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Hearsay

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House divided

By Kris Olson

Local family law attorneys are hoping that the storm has passed. But forgive them if they don't exhale completely. We are talking about Congress, after all.

The U.S. House of Representatives "got the divorce bar's attention," says **Jonathan E. Fields.** The Wellesley lawyer is referring to the House's inclusion in its recent tax-reform proposal of a repeal of the so-called "divorce subsidy," which currently allows a payor to deduct alimony payments from his taxes. While alimony is taxable income to the recipient, that recipient is generally in a lower tax bracket, allowing the two former partners to pay less tax combined than if they were still married.

Or, as Fields says, the current system "puts more cash in the post-divorce pot."

In a subsequent Senate version of the tax-reform bill, however, the effort to end the divorce subsidy seems to have been abandoned, reports Lincoln practitioner **Regina Snow Mandl**.

Mandl was so alarmed by the House proposal that she sent out a client alert, highlighting what she considered a flaw in the House bill proponents' logic.

"This proposal fails to recognize that two households are more expensive than one, and that there were good reasons for allowing the seeming disparity between married couples and those living apart due to divorce," she wrote.

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The House Ways and Means Committee cited fairness as a justification for the proposed change.

"The provision recognizes that spousal support should have the same tax treatment as within the context of a married couple, as well as the provision of child support," read a portion of the committee's summary of Section 1309 of the Tax Cuts and Jobs Act, H.R.1.

However, critics characterized the proposal as a thinly veiled money grab, one estimated to generate $8.3 billion in tax revenue over the next 10 years that could help pay for tax cuts elsewhere in the plan.

While some suggested there was also a "pro-family" agenda embodied in ending the divorce subsidy, Fields isn't so sure, if for no other reason than there are plenty of divorced legislators who would stand to be negatively affected by the change.

In addition to the nature of the proposal, the attorneys were concerned about its timing. The House proposed making the change effective as early as Jan. 1, which Mandl says would have given state legislatures and courts no time to consider an adjustment to the various alimony formulas, such as those in the Massachusetts Alimony Reform Act.

Specifically, §53(b) of G.L.c. 208 provides that "the amount of alimony should generally not exceed the recipient's need or 30 to 35 percent of the difference between the parties' gross incomes established at the time of the order being issued."

Fields says that an unintended, though somewhat predictable, consequence of the Alimony Reform Act passing in 2011 has been that many divorcing couples now tend to settle on an alimony figure of 32 or 33 percent of the difference between their incomes. Baked into the conclusion that such a figure is reasonable is the fact that alimony payments will be deductible.

If representing a payor, "I don't want a 33-percent order if my client can't take the deduction," Fields says.

While Probate & Family Court judges would no doubt adjust to the new reality should it come to pass, Fields suggests a prudent practitioner may feel compelled to provide the court with a tax analysis to illustrate why a level of alimony payments that once made sense no longer does.

For now, at least, such considerations seem destined to remain theoretical, though repeal of the Affordable Care Act looked dead several times this summer, only to have Republican lawmakers attempt to resuscitate it repeatedly.

"I don't take anything for granted anymore," Fields says. MLW