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Alimony and the TCJA:
Less a Misconception than a Worry, and What to Do About It – A Mediator's View

By William M. Levine

Call me a skeptic.

I agree with Jonathan E. Field's excellent essay "Alimony and the TCJA: A Common Misconception" (July 23, 2018), to the extent that he asserts that an alimony agreement that is executed during calendar 2018 *should* entitle the parties to the continued economic leverage of the alimony deduction, on which many divorcing families have relied since 1942. I wish that I shared Jon's confidence that what *should* be *will be*, but I am less than sure.

Read literally, the 2017 Tax Cuts and Jobs Act permits tax-deductible alimony if contained in "decrees of divorce *or* separate maintenance or written instruments[s] incident to such decrees…" (my italics). I do not question that tax cases construe "written instruments" liberally, nor do I debate that the "incident to" clause has been applied generously to past taxpayers. But, we live in a time in which political and policy expectations are a wisp in the wind, subject to a profoundly polarized federal legislature and the whimsy of an erratic executive.

Every tax act is a legislative skeleton on which the reigning administration grafts regulations, telling us how the congressional mandate will *really* work. Witness Jon's accurately ironic note that the "temporary" treasury regulations of the Tax Reform Act of 1984, that comprise a substantial part of how that set of alimony reforms function to this day, are now 34 years old!

The Internal Revenue Service of Stephen Mnuchin's Treasury Department is charged with fleshing out TCJA; and it does so in a political/fiscal context. The public face of the alimony deduction repeal was a move to save $6.8 billions of tax revenues over the next decade, to be booked against Congress' budget reconciliation limit of $1.5 trillion of cuts, to enable passage without Democratic votes. Meanwhile, a deeper problem lurked in the form of the IRS's indifference or inability to enforce the existing law. In 2010 alone, 47 percent of alimony recipients failed to report any or all of alimony received, resulting in $2.3 billion of losses to federal coffers, according to a 2014 report of the Treasury Inspector General for Tax Administration.

So, we can see that the Trump Administration has incentive, especially in an election year during which the deficit is rising faster than projected, to interpret the alimony repeal in a way that maximizes revenues to offset some of TCJA's corporate and high-income tax cuts. One contribution that Treasury can make is to promulgate regulations that interpret, or re-interpret, the "incident to" language that Jon cites, by limiting the alimony deduction to those taxpayers whose divorce instruments have actually been made a part of a divorce decree in 2018.

In Massachusetts, that would require the parties to step back from the Probate and Family court bench, with an approved and incorporated agreement, before the close of business on New Year's Eve *if* a judgment *nisi* would suffice. Even worse, if the IRS requires a *final* divorce judgment (as it does in determining tax return filing status), the parties would need be in court before the end of August or September, given the post-hearing waiting periods of M.G.L., ch. 208, §§ 1, 1A and 1B.

As a divorce mediator, whose job includes providing enough information to assure both parties' informed consent to divorce settlements, I cannot, despite Jon's assurances, provide them myself. Rather, I feel obliged to explain the possibilities, even if remote, so that clients do not wake up on January 2d, or April 15th, and learn that some regulation sleight of hand has denied them the benefit of the alimony bargain that they made. It isn't clear; and it is most surely not easy. But who among us can predict any act the current federal regime – especially with mid-terms looming?

So, what to do in mid-2018? For the dwindling cases that can realistically expect to appear for uncontested divorce hearings in August (§1A) or September (§1B), the question is academic. For the other couples who will be mediating during the balance of this year, I will be raising the issue, and asking them to consider the two-tiered approach of agreeing on an alimony regime that covers both deductibility outcomes; and trust them to make the appropriate decision, *for them*, in consultation with counsel.

With our alimony statute remaining as written, and 2019 agreements surely precluded from the alimony deduction, we are all going to have to struggle to create equivalencies for taxable and non-taxable spousal support, anyway. There are smart people among us who are studying fast and hard to create mechanical ways of doing that for us, as in, "for income levels of $X, the after-tax equivalent of 32.5% of gross income, fairly balancing the net payor cost versus net payee value gap, is $Y." Another approach is to prepare case-by-case "old law" and "new law" cash flow analyses, and try, as closely as possible, to translate the net-after-tax shares for the parties with deductibility assumed, to the newer scenario, e.g., if deductibility would result in a 60%-40% sharing of net-after tax income, and then solve to that end result with non-deductible alimony assumed.

The specific approach taken is less important than that we all be aware of the challenge itself, and that we grapple with it in the cause of advancing the parties' informed consent.