UNMASKING TODAY'S DIVORCE TAXATION PROBLEMS

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Former I.R.C. § 71 (prospectively repealed)

1. Text:

(b) Alimony or separate maintenance payments defined. –For purposes of this section –

(1) In general. -The term "alimony or separate maintenance payment" means any payment in cash if -

(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,

(B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,

(C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

(D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.

. . . .

(c) Payments to support children. –

(1) In general. –Subsection (a) shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse.

(2) Treatment of certain reductions related to contingencies involving child. –For purposes of paragraph (1), if any amount specified in the instrument will be reduced –

(A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

(B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A),

an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

Former I.R.C. § 71(b)(1), (c).

2. Statutory Changes

As has been widely reported, Congress has repealed I.R.C. §§ 71 and 215, thereby eliminating the federal tax reduction for alimony. In addition, Congress has repealed former I.R.C. § 61(a)(8), which expressly defined alimony as taxable income.

In tax years governed by the new law, alimony will be taxable income to the payor, and will not be taxable income to the payee.

The effective date of the change is as follows:

(c) EFFECTIVE DATE. –The amendments made by this section shall apply to –

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

Pub. L. No. 115-97, § 11051, 131 Stat. 2054.

Thus, the new law will apply to all divorce or separation instruments executed after December 31, 2018. **Divorce or separation instruments executed before December 31, 2018 will continue to be governed by former law**, so alimony under those instruments will still be income to the payee and generate a tax deduction for the payor. Since many instruments will continue to be governed by prior law, the alimony deduction has not been repealed all at once but, rather, will die out slowly over a period of many years.

As an exception, if an instrument executed before December 31, 2018 is modified after December 31, 2018, the new law applies *if the modification expressly so provides*. *Id.* If an instrument governed by former law is modified, and the modification is silent or states an intention to apply former law, former law will continue to apply.

It is highly likely that a line of cases will eventually construe the statutory language quoted above. But there were no such decisions in the coverage period for this outline; the courts are still resolving disputes over pre-2019 tax returns.

3. *Siegel v. Comm'r*, T.C. Memo. 2019-11, 2019 WL 643186 (2019)

(a) Facts: Husband and wife were divorced in New York. The final decree ordered the husband to pay to the wife spousal maintenance of $10,110 per month. The husband failed to pay, and the wife filed enforcement proceedings. The court found the husband in contempt and threatened to imprison him unless he paid $225,000 to the wife.

The husband paid the sum required and then deducted it as alimony on his 2012 tax return. The IRS assessed a deficiency on the basis that the $225,000 was not alimony, and the husband appealed to the Tax Court.

(b) Issue: Was the husband entitled to an alimony deduction?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: "Lump-sum payments of alimony or child support arrearages generally retain their character as alimony or child support for Federal tax purposes." 2019 WL 643186, at *8.

A payment is alimony for federal tax purposes only if it terminates upon the payee's death. I.R.C. § 71(b)(1)(D). The IRS argued that the $225,000 could not be alimony because the obligation to make the payment would not terminate if the wife died. It relied particularly upon *Iglicki v. Commissioner*, T.C. Memo. 2015-80, 2015 WL 1886010 (2015), which was discussed and criticized in the 2015 version of this outline. *Iglicki* held that a judgment for arrears was not alimony under federal tax law because it did not terminate upon the wife's death.

But the judgment for arrears in *Iglicki* was a money judgment. The *Siegel* court held that the obligation to pay the $225,000 was not a money judgment. Rather, it was a condition in a contempt judgment. *Iglicki* was therefore distinguishable, and the obligation to pay $225,000 was alimony.

<u>Observations:</u>

1. *Siegel* held that *Iglicki* applies only where the arrears obligation was a money judgment, but the issue is whether the obligation terminates upon the payee's death, not whether the obligation is a money judgment. It is unclear why the presence of a money judgment should be the key point.

2. "Having decided that the 2012 order was not a money judgment . . . we need not consider *Iglicki*." *Siegel*, 2019 WL 643186, at *8. *Siegel* therefore stopped short of criticizing *Iglicki* directly. But the court certainly showed zero interest in expanding *Iglicki* beyond its very specific facts.

3. As the 2015 version of this outline noted, if *Iglicki* is correct, then the entry of the judgment for arrears converted the obligation at issue from alimony to not-alimony. It seems odd that the time of payment should cause such a fundamental change in the nature of the obligation.

4. Moreover, the issue is whether *the original support obligation* ceased upon the payee's death. If so, the obligation is alimony. When alimony is paid late, the court knows that the payee did not die, and, therefore, the obligation to pay arrears does not terminate upon death—because death did not happen. But the obligation would have terminated upon death if death had happened. The fact that *the original underlying support obligation* was terminable upon death should make any judgment for arrears alimony for federal tax purposes. *Siegel* reached the right result; *Iglicki* did not.

5. Nevertheless, the IRS seems determined to try to take the position that judgments for alimony arrears are not alimony because they do not terminate upon the payee's death. As long as the IRS continues to take this position, there will continue to be an unfortunate element of risk to taking an alimony deduction based upon any post-due payment.

4. *Faust v. Comm'r*, T.C. Memo. 2019-105, 2019 WL 3938725 (2019)

(a) Facts: Husband and wife were divorced in Virginia. The wife was a victim of spousal abuse during the marriage. She was Hispanic; English was not her first language.

A divorce settlement agreement, incorporated into the divorce decree, required the husband to pay to the wife $2,270 per month in spousal support. The husband made the payments. The wife's tax return, which was prepared by a low-income taxpayer return preparation service, did not report the payments as income.

The IRS assessed a deficiency and an accuracy-related penalty, and the wife appealed to the Tax Court.

(b) Issues: (1) Were the payments alimony, and (2) was the wife liable for an accuracy-related penalty?

(c) Answer to Issues: (1) Yes, and (2) no.

(d) Summary of Rationale: The divorce decree and settlement agreement were certainly divorce or separation instruments. They did not expressly designate the support payments as not includible in gross income. The husband and wife did not live together after the divorce. "Unless otherwise provided by stipulation or contract, spousal support and maintenance shall terminate upon the death of either party or remarriage of the spouse receiving support." Va. Code Ann. § 20-109(D). The settlement did not provide otherwise. The payments were therefore alimony.

The wife's failure to report alimony as income was a clear mistake. But English was not her first language, she had been abused during the marriage, and her return was prepared by persons claiming knowledge in preparation of tax returns for low income persons.

The accuracy-related penalty is not imposed if the taxpayer acted in good faith.

Taking all of the facts and circumstances together, the Court believes that petitioner made honest and reasonable efforts to determine her 2015 Federal income tax liability and that the underpayment resulted from an honest misunderstanding of law that is reasonable in the light of her limited English proficiency, education, history of abuse at the hands of her ex-husband, and the multitude of complicated facts and unusual circumstances surrounding this particular case.

2019 WL 3938725 at *7.

Observation: It is mildly remarkable that a service specializing in preparing tax returns for low-income people did not know that alimony was taxable income. This had been the law for many years before 2019.

I.R.C. § 212

1. Text

In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year –

(1) for the production or collection of income;

(2) for the management, conservation, or maintenance of property held for the production of income; or

(3) in connection with the determination, collection, or refund of any tax.

I.R.C. § 212.

2. *Sholes v. Comm'r,* T.C. Memo. 2018-203, 2018 WL 6629571 (2018)

(a) Facts: Husband and wife were engaged in divorce proceedings in Arizona. The wife alleged that real property named Oasis was held in the name of the husband's parents but was actually community property. She joined the parents as parties to the action. The court ultimately held that Oasis was 50% community property and 50% the property of the parents.

On their tax return, the parents claimed a business expense deduction for their attorney's fees in the divorce case. The IRS disallowed the deduction and assessed a deficiency. The husband's mother (his father had passed away) appealed to the Tax Court.

(b) Issue: Were the parents entitled to a business expense deduction for their attorney's fees in the divorce case?

(c) Answer to Issue: No.

(d) Summary of Rationale: "If the origin of the [business expense] claim is a marital relationship, the legal expenses are nondeductible even if the outcome affects income-producing property of the taxpayer." 2018 WL 6629571, at *4. "Deductions are allowable under sections 162 and 212 for activities in which the taxpayer engaged with the predominant purpose and intention of making a profit." *Bronson v. Comm'r*, T.C. Memo. 2012-17, 2012 WL 129803 (2012).

The mother argued that she was not a party to the marriage involved in the divorce case so that her legal fees were a valid business expense of Oasis, which she alleged was a rental property. But the court found that Oasis was the parents' personal residence.

Moreover, the mother did not sufficiently prove the amount incurred for legal fees in the divorce case, as distinguished from legal fees incurred for other purposes. There was also no attempt to prove exactly what legal services were provided in exchange for the fees. "Even if we concluded that some of the fees petitioner paid might be deductible under section 212, we would be unable to estimate the deductible amount under the principles of *Cohan v. Commissioner*, 39 F.2d 540 (2d Cir. 1930), because we have no reliable evidence on which we could base an estimate." *Sholes*, 2018 WL 6629571, at *12.

Observations:

1. "Generally, attorney's fees and other costs paid in connection with a divorce, separation, or decree for support are not deductible by either the husband or the wife." Treas. Reg. § 1.262-1(b)(7). Business expenses must be incurred for the purpose of making a profit, and spouses generally do get divorced for purposes of economic gain. *See United States v. Gilmore*, 372 U.S. 39 (1963); *Barry v. Comm'r*, T.C. Memo. 2017-237, 2017 WL 5899406 (2017) (discussed in last year's version of this outline).

2. "However, the part of an attorney's fee and the part of the other costs paid in connection with a divorce, legal separation, written separation agreement, or a decree for support, which are properly attributable to the production or collection of amounts includible in gross income under section 71 are deductible by the wife under section 212." Treas. Reg. § 1.262-1(b)(7); *see also Gale v. Comm'r*, 13 T.C. 661 (1949), *aff'd*, 191 F.2d 179 (2d Cir. 1951); *Wild v. Comm'r*, 42 T.C. 706 (1964). This is a fact-specific exception that the courts tend to construe narrowly. *See, e.g., Hunter v. Comm'r*, 219 F.2d 69 (2d Cir. 1955) (exception does not apply to fees incurred to avoid paying alimony).

3. The exception probably is not available after 2018 as alimony is no longer taxable income, so the attorney's fees incurred to obtain it are no longer an expense of producing taxable income.

4. The fees at issue in *Sholes* had nothing to do with obtaining alimony and therefore fell under the general rule.

5. The court is especially likely to apply the general rule when the alleged business expense relates to a personal residence that the taxpayer is falsely claiming to be a business.

6. The court is especially likely to apply the general rule when the taxpayer cannot prove the amount of the legal fees at issue and the services received in return for the fees. "The requirement . . . that deductible expenses be 'ordinary and necessary' implies that they must be reasonable in amount[.]" *Bingham's Trust v. Comm'r*, 325 U.S. 365, 370 (1945). The court had no way to determine whether the fees at issue in *Sholes* were reasonable in amount.

I.R.C. § 1041

1. Text:

(a) General rule. –No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of) -

(1) a spouse, or

(2) a former spouse, but only if the transfer is incident to the divorce.

(b) Transfer treated as gift; transferee has transferor's basis.CIn the case of any transfer of property described in subsection (a) –

(1) for purposes of this subtitle, the property shall be treated as acquired by the transferee by gift, and

(2) the basis of the transferee in the property shall be the adjusted basis of the transferor.

I.R.C. § 1041(a)-(b).

2. No published opinions addressing this code section were released during the period of coverage of this summary.

I.R.C. § 408(d)(6)

1. General Rule

The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in subparagraph (A) of section 71(b)(2) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

I.R.C. § 408(d)(6). Thus, a transfer of an interest in an IRA pursuant to a divorce or separation instrument is generally not taxable.

2. No published opinions addressing this code section were released during the period of coverage of this summary.

I.R.C. § 414(p) and 29 U.S.C. § 1056

1. Introductory note: The Qualified Domestic Relations Order ("QDRO") provisions in I.R.C. § 414(p) are exactly identical to the QDRO provisions in 29 U.S.C. § 1056. Most cases cite to Title 29, but some cases cite to the Internal Revenue Code.

2. Summary of the Law: ERISA normally bars any assignment of retirement benefits. But there is an express exception for assignments of benefits under state domestic relations law. The exception applies only if the assignment of benefits is stated in a QDRO. A QDRO directs the employer to pay a portion of an employee's benefits to another person –normally, the employee's spouse. This person is known under ERISA as an alternate payee.

It is important to understand how QDRO procedure operates. The process begins when the state court issues a domestic relations order –a "DRO" –assigning benefits from the employer to an alternate payee. This order must be submitted to the retirement plan that administers the benefits. The plan then determines whether the order meets certain federal requirements. If it meets those requirements, it is qualified and becomes a QDRO. If it does not meet the requirements, the order is not qualified, and federal law prevents the plan from following it. (The DRO would then normally be modified by the state court to respond to the plan's objections.) The plan's decision on whether to qualify a QDRO can be appealed to a federal or state court.

In the absence of a QDRO, ERISA bars the enforcement of any state court order assigning ERISA-regulated benefits to another person.

3. *Garcia-Tatupu v. Bert Bell/Peter Rozelle NFL Player Ret. Plan*, 296 F. Supp. 3d 407 (D. Mass. 2017), *aff'd*, 747 F. App'x 873 (1st Cir. 2019)

(a) Facts: The husband, a former NFL football player, was divorced from his wife in Massachusetts in 1997. The decree incorporated a separation agreement, which provided:

> At the time of Mosiula F. Tatupu's retirement and decision to draw pension benefits as may be available to him by virtue of his employment with the National Football League from 1978 through and including 1991, Mosiula F. Tatupu, shall pay to Linnea Garcia-Tatupu one-third (1/3) of the net benefit he receives from said pension benefit plan. *Mosiula F. Tatupu shall have exclusive right to decide, if, when, and how he wishes to receive said benefits, having the sole right to choose what payment option he desires without regard to the desires and/or wishes of Linnea Garcia-Tatupu.* Whatever payment option Mosiula F. Tatupu elects shall govern the time amount and manner of payments to Linnea Garcia-Tatupu. Mosiula F. Tatupu shall remit the payments due to Linnea Garcia Tatupu within two (2) business days of his receipt of any payments of benefits under said plan. Any and

> all benefits paid to Linnea Garcia-Tatupu by Mosiula F. Tatupu shall be deemed alimony payments. Said benefits shall continue to be payable to Linnea Garcia-Tatupu subsequent to the death of Mosiula F. Tatupu, if the plan so provides, and *if she survives Mosiula F. Tatupu, Linnea Garcia-Tatupu specifically waives any rights to receive any alimony and/or pension benefits in excess of the amount provided herein*. The parties agree to cooperate with any plan administrator in coordinating distribution of benefits so long as the distribution is consistent with the terms of this Agreement.

296 F. Supp. 3d at 409 (emphasis added). Thus, the wife received one-third of the husband's pension benefits and expressly agreed that the benefit options chosen by the husband would determine the benefits paid to the wife.

No DRO was entered at the time of the divorce. The husband died in 2010; he had not remarried. At the time of his death, he had not elected to receive survivor benefits.

In 2012, the Massachusetts court issued a DRO, nunc pro tunc back to 1997, which awarded the wife "100% of the Player's [Mosiula Tatupu's] accrued benefit under the Retirement Plan, based on the Player's Credited Seasons earned as of the date of this order and the terms of the Plan in effect as of the date of this order." *Id.*

The plan refused to qualify the order on the ground that it awarded an alternate payee more benefits than the employee had earned. The wife sued the plan in federal court to question its refusal.

In a decision discussed in the 2017 version of this outline, the court refused to dismiss the action. *Garcia-Tatupu v. Bert Bell/Peter Rozelle NFL Player Ret. Plan*, 249 F. Supp. 3d 570 (D. Mass. 2017).

(b) Issue: Did the 2012 Massachusetts DRO meet the requirements for qualification?

(c) Answer to Issue: No.

(d) Summary of Rationale (District Court): The language of the agreement clearly gave the wife a right to be paid only one-third of what the husband received. The agreement stated clearly, in multiple places, that the wife was not entitled to any benefits beyond one-third of the benefits that the husband elected and that he had no duty to consider her interests in making elections.

The husband selected benefits only during his lifetime; he did not elect survivor benefits. By awarding the wife benefits never elected by the husband, the DRO divided benefits not available under the plan:

> Ms. Garcia-Tatupu . . . agreed to a "shared payment" approach with her ex-husband. In other words, the Marital Separation Agreement provides that Ms. Garcia-Tatupu is entitled to share in any actual benefit payments made toCand as directed byCMosiula Tatupu. But it does not divide Mosiula Tatupu's retirement benefit into separate portions, or otherwise purport to give Ms. Garcia-Tatupu an interest independent from Mosiula Tatupu's interest in the Plan. By subsequently purporting to give Ms. Garcia-Tatupu survivorship rights,

> thus allowing her to assert a separate interest in the Plan, the state post mortem and nunc pro tunc domestic relations orders have the effect of altering rights under the Marital Separation Agreement and providing benefits that were not otherwise payable upon Mosiula Tatupu's death. This is an increased benefit under 29 U.S.C. § 1056(d)(3)(D); therefore, the post mortem state domestic relations orders do not provide an enforceable Qualified Domestic Relations Order beyond the terms of the Marital Separation Agreement.

296 F. Supp. 3d at 416.

(e) Summary of Rationale (Circuit Court): "[T]he district court's judgment should be affirmed essentially for the reasons articulated by the district court[.]" 747 F. App'x at 873.

> [W]e do not opine upon the circumstances in which nunc pro tunc state court domestic relations orders entered after the death of a plan beneficiary may be treated as QDROs. We merely hold that, on the specific facts of this case –in particular, the language of the separation agreement and the status of Mr. Tatupu's election and receipt of benefits at the time of his death –the domestic relations orders at issue may not be so treated.

Id.

Observations:

1. The 2012 DRO, and an earlier 2011 order on which it was based, both consisted of signatures of the judge on a form order on the stationary of wife's counsel. There was a clear appearance that the state court did not fully consider the issues. No basis was stated for giving the wife additional benefits in 2012, benefits that she had not been given by the original decree and that she had expressly waived in the agreement. There is a strong appearance that the order violated state law.

2. Federal courts, in determining whether a DRO should be qualified, generally cannot revisit questions of state law. The federal court was therefore not permitted to revisit the state law question. The court expressly so held. But the weakness of the order under state law probably influenced the federal court's reasoning.

3. The end result is perfectly reasonable on the facts reached, but it poses long-term questions. Suppose that the husband had promised in the order to provide survivor benefits and then refused to do so. The court's reasoning leads one to the conclusion that any state court order giving the wife survivor benefits would be providing a benefit not available under the plan because the husband had never actually elected the benefit. But it surely matters that the benefit was actually available under the plan and that the husband wrongfully failed to elect it. The court's broad reasoning is going to create a problem in situations where a state court's order has a much stronger basis.

4. It is possible that the state court order might have had a stronger basis. For example, perhaps the agreement in which the wife so clearly waived benefits not elected by husband was signed by the wife under some form of duress. If such a fact pattern existed, however, the state court did the

wife no favors by simply signing her draft order. The wife's counsel likewise did her no favors by allowing the state court to do that. A written opinion from the state judge, setting forth the basis for the 2011 and 2012 orders, would have helped the wife immensely in federal court. Of course, it is also possible that there was no proper basis for the state court order.

5. The problem of hasty state court orders giving alternate payees excessive benefits under state law is difficult to address. The preferred remedy on the facts of *Garcia-Tatupu* would have been for a state court to reverse the 2012 DRO under state law. It is unclear why the husband's estate did not appeal. The plan, of course, lacked standing to appeal in state court, but it was then able to avoid the order in federal court. Pressure arising from questionable state court orders is likely to encourage federal courts to construe ERISA in ways that create problems. The author would feel more comfortable with a system allowing pension plans a way to question DROs in state court under state law. Over the long term, such a system would remove pressures on federal judges to construe ERISA in problematic ways.

6. The First Circuit opinion carefully stresses that the result is limited to the facts. This is almost certainly wise. The highly questionable nature of the state court order in *Garcia-Tutupu* is a fact not likely to recur in future cases, and it had a very strong effect on the result.

4. *Christopoulos v. Trout*, 343 F. Supp. 3d 812 (N.D. Ill. 2018)

(a) Facts: Husband filed a divorce action against wife in Illinois. Immediately thereafter, he changed the beneficiary of his employer-provided group life insurance, naming a series of relatives in varying percentages.

The wife immediately asked the divorce judge to order the husband to name the children as beneficiaries. The trial court properly entered a handwritten order granting the relief requested.

The husband did not comply with the order before his death three months later. The parties had not yet been divorced, and the divorce action abated upon the husband's death.

Seven months after the husband's death, the wife filed a motion in the divorce case seeking clarification of the handwritten order. The motion sought formal entry of a DRO. The state court granted the motion and entered a formal DRO nunc pro tunc to the date of the handwritten order. The husband's estate appealed from the order, but an Illinois appellate court affirmed it, and the Illinois Supreme Court denied review.

The wife sued the insurance company to force payment to the children. The insurance company moved the action to federal court and interpleaded the policy proceeds. The wife moved for summary judgment.

(b) Issue: Who is entitled to the policy proceeds?

(c) Answer to Issue: The children.

(d) Summary of Rationale: All parties agreed that employer-provided life insurance plans, like retirement plans, are subject to ERISA. Thus, the wife and children could prevail only if one or both state court orders was a QDRO.

But the relatives did not argue that either state order failed to meet the definition of a QDRO. They argued, instead, that the state court orders were both void because the divorce case had abated. But this was a question of state law, already resolved by the Illinois state courts. The federal court summarily refused to exercise what amounted to appellate jurisdiction over the state courts on a pure matter of state law.

The relatives also raised the defense of laches. But the real parties in interest on the wife's side of the case were the children. "The defense of laches does not treat a minor's failure to act while still under the age of majority as a culpable delay; that is, the defense does not apply to a minor." 343 F. Supp. 3d at 822. The court therefore rejected the relatives' attempt to assert laches.

Observations:

1. While ERISA is mostly frequently applied to retirement plans, ERISA also applies to employer-provided life insurance plans. Any order directing the transfer of employer-provided life insurance must meet the requirements for a QDRO.

2. ERISA imposes federal requirements that must be met before a state court order can make a valid divorce-related transfer of covered benefits. But it does not allow federal courts to second-guess state courts on issues of state law, especially when those issues have been ruled upon by final decisions of the state appellate courts.

3. *Christopoulos* makes an interesting contrast with *Garcia-Tutupu*. The state court order in *Christopolous* had a sounder substantive basis. But the extensive state court litigation in *Christopoulos* also made it much easier for a federal court to decline to review the result. If there had been a less hasty state court order in *Garcia-Tutupu*, and a state court appellate decision upholding it, the facts would have been much clearer as to why the state court order was proper under state law. In other words, a state court order that survived the state court appellate process would have been stronger and easier to defend in federal court. Where ERISA benefits are involved and federal jurisdiction is possible, a hasty favorable state court order can be a very mixed blessing.

5. *Miletello v. RMR Mech., Inc.*, 921 F.3d 493 (5th Cir. 2019)

(a) Facts: Husband and wife were engaged in divorce proceedings. A settlement agreement awarded to the wife $500,000 of the funds in the husband's 401(k) plan.

Before the husband complied with the order, he died. Two days later, the state court incorporated the settlement into a court order. Fifteen months later, the state court entered a QDRO ordering the plan to pay the ex-wife the $500,000.

The second wife sued the plan administrator in federal court to recover the $500,000. The plan administrator interpleaded the funds.

(b) Issue: Who is entitled to the $500,000?

(c) Answer to Issue: The ex-wife.

(d) Summary of Rationale: The husband's second wife argued that the state court could not enter a QDRO after the husband's death. She cited *Rivers v. Central & South West Corp.*, 186 F.3d 681 (5th Cir. 1999). But the court held that the law had changed since *Rivers:*

> Since *Rivers* was decided, Congress has modified ERISA to make "clear that a QDRO will not fail solely because of the time at which it [was] issued." *Yale-New Haven Hosp. v. Nicholls*, 788 F.3d 79, 85 (2d Cir. 2015) (citing Pension Protection Act of 2006, Pub. L. No. 109-280, § 1001, 120 Stat. 780 (2006)); *see also* 29 C.F.R. § 2530.206(c)(2) (stating that an "order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant . . . even if no order [was] issued before the Participant's death"). "The QDRO provisions of ERISA do not suggest that [the former spouse] has no interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained." *Nicholls*, 788 F.3d at 86 (alteration in original) (quoting *In re Gendreau*, 122 F.3d 815, 818 (9th Cir. 1997) (emphasis omitted)). We thus reject Pam's argument that the January 18, 2017 QDRO is insufficient.

Miletello, 921 F.3d at 497.

Observation: As the cases cited in the quoted passage suggest, *Miletello* is the majority rule; most circuits will enforce a QDRO entered after the death and/or remarriage of a spouse. But this result is not uniform. The Third Circuit in particular continues to hold that QDROs cannot be entered after death. *Richardson-Roy v. Johnson*, 657 F. App'x 113, 114 (3d Cir. 2016), *reaff'g Samaroo v. Samaroo*, 193 F.3d 185, 190 (3d Cir. 1999).

Whenever possible, it is critical that state court orders dividing retirement benefits be entered as QDROs. Every day of delay between the division of benefits and the entry of a QDRO increases the risk that unforeseen events will frustrate the intended division.

6. *Culwick v. Wood*, 384 F. Supp. 3d 328 (E.D.N.Y. 2019)

(a) Facts: Husband and wife were divorced. Their divorce decree incorporated a separation agreement. The agreement provided:

> [T]he Husband shall otherwise retain all pensions and annuities acquired by him at any time, including during the term of the marriage. . . . The Wife waives any claims she might have in and to these benefits including the right to be named as a survivor beneficiary.

384 F. Supp. 3d at 335. The agreement further provided that "nothing herein contained shall require either party to renounce or disclaim any gift, devise or bequest which he or she may be given by the other's Will, Trust, or other document." *Id.*

The husband died. At the time of his death, the wife was still named as the survivor beneficiary of his retirement plan under a predivorce designation. The husband's estate assigned its claim to the husband's father. The plan paid the survivor benefits to the wife, and the father sued the wife to recover the amount paid.

(b) Issue: Who is entitled to the husband's survivor benefits?

(c) Answer to Issue: His father.

(d) Summary of Rationale: The retirement plan was regulated by ERISA, and the divorce decree was not a QDRO. Thus, the plan was required to pay the wife. *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285 (2009). But in its infamous footnote 10, *Kennedy* refused to reach the question of whether competing claims to ERISA-regulated benefits could be raised between competing claimants after the plan paid out the benefits. The court held that such claims do not violate federal law. Thus, the lack of a QDRO did not bar the father's claim.
The court expressly rejected *Staelens ex rel. Estate of Staelens v. Staelens*, 677 F. Supp. 2d 499 (D. Mass. 2010), which it construed to hold that federal law does not permit claims between beneficiaries after payment by the plan.

The wife had expressly waived her right to collect survivor benefits. Therefore, she breached the agreement by collecting the survivor benefits. The survivor benefits were not a gift, because a completed gift requires that the donor give up control over the property at issue at the time of the gift. The husband never gave up control over the survivor benefits during his lifetime. The benefits were therefore not a gift to the wife.

Observations:

1. As noted in previous versions of this outline, the court's resolution of the issue reserved in footnote 10 of *Kennedy* is the majority rule. Most federal courts permit claims to ERISA-regulated benefits between private parties after payment by the plan. *See, e.g., Estate of Kensinger v. URL Pharma, Inc.*, 674 F.3d 131 (3d Cir. 2012); *Andochick v. Byrd*, 709 F.3d 296 (4th Cir. 2013).

2. The court's reading of *Staelens* is questionable. *Staelens* suggested that federal law perhaps should not permit competing claims. But it recognized that there was contrary First Circuit law. Moreover, as noted in the 2010 version of this outline, the actual holding of the case was that the waiver of benefits at issue was not sufficiently specific to be enforceable. The court's entire discussion of the competing claims issue was not the basis for the decision and was therefore dicta.

3. The court's holding that any gift was incomplete leads logically to the position that it is impossible ever to make a gift of survivor benefits, which seems doubtful. A more convincing rationale would be that the beneficiary designation predated the agreement and the divorce, so it

was among the rights expressly waived by the wife. In other words, the provision permitting gifts applied only to gifts made after the agreement was signed.

To see the difference, consider what would have happened if the husband had made a new beneficiary designation after the divorce. Under the court's reasoning, the father would still have received the survivor benefits because the husband did not give up control over the benefits. In other words, despite language in the agreement expressly permitting gifts, even a postdivorce gift of survivor benefits would be unenforceable. By contrast, the rationale suggested above would make a predivorce beneficiary designation unenforceable while still permitting enforcement if the husband voluntarily redesignated the wife after the divorce.

7. *Metro. Life Ins. Co. v. McDonald,* ___ F. Supp. 3d ___, 2019 WL 2419659 (E.D. Mich. 2019)

(a) Facts: Husband wife were divorced in Florida. Their divorce decree incorporated a property settlement agreement providing that the husband would name the wife as beneficiary of his employer-provided life insurance.
Despite the agreement, the husband named his second wife as beneficiary of the policy. Upon his death, both wives claimed the proceeds, and the insurer filed an interpleader action in federal court.

(b) Issue: Who is entitled to the policy proceeds?

(c) Answer to Issue: The first wife.

(d) Summary of Rationale: ERISA generally prohibits the assignment of ERISA-regulated benefits, but not if the assignment is made in a QDRO. So the key question was whether the divorce decree, which incorporated the agreement, was a QDRO.

The decree expressly assigned benefits to the wife, and it did not require the plan to make payments that the employee had not earned. It stated the parties' full names. It did not state their mailing addresses, but it did state the address of the former marital home, which had not yet been sold at the time of divorce. Since the parties could actually be contacted through the home, their mailing addresses were effectively specified. The decree stated the amount assigned –100% of the policy proceeds, in one single payment.

The second wife argued that the decree did not expressly state the name of the plan. But it referred to "husband's General Motors Corporation life insurance policy." 2019 WL 2419659, at *3. The second wife noted that the husband had five or six other policies, but he had only one policy through General Motors. The agreement sufficiently indicated the name of the plan. Because the decree was a QDRO, ERISA's antiassignment provision did not apply.

The second wife argued that the insurance provision was not enforceable under state law. In contrast to most federal cases, including the *Garcia* and *Christopoulos* cases cited above, the court was willing to reach the state law issue. But the court rejected the state law argument on the merits. "The Court is unpersuaded that Florida law prevents divorcing spouses from agreeing to maintain one spouse as the primary beneficiary of the other's life-insurance policy." *Id.* at *4.

Observations:

1. Prudent parties do not gamble on whether a federal court will find after the fact that a divorce decree is a QDRO. The wife in *McDonald* should have insisted that the state court enter a formal QDRO directing the husband to name her as beneficiary. The wife is fortunate that the divorce decree met the QDRO requirements; many divorce decrees do not.

2. The court made no reference to legislative history strongly suggesting that the address requirements are satisfied if the plan administrator actually knows the address from other sources:

> The Committee intends that an order will not be treated as failing to be a qualified order merely because the order does not specify the current mailing address of the participant and alternate payee if the plan administrator has reason to know that address independently of the order.

S. Rep. No. 98-575, at 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2566. But the court's emphasis on whether the administrator could actually contact the parties is quite consistent with the legislative history.

3. The Florida state judge who entered the divorce decree obviously held that the insurance provision was permitted by Florida state law. It is unclear what authority a federal court would have to reach a contrary result. As *Garcia* and *Christopoulos* both held, ERISA was not intended to give federal courts appellate jurisdiction over state courts on issues of substantive state domestic relations law. The reference in ERISA to state domestic relations law was meant to ensure that state court orders are given under the color of state domestic relations law, not to give federal courts jurisdiction to question state court orders on questions of pure state law.

8. *Schwartz v. Bogen*, 913 F.3d 777 (8th Cir. 2019)

(a) Facts: Husband and wife were divorced in New Jersey in 1983. The divorce decree incorporated a settlement agreement. The agreement provided that if the wife remarried between 1986 and 1990, the husband would pay her, "as equitable distribution, a yearly sum equal to Twenty (20%) percent of [the husband's]'s Basic Bell System Management Pension Plan." 913 F.3d at 779. Since the divorce was in 1983, and the QDRO provisions were not added until 1984, no QDRO was ever obtained.

The wife remarried in 1989. The husband made voluntary payments to the wife until 2016. He then tried to argue that the payments were alimony that stopped upon the wife's remarriage. When the wife reject this argument, he then argued that the assignment of retirement benefits in the original decree violated ERISA.

A New Jersey state court found that the husband's claim was barred by laches. It further found that the payments were equitable distribution and alimony and that ERISA was not intended to

prevent assignments to a spouse in need of support. The husband did not appeal the New Jersey ruling.

Instead, the husband filed a federal court action in Minnesota, arguing that the New Jersey pension division order was void. The District Court dismissed the action, finding that the New Jersey ruling was res judicata. The husband appealed to the Eighth Circuit.

(b) Issue: Was the New Jersey pension division order void?

(c) Answer to Issue: No.

(d) Summary of Rationale: The husband claimed that New Jersey had no jurisdiction to rule on issues involving ERISA. But he admitted that he did not raise this argument in New Jersey, and he admitted that he had fully participated in the New Jersey proceedings. While he did not argue lack of jurisdiction specifically, he did argue that ERISA preempted New Jersey state law, and the New Jersey court held otherwise. Its holding was binding under basic principles of res judicata.

Observation: It is quite difficult to question pension division orders in federal court after the exact same arguments have been made unsuccessfully in state court. As a practical matter, the decision to seek a state or federal remedy must be made when the case is filed. The remedy for a defeat in state court is an appeal to a higher state court, not a federal action.

9. *Hoak v. Plan Adm'r of Plans of NCR Corp.*, 389 F. Supp. 3d 1234 (N.D. Ga. 2019)

(a) Facts: Two wives were divorced from their husbands. Both husbands were members of a senior executive retirement plan. The plan provided that survivor benefits would be paid to the "eligible spouse" of each plan participant. "Eligible spouse" was defined as "the spouse to whom the Participant is married on the date the Participant's benefit payments under the Plan commence." 389 F. Supp. 2d at 1278.

Each wife was married to the husband when their respective husbands' benefits commenced. Both wives were then divorced from their husbands. At some point after the two divorces, the employer terminated the plan and paid the benefits to the participating employees in a lump sum, thereby depriving the wives of their survivor benefits. It then formally reconstrued "eligible spouse" to mean a person married to a plan participant on the date when the plan was terminated, so that neither wife was entitled to survivor benefits. Both wives sued the plan, seeking a judgment that they were entitled to survivor benefits.

(b) Issue: Were the wives entitled to survivor benefits?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: The courts defer to the plan administrator's construction of its own plan if the construction is reasonable. But the plan's construction of "eligible spouse" was not reasonable. "While the term 'Eligible Spouse' might be ambiguous standing alone, the definition

of the term in the plan is not ambiguous: an Eligible Spouse is the spouse of the Participant on the day he begins to receive retirement benefits." *Id.* at 1279. "The Plan Administrator has impermissibly and unilaterally appended an additional requirement beyond what the Plan provides that adversely impacts the Plan's beneficiaries." *Id.* "The Plan Administrator's interpretation constitutes a material modification to the terms of the Plan that adversely impacts the expectations of beneficiaries who reasonably relied on the express language of the plans when they may have made decisions on their marital property division of at the end of their marriages." *Id.*

Obvious Lesson: Do not make changes to your company's pension plan for the purpose of taking rights away from former spouses of your employees. It seems quite possible that even if the employer had prevailed, its attorney's fees alone would have approached or exceeded the cost of paying the benefits. Since the company did not prevail, it was left liable for both the benefits and its attorney's fees –a very substantial sum. The actions of the company in *Hoak* were not wise business decisions.

Observation: Alternate payees under QDROs and spouses who are direct beneficiaries under the plan (as the wives were in *Hoak*) are members of the plan, and they have standing to sue the plan if deprived of plan benefits. A decision to sue the plan should not be made lightly, as such a suit is extremely expensive, and significant deference is given to the plan administrator's decisions. But when the plan starts denying benefits arbitrarily, there may come a point at which suing the plan is the only option. *Hoak* shows that it is not impossible for a former spouse to prevail in such an action.

10. *In re Kiley*, 595 B.R. 595 (Bankr. D. Utah 2018)

(a) Facts: Husband and wife were divorced in Utah. The divorce decree awarded the wife a lump-sum payment from the husband's retirement plan and ordered that she be named as the plan's survivor beneficiary.

The wife then declared bankruptcy. The trustee argued that the wife's interests in the retirement plan was property of the estate, subject to division among the creditors.

(b) Issue: Was the wife's interest in the plan part of her estate in bankruptcy?

(c) Answer to Issue: Yes as to the lump-sum payment, no as to the survivor benefits.

(d) Summary of Rationale: The wife's survivor benefits were an interest in a retirement plan regulated by ERISA. ERISA generally prevents the assignment of regulated benefits. Thus, the wife's survivor benefits were not part of her estate in bankruptcy.

The wife's lump-sum award was not an interest in a retirement plan after it was paid out. Thus, ERISA's antiassignment provision did not apply. Utah had a state law exemption for amounts received as an alternate payee, but federal law required the court to apply the exemptions as of the date on which the bankruptcy was filed. The bankruptcy was filed during the divorce case so that

on the date of the bankruptcy filing, the wife was not yet an alternate payee. The wife's lump-sum award was therefore property of the estate.

Observations:

1. The wife's lump-sum award was 100% of the plan balance –the husband was substantially in arrears in support, and he gave up his interest in the plan as payment of arrears –so it is unclear what remaining value the wife's survivor benefits would have.

2. With regard to the lump sum, did the court reach the correct result? The federal court reasoned that the wife was not an alternate payee when the bankruptcy was filed, but at that time she had rights under an ERISA-regulated retirement plan that could not be assigned to another. The wife's payment was arguably protected at all times –before the decree as an unassignable interest in the plan and after the decree as benefits received by an alternate payee. The court's attempt to judge retirement plan status at one point in time, and alternate payee status at another point in time, is open to question.

I.R.C. § 152

1. General Rule.

A tax exemption is provided for each "qualifying child." A qualifying child must have "the same principal place of abode as the taxpayer for more than one-half of such taxable year" and must have "not provided over one-half of such individual's own support for the calendar year in which the taxable year of the taxpayer begins." I.R.C. § 152(c)(1)(B), (D). There is also a relationship requirement and an age requirement.

For divorced parents, the deduction may be taken despite the principal place of abode requirement if the exemption is transferred. A transfer is made when "the custodial parent signs a written declaration (in such manner and form as the Secretary may by regulations prescribe) that such custodial parent will not claim such child as a dependent" for that tax year and "the noncustodial parent attaches such written declaration to the noncustodial parent's return for the taxable year beginning during such calendar year." *Id.* § 152(e)(2). In addition, the following requirements must be met:

(A) a child receives over one-half of the child's support during the calendar year from the child's parents –

(i) who are divorced or legally separated under a decree of divorce or separate maintenance,

(ii) who are separated under a written separation agreement, or

(iii) who live apart at all times during the last 6 months of the calendar year, and –

(B) such child is in the custody of 1 or both of the child's parents for more than one-half of the calendar year[.]

Id. § 152(e)(1). The IRS has determined that the written declaration necessary to transfer the exemption shall be IRS Form 8332.

A tax exemption is also provided for each "qualifying relative." *Id.* § 152(d). A qualifying relative need not live with the taxpayer for more than one-half of the year. But the taxpayer must still provide more than one-half of the relative's support during the applicable tax year, and the relative's gross income must be less than the amount of the standard personal exemption. There is a relationship requirement, and a qualifying relative must not be the qualifying child of any taxpayer. There is no age requirement.

2. Statutory Changes

(a) The child dependency exemption remains in the Internal Revenue Code. But "[i]n the case of a taxable year beginning after December 31, 2017, and before January 1, 2026 . . . [t]he term 'exemption amount' means zero." I.R.C. § 151(d)(5)(A).

Thus, for tax years 2018 to 2025 inclusive, the dependency exemption has no value. **The exemption has not been repealed or eliminated; its amount has simply been reduced to zero.** The question of transferring the exemption has become less important; there is no direct benefit to transferring the exemption. But there might be an indirect benefit.

3. Child Tax Credit

There shall be allowed as a credit against the tax imposed by this chapter for the taxable year with respect to each qualifying child of the taxpayer for which the taxpayer is allowed a deduction under section 151 an amount equal to $1,000.

I.R.C. § 24(a). This section gives a tax *credit* (not a deduction) to every "qualifying child" of the taxpayer. "Qualifying child" is defined in I.R.C. § 152, the same section that governs the dependency exemption.

Courts and commentators before 2018 commonly spoke of transferring the dependency exemption. *But what § 152(e) really does is to authorize the transfer of a right to claim "qualifying child" status*. Before 2018, the primary financial consequence of "qualified child" status was the dependency exemption. Starting in 2018, the primary financial consequence of "qualifying child" status is the child tax credit.

There are not yet any cases on point because the new changes took effect only in the 2018 tax year. But it appears that if Form 8332 is filed, and "qualifying child" status is therefore validly

transferred, the transferee parent will have not only the right to claim the zero-value dependency exemption but also the right to claim the child tax credit.

"The child tax credit goes hand-in-hand with the dependency exemption, which means that it can be assigned (using IRS Form 8332) between parents who are divorced, separated or unmarried." Brian Vertz, "Get the Child Tax Credit for Divorced, Separated or Unmarried Parents in 2018," https://familylawtaxalert.com/child-tax-credit-divorced-separated-unmarried-2018.

Pre-2018 case law supports this construction. For example, in *George v. Commissioner*, 139 T.C. 508 (2012) (discussed fully in the 2013 version of this outline), the Tax Court held that Form 8332 had been properly filed. It then held that the mother, who signed the Form and transferred the dependency exemption, could not claim *either* the exemption *or* the child tax credit; both had been transferred away. *See also* IRS Publication 596, at 14 ("A child will be treated as the qualifying child of his or her noncustodial parent (for purposes of claiming an exemption *and the child tax credit* [if the standard requirements are met and] [t]he custodial parent signs Form 8332[.]" (emphasis added)).

The amount of the exemption is now zero, but Form 8332 transfers more than just the exemption; it transfers the right to claim "qualifying child" status. If Form 8332 is filed, therefore, the right to claim the child-care tax credit is also transferred, and the value of the child-care tax credit is much more than zero.

Indeed, the amount of the tax credit is *doubled*, from $1,000 to $2,000, for tax years 2018 to 2025, inclusive.

It could be argued in response that the actual text of Form 8332 speaks of transferring the exemption. But pre-2018 case law still held, *e.g.*, *George*, that when Form 8332 is filed, both the exemption and the child tax credit are transferred. There is no logical reason why the result should be different merely because the value of the tax exemption has been reduced to zero. In other words, the reduction in value of the exemption does not change prior law holding that Form 8332 also transfers the child tax credit.

But this issue will remain less than 100% certain until authoritative guidance is provided by the IRS or the courts.

It could also be argued that where the underlying state court order speaks only of transferring the dependency exemption, perhaps there is no basis under state law for finding that the child tax credit has been transferred. But federal law was clear before 2018 that Form 8332 transferred both the exemption and the credit. *E.g.*, *id.* Once again, the form really transfers "qualified child" status. Thus, if a state court order requires the filing of Form 8332 –and that is the only way to transfer the exemption –then the same form also, by operation of federal law, also transfers the credit.

Perhaps it will be possible to get state courts to distinguish more carefully between the exemption and the credit under post-2018 law. But the expanded tax credit under post-2017 law is really a form of replacement for the pre-2018 dependency exemption, so it seems more likely that state courts will consider the exemption and the credit as two different but similar ways in which federal

tax gives a tax benefit to those who spend time and money taking care of children, and then allows transfer of that tax benefit between divorcing parents.

The practical effect of the tax *credit* given by I.R.C. § 24 is, of course, much greater than a tax *deduction* of similar size. The credit is a direct offset against taxes otherwise due.

4. Proposed Regulations

In early 2017, the IRS announced a proposed revision of the regulations under I.R.C. § 152. *See* 82 Fed. Reg. 6370 (Jan. 19, 2017). As of this writing, these proposed regulations have neither been finalized nor formally withdrawn.

In the *Demar* case discussed *infra*, the court gave at least limited weight to the proposed regulations and seemed to suggest that it might be open to treating the regulations as persuasive (although of course not binding) guidance on open questions. Ultimately, however, the court decided that the regulations had not been complied with, so the point was moot.

The main divorce-related change made by the proposed regulations will be discussed below, in the context of the *Demar* case.

5. I.R.S. Notice 2018-70

In late 2018, the IRS released I.R.S. Notice 2018-70, 2018-38 I.R.B. 441. The notice states that the IRS intends to issue new regulations under I.R.C. § 152, addressing the effect of the above statutory changes. No proposed regulations have actually been introduced as of the present writing.

Given that new regulations are coming, the IRS may well allow the 2017 proposed changes to remain in proposed status for the time being and then combine them into the forthcoming new regulations.

The Notice discusses current law for several pages and then states that "[b]efore the issuance of the proposed regulations described in this notice, taxpayers may rely on the rules described in section 3 of this notice." *Id.* § 4. The Notice is therefore official guidance on the effect of tax reform on § 152.

Two points in the Notice are noteworthy. First, the IRS notes that under current law, "the term 'exemption amount' means zero, thereby suspending the deduction for personal exemptions." *Id.* § 2. Use of the word "suspending" confirms the suggestion made above that the exemption continues to exist for a host of secondary purposes, even though the exemption itself has no present value.

Second, the Notice addresses a real problem with the definition of a qualifying relative. One requirement in that definition, as noted above, is that the relative's gross income must be less than

the amount of the standard personal exemption. Since the value of the personal exemption is now zero, a literal construction of the statutory language would render it functionally impossible for anyone to be a qualifying relativeCthe relative would have to have negative gross income. The IRS does not believe that this is what Congress intended:

> Construing § 152 in light of the structure of the statute, the Treasury Department and the IRS believe that the exemption amount referenced in that section must be $4,150 (adjusted for inflation), rather than zero, for purposes of determining who is a qualifying relative.

Id. § 3.

> A zero exemption amount would thus effectively render § 152(d)(1)(B) inoperable and eliminate an entire category of dependents. The Treasury Department and IRS do not believe Congress intended to make such a significant change in such an indirect manner.

Id.

In short, the exemption amount will be treated as zero only for purposes of the exemption itself. For purposes of other provisions referring to the exemption amount, the former amount will be used, as indexed for inflation.

6. *Cook v. Comm'r*, T.C. Memo. 2019-48, 2019 WL 2011087 (2019)

(a) Facts: An unmarried couple had a child. A New York court awarded custody to the mother. The order was silent on the tax exemption for the child. The parties orally agreed that the father could claim the exemption.

The father took the exemption. The IRS disallowed the exemption and assessed a deficiency. The husband appealed to the Tax Court.

(b) Issue: Was the husband entitled to claim the exemption?

(c) Answer to Issue: Clearly not.

(d) Summary of Rationale: The child was not a qualifying child of the father because the child did not live with the father for more than half of the year. "Despite the oral agreement between petitioner and Mrs. Taylor and petitioner's related assertions, the statute is clear that, because petitioner is C.D.C.'s noncustodial parent, C.D.C. cannot be his qualifying child." 2019 WL 2011087, at *2.

The child could not be the father's qualifying relative because the child was the mother's qualifying child.

The mother could have transferred the exemption to the father, but only if she gave the father Form 8332 or its substantial equivalent and he attached the form to his return. The mother did not give the father the form. The father argued that the mother had no income and could not use the exemption, but that is not the test; the test is whether Form 8332 was filled out and filed. Plainly, it was not.

Observations:

1. The *only* way to transfer the exemption is Form 8332 or its substantial equivalent. The oral agreement of the parties was not a sufficient substitute.

2. *Cook* was not a difficult case, and it is hard to see how the taxpayer could reasonably have hoped to prevail.

7. *Skitzki v. Comm'r,* T.C. Memo. 2019-106, 2019 WL 3946102 (2019)

(a) Facts: Husband and wife were divorced. The divorce decree gave the father custody two weekends each month, one weekday per week if the mother was in Ohio, and three (before age four) or four weeks in the summer. It described both parents as "residential parent and legal custodian." The decree further stated that the father "shall take" the child as a dependent for tax purposes in even-numbered years.

Three years later, the decree was modified so that the father would have the child every other week and every other holiday. Four months later, another modification gave the father custody 6 out of every 14 nights during the school year and every other week in the summer. The father provided more than half of the child's support; the child resided more than 50% of the time with the mother.

For tax year 2014, both parents claimed the dependency deduction. The mother did not sign Form 8332. The IRS disallowed the father's deduction and assessed a deficiency. The father appealed to the Tax Court.

(b) Issue: Was the father entitled to the dependency exemption?

(c) Answer to Issue: Clearly not.

(d) Summary of Rationale: The child was not the father's qualifying child as the child resided with the mother for more than half of 2014. The child was not the father's qualifying relative as the child was the mother's qualifying child.

The divorce decree awarded the exemption to the father. But again, the *only* way to transfer the exemption is to file Form 8332. *A state court order alone is not sufficient*.

The father argued that the divorce decree was the substantial equivalent of Form 8332. But to be a substantial equivalent of Form 8332, a document "must be a document executed for the sole purpose of serving as a written declaration." Treas. Reg. § 1.152-4(e)(1)(i). The divorce decree

was not executed for the sole purpose of transferring the exemption. It was therefore not the substantial equivalent of Form 8332.

Observations:

1. Again, Form 8332 is the *only* way to transfer the exemption. If there is no Form 8332, there is no transfer. The law is as simple as that.

2. The tax regulations have provided for years that a document cannot be the substantial equivalent of Form 8332 unless it is executed for the sole purpose of transferring the exemption. *That means that divorce settlement agreements and divorce decrees are never the substantial equivalent of Form 8332*. Federal law on this point is completely settled, and yet Tax Court reports are still full of cases in which parties argue to the contrary. *Only Form 8332 can transfer the exemption*.

3. Given the previous point, the proper procedure is simple. The noncustodial parent should *never* claim the exemption without Form 8332. If the custodial parent has been ordered to transfer the exemption and will not sign the form, the remedy is a contempt petition in state court. The exemption is not transferred unless the custodial parent signs the form.

4. There is a reasonable argument that federal law on this point is too strict. But that is an argument for changing a very well-settled rule of tax law. The argument must be made in Congress, not in the courts.

5. *Skitzki* was not a difficult case, and it is hard to see how the taxpayer could reasonably have hoped to prevail.

6. The IRS is very good at detecting situations in which both parties claim the dependency exemption on their tax returns. It is highly likely in this situation that one of the exemptions will be disallowed.

8. *Demar v. Comm'r,* T.C. Memo. 2019-91, 2019 WL 3244301 (2019)

(a) Facts: Husband and wife were divorced. The divorce decree, which was a consent judgment, provided that the child would reside primarily with the wife. The husband was permitted to claim the child as a dependent for tax purposes in odd-numbered years but only if he was current on child support and the wife's income was less than $15,000. "If these conditions were met, Ms. DeMar agreed to execute Form 8332 or a similar written declaration." 2019 WL 3244301, at *1.

Both parties claimed the exemption on their 2015 returns. The IRS disallowed the husband's exemption and assessed a deficiency. After the husband received the notice of deficiency, the wife executed Form 8332 after the fact, but the form was obviously not attached to the husband's return. The husband challenged the deficiency in the Tax Court.

(b) Issue: Was the husband entitled to claim the exemption?

(c) Answer to Issue: No.

(d) Summary of Rationale: The husband did not contest that the child was not a qualifying child. Thus, the husband could claim the exemption only if he attached Form 8332 to his return. But he did not do that. Therefore, he could not claim the exemption.

The husband's belated filing of Form 8332 was not sufficient:

> The current regulations do not explicitly allow (or prohibit) Form 8332 or a similar written declaration to be submitted during examination or with an amended return. Sec. 1.152-4, Income Tax Regs. A proposed regulation explicitly permits a noncustodial parent to submit Form 8332 or a similar written declaration during examination or with an amended return. Sec. 1.152-5(e)(2)(i), Proposed Income Tax Regs., 82 Fed. Reg. 6387 (Jan. 19, 2017). But that regulation requires that the custodial parent either did not claim the dependency exemption or filed an amended return removing the claim to the dependency exemption. *Id.* We have no such facts in the record.

Id. at *2.

Observations:

1. Many, many parties fail to file Form 8332. Current federal tax law on transfer of the exemption is in many ways a trap for the unwary: The requirements are so counterintuitive that taxpayers regularly fail to meet them.

2. At a minimum, the reform proposed in the Regulations should be adopted –the law should permit a noncustodial parent to file Form 8332 after the fact.

3. The reform proposed in the Regulations is not sufficient, because the custodial parent is unlikely to file an amended return. There should be a way to file Form 8332 after the fact even if the noncustodial parent has not filed an amended return. To allow a late filing only after the filing of an amended return is functionally to reject the late filing in most cases.

4. There is also, as noted above, a strong argument for amending federal law on Form 8332 generally. The law is imposing too many obstacles on parents who wish to transfer the exemption. An unacceptably high number of transfer attempts fail for technical reasons. If the law is going to permit the transfer of the exemption, it should not impose procedural requirements that are so difficult to meet.

5. That having been said, present law is clear, and there is no excuse for not complying with it.

6. Note that the state court imposed conditions on the transfer of the exemption. The IRS consistently takes the position that the exemption can only be transferred without conditions. In particular, yet another perennial problem with transferring the exemption is the requirement that the noncustodial parent be current on child support. The IRS is not a child support collection agency; it has no way to know whether the noncustodial parent is current on child support.

The state court in *Demar* appears to have handled this issue exactly correctly; it ordered the wife to sign Form 8332 if the requirements were met. That is entirely proper; the wife would know whether the father is current in support. But the courts should not expect the IRS to know whether the noncustodial parent is current on support. The IRS does not have that information.

I.R.C. § 6015

1. General Rules

(a) When the parties file a joint tax return, they are generally jointly liable for any tax problem, and the IRS is free to collect the full amount owed from either of them. I.R.C. § 6015(d)(3)(A).

(b) Section 6015 allows either spouse to petition for innocent spouse relief. If relief is granted, the innocent spouse is not liable for the tax problem.

(c) There are three types of innocent spouse relief:

(1) Under I.R.C. § 6015(b), the IRS must grant innocent spouse relief if "the other individual filing the joint return establishes that in signing the return he or she did not know, and had no reason to know, that there was [a tax] understatement" and "it is inequitable to hold the other individual liable for the deficiency." *Id.* § 6015(b)(1)(C), (D).

(2) Under I.R.C. § 6015(c), the IRS must grant innocent spouse relief from a tax understatement if the innocent spouse is legally separated or divorced from the other spouse or was separated from the other spouse for 12 months at the time innocent spouse relief was requested. There is an exception if the IRS proves that the allegedly innocent spouse had actual knowledge of the tax problem, and there is an exception to the exception if the joint tax return was filed under duress. Relief is allowed only as to understatements attributable to the income of the other spouse.

(3) Under I.R.C. § 6015(f), the IRS may grant innocent spouse relief if "it is inequitable to hold the individual liable for any unpaid tax or any deficiency (or any portion of either)" and relief is not available under § 6015(b) or (c).

(d) The former two types of relief are known generally as mandatory innocent spouse relief, and the last type of relief is known generally as discretionary innocent spouse relief.

2. Background and Statute of Limitations

(a) A two-year statute of limitations applies to mandatory innocent spouse relief; relief must be requested within two years of the filing of the return. There is no express statute of limitations for discretionary innocent spouse relief.

(b) By regulation, the IRS ruled that the two-year limitations period on requests for mandatory innocent spouse relief under § 6015(b) and (c) also applies to § 6015(f). Treas. Reg. § 1.6015-5(b)(1).

(c) The Tax Court, sitting en banc, held that the regulatory statute of limitations violated § 6015 and was invalid. *Lantz v. Comm'r*, 132 T.C. 131 (2009). *Lantz* was reversed on appeal, *Lantz v. Comm'r*, 607 F.3d 479 (7th Cir. 2010), but the reversal applied only in the Seventh Circuit. The Tax Court held in *Hall v. Commissioner*, 135 T.C. 374 (2010), that the Seventh Circuit was wrong and that it would continue to follow *Lantz* in cases arising outside of the Seventh Circuit. At least two other Circuits then agreed with the Seventh Circuit that the regulatory limitations period was within the IRS's authority. *See Mannella v. Comm'r*, 631 F.3d 115 (3d Cir. 2011); *Jones v. Comm'r*, 642 F.3d 459 (4th Cir. 2011).

(d) Congress was not happy, and there was a strong bipartisan move to reject the regulatory statute of limitations. Legislation was introduced stating expressly that there should be no limitations period on requests for discretionary innocent spouse relief. *See* H.R. 1450, 112th Cong. (2011). There was particular concern that many innocent spouses could not meet the two-year deadline because they were kept in financial ignorance by the other spouse and perhaps even subject to physical abuse for trying to learn more about finances and taxes.

(e) The IRS blinked. In I.R.S. Notice 2011-70, 2011-32 I.R.B. 135, it announced that it would no longer apply the regulatory two-year statute of limitations. The notice applies retroactively and even permits reconsideration of certain requests previously denied. The spouse who started the whole issue rolling, the wife in *Lantz*, was ultimately granted innocent spouse relief. *See* http://www.nytimes.com/2012/02/12/business/yourtaxes/innocent-spouses-get-more-relief- from-irs.html. *But see Haag v. United States*, 736 F.3d 66, 67 (1st Cir. 2013) (IRS may deny retroactive relief where case was fully litigated before Notice 2011-70, and IRS did not stipulate that the request was denied solely due to untimeliness).

(f) The notice states that the IRS will revise Treas. Reg. § 1.6015-5(b)(1) in a manner consistent with the notice. Proposed regulations were published in 2013, *see* 78 Fed. Reg. 49242-01 (Aug. 13, 2013), and the proposal was revised in 2015, *see* 80 Fed. Reg. 72649-01 (Nov. 20, 2015), but no final regulation has been published as of this writing.

(g) The basic framework for resolving requests for discretionary innocent spouse relief was set forth in Revenue Procedure 2003-61,2003-32 I.R.B. 296 . In I.R.S. Notice 2012-8, 2012-4 I.R.B. 309, the IRS announced that it would issue a new Revenue Procedure setting forth a revised test. A tentative Revenue Procedure was attached for public comment. The proposed changes generally made the law more sensitive to claims of fraud and abuse by dominant spouses.

(h) The Tax Court held that the proposed new language was only proposed, and it continued to apply Revenue Procedure 2003-61. *See Yosinski v. Comm'r*, T.C. Memo. 2012-195, 2012 WL 2865808, at *4 n.9 (2012).

(i) The new framework was formally published as Revenue Procedure 2013-34, 2013-43 I.R.B. 397on October 21, 2013.

3. Requirements for Discretionary Innocent Spouse Relief

(a) The Former Requirements: Revenue Procedure 2003-61

(1) Conditions For Eligibility. A spouse is eligible for discretionary relief only if all of the following factors are met: (1) the requesting spouse filed a joint tax return; (2) mandatory innocent spouse relief under § 6015(b) or (c) is not available; (3) the claim for relief is timely filed; (4) the spouses did not transfer assets between themselves in a fraudulent scheme; (5) the spouse not requesting relief did not transfer certain disqualified assets to the requesting spouse (generally any asset transferred for the purposes of avoiding taxes); (6) the requesting spouse did not knowingly participate in the filing of a fraudulent joint return; and (7) the tax liability at issue is attributable at least in part to property or income of the nonrequesting spouse.

(2) The "Safe Harbor"/"Streamlined Relief" Provision. A request for discretionary innocent spouse relief under § 6015(f) will ordinarily be granted when the request involves the underpayment of tax and (1) the parties are divorced or legally separated, or were physically separated for 12 months before the filing of the request for relief; (2) if relief is denied, the spouse seeking relief would suffer economic hardship, and (3) the spouse seeking relief had no reason to know that the other spouse would not pay his or her tax liability.

(3) The Discretionary Factors. If the safe harbor provision does not apply, the IRS will consider the following factors: (1) whether the spouse seeking relief is divorced or legally separated from the other spouse; (2) whether the spouse seeking relief will suffer economic hardship if relief is denied; (3) whether the spouse seeking relief had reason to know of the tax problem; (4) whether the other spouse had a duty to pay the taxes at issue under a divorce decree or settlement agreement; (5) whether the spouse seeking relief received significant benefits from the nonpayment of taxes; and (6) whether the spouse seeking relief complied with tax law in future tax years.

(b) The New Requirements: Revenue Procedure 2013-34

(1) This is the new Revenue Procedure setting forth the new IRS framework for considering requests for discretionary innocent spouse relief.

(2) Revenue Procedure 2013-34 supersedes Revenue Procedure 2003-61 in cases in which the former ruling appliesCpresumably cases decided after October 21, 2013.

(3) Conditions For Eligibility. A spouse is eligible for discretionary relief only if all of the following factors are met: (1) the requesting spouse filed a joint tax return; (2) mandatory innocent

spouse relief under § 6015(b) or (c) is not available; (3) the claim for relief is timely filed; (4) the spouses did not transfer assets between themselves in a fraudulent scheme; (5) the spouse not requesting relief did not transfer certain disqualified assets to the requesting spouse (generally any asset transferred for the purposes of avoiding taxes); (6) the requesting spouse did not knowingly participate in the filing of a fraudulent joint return; and (7) the tax liability at issue is attributable at least in part to property or income of the nonrequesting spouse.

Comment: The core of these requirements is that innocent spouse relief will be denied if (1) the requesting spouse was engaged in a scheme to avoid taxes or commit fraud, or (2) the tax problem arises from the requesting spouse's own income or property. It is a rare case where these factors disqualify a spouse from receiving relief.

(4) The "Safe Harbor"/"Streamlined Relief" Provision. A request for discretionary innocent spouse relief under § 6015(f) will ordinarily be granted if (1) the parties are divorced or legally separated, or were physically separated for 12 months before the filing of the request for relief; (2) if relief is denied, the spouse seeking relief would suffer economic hardship; and (3) the spouse seeking relief had no reason to know of an understatement or deficiency or had no reason to know that the other spouse was unable to pay tax that was correctly reported.

Factor 3 is deemed satisfied even if the requesting spouse did have reason to know if the requesting spouse was not able to challenge the joint return due to the other spouse's (a) abuse, or (b) restricted disclosure of financial information.

(5) The Discretionary Factors. If the safe harbor provision does not apply, the IRS will consider the following factors: (1) whether the spouse seeking relief is divorced or legally separated from the other spouse; (2) whether the spouse seeking relief will suffer economic hardship if relief is denied; (3) whether the spouse seeking relief had reason to know of the tax problem (unless the requesting spouse was a victim of abuse); (4) whether the other spouse had a duty to pay the taxes at issue under a divorce decree or settlement agreement; (5) whether the spouse seeking relief received significant benefits from the nonpayment of taxes; (6) whether the spouse seeking relief complied with tax law in future tax years; and (7) whether the requesting spouse was in poor physical or mental health.

(c) Summary of Major Changes

(1) The new framework is generally very similar to the old one. The changes are incremental, not revolutionary.

(2) The new procedures are much more sensitive to the real-world effects of spousal abuse and restricted access to financial information than were the previous procedures. One of the major side benefits of the political fight over the statute of limitations was the increased awareness in the tax community of the fact that many innocent spouses are unable to comply with tax law due to various forms of fraud and abuse.

(3) The increased importance of the abuse factor has led to a wave of cases asking the federal courts to define "abuse." The definition of "abuse" is likely to be a heavily contested issue until the case law is more certain.

(4) The safe harbor formerly applied only to tax underpayment cases. It now applies to tax understatement cases as well.

(5) Financial hardship is now measured against the federal poverty guidelines:

> This factor [financial hardship] will weigh in favor of relief if the requesting spouse's income is below 250% of the Federal poverty guidelines, unless the requesting spouse has assets out of which the requesting spouse can make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses.
>
> If the requesting spouse's income exceeds 250% of the Federal poverty guidelines, this factor will still weigh in favor of relief if the requesting spouse's monthly income exceeds the requesting spouse's reasonable basic monthly living expenses by $300 or less, unless the requesting spouse has assets out of which the requesting spouse can make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses.
>
> If the requesting spouse's income exceeds 250% of the Federal poverty guidelines and monthly income exceeds monthly expenses by more than $300, or if the requesting spouse qualifies under either standard but has sufficient assets to make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses, the Service will consider all facts and circumstances (including the size of the requesting spouse's household) in determining whether the requesting spouse would suffer economic hardship if relief is not granted. If the requesting spouse is deceased, this factor is neutral.

Rev. Proc. 2013-34, § 4.03(2)(b) (paragraph breaks added).

4. *Chandler v. United States*, 338 F. Supp. 3d 592 (N.D. Tex. 2018)

(a) Facts: Wife filed a petition for innocent spouse relief. The IRS denied the petition. The wife did not seek review in the Tax Court within the 90-day review period. The wife then filed an action in federal District Court seeking a refund of funds seized by the IRS.

(b) Issue: Did the District Court have subject-matter jurisdiction over the action?

(c) Answer to Issue: No.

(d) Summary of Rationale: The Tax Court has exclusive jurisdiction over innocent spouse issues:

> As to the exclusivity of the Tax Court's jurisdiction, "[a]lthough the statute itself does not address whether the Tax Court's jurisdiction is exclusive, courts interpreting the statute

> have concluded that it is." *United States v. Elman*, No. 10-CV-6369, 2012 WL 6055782, at *3 (N.D. Ill. Dec. 6, 2012); *accord Boynton*, 2007 WL 737725, at *3-*4. Courts have also held that "district court[s] [have] jurisdiction to decide an innocent spouse issue only when the taxpayer files a refund suit in the district court while a [Section] 6015 petition is pending with the Tax Court." *United States v. LeBeau*, No. 10CV817, 2012 WL 835160, at *3 (S.D. Cal. Mar. 12, 2012); *see also Andrews v. United States*, 69 F.Supp.2d 972, 978 (N.D. Ohio 1999) (holding that district courts lack jurisdiction to reevaluate a tax payer's innocent spouse claim). "In other words, Congress' statutory scheme envisions the Secretary and the Tax Court deciding questions about the exemption in all but the rarest circumstances. Certainly no part of [Section] 6015 confers jurisdiction to the federal district courts 'to determine innocent spouse claims in the first instance.'" *Stein*, 2015 WL 5943441, at *3 (quoting *United States v. Wallace*, No. 1:09-CV-87, 2010 WL 2302377, at *4 (S.D. Ohio Apr. 28, 2010)).

338 F. Supp. 3d at 602.

Obvious Lesson: If you disagree with the IRS's decision on an innocent spouse issue not involving a request for a refund, seek review in the Tax Court, not in District Court.

Note: *But cf. United States v. LeBeau*, 335 F. Supp. 3d 1206 (S.D. Cal. 2018) (while District Court had no jurisdiction over innocent spouse issues, District Court had discretion to stay IRS collection action while defendant's petition for innocent spouse relief was pending in the Tax Court).

5. *Hockin v. United States*, ___ F. Supp. ___, 2019 WL 3845380 (D. Or. 2019)

(a) Facts: Husband and wife married in 1997. The IRS received from the parties' joint tax returns for tax year 2007 and 2008. Tax was due for both years.

The wife made several payments then sought innocent spouse relief, including a refund. The IRS granted relief from 2008 on the ground that the wife's signature on the 2008 return was a forgery. The IRS denied relief for 2007.

The wife filed a suit in the federal District Court seeking a refund of her 2007 payments and discretionary innocent spouse relief. The IRS moved to dismiss for lack of jurisdiction.

(b) Issue: Did the District Court have jurisdiction over the case?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: Federal District Courts have jurisdiction over all actions to collect refunds from the government, including refunds of taxes paid. Thus, when a deficiency is assessed, a taxpayer can either (1) refuse to pay and directly question the deficiency in the Tax Court, or (2) pay the deficiency and seek a refund in District Court.

The District Court clearly had jurisdiction over the wife's request for a refund because her signature was also forged on the 2007 return.

The IRS argued that the District Court lacks jurisdiction over innocent spouse issues. But the District Court lacks jurisdiction only over "stand alone" claims with no refund requested. Those must be made in the Tax Court. But when the taxpayer properly requests a refund in District Court, the District Court may hear a related claim for innocent spouse relief.

Summary: Innocent spouse issues generally go to the Tax Court. But to obtain a refund of amounts already paid, you may file in District Court.

6. *Hiramanek v. Comm'r*, T.C. Memo. 2016-92, 2016 WL 2763870 (2016), *aff'd*, 745 F. App'x 762 (9th Cir. 2018)

(a) Facts: The husband prepared a joint tax return for tax year 2006 and asked the wife to sign it. She refused to sign without reading it, and he permitted her to take a quick glance at the return. She noticed that the return contained a $35,000 casualty loss deduction for a break-in to the couple's car while they were on vacation in Hawaii. Believing the deduction to be overstated, she refused to sign. The husband threatened and physically abused her for several hours, and she finally made a scribble on the signature line. The husband's physical abuse was consistent with other physical abuse that the wife had endured during the marriage.

The next day, the husband presented the wife with a new report with the $35,000 deduction omitted. The wife, fearful of further abuse, signed the return.

Six days later, the wife reported the abuse to the police. Two weeks later, she filed for divorce. But the parties eventually reconciled.

The IRS investigated the parties' tax return. The husband did not permit the wife to participate in the investigation. During negotiations, the wife refused to sign documents that would have given the husband exclusive authority to settle the tax dispute. The husband began yelling, a neighbor called the police, and the husband was arrested. The wife then filed a second divorce complaint, which eventually resulted in entry of a divorce by a California state court.

In 2009, while the investigation was continuing, the wife filed for innocent spouse relief. The IRS eventually assessed a deficiency. Before the IRS ruled on her petition, she filed an action in Tax Court, arguing that the joint tax return was invalid because her consent was procured by duress. The husband intervened in the action.

The wife and the IRS agreed that the joint tax return was invalid for duress, but the husband contested the issue. The Tax Court agreed with the wife and the IRS, as did the Ninth Circuit, and the Supreme Court denied review. *Hiramanek v. Comm'r*, T.C. Memo. 2011-280, 2011 WL 5921512 (2011), *aff'd sub nom. Hiramanek v. Hiramanek*, 588 F. App'x 681 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 167 (2015).

The husband then filed a petition seeking innocent spouse relief from the same tax liability.

(b) Issue: Was the husband entitled to innocent spouse relief?

(c) Answer to Issue: No.

(d) Summary of Rationale (District Court): Innocent spouse relief is available only if the party seeking relief signed a joint tax return. A joint tax return that is filed under duress is invalid and therefore not a proper subject for innocent spouse relief.

The husband argued that the wife did not sign the return under duress. But this was the same argument raised in the case arising from the wife's request for innocent spouse relief. The husband was a party to that case. He litigated his position all the way up to the U.S. Supreme Court, but lost. The decision in that case is binding in the present case under principles of collateral estoppel.

Because the wife signed under duress, "the return [husband] filed for [2006] was not a joint return. He thus has no claim for relief under section 6015; in fact he has no joint and several liability from which to be relieved." 2016 WL 2763870, at *5.

(3) Summary of Rationale (District Court): "The Tax Court properly held that Hiramanek is collaterally estopped by [the prior decision], which held that the return filed by him and his former wife for 2006 was not a joint return because it was signed under duress by his former wife." 745 F. App'x at 763.

Lessons:

1. A joint tax return signed under duress does not give rise to joint and several liability. The signature of the coerced spouse is invalid, and the coercing spouse is solely liable for taxes due.

2. As noted in the 2012 version of this outline, *Hiramanek* is a textbook illustration of why Congress forced the IRS to abandon the former regulatory statute of limitations and to start considering spousal abuse as a factor in making innocent spouse determinations. The wife did not consent in any real way to the filing of the tax return at issue.

3. If you coerce your spouse into filing a joint tax return, do not expect to be granted innocent spouse relief.

7. *Contreras v. Comm'r* , T.C. Memo. 2019-12, 2019 WL 980695 (2019)

(a) Facts: Husband and wife had two children. The husband ran a construction business, while the wife was a homemaker. The parties were divorced in 2011.

The husband brought into the marriage a piece of real property called Lot 13, and during the marriage the parties acquired an adjoining parcel, Lot 12. In 2005, the husband conveyed to the wife half of Lot 13, and he built a home upon it.

During the marriage, the wife was regularly subjected to physical abuse. The police were called to the home repeatedly, and the parties' daughter witnessed the abuse. The abuse was so severe that the wife at times took the children and stayed with her grandmother. In 2010, the wife obtained a temporary restraining order against the husband on the ground of domestic violence.

The final divorce decree included provisions to protect the wife and children from further abuse. It awarded the wife half of Lot 12 and half of Lot 13, securing the entire property division award (including a monetary award to divide other assets) with a lien. The husband failed to pay the award, and in 2012, the husband transferred both Lot 12 and Lot 13 to the wife to satisfy the judgment.

It is difficult to understand why the IRS took the position that the wife's foreclosure on Lots 12 and 13 was fraudulent, when she was clearly responding to the husband's failure to comply with the divorce decree.

The husband had substantial tax liability from 2008, and to satisfy that liability, the IRS sought to foreclose upon Lots 12 and 13. In IRS proceedings arising from the 2008 deficiency, the husband and the wife had the same counsel, paid by the husband, even though they had been divorced for over a year. The IRS declined to respond to the wife's questions and referred her to the husband's counsel.

The wife filed a petition for discretionary innocent spouse relief, claiming expressly that she signed the returns at issue under duress. The IRS denied relief, and the wife sought review in the Tax Court.

(b) Issue: Was the wife entitled to discretionary innocent spouse relief?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: The fourth threshold condition for discretionary innocent spouse relief provides that relief is not available if assets were fraudulently transferred between the spouses. The IRS claimed that the transfers of Lots 12 and 13 were fraudulent. To the contrary, the transfers were made, with the guidance of wife's divorce attorney, as payment for obligations placed upon the husband by the divorce decree. The transfers were recorded publicly and were not hidden from the IRS. They were not fraudulent transfers.

The first safe harbor condition, which requires that the parties be divorced, was clearly met. The second condition requires proof of economic hardship. The wife had income of $3,371.66 per month and expenses of $4,600 per month. She relied on child support and government assistance to make ends meet. Her income was below 250% of the federal poverty guidelines and would fall under that amount even if income were imputed to her. The IRS argued that the wife could sell her real property, but that would leave her homeless. The court held that economic hardship was present.

The third safe harbor condition requires proof that the requesting spouse did not have reason to know that the tax would not be paid. The wife did not know the husband's income during the marriage, and she had no involvement with his business, Thus, she had no way to know he would not pay taxes.

The wife did know before signing some of the returns that the husband had not complied with his financial obligations under the divorce decree. Therefore, she had some reason to suspect that he would not pay the overdue taxes either. But the husband's long-term abusive conduct limited the effect of the wife's knowledge. The wife even attempted to ask questions about the overdue taxes, but the IRS only referred her to counsel –who was paid by the husband. The wife "was not a willing participant in filing the joint returns, but rather a victim still being controlled by her ex-husband's actions." 2019 WL 980695, at *22.

Because all of the safe harbor conditions were met, the court granted discretionary innocent spouse relief.

Observations:

1. *Contreras* is another example of the type of case at which the recent innocent spouse reforms were aimed. It is difficult to understand why the IRS took the position that the wife's foreclosure on Lots 12 and 13 was fraudulent when she was clearly responding to the husband's failure to comply with the divorce decree. It is appalling that the IRS apparently suspected some sort of collusive behavior between the husband and wife despite a long history of physical abuse documented by repeated police visits and by the findings in the divorce decree. The IRS's lack of sensitivity to the wife's difficult economic situation is also hard to explain.

2. The fact that the IRS did not contest *Hiramanek* is some evidence that the IRS is becoming more sensitive to abuse issues. The fact that the IRS did contest *Contreras* is strong evidence that more progress is necessary.

Question: Did valid joint returns exist at all in *Contreras?* The wife would seem to have an argument that she signed the returns under duress. *See Hiramanek.* But she did not expressly argue that the joint returns were invalid.

8. *Abdelhadi v. Comm'r*, T.C. Memo. 2018-183, 2018 WL 5609201 (2018)

(a) Facts: Husband and wife were married in 2014. Before getting married, they were romantically involved with one another and had both a daughter and a son.

The IRS received a joint tax return for tax year 2007, in which the couple clearly was not married. The wife "did not see, review, or sign that return; she has not seen it since and it is not part of the record." 2018 WL 5609201, at *2. (To the extent that the wife's signature appeared on the return, she presumably argued that her signature had been forged.)

The IRS assessed a deficiency on the 2007 return. The wife filed a petition for innocent spouse relief. The IRS denied the claim, and the wife appealed.

(b) Issue: Was the wife entitled to innocent spouse relief?

(c) Answer to Issue: No, but the Tax Court expressly refused to rule upon whether joint and several liability existed to begin with.

(d) Summary of Rationale: The wife argued that she did not file a joint tax return in 2007 because she never signed such a return. Further, the wife was not even permitted by law to file a joint return for 2007 as the parties were not then married.

The IRS did not contest the above facts, but it argued that when considering a petition for innocent spouse relief, the Tax Court lacked jurisdiction to rule upon whether the petitioning spouse was liable for the tax to begin with. The Tax Court agreed. "Because petitioner did not file a joint return, there is no relief we can grant under section 6015." *Id.* at *2.

Observation: When a spouse does not sign a valid joint tax return to begin with, the spouse should file an action in the Tax Court for relief from joint and several liability on the ground that the return was invalid, not a request for innocent spouse relief. *See, e.g.*, *Hiramanek.* The wife in *Abdelhadi* was obviously not subject to liability on a return she did not sign, but she pushed the wrong procedural button.

9. *Neitzer v. Comm'r*, T.C. Memo. 2018-156, 2018 WL 4519997 (2018)

(a) Facts: Husband owned and operated two businesses. The wife, who was trained as a nurse, was totally disabled after a series of spine and hip surgeries. Her income came primarily from disability benefits.

The couple separated in 2010. Their 2012 joint tax return was prepared by the husband's business accountant. The wife was notified of the return only two hours before she was expected to sign it. The accountant had been told to disclose nothing to the wife about the husband's personal or business finances. The wife signed the return without reading it.

The return correctly stated the couple's tax liability, but the husband refused to fully pay that liability. The unpaid liability was attributable solely to the husband's income. Morever, the husband changed his mailing address to the IRS to his business, so the IRS's repeat notices of nonpayment went only to the husband and not to the wife.

After a period of nonpayment, the IRS satisfied the tax debt completely by seizing $21,637.93 from the wife's bank account.

The divorce court denied the wife's motion to be reimbursed immediately for the levied funds, but it found the husband in contempt for failing to disclose the unpaid tax debt on a financial disclosure statement. The decree of divorce incorporated a stipulation that awarded the wife $277,000, but it did not expressly require reimbursement for the seized funds.

The wife filed for discretionary innocent spouse relief. The IRS denied relief, and the wife appealed to the Tax Court.

(b) Issue: Was the wife entitled to discretionary innocent spouse relief?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: The IRS agreed that the wife had met the threshold conditions. The wife's income was $1,400 per month, and the tax debt at issue was $21,637.93. But the wife was given a divorce settlement of $277,000. The court held that payment of the debt would not cause economic hardship. Therefore, the safe harbor conditions were not met, and the result turned upon the discretionary relief factors.

The wife signed the tax return at issue, and she was charged with knowledge of its contents. But she had no way to know that the husband would not pay the debt. The husband told her little about his finances, and he even told his accountant to tell her nothing. The wife's lack of knowledge favored relief.

The parties were separated for the tax year in question, so the wife did not benefit from the husband's nonpayment. She had not filed tax returns since the divorce, but her income was so small that she was not required to file. The wife's disabled condition also favored relief.

Because essentially all of the factors were favorable to the wife, the court granted discretionary innocent spouse relief and awarded her a refund of the entire amount seized from her account.

Observation:

It speaks poorly of the IRS that it denied relief in *Neitzer*. The wife was a classic example of the sort of spouse the drafters of the new innocent spouse procedures had in mind. She was not abused physically, but she was deliberately kept ignorant about financial matters. Not only did the husband tell her nothing and instruct his accountant to tell her nothing, he changed his address so that she would not receive communications from the IRS regarding nonpayment. Finally, the wife was physically disabled and her income was very limited. She received a substantial settlement, but that settlement was effectively her only source of retirement income, and *the unpaid taxes were entirely due to the husband's income*. The IRS should not have opposed innocent spouse relief.

10. *Heydon-Grauss v. Comm'r*, T.C. Memo. 2018-209, 2018 WL 6720943 (2018)

(a) Facts: Husband and wife filed joint tax returns for tax years 2005 to 2009. They separated on 2010 and were divorced in 2015.

The parties did not enclose full payment with their 2005-2009 tax returns until 2010. The wife was not aware of this fact until 2010. But she was aware that the parties were spending beyond

their incomes and living beyond their means. The wife paid nothing on the parties' tax liabilities, and the divorce decree ordered her to reimburse the husband for half of the payments he had made.

The wife filed a petition for discretionary innocent spouse relief. The IRS granted limited relief for certain amounts in some of the years. The wife sought review in the Tax Court.

(b) Issue: Was the wife entitled to more discretionary innocent spouse relief than the IRS gave her?

(c) Answer to Issue: No.

(d) Summary of Rationale: The seventh and final threshold condition for innocent spouse relief provides that the tax must be attributable to the income of the nonrequesting spouse. In other words, discretionary innocent spouse relief is generally not available for tax due on the requesting spouse's own income. But there is an exception if the requesting spouse was subject to abuse.

The wife argued that abuse was present and therefore she should be relieved of liability for tax on her own income. "To satisfy the abuse exception . . . , the requesting spouse must establish that as a result of abuse she was unable to question the payment of the tax due on a return for fear of retaliation from the nonrequesting spouse." 2018 WL 6720943, at *14.

The court described the wife's claim of abuse as follows:

> [P]etitioner did not provide specific testimony supporting a pattern of abuse. Specifically, she testified that there was "abuse in the household. There was alcohol. There were drugs. There were gambling. There were sexual affairs. There was mismanagement of money. Risky investments. Gambling." She also testified that "[t]here was a lot of anger and yelling in the household." She testified that documents from the domestic relations court indicated that intervenor abused the children. Specifically, she testified that intervenor "had supervised visits" of the children and the court documents "reference the alcohol and drug testing".

Id.

Thus, the wife alleged abuse of alcohol and drugs. But the abuse required by the regulations is abuse of the other spouse. "Anger and yelling" likewise fall short of abuse. The husband denied physical abuse of either the wife or the parties' children, and the court found his denial credible.

Because abuse was not proven, and because the tax at issue arose from the wife's own income, the seventh threshold condition was not met, and the wife was not entitled to additional innocent spouse relief.

Observations:

1. It is good that the IRS has promised to be more sensitive to a situation in which abuse prevents one spouse from discovering or responding to tax-related misconduct of the other spouse. There

are cases, *e.g.*, *Hiramanek*; *Contreras*, in which real abuse is present, and the new rules greatly improve the fairness of tax law.

2. But as this outline has noted in prior years, a power that can be used for good can also be misused for more questionable purposes. It is highly foreseeable that some spouses who were not genuinely abused will attempt to use the new rules to obtain innocent spouse relief from taxes that they can and should help to pay. The federal courts are going to have to find a workable definition of genuine abuse.

4. *Heydon-Grauss* is a good example of a spouse attempting to misuse the new rules. The new rules focus upon physical or emotional abuse *of the other spouse*. The mere fact that both parties misused alcohol or even drugs is not what the new rules mean by abuse. Further, as divorce courts have realized for years, anger and harsh words do not constitute abuse. Abuse generally requires some form of intimidation, and there was no evidence of any intimidation in *Heydon-Grauss*. The facts before the court did not show the type of abuse at which the new rules are aimed.

11. *Ogden v. Comm'r*, T.C. Memo. 2019-88, 2019 WL 3162423 (2019)

(a) Facts: Husband and wife were married in 1991 and divorced in 2011. The wife was granted Social Security disability benefits in 2008. She received $36,083 that year and $10,297 in 2010.

On their 2008 tax return, the parties did not report the wife's benefits. On their 2010 return, the parties reported the benefits but did not pay the tax. Both returns were prepared by the husband.

The IRS assessed a deficiency for 2008. The wife filed a petition for discretionary innocent spouse relief. The IRS granted the petition as to the husband's income but denied the petition as to the wife's income. The wife sought review in the Tax Court.

(b) Issue: Was the wife entitled to discretionary innocent spouse relief from tax on her own income?

(c) Answer to Issue: No.

(d) Summary of Rationale: One of the threshold requirements for discretionary innocent spouse relief is that the tax cannot arise from the requesting spouse's own income. But there is an exception for abuse. The wife argued that she was abused during the marriage. The court noted:

> By the time the 2008 return was filed in 2009, petitioner and Mr. Ogden were separated and living apart. There is no documentation provided by petitioner's physicians or mental health care provider, nor a law enforcement entity, attesting to either physical or psychological abuse suffered by petitioner at the hands of Mr. Ogden. No witnesses testified to the alleged abuse suffered by petitioner. Petitioner's own allegations of abuse are vague and generalized.

2019 WL 3162423, at *8-9. Even if the wife's claims of abuse were credible, the wife testified that she was unaware that her Social Security benefits were taxable. Thus, the facts simply did not show that abuse prevented the wife from objecting to the husband's decision on how to treat her benefits for tax purposes.

For 2010, there was no evidence that abuse limited the wife's ability to question the husband's nonpayment of the balance of taxes due.

Because the abuse exception was not proven, the wife was not entitled to innocent spouse relief from tax due on her own income.

Observations:

1. Again, the wife's evidence of abuse was weak, and the court effectively found that no abuse had occurred.

2. The developing rule seems to be that the Tax Court is looking for some amount of evidence to corroborate a claim for abuse. Genuine abuse usually results in police or medical reports, testimony of at least some third-party witnesses, or evidence of domestic violence claims in state court, either as a request for a protective order or as an issue in a divorce case. The Tax Court is much more likely to find abuse when at least some amount of corroborative evidence is present.

3. There is no legal requirement for corroborative evidence. It is possible that an unsupported claim of abuse, made in the requesting spouse's testimony, might be accepted in at least some cases. But the trend is to reject such testimony, especially where it is very general.

12. *Welwood v. Comm'r*, T.C. Memo. 2019-113, 2019 WL 4187568 (2019)

(a) Facts: Husband and wife were married in 1973. They separated in Florida 2003 and signed an agreement dividing their property.

In the agreement, the husband conveyed to the wife a 50% interest in certain real estate partnerships. The partnerships were designed to generate tax savings in early years. A 1986 tax law change limiting the deduction of passive losses against other income made the partnerships much less attractive in their later years.

In 2010, the husband suffered a series of strokes that left him significantly disabled. He lived in series of care facilities until his death in 2017. The parties never divorced.

The parties filed accurate joint tax returns from 2008 until 2015, but they paid only the tax due in 2009; significant amounts remained outstanding for the other years.

In 2015, the parties signed another marital property agreement transferring the real estate partnerships back to the husband.

The IRS initiated collection proceedings on the unpaid taxes, and the wife filed a petition for discretionary innocent spouse relief. The wife claimed abuse, but the IRS did not believe her. "The [wife] claimed abuse, but she also described the [husband] as not having the cognitive ability to peel an orange." 2019 WL 4187568, at *8. The IRS denied relief, and the wife sought review in the Tax Court.

(b) Issue: Was the wife entitled to discretionary innocent spouse relief?

(c) Answer to Issue: No.

(d) Summary of Rationale: The IRS argued that one of the threshold conditions was not met because the 2015 transfer of the real estate partnerships back to the husband was fraudulent. The court disagreed and found that the threshold requirements were met. "We see no intent to hide the transfers in this case or other indicia of fraud." *Id.* at *15.

The first safe harbor condition requires that the parties be divorced or legally separated. The wife argued that the parties had been separated for well over a year, so this requirement was functionally met. The court suggested that the requirement might not be met. "Petitioner's actions in taking care of her husband (despite alleged abuse over the years), paying household bills, and bearing the financial burdens of his care suggest that she regarded herself as a member of the same household and married to him until he died." *Id.* at *16-17. Also, as discussed below, the wife had reason to know that the taxes would not be paid. The safe harbor conditions were therefore not met.

The result therefore turned upon the discretionary relief factors. The court agreed with the IRS that the wife's assessment of her own financial condition was questionable and that her expenses exceeded her income by less than $300. She was therefore not facing economic hardship.

Further, the wife had reason to know that the husband would not pay the taxes due. The wife argued that this knowledge was irrelevant because she had been abused, but the court found her claim not credible even as to tax years before the husband's stroke:

> [The wife] testified that she was fearful because her husband had guns, but the only incident she specifically described occurred in 2015 or 2016 while he was in a nursing and rehabilitative care facility. During the incident M. Welwood stated that he wanted a gun in order to commit suicide. There is no evidence that he threatened petitioner with a gun or that he had access to a gun at the time.

Id. at *21-22.

Finally, the wife knew that partnerships generated substantial tax liability because she ultimately transferred them away in 2015. She made no attempt to pay any of the tax liability even though assets existed from which the liability could have been paid.

"Although petitioner's situation is difficult and unfortunate, the circumstances are not compelling and do not justify relief from the joint liabilities." *Id.* at *23-24.

Observations:

1. *Welwood* is another case where the abuse factor was misused. Given the husband's medical condition after he had his strokes, and especially the fact that he was in care facilities, it is highly doubtful that he could have abused the wife. Even before the strokes, the fact that the husband owned guns and that the wife was afraid of guns does not show abuse. There was zero evidence that the husband took any concrete action to intimidate the wife.

2. The wife managed the parties' finances after 2010, so she had every reason to know the parties' financial condition. She discussed financial matters with advisors and ultimately conveyed away the real estate partnerships that were responsible for most of the taxes. The wife was not the sort of financially unaware spouse who tends to obtain innocent spouse relief.

13. *Rogers v. Comm'r*, 908 F.3d 1094 (7th Cir. 2018)

(a) Facts: Husband and wife filed a joint tax return for 2004. The IRS assessed a deficiency, and the parties sought review in the Tax Court. The Tax Court held for the IRS.

Three years later, the wife filed a petition for innocent spouse relief. The IRS rejected that petition. The wife sought review in the Tax Court, which agreed with the IRS. The wife appealed to the Seventh Circuit.

(b) Issue: Was the wife entitled to innocent spouse relief?

(c) Answer to Issue: No.

(d) Summary of Rationale: "[I]f a decision of a court in any prior proceeding for the same taxable year has become final, such decision shall be conclusive except with respect to the qualification of the individual for [innocent spouse] relief which was not an issue in such proceeding. The exception contained in the preceding sentence shall not apply if the court determines that the individual participated meaningfully in such prior proceeding." I.R.C. ' 6015(g)(2).

The above language is full of confusing double negatives, but the bottom-line rule is that when married taxpayers contest a deficiency, and both spouses "participated meaningfully" in the proceeding, the proceeding bars a later petition for innocent spouse relief. It is expected that any claim for innocent spouse relief would have been asserted in the initial proceeding.

The Tax Court held that the wife participated meaningfully in the proceedings to question the deficiency and therefore could not file an independent petition for relief. In particular, the wife had an MBA and a law degree and substantial knowledge of tax law, yet she claimed complete ignorance of tax matters. The wife also had counsel in the previous tax proceedings. The Tax Court found her testimony not credible, and the Seventh Circuit agreed.

The wife argued that the result should be different because the IRS failed to inform her of her right to innocent spouse relief. "[The wife] has identified no authority that a disclosure

shortcoming precluded the Service from taking the position that she was not entitled to innocent spouse relief." 908 F.3d at 1097.

Lesson: When contesting a deficiency in the Tax Court, it is prudent to seek innocent spouse relief at that time. A later petition for such relief will not be available if the petitioning spouse "participated meaningfully" in contesting the deficiency.

There will obviously be cases in which the spouse seeking relief did not participate at all in questioning the deficiency. But the prudent step, in doubtful cases, is to seek innocent spouse relief at the earliest opportunity.

Observation: It is difficult for a person with a law degree and an MBA to obtain innocent spouse relief.

14. *Asad v. Comm'r*, T.C. Memo. 2017-80, 2017 WL 2211215 (2017), *aff'd*, 751 F. App'x 339 (3d Cir. 2018)

(a) Facts: A husband and wife owned rental properties. Each spouse was responsible for some of the properties. They filed joint tax returns in which they claimed losses on the properties.

The IRS disallowed these losses and assessed a deficiency. The deficiency was asserted after the passage of the three-year statute of limitations in I.R.C. § 6501(a). Neither party contested the notice of deficiency within the 90-day period set forth in I.R.C. § 6213(a).

After the 90-day period, both parties petitioned for innocent spouse relief, and their respective requests were consolidated into one case. After the joint returns were filed, but before the Tax Court proceedings, the parties divorced. In their separation agreement, they agreed to divide all tax liabilities equally.

The IRS conceded that each spouse was entitled to relief from underpayment of tax on properties managed by the other. But the parties wanted to divide unpaid losses equally, as required by their separation agreement.

(b) Issues: (1) Could the parties raise a limitations defense to the notice of deficiency? (2) Should the tax liabilities be divided equally?

(c) Answer to Issues: No on both issues.

(d) Summary of Rationale (District Court): The statute of limitations was an affirmative defense, which could have been raised only within the 90-day statutory period for challenging a notice of deficiency. By failing to question the notice within 90 days, the parties waived their limitations defense.

"The divorce agreement establishes Asad's and Akel's rights against each other under state law. . . . However, it does not control their liabilities to the IRS." 2017 WL 2211215, at *2.

(d) Summary of Rationale (Circuit Court): The appeal focused primarily upon the first issue. Because the parties missed the 90-day deadline, "the Tax Court properly determined that it lacked jurisdiction to consider the validity of the merits of any of Asad's challenges to the underlying federal tax liability assessment, and that it was limited to determining whether Asad was eligible for innocent spouse relief." 751 F. App'x at 341-42.

Lessons:

1. The IRS should pay more attention to the three-year statute of limitations on assessing deficiencies.

2. Taxpayers should pay more attention to the 90-day deadline for challenging a notice of deficiency.

Observations:

1. *Asad* only determined who pays the IRS. If the parties want to divide the tax liability equally, they are still free to ask the divorce court to enforce their agreement and order that result or even to reach that result through payments between themselves without involving any judge at all.

2. *Asad* creates a certain amount of judicial inefficiency, because there will have to be an extra action in state court to enforce the agreement. But federal judges do not handle domestic relations cases very often, they lack interest in family law, and sometimes they are not very good at applying it. Also, in many cases, the state law issues will be heard by the same state judge who approved the agreement or issued the divorce decree. There are powerful advantages to letting state judges decide state domestic relations law issues.

15. *Benson v. Comm'r*, T.C. Memo. 2018-157, 2018 WL 4520083 (2018), *aff'd*, 774 F. App'x 339 (8th Cir. 2019)

(a) Facts: Wife owned a corporation that maintained and collected revenue from St. Louis parking meters. She fraudulently overbilled the city, was convicted, and went to prison. While she was in prison, the husband filed to divorce her.

On their 2011 joint tax return, the husband and the wife correctly reported their incomes. But they did not pay the entire $69,513 tax liability.
The husband petitioned for innocent spouse relief. The IRS denied the petition, and the husband appealed to the Tax Court.

(b) Issue: Was the husband entitled to innocent spouse relief?

(c) Answer to Issue: No.

(d) Summary of Rationale: Mandatory innocent spouse relief is available only for tax understatements. Here, the problem was not understatement but, rather, lack of payment.

The IRS agreed that the threshold conditions were met. The husband had an annual income of $140,000, which was sufficient to make payments on the tax liability, so he would not suffer hardship by paying the taxes, and the safe harbor conditions were not met.

The result therefore depended upon the discretionary relief factors. Only one factor favored relief –the parties were separated when the husband requested relief. By contrast, three factors opposed relief: (1) the husband benefitted from the unpaid tax liability because his financial status was intertwined with the wife's; and (2) the husband was aware that the wife could not pay the taxes (because her conviction resulted in a total loss of income); and (3) the husband had not timely paid his 2013 and 2014 taxes. Because the balance of factors was negative, the court refused to grant the husband innocent spouse relief.

In an unpublished opinion, the Eighth Circuit summarily affirmed the Tax Court's decision.

Observation: The husband did not know of the wife's fraud, but he appears to have shared in spending the proceeds. Also, he could repay the debt of $69,513 (presumably plus interest) from his annual income of $140,000. Finally, it never helps when a claimant seeking innocent spouse relief has failed to pay taxes on time in later years.

16. *Schorse v. Comm'r,* T.C. Memo. 2018-176, 2018 WL 5270556 (2018)

(a) Facts: Husband was a computer programmer and wife was a physician. During the marriage, the wife earned 80% to 90% of the parties' income.

For tax years 2002, 2003, and 2004, the wife provided her tax information to the husband, and his business accountant prepared joint tax returns. The wife's tax information claimed that her practice suffered losses each year. The husband asked the wife and her accountant about the losses, and he was told that the wife did not have a sufficient basis in the medical practice to deduct the losses.

Nevertheless, the husband told his accountant to prepare returns that claimed loss deductions. Predictably, the IRS disallowed the deductions and assessed deficiencies. The couple paid these deficiencies for several years, paying off their tax debt for 2002.
The parties separated in 2012 and divorced in 2014. The divorce decree assigned all outstanding tax liabilities to the wife.

The husband filed a petition for innocent spouse relief from the 2003 and 2004 liabilities. The IRS denied the petition, and the husband sought review in the Tax Court.

(b) Issue: Was the husband entitled to innocent spouse relief?

(c) Answer to Issue: No.

(d) Summary of Rationale: To obtain mandatory innocent spouse relief, the claiming spouse must prove that he or she had no reason to know of a tax understatement. The husband here had reason to know, because the wife and her accountant told him, that the losses of the wife's practice were not tax deductible.

The IRS agreed that the husband had not met the threshold conditions for innocent spouse relief. The husband had reason to know of the tax understatement, so the safe harbor conditions were not met. The result therefore turned upon the discretionary relief factors.

Factors favoring relief were (1) the husband had been divorced from the wife; (2) the divorce decree assigned all outstanding tax liabilities to the wife; and (3) the husband was current on taxes from later years. Factors opposing relief were (1) the husband had reason to know of the tax understatement; (2) the parties had a high standard of living; and (3) the husband therefore benefitted from the tax underpayment.

"Although many of the factors for equitable relief either favor petitioner or are neutral, petitioner's actual knowledge of the losses deducted on the joint returns, his involvement in preparing those returns, and the significant benefit he received from the understatements weigh too heavily against him to allow relief." 2018 WL 5270556, at *22-23.

Obvious Lessons:

1. If your wife's accountant tells you that the wife's business losses cannot be deducted on your tax return, you should probably consider taking the accountant's advice.

2. It is hard to get innocent spouse relief when the tax problem is a deduction you instructed your accountant to take against the direct contrary advice of both your wife and her accountant.

17. *Henry v. Comm'r*, T.C. Memo. 2019-24, 2019 WL 1385242 (2019)

(a) Facts: Husband and wife married in 1997 and divorced in 2013. While the divorce case was pending, the parties filed a joint income tax return for tax year 2012. The return did not report $14,650 in income earned by the husband from his second job as a church musician.

The IRS assessed a deficiency, which neither party contested. The IRS then seized funds from the wife's 2014 tax return to satisfy the deficiency. The wife moved for innocent spouse relief. The IRS granted relief but denied the wife a refund. The wife sought review in the Tax Court.

(b) Issue: Was the wife entitled to innocent spouse relief?

(c) Answer to Issue: Yes.

(d) Summary of Rationale: The court construed the wife's request for a refund as a request for discretionary innocent spouse relief. The IRS conceded that the wife was entitled to such relief, but the husband intervened and opposed relief.

The husband did not contest that the threshold conditions were met. Because the wife had reason to know of the tax understatement and there was no evidence of abuse, the safe harbor conditions were not met.

The result therefore turned upon the discretionary relief factors.

Factors favoring relief were (1) the parties had been divorced; (2) the wife's only monthly income was $500 in alimony and $999 on Social Security disability, so she faced economic hardship; (3) the wife did not benefit from the unreported income, which husband spent for his own purposes; (4) the wife had complied with tax law in future years; and (5) the wife's health was poor. Only one factor opposed relief –the wife argued in the divorce case only two weeks after the filing of the return that the husband had omitted his church income from a financial statement and that she knew he had had church income the year before, which suggested that she had reason to know of the omitted church income. Because the strong preponderance of the factors was favorable, the court granted discretionary spouse relief.

APPENDIX

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2019

SESSION LAW 2019-172

HOUSE BILL 469

AN ACT TO REVISE THE LAWS PERTAINING TO EQUITABLE DISTRIBUTION, AMEND THE LAWS PERTAINING TO PARENTING COORDINATORS, AND TO MAKE VARIOUS CHANGES UNDER THE LAWS PERTAINING TO ADOPTIONS.

The General Assembly of North Carolina enacts:

PART I. REVISE EQUITABLE DISTRIBUTION LAWS

SECTION 1. G.S. 50-20.1 reads as rewritten:

"**§ 50-20.1. ~~Pension and retirement~~ Pension, retirement, and deferred compensation benefits.**

(a) The ~~award~~ distribution of vested marital pension, retirement, or ~~other~~ deferred compensation benefits may be made ~~payable:~~payable by any of the following means:

(1) As a lump sum ~~by agreement;~~from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.

(2) Over a period of time in fixed amounts ~~by agreement;~~from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.

(3) ~~By appropriate domestic relations order as~~ As a prorated portion of the benefits made to the designated ~~recipient~~ recipient, if permitted by the plan, program, system, or fund (i) at the time the ~~party against whom the award is made~~ participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the ~~benefits; or~~benefits, or (iii) at the participant-spouse's earliest retirement age. For purposes of this section, "participant-spouse" means the spouse who is a participant in the plan, program, system, or fund.

(4) By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.

(5) As a lump sum, or over a period of time in fixed amounts, by agreement.

(b) The ~~award~~ distribution of nonvested marital pension, retirement, or ~~other~~ deferred compensation benefits may be made ~~payable:~~payable by any of the following means:

(1) As a lump sum by ~~agreement;~~agreement.

(2) Over a period of time in fixed amounts by ~~agreement; or~~agreement.

(3) ~~By appropriate domestic relations order as~~ As a prorated portion of the benefits made to the designated ~~recipient~~ recipient, if permitted by the plan, program, system, or fund (i) at the time the ~~party against whom the award is made~~ participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the ~~benefits.~~benefits, or (iii) at the participant-spouse's earliest retirement age.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the court shall not require the administrator of the ~~fund or plan~~ plan, program, system, or fund involved to make any payments ~~until the party against whom the award is made actually begins to receive the benefits unless the plan permits an earlier distribution.~~or distributions to the nonparticipant spouse, except as permitted by the terms of the plan, program, system, or fund.

(d) ~~The award~~ When the amount of the benefit payable by the plan, program, system, or fund to the participant-spouse is determined in whole or part by the length of time of the participant-spouse's

employment, the marital portion shall be determined using the proportion of time the marriage existed (up to the date of separation of the ~~parties),~~ parties) simultaneously with the total time of the employment which earned the ~~vested and nonvested pension, retirement, or deferred compensation benefit,~~ benefit subject to equitable distribution, to the total amount of time of ~~employment.~~ employment that earned the benefit subject to equitable distribution. The ~~award~~ determination shall be based on the vested and nonvested accrued benefit, as provided by the ~~plan or~~ plan, program, system, or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of ~~separation.~~separation and cost-of-living adjustments and similar enhancements to the participant's benefit. Notwithstanding any other provision of this Chapter, if the court makes the award payable pursuant to subdivision (a)(3) or (b)(3) of this section and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits. However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse. When a pension, retirement, or deferred compensation plan, program, system, or fund, or an applicable statute limits or restricts the amount of the benefit subject to equitable distribution by a State court, the award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.

(d1) When the amount of the benefit payable by the plan, program, system, or fund is not determined in whole or part by the length of time of the participant-spouse's employment, but is instead based on contributions and held in one or more accounts with readily determinable balances, including, but not limited to, individual retirement accounts and defined contribution plans, such as those within the definitions of Internal Revenue Code section 401(k), 403(b), 408, 408A, or 457, the court shall not determine the award using the fraction described in subsection (d) of this section. The court instead shall determine the marital portion of the benefit by determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the fraction described in subsection (d) of this section, namely, by using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the employment which earned the benefit subject to equitable distribution to the total amount of time of employment. In either event, the award shall be based on the vested and nonvested accrued benefit as of the date of separation, together with the income, gains, losses, appreciation, and depreciation accrued after the date of separation on the date-of-separation benefits. However, the award shall not include contributions that may accrue or be made after the date of separation, or any income, gains, losses, appreciation, and depreciation accrued on those contributions.

(e) No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested and nonvested pension, retirement, or ~~other~~ deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation ~~plan~~ plan, program, system, or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a ~~plan~~ plan, program, system, or fund prohibits an award in excess of fifty percent (50%).

(f) In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary

designation with the ~~plan~~ plan, program, system, or fund consistent with the terms of the ~~plan~~ plan, program, system, or fund unless the ~~plan~~ plan, program, system, or fund prohibits such designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation ~~plan~~ plan, program, system, or fund involved.

(f1) Whenever the award is made payable pursuant to subdivision (a)(3) or (b)(3) of this section, and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a "separate interest" approach in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the "separate interest" approach shall be used to divide the benefit in question. For purposes of this section, the phrase "separate interest" approach means any method of dividing pension or retirement system or deferred compensation benefits in which the nonparticipant spouse, the spouse not a participant in the plan, program, system, or fund in question, receives an interest that allows the nonparticipant spouse to receive benefits in a manner independent, in whole or part, of the benefits received by the participant-spouse, or to make elections concerning the receipt of benefits independently of the elections made by the participant-spouse.

(f2) Whenever the pension or retirement or deferred compensation benefit is distributed pursuant to subdivision (a)(3) or (b)(3) of this section in an order that does not employ the "separate interest" approach, the court may, considering the length of the marriage and the ages of the parties, (i) award all or a portion of a survivor annuity to the nonparticipant spouse or former spouse and (ii) allocate the cost of providing the survivor annuity between the parties. The survivor annuity awarded by the court, if any, shall be allocated in accordance with the terms of the retirement plan, program, system, or fund.

(f3) Whenever the pension or retirement or deferred compensation plan, program, system, or fund does not automatically provide pre-retirement survivor annuity protection for the nonparticipant spouse, the court shall order pre-retirement survivor annuity protection for the nonparticipant spouse if permitted by the plan, program, system, or fund.

(f4) The court may allocate equally between the parties any fees assessed by a plan, program, system, or fund in order to process any domestic relations order or qualified domestic relations order.

(g) The court may require distribution of the award by means of a qualified domestic relations order, or as defined in section 414(p) of the Internal Revenue Code of 1986, or by domestic relations order or other appropriate order. To facilitate the calculating and payment of distributive awards, the administrator of the plan, program, system, ~~plan,~~ or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

(h) This section and G.S. 50-21 shall apply to all vested and nonvested pension, retirement, and ~~other~~ deferred compensation ~~plans and~~ plans, programs, systems, or funds, ~~including vested and nonvested military pensions eligible under the federal Uniform Services Former Spouses Protection Act, and including funds administered by the State pursuant to Articles 84 through 88 of Chapter 58 and Chapters 120, 127A, 128, 135, 143, 143B, and 147 of the General Statutes, to the extent of a member's accrued benefit at the date of separation, as determined by the court.~~including, but not limited to, uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of Internal Revenue Code sections 408 and 408A, and accounts within the definitions of Internal Revenue Code section 401(k), 403(b), or 457.

(i) If a plan, program, system, or fund deems unacceptable an order providing for a distribution of pension, retirement, or deferred compensation benefits, then the court may upon motion of a party enter a subsequent order clarifying or correcting its prior order, as may be necessary to comply with the specific technical requirements of the plan, program, system, or fund.

(j) Notwithstanding any other provision of this Chapter, a claim may be filed, either as a separate civil action or as a motion in the cause in an action brought pursuant to this Chapter, for an order effectuating the distribution of pension, retirement, or deferred compensation benefits provided for in a valid written agreement, as defined in G.S. 50-20(d), whether or not a claim for equitable distribution has been filed or

adjudicated. The court may enter an order effectuating the distribution provided for in the valid written agreement."

SECTION 1.1 G.S. 135-9(a) reads as rewritten:

"(a) Except for the applications of the provisions of G.S. 110-136, and G.S. 110-136.3 et seq., and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a person to a pension, or annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Chapter, and the moneys in the various funds created by this Chapter, are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Chapter specifically otherwise provided. ~~Application~~ Notwithstanding any provisions to the contrary, application for System approval of a domestic relations order dividing a person's interest under the Retirement System shall be accompanied by an order consistent with the system-designed template order provided on the System's Web site. ~~For~~ Notwithstanding any provisions to the contrary, the Retirement System shall only make payment of a share of the member's retirement benefits to the member's former spouse based upon a domestic relations order, and the former spouse shall not be permitted to receive a share of the member's retirement benefits until the member begins to receive the benefits, consistent with the system-designed template order. Notwithstanding any provisions to the contrary, the former spouse shall not be entitled to any type or form of benefit or any option not otherwise available to the member. Notwithstanding any provisions to the contrary, for orders entered on or after January 1, 2015, payment to a member's former spouse pursuant to any such domestic relations order shall be limited to the lifetime of that former spouse and, upon the death of that former spouse, the former spouse's share shall revert to the member."

SECTION 1.2 G.S. 128-31(a) reads as rewritten:

"(a) Except for the applications of the provisions of G.S. 110-136, and G.S. 110-136.3 et seq., and in connection with a court-ordered equitable distribution under G.S. 50-20, the right of a person to a pension, an annuity, or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit or any other right accrued or accruing to any person under the provisions of this Article, and the moneys in the various funds created by this Article, are exempt from levy and sale, garnishment, attachment, or any other process whatsoever, and shall be unassignable except as in this Article specifically otherwise provided. ~~Application~~ Notwithstanding any provisions to the contrary, application for System approval of a domestic relations order dividing a person's interest under the Retirement System shall be accompanied by an order consistent with the system-designed template order provided on the System's Web site. ~~For~~ Notwithstanding any provisions to the contrary, the Retirement System shall only make payment of a share of the member's retirement benefits to the member's former spouse based upon a domestic relations order, and the former spouse shall not be permitted to receive a share of the member's retirement benefits until the member begins to receive the benefits, consistent with the system-designed template order. Notwithstanding any provisions to the contrary, the former spouse shall not be entitled to any type or form of benefit or any option not otherwise available to the member. Notwithstanding any provisions to the contrary, for orders entered on or after January 1, 2015, payment to a member's former spouse pursuant to any such domestic relations order shall be limited to the lifetime of that former spouse and, upon the death of that former spouse, the former spouse's share shall revert to the member."

PART II. REVISE PARENTING COORDINATOR LAWS

SECTION 2. Article 5 of Chapter 50 of the General Statutes reads as rewritten:

"Article 5.

"Parenting Coordinator.

"**§ 50-90. Definitions.**

As used in this Article, the following terms mean:

…

(4) Party. – Any person granted legal or physical custodial rights to a child in a child custody action.

"**§ 50-91. Appointment of parenting coordinator.**

(a) The court may appoint or reappoint a parenting coordinator at any time ~~during the proceedings of~~ in a child custody action involving minor children brought under Article 1 of this Chapter ~~if all parties consent to the appointment. The parties may agree to limit the parenting coordinator's decision-making authority to specific issues or areas.~~on or after the entry of a custody order, other than an ex parte order, or upon entry of a contempt order involving a custody issue pursuant to any of the following:

(1) All parties consent to the appointment and the scope of the parenting coordinator's authority.

(2) Upon motion of a party requesting the appointment of a parenting coordinator.

(3) Upon the court's own motion.

(b) ~~The court may appoint a parenting coordinator without the consent of the parties upon entry of a custody order other than an ex parte order, or upon entry of a parenting plan only if~~ If the parties have not consented to the appointment of a parenting coordinator, the court ~~also makes~~ shall make specific findings that the action is a high-conflict case, that the appointment of the parenting coordinator is in the best interests of any minor child in the case, and that the parties are able to pay for the cost of the parenting coordinator. The court does not have to find a substantial change of circumstance has occurred to appoint a parenting coordinator.

(c) The order appointing a parenting coordinator shall specify the terms of the appointment and the issues the parenting coordinator is directed to assist the parties in resolving and deciding. ~~The order may also incorporate any agreement regarding the role of the parenting coordinator made by the parties under subsection (a) of this section. The court shall give a copy of the appointment order to the parties prior to the appointment conference.~~ Notwithstanding the appointment of a parenting coordinator, the court shall retain exclusive jurisdiction to determine fundamental issues of custody, visitation, and support, and the authority to exercise management and control of the case.

(d) The ~~court shall select a~~ parenting coordinator shall be selected from a list maintained by the district court. Prior to the ~~appointment conference, the court must complete and give to the parenting coordinator a referral form listing contact information for the parties and their attorneys, the court's findings in support of the appointment, and any agreement by the parties.~~appointment, the court, the parties' attorneys, or the parties shall contact the parenting coordinator to determine if the parenting coordinator is willing and able to accept the appointment.

"**§ 50-92. Authority of parenting coordinator.**

(a) The authority of a parenting coordinator shall be specified in the court order appointing the parenting coordinator and shall be limited to matters that will aid the ~~parties:~~parties in complying with the court's custody order, resolving disputes regarding issues that were not specifically addressed in the custody order, or ambiguous or conflicting terms in the custody order. The parenting coordinator's scope of authority may include, but is not limited to, any of the following areas:

(1) ~~Identify disputed issues.~~Transition time, pickup, or delivery.

(2) ~~Reduce misunderstandings.~~Sharing of vacations and holidays.

(3) ~~Clarify priorities.~~Method of pickup and delivery.

(4) ~~Explore possibilities for compromise.~~Transportation to and from visitation.

(5) ~~Develop methods of collaboration in parenting.~~Participation in child or day care and babysitting.

(6) ~~Comply with the court's order of custody, visitation, or guardianship.~~Bed time.

(7) Diet.

(8) Clothing.

(9) Recreation.

(10) Before- and after-school activities.

(11) Extracurricular activities.

(12) Discipline.

(13) Health care management.
(14) Alterations in schedule that do not substantially interfere with the basic time-share agreement.
(15) Participation in visitation, including significant others or relatives.
(16) Telephone contact.
(17) Alterations to appearance, including tattoos or piercings.
(18) The child's passport.
(19) Education.
(20) Other areas of specific authority as designated by the court or the parties.

(b) ~~Notwithstanding subsection (a) of this section, the court may authorize a parenting coordinator to decide issues regarding the implementation of the parenting plan that are not specifically governed by the court order and which the parties are unable to resolve. The parties must comply with the parenting coordinator's decision until the court reviews the decision. The parenting coordinator, any party, or the attorney for any party may request an expedited hearing to review a parenting coordinator's decision. Only the judge presiding over the case may subpoena the parenting coordinator to appear and testify at the hearing.~~The parenting coordinator shall decide any issue within the scope of the parenting coordinator's authority, and the decision shall be enforceable as an order of the court. The decision shall be in writing and provided to the parties and their attorneys. So long as the custody order under which the decision is made is in effect, the decision shall remain binding after the expiration of the parenting coordinator's term unless the parenting coordinator or a subsequent parenting coordinator modifies the decision or the court reviews and modifies the decision.

(b1) Any party or attorney for the party may file a motion for the court to review a parenting coordinator's decision. The parties shall comply with the parenting coordinator's decision unless the court, after a review hearing, determines that (i) the parenting coordinator's decision is not in the child's best interests or (ii) the decision exceeded the scope of the parenting coordinator's authority. The moving party or the attorney for the moving party shall cause a subpoena to be issued for the parenting coordinator's attendance at the review hearing. At the conclusion of the review hearing, the court shall determine how the parenting coordinator's fees, as related to the review hearing, shall be apportioned between the parties. The court may review and modify a parenting coordinator's decision after the expiration of a parenting coordinator's term.

(c) The parenting coordinator shall not provide any professional services or counseling to ~~either parent~~ any party or any of the minor children.

(d) The parenting coordinator shall refer financial issues related to the parenting coordinator's decisions to the ~~parties'~~ parties or their attorneys.

"**§ 50-93. Qualifications.**

(a) To be eligible to be included on the district court's list of parenting coordinators, a person must meet all of the following requirements:

(1) Hold a masters or doctorate degree in psychology, law, social work, ~~counseling, medicine, or a related subject area.~~or counseling.
(2) Have at least five years of related professional post-degree experience.
(3) Hold a current North Carolina license in the parenting coordinator's area of ~~practice, if applicable.~~practice.
(4) Participate in 24 hours of training in topics related to the developmental stages of children, the dynamics of high-conflict families, the stages and effects of divorce, problem solving techniques, mediation, and legal issues.

…

"**§ 50-94. Appointment conference.**

(a) The parties, their attorneys, and the proposed parenting coordinator must all attend the appointment conference. However, no appointment conference is required if (i) the parenting coordinator's term is later extended, (ii) a subsequent parenting coordinator is appointed in the same matter, or (iii) the parties, their attorneys, and the proposed parenting coordinator consent to a waiver of the appointment

conference by signing the proposed appointment order. The court shall not enter an order appointing a parenting coordinator or conduct an appointment conference unless a custody order has already been entered or is being simultaneously entered.

(b) At the time of the appointment conference, the court shall do all of the following:

(1) Explain to the parties the parenting coordinator's role, authority, and responsibilities as specified in the appointment order and any agreement entered into by the parties.

~~(2) Determine the information each party must provide to the parenting coordinator.~~

(3) Determine financial arrangements for the parenting coordinator's fee to be paid by each party and authorize the parenting coordinator to charge any party separately for individual contacts made necessary by that party's behavior.

(4) Inform the parties, their attorneys, and the parenting coordinator of the rules regarding communications among them and with the court.

(5) Enter the appointment ~~order.~~order if the order has not yet been entered.

~~(c) The parenting coordinator and any guardians ad litem shall bring to the appointment conference all necessary releases, contracts, and consents. The parenting coordinator must also schedule the first sessions with the parties.~~

"**§ 50-95. Fees.**

~~(a)~~ The parenting coordinator shall be entitled to reasonable compensation from the parties for services rendered and to a reasonable retainer. ~~The parenting coordinator may request a hearing in the event of a fee dispute.~~If a dispute arises regarding the payment of fees or the retainer, the parenting coordinator may file a fee report and request a hearing. If a party disputes the parenting coordinator's fees or the allocation of those fees, the party may file a motion with the court requesting that the court review the fees. The district court retains jurisdiction to resolve disputes regarding the parenting coordinator's fees after the conclusion of the parenting coordinator's term so long as the parenting coordinator's fee report was filed in a timely manner.

~~(b) The court may make the appointment of a parenting coordinator contingent upon the parties' payment of a specific fee to the parenting coordinator. The parenting coordinator shall not begin any duties until the fee has been paid.~~

"**§ 50-96. Meetings and communications.**

Meetings and communications between the parenting coordinator and the ~~parties~~ parties, the attorneys for the parties, or any other person with information that assists the parenting coordinator in the coordinator's duties may be informal and ex parte. Communications between the parties and the parenting coordinator are not confidential. The parenting coordinator and the court shall not engage in any ex parte communications. Upon request of the parenting coordinator, the parties shall timely execute any releases necessary to facilitate communication with any person having information that assists the parenting coordinator in the coordinator's duties. The parenting coordinator, in the coordinator's discretion, may meet or communicate with the minor children.

"**§ 50-97. Reports.**

(a) ~~The parenting coordinator shall promptly provide written notification to the court, the parties, and attorneys for the parties if the parenting coordinator makes any of the following determinations:~~The parenting coordinator may file a report with the court regarding any of the following:

(1) The parenting coordinator's belief that the existing custody order is not in the best interests of the child.

(2) The parenting ~~coordinator~~ coordinator's determination that the parenting coordinator is not qualified to address or resolve certain issues in the case.

(3) A party's noncompliance with a decision of the parenting coordinator or the terms of the custody order.

(4) The parenting coordinator's fees as set forth in G.S. 50-95.

(5) The parenting coordinator's request that the parenting coordinator's appointment be modified or terminated.

(b) ~~The court shall schedule a hearing and review the matter no later than two weeks following receipt of the report. The parenting coordinator shall remain involved in the case until the hearing.~~Upon the filing of a verified report by the parenting coordinator alleging that a party is not complying with a decision of the parenting coordinator, not complying with the terms of the custody order, or not paying the parenting coordinator's fees, the court may issue an order directing a party to appear at a specified reasonable time and show cause why the party shall not be held in contempt. Nothing in this section prevents a party from filing the party's own motion regarding noncompliance with a parenting coordinator's decision or noncompliance with the terms of the custody order.

(c) ~~If the parties agree to any fundamental change in the child custody order, the parenting coordinator shall send the agreement to the parties' attorneys for preparation of a consent order.~~An expedited hearing shall be granted and shall occur within four weeks of the filing of the report unless the parenting coordinator requests a longer length of time or the court has already issued an order directing a party to show cause why the party shall not be held in contempt.

(d) The court, after a hearing on the parenting coordinator's report, shall be authorized to issue temporary custody orders as may be required for a child's best interests.

"**§ 50-98. Parenting coordinator records.**

(a) ~~The parenting coordinator shall provide the following to the attorneys for the parties and to the parties:~~In the parenting coordinator's discretion, the parenting coordinator may release any records held by the parenting coordinator to the parties or the attorneys for the parties.

~~(1) A written summary of the developments in the case following each meeting with the parties.~~

~~(2) Copies of any other written communications.~~

(b) ~~The parenting coordinator shall maintain records of each meeting. These records may only be subpoenaed by order of the judge presiding over the case. The court must review the records in camera and may release the records to the parties and their attorneys only if the court determines release of the information contained in the records will assist the parties with the presentation of their case at trial.~~Any party may apply to the judge presiding for the issuance of a subpoena to compel production of the parenting coordinator's records. Any party who submits an application for a subpoena shall provide reasonable notice to the parenting coordinator and the parties so that any objection to the release of information or the manner of the release of information may be considered prior to the issuance of a subpoena.

"**§ 50-99. Modification or termination of parenting coordinator appointment.**

(a) For good cause shown, the court may terminate or modify the parenting coordinator appointment upon motion of ~~either party at the request of the parenting coordinator,~~ any party, upon the agreement of the ~~parties and the parenting coordinator,~~ parties, or by the court on its own motion. ~~Good cause includes any of the following:~~

~~(1) Lack of reasonable progress over a significant period of time despite the best efforts of the parties and the parenting coordinator.~~

~~(2) A determination that the parties no longer need the assistance of a parenting coordinator.~~

~~(3) Impairment on the part of a party that significantly interferes with the party's participation in the process.~~

~~(4) The parenting coordinator is unable or unwilling to continue to serve.~~

(b) ~~If the parties agreed to the appointment of the parenting coordinator under G.S. 50-91(a), the court may terminate or modify the appointment according to that agreement or according to a subsequent agreement by the parties.~~For good cause shown, the court may modify or terminate the parenting coordinator's appointment upon request of the parenting coordinator as set forth in G.S. 50-97(a)(5).

(c) For purposes of termination or modification of the parenting coordinator's appointment, good cause may include, but is not limited to, any of the following:

(1) The lack of reasonable progress.

(2) A determination that the parties no longer need the assistance of a parenting coordinator.

(3) Impairment on the part of a party that significantly interferes with the party's participation in the process.

(4) The inability or unwillingness of the parenting coordinator to continue to serve.

…."

PART III. ADOPTION LAW CHANGES

SECTION 3. G.S. 48-2-100(c) reads as rewritten:

"(c) The courts of this State shall not exercise jurisdiction under this Chapter if at the time the petition for adoption is filed, a court of any other state is exercising jurisdiction substantially in conformity with the Uniform Child-Custody Jurisdiction and Enforcement Act, Article 2 of Chapter 50A of the General Statutes. However, this subsection shall not apply ~~if prior~~ and the courts of this State may exercise jurisdiction under this Chapter if either of the following apply:

(1) The matter in which the other state is exercising jurisdiction places custody of the adoptee in an agency, the petitioner, or another custodian expressly in support of an adoption plan that does not identify a specific prospective adoptive parent other than the petitioner.

(2) Prior to the decree of adoption being granted, the court of the other state dismisses its proceeding or releases its exclusive, continuing jurisdiction."

SECTION 4.(a) G.S. 48-2-205 reads as rewritten:

"**§ 48-2-205. Recognition of adoption decrees from other jurisdictions.**

A final adoption decree issued by any other state must be recognized in this State. Where a minor child has been previously adopted in a foreign country by a petitioner or petitioners seeking to readopt the child under the laws of North Carolina, the adoption order entered in the foreign country may be accepted in lieu of the consent of the biological parent or parents or the guardian of the child to the readoption. A man and a woman who adopted a minor child in a foreign country while married to one another must readopt jointly, regardless of whether they have since divorced. If either does not join in the petition, he or she must be joined as a necessary party as provided in G.S. 1A-1, Rule 19. If a man and a woman have adopted a minor child in a foreign country while married to one another and one of them has died, then the survivor may petition for readoption, and the court shall issue any decree of adoption in the names of both of the man and the woman who adopted the minor child in a foreign country."

SECTION 4.(b) G.S. 48-2-301(c) reads as rewritten:

"(c) If the individual who files the petition pursuant to Article 3 of this Chapter is unmarried, no other individual may join in the petition, except that a man and a woman who jointly adopted a minor child in a foreign country while married to one another must readopt jointly as provided in ~~G.S. 48-2-205.~~G.S. 48-2-205, and the survivor of the man and the woman who jointly adopted a minor child in a foreign country while married to one another may file to adopt in the names of both, as provided in G.S. 48-2-205."

SECTION 5. G.S. 48-2-606(b) reads as rewritten:

"(b) In stating the date and place of birth of an adoptee born outside the United States, the court ~~shall:~~shall do each of the following:

(1) Enter the date ~~and place~~ of birth as stated in the certificate of birth from the country of origin, the United States Department of State's report of birth abroad, or the documents of the United States Immigration and Naturalization ~~Service;~~Service or a date of birth based upon medical evidence by affidavit or testimony as to the probable chronological age of the adoptee and other evidence the court finds appropriate to consider.

(2) ~~If~~ Enter the place of birth as stated in the certificate of birth from the country of origin, the United States Department of State's report of birth abroad, or the documents of the United States Immigration and Naturalization Service or, if the exact place of birth is unknown, enter the information that is known, including the country of ~~origin; and~~origin.

~~(3) If the exact date of birth is unknown, determine and enter a date of birth based upon medical evidence by affidavit or testimony as to the probable chronological age of the adoptee and other evidence the court finds appropriate to consider.~~"

SECTION 6. G.S. 48-3-303(c)(12) reads as rewritten:

"(c) The preplacement assessment shall, after a reasonable investigation, report on the following about the individual being assessed:

…

(12) The agency preparing the preplacement assessment may redact from the preplacement assessment provided to a placing parent or guardian detailed information reflecting the prospective adoptive parent's ~~income and financial account balances~~ income, expenditures, assets, liabilities, and social security numbers, and detailed information about the prospective adoptive parent's extended family members, including surnames, names of employers, names of schools attended, social security numbers, telephone numbers and addresses, and other similarly detailed information about extended family members obtained under subsections (b) and (c) of this section."

SECTION 7.(a) G.S. 48-3-605(c) is amended by adding a new subdivision to read:

"(c) An individual before whom a consent is signed and acknowledged under subsection (a) of this section shall certify in writing that to the best of the individual's knowledge or belief, the parent, guardian, or minor to be adopted executing the consent has met each of the following:

…

(5) Been advised of the right to seek the advice of legal counsel before executing the consent."

SECTION 7.(b) G.S. 48-3-606(14)c. reads as rewritten:

"**§ 48-3-606. Content of consent; mandatory provisions.**

A consent required from a minor to be adopted, a parent, or a guardian under G.S. 48-3-601 must be in writing and state each of the following:

…

(14) That the person executing the consent has:

…

c. Been advised of the right to ~~employ independent~~ seek the advice of legal counsel."

SECTION 7.(c) G.S. 48-3-702(b1) is amended by adding a new subdivision to read:

"(b1) An individual before whom a relinquishment is signed and acknowledged under subsection (a) of this section shall certify in writing that to the best of the individual's knowledge or belief, the parent, guardian, or minor to be adopted executing the relinquishment has met each of the following:

…

(5) Been advised of the right to seek the advice of legal counsel before executing the relinquishment."

SECTION 7.(d) G.S. 48-3-703(a)(12)c. reads as rewritten:

"(a) A relinquishment executed by a parent or guardian under G.S. 48-3-701 must be in writing and state the following:

…

(12) That the individual executing the relinquishment has:

…

c. Been advised of the right to ~~employ independent~~ seek the advice of legal counsel."

SECTION 8. G.S. 48-9-102 reads as rewritten:

"**§ 48-9-102. Records confidential and sealed.**

…

(d1) The Division, within 40 days after receipt of the record in subsection (d), shall conduct a limited review for the sole purpose of identifying any obvious error on the report to vital records that is prepared by the superior court clerk and to notify the clerk of the error. If the Division notifies the superior court clerk of an error in the report to vital records, then the clerk shall correct the report and return it to the Division within 10 days after receipt of the notice.

(e) The Division ~~must~~ shall, subject to the review in (d1), cause the papers and reports related to the proceeding to be permanently indexed and filed.

(f) The Division ~~shall~~ shall, within 40 days after receiving it from the court, transmit a report of each adoption and any name change to the State Registrar if the adoptee was born in this State. In the case of an adoptee who was not born in this State, the Division ~~shall~~ shall, within 40 days after receiving it from the court, transmit the report and any name change to the appropriate official responsible for issuing birth certificates or their equivalent.

…."

SECTION 9. G.S. 48-9-109(1) is amended by adding a new sub-subdivision to read:

"**§ 48-9-109. Certain disclosures authorized.**

Nothing in this Article shall be interpreted or construed to prevent:

(1) An employee of a court, agency, or any other person from:

…

d. Giving a file-stamped copy of a document to a person, or to the legal representative of a person, who has filed the document in an adoption proceeding."

SECTION 10. G.S. 1-597 reads as rewritten:

"**§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.**

(a) Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails in the Periodicals class in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least 25 of the 26 consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by G.S. 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of G.S. 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of G.S. 1-597 to 1-599. This provision shall be retroactive to May 1, 1940, and all publications, advertisements and notices published in accordance with this provision since May 1, 1940, are hereby validated.

(b) Notwithstanding the provisions of G.S. 1-599, whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this

State to be published or advertised in a newspaper qualified for legal advertising in a county and there is no newspaper qualified for legal advertising as defined in this section in such county, then it shall be deemed sufficient compliance with such laws, order or judgment by publication of such notice or any other such paper, document or legal advertisement of any kind or description in a newspaper published in an adjoining county or in a county within the same district court district as defined in G.S. 7A-133 or superior court district or set of districts as defined in G.S. 7A-41.1, as the case may be; provided, if the clerk of the superior court finds as a fact that such newspaper otherwise meets the requirements of this section and has a general circulation in such county where no newspaper is published meeting the requirements of this section.

(c) Whenever a notice or any other paper, document, or legal advertisement of any kind or description is required to be published in a jurisdiction outside of North Carolina where legal notices are customarily published in specialized legal publications, any form of publication which meets the requirements for legal notices under the law of the locality where it is published shall be deemed sufficient under this section."

SECTION 11. Article 38 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-3807. Adoption of the Interstate Compact on the Placement of Children regulations.**

The Interstate Compact on the Placement of Children regulations and any subsequent amendments that are adopted by the Association of Administrators of the Interstate Compact on the Placement of Children of the American Public Human Service Association are hereby enacted into law and shall apply to all interstate placements of children between North Carolina and jurisdictions that are a party to this Compact."

SECTION 12. Article 38 of Chapter 7B of the General Statutes is amended by adding a new section to read:

"**§ 7B-3808. Action for Interstate Compact administrator to forward a request.**

The Interstate Compact on the Placement of Children office at the Department of Health and Human Services has the authority to request supporting or additional information necessary to carry out the purpose and policy of the compact and to require assurance that the placement meets all applicable North Carolina placement statutes. Any sending agency that intends to place a child into and out of North Carolina shall submit a complete request to the Interstate Compact on the Placement of Children office at the Department of Health and Human Services. To be considered a complete request, the submission must comply with the Interstate Compact on the Placement of Children regulations and include any supporting additional information that the Department of Health and Human Services or the receiving state deems necessary. Unless otherwise provided by the Interstate Compact on the Placement of Children regulations, when the Department of Health and Human Services receives an incomplete request, the Department of Health and Human Services shall provide either the sending agency in North Carolina or the receiving state with written notice of the specific information needed to process the request and shall allow the sending agency 10 business days from the date of the notice to submit the requested information. If after the expiration of the 10 business days the Interstate Compact on the Placement of Children office at the Department of Health and Human Services does not receive the requested information or the sending agency does not withdraw its request, the request shall be deemed expired."

PART IV. EFFECTIVE DATE

SECTION 13. Part II and Part III of this act become effective October 1, 2019. Part I of this act becomes effective October 1, 2019, and applies to distributions on or after that date. Except as otherwise provided, the act is effective when it becomes law.

In the General Assembly read three times and ratified this the 15th day of July, 2019.

s/ Daniel J. Forest
President of the Senate

s/ Tim Moore
Speaker of the House of Representatives

s/ Roy Cooper
Governor

Approved 12:09 p.m. this 26th day of July, 2019