

IV. THE DEDUCTIBILITY OF ALIMONY PURSUANT TO I.R.C. § 71

Under I.R.C. § 215, “in the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual’s taxable years.” I.R.C. § 215 (2001). However, in order for payments to be deductible, the eight requirements of I.R.C. § 71 must be met:

1. Payments must be made in cash;
2. Payments must be to a spouse or on behalf of the spouse;
3. Payments must be made pursuant to a divorce or separation instrument (including a pendente lite order);
4. Payments may not be designated as non-qualifying for tax deductions by the payor or non-taxable to the recipient;
5. Spouses may not be members of the same household (except for pendente lite orders);
6. The payment must terminate at the recipient spouse’s death;
7. Spouses may not file a joint return; and,
8. Payment can not constitute child support.

"The mere use of the word 'alimony' does not affect the tax consequences of payments." Hoover v. C.I.R., 102 F.3d 842,845 (6th Cir.1996). See, also, Sroufe v. Commissioner, 69 T.C.M. 2870,2874, 1995 WL 35092 (1995)(stating that even though a divorce settlement agreement had used the term ‘alimony’ to characterize payments, the payments could not be deemed alimony under § 71 because nothing in the document suggested that the payor’s obligation would terminate upon the payee’s death).

A. REQUIREMENT # 1 - PAYMENTS MUST BE MADE IN CASH

I.R.C. § 71(b)(1) provides that “the term alimony or separate maintenance payment means any payment in cash.”

CASH PAYMENTS MAY BE MADE TO A THIRD PARTY

Where a payor/car dealer agrees to provide his wife with a “new Lincoln Town Car each and every year, and in addition provide for all maintenance on said automobile including, repairs, insurance, gas, oil and license ... until the death of either party,” such “cash payments for the lease, insurance, and maintenance of the automobile” and medical insurance premiums are “properly treated as cash payments.” Medlin v. C.I.R., 1998 WL 725780, 76 T.C.M. 707 (1998).

TRANSFERS OF PROPERTY DO NOT QUALIFY

“Only cash payments, including checks and money orders payable on demand, qualify as alimony or separate maintenance payments. Transfers of services or property, execution of a debt instrument by the payor, or the use of property of the payor do not qualify.” Medlin v. C.I.R., 1998 WL 725780, 76 T.C.M. 707 (1998)(Temp.Treas. Reg. § 1.71-IT(b), Q&A 5 (1998)).

B. REQUIREMENT # 2 - PAYMENTS MUST BE TO SPOUSE OR ON BEHALF OF THE SPOUSE

I.R.C. § 71(b)(1) provides that the “term alimony or separate maintenance payment” means any payment in cash if —

1. Such payment is received by (or on behalf of) a spouse under a divorce or separation instrument.

TUITION PAYMENTS QUALIFY WHETHER MADE TO THE INSTITUTION OR TO REIMBURSE WIFE

Tuition payments were “on behalf of” spouse where an agreement provided that “Husband shall pay to Wife all expenses for Wife to complete a four (4) year college degree, to include only the actual tuition, books, laboratory fees and matriculation fees, activity fees, and other fees charged by the institution selected by Wife, which is presently Oglethorpe University of Georgia in Atlanta ... If certain expenses cannot be paid directly to the institution, and Wife pays them, then Husband shall be responsible for reimbursement ... Husband's obligation shall not be terminated in the event Wife chooses to attend college on a part time basis, but will terminate after the summer quarter of 1999.” Hopkinson v. C.I.R., T.C. Memo 1999-154 (1999).

CAR PAYMENTS TO A DEALER QUALIFY

Where a payor-spouse made cash payments to a car dealer (third party) under a property settlement agreement for the sole benefit of the payee spouse and the payments would not have been made but for the terms of the agreement, such payments were made “on behalf of” the payee spouse within the meaning of I.R.C. §71(b)(1)(A). Medlin v. C.I.R., 1998 WL 725780, 76 T.C.M. 707 (1998).

**PAYMENTS ON PROPERTY OWNED BY THE PAYOR SPOUSE
DO NOT QUALIFY**

Assuming all other requirements are satisfied, a payment of cash by the payor spouse to a third party under the terms of the divorce or separation instrument will qualify as payment of cash which is received ‘on behalf of a spouse.’ For example, cash payments of rent, mortgage, tax or tuition liabilities of the payee spouse made under the terms of the divorce or separation instrument will qualify as alimony or separate maintenance payments. Any payments to maintain property owned by the payor spouse and used by the payee spouse (including mortgage payments, real estate taxes and insurance premiums) are not payment on behalf of a spouse even if those payments are made pursuant to the terms of the divorce or separation instrument. Premiums paid by the payor spouse for term or whole life insurance on the payor’s life made under the terms of the divorce or separation instrument will qualify as payments on behalf of the payee spouse to the extent that the PAYEE SPOUSE is the owner of the policy. Temp. Treas. Reg. § 1.71-1T(b), A-6 (2001).

C. REQUIREMENT # 3 - PAYMENTS MUST BE MADE PURSUANT TO A DIVORCE OR SEPARATION INSTRUMENT

I.R.C. § 71(b)(1) provides that the “term alimony or separate maintenance payment” means any payment in cash if —

2. Such payment is received by (or on behalf of) a spouse under a divorce or separation instrument.

I.R.C. § 71(b)(2) provides that the term “divorce or separation instrument” means —

(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

(B) a written separation agreement, or

(C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support or maintenance of the other spouse.

“While the instrument does not have to be part of the divorce decree itself, some written agreement must exist that creates a legally enforceable right to the support payments.”

Anderson v. Commissioner, T.C. Memo 1999-53 (1999) (citing Prince v. Commissioner, 66 T.C. 1058, 1066-1067, 1976 WL 3686 (1976).

PENDENTE LITE ALIMONY

Part (C) above covers pendente lite alimony orders if they meet the requirements of Hoover v. C.I.R., 102 F.3d 842 (6th Cir. 1996) that the order specifically state that the support payments terminate upon the death of the payee, and the requirement of I.R.C. § 71 (C)(1) that they are not child support. See, Section IV-9. Also See, Section IV-6 and IV-7 for more information on pendente lite alimony.

D. REQUIREMENT # 4 - PAYMENTS MAY NOT BE DESIGNATED AS NON-QUALIFYING FOR ALIMONY

I.R.C. § 71(b)(1) provides that the “term alimony or separate maintenance payment” means any payment in cash if —

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

PAYMENTS WHICH HAVE THE FEATURES OF ALIMONY WILL BE TAXABLE TO THE RECIPIENT UNLESS THE PAYMENTS ARE CLEARLY DESIGNATED AS NOT INCLUDABLE UNDER THE RECIPIENT’S GROSS INCOME UNDER IRC § 71(B)(1)(B) AND NOT ALLOWABLE AS A DEDUCTION UNDER § 215

In Baker v. CIR, T.C. Memo 2000-164, U.S. Tax Ct. 2000, the Court held that a husband’s payments to his former wife were alimony, despite the existence of a provision entitled, “Property Settlement.” The Property Settlement provision provided that: “Beginning June 1, 1994, the Plaintiff shall pay the Defendant Fifty (50%) Percent of his monthly gross Military Retirement pay from the U.S. Army each month as a property settlement until such time as she remarries or co-habitates with another person or until her death. In the event the Defendant remarries, then she shall receive Twenty-Five (25%) Percent of the Plaintiff’s monthly gross military retirement pay. The said monthly gross retirement pay will be the top line of the Plaintiff’s LES statement. Said payments shall be paid directly to the Defendant’s checking account by the U.S. Government through the Plaintiff’s allotment.” Pursuant to this determination, the Court stated, “the designation in the instrument need not specifically refer to sections 71 and 215.” “However, the statutory language of section 71(b)(1)(B) does not allow

designations by attenuated implication.” Baker v. C.I.R., T.C. Memo 2000-164, U.S. Tax Ct. 2000. (citing Estate of Goldman v. C.I.R., 112 T.C. 317, (1999).

NONINCLUDABILITY IN THE PAYEE’S INCOME MUST BE VERY SPECIFICALLY STATED

When an agreed order specified that the payor spouse “shall be responsible for income taxes due on the amount which is ultimately adjudicated to have been his alimony pendente lite obligation, such language, in the view of the Court, does not suffice to constitute a designation for purposes of section 71(b)(1)(B).” As a result, such funds are deductible alimony. Jaffe v. Commisioner, T.C. Memo 1999-196 (1999).

“For a legal instrument to make known directly that a spouse's payments are not to be treated as income, we believe that the instrument must contain a clear, explicit and express direction to that effect.” Richardson v. Commissioner, T.C. Memo 1995-554, *aff’d* 125 F.3d 551,556 (7th Cir. 1997).

CLEAR LANGUAGE IS NEEDED TO INSURE THAT PROPERTY SETTLEMENT PAYMENTS ARE NOT DEEMED ALIMONY

Where an agreement contains “a clear, explicit and express direction” that payments are not to be includable in income, a court will designate such payments as non-alimony within the meaning of § 71. Proper designations appear in the following language: “The parties intend and agree that all transfers of property as provided for herein are subject to the provision Section 1041, Internal Revenue Code of 1954 as amended, entitled, "Treatment of Transfers of Property Between Spouses or Incident to Divorce", and that they shall be accounted for and reported on his or her respective individual income tax returns in such a manner so that no gain or loss shall be recognized as a result of the division and transfer of property as provided for herein. Each party shall file his or her Federal and State tax returns, and report his or her income and losses thereon, consistent with the foregoing intent of reporting the division and transfers of property as a non-taxable event.” Estate of Goldman v. C.I.R., 112 T.C. 317, 320-323,U.S. Tax Ct. 1999. *Compare* Baker v. C.I.R., T.C. Memo 2000-164, U.S. Tax Ct. 2000 (finding “that the labeling of the payments as a ‘property settlement’, with nothing more, is not a clear, explicit, and express direction that the payments are not includable in petitioner's gross income and are not deductible”).

E. REQUIREMENT # 5 - SPOUSES MAY NOT BE MEMBERS OF THE SAME HOUSEHOLD AFTER THE FINAL DECREE OF LEGAL SEPARATION, DIVORCE OR SEPARATE MAINTENANCE

I.R.C. § 71(b)(1) provides that the “term alimony or separate maintenance payment” means any payment in cash if —

(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.

1. (a) **POST-DIVORCE, THE PARTIES MUST LIVE IN SEPARATE DWELLINGS**

“It is our view Congress intended that a husband and wife should not be treated as ‘separated and living apart’ when both are living under the same roof.”

Washington v. C.I.R., 77 T.C. 601,605 (1981).

Where a husband and wife “occupied separate bedrooms, used separate bathrooms, prepared meals at different places did not eat together, and did not converse with each other,” they were not ‘separated’ within the meaning of the Internal Revenue Code. Consequently, the payor spouse could not deduct payments pursuant to I.R.C. § 215. Washington v. C.I.R., 77 T.C. 601, 603 (1981).

Generally, a payment made at the time when the payor and payee spouses are members of the same household cannot qualify as an alimony or separate maintenance payment if the spouses are legally separated under a decree of divorce or of separate maintenance. For purposes of the preceding sentence, a dwelling unit formerly shared by both spouses shall not be considered two separate households even if the spouses physically separate themselves within the dwelling unit. Temp. Treas. Reg. § 1.71-IT, Q&A, 9 (2001).

(b) **OR, THE PARTIES MUST BE PREPARING TO LIVE IN SEPARATE DWELLINGS WITHIN 30 DAYS**

The spouses will not be treated as members of the same household if one spouse is preparing to depart from the household of the other spouse, and does depart not more than one month after the date the payment is made. Temp. Treas. Reg. § 1.71-IT, Q&A, 9 (2001).

2. PENDENTE LITE PAYMENTS – THE PARTIES MAY LIVE IN THE SAME DWELLING

If the spouses are not legally separated under a decree of divorce or separate maintenance, a payment under a written separation agreement or a decree described in section 71(b)(2)(C) may qualify as an alimony or separate maintenance payment notwithstanding that the payor and payee are members of the same household at the time the payment is made. Temp. Treas. Reg. § 1.71-1T, Q&A, 9 (2001).

3. TAXATION OF PENDENTE LITE PAYMENTS

Pendente lite alimony payments may be deductible by the payor and taxable to the payee under certain circumstances. The governing tax code section is I.R.C. § 71(b)(2)(C) which reads: “(C) A decree (not described in subparagraph (A)) requiring a spouse to make payments for the support and maintenance of the other spouse.” Also See, Temp. Treas. Reg. § 1.71-1T, Q&A, 9 (2001) discussed above.

The trial court may or may not desire to have the temporary alimony payments be taxable to the recipient and deductible by the payor. If the court desires that the alimony be deductible by the payor, the court will need to specifically state that the pendente lite alimony terminates upon the death of the recipient.

Where pendente lite support is being provided for a spouse and minor children, if the court desires that a portion of it be deemed alimony taxable to the recipient, the court should allocate a specific dollar amount as alimony or spousal maintenance and a specific dollar amount as child support. Further, if the order states that any of the amount designated as alimony or spousal support will be reduced on the happening of a contingency relating to a child, or at a time which can clearly be associated with such a contingency, that portion may be deemed to be child support and not deductible by the payor. I.R.C. § 71(c)(1).

Pendente lite alimony or spousal maintenance payments may be deductible by the recipient even though the parties reside in the same residence so long as the other requirements referenced in this comment are met. Temp. Treas. Reg. § 1.71-1T, Q&A, 9 (2001). The payments are not deductible, however, if the parties file a joint federal income tax return for the year in which the pendente lite alimony or spousal maintenance payments were made. I.R.C. § 71(e).

F. REQUIREMENT # 6 - THE PAYMENT MUST TERMINATE AT THE RECIPIENT SPOUSE'S DEATH

I.R.C. § 71(b)(1) provides that the “term alimony or separate maintenance payment” means any payment in cash if —

(D) There is no liability to make 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.

THE DECREE OR STATE LAW MUST PROVIDE FOR TERMINATION AT THE DEATH OF THE PAYEE

Where a “divorce decree contains no provision for termination of the payments at issue” upon death and Ohio state law did not provide for termination, such payments “fail to meet the definition of alimony set forth in § 71(b)(1), and cannot be deductible under § 215.” Hoover v. C.I.R., 102 F.3d 842,848 (6th Cir.1996).

Where a divorce decree awards “alimony as division of equity” with payments of at least \$3000 per month “until said amount is paid in full” such payments do not qualify as alimony where the divorce decree does not terminate the payments on death and the payee spouse receives a security interest which remains “in full force and effect until all of the alimony has been paid in full.” Hoover v. C.I.R., 102 F.3d at 844,888. (6th Cir.1996).

A court determining whether payments qualify as alimony as defined in § 71 will turn to state law only to determine whether state law, by requiring that the payments terminate upon the payee’s death, ensures that the payments satisfy § 71(b)(1)(D) ... a federal court will not engage in complex, subjective inquiries under state law; rather, the court will read the divorce instrument and make its own determination based on the language of the document. Hoover v. C.I.R., 102 F.3d 842,846 (6th Cir.1996).

Lovejoy v. Commission, 293 F3d 1208 (10th Cir. 2002), confirms that unless state law specifically provides that alimony terminates upon the death of the payee, the payments are not deductible. Tennessee law does not specifically provide for termination of alimony *in futuro* upon the death of the payee, although rehabilitative alimony and transitional alimony do, by statutory provision, terminate upon the death of the payee.

STATUTORY AUTHORITY

T.C.A. § 36-5-101(d)(2) governs rehabilitative alimony and specifically provides that:
“Rehabilitative support and maintenance shall terminate upon the death of the recipient.”

T.C.A. § 36-5-101(d)(1)(D) governs transitional alimony and specifically provides that:
“Transitional alimony shall terminate on the death of the recipient.”

There is no automatic statutory termination of alimony *in futuro* or alimony *in solido* upon the death of the payee, and no cases were found providing for such automatic termination.

G. REQUIREMENT # 7 - SPOUSES MAY NOT FILE A JOINT RETURN

I.R.C. § 71 (e) provides that – This section and section 215 shall not apply if the spouses make a joint return with each other.

“Neither section 215 nor section 71 applies if the spouses file a joint return.”

Croteau v. C.I.R., T.C. Memo 1998-9 (1998).

H. REQUIREMENT # 8 - CHILD SUPPORT PAYMENTS CANNOT QUALIFY

I.R.C. 71(c)(1) provides that a payment is not includable in the payee’s gross income or deductible by the payor spouse, to the extent that “the terms of the divorce or separation instrument fix (in terms of an amount of money or part of the payment) as a sum which is payable for the support of children of the payor spouse.”

(2) For purposes of paragraph (1), if any amount specified in the instrument will be reduced —

3. 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

at a time which can clearly be associated with a contingency of a kind specified in paragraph (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.

TUITION PAYMENTS FOR CHILD DO NOT QUALIFY

College and tuition payments made under the express provisions of a separation stipulation “for and in behalf of the children” are not alimony within the meaning of § 71. Sperling v. C.I.R., 726 F.2d 948,951 (1984).

PAYMENTS WITH CONTINGENCIES RELATED TO CHILD DO NOT QUALIFY

A contingency relates to a child of the payor if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to a child of the payor include the following: the child's attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment. There are two situations, described below, in which payments which would otherwise qualify as alimony or separate maintenance payments will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor ... The first situation referred to above is where the payments are to be reduced not more than 6 months before or after the date the child is to attain the age of 18, 21, or local age of majority. The second situation is where the payments are to be reduced on two or more occasions which occur not more than one year before or after a different child of the payor spouse attains a certain age between the ages of 18 and 24, inclusive. The certain age referred to in the preceding sentence must be the same for each such child, but need not be a whole number of years. The presumption in the two situations described above that payments are to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor may be rebutted (either by the Service or by taxpayers) by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. Temp. Treas. Reg. § 1.71-1T, A-17, A-18 (2001).

I. RECOMPUTATION WHERE THERE IS EXCESS FRONT-LOADING OF ALIMONY PAYMENTS

I.R.C. §71 (f)(1) states that: If there are excess alimony payments under I.R.C. §71(f)(1) —

A. the payor spouse shall include the amount of such excess payments in gross income for the payor spouse's taxable year beginning in the 3rd post-separation year, and

B. the payee spouse shall be allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee's taxable year beginning in the 3rd post-separation year.

(2) The term excess alimony payments means the sum of —

A. the excess payments for the 1st post-separation year, and

B. the excess payments for the 2nd post separation year.

(3) The amount of excess payments for the first post separation years is the excess (if any) of:

A. the amount of the alimony or separate maintenance payments paid by the payor spouse during the 1st post-separation year, over

B. the sum of —

I. the average of —

(I) the alimony or separate maintenance payments paid by the payor spouse during the 2nd post separation year, reduced by the excess payments for the 2nd post separation year, and

(II) the alimony or separate maintenance payments paid by the payor spouse during the 3rd post separation year, plus

II. \$15,000

(4) The amount of excess payments for the 2nd post-separation year is the excess (if any) of:

A. the amount of the alimony or separate maintenance payments paid by the payer spouse during the 2nd post-separation year, over

B. the sum of –

I. the amount of the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

II. \$15,000

AS A GENERAL RULE OF THUMB, FRONT-LOADING CAN BE AVOIDED IF, WITHIN THE FIRST THREE CALENDAR YEARS AFTER THE DIVORCE, THERE IS NO MORE THAN A \$15,000 VARIATION IN ALIMONY FROM YEAR TO YEAR.

OPERATION OF I.R.C. § 71(F) - EXCESS PAYMENTS

If the amount of alimony or separate maintenance payments paid in any post-separation year (referred to as the 'computation year') falls short of the amount of alimony or separate maintenance payments paid in any prior post-separation year by more than \$15,000, the payor must compute an 'excess amount' for the computation year. The excess amount for any computation year is the sum of excess amounts determined with respect to each prior post-separation year. The excess amount determined with respect to a prior post-separation year is the excess of (1) the amount of alimony or separate maintenance payments paid by the payor spouse during such prior post-separation year, over (2) the amount of the alimony or separate maintenance payments paid by the payor spouse during the computation year plus \$15,000. For purposes of this calculation, the amount of alimony or separate maintenance payments made by the payor spouse during any post-separation year preceding the computation year is reduced by any excess amount previously determined with respect to such year. Temp. Treas. Reg. § 1.71-1T(f), Q-24 (2001).

“Payments under decrees described in section 71(b)(2)(C) (pendente lite) are to be disregarded entirely for purposes of applying the excess front-loading rules.” Temp. Treas. Reg. § 1.71-1T(f), Q-21 (2001).