Changing Tax Laws and Support: Keeping Up as the Ground Shifts

By
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While Congress constantly tweaks and makes changes to tax laws, the last few years have seen substantial major revisions that directly impact family law. This article will focus on the tax law changes that could impact child and spousal support. Since many of these tax law changes are very new as of the writing of this article, there are no appellate decisions yet interpreting and applying these changes to child and spousal support laws in the various states. It is the author's intention to provide ammunition for argument on both sides of these as yet undefined impacts. Since these tax law changes will impact taxes to be paid, and therefore resulting net incomes, the impact on child and spousal support should be considered. In Part I, this article will examine the Tax Cuts and Jobs Act passed in December 2017, including repeal of the alimony deduction and the temporary reduction of the dependent exemption, and look at the impact of other aspects of the tax law changes on spousal and child support. In Part II, this article will examine the tax law changes and financial impacts of the CARES Act and other legislative responses to the COVID-19 pandemic and their potential effects on support.

I. The Tax Cuts And Jobs Act

A. *Alimony Taxability and Deductibility*

The Tax Cuts and Jobs Act of 2017 (TCJA) made some major changes impacting divorce.[1] The most well-known and described of these changes was the repeal of the alimony deduction. The passage of the TCJA also eliminated many personal deduc-

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1 Pub. L. No. 115-97, 131 Stat. 2054 (2017) (codified as amended at I.R.C. § 63 (2018), https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.htm).

tions.[2] Only one change was delayed in implementation for a year – the repeal of the alimony deduction. Additionally, existing alimony arrangements as of December 31, 2018 (and future modifications of those existing alimony arrangements) are entitled to retain their prior tax status of being fully deductible for the payor, and fully included in the income of the recipient.[3]

As that deadline grew closer, many lawyers, clients, and accountants tried to figure out how to retain the favorable tax treatment for alimony when the case did not look like it would be finished and proved-up by the end of the year (including the inability of the courts to accommodate a crush of last minute prove-ups). There were some options utilized in that scenario by practitioners prior to December 31, 2018, including preparing written separation agreements and entering temporary spousal support orders. These options also carried some risk since they were not yet incorporated into final judgments.

The deductibility of alimony in federal law stems from Internal Revenue Code section 71 (income) and corresponding provisions in section 215 (deductions).[4] For payments to be deductible, all payments must be under the provisions of a divorce or separation instrument and section 71 defines a "divorce or separation instrument":

A. A decree of divorce or separate maintenance or a written instrument incident to such a decree, or
B. A written separation agreement, or
C. A decree (not described in sub-paragraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.[5]

A divorce or separation instrument also includes a modification or amendment to such decree (judgment/order) or agreement. It is important to note that each of the three types of divorce or separation instruments are listed in the alternative.

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[2] I.R.S., *Divorce or Separation May Have an Effect on Taxes* (July 8, 2019), https://www.irs.gov/newsroom/divorce-or-separation-may-have-an-effect-on-taxes.

[3] I.R.S., *Topic No. 452 Alimony and Separate Maintenance* (May 28, 2020), https://www.irs.gov/taxtopics/tc452.

[4] IRC §§ 71, § 215.

[5] IRC § 71(b)(2).

From basic statutory construction, use of the "or" conjunction is crucial in understanding that any one of those three alternatives will suffice. There is a great deal of Tax Court and federal case law on the meaning and application of each of these three alternatives listed in the statute.[6]

Subsection A, "a decree of divorce or separate maintenance or a written instrument incident to such a decree," is generally considered as the final decree or judgment for divorce or dissolution of the marriage, of separate maintenance or support, or of legal separation.[7]

Subsection C, "a decree (not described in sub-paragraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse," is generally understood to include an order for temporary or pendente lite support.[8] An order for temporary support is a "C" type of divorce or separation instrument: i.e. "a decree [not a decree of divorce or separate maintenance] requiring a spouse to make payments for the support or maintenance of the other spouse."

Subsection B, "a written separation agreement," may be the provision most important to evaluating options to retain taxable status for a maintenance arrangement before December 31 of that year.[9] The term "written separation agreement" is not defined in the Code or the Regulations. The court in *Richardson v. Commissioner* observed: "Surprisingly, the Commissioner has not promulgated any regulations describing what a divorce or separation instrument must say, or what a divorce court must do, to "designate" the tax treatment to be afforded inter-spousal payments."[10] Clarity in the terms of these written separation agreements is crucial, but also the form and manner of memorializing the agreement is undefined. As the Tax Court stated in *Prince v. Commissioner*, "[I]t is clear that the writing requirement imposed by section 71 was designed only to insure adequate proof of the existence of an obligation and the specific terms thereof when a divorce has occurred."[11] The court pointed

6 *See generally* Jacklin v. Commissioner, 79 T.C. 340 (1984).
7 IRC § 71(b)(2)(A).
8 IRC § 71(b)(2)(C).
9 IRC § 71(b)(2)(B).
10 125 F.3d 551, 556 n.3 (7th Cir. 1997).
11 Prince v. Comm'r, 66 T.C. 1058, 1067 (1976).

out that section 71 "does not dictate the medium which may be used nor the form of writing which the instrument must take."[12] The court found that, while an oral agreement does not qualify as a written separation agreement, an oral agreement in court which is recorded in a written, official transcript does qualify.[13]

For those who struggled to get in place a tax-deductible maintenance arrangement before December 31, 2018, there were several options to resolve the issue of maintenance before December 31 in a way that preserved the tax-deductible status of the alimony payments even if the case could not be proved up and final judgment entered before December 31, 2018.

Many litigants tried to get the divorce case bifurcated and have the court enter a judgment for dissolution of the marriage and regarding alimony, reserving the remaining issues. However, this could lead to a series of complicating issues. For example, if the divorce is entered mid-December, and the bonus or retirement matching contribution is not made until after the divorce is final – are those assets then going to be separate property?

Another approach to resolve the maintenance issue was through a written separation agreement. The amount and duration of maintenance in Illinois and some other states are often now based on the statutory formula.[14] Even if the other terms of a divorce or legal separation are not resolved, it was a reasonably achievable goal to calculate the amount and duration of maintenance pursuant to the statutory guidelines and enter into a written separation agreement addressing at least, or only, the maintenance issue before December 31. This "final" agreement would later be incorporated into the judgment for dissolution of marriage or legal separation. It could also later be modified if necessary, which retains the tax-deductible status under the TCJA.

Additionally, a temporary maintenance order could have been entered before December 31, which qualifies as a type "C" divorce or separation instrument. This raises a concern about the conversion of the temporary order into a permanent one after January 1, 2019, while still retaining the tax-deductible status. How would a 2018 temporary alimony order followed by a post

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12 *Id.* at 1067.

13 *Id.*

14 750 Ill. Comp. Stat. § 5/504 (2019).

January 1, 2019 judgment be treated? If nothing in the terms of the order change, it could possibly still qualify as tax-deductible. One may be able to preserve the deductibility by incorporating the terms of the temporary order into the judgment. Support for this is found in 26 CFR §1.71-1T (Q-A #26), a regulation enacted under the Tax Reform Act of 1984.[15]

The focus and unanswered questions now revolve around how to incorporate temporary orders or written settlement agreements into a final judgment without losing the tax attributes of the alimony. There is no official guidance yet from the IRS on this question. However, since modifications of taxable/deductible alimony are permitted without losing the tax attributes, one method that may work is to incorporate the prior arrangement into a final judgment as is. If the amount or other terms need to be changed, enter a separate provision or order modifying the prior temporary order or written settlement agreement with the new terms. The statute provides that the taxable/deductible status of alimony remains in place in a modification unless the modification states that the alimony or separate maintenance payments are not deductible by the payer spouse or includable in the income of the receiving spouse.[16] Although this provides a safe harbor to retain the taxable/deductible status, in keeping with the typical "belt and suspenders"(adding another measure of security) approach to drafting employed by many attorneys, it does not hurt to specify the continuation of the tax treatment in the modification provisions.

B. *Tax Rates, Filing Status and Dependent Exemptions*

Major TCJA changes impacting divorce include the restructuring of personal exemptions and tax rates. These changes are not permanent and are set to expire after ten years.[17] Given the scheduled sunset of these provisions, especially regarding families with young children, marital settlement agreement drafting

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15 26 C.F.R. § 1.71-1T (Q-A #26) (2017).

16 IRC §§ 71, 215; I.R.S., *Clarification: Changes to Deduction for Certain Alimony Payments Effective in 2019*, https://www.irs.gov/forms-pubs/clarification-changes-to-deduction-for-certain-alimony-payments-effective-in-2019 (last visited May 14, 2020).

17 *See generally* I.R.S., Pub. No. 5307, *Tax Reform Basics for Individuals and Families* (2019), https://www.irs.gov/pub/irs-pdf/p5307.pdf.

should still take into account these tax aspects that may impact families later. Attorneys do not want to create a situation where the structure of their settlements will become unworkable and require coming back into a court process many years later. Under many states' child support statutes these tax credits and deductions impact income for purposes of child support. For example, in Illinois, as in many other states, income is defined as all income from all sources.[18] For child support purposes, income is not limited to the IRS definition of taxable income and includes sources of funds even if not included in taxable income.[19] In states that look at net income for purposes of support guidelines like Illinois, net is defined as income after deduction of taxes properly calculated.[20] Application of deductions and tax credits could increase income for purposes of child support by thousands of dollars, which wise counsel will include in their analysis before finalizing settlements and in advocacy with the court.

The TCJA eliminated personal exemptions, at the same time increasing the standard deduction. Eliminated in the TCJA as part of this tax restructuring was the value of the dependent exemption.[21] Keep in mind the dependency exemption itself was not repealed. The value of the dependent exemption was reduced to zero during this ten-year time period. Often misunderstood are the other tax implications that follow the dependent exemption and changes in the standard deduction. Attorneys need to understand the complex web of tax credits that accompany the allocation of the dependent exemption, and the other tax benefits that shadow Head of Household status which are independent of the dependent exemption allocation.

After the elimination of the dependency exemption value in the 2017 Tax Cuts and Jobs Act, much confusion has reigned about their value and utility. Attorneys still hear clients asking (demanding?) to be allocated the dependency exemption, and often find counsel arguing the point, without any understanding of the real costs or benefits. It is important to understand what the dependency exemption is now worth, and how it should be

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[18] 750 Ill. Comp. Stat. § 5/505(a)(3)(A) (2019).

[19] *See* Laura W. Morgan, Child Support Guidelines: Interpretation and Application § 4.03(A), at 4-6, 4-9 (2d ed. Supp. 2019-20).

[20] 750 Ill. Comp. Stat. § 5/505(a)(3)(B).

[21] I.R.S., *Tax Reform Basics for Individuals and Families*, *supra* note 17.

allocated. A balance of three factors interrelate and can be adjusted to be more advantageous for the finances of the family: parenting time schedule, filing status, and dependent exemptions.

First, the dependency exemption can be allocated by agreement of the parties. It can be allocated year by year, or for all future years (or specific or all even or odd future years). The allocation must be done by completing and signing IRS Form 8332. Simply including allocation language in the settlement agreement or judgment is insufficient. Additionally, the allocation must be unconditional. Attorneys cannot use language that allocates the exemption so long as the support payments have been paid in full, for example.

The dependency exemption is completely different and separate from Head of Household (HOH) status. Generally, HOH is a filing status which results in more favorable tax rates and less taxes due. However, the TCJA also changed the income range where the HOH status impacts tax rates. Compared to Single taxpayers, HOH status entitles the taxpayer to apply lower tax rates for incomes between (for 2020) $9,875 and $53,700. Incomes over $53,700 have the same tax rates as Single filing status.[22]

One must qualify for HOH status; it cannot be allocated by agreement or by signing the IRS Form 8332. To qualify for HOH status, among other requirements, a parent must have a child (dependent) living in their household more than 50% of the year (so more than 182.5 overnights). From IRS Publication 504, filing as head of household has the following advantages:

- You can claim the standard deduction even if your spouse files a separate return and itemizes deductions. . . .
- Your standard deduction is higher than is allowed if you claim a filing status of single or married filing separately. . . .
- Your tax rate usually will be lower than it is if you claim a filing status of single or married filing separately. . . .
- You may be able to claim certain credits (such as the dependent care credit and the earned income credit) you can't claim if your filing status is married filing separately. . . .

22 Amir El-Sibaie, *2020 Tax Brackets*, TAX FOUND. (Nov. 14, 2019), https://taxfoundation.org/2020-tax-brackets/.

- Income limits that reduce your child tax credit and your retirement savings contributions credit, for example, are higher than the income limits if you claim a filing status of married filing separately.[23]

The taxpayer may be able to file as head of household if all of the following requirements are met:

- You are unmarried or "considered unmarried" on the last day of the year.
- You paid more than half the cost of keeping up a home for the year.
- A "qualifying person" lived with you in the home for more than half the year (except for temporary absences, such as school).[24]

For Head of Household, the taxpayer must be considered "unmarried" for more than half of the year. A taxpayer is considered unmarried on the last day of the tax year if all of the following tests are met:

- You file a separate return. A separate return includes a return claiming married filing separately, single, or head of household filing status.
- You paid more than half the cost of keeping up your home for the tax year.
- Your spouse didn't live in your home during the last 6 months of the tax year.
- Your home was the main home of your child, stepchild, or foster child for more than half the year.[25]

The rules for Head of Household status include the requirement the taxpayer must be able to claim the child as a dependent, except this test is met if the taxpayer cannot claim the child as a dependent only because the noncustodial parent can claim the child (when a Form 8332 has been executed). The IRS has special rules for children of divorced or separated parents. A child will be treated as the qualifying child of his or her noncustodial parent if all of the following statements are true.

1. The parents:
a. Are 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 during the last 6 months of the year, whether or not they are or were married.

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23 I.R.S., Pub. No. 504, *Divorced or Separated Individuals* 6, https://www.irs.gov/pub/irs-pdf/p504.pdf (2019).

24 *Id.*

25 *Id.*

2. The child received over half of his or her support for the year from the parents.
3. The child is in the custody of one or both parents for *more than half* of the year.[26]

A 50/50 parenting time schedule may prevent both parents from claiming HOH status, since neither has the child living in their household more than 50% of the overnights. The IRS does have a tie breaker rule, which is not often known or followed: "If the child lived with each parent for an equal number of nights during the year, the custodial parent is the parent with the *higher adjusted gross income."*[27]

Given the phase out of the tax differential between HOH and Single filing status, this tie-breaker rule in 50/50 parenting time cases can result in only the higher earning parent qualifying for HOH status, but being phased out of any significant benefit in tax rates because his or her taxable income exceeds $53,700. A careful analysis of the relative cost and benefit of not only the changes in the child support amount due to adjustment in the parenting time schedule must also consider the impact of the HOH tax rates and other items like the Child Tax Credit (discussed below). This analysis can be delegated to the parties' accountant or computed using divorce financial software such as Family Law Software. Parental demands for an ostensibly 50/50 parenting time schedule may end up in lower child support for the higher earning parent, but overall less net income available to the family.

Pursuant to the Tax Cuts and Jobs Act passed in December 2017, the value of the dependency exemption was reduced to $0 for 10 years (through the 2026 tax year).[28] At the same time, the standard deduction was increased significantly. For 2020, the standard deduction for a single person is $12,400, for a married couple it is $24,800.[29] The Head of Household standard deduction for 2020 is $18,650, an additional $6,250 over a single person.[30] In addition, there is a separate tax rate table for Head of Household as discussed above. The net result is that having a

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26 *Id.* at 8 (emphasis added).
27 *Id.* at 9 (emphasis added).
28 *Id.* at 7.
29 *Id.* at 4.
30 *Id*.

dependent child in one's home to qualify as HOH permits a higher standard deduction and, for some taxpayers, lower tax rates.

The Child Tax Credit was significantly increased in the TCJA, in part to compensate taxpayers for the elimination of the dependent exemption. Until the passage of the Tax Cuts and Jobs Act in December 2017, taxpayers could claim an exemption for having dependents that would further reduce the part of their income on which they could be taxed. "This personal exemption has been removed; in its place, the IRS now offers increased credits for claiming dependents."[31]

There is a Child Tax Credit and an Additional Child Tax Credit laid out in the TCJA.[32] The Child Tax Credit itself is worth $2,000 per child, and can only at most reduce a taxpayer's taxes to zero. If there are unused amounts of the Child Tax Credit after reduction of the tax owed to zero, an Additional Child Tax Credit is applied, which can result in refundable amounts being paid to the taxpayer by the government. This is not universal; some taxpayers may be phased out of the benefit as described in detail below.

The Child Tax Credit is generally a nonrefundable credit; however, certain taxpayers may be entitled to a refundable Additional Child Tax Credit:

> • Taxpayers with more than $2,500 of taxable earned income may be eligible for the additional child tax credit if they have at least one qualifying child.
>
> • Taxpayers with three or more children may also be eligible for the additional child tax credit regardless of their income.[33]

The Child Tax Credit is available to the parent who claims the child as a dependent. Therefore, this tax benefit is allocated when the dependent exemption is allocated by IRS Form 8332. As reflected in the name, this is a tax credit. A tax credit reduces tax liability dollar-for-dollar, directly reducing the tax owed, rather

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31 Zack Sigel, *Who Can I Claim as a Dependent and Why Would I Want to?*, Pol'y Genius (Feb. 14, 2020), https://www.policygenius.com/taxes/who-can-i-claim-as-a-dependent-and-why-would-i-want-to/.

32 I.R.S., *Tax Reform Basics for Individuals and Families*, *supra* note 17.

33 I.R.S., *Additional Child Tax Credit – General Eligibility,* https://apps.irs.gov/app/vita/content/globalmedia/additional_child_tax_credit_4012.pdf (last visited Sept. 19, 2020).

than a deduction from taxable income, and therefore is potentially more valuable. In addition, under the TCJA, these tax credits are now partially refundable if the application of the tax credit to the taxes due on a return results in overpayment of taxes, up to $1,400 per qualifying child.

Not to be forgotten in the analysis, however, is the phase out of the Child Tax Credits for higher income taxpayers. "Above certain levels of adjusted gross income, or AGI, the credit begins to phase out – meaning that it is reduced – and if the taxpayer's AGI is greater than an even higher threshold, the credit disappears entirely."[34] For 2020, the income amounts for phase out begin at $200,000 for Single (and HOH) taxpayers, and completely disappears at AGI of $240,000. This is important to keep in mind when dealing with client requests to be allocated the dependent exemptions after the TCJA.

Along with the Child Tax Credits, there are other tax credits which follow the allocation of the dependency exemption and/or primary residence of the child, and that may have significant value to taxpayers after a divorce. These include: The Earned Income Tax Credit (EITC), the Child and Dependent Care Credit, the American Opportunity Tax Credit (AOTC), and the Lifetime Learning Credit (LLC).

The Earned Income Tax credit, or EITC, is one of the few fully refundable tax credits in the U.S. Tax Code. Designed to reduce the financial burden on lower-income workers, particularly those with children, the EITC can be worth thousands of dollars for larger families of modest incomes. Eligibility for the EITC requires the taxpayer to have at least one qualifying child, and the credit increases in amount for up to three children. For divorced and separated individuals, that means the child must have the same main home as the taxpayer for more than half of the year, and the taxpayer must be the only one who can claim this child or the one who can claim the child under the tie-breaker rules for a child who is a qualifying child of more than one person.[35] To qualify for the EITC in 2020, the taxpayer must

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[34] Matthew Frankel, *Your 2020 Guide to Tax Credits*, MOTLEY FOOL (Feb. 15, 2020), https://www.fool.com/taxes/2020/02/15/your-2020-guide-to-tax-credits.aspx.

[35] I.R.S., Pub. No. 5334, *Do I Qualify for EITC?* (Nov. 2019), https://www.irs.gov/pub/irs-pdf/p5334.pdf.

have taxable income of at least $15,820, but no more than $50,594 (with three children) if filing as Single or HOH.[36] At the highest eligible income level and maximum number of children, the EITC can result in a refund to the taxpayer of $6,600. This refundable tax credit could impact the computation of net income for purposes of computing child support. A parent with taxable income of $50,000 and three children could end up with an additional $6,600 of funds. That additional money could be considered as income for purposes of support, and may substantially change the guideline amount of support awarded.

The Child and Dependent Care Credit (Child Care Credit) can be worth up to 35% of a taxpayer's qualifying childcare expenses.[37] This credit is not refundable, meaning it can reduce tax owed up to the amount of the taxes owed, but not more. Qualifying for the Child Care Credit requires analysis of not only the expense itself, but also whether the child is a qualifying child for purposes of the credit. A dependent for purposes of this credit is a person for whom the taxpayer could claim an exemption. To be a qualifying child, a child must live with the taxpayer for more than half the year. Even if the parent can't claim a child as a dependent, he or she is treated as a qualifying person if:

- The child was under age 13;
- The child received over half of his or her support during the calendar year from one or both parents who are divorced or legally separated under a decree of divorce or separate maintenance, are separated under a written separation agreement, or lived apart at all times during the last 6 months of the calendar year;
- The child was in the custody of one or both parents for more than half the year; and
- The taxpayer was the child's custodial parent.[38]

According to IRS Publication 503, the custodial parent is the parent with whom the child lived for the greater number of nights. If the child was with each parent for an equal number of nights, again the custodial parent is the parent with the higher adjusted gross income.[39]

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36 *Id.*

37 I.R.S., Pub. No. 503, *Child and Dependent Care Expenses* 2 (2019), https://www.irs.gov/pub/irs-pdf/p503.pdf.

38 *Id.* at 4.

39 *Id*.

The noncustodial parent cannot treat the child as a qualifying person for the Child Care Credit even if that parent is entitled to claim the child as a dependent under the special rules for a child of divorced or separated parents.[40]

For divorcing parents with older children, consideration should be given to the impact of the Lifetime Learning Credit (LLC) and the American Opportunity Tax Credit (AOTC).[41]

The AOTC is a credit for qualified education expenses paid for an eligible student for the first four years of higher education. A taxpayer can get a maximum annual credit of $2,500 per eligible student. If the credit brings the amount of tax owed to zero, the taxpayer can have 40% of any remaining amount of the credit (up to $1,000) refunded. The amount of the LLC credit is 20% of the first $10,000 of qualified education expenses or a maximum of $2,000 per return. The LLC is not refundable. So, taxpayers can use the credit to pay any tax owed but will not receive any of the LLC credit back as a refund. A taxpayer cannot claim both the LLC and AOTC for the same student in the same tax year.

Both the LLC and AOTC require the student to be a qualifying individual for the credit to be claimed on a parent's return. The student must be claimed as a dependent on the parent's return. If you allocate the dependent exemption through an IRS Form 8332, the right to claim either the LLC or the AOTC goes with that allocation. Of course, there are other rules and limitations, so careful analysis should be undertaken in considering the impact of allocation of the dependent exemption for older children.

II. The CARES Act and Other Legislative Responses to the COVID19 Pandemic

As the global pandemic began to impact the U.S. economy, Congress passed sweeping legislation in an attempt to deal with the anticipated fallout. First, Congress passed the Families First

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40 *Id.*

41 I.R.S., *Individual Education Credits – AOTC and LLC* (Sept. 19, 2020), https://www.irs.gov/credits-deductions/individuals/education-credits-aotc-llc.

Coronavirus Response Act (FFCRA).[42] Shortly thereafter Congress passed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).[43] Between the two acts there are provisions that could impact the determination of income, and therefore support computations for divorced and divorcing parties.

FFCRA and the CARES Act made changes to tax law that can impact divorcing and divorced families. There are four basic programs created in this legislation which provided financial relief and/or stimulus payments. Each of these programs could have an impact on net income for purposes of support, child and spousal.

1. Stimulus payments, technically called the Stimulus Recovery Rebate (SRR) or Economic Impact Payments (EIP)
2. Paycheck Protection Act (PPP) forgivable loans
3. Economic Injury Disaster Loan Advances (EIDL Advances)
4. Economic Injury Disaster Loan (EIDL Loans)

The most widely implemented program in the CARES Act is the individual stimulus payment, which is in many cases automatically deposited money into taxpayers' bank accounts. Technically called "recovery rebates," this is a new refundable tax credit for taxpayers' 2020 taxes that was created by the CARES Act. Unlike most tax credits, recovery rebates were paid out immediately to Americans who qualified to receive them. This means that an American who qualified for a $1,200 recovery rebate received a check (or direct deposit) for $1,200, rather than having to wait until his or her 2020 taxes are filed next year.[44]

The money that taxpayers received via their stimulus check is not taxable, meaning it does not count towards their 2020 taxable income. In addition, the check is not an advance on their 2020 tax refund, since they are mutually exclusive. Stimulus checks are also not a loan, so taxpayers do not need to pay the money back

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[42] Pub. L. No. 116-127, 134 Stat. 177-218 (Mar. 18, 2020), https://www.congress.gov/bill/116th-congress/house-bill/6201/text.

[43] Pub. L. No. 116-136, 134 Stat. 281 (Mar. 27, 2020).

[44] Paul Cook, *Calculating Recovery Rebates from the Stimulus* (Mar. 30, 2020), https://cook.house.gov/media-center/press-releases/calculating-recovery-rebates-from-the-stimulus.

to the federal government.[45] For divorced and divorcing families, after the question of who gets possession of this money (which was deposited based on the prior year's income tax filing status and account information), the impact on income for purposes of support should be considered. Again, if support is based on all income from all sources, and the definition of income does not rely on the IRS definition but includes all money (or wealth) received, this money should be included as income for purposes of support. The stimulus rebate will essentially reduce taxes for the 2020 tax year, which would increase net income for purposes of child or spousal support. Factors that mitigate against including these amounts as income for purposes of support include that the SRR is a one-time payment (it is still an open political question whether it will be repeated or expanded) and will not have a long-term impact on income for purposes of support. While not determinative, the IRS does not consider these funds to be income, and it will not be counted as additional taxable income.[46] Each parent could have received this payment (if not phased out or otherwise disqualified), so for the majority of states that based support on an income shares method, the SRR would have an impact on both parents, and ultimately a very small impact on support. Additionally, the cost of returning to court to compute the impact outweighs the benefit of a possible small increase in support.

The Paycheck Protection Program (PPP) is part of the CARES Act and permits businesses to obtain loans from their bank but backed by the government, primarily to maintain company payrolls while the "shelter at home" rules potentially reduce company revenue.[47] No specific reduction in revenue is required to qualify for this loan. If a company takes this loan, and uses the proceeds as required in the statutory scheme, the full loan can be forgiven. The loan itself does not become income for

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45 Caroline Hwang, *Coronavirus Stimulus Package: What You Need to Know*, SmartAsset (July 13, 2020), https://smartasset.com/financial-advisor/coronavirus-stimulus-package.

46 IRS, *What People Really Want to Know About Economic Impact Payments* (May 12, 2020), https://www.irs.gov/newsroom/what-people-really-want-to-know-about-economic-impact-payments.

47 Small Business Administration, *Paycheck Protection Program*, https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program (last visited Sept. 19, 2020).

tax purposes, however the expenses paid with the loan are not permitted to be deductible expenses for tax purposes.[48] For example, assume ABC company takes a $100,000 PPP loan. Within 8 weeks of disbursal of the loan (or 24 weeks if a longer time is elected under revisions to the CARES II Act passed in June 2020), the business uses the loan proceeds for payment of payroll and other expenses. The rules require 60% of the amount to be used to maintain payroll, while the other 40% may be used for other allowable expenses such as rents, utilities, and mortgage interest (originally the statute required 75% to be spent on payroll, which was reduced in the June statutory revisions to 60%).[49]

So, assume a hypothetical ABC company took that $100,000 and paid $60,000 in payroll and $40,000 in other allowable expenses. Then ABC applies for forgiveness of the $100,000 loan. Once approved, ABC does not have to include the original $100,000 of loan proceeds as income, but the company will not be permitted to include the $60,000 of payroll and $40,000 of other expenses as deductions. For support purposes, however, how should this $100,000 be treated? The reality is that the business has $100,000 more of cash flow. Especially in a flow-through entity like an S Corp, partnership or LLC, or sole proprietorship, the reality of this financial shot in the arm of additional cash flow does not change the bottom line for tax purposes, but for cash flow purposes it could have an impact. Another aspect of a PPP forgivable loan that could impact divorcing families is the impact on business valuation, which is beyond the scope of this article.

Economic Injury Disaster Loan (EIDL) is another portion of the CARES Act that provides funds to small businesses.[50] The EIDL program consists of two portions, the EIDL Emergency Advance and an EIDL Loan. Both programs are run through the

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48 *Business Loan Program Temporary Changes; Paycheck Protection Program—Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules*, 85 Fed. Reg. 38304 (June 26, 2020), https://www.federalregister.gov/documents/2020/06/26/2020-13782/business-loan-program-temporary-changes-paycheck-protection-program-revisions-to-loan-forgiveness.

49 *Id.*

50 *SBA Provided $20 Billion to Small Businesses and Non-Profits Through the Economic Injury Disaster Loan Advance Program*, *Release No. 20-56,* Small Business Administration (July 11, 2020), https://www.sba.gov/article/2020/jul/11/sba-provided-20-billion-small-businesses-non-profits-through-economic-injury-disaster-loan-advance.

Small Business Administration (SBA). The EIDL Emergency Advance applies to small businesses. They were able to apply for an Economic Injury Disaster Loan advance of up to $10,000. This advance is designed to provide economic relief to businesses that are currently experiencing a temporary loss of revenue. This loan advance will not have to be repaid, but it does get applied to the PPP loan amounts for forgiveness. Recipients do not have to be approved for a loan in order to receive the advance, but the amount of the loan advance will be deducted from total loan eligibility. Every small business, from multi-million dollar enterprises to small sole proprietorships, was entitled to the same up to $10,000 payment. While in a larger business this amount may have no significant impact on the bottom line, in a smaller business like a mom-and pop operation with $50,000 per year in revenue, this payment could increase the bottom line by 20%, with no tax consequences and no reduction in expense deductions. Still unclear is whether this will impact flow-through calculations of income for purposes of support. However, again, if support is required to be based on all income from all sources, the addition of $10,000 of cash (wealth) to a company which flows through to the business owner could and possibly should have an impact on support.

The EIDL itself is a loan, although with a very favorable interest rate and payment terms. An EIDL loan should not impact cash flow for purposes of support differently from any other loan a company may receive. However, EIDL and other provisions of the CARES Act may impact business valuations in current cases of divorcing families; this topic is still being discussed by business valuation professionals.[51]

Congress continually passes legislation that impacts divorced and divorcing families, with little regard to or explanation of the intended impact on child and spousal support. Most practitioners are confused by these shifting rules, and often do not understand the complete impact of these various options on state guidelines

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51 American Inst. of CPAs, *Valuation Considerations Related to the CARES Act*, AICPA, https://www.aicpa.org/interestareas/forensicandvaluation/resources/businessvaluation/valuation-considerations-related-to-cares-act.html (last visited Sept. 19, 2020).

for support. Use of comprehensive divorce financial software cansignificantly assist in making sure all potential tax implications are considered in the guideline calculations.