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Family law bar: Need for alimony tax fix urgent

By: Kris Olson January 31, 2019

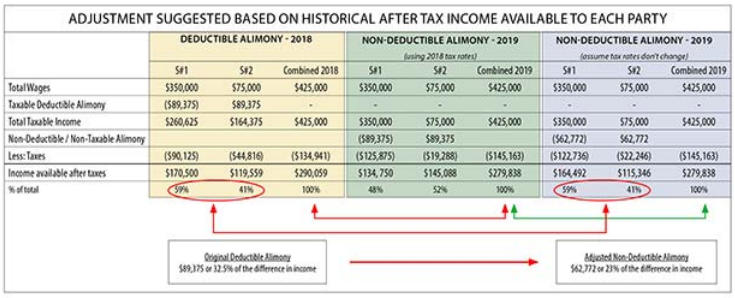
It began as the "Ginsburg formula," named for now-retired Probate & Family Court Judge Edward M. Ginsburg.

"A third for him, a third for her, and a third for Uncle Sam," Ginsburg was known to advise divorcing parties in some form, explaining the basis for a reasonable alimony award.

The Ginsburg formula would come to be codified as part of the Alimony Reform Act under G.L.c. 208, §53(b), which reads in part that "the amount of alimony should generally not exceed the recipient's need or 30 to 35 percent of the difference between the parties' gross incomes."

But now, the federal Tax Cuts and Jobs Act of 2017 has lain waste to a central premise of that time-honored formula. The 30- to 35-percent range was derived with the understanding that sums paid as alimony would be deductible to the payor and includable as income to the payee. As of Jan. 1, that is no longer the case; alimony is now neither deductible nor includable.

While the effort is just now gearing up, the local family law bar hopes the Legislature will address in short order a situation that is greatly complicating pending divorce cases and impacting self-represented parties perhaps most of all.



The above graphic illustrates the issue the family bar seeks to address. It is premised on a divorcing couple in which the first spouse earns $350,000, the other spouse earns $75,000; they are both single tax filers with no children, taking a standard deduction. The middle (orange) box shows the current problem: If an alimony award is based on a 32.5-percent difference between the parties' gross incomes, the second spouse ends up with a greater share of the two parties' combined after-tax incomes. The proposed solution (blue box at right) maintains the same split in after-tax income that the pre-Jan. 1, 2019, formula would have achieved (though thanks to the change in the tax status of alimony, there are fewer total dollars to be divvied up).

Draft answer

At its Jan. 24 meeting, the Massachusetts Bar Association's House of Delegates unanimously endorsed a proposal developed by certified public accountant Marc D. Bello at the behest of the Family Law Joint Legislative Task Force.

Bello determined that the rough equivalent of the 30- to 35-percent range is 23- to 28-percent, if the alimony payments are not tax-deductible. Based on Bello's numbers, the task force is now proposing that the Alimony Reform Act be amended to apply the 23- to 28-percent range when setting alimony payments, unless those payments once again become tax-deductible to the payor.

Kimberley J. Joyce, who chairs the MBA's Family Law Section, told the House of Delegates that fixing the statute is a critical issue in domestic relations.

"I can't think of any issue more pressing," she said.

Joyce and Vice Chair Holly A. Hinte explained that "achieving a perfect match" to the 30- to 35-percent range was not possible and that there would continue to be outlying cases disproportionately impacted by the new range. However, the 23- to 28-percent range is a reasonable equivalent, they said.

According to Bello, absent the change, there are instances in which continued use of the 30- to 35-percent range would leave the payor with a smaller share of the divorcing couple's after-tax income, which was clearly not the Legislature's intent.

Bello said his calculation of the proper range began with the premise that, in the pre-TCJA world, each party was ending up with a certain percentage of the after-tax income. The goal, he said, was to maintain a similar split while accounting for the overall reduction of after-tax income.

"It's only fair both parties absorb some of the additional tax burden," he said.

Bello added that he also accounted for the fact that Massachusetts is continuing to allow payors to deduct alimony from their state income taxes.

Even if the proposed amendment is adopted, judges would retain the ability to deviate from the range based on any number of circumstances, Joyce stressed.

"The outliers who currently have protection will still have it," she said.

Joyce added that the law's admonition that "the amount of alimony should generally not exceed the recipient's need" would remain intact.

"Need remains the touchstone of alimony," she said.

Joyce and Hinte said that other members of the task force are in the process of taking the proposal back to their respective memberships, which include the MBA, Boston Bar Association, Women's Bar Association, American Academy of Matrimonial Lawyers, Association of Family and Conciliation Courts, and the Office of the Chief Justice of the Probate & Family Court.

There is at least some indication that the Women's Bar Association might hold a different view of the appropriate shift in percentages, or at least want to have its own CPA run the numbers.

President Meredith L. Ainbinder said that the WBA is in the process of studying the issue and declined further comment until the organization had fully evaluated it.

Joyce explained to the MBA House of Delegates that the task force tried to keep its draft amendment to the statute as simple and straightforward as possible. The proposed language accounted for the fact that a future Congress could reinstate the deductibility of alimony.

The hope is that a draft bill with the backing of a wide swath of the family law bar will soon find a legislator or two to champion it.

"What we can hopefully do is present a united front and get an amendment through," Joyce said.

Task force members explored alternatives to a legislative fix, Hinte said, such as a standing order or memo from the administrative office of the Probate & Family Court. However, they got the sense that judges would be hesitant to rely on anything other than a clear mandate from the Legislature.

> *"This is costing our clients lots of money. No one knows what judges are going to do."*
>
> *— Andrew P. Cornell, Cambridge*

No rest for weary

The uncertain landscape has presented a new challenge for family law attorneys still trying to catch their breath from a flurry of filings at year's end on behalf of litigants looking to dodge the brunt of the tax law's changes, the treatment of alimony chief among them.

While they say Probate & Family Court judges are aware of the issue, there has not yet been any uniform response developed. Some attorneys fear that judges will be disinclined to stray from the 30- to 35-percent range until they are explicitly authorized to do so by the Legislature, leading to unjust results.

Newburyport family law attorney Damian Turco raised the possibility that a judge could "really hammer" a payor for whom he develops a strong distaste, despite knowing that using a 35-percent spread to calculate alimony in the absence of the tax benefit would have harsh consequences for that payor.

Until the law changes, "the judge does have discretion to order alimony inconsistent with what the Legislature intended," he noted.

Even if that inconsistent order is a mistake, it may not be a reversible one if the alimony award falls within the current 30- to 35-percent range, Turco added.

To deal with the uncertainty, attorneys have been forced to retain the services of CPAs to demonstrate that deviating downward from the range is appropriate. Even then, Hinte said there is some wariness among the judiciary about entering an order that is not based on the statute as currently written.

"This is costing our clients lots of money," Cambridge attorney Andrew P. Cornell told the House of Delegates. "No one knows what judges are going to do."

Meanwhile, it is likely that, for self-represented parties, such expert testimony from a CPA may not be within reach — if the need for it is even on their radar at all.

Though they have no choice but to adjust to the new reality, the TCJA — "the biggest change in the law since 1942" — is still a bitter pill for divorcing parties, said Wellesley Hills attorney Jonathan E. Fields.

Given that the payor is generally in a higher tax bracket than the payee, having money move from the former to the latter meant that the government had been in essence "underwriting" the divorce, Fields said.

Now, in the post-TCJA world, there is simply less money to divvy up and a little more financial pain all around, he said.

For most family law attorneys and CPAs, the change in the tax status of alimony came out of nowhere, Fields added.

It was incorporated into the TCJA to help enable Republicans to soften — if ever so slightly — the impact of the $1.5 trillion in tax cuts on the federal deficit and thereby abide by the Byrd Rule. That $6.8 billion in additional tax revenue over the next decade, along with other measures, allowed the GOP to pass the TCJA using the reconciliation process, obviating the need to obtain Democratic votes.

The change in the tax status of alimony will also help the government address what it has said has been rampant under-reporting of alimony payments by recipients. According to a 2014 report from the Treasury Inspector General for Tax Administration, there was a $2.3 billion gap between what payors deducted and what corresponding payees included in their incomes in 2010. In nearly half the cases (47 percent), payees either did not claim the income at all or claimed a different (presumably lesser) amount.

> *"I can't think of any issue more pressing," said Kimberley J. Joyce, chair of the MBA's Family Law Section.*

Will Beacon Hill respond?

Though there is no reason to suspect that the Legislature will resist a fix, family law attorneys say they have been surprised by inaction on Beacon Hill before.

Hinte points to the failure to adopt the Uniform Child Custody Jurisdiction and Enforcement Act, something that fellow task force member Fern L. Frolin began working on in the 1980s. As of July 2011, the UCCJEA had been adopted in 49 states, with Massachusetts the lone holdout.

Hinte said there seemed to be momentum to finally pass the UCCJEA here last session. At hearings, legislators listened intently to testimony from Ginsburg, attorneys and domestic violence groups. But then nothing happened.

Attorneys fear that the longer the alimony issue persists, it could have negative consequences. Joyce believes that depriving payors of the tax benefit of paying alimony might incentivize them to retire early or otherwise stop working.

But more broadly, the uncertainty is complicating what is already a fraught negotiation process.

"It's hard enough to settle a case," Joyce said.

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