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Advise Your Clients Now About New Family Law Considerations Under the 2018 Tax Law

As 2019 nears, the window is closing to timely advise clients about various family law considerations under the 2018 federal tax law overhaul. For instance, prospective payors of spousal support might be unhappy to learn too-late that it will no longer be deductible. Clients with pre- or post-nuptial agreements ("PNAs") might wish to now become pro-active. In currently-pending divorces, owners of newly-tax-preferred family businesses might try to expedite buy-outs of their spouses' interests before the tax savings more obviously manifest.

Spousal Support

The new law provides in part that, in any spousal support orders **entered after December 31, 2018**, the support payor will **not** be able to deduct it and the recipient will not have to claim it as income for tax purposes. In other words: The 75-year-old deduction will still be available going forward, but only to those who already have spousal support orders or might at least gain them prior to the year's end.

The deduction subsidizes increased amounts of spousal support. Payors in higher tax brackets than their spouse-recipients can pay relatively generous amounts of support, take the tax deduction and thus pay significantly less in after-tax dollars. Recipients in lower tax brackets benefit from the higher amounts, but typically pay relatively low or no related taxes. The Treasury has thereby created a type of arbitrage, helping divorcing couples accomplish softer financial landings as they divide one household into two.

The Census Bureau reports that 243,000 Americans received spousal support last year. A whopping 98% of them were women.

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According to a nationwide survey of the over 1,600 Fellows of the American Academy of Matrimonial Lawyers (aaml.org), the change will make divorce more emotionally challenging. Awards will likely drop. Recipients' budgets will tighten. Most Fellows believe that family law cases will thus become more acrimonious.

We cannot assume that our courts will be able to handle all the potential last-minute rushes for pre-2019 dissolution judgments and spousal support orders.

PNAs

California public policy favors prenuptial agreements and, to an extent, post-nuptial agreements, too. PNAs are intended to clarify spouses' expectations and (hopefully) minimize litigation in case of an eventual divorce. Many, of course, contain spousal support provisions. Prospective support payors who previously negotiated with expectations of enjoying deductibility might reasonably be concerned to later learn of its loss.

Will future payors who "lost" deductibility challenge their spousal support provisions, for instance through "severance" clauses located elsewhere in the PNAs? Would **both sides** then tend toward challenging their **entire** PNAs? Would the PNAs' drafters get blamed for all this new litigation? Would the blame extend to the parties' present attorneys and other professionals - even if they might not have drafted the PNAs?

Most clients would understandably prefer to "let sleeping dogs lie" rather than revisit their PNAs. But the best practice is to at least offer to have those potentially difficult discussions now, while a prospective payor might still timely act. Our firm anticipates opportunistic post-2019 complaints that "my lawyer never told me about the loss of deductibility and I would have attempted to re-negotiate or else filed for divorce had I known." Avoid becoming one of those potential targets!

Family Business Buy-outs

Under the new law, certain real estate development and construction-related businesses, among others, are already achieving tax benefits as public policy-preferred enterprises. If a dissolution case involving such a family business might already be midway, **now** might be the time for the party wanting it awarded to her to quickly resolve the valuation and "buy-out" process. That is because the company's newly-increased cash-flow will likely translate into a higher business value and, therefore, buy-out burden for the "purchasing" spouse. She might



not want to wait for the tax savings to more obviously manifest through routine 2018 year-end financial reconciliations and tax preparations.

Conclusion

The 2018 tax law overhaul requires us to advise our clients about the resulting family law considerations. The potential exposure – possibly extending to those who might not consider themselves “family law lawyers” - for failing to do this is easily imagined. The window for achieving pre-2019 judgments and orders is closing. As our courts might not be able to handle all the potential last-minute rushes, the period for discussing these things is **now**.

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