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The Future Landscape of Maintenace in Divorces

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> "For family law practitioners, [legislative] changes will have enormous ramifications, the most important of which concern maintenance."

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Two major pieces of legislation that affect maintenance and divorce have been enacted over the last year. First, the Tax Cuts and Jobs Act of 2017, and second, Colorado House Bill 18-1385. The new federal law changed the entire tax landscape and repealed the tax deduction for the spouse who pays maintenance. Several months later, House Bill 1385 was enacted to deal with the new changes on a state level. For family law practitioners, these changes will have enormous ramifications, the most important of which concern maintenance.

HOW MAINTENANCE IS CHANGING

For family law practitioners, the most critical set of changes to the new tax code concern the taxability of maintenance. Under the new law, 26 U.S. Code, sections 71 and 215 have been repealed, and maintenance is, therefore, no longer tax deductible to the spouse paying maintenance, effective for all divorces or separation instruments executed after Dec. 31.

What this means for most practitioners is an invitation into a legal quagmire. This is because net income will now be used instead of gross income to determine the amount of maintenance a spouse owes. While this might seem like a straightforward change, it has huge implications.

Net income takes into account the manner in which a spouse is taxed. Accordingly, a spouse who pays more in taxes has a lower net income and may be required to pay less maintenance. Conversely, a spouse who pays fewer taxes may have an obligation to pay more maintenance because their net income is higher. Because of this, practitioners not only need to know how much a spouse's gross income is, but also how that spouse earned the income.

Particularly under the new tax changes, certain businesses and corporate structures are taxed very differently. Going forward, practitioners representing the party paying maintenance will likely argue that the taxes payable by their client are enormous and practitioners representing the party receiving maintenance will conversely argue that the taxes are lower.

HOUSE BILL 18-1385

Because maintenance was historically calculated using gross numbers, Colorado's prior laws concerning how courts ought to award maintenance will soon become outdated. In May, Gov. John Hickenlooper signed House Bill 1385 into law, which makes several changes to ensure that Colorado's state laws kept up with the federal legislation. Under that new law, courts are specifically instructed to consider whether a maintenance award would be deductible for federal income tax purposes. Moreover, courts are now equipped with tools for efficiently determining how much to remove from a spouse's gross income to determine their net income.

Under the new law, courts are instructed to multiply the prescribed maintenance calculation found in section 14-10-114(3)(b)(I)(A) of the Colorado Revised Statutes by 80 percent for couples that have a combined, monthly adjusted gross income of $10,000 or less. For couples that have a combined, monthly adjusted gross income of more than $10,000 but less than $20,000, the court is instructed to multiply the prescribed calculation by 75 percent. This reflects the General Assembly's rough calculation of the taxes payable by couples who earn incomes in these ranges. However, for couples earning over $240,000 in combined, annual adjusted gross income, courts are specifically instructed not to use the "calculation methodology" used to calculate the maintenance amount for couples who earn less than that amount. Instead, courts are instructed to consider the factors enumerated in section 14-10-114(3)(c).

PRACTICAL ADVICE GOING FORWARD

What this means in practice is that couples earning less than $240,000 will have a reasonably easy time determining the amount of maintenance to be paid. The vast majority of disagreements will center on what the advisory guidelines recommend and then deviations therefrom. However, what this means for couples earning more than $240,000 is likely more intense litigation. As readers of this article probably know, the manner in which certain income is taxed can be extraordinarily difficult to determine. Many couples earning over $240,000 per year have income flowing through to them from numerous sources. Each of those sources may be taxed very differently.

Going forward, spouses with huge incomes from vague, obscure sources will undoubtedly gather evidence suggesting that the taxes they owe on certain income is higher so as to strengthen their case for a lower maintenance obligation.

Practitioners may want to consider retaining experts specifically to evaluate how a spouse's income has or will be taxed. Part of this analysis may be challenging because how an individual or their economic interests are taxed depends on what actions that individual takes. For example, selling certain assets at certain times can change the manner in which the sale of that asset is taxed due to various deductions. The manner in which assets are depreciated can also have a dramatic effect. Moreover, companies can be converted and restructured such that the taxes are paid in varying ways.

Bringing taxes into the analysis of how much someone earns invites gamesmanship on an extraordinary level. Experts evaluating an individual's tax practices to determine their net income may want to consider opining about what a "reasonable taxpayer" would do under the same or similar circumstances.

In instances where a person improperly manipulates their taxes to reduce their net income (temporarily, of course), practitioners may want to call expert witnesses to opine that such tax practices are not what an ordinary person would have done and that the questionable tax practice was done solely to reduce the person's net income.

The new landscape is sure to be fraught with disagreement. Practitioners would be strongly advised to stay up-to-date on the latest developments from a legal, accounting, as well as a tax perspective.•

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