

Taxes and Divorce in Minnesota: a Few Common Questions & Answers

One of failings that us divorce lawyers have is that we usually focus on family law instead of on tax law. In fact, many divorce lawyers actually put a bold disclaimer into their retainer saying that they don't give tax advice and for that you need to go to a certified public accountant, this is good advice, but the problem is that most divorcing



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people don't have a CPA on speed dial when it comes time to either negotiate the divorce out OR file for taxes so you need to at least be aware of some of the common questions that come up during divorce.

So, in an effort to help out during this tax season the I've picked some of the most common tax related questions that come up regarding divorce and taxes and list them here along with an answer. I will give my standard disclaimer which is that dammit I'm a lawyer Jim, not a CPA!! (forgive the cheesy Star Trek reference!) and that this not legal or even tax advice just a nice outline of some common questions that arise with taxes and divorce. The other concern that comes up a lot is that the IRS has a pesky habit of changing their rules, sometimes totally reversing themselves, sometimes just tweaking them, but often with little actual notice so while this article is good this year, who knows if it will still be good next year or the year to come?

1. Can a divorced couple split the Exemption and Earned Income Tax Credit (EIC)?

The short answer is yes, they can if they meet some requirements. This goes against the general rule which says no you cant and that the dependency exemption and the EIC must go together. However, [IRS publication 596](#) does lay out a "Special Rule" with some requirements:

- Must be divorced or legally separated.
- Have lived apart during the at least the last 6 months of the year.
- The child receive more than 1/2 of his or her support from both parents OR

- The child lived with both parents for more than 1/2 of the year. (this may seem odd, but it is in the rule to ensure no one else can claim the child under Head of Household such as a grandparent).
- Finally, the custodial parent must sign [form 8332](#) (or a substantially similar document) saying she' wont' claim the depend for the year and attach to the taxes.

If these requirement are met then you may be able to split the dependency exemption and the earned income credit, but be sure to follow the requirements and not just start making claims!

2. If the court orders the parents to the alternate dependency exemption, can the other parent claim the EIC?

Short answer is not usually, unless the above requirements are met AND the person claiming the exemption signs Form 8332. Since the EIC is usually (but not always based on income) a benefit there is little reason why the parent claiming the exemption would actually sign off on Form 8332 and give up this benefit.

The time to deal with this is in mediation or even trial; however I can attest that as a divorce lawyer of 15 years taxes are rarely, and I mean RARELY brought up in mediation, for better or worse divorce lawyers are just not into taxes!

3. Parents were never married, have separated and now alternate claiming the child as a dependency exemption, is this ok?

Yes, in fact it's fairly common. However, there is still a residency requirement to fulfill in order to determine if it is proper. [Form 886-H-EIC](#) is the form that the IRS looks at and has you fill out, but typically only if you are audited. You do not want to be audited so here it is better safe than sorry to look at the form and make sure that you are full compliance.

One issue that comes frequently is that the ex-partners don't discuss who will claim the child and this is not good, as it is often a raise to file and the second one to file will not be allowed to file electronically. I do have a bit of advice here, if you are in this situation talk your ex, get an agreement on filing so that you can avoid very costly litigation and audits in the future. (lecture concluded on this topic).

4. If husband and wife separate can they file individually Head of Household?

There is a requirement that in order to file Head of Household the parties must have lived apart for more than six months. If they separate in say August, there can be only one head of household. [IRS Publication 501](#) has some more details on this that you should look at to make sure you are in compliance.

5. Can't I just submit the divorce decree to prove who has the right to claim the children on taxes?

No. As mentioned above the Internal Revenue Service changes their rules fairly frequently and while this was allowed for divorces prior to December 31, 2008, all "new" divorces must file Form 8332 in order to be in compliance. * as an aside to make it even more complex if you file electronically, the form is called [Form 8453](#) which is really the same form but the electronic version, ahhh how great is our federal bureaucracy!?

There you go, some of the common questions that are raised quite a bit in the divorce and tax realm here in Minnesota. While this article is not advice per se, I do have some advice to give: **Get an accountant.** And by accountant I don't mean tax prepare at H&R block or their like. While those fine people work hard and try and help out they typically work part-time and have very limited training (sometimes less than 40 hours). The cost of having a Certified Public Accountant is not that great, if you shop around you'll be amazed for just a few dollars more than you will get an expert to help you prepare you taxes and not a guy whose full-time job is being the assistant-manager at a fast joint during the tax off-season.

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