ALIMONY, MAINTENANCE AND TEMPORARY SPOUSAL SUPPORT

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Chapter _____

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I. GENERALLY

Texas became the last state in the nation to enact a statute that would allow a court, under some circumstances, to impose on one ex-spouse a duty to provide support to another ex-spouse out of future income. The Texas Legislature enacted the spousal maintenance statute in 1995, which became effective September 1, 1995.

Although the spousal maintenance statute was regarded as a huge step toward reform in Texas law, it is nonetheless restrictive and spousal maintenance is difficult to obtain. As discussed below, spousal maintenance is generally limited to a maximum duration of three years and the monthly payment is limited to not more than $2,500 or 20% of the payor's income, whichever is less. *See Tex. Fam. Code Ann. §§ 8.054 and 8.055; see also O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.–Austin 2002, no pet.)

The purpose of the spousal maintenance statute was to provide spousal maintenance primarily as a temporary rehabilitative measure for a divorced spouse whose ability to self-support is lacking or has deteriorated through the passage of time while the spouse was engaged in homemaking activities and whose capital assets are not sufficient to support the reasonable minimum needs of the spouse. *Id.*; *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App.–Dallas 2003, no pet.).

"Maintenance" as defined in the Texas Family Code is an award in a suit for dissolution of a marriage of periodic payments from the future income of one spouse for the support of the other spouse. *Tex. Fam. Code Ann. § 8.001(1).* An order for maintenance is not authorized between unmarried cohabitants under any circumstances. *Tex. Fam. Code Ann. § 8.061.*

The term "alimony" is used to refer to a contractual agreement between the spouses for the future support of one of the spouses. Contractual alimony can be a useful tool in negotiating a settlement between divorcing spouses that will meet the needs of the receiving party and provide tax benefits to the paying party.

II. MAINTENANCE

A. Eligibility

Section 8.051 of the Texas Family Code outlines the eligibility for spousal maintenance. It provides as follows:

> "In a suit for dissolution of a marriage or in a proceeding for maintenance in a court with personal jurisdiction over both former spouses following the dissolution of their marriage by a court that lacked personal jurisdiction over an absent spouse, the court may order maintenance for either spouse only if:
>
> (1) the spouse from whom maintenance is requested was convicted of or received deferred adjudication for a criminal offense that also constitutes an act of family violence under Title 4 and the offense occurred:
>
> (A) within two years before the date on which a suit for dissolution of the marriage is filed; or
>
> (B) while the suit is pending; or
>
> (2) the duration of the marriage was 10 years or longer, the spouse seeking maintenance lacks sufficient property, including property distributed to the spouse under this code, to provide for the spouse's minimum reasonable needs, as limited by Section 8.054, and the spouse seeking maintenance:
>
> (A) is unable to support himself or herself through appropriate employment because of an incapacitating physical or mental disability;
>
> (B) is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because a physical or mental disability makes it necessary, taking into consideration the needs of the child, that the spouse not be employed outside the home; or
>
> (C) clearly lacks earning ability in the labor market adequate to provide support for the spouse's minimum reasonable needs, as limited by Section 8.054." *Tex. Fam. Code Ann. § 8.051.*
>
> NOTE: Merely obtaining a protective order does not satisfy the statutory requirement of "convicted of or received deferred adjudication" for a criminal offense.

1. Minimum Reasonable Needs

The statute does not define minimum reasonable needs, although the stated legislative purpose and intent was to provide a spouse with a temporary rehabilitative measure to enable him or her to become self-supporting, except in those cases where the spouse is subject to a mental or

physical disability. Acts of June 13, 1995, 74th Leg., R.S. ch. 655, § 10.01(a), 1995 Tex. Sess. Law Serv. ch. 655 (formerly codified as Tex. Fam. Code Ann. § 3.9601, repealed by Acts of April 17, 1997, 75th Leg., R.S., ch. 7, § 1, 1997 Tex. Sess. Law Serv. ch. 7).

Evidence must exist in the record regarding expenses and property of the spouse seeking maintenance. *See Alexander v. Alexander*, 982 S.W.2d 116 (Tex. App.– Houston [1st Dist.] 1998, no pet.)(comparison of income and expenses to determine minimum monthly needs); *see also Morris v. Morris*, 2001 WL 257809 (Tex. App– Amarillo)(unpublished)(trial court abused its discretion in awarding spousal support to wife where evidence was not sufficient to show minimum reasonable needs or value of property); *Stone v. Stone*, 119 S.W.3d 866 (Tex. App.– Eastland 2003, no pet.). Deciding what the minimum reasonable needs are for a particular individual or family is a fact specific determination that should be made by the trial judge on a case-by-case basis. *In re Hale*, 975 S.W.3d 694 (Tex. App.–Texarkana 1998, no pet.); *Lopez v. Lopez*, 55 S.W.3d 194 (Tex. App.–Corpus Christi 2001, no pet.).

NOTE: In defending against a request for alimony, the court should be requested to make specific findings as to the amount of the "minimum reasonable needs" of the spouse seeking maintenance. Also, the court should be requested to make specific findings as to the fair market value of the property owned by that spouse as his or her separate property as well as the property awarded to that spouse in the dissolution suit.

2. Sufficient Property to Provide for Minimum Reasonable Needs

The phrase "... lacks sufficient property, including property distributed to the spouse under this code, to provide for the spouse's minimum reasonable needs..." most likely refers to income producing property. It has been held in other states that use of a phrase similar to the Texas statute that the spouse seeking maintenance does not have to deplete his or her assets to be awarded alimony. See, for example, *Deatherage v. Deatherage*, 140 Ariz. 317, 681 P.2d 469 (Ct. App. Div. 1 1984); see also *Tex. Fam. Code Ann. § 8.006(b)* (addresses property that "contributes" to the minimum reasonable needs of the receiving spouse).

There are several courts that have upheld maintenance awards where the spouse receiving maintenance obtained substantial property in the divorce proceeding when those assets provided insufficient support.

Deltuva v. Deltuva, 113 S.W.3d 882 (Tex. App.–Dallas 2003, no pet.). – In *Deltuva*, the Court reversed a trial court's award of spousal maintenance because the award's duration was longer than three years, but otherwise approved the decision to award spousal maintenance. The court noted that the wife was awarded "the majority of the marital estate," *id.* at 888, but found there was evidence in the record to support the conclusion that the recipient spouse's living expenses would significantly exceed her income (even after exhaustion of her savings).

Lopez v. Lopez, 55 S.W.3d 194 (Tex. App.–Corpus Christi 2001, no pet.) – In *Lopez*, the husband contended the trial court erred by awarding spousal maintenance to the wife because she received sufficient property from the division of the marital estate from which she could provide for her reasonable minimum needs. The wife received a home appraised at $59,262.00, a vehicle valued at $7,014.00, the proceeds of the sale of a home in the amount of $33,678.00, and a one-half interest in a Thrift Savings Plan worth $20,778.00. The Court held that there was sufficient evidence in the record about the wife's education, a physical disability that prevented her from working full time, and her inability to use the property received through the divorce settlement to provide for her minimum needs. *Id*. at 199.

Amos v. Amos, 79 S.W.3d 747 (Tex. App.–Corpus Christi 2002, no pet.) – In *Amos*, the trial court had found that, because of the kind and character of the assets–and as a result of the tax-deferred community property requiring the payment of heavy penalties, intrest, and taxes associated with the withdrawal and use of the funds–that the property awarded to the wife was not sufficient to allow her to meet her reasonable needs. *Id.* at 748-50.

Trueheart v. Trueheart, (Tex. App.–Houston [14th Dist.] 2003, no pet.)(not designated for publication) – In *Trueheart*, $290,000.00 of the community property was awarded to the wife. In affirming the award of spousal of maintenance, the Court of Appeals noted that almost one-half of that consisted of life insurance policies, IRA accounts, and other assets that could not be easily liquidated without significant penalties.

Alaghehband v. Abolbaghaei, (Tex. App.–Austin 2003, no pet.)(not designated for publication) – In *Alaghehband*, the wife was awarded about $118,000.00 in community assets. The Court of Appeals noted that several of the assets were retirement accounts and that the tax consequences and long-term financial consequences of early withdrawal would render the liquidity of the assets problematic. The Court stated the spouse would exhaust the liquid assets she was awarded (approximately $85,000.00) within two years. *Id. at 13*.

In re McFarland, _____ S.W.3d ____ (Tex. App.–Texarkana 2005) – In *McFarland*, the trial court upheld an award of spousal maintenance to the wife. The primary asset which was awarded to the wife was a retirement account, which was subject to significant taxes for early withdrawal. Further, the home that she was awarded was not a readily liquid assets and not capable of producing current income. The Court agreed with the trial court that the financial resources available to the wife at the time of the divorce were not sufficiently liquid to enable her to meet her minimum reasonable monthly needs, and that the wife met the other statutory eligibility requirements for spousal maintenance (more than 10-year marriage, clearly lacks ability in the labor market to provide for her minimum reasonable needs).

3. Pleading for Maintenance

Requests for post divorce spousal maintenance should be expressly requested and plead for when sought. Vague requests for support should not be relied upon. *See In re McFarland*, _____ S.W.3d _____ (Tex. App.–Texarkana 2005).

B. Presumption Against Maintenance

Except in the case of a spouse who suffers from an incapacitating physical or mental disability as provided by Section 8.053(b), discussed below, it is presumed that maintenance is not warranted unless the spouse seeking maintenance has exercised diligence in seeking suitable employment, or developing the necessary skills to become self-supporting during a period of separation and during the time the suit for dissolution of the marriage is pending. *Tex. Fam. Code Ann. § 8.053(a); see also Sheshtawy v. Sheshtawy*, 150 S.W.3d 772 (Tex. App.–San Antonio 2004, pet. denied), cert. denied, 126 S. Ct. 359 (2005)(wife failed to produce evidence that she diligently sought employment or steps to gaining employment); *In re McFarland*, _____ S.W.3d _____ (Tex. App.–Texarkana 2005).

It is imperative that the spouse seeking maintenance presents evidence to demonstrate that he or she has used diligence in seeking employment or in taking steps necessary to develop skills to become self-supporting during the period of separation and while the divorce is pending. At a minimum, the spouse should show that he or she has applied for employment or has begun some type of a training program. The following are examples of such evidence: copies of job applications or a list of applications; list of job interviews including dates and salary; and copies of training programs or education programs pursued and projected dates of completion.

Preparations to pursue a claim for maintenance should begin by gathering information regarding both spouses: health, education, training, work history, their marital roles, marital misconduct, if any, and the nature and extent of the spouses' marital estate and separate property. If the spouse is not mentally or physically disabled or does not have custody of a child with a disability, the spouse seeking maintenance must prove that he or she lacks earning ability in the labor market adequate to meet his or her minimum reasonable needs and provide detailed information regarding that spouse's minimum reasonable needs. The spouse's efforts to obtain employment and the typical wages for that level of employment, which presumably do not meet the minimum reasonable needs of that spouse, should be shown. See *Alexander v. Alexander*, 982 S.W.2d 116 (Tex. App.– Houston [1st Dist.] 1998, no pet.) for a discussion of the wife's efforts to improve her skills in order to become self-supporting.

The presumption that alimony is not warranted does not apply to a spouse who is not able to seek suitable employment or develop skills to become self-supporting during separation because the spouse has an incapacitating physical or mental disability or is the custodian of a child of the marriage of any age who requires substantial care and personal supervision because a physical or mental disability makes it necessary, taking into consideration the needs of the child, that the spouse not be employed outside the home. *Tex. Fam. Code Ann. § 8.053(b).*

C. Factors in Determining Maintenance

A court that determines that a spouse is eligible to receive maintenance under the Family Code must determine the nature, amount, duration, and manner of periodic payments by considering all relevant factors, including:

(1) the financial resources of the spouse seeking maintenance, including the community and separate property and liabilities apportioned to that spouse in the dissolution proceeding, and that spouse's ability to meet the spouse's needs independently;
(2) the education and employment skills of the spouses, the time necessary to acquire sufficient education or training to enable the spouse seeking maintenance to find appropriate employment, the availability of that education or training, and the feasibility of that education or training;
(3) the duration of the marriage;
(4) the age, employment history, earning ability, and physical and emotional condition of the spouse seeking maintenance;
(5) the ability of the spouse from whom maintenance is requested to meet that spouse's personal needs and to provide periodic child support payments, if applicable, while meeting the personal needs of the spouse seeking maintenance;
(6) acts by either spouse resulting in excessive or abnormal expenditures or destruction, concealment, or fraudulent disposition of community property, joint tenancy, or other property held in common;
(7) the comparative financial resources of the spouses, including medical, retirement, insurance, or other benefits, and the separate property of each spouse;
(8) the contribution by one spouse to the education, training, or increased earning power of the other spouse;
(9) the property brought to the marriage by either spouse;
(10) the contribution of a spouse as homemaker;
(11) marital misconduct of the spouse seeking maintenance; and
(12) the efforts of the spouse seeking maintenance to pursue available employment counseling as provided by Chapter 304, Labor Code; *Tex. Fam. Code Ann. § 8.052.*

NOTE: The marital misconduct of the spouse seeking maintenance is considered a relevant factor in determining the amount, duration and manner of payments. By the obvious exclusion of the marital misconduct of the spouse from whom maintenance is sought, it can be deduced that the misconduct of that party will not be considered and the focus will be on the conduct of the requesting spouse.

D. Case Examples of Maintenance Awards

1. *Stone v. Stone*, 119 S.W.3d 866 (Tex. App.– Eastland 2003, no pet.). The trial court did not abuse its discretion in ordering the husband to pay the wife $650 monthly spousal maintenance for three years. There was some evidence of probative force to support the court's findings. The wife testified that her average monthly expenses were $6,156, and she had no money left at the end of the month because her only income was child support of $400 per month, $2,729 per month from a note payment, and the $10 per hour that she earned.

2. *Lopez v. Lopez*, 55 S.W.3d 194 (Tex. App.–Corpus Christi 2001, no pet. h.). The trial court did not abuse its discretion in awarding wife spousal maintenance of $840 per month for 36 months. The parties were married over 10 years, the wife lacked sufficient property to provide for her minimum reasonable needs. The Court found that the wife was unable to support herself through appropriate employment because of a physical incapacity from diabetes and a mental incapability from depression. The wife further lacked earning ability in the labor market adequate to provide support for her minimum reasonable needs.

3. *Pickens v. Pickens*, 62 S.W.3d 212 (Tex. App.– Dallas 2001, pet. denied). The court upheld award of spousal maintenance in favor of the wife in the amount of $1,500 per month for an indefinite period as long as her disability continued. The trial court found that wife lacked sufficient property to provide for her minimum reasonable needs and she was unable to support herself because of an incapacitating physical disability that appeared to be permanent. The Court found there is no statutory requirement that incapacity be proven by expert testimony for spousal maintenance, and the testimony of the injured party will support a finding of incapacity even if it is directly contradicted by expert medical testimony.

4. *Alexander v. Alexander*, 982 S.W.2d 116 (Tex. App.– Houston [1st Dist.] 1998, no pet.). The court upheld a spousal maintenance award where evidence showed that full-time employment with wife's current education and employment skills would not generate sufficient income to provide for her reasonable needs, whereas if she was allowed to complete her education, she could be self-sufficient.

5. *DuBois v. DuBois*, 956 S.W.2d 607 (Tex. App– Tyler 1997, no writ). The amount of property awarded plus wife's employable skills, justified the trial court's discretionary denial of maintenance. The court did not abuse its discretion in denying maintenance where the wife received $7,500 in cash and $18,000 in retirement benefits from her husband's retirement plan, she held a teaching certificate, and she was currently seeking employment.

6. *In re Hale*, 975 S.W.2d 694 (Tex. App.– Texarkana 1998, no pet.). The trial court did not abuse its discretion when it awarded spousal maintenance of $300 per month for three years to the wife whose income was $367 per month, and

whose estimated expenses were $851 per month, plus expenses for medical, medications, clothing and other needs. The Court rejected argument that anybody with a job is ineligible for maintenance as a matter of law.

7. *Kniffin v. Kniffin*, 1999 WL 993933 (Tex. App.– Dallas 1999)(unpublished). The Court upheld a maintenance award of $120 per month where the evidence showed that the 72-year-old wife's resources were insufficient to meet her needs, and that, because of her age, her work history, and her physical condition, she lacked the earning ability in the labor market adequate to meet her needs. Specifically, the evidence showed that she received $33,000 from the division of the community estate, as well as $394 per month from social security. The evidence further showed that the wife had problems with her blood pressure and circulation. Further, it was found that her rent was $400 per month, she had monthly bills totaling $549, and she was forced to expend $300 per month on medications. Moreover, she would lose her medical insurance following the divorce.

8. *Henry v. Henry*, 1999 WL 699760 (Tex. App.--Austin 1999)(unpublished). The trial court did not abuse its discretion by awarding spousal maintenance of $750 per month for three years upon a showing that the wife's monthly net income was $1,400 per month while her monthly expenses were of $2,438, leaving her with a shortfall of $1,038 per month. The wife received the house in the divorce, however, she also received all of its debt, as well as some existing credit card debt. She received no liquid or income-generating assets to use for short-term support.

9. *Cooper v. Cooper*, _____ S.W.3d _____ (Tex. App.–Houston [1st Dist.] 2004, no pet.). The trial court did not abuse its discretion by awarding the wife $500 per month in spousal maintenance for one year upon finding that the wife's monthly expenses of $2,794 exceeded her monthly income of $2,600 (which included $1,200 per month in child support). The Court found that the wife lacked sufficient property to meet her minimum reasonable needs where the husband did not address the nature and extent of property awarded to the wife in his argument to the Court of Appeals.

10. *Amos v. Amos*, 79 S.W.3d 747 (Tex. App.–Corpus Christi 2002, no pet.). The evidence supported the trial court's granting the wife $1,257.60 per month in spousal maintenance for three years where the wife could not return to work as a secretary because of carpal tunnel which was going to require surgery. Further, she had custody of the couple's two children, and she lacked the skills and income to meet her reasonable needs.

11. *Kennedy v. Kennedy*, 125 S.W.3d 14 (Tex. App.– Austin 2002, pet. denied). The Court of Appeals held that it was not error for the trial court not to award spousal maintenance even after the jury found the wife was unable to support herself because of an incapacitating physical or mental disability. The court found that the wife had sufficient property to provide for her minimum reasonable needs.

12. *Sheshtawy v. Sheshtawy*, 150 S.W.3d 772 (Tex. App.–San Antonio 2004, pet. denied), cert. denied, 126 S. Ct. 359 (2005). The Court held that the wife failed to provide any evidence to rebut the presumption that spousal maintenance was not warranted, even though she met the threshold requirement for entitlement to spousal maintenance when her husband was convicted of a crime involving family violence within two years before the date of the filing of the petition for divorce. The wife failed to introduce any evidence that she had been diligently seeking employment or developing skills necessary to become self-supporting. She also offered no evidence of an incapacitating physical or mental disability.

13. *Limbaugh v. Limbaugh*, 71 S.W.3d 1 (Tex. App.–Waco 2002, no pet.). The Court upheld the trial court's award for maintenance, however, the trial court's order for the husband to pay spousal support if he trades in his military retirement pay for VA disability benefits went too far.

14. *Stafford v. Stafford*, ____ S.W.3d _____ (Tex. App.–Tyler 2005). The Court upheld an award of spousal maintenance and held that the minimum reasonable needs for a particular individual or family is a fact-specific determination that must be made on a case-by-case basis. The judge could consider the husband's good physical condition and potential strong future earning capacity, as contrasted with the wife's poor health, disability and lack of any substantial future earning capacity. The wife's monthly expenses exceeded her monthly income by $478.00. The court ordered spousal maintenance of $368.00 per month.

15. *Yarbrough v. Yarbrough*, 157 S.W.3d 687 (Tex. App.–Waco 2004). The Court upheld the trial court's award of spousal support for one year. The child's medical condition prevented the mother from obtaining a full-time job. Further, the court concluded that the wife exercised diligence under the circumstances to find the best employment possible, and the wife established her "minimum reasonable needs."

16. *In re McFarland*, _____ S.W.3d ____ (Tex. App.–Texarkana 2005). The trial court did not err in awarding spousal maintenance of $1,200 per month for 24 months, followed by $800 per month for one year where the wife was not sufficiently liquid to enable her to meet her minimum reasonable needs. The court found the following: the wife had been a homemaker during the parties' 17-year marriage, the wife had no vocational training and would need training or education in order to develop the necessary skills to become self-supporting, her monthly expenses exceeded her monthly income, the husband had a much higher earning capacity, and the wife exercised due diligence in attempting to obtain suitable employment during the pendency of the case.

17. *Lagenbeck v. Lagenbeck*, WL51075 (Tex. App.–Dallas 2001)(not published). The Court upheld an award of spousal maintenance of $1,800 per month. The

wife lacked any substantive future earning capacity absent some improvement in her overall health.

18. *O'Carolan v. Hopper*, 71 S.W.3d 529, 533 (Tex. App.–Austin 2002, no pet.). The trial court awarded all of the community property to the husband, except the wife's personal items, and ordered the husband to pay spousal maintenance to the wife for two years. The trial court apparently equated the gross value of the maintenance payments to the equity in the marital home and thought this was a just and fair division. The Court of Appeals held that spousal maintenance is not property and should not be used for purposes of division. The legislative purpose in enacting provisions for spousal maintenance was to provide temporary and rehabilitative support for a spouse whose ability for self-support is lacking or has deteriorated over time while engaged in homemaking activities and whose capital assets are insufficient to provide support.

19. *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App.–Dallas 2003, no pet.). The Court awarded $650 per month as spousal maintenance to the wife, even though the wife had a college degree. She had been a homemaker for the entire 17 years of marriage. During the separation, the wife worked in retail and earned her realtor's license. She testified that is would take her at least a year to get her real estate business off the ground.

E. Putative Spouse

In a suit to declare a marriage void, a putative spouse who did not have knowledge of an existing impediment to a valid marriage may be awarded maintenance if otherwise qualified to receive maintenance under the Family Code. *Tex. Fam. Code Ann. § 8.060.*

III. DURATION AND AMOUNT OF MAINTENANCE

A. General Rule – Three-Year Limitation

Except for a spouse with an incapacitating disability as provided by Section 8.054(b) discussed below, a court may not order maintenance that remains in effect for more than three years after the date of the order. *Tex. Fam. Code Ann. § 8.054(a)(1)*; *Deltuva v. Deltuva*, 113 S.W.3d 882 (Tex. App.– Dallas 2003, no pet.)(court upheld the amount of a spousal maintenance award, but held that the trial court erred in ordering maintenance for four years because the statutory maximum duration is three years).

Further, the court must limit the duration of a maintenance order to the shortest reasonable period that allows the spouse seeking maintenance to meet the spouse's minimum reasonable needs by obtaining appropriate employment or developing an appropriate skill, unless the ability of the spouse to provide for the spouse's minimum reasonable needs through employment is substantially or totally diminished because of:

(1) physical or mental disability;
(2) duties as the custodian of an infant or young child; or
(3) another compelling impediment to gainful employment. *Tex. Fam. Code Ann. § 8.054(a)(2).*

B. Exception for Incapacitating Disability

If a spouse seeking maintenance is unable to support himself or herself through appropriate employment because the spouse has an incapacitating physical or mental disability or because the spouse is the custodian of a child of the marriage of any age who has a physical or mental disability, the court may order maintenance for an indefinite period for as long as the disability continues. *Tex. Fam. Code Ann. § 8.054(b); Smith v. Smith*, 115 S.W.3d 303 (Tex. App.–Corpus Christi 2003, no pet.)(disabled husband received nine years of spousal maintenance, after which he will receive Social Security retirement); *In re Brunin*, _____ S.W.3d _____ (Tex. App.–San Antonio 2005)(Family Code does not contain a provision that requires an express finding that the maintenance was based on an incapacitating physical or mental disability – since maintenance for any reason other than incapacitating physical or mental disability may only extend for three years, the divorce decree and the 2002 order could be read as being implicitly based on a finding of incapacitating physical or mental disability).

The court may order periodic review of its order, on the request of either party or on its own motion, to determine whether the disability continues to render the spouse unable to support himself or herself through appropriate employment. The continuation of spousal maintenance under these circumstances is subject to a motion to modify as provided by Section 8.057. *Tex. Fam. Code Ann. § 8.057; Dunn v. Dunn*, 177 S.W.3d 393 (Tex. App.–Houston [1st Dist.] 2005, pet. denied); *Crane v. Crane*, ____ S.W.3d ____ (Tex. App.–Fort Worth 2006); *See Pickens v. Pickens*, 62 S.W.3d 212, (Tex. App.– Dallas 2001, no pet. h.)(court upheld award of spousal maintenance in favor of wife in the amount of $1,500 per month for an indefinite period as long

as her disability continued – Court found there is no statutory requirement of medical evidence for spousal maintenance--testimony of the injured party will support a finding of incapacity even if directly contradicted by expert medical testimony); *Tyler v. Talburt*, 2003 WL 1964186, S.W.3d (Tex. App.–San Antonio 2003, no pet.)(spousal support modification was denied where husband continued to suffer from an incapacitating physical or mental condition); *Carlin v. Carlin*, 92 S.W.3d 902 (Tex. App.–Beaumont 2002, no pet.)(ex-wife failed to prove her physical disability was incapacitating to warrant continued spousal maintenance beyond three years).

In *Dunn v. Dunn*, 177 S.W.3d 393 (Tex. App.–Houston [1st Dist.] 2005, pet. denied), during the divorce proceedings, the court ordered maintenance to be paid to the wife for a limited period of time, which was to be reviewed at the end of the period to see if the support should be continued. After a couple of orders continuing the maintenance payments, the court stated that it wanted certain financial documentation and expert testimony as to the wife's medical conditions at the next status hearing. When the wife failed to present this evidence and the only evidence offered was a statement from her attorney that the financial and medical conditions remained unchanged, the court did not err in ordering the termination of the maintenance support for the failure to produce evidence in support of the continuance of the maintenance order.

In *Crane v. Crane*, ____ S.W.3d ____ (Tex. App.–Fort Worth 2006), the trial court ordered that the husband pay the wife spousal maintenance through December 2002. In July 2003, the wife filed a motion requesting a periodic review of the spousal maintenance to determine whether her physical disability was continuing and seeking an indefinite continuation of spousal maintenance. At the hearing on the motion, the wife's doctor testified that the wife was totally disabled and that he made this diagnosis in 1996, as she had suffered from fibromyalgia, chronic fatigue syndrome and depression since 1991. The trial court denied the wife's continuation of the spousal maintenance holding that she did not show a material or substantial change of circumstances as required by Section 8.057 of the Family Code, even though the trial court found that she could not support herself at appropriate employment because of the incapacitating physical disability which she was found to be under at the time of divorce, and that she lacked sufficient property or income to meet her minimum reasonable needs. The court of appeals in *Crane* reversed and held that the trial court incorrectly treated the wife's motion for continuation of the spousal maintenance as a motion under Section 8.056 to modify the maintenance ordered by the original decree. All the wife had to show was that her disability was continuing, and she was not required to prove a material and substantial change in circumstances of either party under Section 8.057(c).

The *Crane* court further held that the duration of a spousal maintenance award is determined at the time of the divorce, when the trial court must determine whether spousal maintenance will be ordered for a period of up to three years pursuant to Section 8.054(a) or, if the trial court finds that the spouse has an incapacitating physical or mental disability, for more than three years pursuant to Section 8.054(b). Once the maintenance order is incorporated into a final judgment, the language of the final divorce decree controls whether a movant may file a motion to continue maintenance. In the *Crane* case, the trial court ordered the spousal payments to be paid for more than 3 years, and this could only be done under Section 8.054(b), since maintenance for any other reason is limited to three years and under.

C. Amount of Maintenance

A court may not order maintenance that requires a spouse to pay monthly more than the lesser of :

1. $2,500; or
2. 20% of the spouse's average monthly gross income. *Tex. Fam. Code Ann. § 8.055(a).* (NOTE: Maintenance is calculated based on a spouse's gross income, not net monthly resources as used to calculate child support).

D. Provision for Minimum Reasonable Needs

The court shall set the amount that an obligor is required to pay in a maintenance order to provide for the minimum reasonable needs of the obligee, considering employment or property received in the dissolution of the marriage or otherwise owned by the obligee that contributes to the minimum reasonable needs of the obligee. *Tex. Fam. Code Ann. § 8.055(b).*

E. Exclusions from Monthly Gross Income

Department of Veterans Affairs service-connected disability compensation, social security benefits and disability benefits, and workers. compensation benefits are excluded from monthly gross income in calculating maintenance. *Tex. Fam. Code Ann. § 8.055(c).* Deductions for Social Security taxes, federal income taxes, state income taxes, union dues, and health insurance coverage for a child
are disregarded. *Tex. Fam. Code Ann. § 8.055(d).*

IV. TERMINATION AND MODIFICATION OF MAINTENANCE

A. Death or Remarriage

The obligation to pay future maintenance terminates on the death of either party or on the remarriage of the obligee. *Tex. Fam. Code Ann. § 8.056(a).*

B. Cohabitation

After a hearing, the court shall terminate the maintenance order if the obligee cohabits with another person in a permanent place of abode on a continuing, conjugal basis. *Tex. Fam. Code Ann. § 8.056(b); see Allen v. Allen*, 966 S.W.2d 658 (Tex. App.–San Antonio 1998, writ denied).

C. Modification of Maintenance Order

The amount of maintenance specified in a court order or the portion of a decree that provides for the support of a former spouse may be reduced by the filing of a motion in the court that originally rendered the order. A party affected by the order or the portion of the decree to be modified may file the motion. *Tex. Fam. Code Ann. § 8.057(a).*

NOTE: The amount of maintenance can never be increased by the court, only reduced.

Notice of a motion to modify maintenance and the response, if any, are governed by the Texas Rules of Civil Procedure applicable to the filing of an original lawsuit. Notice must be given by service of citation, and a response must be in the form of an answer due on or before 10 a.m. of the first Monday after 20 days after the date of service. A court shall set a hearing on the motion in the manner provided by Rule 245 of the Texas Rules of Civil Procedure. *Tex. Fam. Code Ann. § 8.057(b).*

After a hearing, the court may modify an original or modified order or portion of a decree providing for maintenance on a proper showing of a material and substantial change in circumstances of either party. To make this determination, the trial court must compare the financial circumstances of the parties at the time of the existing support order with the circumstances at the time when the modification was sought. *London v. London*, 94 S.W.3d 139, 144 (Tex. App.–Houston [14th Dist.] 2002, no pet.); *In re Marriage of Lendman*, 170 S.W.3d 894, 899 (Tex. App.–Texarkana 2005, no pet.)(court did not abuse its discretion in denying the motion to modify a maintenance order where the only change in circumstances reflected in the record is that the wife now received retirement benefits paid to her due to the property division of the marital estate). If the court then orders a modification, it will only apply to payments accruing after the filing of the motion to modify. *Tex. Fam. Code Ann. § 8.057(c).*

D. Maintenance May Not be Instituted After Divorce

A loss of employment or circumstances that render a former spouse unable to support

himself or herself through appropriate employment by reason of incapacitating physical or mental disability that occur after the divorce or annulment are not grounds for the institution of spousal maintenance for the benefit of the former spouse. *Tex. Fam. Code Ann. § 8.057(d).*

V. ENFORCEMENT OF A MAINTENANCE OR ALIMONY ORDER

A Enforcement by Contempt

The court may enforce, by contempt, the court's maintenance order or an agreement for the payment of maintenance voluntarily entered into between the parties and approved by the court. *Tex. Fam. Code Ann. § 8.059(a); see Woolam v. Tussing*, 54 S.W.3d 442 (Tex. App.– Corpus Christi 2001)(court did not have the authority to enforce by contempt the spousal support provision of the parties' agreement incident to divorce where divorce action was prior to September 1, 1995, when spousal maintenance statute took effect); *In re Dupree*, 118 S.W.3d 911 (Tex. App.--Dallas 2003, pet. denied)(husband who was ordered to pay "contractual alimony" cannot be held in contempt and jailed as the payments were a debt, and the Texas Constitution prohibits imprisonment for the failure to comply with an order to pay a debt); *but see In re Taylor*, 130 S.W.3d 448 (Tex. App.– Texarkana 2004, no pet.)(divorce decree providing contractual alimony was enforceable by contempt).

In *Dupree*, the Dallas Court of Appeals held that, although a court may enforce by contempt an order to pay spousal maintenance entered pursuant to Chapter 8 of the Texas Family Code, in this case the decree specifically described the ex-husband's obligation as "contractual alimony." There were no references to the ex-wife's eligibility for spousal maintenance under Section 8.054, and the contractual alimony provisions differed from and exceeded the statutory provisions for amount, duration, and termination of spousal support. The *Dupree* court concluded that the trial court had no authority to enforce the ex-husband's contract obligations by contempt pursuant to the Family Code and in contravention of the Texas Constitution. It is important to note that the decree in the *Dupree* case did not contain language ordering the husband to make the alimony payments, therefore he could not be held in contempt of court.

In the recent case of *In re Taylor*, 130 S.W.3d 448 (Tex. App.– Texarkana 2004, no pet.), the court distinguished *Dupree* and held that the divorce decree providing contractual alimony was enforceable by contempt. The decree contained decretal language, so it was an order of the court. Further, the court held that Section 8.059 of the Texas Family Code specifically states that a court may enforce by contempt the court's maintenance order or an agreement for the payment of maintenance.

Furthermore, in *In re Bielefeld*, 143 S.W.3d 924, 928 (Tex. App.–Fort Worth 2004, no pet.), the court recognized that it has "long been established that the obligation that the law imposes on spouses to support one another, as well as on parents to support their children, is not considered a "debt" within the constitutional prohibition but, rather a legal duty arising out of the legal status of the parties." *Id.*; See also, *Tex. Const. art I, Section 18.*

NOTE: Even though it seems the current direction of the courts is to allow contempt to be a means of enforcement of an agreement for the payment of maintenance, some may still have concerns over the *Dupree* holding. Therefore, to ensure that the theory used in *Dupree* does not apply, the decree ordered by the court should order the payment of maintenance in clear, specific, and unambiguous terms and not just incorporating an agreement by reference.

B. Maintenance Arrearages

A spousal maintenance payment not timely made constitutes an arrearage. *Tex. Fam. Code Ann. § 8.058; Mastin v. Mastin*, 70 S.W.3d 148 (Tex. App.–San Antonio 2001, no pet.)(ex-wife was entitled to arrearages for contractual alimony, but an unequivocal notice of intent to accelerate contractual alimony after breach was not provided, so there was no acceleration in the payments)

C. Suit to Enforce

On the suit to enforce by an obligee, the court may render judgment against a defaulting party for the amount of arrearages after notice by service of citation, answer, if any, and a hearing finding that the defaulting party has failed or refused to carry out the terms of the order. The judgment may be enforced by any means available for the enforcement of judgment for debts. *Tex. Fam. Code Ann. § 8.059(b)*; see *Woolam v. Tussing*, 54 S.W.3d 442 (Tex. App.– Corpus Christi 2001, no pet.); see *Bergman v. Bergman*, 888 S.W.2d 580 (Tex. App.--El Paso 1994, no writ)(money judgment for alimony entitled to full faith, but Texas law exempting retirement payments from turnover prevails regarding enforcement remedy).

D. Affirmative Defense

It is an affirmative defense to an allegation of contempt of court or the violation of a condition of probation requiring payment of court-ordered maintenance that the obligor, *Tex. Fam. Code Ann. § 8.009(c):*

(1) lacked the ability to provide maintenance in the amount ordered;
(2) lacked property that could be sold, mortgaged, or otherwise pledged to raise the funds needed;
(3) attempted unsuccessfully to borrow the needed funds; and
(4) did not know of a source from which the money could have been borrowed or otherwise legally obtained.

The issue of the existence of an affirmative defense does not arise unless evidence is admitted supporting the defense. If the issue of the existence of an affirmative defense arises, an obligor must prove the affirmative defense by a preponderance of the evidence. *Tex. Fam. Code Ann. § 8.059(d).*

E. Wage Garnishment

A court may enforce an order for spousal maintenance by ordering garnishment of the wages of the person ordered to pay the maintenance. *Tex. Fam. Code Ann. § 8.059(e).*

NOTE: Garnishment of wages for spousal support became effective on September 1, 1999.

Wage-withholding orders for the collection of spousal maintenance was further clarified on
September 1, 2001.

VI. INCOME WITHHOLDING

Effective September 2001, any court-ordered spousal maintenance payments and certain contractual payments may be subject to income withholding. The provisions in the new statute resemble the provisions for withholding for child support in Chapter 158 of the Family Code. The complete statute should be carefully reviewed regarding procedure, rights and duties of the employer, issuance of the writ of withholding, and modification, reduction or termination of the withholding order.

In a proceeding in which periodic payments of spousal maintenance are ordered, modified, or enforced, the court may order that income be withheld from the disposable earnings of the obligor. *Tex. Fam. Code Ann. § 8.101(a).*

The income withholding rules do not apply to contractual alimony or spousal maintenance, regardless of whether the alimony or maintenance is taxable, unless:

(1) the contract specifically permits income withholding; or
(2) the alimony or maintenance payments are not timely made under the terms of the contract. *Tex. Fam. Code Ann. § 8.101(b).*

An order or writ of withholding for spousal maintenance may be combined with an order or writ of withholding for child support only if the obligee has been appointed managing conservator of the child for whom the child support is owed and is the conservator with whom the child primarily resides. *Tex. Fam. Code Ann. § 8.101(c).*

An order or writ of withholding that combines withholding for spousal maintenance and child support must, Tex. Fam. Code Ann. § 8.101(d):

(1) require that the withheld amounts be paid to the appropriate place of payment under Family Code Section 154.004;

(2) be in the form prescribed by the Title IV-D agency under Family Code Section 158.106;

(3) clearly indicate the amounts withheld that are to be applied to current spousal

maintenance and to any maintenance arrearages; and

(4) subject to the maximum withholding allowed under Family Code Section 8.106, order that withheld income be applied in the following order of priority:

(a) current child support;
(b) current spousal maintenance;
(c) child support arrearages; and
(d) spousal maintenance arrearages.

Garnishment for the purposes of spousal maintenance does not apply to unemployment insurance benefit payments. *Tex. Fam. Code Ann. § 8.101(e).*

VII. JURY ISSUES

A. Generally

It is not settled whether or not a party is entitled to a binding jury decision on the issue of eligibility, amount or duration of maintenance. The Texas Constitution provides that the right to a trial by jury must remain inviolate. *Tex. Const. art. I, § 15*. The Constitution further grants power to the Legislature to pass such laws as may be needed to regulate this right and maintain its purity and efficiency. *Tex. Const. art. I, § 15.*

B. Court's Refusal to Empanel a Jury

It is a denial of a party's Constitutional right for the trial court to refuse to empanel a jury if the demand has been timely made and the jury fee paid. *Tex. Const. art. V, § 10; see Tex. R. Civ. P. 216; Jerrell v. Jerrell*, 409 S.W.2d 885 (Tex. Civ. App.– San Antonio 1966, no writ). However, a refusal to grant a jury trial is harmless error only if the record shows that no material issues of fact existed and an instructed verdict would have been justified. *Halsell v. Dehoyos*, 810 S.W.2d 371
(Tex. 1991).

C. Family Code Restrictions on Right to Jury

The Texas Family Code contains specific restrictions on the right to trial by jury. *See, for example, Tex. Fam. Code Ann. §§ 6.104* (no jury in annulment of marriage of minor), 4.006(b) (issue of unconscionability of a premarital agreement decided by the court as a matter of law), *§ 105.002(b)* (no jury trial for adoption), *§ 105.002(c)*(party is not entitled to jury verdict on issues of child support, specific term or condition of possession to the child, or rights and duties of the conservators other than the issue of primary residence).

D. Jury Issues

It has been held that the "just and right" division requirement of the Texas Family Code, *Tex. Fam. Code Ann. § 7.001*, does not entitle the litigants to a binding jury verdict regarding the division of the community estate. See *Cockerham v. Cockerham,* 527 S.W.2d 162 (Tex. 1975). Jury findings on proportional division of the estate are advisory only and may be disregarded by the court. *Matter of Marriage of Moore*, 890 S.W.2d 821 (Tex. App.–Amarillo 1994, no writ). Other than the division of property, almost all other issues in which there are disputed facts are subject to a binding jury verdict. See *Archambault v. Archambault*, 763 S.W.2d 50 (Tex. App.–Beaumont 1988, no writ) (value of property); *Lawson v. Lawson*, 828 S.W.2d 158 (Tex. App.–Texarkana 1992, writ denied) (characterization and value of property). The Texas Pattern Jury Charges – Family currently does not contain alimony issues. See Appendix A attached for sample jury issues.

VIII. TAX IMPLICATIONS OF ALIMONY

A. Taxability/Deductibility

Alimony or separate maintenance payments are included in the gross income of the payee, 26 U.S.C.A. § 71, and are deducted from the gross income of the payor. 26 U.S.C.A. § 215. To qualify for alimony tax treatment, alimony or separate maintenance payments must meet the following requirements, 26 U.S.C.A. § 71:

(1) the payments must be made in cash;
(2) the payee must be a spouse or former spouse of the payor;
(3) the payments must be made under a divorce or separation instrument;
(4) the divorce or separation instrument must not designate that payments are not includible in the calculation of the gross income of the payee and not allowable as a deduction by the payor under 26 U.S.C.A. § 215;
(5) the payor and payee must not be members of the same household at the time alimony payments are made;
(6) the payments must cease upon the death of the payee;
(7) the payment cannot constitute child support in any form (including a portion of any payment that can be construed as child support);
(8) there must be a minimum payout period of at least three years for alimony or separate maintenance payments exceeding $15,000 per year; and
(9) a joint return cannot be filed by the payor or payee, even if they are considered legally married under state law.

A CPA should definitely be consulted to provide advice regarding the tax consequences of alimony payments.

1. Above-the-line Deduction

The payor spouse can take the alimony deduction even if the standard deduction is taken, because alimony is a deduction from gross income. *26 U.S.C.A. § 62(a)(10).*

2. Cash Payments

Alimony or separate maintenance payments must be in cash, which includes checks and money orders payable on demand, received by or on behalf of a spouse (including a former spouse). *26 U.S.C.A. § 71(b)(1).* A transfer of services or property (including a debt instrument of a third party or an annuity contract), the execution of a debt instrument by the payor, or the use of other property of the payor does not qualify as alimony. *26 C.F.R. § 1.71-1T(b)A-5.*

Payments of cash by the payor spouse to a third party under the terms of the divorce or separation instrument will qualify so long as it is for the benefit of a payee spouse or former spouse. *26 C.F.R. § 1.71-1T(b)A-6;* see *Baxter v. C.I.R.*, 77 T.C.M. (CCH) 2137 (1999)(Tax Court held that mortgage payments under a divorce settlement agreement qualified for alimony tax treatment because the payments were terminable on the death of the payee spouse).

Examples of qualifying payments are cash payments of rent, mortgage, tax or tuition liabilities of the payee spouse. 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 payments on behalf of a spouse even if those payments are made pursuant to the terms of the divorce or separation instrument. *26 C.F.R. § 1.71-1T(b)A-6.* 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. See *Marten v. C.I.R.*, 78 T.C.M. (CCH) 584 (1999)(where a husband was ordered to purchase a life insurance policy naming his ex-wife and son as beneficiary, his premium payments held to be alimony that he can deduct and that must be included in wife's income).

NOTE: The agreement between the parties regarding the tax consequences of any cash payments should be carefully considered and spelled out. Further, any payments to third parties on behalf of a spouse should explicitly state that the obligation terminates on the death of the payee spouse.

3. Divorce or Separation Instrument

The payment must be received by (or on behalf of) a spouse (or former spouse) under a divorce or separation instrument. *26 U.S.C.A. § 71(b)(1)(A).* A "divorce or separation instrument" is one of the following: (1) a decree of divorce or separate maintenance or a written instrument incident to such a decree; (2) a written separation agreement; (3) a decree requiring a spouse to make payments for the support or maintenance of the other spouse; or (4) a court order granting temporary alimony. *26 U.S.C.A. § 71(b)(2); see Muracca v. C.I.R.*, 47 T.C.M. (CCH) 1762 (1984)(husband's payments to wife that the parties later stipulated in writing to be spousal support did not satisfy the writing requirement as there was no written agreement designating the payments as support at the time the payments were made).

In order to deduct alimony payments, the payments must be pursuant to a written

instrument. A voluntary payment from one spouse to the other by way of an informal arrangement or oral agreement will not qualify.

An increase in alimony payments on the payor spouse's own volition will not qualify as alimony. Any amounts paid in excess of that required by the written instrument are not considered alimony payments, therefore, are not deductible by the payor, nor includible by the payee. *Ellis v. C.I.R.*, 60 T.C.M. (CCH) 593 (1990).

Payments made prior to the time a decree, agreement, or order of support is issued or becomes effective do not qualify as alimony or separate maintenance payments. *Grant v. C.I.R.*, 84 T.C. 809 (1985), aff'd in unpublished opinion (4th Cir. 1986); *White v. C.I.R.*, 47 T.C.M. (CCH) 1064 (1984).

Letters that merely represent support proposals, but do not constitute an agreement between the parties as support, do not constitute written separation agreements. *Grant v. C.I.R.*, 84 T.C. 809 (1985), aff'd in unpublished opinion (4th Cir. 1986); *White v. C.I.R.*, 47 T.C.M. (CCH) 1064 (1984). However, neither the Internal Revenue Code nor the regulations specifically require the written separation agreement actually be signed by the husband and wife, only that it be "executed;" an attorney may sign a separation agreement on behalf of his or her client. *Azenaro v. C.I.R.*, 57 T.C.M. (CCH) 355 (1989)(Tax Court held that a letter from husband's attorney to wife offering a monthly payment of support that was accepted and signed by wife constituted a written separation agreement and that payments made pursuant thereto were alimony).

4. Nondesignation Requirement

The divorce or separation instrument must not designate the payments as nondeductible by the payor and excludible from the gross income by the payee. 26 U.S.C.A. § 71(b)(1)(B); *See Estate of Monte H. Goldman*, 112 T.C. 317 (1999) ($20,000 per month payments to an ex-spouse were not deductible as alimony because the divorce instrument indicated otherwise). This provision gives the parties some flexibility and permits them or the court to specifically designate payments that would otherwise be deductible as nondeductible. *See Lowe v. Lowe*, 622 N.Y.S.2d 26 (App. Div. 1st Dept. 1995)(it is within the sound discretion of the court, pursuant to 26 U.S.C.A. § 71(b)(1)(B), to provide in its order that the maintenance payments be neither income to the payor nor deductible to the payee, the court may provide that the payments are not deductible).

Absent a designation that cash payments are not deductible by the payor and includible by the payee, they will be deductible by the payor and includible by the payee even if an examination of the basis on which the state court calculated the alimony award reveals an underlying assumption that the payee would not be taxed on the payments. *See Richardson v. C.I.R.*, 125 F.3d 551 (7th Cir. 1997), affirming,70 T.C.M. (CCH) 1390 (1995).

Although the parties or the court can elect out of alimony treatment under the Internal Revenue Code, 26 U.S.C.A. § 71(b)(1)(B), neither the parties nor the court can elect to treat

property settlement or child support payments as alimony. *See McKelvey v. McKelvey*, 534 So. 2d 801 (Fla. Dist. Ct. App. 3d Dist. 1988). To qualify for alimony tax treatment under the Internal Revenue Code, all requirements must be met.

A copy of the instrument containing the designation of payments as not alimony or separate maintenance payments must be attached to the payee.s federal income tax return for each year in which the designation applies. *26 C.F.R. § 1.71-1T(b)A-8.*

5. Separate Households Requirement

If the spouses are separated under a decree of divorce or separate maintenance, they must not be members of the same household at the time payment is made. *26 U.S.C.A. § 71(b)(1)(C).* Physical separation within a single dwelling unit is not sufficient; there must be two separate households. *26 C.F.R. § 1.71-1T(b)A-9*; see also *Coltman v. C.I.R.*, 61 T.C.M. (CCH) 2207 (1991) (although emotionally separated, court held marital support payments nondeductible because husband and wife lived in same home). However, 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 payment is made. *26 C.F.R. § 1.71-1T(b)A-9.*

6. Termination on Death of Payee

To qualify as alimony, thus to be deductible to the payor and taxable to the payee, the payor spouse must not have any liability to make any payments for any period after the death of the payee spouse and no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. *26 U.S.C.A. § 71(b)(1)(D).* If a spouse is required to continue to make payments or to make substitute payments after the death of a spouse, then none of the payments before or after the death of the spouse qualify as alimony or separate maintenance payments. *26 C.F.R. § 1.71-1T(b)A-10.*

NOTE: Although the Internal Revenue Code does not require that the divorce or separation instrument state that there be no liability of the payor spouse to make alimony payments after the
death of the payee spouse (some state laws provide that alimony automatically terminates on the death of the payee), it is best to include termination language in the instrument if the parties intend
the payments to be taxable/deductible. Further, spousal support payments pursuant to temporary orders must provide that the obligor's payments terminate on the death of the payee spouse in order
to qualify for alimony tax treatment. *Miller v. C.I.R.*, 78 T.C.M. (CCH) 307 (1999).

7. Alimony Payments Must Not be Child Support

The payor spouse is not entitled to deduct, and the payee spouse is not required to include

in income, that part of any payment which the terms of the divorce or separation instrument (in terms of an amount of money or a part of the payment) can be construed as a sum that is payable for the support of the children of the payor spouse. 26 U.S.C.A. § 71(c)(1). If any amount specified in the instrument will be reduced 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 relating to a child, 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. 26 U.S.C.A. § 72(c)(2). A payment may be treated as fixed as payable for child support even if other separate payments specifically are designed as payable for the support of a child of the payor spouse. 26 C.F.R. § 1.71-1T(b)A-16.

A payment will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child where payments are to be reduced not more than six months before or after the date a child is to attain the age of 18, 21, or local age of majority. 26 C.F.R. § 1.71-1T(b)A-18. Also, there will be a similar presumption where 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, and is the same age for each child. This test comes into play only if there are at least two children and at least two reduction dates. Alimony cannot be reduced on two or more occasions that occur within a year before or after two or more children attain a particular age between 18 and 24 years. The measuring age for each child must be the same but it does not have to be one of whole years.

The presumptions provided for are rebuttable presumptions and may be rebutted 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. *26 C.F.R. § 1.71-1T(b)A-18.*

8. Joint Tax Return

Internal Revenue Code Sections 71 and 215 do not apply if the spouses file a joint return with each other for that tax year. *26 U.S.C.A. § 71(e).*

9. Front-End Loaded Payments

26 U.S.C.A. § 71(f)(1) provides a penalty for front-end loading of the stream of alimony payments. It was designed to discourage property divisions disguised as alimony. If the payments made in the first post-separation year exceed the average of the payments made in the second and third years by $15,000 or more, the payor spouse will be deemed to have made "excess" payments in the first year. Any amount of the "excess" above $15,000 will be recaptured and added to the obligor's gross income for the third year. *26 U.S.C.A. § 71(f)(1) to (4).* The rule only applies to the first three years of alimony.

a. Recapture

If there are excess alimony payments, the payor spouse must include the amount of such excess payments in gross income for the payor spouse's taxable year beginning in the third

post-separation year, and the payee spouse is allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee's taxable year beginning in the third post-separation year. *26 U.S.C.A. § 71(f)(1).*

b. Definition of Excess Alimony Payments

The term "excess alimony payments" means the sum of the excess payments for the first post-separation year, and the excess payments for the second post-separation year. *26 U.S.C.A. § 71(f)(2).*

NOTE: If the spouses desire for a property settlement payment to be treated as alimony, the recapture provisions can be avoided by spreading the payments over three post-separation years and carefully calculating the amounts that need to be paid in each year to avoid triggering the recapture provisions. In addition, a provision that the payments will end on the death of either spouse or the remarriage of the payee spouse will not trigger the recapture rules in the event such contingency actually occurs within the three-year period. *26 U.S.C.A. § 71(f)(5)(A).*

There will generally not be an excessive alimony problem if alimony payments are not to be varied more than $10,000 during any one of the first three years. There is also generally no recapture if year 2 is greater than or equal to year 1 minus $7,500 and year 3 is greater than year 2 minus $15,000. A CPA should be consulted to determine whether or not a recapture situation applies.

c. Exceptions to Recapture

There are three statutory exceptions to the recapture provisions:

1. Death of either spouse/remarriage of payee – The recapture rule does not apply if either spouse dies before the close of the third post-separation year, or the payee spouse remarries before the close of the third post-separation year. *26 U.S.C.A. § 71(f)(5)(A).*

2. Support payments – The recapture rule does not apply to payments received under temporary support orders described in Section 71(b)(2(c). *26 U.S.C.A. § 71(f)(5)(B).*

3. Fluctuating payments – The recapture rule does not apply to any payment to the extent it is made pursuant to a continuing liability (over a period of not less than three years) to pay a fixed portion or portions of the income from a business or property or from compensation for employment or self-employment. *26 U.S.C.A. § 71(f)(5)(c).*

IX. TEMPORARY SPOUSAL SUPPORT

A. Generally

While a divorce action is pending, the court may, on it own motion or that of a party, and after notice and a hearing, issue an order directed to one or both of the parties requiring payments to be made for the support of either spouse. *Tex. Fam. Code Ann. 6.502(2).* A temporary support order is a means of protecting the welfare of a financially dependent spouse between the time the petition is filed and the divorce is granted. *Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.–Corpus Christi 1999, no pet.)(temporary support particularly appropriate where husband maintained control over vast majority of marital estate and wife had minimal ability to support herself without some access to assets in estate); *Garduno v. Garduno*, 760 S.W.2d 735 (Tex. App.–Corpus Christi 1988, no writ).

The trial court has broad, though not unlimited, discretion in making temporary orders for support and attorney's fees during the course of divorce proceedings, and the trial court's order will not be disturbed absent an abuse of that discretion. *Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.–Corpus Christi 1999, no pet.); *Villasenor v. Villasenor*, 911 S.W.2d 411, 420 (Tex. App.–San Antonio 1995, no writ).

B. Procedure

An application for temporary support may be included in the petition or answer, filed as a separate morion, or included in a motion seeking multiple types of temporary relief. Counsel should be prepared to submit a financial statement for his or her client who is seeking temporary support.

C. Amount of Support

The purpose of temporary support pending divorce is the maintenance of the family until the final decree is signed, and the amount is therefore to be determined according to the needs of the applicant. *Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.–Corpus Christi 1999, no pet.). The court should consider both the applicant's means to pay for his or her necessities during the pendency of the suit and the ability of the other spouse to pay. A temporary support order is not to be used o make an interim property division or to equalize the parties' standard of living before the divorce becomes final. *Herschberg v. Herschberg*, 994 S.W.2d 273 (Tex. App.–Corpus Christi 1999, no pet.)(trial court abused its discretion in ordering increase in temporary support payments from $5,000 to $8,000 per month, where wife earned $1,000 per month and her expenses totaled $5,090).

X. CONCLUSION

Spousal maintenance is only seen in a small asset cases, however, contractual alimony is used frequently in negotiating settlements. A CPA should be consulted to provide advice regarding the tax consequences of alimony payments.

APPENDIX A

Jury questions – Determination of Eligibility for Maintenance:

QUESTION 1. Is Party A (seeking spouse) eligible for spousal maintenance from Party B (obligor spouse)?

ANSWER: Yes or No.

NOTE: This question would be preceded with appropriate instructions regarding eligibility and the presumption found at Tex. Fam. Code Ann. §§ 8.002, 8.004.

If you have answered Question 1 "Yes," then answer the following questions. If you have answered Question 1 "No," do not answer any other questions.

QUESTION 2. What are the minimum reasonable needs of Party A?

ANSWER: State the amount in dollars: $._____.

QUESTION 3. What contributions to those needs can be made by Party A?

ANSWER: State the amount in dollars: $_____.

QUESTION 4. What is the average monthly gross income of Party B?

ANSWER: State the amount in dollars: $_____.

For Modification Actions:

QUESTION 1. Do you find from a preponderance of the evidence that there has been a material and substantial change in the circumstances of either party since the date of the order to be modified?

ANSWER: Yes or No.

If you have answered Question 1 "Yes," then answer the following questions. If you have answered Question 1 "No," do not answer any other questions.

QUESTION 2. What are the minimum reasonable needs of Party A?

ANSWER: State the amount in dollars: $_____.

QUESTION 3. What contributions to those needs can be made by Party A?

ANSWER: State the amount in dollars: $_____.

QUESTION 4. What is the average monthly gross income of Party B?

ANSWER: State the amount in dollars: $_____