

ADOPTED

AMERICAN BAR ASSOCIATION

SECTION OF FAMILY LAW

REPORT TO THE HOUSE OF DELEGATES

RESOLUTION

1 RESOLVED, That the American Bar Association urges Congress to enact former Sections 215
2 and 682 of the Internal Revenue Code that, before their repeal in the Tax Cuts and Jobs Act of
3 2017 allowed payors to deduct and required payees to treat as taxable income alimony payments.
4
5 FURTHER RESOLVED, That, if Congress does not reinstate the alimony deduction and section
6 682 of the Internal Revenue Code, the American Bar Association urges all federal, state,
7 territorial and tribal governments to enact laws protecting the reasonable expectations of
8 taxpayers with respect to agreements and arrangements entered into prior to the effective date of
9 said repeal, including but not limited to pre-nuptial agreements, post-nuptial agreements, trusts
10 and similar arrangements, but only to the extent that income is not attributable to corpus added to
11 a trust after the effective date of on which the Tax Cuts and Jobs Act of 2017 became effective.

REPORT

I. INTRODUCTION AND SUMMARY

Among the many tax deductions that the Tax Cuts and Jobs Act eliminated from the Internal Revenue Code was the deduction for alimony payments. This deduction is not a deduction like others that eliminates the payment of tax on income. Rather, this deduction shifts the tax obligation to the individual who has the benefit of spending the income. In promoting the 2017 Tax Act, the Joint Committee on Taxation characterized the alimony deduction as a “divorce subsidy” which gives an advantage to divorced couples over married couples and projected that the elimination of the alimony deduction will increase tax revenues by \$8.3 billion over 10 years.¹ Even if true, this savings should not be funded at the expense of divorcing families whose financial conditions are most often changing for the worse. The 2017 Tax Cuts and Jobs Act was signed into law on December 22, 2017. The elimination of the alimony deduction applies 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, 2018, 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.

This Resolution asks Congress to reinstate the alimony deduction available to payors of alimony. Eliminating the deduction will make court proceedings more costly and time consuming as many states which currently use gross income to calculate alimony awards will now have to determine net income to calculate alimony awards. Further, divorcing couples will receive less favorable tax benefits than married couples. Without the alimony deduction, alimony paying spouses will pay taxes on money they do not get to spend at a higher tax rate and without many of the deductions available to married couples. As a result, the same gross income that was available during the marriage to support one household will be taxed at a higher rate leaving less net income to allocate between two households. Finally, the elimination of the alimony deduction will negatively affect couples who entered into prenuptial agreements with alimony provisions based on the assumption that the alimony deduction would be available. Because prenuptial agreements do not qualify as “divorce or separation instruments,” if the couple divorces after December 31, 2018, the party who agreed to pay alimony on the assumption that it would be tax deductible will now be required to pay the amount agreed upon without that benefit and the party receiving the alimony will receive a windfall.

The 2017 Tax Act also repealed section 682 of the Tax Code which provided rules regarding the tax treatment of income of alimony trusts payable to a former spouse. Section 682(a)

¹ Joint Committee on Taxation, *Description of the Chairman’s Mark of the “Tax Cuts and Jobs Act”* (JCX-51-17) (2017).

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provides that the donee spouse is to include the gross income actually received rather than requiring the donor spouse to include the gross income. With the repeal of section 682, parties that set up such alimony trusts prior to December 31, 2018 but who are not divorced or legally separated until after December 31, 2018 will lose the anticipated tax treatment.

II. BACKGROUND

In a divorce situation, alimony payments are often based upon one party's need and the other party's ability to pay or on the disparity in the parties' incomes. It is well recognized that it is more expensive for families to support two households after a divorce. The alimony deduction has been part of the Internal Revenue Code for the last seventy-five years.² The Internal Revenue Code includes alimony and separate maintenance receipts in the definition of "Gross Income."³ The Internal Revenue Code defines "alimony or separate maintenance payments" as follows:

(1) In general. The term "alimony or separate maintenance payment" means any payment in cash if—

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.⁴

Before its repeal Section 215 provided:

In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.⁵

The change is effective for any divorce or separation agreements or court orders entered into after December 31, 2018 and for any divorce or separation agreements or court orders entered into before December 31, 2018 that are modified after December 31, 2018. A party paying alimony will no longer receive a deduction and the party receiving alimony will no longer have to

² 26 U.S.C. §§ 1-1564 (1986). The 1986 Act continued the deduction first established in 1942.

³ 26 U.S.C. § 61(a)(8).

⁴ 26 U.S.C. § 71(b).

⁵ 26 U.S.C. § 215(a).

report it as income. When the bill was introduced in the House, the House Ways and Means Committee claimed that the “intent of the proposal was to follow the rule of the Supreme Court’s holding in *Gould v. Gould*⁶, in which the Court held that such payments are not taxable income to the recipient.”⁷ The *Gould* decision was based upon the Income Tax Act of October 3, 1913, long before the current law.

III. PURPOSE OF THE RESOLUTION

The purpose of this Resolution is to urge Congress again enact the alimony deduction. Over the last seventy-five years, the ability to deduct alimony payments has made paying alimony more palatable to the higher income spouse, has enabled divorcing couples to continue to share income as they did during marriage and has done so in a manner that makes calculations easy for the parties without the expense of having attorneys, experts and the court perform complicated net income calculations.

The other purpose of this Resolution is to urge Congress to enact legislation to protect the expectation of taxpayers who entered into agreements to create Section 682 Trusts in the event of a divorce. If such legislation is not enacted, couples who have a 682 Trust agreement in place but who do not divorce before December 31, 2018 will lose the anticipated ability to transfer tax liability to the spouse receiving the payment and the grantor spouse will be required to pay tax on all trust income. As a result, the grantor spouse will have a higher tax burden and beneficiary spouse will receive non-taxable funds.

IV. THE IMPORTANCE OF THE ALIMONY DEDUCTION

The alimony deduction has been an important tool for family law attorneys since 1942 and has enabled divorced families to easily calculate alimony agreements without the necessity of lengthy and expensive court proceedings involving experts to calculate net incomes of the parties. Allowing the higher income spouse to make payments based on gross income by shifting part of the tax liability on his/her income to the lower income spouse enables the divorcing couple to share the same income they had to support one household during the marriage in a way that results in the ability to provide for the two households. Further, unlike other tax deductions, the alimony deduction is not one that results in no revenue to the federal government. Rather, the alimony deduction shifts the tax obligation to the party who actually receives the funds. Without the alimony tax deduction, divorced spouses will be unable to continue to share the same income that was available in the household during the marriage and the higher income spouse will not be able to pay alimony at a rate that will enable the lower income spouse to support his/her own household.

Currently, in most cases, after a divorce, the spouse paying the alimony is in a considerably higher tax bracket than spouse receiving the money. The difference between these tax brackets provides a benefit to the spouse paying the alimony and an even

⁶ 245 U.S. 151 (1917).

⁷ Committee on Ways and Means, *Tax Cuts and Jobs Act, H.R. 1: Section-by-Section Summary*, at 61 (2017).

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greater benefit to the one receiving it. Essentially, the spouse receiving alimony is getting considerably more in actual dollars than the spouse paying it.⁸

Thus, many family law attorneys view the elimination of the alimony tax deduction as a “divorce penalty,” not a “divorce subsidy.”

If alimony is no longer deductible, the ability of an ex-spouse to pay it may be limited, due to other fixed expenses, such as child support payments, and education expenses for children. There is only so much juice that can be squeezed from the orange.⁹

Additionally, many states use gross income to determine a party’s alimony obligation because the party receiving alimony will be paying the taxes on the funds. Being able to calculate a party’s alimony obligation based on gross income is easier for the courts and results in less frequent modifications due to fluctuating tax deductions from year to year. The elimination of the alimony deduction will require many states to formulate a new methodology for determining alimony and will likely cause parties to file modification requests more frequently as their tax obligations change.

There is a concern among the family law bar that the elimination of the alimony deduction will result in fewer settlements, higher litigation costs and lower support orders for the dependent spouse as the parties will now be sharing less net income between two households. Divorcing couples will have greater tax obligations than married couples on the same amount of gross income. There is also concern that the elimination of the alimony deduction will cause some unhappy couples or couples where domestic violence or other abuses exist to remain married because they will simply be unable to afford to get divorced.

Family lawyers are also concerned that the repeal of the alimony deduction has overlooked couples who have entered into prenuptial agreements with alimony provisions on the assumption that the alimony deduction will be available. Since the Internal Revenue Code’s definition of “divorce or separation instrument” does not include a prenuptial agreement that is not in pay status, if the couple divorces after December 31, 2018, the party who agreed to pay alimony will no longer be able to deduct the payments. Rather, the party paying alimony will have to pay the agreed upon amount without being able to deduct the payments and the party receiving alimony will receive an unanticipated windfall by not having to pay taxes on the payments. This unanticipated consequence could lead to more court proceedings in seeking to modify or enforce such prenuptial agreements.

⁸ Malcom S. Taub, *How Tax Reform Could Radically Change Divorce*, Forbes (Nov. 9, 2017), <https://www.forbes.com/sites/nextavenue/2017/11/09/how-tax-reform-could-radically-change-divorce/#6fdac6e74e02>.

⁹ *Id.*

V. THE IMPORTANCE OF IRC SECTION 682

The effect of the repeal of IRC Section 682 is addressed in the attached Tax Section Report on Alimony Transitional Guidance. As noted therein, before its repeal, Section 682 allowed the grantor spouse to transfer separate property to a trust for the benefit of the other spouse. Upon divorce, the beneficiary spouse would receive the income from the trust for a certain term and pay the taxes on the income received. The principal would eventually revert back to the grantor spouse.

The 2017 Tax Act did not grandfather in Section 682 Trusts and agreements to create 682 trusts in the event of a divorce that are not yet in pay status. Thus, couples who divorce after December 31, 2018 will not receive the benefit of their bargain. Rather, the grantor spouse who agreed to place certain assets into trust with the expectation of transferring the tax liability for the payments made by the trust will now have to pay the taxes. If the beneficiary spouse is not willing to renegotiate changes to the trust or if the trust is irrevocable, the divorcing couples may experience further stress and additional litigation costs.

VI. CONCLUSION

This Resolution urges Congress to consider the detrimental effects on the family court system and divorced families caused by eliminating the alimony deduction and to reinstate the alimony deduction. This Resolution also urges Congress to reinstate former Section 682 of the Internal Revenue Code, as its elimination will have unintended consequences for parties who established alimony trusts prior to December 31, 2018, but who are not yet divorced or legally separated.

VII. Alimony Transitional Guidance

Background On The Alternative Resolution

Prior to its repeal in the Tax Cut And Jobs Act of 2017 (TCJA), the alimony deduction, as codified by Internal Revenue Code (IRC) Section 71, was one of the longest-standing deductions available to individual taxpayers. A part of the income tax law for roughly 75 years, the alimony deduction predates the first modern income tax code. For many taxpayers, the alimony deduction was treated as an immutable fact upon which to base planning for future divorce contingencies. The revocation of the alimony deduction puts many taxpayers who incorporated the alimony deduction into their post marital planning in a difficult position. These taxpayers have pre-existing, binding agreements that will lose their intended economic effect if the taxpayer divorces after 2018.

Restoring the alimony deduction, as requested by the ABA Family Law Section in Resolution 115A would eliminate the issues addressed below. Should Congress not restore the alimony deduction, this report is intended to: 1) identify issues that should be addressed by separate legislation, or if appropriate, rule-making; and 2) provide recommendations on how to correct some of the most serious problems arising from the repeal of the alimony deduction.

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Current State Of The Law

The alimony deduction allows the payor of alimony, as specifically defined, to take a deduction from income for amounts paid to a former spouse. The recipient of the alimony then includes the payment as income and pays tax on the amounts received. As long as both the payor and the recipient include the same amount as deductible and as income, 100% of the income is reported to the IRS. Each party is then responsible for calculating and paying the correct amount of tax based upon their individual situation. Given the recipient of the alimony often has a lower marginal rate than the person paying the alimony, the deduction frequently reduces the combined overall tax burden of the former spouses.¹⁰

The TCJA repealed the alimony deduction for couples divorcing after 2018. Couples that are divorced, or finalize their divorce, prior to the end of 2018, may apply pre-TCJA law and will be able to claim the alimony deduction. Those couples that divorce in 2019 or later will no longer be able to claim the alimony deduction. Absent the alimony deduction, all income is taxed to the person who earned the income regardless of what obligations they may have to pay support to a former spouse.

Guiding Principles Of The Report

This report is not intended to be an exhaustive list of potential future problems associated with the repeal of the §71 alimony deduction. It is intended to be narrowly construed and only seeks to comment on issues that are of importance to the integrity of tax administration, which seeks to provide consistent tax treatment of similarly situated taxpayers. The repeal of the alimony deduction has created two categories of taxpayers who may face different and unequal treatment under the new law because it grandfathered in certain taxpayers into the current alimony rules but excludes others. These two categories of excluded taxpayers are;

1. Taxpayers who entered into binding contracts through pre and post nuptial agreements, prior to the repeal of the alimony deduction, under which they are obligated to make alimony payments.
2. Taxpayers who entered into binding contracts to create, or have previously created, trusts that pay support similar to alimony and which prior to 2019, would result in the payments from the trust being income to the beneficiary rather than the grantor under IRC Section 682.

Importance Of Equal Treatment

The issues selected for this report were selected because the repeal of the alimony deduction changed the economic effect of previously agreed to contracts. Other similar contracts, such as privately negotiated divorce settlements entered into prior to 2019, were allowed to maintain the bargained-for economic effect. This creates a system where two contracts, both made before the effective date of TCJA, that both made the same assumptions about the future deductibility of alimony payments, and both provided for the same alimony payments, nonetheless have two different tax treatments under TCJA.

¹⁰Many scholars view alimony payments as payments made for the value of gains made by the marital unit during the length of marriage. Under this gain theory of alimony these payments represent ongoing property divisions from current income rather than true “deductions” which are normally tied to expenses for the production of income.

It is important to note how similar these types of private contracts are to divorce decrees or separation agreements. Taxpayers who enter into an agreement in contemplation of divorce have the same type of representation as those taxpayers who enter into settlement after a couple has filed for divorce. In both circumstances, each party is represented by a family law attorney, each has access to the other party's financial information, and both use similar information to calculate support payments.

Pre and Post Nuptial Agreements

Pre and postnuptial agreements are binding agreements made between individuals that are enforceable under state law. As these agreements specify what should happen in the event of a future divorce, they require the parties and their counsel to make assumptions about what the future will hold. Every agreement that specifies support after the termination of the marriage, either by the application of an earnings formula or a specified dollar amount, is implicitly based upon the assumption that alimony would be deductible by the payor.

TCJA grandfathers payments structured under a pre-2019 divorce decree, allowing application of the alimony deduction. However, pre and postnuptial agreements entered into prior to 2019 are not grandfathered under the legislation. This causes a number of problems for currently married couples who entered into these agreements. First, if a couple with a prenuptial agreement, even a 20 year old prenuptial agreement, divorces after 2019, the economic effect of the agreement has been altered. The payor will likely end up with a larger tax burden than anticipated, while the recipient will receive tax-exempt payments.

Fixing these economic distortions is not as simple as saying the agreement should be renegotiated. Even under the best of circumstances, renegotiating the agreement would cause familial stress. Each side would likely incur additional legal fees and in many cases the renegotiation would fail. It is likely that in many circumstances the recipient of the alimony would refuse to renegotiate if the recalculated alimony amount would be reduced because that would be against their interests. It is also likely that there would be an increased volume in contests to the validity of the agreement based on the change in the law. This could lead to litigation and uncertainty, which is what pre and post nuptial agreements are intended to avoid.

Trust Payments Pursuant To A Divorce - Irc Section 682

Prior to its repeal by the Tax Cut and Jobs Act of 2017, Section 682 provided that income from a trust established by a grantor as part of a divorce decree or a separation agreement was properly taxable to the designated beneficiary, rather than the grantor of the trust. Section 682 allowed a spouse with substantial separate property to transfer a principal amount to a trust. In the event of a divorce, or pursuant to a preexisting plan or agreement, the income from the property held by the trust would be payable to the former spouse for a certain term, after which the property, or the income from the property would revert back to the grantor.

The advantage of a Section 682 trust was that it reduced some of the uncertainties for each party. The contributing party was assured that the principal would not be at risk. The recipient of

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the income would be assured of steady stream of income from assets that could not be squandered or transferred beyond their reach, and each party could rely on a professional to manage the assets of the trust so that the assets would generate a commercially reasonable rate of return.

Like pre/post nuptial agreements, existing Section 682 trusts and agreements to create Section 682 trusts in the event of a divorce, are not grandfathered into the alimony deduction under TCJA. If a couple has a valid Section 682 trust agreement in place and does not divorce before 2019, the trust will be treated under the general grantor trust rules, which essentially treat the grantor as the taxpayer. The grantor would be responsible for paying tax on all of the income from the trust assets, including amounts legally required to be transferred to the former spouse.

The economic distortion caused by the repeal of the alimony deduction on Section 682 trusts is twofold. First, the grantor will have a higher tax burden and the beneficiary will receive non taxable distributions. Second, if the agreement only specified a set amount of principal to be transferred to the trust because the negotiations assumed, but the documents did not incorporate in a support formula with an assumed rate of a return and the beneficiary's tax rate on that income, the amount of principal contributed may be higher than needed to achieve the desired agreed upon result.¹¹

Curing these economic distortions may not always be possible. In some cases, Section 682 trusts are irrevocable trusts. As an irrevocable trust, it may be impossible for the settlor or the beneficiary to modify the terms of the trust so that it complies with the couple's original intentions. As with prenuptial agreements, the beneficiary spouse may be unwilling to negotiate any changes, and any negotiations regardless of success will take resources and cause family stress.

Solution To TCJA Created Consequences For Pre-2019 Marital Agreements And Trusts

Payments under binding agreements such as prenuptial agreements and Section 682 trusts entered into before 2019 should be given the same tax treatment as payments pursuant to divorce decrees entered into before 2019. In both situations, the payor should receive a deduction and the payee should pay tax on the amount that would be considered alimony under the pre-2019 rules.

Granting binding agreements the same protections as divorce decrees is good tax policy. Pre and post nuptial agreements as well as Section 682 trusts are not substantially different from the agreement that currently are grandfathered into the existing alimony deduction. As binding agreements, the parties should be able to enjoy the economic effect that they agreed to when entering the contract. Grandfathering these agreements into the alimony deduction creates certainty for the parties involved. Furthermore, the proposed grandfathering saves taxpayers time, resources, and marital stress by not forcing them to attempt to renegotiate old agreements.

¹¹ A simple support formula may be $\text{Annual Support} = (\text{Principal} \times \text{rate of return}) - \text{Beneficiary's tax rate}$. The document may simply solve for Principal to avoid the grantor being responsible for a lower than expected rate of return due to market conditions.

Administration Of Proposed Solution

From an administrative standpoint, proving the existence of a pre-2019 agreement does not require significant resources. Any agreement which would be grandfathered into the current alimony rules is a written agreement which is dated and signed by the parties. In the event of an audit, a revenue agent can simply request a copy of the document and verify the date on which the parties signed the agreement. If there is a question of authenticity there are other parties which can verify the date of the agreement. Overall, it is a small burden for the IRS when compared to the significant impact on affected taxpayers.

Conclusion

Good tax administration should strive to treat all similarly situated taxpayers the same way. The way the repeal of the alimony deduction was drafted does not accomplish this goal. The law as written grandfathers in some taxpayers into the current alimony system while depriving other similarly situated taxpayers the same benefit. In order to treat all similarly situated taxpayers the same, Congress should pass legislation that extends the alimony deduction to all taxpayers who entered into binding agreements prior to the repeal date.

Respectfully submitted,

Roberta S. Batley
Chair, Family Law Section

Dated: August 2018

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GENERAL INFORMATION FORM

Submitting Entity: ABA Section of Family Law

Submitted By: Bobbie Batley, Chair, ABA Section of Family Law

1. Summary of Resolution(s). The Resolution urges Congress to reinstate the tax deduction for alimony payments.
2. Approval by Submitting Entity. The ABA Section of Family Law approved submission of this Resolution on June 4, 2018.
3. Has this or a similar resolution been submitted to the House or Board previously? Yes, it was submitted for the Midyear 2018 Meeting of the House of Delegates, but was withdrawn prior to February 5.
4. What existing Association policies are relevant to this Resolution and how would they be affected by its adoption? There is no ABA policy on this subject so no existing policy would be adversely affected by this Resolution. This resolution strives to give divorcing individuals equal treatment to other taxpayers and is in harmony with other ABA policy designed to ensure equal protection.
5. If this is a late report, what urgency exists which requires action at this meeting of the House? Not Applicable.
6. Status of Legislation. The Resolution urges enactment of tax code sections previously repealed in on December 22, 2017, but there is no pending legislation.
7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates. Submission to the Congress.
8. Cost to the Association. (Both direct and indirect costs). None.
9. Disclosure of Interest. (If applicable). Not Applicable.
10. Referrals.

Section of Taxation
Real Property, Trust and Estate Law Section
Business Law Section
Litigation Section
Dispute Resolution Section
Solo, Small Firm and General Practice Division
Young Lawyers Division
Senior Lawyers Division

11. Contact Name and Address Information. (Prior to the meeting. Please include name, address, telephone number and e-mail address).

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EXECUTIVE SUMMARY1. **Summary of the Resolution**

The Resolution urges Congress to reinstate the tax deduction for alimony payments.

2. **Summary of the Issue that the Resolution Addresses**

Alimony is often relied upon to provide ongoing financial support to the lower income spouse following a divorce. The alimony deduction helps enable divorced families to support two households on the same income that married couples use to support one household by shifting the income to the spouse in a lower tax bracket. Without the alimony deduction, there will be a larger portion of the income going to the government and a smaller portion of the income allocated between two households. Elimination of the alimony deduction from the new tax code may have a chilling effect on divorce settlements; may result in lower alimony awards; and may have a negative effect on divorced families. .

3. **Please Explain How the Proposed Policy Position will address the issue**

This Resolution urges Congress to enact anew provisions providing for an alimony deduction. It similarly urges Congress to reinstate Section 682 of the Internal Revenue Code, with similar effect on the taxability of alimony trusts.

4. **Summary of Minority Views**

None.