

SPOUSAL SUPPORT GUIDELINE CHANGES FOLLOWING THE U.S. TAX CUTS AND JOBS ACT OF 2017

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This memorandum addresses the impact of the Tax Cuts and Jobs Act of 2017 on spousal support guidelines in Virginia, which has yet to officially address changes brought by the Act. It then presents recommendations for going forward in Virginia. If a payor were to agree to pay the same amount of spousal support as he/she would have paid under the prior tax laws affecting spousal support, the payor would suffer a significant increase in the real cost of the payments, while the payee would enjoy a potential windfall due to that amount not being taxable as income. The purpose of this memorandum is to provide a brief overview of the changes caused by the Act along with an overview of how several states have responded by amending their spousal support maintenance guidelines to adjust fairly for the new tax law.

Part I will explore changes made in New Mexico, Illinois, Colorado, and Pennsylvania in response to the Tax Cuts and Jobs Act of 2017. Part II will discuss what can, or arguably should, be done in Virginia in light of the Tax Cuts and Jobs Act of 2017 and possibly useful changes to consider that were made in the states discussed in Part I.

Overall, negotiating to reduce the amount of spousal support can effectively address the changes brought by the Act. For that matter, judges will presumably, or at least hopefully, attempt to implement spousal support that takes into account the significant change caused by the new Act. Although recipients no longer need to pay taxes upon spousal support payments received, it is a misconception to presume that recipients likely will be better off under the post TCJA system.² This is primarily due to the fact that payors will necessarily pay more, in net cash out to pay spousal support, given the higher tax burden faced under the TCJA and the inability to deduct spousal support payments, as was the case under previous spousal support guidelines.³ Because of this reality, attorneys and courts alike must not ignore the effects of the TCJA since doing so may result in a windfall to a recipient.

Brief Overview of the Tax Cuts and Jobs Act of 2017:

Under the Tax Cuts and Jobs Act of 2017 (“TCJA”) alimony is no longer deductible to the Payor. Furthermore, alimony is no longer taxable to the Payee/Recipient. One of the major possible effects of this change is the removal of a considerable incentive to Payors to settle alimony

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² See Linda Sugin, *The Social Meaning of the Tax Cuts and Jobs Act*, 128 YALE L.J. F. 403, 413 (2018).

³ See *Id.*

claims. A more immediate challenge, though, is determining a mutually equitable approach to negotiating spousal support, using a variant of the “old” guidelines.

Part I: Survey of State Responses to TCJA

A. New Mexico

Previously: To determine spousal support payments for parties without children, the calculation is 30% of Payor’s gross monthly income minus 50% of Recipient’s gross monthly income. For parties with children, the calculation is 28% of Payor’s gross monthly income minus 58% of Recipient’s gross monthly income. This is the same as the Virginia formulas, though in Virginia they apply only for couples earning gross incomes not over \$10,000 per month.

Illustration: No children. A earns \$11,000 per month, B earns \$3,000 per month. Combined yearly gross income amount is \$168,000.

Step 1: $\$11,000 \times .3 = \$3,300$ (multiply payor’s gross monthly income by 30%)

Step 2: $\$3,000 \times .5 = \$1,500$ (multiple recipient’s gross monthly income by 50%)

Step 3: $\$3,300 - \$1,500 = \$1,800$ (subtract step 2 from 1)

Post TCJA: On November 1, 2018 the Supreme Court of New Mexico released an order revising its Alimony Guideline Worksheet in response to the changes under the TCJA.⁴ Prior to the order, a committee was created with the goal of reviewing changes in other states and deciding upon an amended guideline that closely reflected the then-current guideline percentages. The committee contained a wide range of professionals, including attorneys but also economists, CPAs and others.

The committee looked to both Illinois and Colorado (both states are discussed separately in Sections B and C) for guidance. In reviewing changes made by Illinois, the committee decided that a shift from a gross to a net income formula would encourage disputes over what is or is not deductible from gross income to reach a net income figure. In reviewing changes in Colorado, the committee decided that the formula adopted there did not conform to New Mexico’s statutory requirements of ability to pay and need.

The resulting changes in New Mexico maintained the same original percentages but added an additional adjustment based on the combined gross income of the parties.

As of January 1, 2019, the New Mexico spousal support guidelines are as follows: for parties without children, the calculation is 30% of Payor’s gross monthly income minus 50% of Recipient’s gross monthly income. For parties with children, the calculation is 28% of Payor’s gross monthly income minus 58% of Recipient’s gross monthly income.

The additional calculation is a percentage deduction, still based upon the parties’ combined gross income. The deductions are as follows: 10% deduction to the established alimony guideline

⁴ See Order in the Matter of the Amendment of the Alimony Guideline Worksheet, No. 18-8500-014 (N.M. 2018).

figure for combined incomes up to \$90,000; 15% deduction for combined incomes up to \$149,000; 20% deductions for combined incomes up to \$199,999; and 25% deduction for incomes combined of \$200,000 and above. The committee reasoned that the resulting amount reflects adjusted guideline amounts that approximate having zero tax consequences.

Combined Yearly Gross Income Amount	Reduce the Above Calculated Amount By:
Up to \$90,000	10%
90,001 to 149,999	15%
150,000 to 199,999	20%
200,000 and over	25%

Illustration: No children. A earns \$11,000 per month, B earns \$3,000 per month. Combined yearly gross income amount is \$168,000.

Step 1: $\$11,000 \times .3 = \$3,300$ (multiply payor’s gross monthly income by 30%)

Step 2: $\$3,000 \times .5 = \$1,500$ (multiple recipient’s gross monthly income by 50%)

Step 3: $\$3,300 - \$1,500 = \$1,800$ (subtract step 2 from 1)

Step 4: $\$1,800 \times .20 = 360$, $\$1,800 - \$360 = \$1,440$ (reduce Step 3 amount by 20%)

B. Illinois

Previously: the court would take 30% of the payor’s **gross** annual income and subtract 20% of the payee’s **gross** annual income. The amended Illinois Marriage and Dissolution of Marriage Act (“IMDMA”) implicitly acknowledges that the new guidelines are in response to the TCJA in that subsection b-1(1)(A-1) notes that modification of orders entered *before January 1, 2019* are still subject to the gross income calculation.

Post TCJA: In response to the TCJA, Illinois amended the IMDMA. Generally, the amended IMDMA has shifted the guidelines used for calculating a spousal maintenance/alimony award from focusing on *gross income* to net income.

Under 750 ILCS 5/504 “Maintenance”, subsection b-1(1)(A), if the combined gross annual incomes of the parties is less than \$500,000 and payor has no obligation to pay child support and/or spousal support from a prior relationship, the court calculates a spousal maintenance award as follows:

(A) “Take 33 1/3% of payor’s **net** annual income minus 25% of payee’s **net** annual income. The amount calculated as maintenance, however, when added to the net income of the payee, shall not result in the payee receiving an amount that is in excess of 40% of the combined net income of the parties.”

We note that this change, from using gross income to using net income, invites consideration of the new question that would exist in Virginia, vs. pre-TCJA in Illinois, of just what would or should be a valid offset from gross income. This also would almost certainly require taking more time, more discovery and debate, and more litigation, all resulting from disagreements

about the answer regarding proper or fair offsets, than would retaining an approach still based on gross income.

C. Colorado

Previously: The amount of maintenance under the guidelines was calculated by taking 40% of the higher income party's monthly adjusted gross income minus 50% of the lower income party's monthly adjusted gross income.

Illustration: No children. A earns \$11,000 per month; B earns \$3,000 per month.

Step 1: $\$11,000 \times .40 = \$4,400$ (40% of higher earner's monthly gross income)

Step 2: $\$3,000 \times .50 = \$1,500$ (50% of lower earner's monthly gross income)

Step 3: $\$4,400 - \$1,500 = \$2,900$ (subtract the two numbers)

Post TCJA: On August 8, 2018 a new Colorado law changing the calculation for spousal alimony went into effect. Under C.R.S. 14-10-114:

Step 1: Take 40% of the parties' combined, monthly adjusted gross income

Step 2: Subtract the lower income party's monthly adjusted gross income. The result is the gross guideline amount, unless the calculation results in a negative number, then the amount of maintenance is zero.

Step 3: Adjust the gross alimony amount downward to account for taxes. If the combined monthly incomes are \$10,000 or less, take 80% of the number reached in Step 2. If the combined monthly incomes are between \$10,000 and \$20,000, take 75% of the number reached in Step 2.

Please note that the Colorado guidance formula only applies to cases where the parties' combined incomes is \$240,000 per year, or less.

Illustration: No children. A earns \$11,000 per month; B earns \$3,000 per month. Total annual gross incomes are \$168,000.

$\$11,000 + \$3,000 = \$14,000$ (combine both incomes)

Step 1: $\$14,000 \times .40 = \$5,600$ (multiply by 40%)

Step 2: $\$5,600 - \$3,000 = \$2,600$ (subtract lower earner's monthly income)

Step 3: $\$2,600 \times .75 = \$1,950$ (reduce to 75%)

This conceptually is similar to what New Mexico did, though the numbers vary because the starting, or pre-TCJA, percentages and approach were different. Nonetheless, it is interesting to note the comparison on a chart:

Combined Yearly Gross Income Amount	Reduce the Prior Guideline Amount By (NM):	Reduce the Prior Guideline Amount By (CO):
Up to \$90,000	10%	20% (up to \$120,000/year)
90,001 to 149,999	15%	---
150,000 to 199,999	20%	25% (up to \$240,000/year)
200,000 and over	25%	N/A

D. Pennsylvania

Previously: Under the previous formula, the amount of spousal support was calculated by taking 40% of the difference between the monthly net incomes of the spouses and making that the spousal support amount payable.

Illustration: Regardless of gross incomes, A earns \$70,000 per year (net), B earns \$40,000 per year (net):

The monthly nets are \$5,833 (A) and \$3,333 (B). The amount of spousal support would be 40% of \$2,500 (the difference between \$5,833 and \$3,333), or \$1,000 per month.

Post TCJA: Under the new guidelines, the amount of spousal support is calculated as follows:

Step 1: Take 33% of the higher earning spouse's net monthly income. Note that, by definition, this means that income tax obligations are taken into account.

Step 2: Take 40% of the lower earning spouse's net monthly income, also with income tax obligations being taken into account.

Step 3: Subtract the lower earning spouse's net income from the higher earning spouse's net income.

The resulting spousal support amount is lower under the new formula than under the previous formula in order to take into account the effects of the TCJA.

Illustration: A earns \$70,000 per year (net), B earns \$40,000 per year (net):

The monthly nets are \$5,833 (A) and \$3,333 (B).

Step 1: $\$5,833 \times .33 = \$1,925$ (33% of higher earner's net monthly income)

Step 2: $\$3,333 \times .40 = \$1,333$ (40% of lower earner's net monthly income)

Step 3: $\$1,925 - \$1,333 = \$592$ (subtract the numbers from Step 1 and 2)

Part II: Virginia's Best Options Going Forward

Virginia has yet to officially address changes caused by the TCJA. By comparing the approaches taken in other states, perhaps the best option would be to follow revisions made in New Mexico because their system, pre-TCJA, was the same as Virginia's Fairfax formula and the state statute (mentioned below)⁵, and thus would entail less new/different approaches. This is not to say that considering what other states are doing could not also be informative and useful in negotiations, but it would involve a bigger change.

Both the Colorado approach and the New Mexico approach follow the same basic formula: arrive at some gross support amount and then deduct/adjust the amount downward based on the parties' combined yearly or monthly gross income, as now is done in New Mexico and Colorado, respectively. However, the resulting number under the New Mexico approach is lower than the number under the Colorado approach, due to Colorado starting with 40% of the payor's gross rather than 30% or 28%.

Given this, along with the fact that the percentages used in New Mexico are identical to those in the pendente lite spousal support formula used in Fairfax County and under Virginia Juvenile and Domestic Relations Court law (Va. Code § 16.1-278.17:1) (30% minus 50% where no children are involved, and 28% minus 58% where there are children), the New Mexico approach starts out closest to the Virginia approach and probably provides the best guidance.

Following the Illinois model to determine an amount for a client is probably not the preferred approach. As the New Mexico Committee pointed out, reaching an accurate net income amount could actually prolong litigation and disincentivize settlements. Furthermore, calculating net income for ongoing disputes would be especially problematic and likely lead to prolonged discovery, etc.

Interestingly, the Pennsylvania approach does not include an additional step that provides for a deduction. However, following the Pennsylvania approach, which is based on net incomes, leads to the same problems of likely making it harder to settle and more likely to require more litigation as under the Illinois model.

⁵ We note, too, that some other Virginia jurisdictions have developed other formulas, and that the formulas themselves are only expressed as *pendente lite* formulas, though they are often used in permanent support negotiations as a rough guide or "smell test" for fairness.