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Your Other Partner

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IN THIS ISSUE

FROM THE CHAIR

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Paul Helvy

As my year as chair draws to a close, I continue to be astounded as to how vibrant the Pennsylvania Bar Association Family Law Section truly is. If all the Section did was hold two incredible meetings per year that enabled attorneys to attend top-notch CLE programs and published the *Pennsylvania Family Lawyer*, a first-rate publication devoted to the practice of family law in Pennsylvania, most people would say the Section was a success. However, those two very visible accomplishments are only a small part of what our Section does on a day-to-day basis.

On the legislative front, the Section keeps a watchful eye on proposed legislation that impacts family law. The Section is blessed to have the assistance of **Fred Cabell Jr.**, the Director of Legislative Affairs for the PBA. Fred has not only kept the Section informed of relevant pending legislation, but has also helped the Section enhance its reputation within the Legislature. The Section leadership is now regularly contacted about potential legislation before it is proposed. This is the direct result of the hard work of past Section leaders, individuals who devote their time and energy to researching and addressing various inquiries we receive from the Legislature and, of course, Fred's contacts in the Legislature.

The Family Law Section also proposes legislation of its own. At the forefront of our current legislative agenda is the effort to change the statutory waiting period from two years to one year in a no-fault divorce where one of the parties refuses to consent. Our efforts in this regard are spearheaded by **Mary Cushing Doherty** and **Carol Behers**. It is our firm belief that reducing the amount of time it takes to address the economic issues in a divorce will lessen the period of time spouses are in conflict. This will not only benefit the spouses themselves but will also benefit their children, who are often the real victims of divorce. Although there are

(continued on page 51)

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AVOIDING ALIMONY RECAPTURE
BY MITCHELL E. BENSON, CPA, MT, CFF; DONNA M. PIRONTI, CPA, MSA; AND ADAM M. POUTASSE, CPA, MAcc

When attorneys, judges, mediators and arbitrators make decisions on the timing and amount of alimony paid and received, they need to consider the alimony-recapture rules under Section 71 of the Internal Revenue Code (IRC). The intent of these rules is to discourage divorcing spouses from disguising property settlements as alimony. This is often done through front-loading alimony payments. This treatment is not favorable since the allocation of assets during the divorce are nontaxable transactions under IRC Section 1041, while alimony is a tax-deductible event for the payor.

The recapture rules look at whether the post-separation alimony is frontloaded in the first three years. In the third year of post-separation alimony there is a look-back and possible recalculation of the deduction/income claimed in Years 1 and 2. The requirement is that in the third year any "excess alimony" over Years 1 and 2 are recaptured as income or deduction in that third year. The excess payment becomes taxable income to the payor and a deduction for the payee in Year 3, a reversed result from the original treatment.

It is important to understand which calendar years fall under these rules. The first post-separation year is the first calendar year in which the payor spouse pays alimony or separate maintenance payments to the payee spouse. Payments in any post-separation year do not have to be made each month in the year for it to count as the first year. For example, payments that start in March and end in December qualify as the first year. The second and third post-separation years are the next two succeeding calendar years. Payments made under temporary support orders (i.e. alimony pendente lite) are not considered in the calculation of years or in payments.

There are three major exceptions to the recapture rules that allow for no recapture:

1. If the payments stop because of the death of either party, or
2. If the payments end because of the remarriage of the payee, or
3. The payor's income fluctuates outside the payor's control.

Generally the recapture rule will only apply if the third-year alimony payment decreases by more than $15,000 from the alimony paid in the second year, or the alimony paid in the second and third year decreases significantly from the alimony paid in the first year.

The formula for the alimony recapture is a three step math-driven process:

1. Determine excess alimony for the second post-separation year.
2. Determine the excess alimony for the first post-separation year.
3. Determine the combined alimony recapture to be made in the third post-separation year.

When alimony is awarded and will decrease between Years 1, 2, and 3, alimony recapture must be taken into consideration. Although the payee spouse would receive a benefit by having the alimony no longer taxable, the payor spouse now has to pay taxes on the amounts he/she believed he/she was paying with the benefit of a tax deduction. The easiest way to avoid this is to be sure the first three years are within the $15,000 per year variance limitation.

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