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# Holla, “We Want Prenup!” . . . But Preferably If It Is Before December 31, 2018

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Holla, “We Want Prenup!” . . . But Preferably If It Is Before December 31, 2018

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Divorce is an increasingly common experience in America—as of 2019, approximately 50 percent of marriages in the United States ended in divorce.[1] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn1) As if going through a divorce is not “taxing” enough for an individual, divorced taxpayers preparing to file a 2019 tax return can no longer deduct alimony payments.[2] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn2) The 2017 Tax Cuts and Jobs Act eliminated the alimony deduction for all divorce agreements finalized after December 31, 2018.[3] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn3) In turn, alimony payments are no longer taxable as gross income to the recipient spouse.[4] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn4) Alimony payments that are part of divorce agreements entered into before December 31, 2018, however, continue to remain taxable to the recipient and deductible by the payor.[5] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn5)

Due to this elimination, alimony payments are now calculated on an after-tax basis.[6] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn6) This result is particularly burdensome to individuals paying alimony because now—since there is no longer an alimony deduction—individuals have less money available to pay spousal maintenance after taxes.[7] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn7) In light of this, judges and attorneys have recently begun searching for ways to make alimony payments more equitable for the payor.

The case of *Wisseman v. Wisseman* is an example of this “equitable” approach. In *Wisseman*, the New York court considered how much alimony should be awarded given the recent elimination of the federal alimony deduction.[8] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn8) The court recognized that, as a result of the new tax law, the husband had less money available to pay spousal support.[9] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn9) The court held that strict application to the New York maintenance guidelines was unjust in light of change in the federal tax law.[10] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn10) As a result, the court reduced the wife’s maintenance award (mandated by New York statutory guidelines) by the wife’s federal tax rate, saving the husband roughly \$61 per month.[11] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn11)

Additionally, although alimony payments from prenuptial agreements entered into before December 31, 2018, continue to be deductible to the higher earner and taxable to the recipient, many tax and divorce lawyers have noted that these agreements usually capped alimony payments based on deductibility.[12] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn12) Many of these agreements no longer seem just under the current law. Consequently, attorneys believe that pre-2019 prenuptial agreements that capped alimony based on deductibility will lead to more litigation. [13] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn13) As one leading divorce lawyer noted, attorneys are waiting on courts “for more guidance” on this issue.[14] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_edn14)

For many Americans, however, one thing is clear: divorce just became even more complicated.

[1] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref1) *Marriage and Divorce*, American Psychological Association, <https://www.apa.org/topics/divorce/> (https://www.apa.org/topics/divorce/) (last visited Feb. 18, 2020).

[2] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref2) Bob Boyd and Beth Garrett, *Insight: How Alimony is Affected by the New Tax Law*, Bloomberg Law (Aug. 8, 2019, 9:01 AM), [https://www.bloomberglaw.com/product/blaw/document/X9OOKMB4000000?criteria\\_id=6f7f9395aa56e3c781e5d3d11a805311&searchGuid=959e3837-acf4-4276-9fc9-f1c6d029666c](https://www.bloomberglaw.com/product/blaw/document/X9OOKMB4000000?criteria_id=6f7f9395aa56e3c781e5d3d11a805311&searchGuid=959e3837-acf4-4276-9fc9-f1c6d029666c) (https://www.bloomberglaw.com/product/blaw/document/X9OOKMB4000000?criteria\_id=6f7f9395aa56e3c781e5d3d11a805311&searchGuid=959e3837-acf4-4276-9fc9-f1c6d029666c).

[3] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref3) See Public Law 115–97—Dec. 22, 2017, <https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf> (https://www.congress.gov/115/plaws/publ97/PLAW-115publ97.pdf) (last visited Jan. 2, 2020).

[4] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref4) See *id.*

[5] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref5) See *id.*

[6] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref6) Eric A. Tepper, *Tax Act’s Impact on Spousal Maintenance, One Year Later*, New York Law Journal (Jan. 24, 2020, 01:03 PM), <https://www.law.com/newyorklawjournal/2020/01/24/tax-acts-impact-on-spousal-maintenance-one-year-later/>.

[7] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref7) See *id.*

[8] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref8) See *Wisseman v. Wisseman*, 63 Misc.3d 819, 820 (Sup. Ct. Dutchess Co. 2019).

[9] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref9) See *id.* at 824.

[10] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref10) See *id.* at 825.

[11] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref11) See *id.*

[12] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref12) Lydia O’Neal, *Alimony Tax Change Upends Payments in Divorce Negotiations*, Bloomberg Law (Aug. 21, 2019, 4:46 AM), [https://www.bloomberglaw.com/product/blaw/document/XALOJPD4000000?criteria\\_id=89137c9b63d6299c88368af0551291cb&searchGuid=73bb771b-d16a-4b65-ad9e-52d21f4529ac&bna\\_news\\_filter=daily-tax-report](https://www.bloomberglaw.com/product/blaw/document/XALOJPD4000000?criteria_id=89137c9b63d6299c88368af0551291cb&searchGuid=73bb771b-d16a-4b65-ad9e-52d21f4529ac&bna_news_filter=daily-tax-report).

[13] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref13) See *id.*

[14] (applewebdata://B2F008FF-805E-4D41-BE5F-52962C079AFE#\_ednref14) See *id.*



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