

Maintenance in Family Law: A Lawyer's Liability Bear Trap

By William
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KATA members certainly represent the best of Kentucky's trial lawyers. Many members handle an occasional dissolution case while others handle quite a few. Some divorces require a higher level of skill in a number of sub-areas of expertise; failure in meeting these duties may subject the lawyer to quite unexpected liability.¹

Alternative Dispute Resolution (ADR) sources consistently maintain that the vast majority of all divorce cases are settled without trial.² With the ever-expanding role of mediation in the Family Courts and Circuit Courts, more and more cases are settled through mediation, which creates substantial potential liability in hastily-drawn, often hand-written settlement agreements.

This article is not about trial practice, but rather settlement and drafting, with emphasis on taxes and some of the traps that can create serious problems for the practitioner.

We will also not discuss the practitioner's probable responsibility to pursue maintenance in any long-term marriage where there is disparate income and/or assets. Even so, the practitioner must keep in mind that times have changed since the old rehabilitative maintenance statutory approach and the potential for liability in such a case can be quite substantial.³

Enforceability

The first divorce language trap requiring discussion involves the inflexible element require-

ments created by the IRS for the deductibility of maintenance.

Seven "D"s

Though the checklist below can be more esoteric than it looks, I am setting forth the simple rules of drafting for deductibility:

Dollars – Cash received by or on behalf of a spouse.

Documents – Under a divorce or separation instrument.

Designation – You may not designate payments as excluded from gross income under § 71 and not allowable as a deduction under § 215 ("private ordering").

Distance – Where the status of the marriage is changed, that is, where the parties are legally separated under a judgment of dissolution or "separate maintenance," the spouses or former spouses are not members of the same household.

Death – Payments must cease upon the death of the payee.

Dependents – Payment may not be fixed as child support.

Dumping – The alimony payments cannot be front-loaded in excess of the permissible amounts, otherwise the alimony will be subject to recomputation in the third post-separation year.⁴

Needless to say, you might have very unhappy clients if they thought they had deductible maintenance and did not, due to your missing a basic element set forth in the above Seven "D"s. The more sophisticated refinements of the Seven "D"s are discussed in Melvin Frumkes' book, cited above. Litigating and mediating many complex maintenance cases caused this writer to issue this Seven "D"s warning to even the seasoned litigator, as tax expertise is not normally in the practitioner's bag of tools.

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Amount and Duration

Though not a tax point, you must also keep clear whether you are drafting for a maintenance award intended to be for a limited duration and amount, or modifiable.⁵ This point is often needlessly litigated due to failure to provide clear language. The simplest way to ensure a definite limit on amount and duration is to have the language spell out the agreed total liability (i.e., 60 months x \$4,000 = \$240,000 total maintenance liability). Obviously, you will want to further provide this covenant's provisions are non-modifiable. Do not forget the death-of-the-payee contingency.

Front-loading Recapture

The most draconian IRS provision sometimes inadequately considered or simply overlooked is found in the IRC provisions used to curb the use of front-loaded deductible alimony. It does not matter whether it is a pay-off for property division, attorney fees for the recipient-spouse, or simply attorney negligence. It will cause all the maintenance to be non-deductible and get you in trouble.

If the maintenance provision involves level payments for a period in excess of three years, you need not be concerned about front-loading recapture.

Continued on following page

Table A
Worksheet Alimony Recapture

\$ _____	1. Alimony paid in second calendar year of permanent order
\$ _____	2. Alimony paid in third calendar year of permanent order
\$ _____	3. Floor \$15,000
\$ _____	4. Line 2 plus Line 3
\$ _____	5. Recapture for second-year payments (Line 1 minus Line 4), but not less than zero
\$ _____	6. Alimony paid in first calendar year of permanent order
\$ _____	7. Adjusted alimony paid in year two (Line 1 minus Line 5)
\$ _____	8. Alimony paid in third year (Line 2)
\$ _____	9. Line 7 plus Line 8
\$ _____	10. Average alimony paid in second and third years (Line 9 divided by 2)
\$ _____	11. Floor
\$ _____	12. Add Lines 10 and 11
\$ _____	13. Recapture for first-year payments (Line 6 minus Line 12)
\$ _____	14. Total recaptured alimony (Line 5 plus Line 13)



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The general concept for recapture rules compares maintenance paid in each of the first three years of the permanent maintenance provisions. Internal Revenue Code §71(f)(1) to (4) defines the formula for determining the amount to recapture. If the annual amounts differ between the second and third year by more than \$15,000, and the amount in the first year is significantly higher than the second and third year, a portion of the support paid is probably subject to recapture.

(Table A on page 7 is a worksheet for alimony recapture.)

A Positive Note

After discussing so many bear traps, which could create disastrous liability, I would like to end on a positive note to help you resolve cases using a provision of the Internal Revenue Code. Recapture does not include maintenance paid under *pendente lite* orders entered prior to the decree.⁶ You may consider a large *pendente lite* payment, which will not trigger recapture. This Code provision may well allow your client to finance attorney fees or debt payments or relocation expense-type payments and yet have them fully deductible. If your client is in the 40 percent bracket, this

may not ease the pain of divorce but it may ease the pain of your fee.

1. *Faris v. Stone*, 2001-SC-0864-DG and 2002-SC-0424-DG (Ky. 2003); failure to have business appraised.
2. *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition*, by Robert Baruch Bush and Joseph P. Folger, Jossey-Bass Publishers, San Francisco, 1994. See also "Alternative Dispute Resolution Processes for Family Law Matters," in the *Journal of the American Academy of Matrimonial Lawyers*, Volume 14, Number 2 (1997).
3. The statutory hurdles found in KRS 403.200(1)(a) and (b) are not as confining and difficult to the trial court in long-term marriages.
 - (1) In a proceeding for dissolution of marriage or legal separation, or a proceeding for maintenance following dissolution of a marriage by a court which lacked personal jurisdiction over the absent spouse, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance:
 - (a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs; and
 - (b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances

make it appropriate that the custodian not be required to seek employment outside the home.

- See *Frost v. Frost*, 581 S.W.2d 582 (Ky.App. 1979); *Atwood v. Atwood*, 643 S.W.2d 263 (Ky.App. 1982); *Combs v. Combs*, 622 S.W.2d 679 (Ky.App. 1981); and *Clark v. Clark*, 782 S.W.2d 56 (Ky.App. 1990) and *Drake v. Drake*, 721 S.W.2d 728 (Ky.App. 1986).
4. *Frumkes on Divorce Taxation*, Third Edition, by Melvyn B. Frumkes, James Publishing Co., 2003. The basic starting place on this issue is IRC § 71 (Alimony and separate maintenance payments), § 215 (Alimony, etc. payments) and § 682(a) and (b) (Alimony trusts). The temporary regulations have been around since 1984. Mr. Frumkes has practiced law for 50 years and is one of the prolific writers on divorce taxation. Any practitioner who handles cases which involve complex property or maintenance issues would be tremendously well served to purchase this volume.
 5. See *John v. John*, 893 S.W.2d 373 (Ky.App. 1995) [surprisingly not terminated by remarriage] and *Dame v. Dame*, 628 S.W.2d 625 (Ky. 1982) [maintenance in gross is non-modifiable] and *Low v. Low*, 777 S.W.2d 936 (Ky. 1989) [exception to *Dame* rule].
 6. IRC § 71(f)(5).



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