REDEFINITION OF ALIMONY UNDER THE TAX REFORM ACT OF 1984

I. INTRODUCTION

Prior to 1943, the prevailing view regarding the taxation of alimony was that a taxpayer receiving payments from a spouse as a result of divorce or separation was not required to include the payments as income.[1] In addition, the payor spouse was not entitled to deduct the payments.[2] When Congress enacted the Revenue Act of 1942 creating section 22, the recipient of support payments was required to include the payments as income and the payor was relieved of the burden of being taxed on the payments.[3] Section 22, however, applied only to payments made under a decree of divorce or separation or a written instrument incident to the divorce.[4] As a result, those couples who had separated but not under a court decree received discriminatory tax treatment.[5] To remedy this discriminatory treatment, Congress enacted sections 71(a)(2) and 71(a)(3), both of which allowed payments under a written separation agreement or a decree for support to be treated as alimony for federal taxation purposes.[6] One of the main purposes of this treatment of alimony was to place the burden of taxation on the party in the lower tax bracket—the recipient spouse.[7]

In 1984, Congress chose to amend section 71 for the first time since 1954.[8] Under the Tax Reform Act of 1984, the term "alimony or separate maintenance payments" was completely redefined.[9] According to the House Ways and Means Committee, the 1954 definition of alimony was not suffi-

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1. H.R. REP. No. 432, 98th Cong., 2d Sess. 1494, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697, 1136 n.9 (citing Gould v. Gould, 245 U.S. 151, 153-54 (1917)).

2. *Id.*

3. H.R. REP. No. 2333, 77th Cong., 2d Sess. 46 (1942).

4. I.R.C. § 22(K) (1942).

5. H.R. REP. No. 1337, 83d Cong., 2d Sess. 10, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4017, 4034. The enactment of section 120 of the 1942 Revenue Act represents an effort to eliminate the severe financial hardship placed upon the payor spouse as a result of high taxes brought on by WW II. H.R. REP. No. 432, 98th Cong., 2d Sess. 1494, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697, 1136.

6. I.R.C. § 71 (1954) (amended 1984).

7. H.R. REP. No. 432, 98th Cong., 2d Sess. 1495, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697, 1137.

8. This was the first major change regarding the definition of alimony. Under the Tax Reform Act of 1976, Congress modified the rules regarding alimony somewhat by making alimony a deduction under section 62(13) in determining adjusted gross income. I.R.C. § 62(13) (1976).

9. H.R. REP. No. 432, 98th Cong., 2d Sess. 1495, *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697, 1137.

ciently objective.[10] Many of the terms were left undefined which, in turn, led to excessive litigation.[11] Other requirements set forth in the 1954 definition were dependent upon state law.[12] The result was a lack of uniform treatment of the payments under the federal tax laws.[13] The new definition represents an attempt to create a uniform federal standard which would "define alimony in a way that would conform to general notions of what type of payments constitute alimony as distinguished from property settlements and to prevent the deduction of large, one-time lump-sum property settlements."[14] In this way, it is anticipated that the amended definition will "make it easier for the Internal Revenue Service, the parties to a divorce, and the courts to apply the rules to the facts in any particular case, and should lead to less litigation."[15]

II. The 1954 Definition of Alimony

Prior to the Tax Reform Act of 1984, it was necessary for payments to meet requirements which were either described in ambiguous and undefined terms[16] or determined by varying state laws.[17] The three main requirements necessary for payments to come within section 71 treatment were: 1) the payments must have been made pursuant to a decree of divorce or separate maintenance or a written instrument incident to the divorce,[18] a written separation agreement,[19] or a decree for support;[20] 2) the payments must have been made in discharge of a legal obligation imposed by the marital or family relationship;[21] and 3) the payments must have been periodic.[22] There were additional requirements which will be addressed following the discussion of the three major requirements.[23]

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10. *Id.*
11. *See, e.g., infra* text accompanying notes 24-37.
12. *See, e.g., infra* text accompanying notes 52-85.
13. *Id.*; *see also* H.R. Rep. No. 432, 98th Cong., 2d Sess. 1495, *reprinted in* 1984 U.S. Code Cong. & Ad. News 711, 1137.
14. H.R. Rep. No. 432, 98th Cong., 2d Sess. 1495, *reprinted in* 1984 U.S. Code Cong. & Ad. News 697, 1137.
15. *Id.*
16. *See supra* note 11.
17. *See supra* note 12.
18. I.R.C. § 71(a)(1) (1954) (amended 1984). For an explanation of this term *see infra* text accompanying note 25-37.
19. I.R.C. § 71(a)(2) (1954) (amended 1984). For explanation of this term *see infra* text accompanying notes 38-48.
20. I.R.C. § 71(a)(3) (1954) (amended 1984). For a brief discussion of this term *see infra* text accompanying notes 49-51.
21. I.R.C. § 71(a)(1)-(2) (1954) (amended 1984). For a discussion of this requirement *see infra* text accompanying notes 52-85.
22. I.R.C. § 71(a)(1)-(3) (1954) (amended 1984). For further discussion of this requirement *see infra* text accompanying notes 86-110.
23. *See infra* text accompanying notes 111-126.

A. *The Instrument*

As stated above, section 71 required that payments be made under one of three types of instruments.[24] Unfortunately, neither the code nor the regulations provided a definition of those terms. That lack of definition led in turn to litigation regarding their precise meaning. A decree of divorce or separate maintenance may be described as merely a decree for support entered by a court pursuant to divorce or legal separation.[25] There has been a great deal of disagreement, however, over the meaning of the phrase "written instrument incident to such divorce or separation."[26] The Treasury Regulations suggest that "incident" means incident to the *status* of divorce and not the decree itself.[27] This interpretation has been adopted by the Second[28] and Ninth[29] Circuits and the Internal Revenue Service (IRS).[30] The distinction became important when the instrument in question was executed subsequent to the actual divorce or time of legal separation.

Under both *Newton v. Pedrick* and *Hollander v. Commissioner*, the courts allowed an alteration of a decree subsequent to the divorce to be considered "incident" within the meaning of section 71. In *Newton*,[31] the court stated:

> We hold no more than that where a legal obligation to support survives the dissolution of the marital relationship— whether because of imposition in the divorce decree itself, or because of a pre-decree agreement not incorporated in the decree . . . a subsequent adjustment of that obligation by court order or by later agreement . . . is 'incident to such

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24. *See supra* text accompanying notes 18-20. It is clear that voluntary payments made before a decree was entered or a written agreement was executed were not considered alimony within section 71 treatment. *See, e.g.*, Brown v. Commissioner, 50 T.C. 865, 870-71, *aff'd*, 415 F.2d 310 (4th Cir. 1969); Healy v. Commissioner, 54 T.C. 1702, 1705-06 (1971); Hoffman v Commissioner, 54 T.C. 1607, 1612-13, *aff'd*, 455 F.2d 161 (7th Cir. 1972); Taylor v. Commissioner, 55 T.C. 1134, 1137-38 (1973). It is also clear that payments were included in income as alimony only when they were, in fact, actually paid. Treas. Reg. § 1.71-1(b)(5) (1954).

25. *See* Treas. Reg. section 1.71-1(b)(1) (1954). An interlocutory decree was not within section 71(a)(1); however, if it was accompanied by a written separation agreement or a decree by the court ordering temporary support, the payments would fall under section 71(a)(2) or section 71(a)(3). I.R.C. § 71(a) (1954) (amended 1984). *See* Rev. Rul. 57-368, 1957-2 C.B. 896, 897-98. Revenue Procedure 82-53 provides a sample clause which, if followed, should guarantee treatment under section 71(a)(1) of the code. Rev. Proc. 82-53, 1982-2 C.B. 842, 843-45.

26. I.R.C. § 71(a)(1) (1954) (amended 1984). One would think that the litigation over whether a written instrument was "incident" to the divorce would be largely academic upon adoption of section 71(a)(2) in 1954, which included all written separation agreements regardless of their "incidence" to a decree of divorce or separate maintenance. I.R.C. § 71(a)(2) (1954) (amended 1984).

27. Treas. Reg. § 1.71-1(b)(1) (1954).

28. *See* Newton v. Pedrick, 212 F.2d 357, 361 (2nd Cir. 1954).

29. *See* Hollander v. Commissioner, 248 F.2d 523, 527 (9th Cir. 1957).

30. Rev. Rul. 60-140, 1960-1 C.B. 31, 32 (the Internal Revenue Service states that it will follow *Hollander* and *Newton*).

31. Newton v. Pedrick, 212 F.2d 357 (2nd Cir. 1954).

decree' within the purview of the statute.[32]

In *Hollander*,[33] the spouses entered into a written agreement prior to their divorce.[34] An amendment of that agreement subsequent to the divorce survived the remarriage of the recipient spouse.[35] The court held that the fact the second agreement was incident to the wife's remarriage did not prevent it also from being incident to the divorce.[36] The Second Circuit has further held that it is "immaterial whether the husband and wife or either of them intend that the agreement shall be 'incident to the divorce.' "[37]

The second type of instrument under which section 71 permitted alimony payments to be made was a written separation agreement.[38] It was not necessary that a written separation agreement between the two parties be a legally enforceable instrument.[39] Guidelines regarding the required formality of the agreement were developed through the litigation process. The main requirement was that the agreement be in writing. An oral agreement, not reduced to writing and not incorporated or referred to in a court decree, was not considered a written separation agreement.[40] A mere letter between the parties probably would not be held sufficient to satisfy this requirement.[41]

In *Nemeth v. Commissioner*,[42] the court held that the term "written separation agreement" required at least "more than a written statement by one spouse offering to make support payments, and the acceptance of those payments by the other spouse."[43] *Nemeth*,[44] however, was distinguished from *Jefferson v. Commissioner*,[45] wherein a letter reciting the parties'

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32. *Id.* at 361-62.

33. Hollander v Commissioner, 248 F.2d 523 (9th Cir. 1957).

34. *Id.* at 524-25.

35. *Id.* at 527.

36. *Id.* It is important to note that the second agreement expressly provided for the payments to continue after remarriage. There may be a problem in some states regarding the existence of a legal obligation in situations such as this. *See infra* text accompanying notes 72-85.

37. Holt v. Commissioner, 226 F.2d 757, 758 (2nd Cir. 1955).

38. I.R.C. § 71(a)(2) (1954) (amended 1984).

39. Treas. Reg. § 1.71-(b)(2) (1954).

40. Welford E. Garner, Jr., 79 T.C.M. (P-H) 350 (1973). The court recognized that "Congress was interested in requiring a clear statement of the separation agreement so it could be determined with certainty the amount of payments . . . ." *Id.* at 352.

41. While a letter may not satisfy the requirements of section 71(a)(2), it may be held sufficient to be a written instrument incident to the divorce. *See* Clark v. Commissioner, 58 T.C. 519, 524 (1972).

42. 45 T.C.M. (CCH) 58 (1982). In *Nemeth*, the parties had orally agreed to support payments. *Id.* at 59. The court held that subsequent correspondence between the parties' counsel concerning the amount of payments did not constitute a "written separation agreement." *Id.* at 60. In another case, the tax court ruled that an offer of payments made via letter from one attorney to the other pursuant to an informal agreement was "merely a unilateral offer to make alimony payments." Hill v. Commissioner, 59 T.C. 846, 856-57 (1973).

43. 45 T.C.M. (CCH) at 60.

44. *Id.*

45. 13 T.C. 1092 (1949).

agreed upon terms constituted a "written separation agreement."[46] The *Nemeth* court found sufficient evidence of the parties' intent to form an agreement regarding support payments.[47] In an attempt to avoid problems in the future regarding the terms or even the existence of a separation agreement, it is highly recommended that the parties reduce the agreement to a written document signed by both parties.[48]

There has been very little, if any, litigation regarding the meaning of the term "a decree for support" as required by section 71(a)(3). It can generally be described as an interim alimony award given by the court pending a final decree of divorce or separate maintenance.[49] This type of decree includes an interlocutory decree of divorce or a decree of alimony *pendente lite*.[50] It is not necessary for the individuals to be legally divorced or separated, nor is it necessary that the decree be a means of enforcing a separation agreement.[51]

B. *Legal Obligation*

Possibly the most litigated requirement under section 71 was the requirement that the payments be made in discharge of a legal obligation imposed by the marital or family relationship.[52] Congress, in adopting this requirement, intended to produce a uniform federal tax effect by determining the applicability of section 71 without resort to state law provisions.[53] Despite such intent, there has been excessive litigation due to the fact that the determination of whether an obligation to support existed depended upon

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46. *Id.* at 1098.

47. *Id.*

48. The parties should also be careful to include a specific amount of support to be paid if possible. The Internal Revenue Service has stated that such specificity was required before an agreement would be recognized. Rev. Rul. 73-409, 1973-2 C.B. 19. On the other hand, the tax court has held that a specific amount need not be stated thus rejecting the earlier Revenue Ruling. Jacklin v. Commissioner, 79 T.C. 340, 348 (1982).

49. Treas. Reg. § 1.71-1(b)(3) (1954).

50. *Id.*

51. *Id.* There were additional requirements, however, which had to be met before the payments were alimony under section 71(a)(3). The payments must have been periodic, the couple must in fact have been separated, and the couple must not have filed a joint return for the year in question. I.R.C. § 71(a)(3) (1954).

52. I.R.C. § 71(a)(1)-(2) (1983). By the express wording of the code this requirement apparently applied only to payments under a decree of divorce or separate maintenance or a written instrument incident to the decree or under a written separation agreement. *Id.* Section 71(a)(3), which applied to payments under a decree for support, used the language "for her support or maintenance" rather than referring to an obligation imposed by the marital or family relationship. I.R.C. § 71(a)(3) (1954) (amended 1984); *see also* Treas. Reg. § 1.71-1(b)(3) (1954). At least one author, however, has interpreted that phrase to mean that the requirement of a legal obligation also applied to payments under a decree for support. *See* Davies, *The Taxation of Alimony: Policies, Problems and a Proposal*, 31 U. MIAMI L. REV. 1355, 1377 (1977).

53. H.R. Rep. No. 2333, 77th Cong., 2d Sess. (1942).

the provisions of the applicable state law.[54] Variant state laws regarding such an obligation have frustrated Congress' goal of uniformity.

Litigation concerning the existence of an obligation for support has centered on one of two issues: 1) whether the payments were for the support and maintenance of the recipient spouse;[55] and 2) whether the payments were made pursuant to a legal obligation.[56] Resolution of the first issue turned upon a determination of whether the payments were part of a property settlement. The general rule was that if a payment was part of a property settlement, it was not within the purview of section 71.[57] While the courts looked to the intent of the parties to determine the nature of the payments,[58] the label which the parties attached to the payments—"alimony"—was not in itself determinative.[59] In other words, for purposes of taxation, the court was interested only in the parties' intent as to the actual purpose of the payments.[60] The court was "not concerned with the tax treatment the parties intended to reach."[61] Thus, parties could not label payments as alimony in order to achieve the desired tax effect when, in fact, they are part of a property settlement.[62]

The determination, then, of whether payments were alimony or part of a property settlement turned upon the facts and circumstances of each case.

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54. *See infra* text accompanying notes 55-85.

55. *See, e.g.*, Suzanne Schatz, 42 T.C.M. (CCH) 292 (1981); Charles S. Presbrey, 39 TAX CT. MEM. DEC. (P-H) ¶70,082 (1970); Beard v. Commissioner, 77 T.C. 1275 (1981). The requirement that payments be for support or maintenance and not as part of a property settlement is found in the regulations rather than in the code. Treas. Reg. § 1.71-1(b)(4) (1954).

56. *See, e.g.*, Dixon v. Commissioner, 44 T.C. 709 (1965); Hoffman v. Commissioner, 54 T.C. 1607 (1970), *aff'd*, 455 F.2d 161 (7th Cir. 1972).

57. Schatz v. Commissioner, 42 T.C.M. (CCH) 292 (1981). The court here recognized the problem that this language created and the need for a change. In a footnote it stated: "Congress . . . did not anticipate the litigation which has arisen over whether certain payments were made in discharge of a legal obligation arising out of a marital or family relationship. It is time for Congress to reconsider this statute and perhaps supply taxpayers with a safe harbor in this area." *Id.* at 296 n.10.

The taxation of property transfers incident to divorce for income tax purposes is governed by I.R.C. section 1041, which treats such transfers as a gift. I.R.C. § 1041 (1954) (amended 1984). This section was also affected by the Tax Reform Act of 1984. *See* H.R. REP. No. 432, 98th Cong., 2d Sess., *reprinted in* 1984 U.S. CODE CONG. & AD. NEWS 697, 1134.

58. Schatz v. Commissioner, 42 T.C.M. (CCH) at 296-97 (citing Porter v. Commissioner, 388 F.2d 670, 671 (6th Cir. 1968)).

59. *Id.* at 296-97 n.12 (citing Hesse v. Commissioner, 60 T.C. 685, 691 (1973)).

60. Schatz v. Commissioner, 42 T.C.M. (CCH) at 296-97 n.12; *see also* Solterman v. United States, 272 F.2d 387, 390 (9th Cir. 1959).

61. Schatz v. Commissioner, 42 T.C.M. (CCH) at 296-97 n.12.

62. *See, e.g.*, Charles S. Presbrey, 39 T.C.M. (P-H) ¶70,082 (1970) (although the payments were labeled as alimony, the court held they were actually made in repayment of a loan); *see also* Treas. Reg. § 1.71-1(b)(4) (1954). Some courts attempted to apportion part of the payment as alimony and part as a property settlement. *See, e.g.*, Hayutin v. Commissioner, 508 F.2d 462 (10th Cir. 1974); Bishop v. Commissioner, 508 F.2d 462 (10th Cir. 1974); Bishop v. Commissioner, 55 T.C. 720 (1971).

In *Beard v. Commissioner*,[63] the court criticized this method of determination as embodying a "metaphysical aura" because of the "vexing problems which frequently arise in determining the nature and extent of a spouse's property rights under state law."[64] The court further criticized this process as giving "similarly situated taxpayers . . . disparate treatment merely because of differences in state marital property laws."[65] Again the court drew attention to the need for a change in the laws "because the confusion in this area has spawned a relentless stream of litigation."[66] The court in *Beard* proceeded to decide the case by plunging "into the morass of the decided cases, many of them irreconcilable, and resolve [the] issue as best [it could]."[67]

The issue as to whether payments were made pursuant to a legal obligation again depended upon the governing state law. For example, payments made out of the estate of the payor spouse after his death could not be alimony depending upon the imposition of an obligation under state law to continue the payments. Courts held that where the state statute provided no obligation to continue support payments after the death of the payor, payments so made would not be considered alimony for federal taxation purposes.[68] This result was not guaranteed. Some courts found such payments to be alimony regardless of state law prohibiting support payments after the death of the payor.[69] In *Dixon v. Commissioner*,[70] the court found that although New York law did not allow alimony after the death of the payor, the husband was not prevented from voluntarily agreeing to make such payments.[71]

Payments made after the remarriage of the payee spouse constituted a second area in which the existence of a legal obligation was dependent upon

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63. 77 T.C. 1275 (1981).

64. *Id.* at 1284.

65. *Id.*

66. *Id.*

67. *Id.* The court proceeded to list the various factors that have arisen from past case law which indicate that payments are not alimony but rather are part of a property settlement. *Id.* at 1284-85. To determine the nature of the payments in question, the court looked into Michigan state law concerning the division of marital property and subsequently held the payments to be a property settlement and not alimony. *Id.* at 1285-86.

68. *See, e.g.*, Washington v. Washington, 162 Mont. 349, 512 P.2d 1300 (1973) (the payments were held not to be alimony because they were to be made regardless of remarriage or the death of the payor spouse).

69. Dixon v. Commissioner, 44 T.C. 709 (1965).

70. *Id.*

71. *Id.* at 713. The *Dixon* court also cited three California cases which similarly allow the payor to voluntarily contract to make support payments after his death in disregard of California law prohibiting such payments. Fairbanks v. Commissioner, 15 T.C. 62 (1950), *aff'd*, 191 F.2d 680 (9th Cir. 1951), *cert: denied*, 343, U.S. 915; Twinam v. Commissioner, 22 T.C. 83 (1954); United States v. Solterman, 163 F.Supp. 397 (N.D. Cal. 1958).

state law. In *Brown v. Commissioner* [72] the husband's sole liability to make payments was imposed by a divorce decree.[73] Payments made after the wife's remarriage were held not to constitute alimony because Virginia law caused the obligation to make such payments to cease upon the wife's remarriage.[74] In *Hoffman v. Commissioner*,[75] the payments were required under both a written agreement and a final divorce decree which incorporated the agreement.[76] Under Illinois law, an agreement incorporated by the decree merged into the decree and had no separate existence.[77] The court reasoned that the obligation to support existed solely under the decree and that, pursuant to Illinois statutory law, the obligation ceased upon remarriage of the payee spouse.[78]

In *Mass v. Commissioner*,[79] however, the court re-examined Illinois law regarding the doctrine of merger.[80] Here the court held that incorporation of the agreement raises a rebuttable presumption of merger which may be overcome by a clear showing of the parties' intent that the agreement survive the remarriage of the payee spouse.[81] In *Blakey v. Commissioner*,[82] the payments were required under a written separation agreement which, although " 'ratified, confirmed and approved' " by the divorce decree, according to Virginia state law did not merge into the divorce decree.[83] The *Blakey* court held that Virginia state law terminating the obligation to make support payments upon remarriage would not apply to an agreement that " 'otherwise specifically [provided support] in the event of remarriage.' "[84] According to a ruling by the IRS, payments made by a husband who knew there was no legal obligation might constitute a gift.[85]

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72. 50 T.C. 865 (1968), *aff'd*, 415 F.2d 310 (4th Cir. 1969).

73. *Id.* at 866.

74. *Id.* at 871. The court also stated, however, that the result may have been different had the payments been made under a written separation agreement. *Id.* at 869. *See infra* text accompanying notes 81-83 for such an example.

75. 54 T.C. 1607 (1970), *aff'd*, 455 F.2d 161 (7th Cir. 1972).

76. *Id.* at 1608-09.

77. *Id.* at 1612.

78. *Id.* at 1613. The Illinois law which eliminated the obligation to pay alimony upon remarriage was repealed in 1977, and the doctrine of merger was abolished in 1980. ILL. ANN. STAT. ch. 40, § 502(e) (Smith-Hurd 1980).

79. 81 T.C. 112 (1983).

80. *Id.* at 124.

81. *Id.* at 127-28. The court found a strong showing of intent on the part of the parties that the payments should continue after the wife's remarriage. *Id.* at 128.

82. 78 T.C. 963 (1982).

83. *Id.* at 974.

84. *Id.* at 976. While the agreement did not "specifically provide" that the payments continue after remarriage, it did specifically provide for the termination of the payments. *Id.* at 976-77. The court determined there was sufficient evidence of intent to continue the payments regardless of remarriage. *Id.* at 978.

85. Rev. Rul. 82-155, 1982-2 C.B. 36. Under *Joss v. Commissioner*, 56 T.C. 378 (1971), the husband continued making payments not knowing his wife had remarried. The payments were

C. *Periodic Payments*

While the code does not provide a definition of the term "periodic payments," it does provide an explanation of what does not constitute a periodic payment. According to the Internal Revenue Code, installment payments which discharged a principal sum were not periodic—with the exception of the ten year rule.[86] The ten year rule stated that if installment payments were to be made for a period longer than ten years, they were considered alimony and were included in the payee's income.[87] According to the regulations, if the payment period was less than ten years, the payments would be treated as alimony only if two requirements were met.[88] The first requirement provided that the payments be subject to one or more of the following contingencies: "the death of either spouse, remarriage of the [payee spouse], or change in the economic status of either spouse."[89] The second requirement provided that the payments be in the nature of alimony or an allowance for support.[90]

The computation of the time period has given rise to litigation in the past. In *Eno v. Commissioner*,[91] the court held that the ten year period began when the appellate court ruled on a decree of alimony which had been appealed.[92] Contrary to this holding, in *Wright v. Commissioner*[93] it was held that while the decree became final one year later, the ten year period commenced upon the date of the initial order.[94] In *Estate of Spicknall v. Commissioner*,[95] the obligation to make payments was created by a written stipulation. The *Spicknall* court used the date on which the written stipulation was signed, rather than the date when the decree itself was signed, as the beginning of the ten year period.[96] The Seventh Circuit, on the other hand, held that state law prevented the parties from having the power to bind themselves by a settlement agreement.[97] As a result, the ten year pe-

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held includible in the wife's income under section 61.

86. I.R.C. § 71(c)(1) (1954) (amended 1984).

87. I.R.C. § 71(c)(2) (1954) (amended 1984). The amount to be treated as alimony was limited to ten percent of the principal sum. *Id.* The regulations, however, provided that the ten percent limitation would not apply to payments which met the following two requirements: 1) the payments were subject to one of the following contingencies: death of either spouse, remarriage of the payee spouse, or a change in the economic circumstances of either spouse; 2) the payments were in the nature of alimony or an allowance for support. Treas. Reg. § 1.71-1(d)(4) (1954).

88. Treas. Reg. § 1.71-1(d)(3) (1954).

89. *Id.*

90. *Id.*

91. 24 T.C.M. (CCH) 1122 (1965).

92. *Id.*

93. 62 T.C. 377 (1974), *aff'd*, 543 F.2d 593 (7th Cir. 1976).

94. *Id.* at 600.

95. 285 F.2d 561 (8th Cir. 1961).

96. *Id.* at 565.

97. Joslin v. Commissioner, 424 F.2d 1223 (7th Cir. 1970).

riod commenced on the date of the actual decree and not on the previous signing of the agreement.[98] Even when the parties attempted to ensure a particular treatment of the payments for federal income tax purposes, the results were not always predictable under this requirement.

If the court determined that the payments were in fact to be made over less than a ten year period, a question remained as to whether the two requirements set out by the regulations had been satisfied.[99] The requirement that the payments be subject to one of three contingencies could be satisfied by local law even though not mentioned in the decree or agreement.[100] If local law provided that alimony cease upon the death or remarriage of either spouse, then the payments would meet this requirement regardless of the fact that no such provision was included in the instrument itself. As a result, similar payment provisions received inconsistent treatment for tax purposes due to differing state laws.[101]

The requirement that the payments be in the nature of alimony or an allowance for support[102] has also spawned a great deal of litigation and has produced inconsistent results. As discussed earlier,[103] the determination of whether payments were for the support and maintenance of the recipient often depended upon whether the payments were part of a property settlement.[104] Payments which were part of a property settlement were not in the nature of alimony or an allowance for support and thus would not come within section 71 treatment.[105] A lump sum stated in the document was often considered by the court as an indication that the payment was part of a property settlement.[106] The "lump sum rule" was not always a reliable rule. Even though a principal sum was stated in the instrument, a court may hold that a contingency prevents the existence of a sum that can be calcu-

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98. *Id.* at 1227.

99. *See supra* text accompanying note 88.

100. Treas. Reg. § 1.71-1(d)(3)(ii)(a) (1954); *see also* Rev. Rul. 59-190, 1959-1 C.B. 23. The question as to whether any other contingency may suffice has been left relatively unanswered. For further discussion see Gutman and Sander, *Divorce and Separation*, 95-3d TAX MGMT (BNA) A-7 (1975).

101. *See* Ellert v. Commissioner, 311 F.2d 707 (6th Cir. 1962). Installment payments which discharged a lump sum were held not periodic. Under Ohio law there was no requirement that payments terminate upon the wife's remarriage. *Id.* at 710. *But see* Warner v. United States, 204 F.Supp. 767 (S.D. Cal. 1962). California law supplied the necessary contingencies of death or remarriage, making installment payments alimony. *Id.* at 769-70.

102. Treas. Reg. § 1.71-1(d)(3) (1954).

103. *See supra* text accompanying notes 57-62.

104. *Id.*

105. *See supra* note 57.

106. If a lump sum or principal sum was not stated, the regulations provided that the payments would be periodic even though the sum was capable of being determined actuarially. Treas. Reg. § 1.71-1(d)(3)(ii)(c) (1954). *See also*, Prewett v. Commissioner, 221 F.2d 250 (8th Cir. 1955).

lated actuarially.[107] For example, in *Salapatas v. Commissioner*,[108] payments of fifty dollars per week in discharge of a $20,000 sum were held periodic because they were to cease upon the wife's death.[109] To the contrary, the court held in a previous case that payments of $2500 per year in discharge of a $25,000 sum were not periodic regardless of the fact that the payments were subject to the contingency of remarriage.[110] Once again, it was difficult for parties to ensure a particular treatment of their payments for tax purposes because of varying state laws and conflicting rulings by the court.

D. *"Separated and Living Apart"*

There has been much litigation over the meaning of the term "separated" in the requirement that the payee spouse be separated from the payor.[111] The Eighth Circuit has consistently held that "living apart" is a factual issue and that it is possible to be "living separately and apart" even though living in the same house.[112] This holding is in direct conflict with the tax court's position that "under no circumstances can husband and wife live separately in the same residence.[113] According to the tax court, "only when living in separate residences do the parties incur the duplicate living expenses normally incurred by divorced or separated couples."[114] In at least two subsequent cases, however, the tax court indicated a possible tendency toward following the Eighth Circuit.[115]

In *Washington v. Commissioner*,[116] although the court expressly rejected the Eighth Circuit's ruling and stated that "Congress intended that a husband and wife should not be treated as 'separated and living apart' when both are living under the same roof,"[117] seven judges dissented and proposed compliance with the Eighth Circuit.[118] In *Hertsch v. Commissioner*,[119] the

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107. *See* Salapatos v. Commissioner, 28 T.C.M. (CCH) 1205 (1969), *aff'd*, 446 F.2d 79 (7th Cir. 1971); Barnett v. Commissioner, 35 AFTR2d 75-1401 (10th Cir. 1975); Knowles v. United States, 290 F.2d 584 (5th Cir. 1961).

108. 446 F.2d 79 (7th Cir. 1971).

109. *Id.* at 82.

110. Estate of Smith v. Commissioner, 208 F.2d 349 (3d Cir. 1953).

111. I.R.C. § 71(a)(1)-(2) (1954) (amended 1984).

112. Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978) reversing on this issue, 68 T.C. 170 (1977). Prior to the final divorce decree, the parties occupied the same household. *Id.* at 62-63. The husband was required by a court order to make support payments. *Id.* The parties kept separate bedrooms and had no meals together. *Id.*

113. *Id.* at 62.

114. *Id.*

115. Washington v. Commissioner, 77 T.C. 601 (1981); Hertsch v. Commissioner, 43 T.C.M. (CCH) 703 (1982).

116. 77 T.C. 601 (1981)

117. *Id.* at 605.

118. *Id.* at 606, 608.

119. 43 T.C.M. (CCH) at 703.

court ruled as a matter of law "that a husband and wife should not be treated as 'separated and living apart' when both are living under the same roof."[120] The court proceeded to consider the case "as a factual matter" and pointed out that the parties intended to live together even after the divorce was final and that the home was not divided into separate apartments or living areas.[121]

It is certain that in the Eighth Circuit parties may live separately although under the same roof. In other circuits, the tax court may be willing to alter their stance where the parties have, in effect, created two residences out of one household. If the parties can show separate living areas with separate entrances, the tax court may decide the issue based on the particular facts of the case.

E. *Child Support*

The code provides that payments fixed as child support will not be considered alimony.[122] Litigation in this area has arisen over the precise meaning of the term "fixed as child support." The trend of the tax court has been to require explicit language stating that certain payments are for the support and maintenance of the child before they are determined to be "fixed as child support." The leading case in this area is *Commissioner v. Lester*.[123] In *Lester*, the Court held that "Congress intended that, to come within the [child support] exception . . . , the agreement providing for the periodic payments must specifically state the amounts or parts thereof allocable to the support of the children."[124] The courts have further held that the intent of the parties is irrelevant.[125] Even if the amount fixed in the instrument as child support was expressly "for tax purposes" only, the tax court has ruled that, where "the amount payable for child support is specifically designated, and not left to 'determination by inference or conjecture,' . . . that amount is fixed within the meaning of section 71(b) and is not deductible by the payor spouse, nor taxable to the recipient, regardless of the purposes for which the allocation was made."[126]

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120. *Id.* at 705.

121. *Id.*

122. I.R.C. § 71(b) (1954) (amended 1984). The Internal Revenue Service has published sample clauses which, if used, would ensure treatment of payments as all money or child support. Rev. Rul. 82-53 1982-2 C.B. 842.

123. 366 U.S. 299 (1961).

124. *Id.* at 301. The language of the document which was in question was as follows: "In the event that any of the [three] children . . . shall marry, become emancipated, or die, then the payments herein specified shall . . . be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue." *Id.* at 300.

125. *See, e.g.*, Harbin v. United States, 432 F.2d 943 (6th Cir. 1970).

126. Abramo v. Commissioner, 78 T.C. 154, 159-60 (1982) (quoting Commissioner v. Lester, 366 U.S. at 306). The *Abramo* court rejected the argument that, because the payments were designated "for tax purposes only," the payee was realistically able to use the money for any

III. Alimony Under the Tax Reform Act of 1984

The Tax Reform Act of 1984 represents a second attempt by Congress to develop a uniform federal definition of alimony.[127] The requirement that the payments be made under a decree of divorce or separation, a written separation agreement, or a decree for support remains unchanged.[128] Other than that requirement, the definition of alimony has been altered substantially for instruments executed after December 31, 1984.[129]

A. *Obligation for Support and Periodic Payments*

The requirement that payments be made under a legal obligation imposed by the marital or family relationship[130] has been eliminated. As a result, one area of excessive litigation has potentially been eliminated. One of the questions that arose under the 1954 definition of alimony was whether payments made out of the estate of the deceased payor were pursuant to a legal obligation.[131] Under the amended definition of alimony, a payor apparently may voluntarily contract to continue payments beyond his death without regard to applicable state law.[132] This is one of the ways in which the parties may now characterize the payments as they wish and ensure a desired tax treatment. Payments made after the remarriage of the payee spouse is another area which had generated litigation.[133] The controversy

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purpose other than child support. *Id.* at 158-59. This decision overrules Talberth v. Commissioner, 47 T.C. 326 (1966), where an amount fixed as child support "for tax purposes" was held to not satisfy the *Lester* requirement because the payee was free to use the money for purposes other than child support. 47 T.C. at 329.

127. *See supra* text accompanying notes 8-15.

128. I.R.C. § 71(b)(1)(A), (b)(2) (1985). *See supra* text accompanying notes 24-51 for a discussion of possible problem areas surrounding the existence of an appropriate instrument. The general rule that "[g]ross income includes amounts received as alimony or separate maintenance payments" also remains the same, as does the rule that the payor may deduct such payments. I.R.C. §§ 71(a), 215 (1985).

129. I.R.C. § 71 (1985). An instrument executed after December 31, 1984, but which adopts without change the terms of a decree, instrument, or order executed before January 1, 1985, will be governed by the 1954 version of section 71. Temp. Treas. Reg. § 1.71-1T, Q & A 26. The temporary regulations have listed three types of change within the meaning "change in the terms": 1) "[a] change in the amount of [the] payments"; 2) a change in the time period for the payments; or 3) "the addition or deletion of any contingencies." *Id.* If an instrument executed before January 1, 1985, has been modified on or after that date, it will come within treatment by the amended version of section 71 only if the modification expressly states that amended section 71 will apply. *Id.* This may result in a great deal of confusion for the first few years because attorneys must first determine if the instrument was executed after January 1, 1985, and second, determine whether it adopts, without change, a prior instrument.

130. I.R.C. § 71(a) (1954) (amended 1984).

131. *See supra* text accompanying notes 68-71.

132. "The instrument must, however, provide that the payments are to cease upon the recipient's death. *See infra* text accompanying notes 162-67.

133. *See supra* text accompanying notes 71-84.

caused by remarriage concerned the existence of a state law imposing an obligation to continue the payments;[134] elimination of the obligation requirement should eliminate the controversy.[135] Finally, removal of the obligation requirement should eliminate the litigation over whether the payments were actually part of a property settlement.[136] The amended definition of alimony does not completely dispense with this distinction, as will be discussed later.[137]

The requirement that the payments be periodic[138] has also been eliminated under the revised rules. As a result, litigation over the existence of a ten year period has potentially been eliminated.[139] A lump sum payment in discharge of a principal sum may now be considered alimony as long as the other requirements of revised section 71 are met.[140] Removal of the periodic requirement also eliminates the need for payments to be "in the nature of alimony."[141] Thus, cash payments arising out of a property settlement may be considered alimony as long as the remaining requirements are met.[142]

B. *The New Requirements*

As stated earlier, to come within section 71 treatment, a payment must be made pursuant to a decree of divorce or separate maintenance, or a written instrument incident to the decree; a written separation agreement; or a decree for support.[143] Additionally, the payment must be in cash.[144] According to the temporary regulations, "[t]ransfers of services or property (including a debt instrument of a third party or an annuity contract), execution of a debt instrument by the payor, or the use of property of the payor do not qualify as alimony or separate maintenance payments."[145] The new definition also allows the payments to be made "on behalf of" a spouse.[146] This means that the parties may arrange in the decree or instrument for the ali-

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134. *Id.*

135. Revenue Ruling 70-557, which allows payment of alimony after the payee remarries, will now probably be controlling. 1970-2 C.B. 10.

136. *See supra* text accompanying notes 57-67.

137. *See infra* text accompanying notes 187-88.

138. I.R.C. § 71(a) (1954) (amended 1984).

139. *See supra* text accompanying notes 91-98. There is the potential for litigation under section 71(f) which requires that, under certain circumstances, the payments be required for the six post-separation years. I.R.C. § 71(f) (1985). *See infra* text accompanying notes 191-94.

140. *See infra* text accompanying notes 143-207 for an explanation of the requirements of amended section 71. In the case of such a lump sum, special attention should be paid to I.R.C. § 71(f)(1).

141. *See supra* text accompanying notes 102-10

142. *See infra* text accompanying notes 143-208.

143. *See supra* text accompanying note 128.

144. I.R.C. § 71(b) (1985). This includes payments by check or money order. Temp. Treas. Reg. § 1.71-1T, Q & A 5.

145. Temp. Treas. Reg. § 1.71-1T, Q & A 5.

146. I.R.C. § 71(b)(1)(A) (1985).

mony to be paid to a third party.[147] The temporary regulations list certain types of payments which will be allowed. Included are payments of rent, tax, tuition, and premiums for term or whole life insurance on the payor's life so long as the payee is the owner of the policy.[148] Mortgage payments will generally be allowed; however, payments to maintain property which is used by the payee spouse but which is owned by the payor will not be considered to be "on behalf of a spouse."[149] While the term "on behalf of a spouse" raises the potential for litigation in the future, it is quite possible that the litigation will not be as extensive as that encountered with the term "legal obligation for support."

Amended section 71 provides the parties with the opportunity to designate that payments which would otherwise qualify as alimony shall be excludable by the recipient and nondeductible by the payor.[150] Such a designation should probably be made using the express language of the code to avoid any differences in interpretation by the court. In the case of a decree of divorce or separation, the designation must be made in the decree.[151] If the payments are made under a written separation agreement, the designation may be made in any writing signed by both parties.[152] The designation is filed each year in which it applies with the payee's tax return. This means, presumably, that the parties may designate payments as not within sections 71 and 215 on a year by year basis.[153] This is another example of how the parties are better able to ensure a desired tax treatment under amended section 71.

The controversy over the meaning of "separated" under the 1954 definition of alimony may have been settled under the amended definition.[154] The code requires that if the parties are legally separated under a decree of divorce or separation, the parties may not be members of the same household at the time alimony payments are made.[155] Any payment which is made while the parties are members of the same household will not be considered

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147. Under the 1954 alimony requirements, before a payment to a third party was considered alimony, it was required that a legal obligation exist between the payee spouse and the third party recipient. *See e.g.*, Christiansen v. Commissioner, 60 T.C. 456, 460 (1973).

148. Temp. Treas. Reg. § 1.71-1T, Q & A 6. The regulations further provide that the payee spouse may arrange for alimony payments to be made to a charity. Temp. Treas. Reg. § 1.71-1T Q & A 7. The requirement for this provision is a "written request, consent or ratification of the payee spouse" which states the intent of the parties. *Id.*

149. *Id.* at Q & A 6. This includes payments for mortgage, insurance, and real estate taxes on such property. *Id.*

150. The express language of the code is as follows: "not includible in gross income under [section 71] and not allowable as a deduction under section 215." I.R.C. § 71(b)(1)(B) (1985).

151. Temp. Treas. Reg. § 1.71-1T, Q & A 8.

152. *Id.*

153. *Id.*

154. *See supra* text accompanying notes 111-21.

155. I.R.C. § 71(b)(1)(c) (1985).

alimony.[156] Payments made under a written separation agreement or a decree for support (before a final decree is entered) will be considered alimony regardless of whether the parties are living together.[157]

The temporary regulations state that "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."[158] Apparently, the Eighth Circuit's ruling in *Sydnes*,[159] that parties may factually be separated while under the same roof,[160] may no longer be valid where the parties have been legally divorced or separated. While the term "separate households" may generate some litigation, the meaning of the requirement, with the help of the regulations, should be clearer than that of the term "separated." Additionally, use of the term "dwelling unit" helps to further define the term, meaning that the rationale in *Sydnes* is no longer persuasive.[161]

It is further required that the instrument state that there is no longer an obligation to make payments after the death of the recipient spouse.[162] The parties may no longer rely on state law to supply this contingency.[163] If the instrument does not clearly state the contingency, "none of the payments whether made before or after the death of the payee spouse, will qualify as alimony or separate maintenance payments."[164] This should reduce some of the confusion produced in the past by the fact that the contingency could be supplied by state or local law.[165] It is also required that there be no obligation to make payments as a substitute for the continuation of post-death payments.[166] A "substitute payment" is required by the instrument "[t]o the extent that one or more payments are to begin to be made, increase in amount, or become accelerated in time as a result of the death of the payee spouse."[167]

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156. Temp. Treas. Reg. § 1.71-1T, Q & A 9. The regulations provide, however, that if "one spouse is preparing to depart from the household . . . and does depart [within one month] after the date the payment is made," then the payment will be considered alimony. *Id.*

157. *Id.* Under the 1954 definition, the restriction on living together applied to all three possible instruments. I.R.C. § 71(a) (1954).

158. Temp. Treas. Reg. § 1.71-1T, Q & A 9.

159. Sydnes v. Commissioner, 577 F.2d 60 (8th Cir. 1978).

160. *See supra* text accompanying note 112.

161. Temp. Treas. Reg. § 1.71-1T, Q & A 9. Use of the term "dwelling unit" suggests that the parties may live in apartments in the same building or separate parts of a duplex so long as the building was so separated prior to the divorce or separation.

162. I.R.C. § 71(b)(1)(D) (1985).

163. *See supra* text accompanying notes 97-98.

164. Temp. Treas. Reg. § 1.71-1T, Q & A 11.

165. *See supra* text accompanying notes 100-01.

166. I.R.C. § 71(b)(1)(D) (1985).

167. Temp. Treas. Reg. § 1.71-1T, Q & A 14.

C. *Child Support*

As under the 1954 definition,[168] payments fixed by the instrument as child support will not be considered alimony.[169] As was held in *Lester*,[170] any payment which is expressly fixed as being for the support of children is not alimony. To the extent that the *Lester* ruling holds that *unless* a payment is expressly fixed as child support it will be considered alimony, it is no longer controlling.[171] The new code section has expanded the 1954 definition by providing that any amount which "will be reduced—(A) on the happening of a contingency specified in the instrument relating to a child, . . . or (B) at a time which can clearly be associated with [such] a contingency" will be treated as fixed for child support.[172] A contingency relates to a child "if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur."[173] The temporary regulations list the following as examples of such event: "attaining a specified age or income level, dying, marrying, leaving school, leaving the spouse's household, or gaining employment."[174] Thus, if the instrument states that the payor is required to make payments of $2000 per month, to be reduced to $1500 when the child turns 18 or moves away from home, then $500 each month will be considered as child support and not alimony (making actual alimony payments for section 71 purposes $1500 per month).

According to the temporary regulations, there are only two situations in which a rebuttable presumption will be raised that a reduction in the payments is clearly associated with a contingency relating to the child.[175] Both situations concern payments that are reduced within a specified time period before or after the child reaches a particular age.[176] The authors of the regulations apparently felt that the only time a reduction in payments was *clearly associated* with such a contingency was when the reduction occurred near a time that was readily identifiable. A good example is the age of majority, rather than a more tenuous date, such as marriage or leaving home. The first situation occurs when payments are to be reduced within six months of the date that a child reaches the age of 18, 21, or the local age of

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168. I.R.C. § 71(b) (1954).

169. I.R.C. § 71(c)(1) (1985).

170. Commissioner v. Lester, 366 U.S. 299, 303 (1961).

171. *Id.* at 303.

172. I.R.C. § 71(c)(2) (1985).

173. Temp. Treas. Reg. § 1.71-1T, Q & A 17.

174. *Id.* Under amended section 71, language similar to that used in the instrument in *Lester* would prevent the payments from being treated as alimony. Commissioner v. Lester, 366 U.S. at 300.

175. Temp. Treas. Reg. § 1.71-1T, Q & A 18. The regulations also state that *only* in these two situations will a reduction be considered as being associated with a contingency relating to the child. *Id.*

176. *Id.*

majority.[177] The second situation occurs when:

> [T]he 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 . . . must be the same for each such child.[178]

At first reading, this language appears to be more than slightly confusing. This provision encompasses those situations where couples have two or more children[179] and there is a corresponding reduction in the payments as each child reaches a particular age between 18 and 24.[180] The age in question can be any age between 18 and 24.[181] In fact, it need not be stated in terms of whole years; it may be stated in terms of years, months and days.[182] It does, however, have to be the exact same age for each child in question.[183]

As is often true with the Internal Revenue Code, an example may help to clarify the meaning of this language. Assume the couple, Roland and Vera, have two children: Susan, who was born August 25, 1968, and Ed, who was born February 6, 1970. Vera is required under a decree of divorce to make alimony payments of $3000 per month, with payments to cease upon the death of either spouse.[184] The payments are to be reduced to $2500 per month on January 1, 1989, (when Susan is at the age of 20 years, 4 months and 6 days) and to $2000 on January 1, 1991, (when Ed is at the age of 20 years, 10 months and 22 days) which is within one year of when each child reaches the age of 21. Under section 71(c), only $2000 will be included in Roland's income as alimony and the remaining $1000 will be considered child support.[185] If Roland and Vera wanted the $1000 to be treated as alimony, they could provide that the second reduction occur on January 1, 1993, when Ed is at the age of 22 years, 10 months and 22 days. These situations, however, raise only a presumption of child support that "may be rebutted . . . by showing that the time at which the payments are to be

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177. *Id.*

178. *Id.*

179. The language "two or more occasions . . . before or after a different child" implies (although awkwardly) that the couple must have two or more children for this situation to apply. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* In the example given in the regulations, the target age was 21 years and 4 months. *Id.*

183. *Id.* While the regulations do not comment on this, if the couple has three children and the payments are to be reduced within one year of only two of the children attaining the same age, presumably only the amount of those two reductions will be considered child support. If, in addition, the payments are reduced within six months of when the third child reaches the age of 18, 21, or the local age of majority, then that reduction would be child support under the first situation. *See supra* text accompanying note 176.

184. The requirement that the instrument state this contingency is found in I.R.C. section 71(b)(1)(D) (1985).

185. I.R.C. § 71(c)(2)(B) (1985).

reduced was determined independently of any contingencies relating to the children of the payor."[186]

D. *Excess Front-Loading Rule*

The purpose of the excess front-loading rule[187] is to "prevent a one-time property settlement from being disguised as alimony."[188] Rather than attempting to determine the actual nature of a large payment made at the beginning of alimony,[189] the new code provisions provide a set of standards which will treat all such payments uniformly. There are two rules encompassed within the excess front-loading rule: the "minimum term" rule and the "recapture" rule.[190] Under the minimum term rule, if any payment exceeds $10,000 for a particular year, then in order for any amount in excess of $10,000 to be considered alimony, the payments must be required for the six "post-separation" years.[191] The six "post-separation" years "are the [six] consecutive calendar years beginning with the first calendar year in which the payor" makes the first alimony or separate maintenance payment.[192] For example, if Vera is required to pay Roland a total of $30,000 in 1986 and $15,000 in 1987, Roland will have to include only $10,000 as alimony income in 1986 and 1987 because the payments are not required for the six post-separation years.[193] If, however, Vera is required to pay the following: $30,000 in 1986; $15,000 in 1987; $10,000 in 1988; $5,000 in 1989; $5,000 in 1990; and $5,000 in 1991, then the entire amount of each payment will be included as alimony income by Roland as long as the other requirements of section 71 are met.[194]

Payments which fall under the minimum term rule are subject to the recapture rule.[195] The recapture rule requires a recomputation of the amount to be included as alimony income whenever payments decrease by

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186. Temp. Treas. Reg. § 1.71-1T, Q & A 18.

187. I.R.C. § 71(f) (1985). The excess front-loading rule applies only to payments made under a decree of divorce or separate maintenance or a written separation agreement. I.R.C § 71(f)(5)(B) (1985).

188. H.R. Rep No. 432, 98th Cong., 2d Sess. 1496, *reprinted in* 1984 U.S. Code & Ad. News 697, 1138.

189. *See supra* text accompanying notes 106-10.

190. Temp. Treas. Reg. § 1.71-1T, Q & A 19.

191. I.R.C. § 71(f)(1) (1984). Payments which are in discharge of a property settlement could be disguised by spreading them out over a six year period. Care must be taken, however, to avoid application of the recapture rule by making the largest payments at the end of the six-year period. *See infra* text accompanying notes 195-201.

192. Temp. Treas. Reg. § 1.71-1T, Q & A 22. The tolling of the six years does not necessarily begin with the date the divorce decree is entered or the agreement is executed. *Id.* Rather, it begins with the year in which the first payment required by such an instrument is made. *Id.*

193. Vera is entitled to deduct $10,000 each year. I.R.C. § 215 (1984).

194. Vera is entitled to deduct the entire amount of the payments. *Id.*

195. Temp. Treas. Reg. § 1.71-1T, Q & A 19.

more than $10,000.[196] To determine the "excess amount",[197] the amount of payment made during the "computation year"[198] plus $10,000 is subtracted from the amount paid in the immediately preceeding year (minus any excess amount already determined for that year).[199] Any excess is included in income, in addition to the amount already paid, as alimony for the computation year.[200] The same process is then executed for each of any other previous years.[201]

Again, an example would help to clarify things. Using the amount stated in the previous example,[202] the amount included in income as alimony for 1987 would be determined as follows: $30,000, (the amount paid in the previous year), minus $25,000 (the amount paid in the computation year plus $10,000) which equals $5,000. The $5,000 is added to the $15,000 (amount paid in the computation year) for a total of $20,000 to be included as alimony under section 71. In 1988, the amount to be included would be a total of $20,000.[203]

The temporary regulations provide for three exceptions to the recapture rule.[204] Under the first exception, payments which are made under a temporary decree for support, pursuant to section 71(b)(2)(C), are not affected by this rule.[205] Secondly, this rule does not apply to payments which are actually determined as a fixed portion of the payor's income from a business or

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196. I.R.C. § 71(f)(2) (1984). *See also* Temp. Treas. Reg. § 1.71-1T, Q & A 24.

197. The "excess amount" is the amount that will be included in the recipient's income as alimony. *Id.*

198. The "computation year" is the current year for which one is attempting to determine the amount of alimony income. I.R.C. § 71(f)(4)(B) (1984).

199. I.R.C. § 71(f)(3) (1984).

200. *Id.* It is also deductible by the payee spouse under I.R.C section 71(f)(2)(B) (1984).

201. I.R.C. § 71(f)(3) (1984).

202. The amounts were as follows:

1986	$30,000
1987	15,000
1988	10,000
1989	5,000
1990	5,000
1991	5,000

203. The $20,000 is computed as follows: The immediately preceding year is 1987. In 1987, $15,000 in payments were made minus the excess amount of $5,000 already computed for that year which equals $10,000. There is no excess because $10,000 minus the 1988 payments of $10,000 + $10,000 results in a negative amount. However, in 1986 the payments were $30,000 (there was no excess computed for that year) which, subtracting $20,000 ($10,000 plus $10,000), equals an excess amount of $10,000. The excess amount of $10,000 plus the payments made in 1988 equals $20,000 to be included as alimony income. The payee spouse is entitled to deduct this amount also. I.R.C. § 71(f)(2)(B) (1984).

204. Temp. Treas. Reg. § 1.71-1T, Q & A 25. These three exceptions are in addition to the threshold requirement of any payment in excess of $10,000. *Id. See also supra* text accompanying note 195.

205. Temp. Treas. Reg. § 1.71-1T, Q & A 25.

property.[206] For example, if Vera is required to pay Roland 10% of her income, which in 1987 equals $20,000 and in 1988 equals $9,000, the recapture rule will not apply even though there is an excess amount of $1000.[207] The third exception involves a situation in which payments during any one of the post-separation years cease because of the death of either spouse or the remarriage of the recepient spouse.[208]

IV. Conclusion

The definition of alimony under the Tax Reform Act of 1984 should prove to be a substantial improvement over the 1954 definition of alimony. In revising section 71, Congress has attempted to avoid some of the major pitfalls incurred under the previous definition. Most of those pitfalls were the result of an unreasonable reliance on variant state laws in determining the existence of alimony. Differences in state laws concerning such issues as the existence of a legal obligation for support resulted in differences in federal tax consequences. These differences, in turn, created problems not only for the Internal Revenue Service, but also for the courts, attorneys, and the parties to the divorce. Under the amended definition, the parties to the divorce are given greater ability to ensure a desired tax treatment with a minimal amount of litigation.

For example, Vera may wish that payments be made out of her estate to Roland upon her death, and yet be treated as alimony for federal taxation purposes. Such a provision may not have been possible in some states regardless of how explicit Vera's and Roland's intentions may have been.[209] According to the amended definition, Vera is free to provide for after-death alimony payments regardless of whether there exists a state imposed obligation to do so.[210] In addition, Vera is free to designate that payments which would ordinarily be treated as alimony under section 71 shall not be so treated.[211]

The amended definition should also simplify things for the attorney by providing readily recognizable and definable terms and requirements. For example, the term "separated" has been defined in a more precise manner. In order to be separated within the meaning of section 71, Vera and Roland may not live under the same roof regardless of whether they use separate

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206. *Id.*

207. The amount is figured as follows:

$$20{,}000 - (9{,}000 + 10{,}000) = 1000 \text{ excess amount.}$$

This is assuming that the payments first qualified under the minimum term rule. *See supra* text accompanying notes 185-89.

208. *Id.*

209. *See supra* text accompanying notes 68-71.

210. *See supra* text accompanying notes 131-33.

211. *See supra* text accompanying notes 150-61.

entrances or otherwise maintain separate residences.[212] In addition, the determination of what payments constitute child support has also been made simpler and more consistent through the use of more precise terminology.[213]

The new definition applies only to those decrees or instruments executed after December 31, 1984. Therefore, since certain instruments still fall under the 1954 definition, the radical change may cause some confusion. This confusion, however, should dissipate within a few years since alimony generally is not intended to be a permanent requirement. As with any new law, the period of adjustment may be difficult; however, in the long run the clarity and advantages of the new definition should prove to be worthwhile.

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212. *See supra* text accompanying notes 154-61; *compare supra* text accompanying notes 111-21.

213. *See supra* text accompanying notes 172-86; *compare supra* text accompanying notes 122-26.