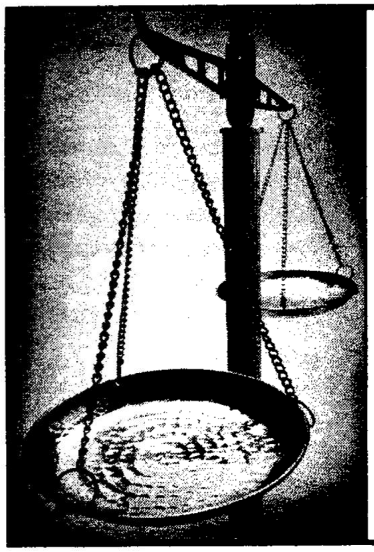

Domestic Relations Journal of Ohio

Stanley Morganstern, Esq. | Editor-in-Chief
Laurel G. Stein, Esq. | Associate Editor

July/August 2007 ■ Volume 19, Issue 4

IN THIS ISSUE

"Family Support"

Dead or Alive?

by Terri A. Lastovka, CPA, JD, ASA[1]
Stout Risius Ross
Cleveland, Ohio

Have "lesterized" support payments survived the Uniform Family Support Act? To quiz the domestic relations attorneys, you would think not. But oddly enough, temporary support orders are not always allocated between spousal and child support.

Ohio adopted the Uniform Family Support Act in 1998. The UFSA requires allocation between child and spousal support. This, in conjunction with IRC 71(c)(2), was essentially a legislative overruling to *Commissioner v. Lester*.[2] *Lester* payments are payments comprised of both spousal support and child support in unallocated amounts. However, under temporary orders, the court does not always make the required distinction.

Why is this distinction so important? There is incentive under Federal income tax law for the obligor to characterize marital payments as includable, deductible alimony rather than excludable, nondeductible child support. In the aftermath of *Lester*, it became common practice for spousal support awards to be "loaded." That is, a theoretically larger than otherwise spousal support payment and a correspondingly adjusted-down child support payment was agreed upon in order to take advantage of the tax laws and, assumedly, to provide ade-

quately for the children through the supported, custodial se's increased income.

Congress made changes in the Internal Revenue Code to address this charade by establishing the four-pronged definition of alimony set forth in IRC 71(b)(1), which includes the proscription of post death liability contained in subsection (D), reinforced by the recapture rule for "front-loaded" alimony. One would think that when the support obligation is not specified to cease upon death, that the obligation would constitute nontaxable child support. But this is not the case at all. In fact, this is where *Lester* was overturned. IRC 71(c)(1) states that if an amount is not "fixed" as support of children, then it is considered alimony. Amounts will not be treated as child support for purposes of IRC 71 unless specifically designated as such in the governing divorce document. This was the result in *Ambrose v. Commissioner*,[3] where the Tax Court held that payments of unallocated family support under a temporary support order were taxable to the payee wife as alimony. The court concluded that child support was not fixed in the divorce instrument within the meaning of IRC 71(c)(1).

Now, let's put a different spin on family support l ents. Take for example a divorce instrument that requires monthly payments of both alimony and child support, where the amounts for each are fixed. But, the payor pays less than the full amount. According to IRC 71(c)(3), the payment will be allocated to child support first, as was the result in *Blair v. Commissioner*.[4]

Putting numbers to the above example, under the divorce decree, husband is to pay wife $1,000 a month until she dies. The decree specifically provides that $300 a month is for child support. In the 10th month, husband pays only $800. Out of the $800, $300 is allocated to child support and the remaining $500 is allocated to alimony. As has been said many times before – it is all about what is in the best interest of the children.

There are a couple additional nuances that should be kept in mind. If the child for whom support is being paid is a step-child of the obligor, the payments will be treated as taxable alimony since IRC 71(c)(1) only applies with respect to a child of the payor spouse. And, all is for naught if the parties under the temporary support order are filing a joint return, as alimony paid and received will just wash each other out and have a zero a effect.

So the lesson of the day is – if the intent is that support is for the child and to be nontaxable, it is imperative that the amount be fixed in amount and specified as such.

Notes

1. Terri A. Lastovka is with the Cleveland Office of Stout Risius Ross. She is an Accredited Senior Appraiser, American Society of Appraisers. This article also appeared in a newsletter published by Stout Risius Ross, *Valuation Observations*, Vol. 7, No. 6.
2. *Commissioner v. Lester*, 366 US. 299, 81 S.Ct. 1343, 6 L.Ed.2d 306 (1961).
3. *Ambrose v. Commissioner*, T.C. Memo 1996-128, 1996 WL 111326 (U.S. Tax Ct. 1996).
4. *Blair v. Commissioner*, T.C. Memo 1988-581, 1988 WL 137123 (U.S. Tax Ct., 1988).

Legislative Update

House Bill 178 Enacted as Part of Budget Bill 119

House Bill 178, sponsored by Representatives Louis W. Blessing, Jr. and Sandra Stabile Harwood, was introduced to amend R.C. § 3119.30 to create a rebuttable presumption that the "reasonable cost" of health insurance coverage in child support orders is one that does not exceed five percent of an individuals gross income, and to identify expenses that a court or CSEA may consider when determining the reasonable cost of health insurance for a child subject of a support order. Those expenses were: (1) Mandatory deductions from wages; (2) Rent or mortgage; (3) Household utility payments, including expenses for heating, cooling, electric, water, and one telephone; (4) Groceries; (5) Clothing for minor children; (6) Work-related transportation that consists of one car payment and gasoline, oil, car insurance, and maintenance relating to that vehicle; (7) Work-related transportation expenses not included under (6); (8) Tax consequences of health insurance costs and non-covered health care expenses; (9) Other child support orders and other orders to provide for the health care needs of a child; (10) Any other expenses or circumstances considered appropriate by the court.

The proposed legislation of H.B. 178 was amended and incorporated into Budget Bill 119. Budget Bill 119 was adopted and enacted into law on June 30, 2007. The "rebuttable presumption" language, and the enumerated expenses found in the introduced version of H.B. 178 did not make it into the final adopted version of Budget Bill 119. However, R.C. § 3119.29 was amended to include the following provisions: