payments. Spousal support payments are inevitably going to be smaller due to the lack of incentives and therefore may not fulfill the purpose that they were meant to serve.<sup>72</sup> In *Mann v. Mann*<sup>73</sup> the court noted that following the tax change on alimony, courts should consider the impact that it may have on the paying spouse.<sup>74</sup> The court found that the economic impact the change will have on the payor will

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<sup>68</sup> Justin T. Miller, *Tax Reform Could Make Divorce a Whole Lot More Taxing*, AMERICAN BAR ASSOCIATION (2019), [https://www.americanbar.org/groups/family\\_law/publications/family-law-quarterly/volume-52/issue-2/tax-reform-could-make-divorce-whole-lot-more-taxing/](https://www.americanbar.org/groups/family_law/publications/family-law-quarterly/volume-52/issue-2/tax-reform-could-make-divorce-whole-lot-more-taxing/).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> See Cunah, *supra* note 16.

<sup>73</sup> *Mann v. Mann*, 943 N.W.2d 15 (Iowa 2020).

<sup>74</sup> *Id.*

be greater than it has been in the past and this may affect the appropriate percentage of their income to be awarded to the payee.<sup>75</sup> Because this tax change creates a new burden that was not seen before, parties are left with a few options on how to deal with the change. Parties have the opportunity to support their ex-spouses through ways other than the well-known alimony payments.<sup>76</sup> For example, they may wish to exchange other assets throughout time, such as stocks, retirements, or transportation.<sup>77</sup> Parties may also agree to a “tax effect”<sup>78</sup> discount on the amount of alimony that is to be awarded.<sup>79</sup> This would allow for the parties to come to an agreement on an amount that would not be such a burden on the payor, which may allow for less argument about payment of alimony. This would take into account the payee’s tax rate and discount that amount from the total that will be paid.<sup>80</sup> While the change may feel like a small one, it is not hard to see that this is going to lead to more payors fighting to pay a lot less alimony to their spouses as they are receiving no real tax recognition for doing so, and payees will begin wanting much higher payments because they are now receiving free money with no tax consequences to them.

#### A. *Policy Considerations That Encouraged the Tax Change and Why They May Be Debunked*

According to the America Bar Association, there are four main policy reasons that the tax change on alimony took place, along with some reasons as to why these may not be accurate:

- 1) “The deduction is an unfair tax subsidy that encourages divorce”;<sup>81</sup>
- 2) The ending of the alimony deduction will result in additional tax revenue for the government;<sup>82</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> Bernadette A. Barbee, *Alimony After the TCJA Dystopian Nightmare or Necessary Change? Either Way, It’s Here to Stay*, 41 FAM. ADVOC. 16 (2019).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

- 3) The deduction has caused issues because the number of people claiming the deduction and the number of those including it in their income do not match;<sup>83</sup> and
- 4) The burden this poses would discourage people from divorcing and was intended to be “family friendly.”<sup>84</sup>

It is important to look at each policy reason individually to determine how the tax change may or may not have accomplished the reason listed. First, allowing payors to take a deduction was an unfair subsidy that was encouraging divorces across the nation. The ABA argues that it is very unlikely that anyone was going through the emotional and financial burden of getting a divorce solely to take advantage of the tax deduction of paying alimony.<sup>85</sup> Divorce requires a considerable amount of money from both parties and the tax deduction that would be received by the payor is not great enough to make up for the burden that is incurred along the way.

Next, the argument that the U.S government will receive additional tax revenue due to this tax change seems unconvincing. The additional income that the government may receive due to repealing the deduction is outweighed by the cost of the Tax Credit and Jobs Act along with the TCJA’s new code that nearly doubles the estate tax exemption to benefit wealthier families which will increase the federal deficit more each year than the cost of repealing the alimony deduction.<sup>86</sup> This policy concern argues with the other changes that were made with the same Act.

The policy concern that the repealing of the deduction will resolve the issue that there is a mismatch in those people claiming the deduction and those reporting it in their income, seems like an aggressive stretch on how to resolve the issue. The ABA argues that while there is a significant mismatch, about \$2,268,091 worth, the solution was not to get rid of the deduction all together.<sup>87</sup> It notes that this consequently made further work for people who have to keep track of these deductions. This issue specifically comes down to the lack of the enforcement of including these payments in income, and the lack of enforcement is not

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

a policy reason for completely eliminating the rules as they are.<sup>88</sup> The idea of matching the payments of alimony and the receiving of it should be simple and if the payees are not reporting the money they are receiving, they should be subject to back taxes, penalties, and interest.<sup>89</sup> This would be a far more practical approach to resolving the issue rather than the elimination of the deduction.

The ABA notes in addition that this tax change creates an additional burden on the Service to determine who is complying and who is not.<sup>90</sup> Prior to the change, the IRS had to match the payments and receipts without much else to consider. With the tax change, the IRS must now determine which rules apply to which payments in accordance with the dates they went into effect.<sup>91</sup> Modification and the dates everything goes into effect has created a harder process to match the payments and receipts and a more unconventional job for those that are in charge of doing so.<sup>92</sup>

The last policy concern was that repealing the alimony deduction was intended to be a “pro-family” approach because it would discourage spouses from divorcing due to the burden that may be put on them post-divorce.<sup>93</sup> The strongest argument against this point is the flipside of the “pro-family” approach which is that it encourages some people to stay in a marriage that is unhappy and unhealthy.<sup>94</sup> Staying in this hostile marriage can have adverse mental and physical effects on those involved, including the children.<sup>95</sup> Psychotherapist Sean Grover states that these hostile marriages are more harmful to the children of the marriage than a divorce would be.<sup>96</sup> The idea that the tax change would support a “pro-family” model is inaccurate in most re-

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> Louise Chang, *Unhappy Marriage: Bad for Your Health*, WEBMD (Sept. 20, 2021) <https://www.webmd.com/sex-relationships/news/20051205/unhappy-marriage-bad-for-your-health>.

<sup>96</sup> Sean Grover, *4 Reasons Why Bad Marriages Are Worse for Kids than Divorce*, PSYCHOLOGY TODAY (Sept. 20, 2021), <https://www.psychologytoday.com>.

gards and the arguments against it point to why this would not be beneficial to a family in the long-run.

## **Conclusion**

Over the years, the rationale for spousal support has shifted dramatically. What was once intended to support a wife after her husband took over her property turned into a punishment for wrongdoing during a marriage, and today serves many purposes. Depending on the state that is awarding the support, spousal support can be used for rehabilitative purposes, permanent support, or for compensatory purposes. Due to this lack of consistency, the awarding of spousal support is very unpredictable, and it is difficult to create uniform guidelines.

Many states have attempted reforms throughout the last decade to create a more stable spousal support system. A few of the reoccurring reform themes have been the calculation of support to be awarded, the duration of how long support should last, and whether retirement should be a consideration for spousal support. With each reform came an increase in the predictability of how support would be awarded by the court.

This changed in 2019 when the IRS changed the tax protocol regarding maintenance payments. Prior to this tax change, the payor was able to deduct the payments and the payee was required to include the amount in their taxable income. With the change that began January 1, 2019, the payor is unable to claim a deduction and the payee is not required to include it in their gross income. Moving forward, this change has the potential to have a significant effect on the settlement of divorce cases involving spousal support.

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