CENTER FOR SURVIVOR AGENCY & JUSTICE

What Survivors Need to Know About Filing a Tax Return

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An Advocacy Brief for Attorneys & Advocates

For more, download CSAJ's webinar training: [Federal Tax Advocacy for Survivors]

Overview

Survivors of abuse frequently have tax problems. The tax return is the starting point for understanding those problems and helping the survivor identify a remedy. Some survivors' tax problems are the direct result of a joint return filed with an abusive spouse. Survivors are frequently faced with the decision of whether to file a joint tax return with the spouse to whom they are currently married or to whom they were married at the end of the tax year. Many survivors will also have questions related to claiming children. These and other tax return-related decisions have significant financial consequences.

The purpose of this advocacy brief is to demystify some of those tax issues, and is designed to help advocates understand and address tax issues facing survivors.

This project is supported all or in part by Grant No. 2014-X1109-MD-TA awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in the publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.

Key Terms

Return: A tax return is the form you submit to IRS stating your income and personal circumstance from the past year. This form is used to assess how much tax, if any, you owe and whether you are due a refund.

Refund: A refund is money owed you, generally because more tax has been withheld or paid than you actually owe. Certain tax credits may also create or increase your refund.

Credit: A tax credit is reported on your tax return. Credits are deducted from the tax you would otherwise owe. Some credits are "refundable" meaning that they can also result in a refund or increase the size of your refund.

Deduction: A tax deduction is reported on your tax return. It reduces the amount of income that is taxed and, generally, the amount of tax you owe.

Exemption: A tax exemption is an amount that is deducted from your income to reduce the amount that is taxed. Generally, you can claim an exemption for yourself. You may be able to claim exemptions for your spouse or dependents if they qualify under IRS's rules.

Joint and Several Liability: When married taxpayers file a tax return, each spouse is joint and severally liable for the full amount of tax shown on the return or as adjusted by IRS. This means that each spouse is responsible for paying the full amount of tax, and IRS may collect the entire amount or any part of what is owed from either spouse.

Decisions About Filing A Tax Return

Should a return be filed?

IRS rules establish who is required, based on the amount of their income and other factors, to file a tax return. Many people who are not required to file a tax return should still do so. Individuals without a filing requirement may still be able to get a refund of withheld tax and may qualify for refundable credits such as the Earned Income Tax Credit, which is discussed below.

What filing status should be used?

There are five filing statuses, each with its own requirements. They are:

- Single
- Married Filing Jointly
- Married Filing Separately
- Head of Household
- Qualifying Widow(er) with Dependent Child.

Filing status is important for several reasons. When married spouses file a joint return, both spouses are responsible for the entire amount of tax due (which is called "joint and several liability") even if only one spouse had income or even if one spouse put mistaken or false information on the tax return. The filing status you choose can also impact things like the amount of income that is taxable, credits that are available, and the amount of tax owed.

Married spouses, including those who are divorcing, are not required to file a joint tax return. Married taxpayers can choose one of the following statuses:

(1) married filing jointly,
(2) married filing separately, or
(3) head of household.

Do married survivors file Jointly or Separately?

The first two can be selected regardless of the spouses' living arrangements. Marital status is determined as of December 31st of the tax year.[1] Spouses who were married on the last day of the tax year[1] cannot file as single even if they subsequently divorce prior to filing the tax return. Single taxpayers can file as single. Alternatively, single taxpayers can file as head of household or qualifying widow(er) with a dependent child if they meet the requirements for those other filing statuses.

How to qualify as Head of Household?

To qualify for the filing status Head of Household, a taxpayer must meet certain requirements. The taxpayer must:

- Provide the primary residence for at least one dependent, and
- Provide more than half the annual support for the household (e.g. rent, utilities, food), and
- Must be "unmarried" which includes a taxpayer who lived apart from their spouse for at least the last 6 months of the year.

A detailed discussion of the rules for each filing status can be found in IRS Publication 501.

Addressing Tax Problems

If a survivor has a tax problem as a result of filing a joint tax return with their [2] spouse, there are steps that can be taken to help that survivor. Abusive partners may also interfere with a survivors' filing status, file first, generate tax debt, claim dependents/children, and/or claim tax benefits or credits. A full assessment of potential risks in the context of other safety needs is critical (see below).

Also see CSAJ's website, http://www.csaj.org/, for a forthcoming Advocacy Brief on finding tax relief for survivors. In that Brief, we explore what survivors can do if they are liable for tax debts arising from a jointly filed return or if their spouse filed a return without the survivor's consent or knowledge.

Decisions About Filing A Tax Return (cont.)

Can survivors change their filing status?

Taxpayers who choose a particular filing status may, within certain time limits, change to a different filing status after filing the return. A taxpayer who files a joint return has until the return's actual due date [usually April 15] to amend and file married filing separately or head of household. That is a very limited opportunity to switch from married filing jointly to another filing status. By contrast, taxpayers who file separately generally have 3 years from the return's due date to amend the returns and file married filing jointly.

How do survivors make the decision for filing status?

When deciding whether to file married filing separately, married filing jointly, or head of household, a survivor should consider the following questions. Questions to consider when deciding whether to file a joint tax return:

- **Is your spouse secretive about financial information?**
- **Do you have access to the household bank account and other financial records?**
- **Do you know how much your spouse earns?**
- **Is your spouse physically or psychologically abusive?**
- **Is your spouse self-employed?**
- **If self-employed, does your spouse keep good records?**
- **Does your spouse control the household financial decisions?**
- **Does your spouse owe tax for past years?**
- **Is your spouse current in filing required tax returns?**

For example, if a spouse is secretive about finances, filing married filing jointly may be risky for a survivor as married spouses are jointly and severally liable for any tax debt arising from a jointly filed return. These questions also address safety concerns. A survivor should always be encouraged to make whatever financial decisions are safest for them.

Photo credit: http://www.duvetfinancialservices.com/tax-forms/

Considerations for Filing Status

	Married Filing Jointly	Married Filing Separately	Head of Household
Requirements	Parties must be married	Parties must be married.	Filer must: (1) Provide the principal place of abode for any dependents; (2) Provide more than half of the annual support for the household [e.g. rent, insurance, utilities, food consumed on the premises] and (3) Be considered "unmarried" which includes a married taxpayer who lived apart from their spouse for the last 6 months of the tax year.[3]
Benefits	• Eligible for Earned Income Tax Credit and Child and Dependent Care Credit • Student loan interest deduction and other deductions and credits related to education. • If the filer lived with their spouse at any point during the year, married filing jointly allows them to exclude more Social Security income from taxation.	A taxpayer who selects married filing separately is only liable for their tax debt for that tax year. They are not responsible for their spouse's tax debt.	• Protects taxpayer from joint and several liability that comes with filing married filing jointly. • Allows a higher standard deduction than married filing separately. • Permits taxpayer to claim the Earned Income Tax Credit.
Disadvantages	• Joint filers are jointly and severally liable for information on the return. Even if only one spouse had income, both are liable for any resulting tax liability whether it appears on an original return or results from a later exam by IRS. • IRS may pursue one or both taxpayers to recover tax owed as the result of a joint return. • IRS may offset [take] the entire refund to pay towards one spouse's prior tax or other debt [including child support, student loan, etc.].	Not eligible for: • Earned Income Tax Credit • Student loan interest deduction and other deductions and credits related to education. • Child and Dependent Care Credit	IRS may audit the taxpayer's return and require the taxpayer to prove that all of the requirements for filing as head of household are met.
Safety Concerns	Filing jointly with an abusive spouse generally requires communication with that spouse and sharing information that may raise safety concerns for survivors. • **Innocent Spouse Relief,** which is relief granted from joint and several liability, is a potential remedy. • **Injured Spouse Relief** may be an option for a survivor whose share of a joint refund has been taken to pay toward the other spouse's debt.	Filing separately does not require communication with or sharing information with one's spouse.	Filing as head of household does not require communication with or sharing information with one's spouse.

Children & Other Dependents

There are multiple tax benefits associated with children, including:

Tax Credit/ Exemption	Benefit to Taxpayer
Dependent Exemption [4]	Reduces income
Child Tax Credit	Reduces tax
Additional Child Tax Credit	Reduces tax & refundable [5]
Earned Income Tax Credit	Reduces tax & refundable
Dependent Care Credit	Reduces tax
Premium Tax Credit	Reduces tax & refundable

The largest and most complicated question here is: who gets to claim the children for each of these tax benefits? An excellent resource is IRS Publication 501 which is available on the IRS website.

What is The Dependent Exemption?

The rules related to dependents are lengthy and complex. A dependent may be a "qualifying child" or "qualifying relative," but neither term means what someone other than a tax professional would expect it to mean. The information presented here is, at best, a sketch of the dependent issues that are most common when spouses divorce and relate primarily to the children those spouses have in common. For situations needing more specificity, look to the resources at the end of this document.

A person that a taxpayer wishes to claim as a dependent must meet either the test to be a "Qualifying Child" or a "Qualifying Relative."[6]

Qualifying Child Test

There are five tests to be a "Qualifying Child."

1. ***The Relationship Test:*** the child must be either the biological, step, adopted, or foster child of the taxpayer; the sibling of the taxpayer; or the taxpayer's child's or sibling's descendant.

2. ***The Age Test:*** the child must be under the age of 19 or under 24 if a full-time student at the end of the tax year. If the child is permanently and totally disabled, there is no age requirement. And unless the child is permanently and totally disabled, they must be younger than the taxpayer.

3. ***The Residence Test:*** the child must live with the taxpayer for more than half of the tax year, but that time does not have to be consecutive.

4. ***The Support Test:*** the child cannot have provided more than half of their own support.

5. ***The Joint Tax Return Test:*** the child must not have filed a joint tax return of their own, unless it is simply to claim a refund.

Qualifying Relative Test

A taxpayer can claim an individual as a "Qualifying Relative" even if the individual is not related or is related in a more distant fashion (such as a cousin). In many cases, the "qualifying relative" has to live with the taxpayer for the entire year. There are four tests to be a "Qualifying Relative."

1

Qualifying Child Test: The qualifying relative must not be a qualifying child for the taxpayer or any other taxpayer. Qualifying child is defined above.

2

Member of household or Relationship Test: the qualifying relative must live with the taxpayer all year as a member of the household or be related to the taxpayer by any of the following ways:

a) A child, stepchild, foster child, or a descendant of any of them (for example, a grandchild). (A legally adopted child is considered a taxpayer's child.)
b) A brother, sister, half-brother, half-sister, stepbrother, or stepsister.
c) A father, mother, grandparent, or other direct ancestor, but not foster parent.
d) A stepfather or stepmother.
e) A son or daughter of taxpayer's brother or sister.
f) A son or daughter of taxpayer's half-brother or half-sister.
g) A brother or sister of taxpayer's father or mother.
h) A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

3

Gross Income Test: The qualifying relative's gross income for the year must be less than $4,000. This does not include tax-exempt

4

Support Test: The taxpayer generally must provide more than half of the qualifying relative's total support during the year. There

How do survivors claim dependents (their children)?

For separated or divorced parents, the custodial parent generally claims the dependent exemption. A "custodial parent" for the IRS means the parent with whom the child has spent the most number of nights during the year. If the child has spent an equal number of nights at each parent's home, the parent with the highest adjusted gross income (AGI) claims the dependent exemption. Note that there is a possible exception to this rule for a parent that works at night.[7]

If the custodial parent unequivocally releases the claim to the exemption, the non-custodial parent may claim the dependent exemption for that child.[8] The custodial parent should use IRS Form 8332, to release the exemption. The release entitles the non-custodial parent to also claim the Child Tax Credit, Educational Credits, and places that child in the non-custodial parent's household for the Affordable Care Act provisions. The custodial parent continues to be able to claim the Earned Income Tax Credit and Dependent Care Credit. The release of the exemption must be unequivocal. IRS will not determine custody, allocate the exemption or decide if the non-custodial parent has paid enough child support. The custodial parent can also revoke the grant of the exemption using IRS Form 8332.

Considerations When Claiming Dependents

A few key things to note when claiming dependents:

Court Enforcement

IRS is not bound by a custody or divorce order that states which parent shall claim the child on tax returns. Although, the IRS is not bound by a court's determination, if one parent files a tax return that violates the court's decree, the other may ask the court to hold that parent in contempt.

Family Law Tip

Family law attorneys should try to avoid custody orders that split physical custody of children 50-50. When custody is split equally, neither parent has the child greater than half the year, so neither may claim the Earned Income Tax Credit (EITC). The EITC can provide a substantial cash benefit to an eligible working parent; care should be taken to ensure that source of funds is not

Responsibility for Health Insurance

The parent who claims the child (even as the non-custodial parent) is responsible for ensuring the child has minimum essential health coverage, or the parent will face the Individual Shared Responsibility Payment (penalty for failure to have qualifying coverage). However, Medicaid is qualifying coverage, and there is an array of exemptions available (e.g., no filing obligations and other forms of hardship).[9]

- The parent who claims the child also has the benefit of including the child in their household size calculations for determining the available Premium Tax Credit (PTC) for Marketplace health plans.

Education Benefits

Higher education (Hope and Lifetime learning) credits are only available to the parent who claims the child as a dependent.

Tax Benefits When Claiming Dependents

What is the Child Tax Credit? [10]

The Child Tax Credit is worth up to $1000 for each qualifying child under age 17. It may be claimed by the custodial parent even if they have filed married filing separately. If the custodial parent has released the dependency exemption, the non-custodial parent is entitled to the Child Tax Credit. A taxpayer who earns more than $3,000 may qualify for the "refundable" Additional Child Tax Credit. Refundable means that the taxpayer receives money [up to the amount of the unused Child Tax Credit] even if the taxpayer has no liability to offset.

Tax Benefits When Claiming Dependents (cont.)

How can survivors benefit from the Earned Income Tax Credit? [11]

The Earned Income Tax Credit is a major anti-poverty program for working people. The maximum Earned Income Tax Credit for tax year 2015 was over $6,000 for a taxpayer with three or more qualifying children. The Earned Income Tax Credit is not available to taxpayers filing married filing separately, but it is available to taxpayers filing single, married filing jointly and head of household.

The Earned Income Tax Credit (EITC) is a fully refundable tax credit, which means it is treated as a payment and can be refunded to the taxpayer by IRS even if the taxpayer had no tax withheld. Most tax credits are non-refundable which means that they can only reduce the taxpayer's liability to zero, and any remaining amount cannot be refunded to the taxpayer. The amount of EITC a taxpayer can receive is based on income, filing status, and the number of dependents. Unlike the dependency exemption, the EITC is non-transferable; only the person who qualifies for it can get it. A parent who qualifies can claim it even if the other parent has the dependent exemption for that tax year.

To qualify for the Earned Income Tax Credit, a taxpayer must:

1) **Be a US citizen, permanent resident, or nonresident filing jointly with a citizen/resident;**
2) **Have earned income;**
3) **Have a Social Security Number, and qualifying children must also have Social Security Numbers;**
4) **Qualifying children must satisfy relationship, age, residence, and joint filing test but don't have to satisfy support test;**
5) **Taxpayer without dependents must be age 25-64 at the end of the tax year, must live in the US for more than half the year, and cannot qualify as someone else's dependent;**
6) **Taxpayer cannot qualify if their spouse has an Individual Taxpayer Identification Number (ITIN).**

What if the other parent already claimed the children ("the race to file")?

The term "the race to file" refers to the timing issues that arise when both parents are attempting to claim the same child as a dependent or one parent files claiming a child that the other parent intended to claim on their tax return. ***When one parent files first, claiming the child, the second parent is prevented from filing electronically and claiming the child. The second parent can still file a paper return by mail.*** Filing a paper return, according to IRS, takes 6 weeks to process, which is why many taxpayers choose to file electronically. Depending on how close in time the returns are received, the IRS may review both before processing, may process one instead of the other, and may audit one or both taxpayers.

If a survivor fears that the other parent has filed first, they can still try to file electronically. Sometimes the other parent has not really filed, but has threatened to or lied about filing. The taxpayer will be unable to electronically file their tax return if the other parent has actually filed a tax return claiming the same child.

Tax Benefits When Claiming Dependents (cont.)

What happens when both parents appear to qualify?

Tie breaker rules apply if both parents wish to claim a child for the Dependent Exemption and the Earned Income Tax Credit.[12] The credit is given to the parent with whom a child resided the longest during the year. If a child resided with both parents an equal amount of time, then the Earned Income Tax Credit goes to the parent with the highest adjusted gross income.

Getting Tax Help

www.irs.gov is the IRS website. It has current and prior years' tax forms and publications as well as links to the Internal Revenue Code, regulations, and the Internal Revenue Manual. It provides a program called Free File to enable low- to moderate-income taxpayers to file their tax returns for free using taxpayer-friendly commercial software. It contains explanations in laypersons' terms on thousands of tax-related topics and has programs that allow taxpayers to answer questions anonymously to determine if they qualify for certain tax benefits like the EITC.

Low Income Taxpayer Clinics (LITC) provide free legal representation to low income taxpayers before IRS including assisting taxpayers with audits and collection disputes. An LITC can also help taxpayers respond to IRS notices, correct account problems, and pursue relief from joint and several liability by requesting innocent spouse relief. There are LITCs in every state; contact information is available on the IRS website.

Taxpayer Advocate Service [TAS] is an independent branch of IRS. TAS helps taxpayers resolve IRS problems that are causing economic hardship or problems where IRS has failed to do what it is required to do. There is at least one TAS office in every state; contact information is available on the IRS website.

Partnership Building

CSAJ's demonstration Site work has provided critical insight that 1) advocates don't have to know it all, and 2) partnerships, not referral systems, are critical to enhancing survivors' economic security. For more detailed strategies on building partnerships, see our Innovative Pilot Site Report as well as a Resource & Assessment Tool for Building Partnerships to Enhance Consumer Rights.

Conclusion

Tax issues, including those related to filing a tax return, are complicated. Tax, however, is of significant importance to survivors. On one hand, unresolved tax problems can lead to or exacerbate economic insecurity and hardship. On the other hand, tax benefits, particularly those related to claiming children, can provide eligible survivors with significant assistance along the path to financial stability. Advocates for survivors can play a key role in ensuring that survivors have access to tax information and representation by partnering with groups, such as the staff of LITCs and pro bono tax professionals.

Additional Resources

For a general overview of survivor centered advocacy and tools to enhance economic security, see:	• Building Partnerships to Enhance Consumer Rights for Domestic Violence Survivors: An Assessment and Resource Tool for Attorneys and Advocates • Consumer Rights Screening Tool for Domestic Violence Advocates and Lawyers
For in-depth training and resources on tax advocacy for survivors, see:	• Federal Tax Advocacy for Survivors: What Attorneys Need to Know • Tax Advocacy for Survivors of Domestic Violence in the Context of Military Life • Public Comments to U.S. Department of Education on Student Leans for Married Borrowers • Tax Abuse, an article by Barbara Hart

References

[1] For a 2016 tax return, which is due in April 2017, marital status is determined as of 12/31/2016.
[2] We have changed "her" to gender neutral "their" for this paper as a way to be inclusive of male and LGBT survivors who may see the use of her as heteronormative.
[3] The definition of HOH is at IRC §2(b). Detailed explanation of who may file as HOH is contained in IRS Publications 17, 501 and 504.
[4] IRC §152, IRS Publication 501
[5] Refundable in this context means that the taxpayer may receive money back from the IRS after their tax is reduced to zero.
[6] Pub 501 contains a few more distinctions.
[7] See Treas. Reg. 1.152-4(d)(5).
[8] IRC §152(e); Treas. Reg. 1.152-4.
[9] See instructions to IRS Form 8965 for list of exemptions and how to claim them.
[10] IRC §24, Publication 972
[11] IRC §32, Publication 596
[12] IRC §152(c)(4)(B).

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This project is supported all or in part by Grant No. 2014-X1109-MD-TA awarded by the Office on Violence Against Women, U.S. Department of Justice. The opinions, findings, conclusions, and recommendations expressed in the publication/program/exhibition are those of the author(s) and do not necessarily reflect the views of the Department of Justice, Office on Violence Against Women.