SOUTH CAROLINA BAR FAMILY LAW SECTION COUNCIL NEWSLETTER

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South Carolina Bar
950 Taylor St.
Columbia, SC

Professionalism Tip of the Month:

"The leading rule for the lawyer, as for the [person] of every calling, is diligence." - Abraham Lincoln

The Council's goals include monitoring pending legislation, sponsoring CLEs, and providing members with information pertaining to all other issues affecting or relating to family law. The Council recently has been working to revise the alimony statutes, and to address issues with lay Guardian *ad Litems*.

We appreciate any input from the members of the Family Law Section. Our email addresses are listed above. Please feel free to contact any member to find out what Council can do for you or to give us feedback.

Family Law Seminars

2018 Bar Convention

The annual Bar Convention took place January 18-21, 2018, at Kiawah Island Golf Resort. The Friday afternoon Family Law Section CLE featured nationally renowned business valuation expert Jay E. Fishman, FASA, and the Council's own Mary Fran Quindlen speaking about recent developments in military divorce.

2018 Family Court Intensive CLE

This biennial seminar is scheduled to take place November 2-4, 2018, at the Omni Grove Park Inn in Asheville, North Carolina. The focus of this intensive will be complex evidence, including admitting social media materials into evidence, and other technology-related subjects.

Ten Things Every South Carolina Family Law Practitioner Should Know About the Recent Tax Law Change

By Richard T. Livingston, CPA/CFF, CFE, CVA, Director, Dixon Hughes Goodman LLP

If you still don't fully understand all of the changes brought about by the new tax law, you are not alone, but you cannot afford to wait any longer to learn. The Tax Cuts and Jobs Act of 2017 made significant amendments to the Internal Revenue Code of 1986. Many of these amendments have a direct impact on financial issues commonly addressed in a divorce.

1. Many Changes Have Already Taken Effect

Many of the changes took effect on January 1, 2018. Any agreements entered into since January 1, 2018 should have been done with those changes in mind. Take the time to understand these changes moving forward or consult with someone who does.

2. The Changes are Temporary

All of the changes that really affect the parties in a family law matter are set to expire after 2025. Depending on how a future Congress handles the changes, we may be revisiting many of these issues again in eight years. Knowing this, it is important to draft an agreement with some flexibility around the other issues identified in this list.

3. Elimination of Alimony Income and Deduction

There is still much confusion regarding this change. The elimination of the taxability and deductibility of alimony only applies to divorce or separation instruments entered into after December 31, 2018 and modifications to existing divorce or separation instruments entered into on or before December 31, 2018 if the modification "expressly provides that the amendments apply to such modification." This means that subsequent modifications to existing agreements entered into on or before December 31, 2018 will not automatically be subject to the new tax rules unless specific language is included in the modified agreement opting into the new tax rules. All amended agreements should therefore be read with care to ensure language of this type does not get included and fundamentally change the tax benefits anticipated under the agreement. Still confused? Hopefully the following examples will provide a better understanding:

Entered into before December 31, 2018

- Alimony can be taxable to recipient and deductible to the payor

Entered into before December 31, 2018 and modified after December 31, 2018

- Alimony can continue to be taxable to recipient and deductible to the payor provide that 1) the amended agreement does not state otherwise, or 2) the amended agreement does not include language expressly stating that the tax law amendments under Tax Cuts and Jobs Act of 2017 apply to the amended agreement. (The act of simply modifying the agreement after December 31, 2018 does not automatically trigger the new tax rules.)

Entered into after December 31, 2018

- Alimony will not be taxable to recipient and will not be deductible to the payor

Entered into after December 31, 2018 and modified after December 31, 2018

- Alimony will not be taxable to recipient and will not be deductible to the payor

A key aspect in applying this change in practice, especially as 2018 starts to draw to a close, is understanding how the tax code defines “divorce or separation instruments.” This definition is found in Internal Revenue Code Section 71, which defines a divorce or separation instruments as

i. A decree of divorce or separate maintenance or written instrument incident to such a decree,

ii. A written separation agreement, or

iii. A decree (not already described above) requiring a spouse to make payments for the support or maintenance of the other spouse.

As can be seen from the above definition, there is no requirement for an agreement to be put on the record before 12:59 pm on December 31, 2018 in order for alimony to continue to be deductible, only that such agreement is entered into by that time.

Since it is not known how this new rule may again be changed eight years from now, it is important to consider language in today’s agreements that addresses future changes to the tax treatment of alimony to ensure neither the payor nor recipient experiences an unexpected burden or benefit.

4. Will Inherently Increase Child Support Obligations

The current child support guidelines base support on the gross income of each party. Beginning in 2019, there will no longer be a need to “gross up” alimony payments for income tax considerations. If alimony is paid and considered taxable to a recipient, a $5,000 per month payment may net the recipient $4,000 in spendable cash. If this payment is no longer taxable, then a payment of $4,000 per month in alimony will provide the recipient with the same amount of spendable cash. Even though the recipient may end up with the same amount of spendable cash, using the lower net alimony figure of $4,000 in the calculation of child support will inherently result in a higher support obligation for the paying party.

For example, assume a shared custody arrangement (183 nights with mother and 182 nights with father) involving one child where the paying spouse earns $15,000 per month and is responsible for the child's health insurance of $250 per month. The receiving spouse earns $4,000 per month and is to receive $3,500 in taxable alimony per month. The calculated child support obligation is $137 per month. Now, assume the paying spouse is not going to get a deduction for the $3,500 alimony payment and the receiving spouse will not be taxed on the receipt of those funds. The paying spouse is likely only going to be willing to pay an amount equal to the net cash the receiving spouse would have received after considering the payment of income taxes. Assuming this amount is $2,500 per month instead of $3,500 per month, then all things being equal, the calculated child support obligation would increase to $266 per month, even though the receiving spouse has the same amount of spendable alimony dollars available to her under both scenarios.

5. Suspension of Deductions for Personal Exemptions

In the past, parties would negotiate for the ability to claim qualifying children as dependents for deduction purposes. This deduction provided the taxpayer with a personal exemption deduction of approximately $4,000 per child (assuming the adjusted gross income did not phase out the deduction). The deduction would serve to reduce the taxpayer's taxable income, resulting in the calculation of a lower tax liability.

Even though this deduction has been suspended, agreements involving children of an age that may still qualify for the deduction eight years from now should continue to address this deduction. Language that identifies how the deduction will be handled if the suspension of the personal exemption is not subsequently made permanent will help clients navigate this uncertainty down the road.

6. Increase in and Modification of the Child Tax Credit

The child tax credit provided the taxpayer with up to a $1,000 non-refundable credit for qualifying children. Unlike the personal exemption deduction, the credit is subtracted after the calculation of the tax liability, resulting in a dollar-for-dollar reduction in the taxpayer's liability. This credit was subject to phase out when adjusted gross incomes exceeded $75,000 for single and head of household filers.

This credit is now much more valuable, being increased from $1,000 to $2,000. The income level subject to phase out has been significantly increased to $200,000 of adjusted gross income for single and head of household filers. These changes make the credit much more valuable to many taxpayers and should not be overlooked in agreements.

7. Significant Changes to Itemized Deductions

The ability to itemize deductions has been significantly changed. One of the most notable is the limitation of the deduction for state and local taxes. This has historically been a major deduction for many taxpayers when itemizing their deductions. Now deductions for state income taxes, sales taxes, real estate taxes, vehicle taxes, and personal property taxes have been capped at only $10,000 total.

Limitations have also been placed on the deduction of qualified residence interest and home equity interest. Qualified residence interest was previously unlimited on mortgages up to $1.0 million, but that threshold has been reduced to $750,000 for homes bought after December 15, 2017. (Exemptions to this rule apply for refinances after December 15, 2017 to the extent the new indebtedness does not exceed the old indebtedness.)

Home equity interest, or interest on indebtedness not used to buy, build, or substantially improve a qualified residence (think equity line used to buy a car or pay off personal credit card debt) was previously unlimited on indebtedness up to $100,000. This deduction has now been eliminated entirely with no grandfathering of existing debt.

8. Increase in the Standard Deduction

Taxpayers can either chose to itemize their deductions or simply claim the standard deduction if their itemized deductions are less. While itemized deductions have been significantly curtailed, the standard deduction has been nearly doubled. For 2018, the standard deduction for single filers has increased from $6,500 to $12,000 and $9,550 to $18,000 for taxpayers filing as head of household. This will help to limit the number of taxpayers that need to itemize their deductions and help to provide some relief for the limitations imposed on itemized deductions and the elimination of the personal exemption deduction.

9. Changes in Bracketed Rates

While there are still seven tax brackets, both the rates and the income bands within those brackets were adjusted. Most single and head of household filers will have a lower effective tax rate, but determining if an individual will pay more or less tax under the new rules must be done so on an individual basis with consideration of all the changes previously discussed.

10. Expanded Use of 529 Plans

529 college savings plans have historically been restricted to paying for qualified higher education expenses. These funds can now be used for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school. This use is limited each taxable year to $10,000 per beneficiary.

Contributions to a South Carolina 529 Plan are tax deductible for South Carolina tax purposes. With no time limit on how long contributions must be held before being used, taxpayers now have the ability to make contributions to their plan for a child and immediately withdraw the funds for expenses associated with enrollment or attendance at an elementary or secondary public, private, or religious school and receive a tax deduction for it. Keep in mind though that total contributions are still limited to $426,000 to a single beneficiary in South Carolina.

Major Changes to Military Family Law

By Mary Fran Quindlen, Esquire, Quindlen Law Firm, P.A.

If you have military clients or military spouses as clients or military retirees as clients then you need to be aware of the three major changes in military family law in 2018. These changes are: (1) the change to the definition of "disposable military retirement pay" pursuant to the National Defense Appropriation Act (NDAA) of 2017; (2) the ruling in Howell v. Howell, 581 U.S. _______ (2017) addressing court-ordered indemnification; and (3) the Blended Retirement System (BRS) becoming mandatory.

The first change regarding the definition of "disposable military retirement pay" is the change that has the most immediate impact on family law practitioners. Prior to November of 2017, dividing military retirement pay was done in the same manner as any other defined benefit plan. You would divide the total number of months of military service overlapping marriage by the total number of months of military service and divide that divisor by 2 and convert to a fraction. For example, if the parties were married for ten (10) years and the servicemember (SM) served for twenty (20) years, the percentage of disposable military retirement pay payable to the spouse would be 25%. 120 months divided by 240 months equals .50 divided by 2 equals .25 converted to a fraction. This is no longer the end of the division for military retirement. Now, you take your number and cap it at "the amount of basic pay payable to the member for the member's pay grade and years of service at the time of the court order, increased by each cost-of-living adjustment that occurs under section 1401a(b) of [US Code Title 10, Section 1408(a)(4)] between the time of the court order and the time of the member's retirement using the adjustment provisions under that section applicable to the member upon retirement." Easy, right?

<u>Howell</u> actually is pretty easy as it has virtually no impact on South Carolina. Howell merely re-affirms <u>Mansell</u> which states that Veteran's Administration (VA) disability pay is non-marital and therefore, non-divisible by State courts. <u>Mansell</u> clearly applied Federal pre-emption to VA disability pay, but the Arizona courts allowed Mrs. Howell to be "indemnified" or made whole by forcing her ex-husband to pay her the difference between what she would have received as her portion of his retirement and what she did receive after his VA disability pay was deducted from it. Justice Breyer wrote the opinion and stated, "Our cases and the statute make clear that the answer to the indemnification question is 'no.'" He also stated that "State courts cannot 'vest' that which . . .they lack to authority to give." Our Courts in South Carolina have not provided indemnification unless it is done by agreement of the parties (which <u>is</u> enforceable).

The BRS becoming mandatory in 2018 is the most significant change with the farthest-reaching consequences. The BRS is the new retirement system in place for all uniformed services (the normal branches plus NOAA and Public Health Commissioned Corps). It reduces the maximum amount of retirement pay for the uniformed services from 75% at 30 years to 60% at 30 years. It also establishes a 12-year re-enlistment bonus and an employee contribution retirement plan with a match of up to 5%. The BRS is extremely far reaching and a much more comprehensive explanation of it can be found at http://apps.americanbar.org/dch/committee.cfm?com=FL115277

When drafting future agreements that contain military retirement as an asset, keep in mind these changes. Two very quick tips I offer that I hope will assist when much of these cases are reviewed in the future are (1) use language that clearly defines which military pay chart will be used in the division and (2) include language that allows the court to keep jurisdiction to issue a Clarifying Order in the future to address the issues of division of military retirement and benefits. And call me if you need help.

Congratulations to Our Newest Family Court Judges!

On February 7, 2018, the General Assembly elected six new family court judges: Angela W. Abstance, Barnwell, elected to the 2nd Judicial Circuit, Seat 2; Thomas Murray Bultman, Sumter, elected to the 3rd Judicial Circuit, Seat 1; Debra A. Matthews, Blackstock, elected to the 6th Judicial Circuit, Seat 2; Matthew Price Turner, Laurens, elected to the 8th Judicial Circuit, Seat 1; Huntley Smith Crouch, Lexington, elected to the 11th Judicial Circuit, Seat 2; and FitzLee Howard McEachin, Florence, elected to the 12th Judicial Circuit, Seat 2. Congratulations, and we look forward to appearing before Your Honors!

SOUTH CAROLINA
FAMILY LAWYERS' TOOLKIT

The **SC Family Lawyers' Toolkit** Third Edition is now available! Council has updated the previous version and it includes new sections, such as: How to Introduce Electronic Evidence, an Alimony Case Spreadsheet, an Adoption checklist and UCCJEA and UIFSA Flow Charts. The Toolkit is designed to provide a practical, user-friendly resource for new and experienced family law attorneys.

Order online here
or
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FEEDBACK REQUESTED

Do you have an opinion about the Supreme Court Order concerning affidavit page limits at temporary hearings, or the family courts' application of the Order? If so, please email it, or any other comments about or suggestions for the newsletter, to chris@chrispatonllc.com.