

## Memorandum in Opposition Family Law Section

FLS Memorandum #3-Federal

November 29, 2017

H.R. 1 Tax Cuts and Jobs Act

Law & Section Referred To: *Sec. 1309. Repeal of deduction for alimony payments.*

### **THE FAMILY LAW SECTION OPPOSES THIS BILL**

The Tax Cuts and Jobs Act of 2017, passed by the United States House of Representatives on November 16, 2017, includes language that would eliminate the deductibility of alimony payments. It is the position of the Family Law Section that such elimination would cause significant harm for middle class divorcing families who depend on the alimony deduction as a means to exit the divorce process in the most economically sustainable fashion. It would also cause unnecessary and significant disruption to the day-to-day practice of matrimonial attorneys and their clients.

The history of the extant law regarding deductibility of alimony and the availability of that deduction to divorced spouses has a history that extends back to 1942, with the current iteration having been enacted in 1986. The elimination of the alimony deduction could significantly decrease combined net after-tax income for divorced family households (particularly in the middle class tax bracket), and could increase the cost of obtaining a divorce through the prolongation of litigation.

The availability of the deduction for spousal support as it presently exists is a significant tool for matrimonial litigators when it comes to resolving litigation. The elimination of that option will make the obtaining of settlements in a great number of contested matrimonial actions more difficult to reach, which will in turn mean that: 1) the cost of obtaining a divorce will increase for the parties through the prolongation of litigation, and 2) the already over-crowded court calendars in many of the matrimonial parts of the Supreme Court of the State of New York will have a new impediment added to the existing challenges faced by attorneys and litigants when attempting to resolve a matter. Indeed, the proposed amendment may have an amplifying effect given that the loss of the alimony deduction may apply not only to divorces subsequent to December 31, 2017, but also to the subsequent modification of spousal support provisions contained in agreements executed and judgments entered prior to December 31, 2017.

The proposed elimination of the alimony deduction would presumably force a complete re-examination of the temporary maintenance guidelines as well. Significant time and effort was dedicated to establishing such guidelines as a means to provide a greater degree of certainty and fairness when determining interim maintenance awards (particularly with respect to lower income households). The temporary maintenance guidelines are predicated on the assumption that the presumptive award of maintenance is taxable (to the payee, and deductible by the payor). The proposed elimination would undo such assumption and effectively render the guidelines unfit for use (in their current form) by matrimonial attorneys and Justices in New York.

However, of more long-term significance to litigants, and especially the children that are often most effected by divorce, the proposed amendment will increase the already difficult economic circumstances for divorced families. Proponents of this amendment have argued that existing law provides a benefit to divorced families -- a benefit that is not available to intact families. That argument has no basis in fact. The intention of the proposed elimination, as set forth in the Report of the Committee on Ways and Means (Report 115-409), is as follows:

*The Committee believes that the repeal of the deduction for alimony payments from the payor spouse and repeal of the corresponding inclusion in gross income by the recipient spouse simplifies the tax code and prevents divorced couples from reducing income tax through a specific form of payments unavailable to married couples.*

That argument in favor of the amendment ignores the fact that, while the deduction does allow for alimony to be taxed at the rates applicable to the lower earner, the tax brackets applicable to divorced individuals are already significantly higher than those applicable to married couples filing jointly. Income tax rates increase at a vastly slower rate for those filing as Married Filing Jointly, or as a Qualifying Widow(er) with Dependent Child, than for those filing Single, or as Head of Household. The amendments to the tax brackets contained within H.R. 1 Tax Cuts and Jobs Act, while changing the number of brackets and the income levels at which they will apply, retains the vastly disparate application of those brackets to those filing as single or head of household when compared to the application of those same brackets as applied to those married filing jointly. (*See* Sec. 1001. Reduction and simplification of individual income tax rates of H.R. 1 Tax Cuts and Jobs Act.)

Currently, the deductibility of alimony lessens the negative impact of the higher tax brackets generally applicable to divorced households, resulting in tax savings that allow divorced families to obtain a measure of economic parity with that of the intact family. This adjustment is both just and necessary given that the divorced family has higher costs than an intact family because of the need for duplication of essential resources, such as shelter.

It has been noted, by some family law practitioners, that the proposed elimination of the alimony deduction would, in fact, create a “divorce penalty”, a view born out by the indisputable fact that the proposed amendment would reduce, potentially by many thousands of dollars depending upon each family’s circumstances, the net after-tax income available to divorced households, and thereby placing those families at a significant financial disadvantage when compared with the net after-tax resources of an intact family earning similar income. This added financial strain can only serve to further deteriorate the conditions under which children of divorce often find themselves in, conditions that the New York State Court System has long sought to treat as a priority of the state for amelioration. (*See* Report of the Chief Judge of the State of New York: Matrimonial Commission, Hon. Sondra Miller, Chairperson, February, 2006.)

Based upon the foregoing, the Family Law Section **OPPOSES** the elimination of the alimony deduction.