TAX ISSUES FOR DOMESTIC COURT May 2011

Judge Susan R. Burch
Guilford County – 18th District
North Carolina

A basic, *very basic*, overview of tax issues for judges in family law cases.

I. Deductions for Dependent Children
II. Taxable Consequences of Alimony and Spousal Support
III. Consideration of tax consequences in Division of Property Cases

The purpose of this manuscript is to provide a basic, very basic, overview of tax issues for judges in family law cases. The first two sections explore the Internal Revenue Code's treatment of deductions related to family law cases, and the final section explores our appellate court's guidance in considering tax consequences in division of marital property cases. As this is a basic, very basic, overview, it contains general information and explanation from IRS publications. I have not cited the applicable sections of the Internal Revenue Code, as I hope I never have to submit anything professionally that requires citing the I.R.C. I have, however, identified the publications used, and will be happy to send an electronic copy of them to anyone who is interested. I have cited several North Carolina appellate cases and trust that you can find the full case on your own if you wish to read it. For anyone interested in further study of taxes and IRS regulations, I recommend their website: www.irs.gov. It is well organized and contains a tremendous amount of information. You can literally waste hours and hours there.

Please do not consider anything about this presentation to be legal or tax advice with regard to preparing your own taxes. I made a C in this class in law school.

SPECIAL NOTE: The extension of tax cuts/credits passed in January 2011 keep the Bush era tax plan in place for another two years.

I. DEPENDENTS (otherwise known as children) AND RELATED TAX MATTERS

There are 5 tax benefits related to dependent minor children:

1. Child Tax Exemption
2. Child Tax Credit
3. Tax Credit for Dependent Care
4. Exclusion from Income for Dependent Care
5. Earned Income Credit

There is also a filing status of Head of Household that may also be available to a parent claiming a dependent minor child.

Basic Rule: The custodial parent claims the children

The *IRS publication 501: Exemptions, Standard Deduction, and Filing Information* is an excellent source for material on this topic.

Exceptions to the Basic Rule: The custodial parent can agree (or the court can order the custodial parent) to allow the noncustodial parent to claim the children as dependents for the Child Tax Exemption and the Child Tax Credit under the special rules for children of divorced or separated parents.

Caveats: The noncustodial parent can only claim the Child Tax Exemption and the Child Tax Credit. He or she cannot use the child as a dependent to qualify for Head of Household filing status, Dependent Care Tax Credits, or the Earned Income Credit. The noncustodial parent would not meet the child's residency requirement to qualify for these benefits.

To qualify for this exception: the custodial parent must execute Form 8332 Written Declaration or a similar written declaration releasing the exemption to the noncustodial parent. This release can be for one year, until a time certain, or in a pattern certain, i.e. odd years.

For divorce decrees and separation agreements entered into after 1984 and before 1/1/2009, the noncustodial parent can also document this exemption by attaching certain portions of the legal document which grant the release.

The legal document must contain language that:

1. The noncustodial parent can claim the child as a dependent without regard to any condition, i.e. payment of support.
2. The custodial parent will not claim the child as a dependent during the same period.
3. Identifies the years for which the noncustodial parent can claim the child.
4. Includes the cover page of the document and the custodial parent's social security number.
5. Includes the signature page of the agreement or the order.

New rule for agreements or decrees entered after 2008: the noncustodial parent can no longer attach pages of the legal document (i.e. order), they must attach form 8332 or a similar written statement by the custodial parent for the purpose of releasing the claim to the exemption.

IMPORTANT POINT: The tax exemptions and credits go with the child, they cannot be divided.

However, a custodial parent may still be able to qualify to file as Head of Household even though the noncustodial parent takes the Tax Exemption and Tax Credit.

IF PARENTS DO NOT AGREE AND MORE THAN ONE PERSON FILES A RETURN CLAIMING THE CHILD: the IRS has a way to deal with this – the **Tie Breaker Rule**

If only one person is the child's parent	The parent gets the deduction
If both are parents and they do not file a joint return	The parent with whom the child lived for the longer period during the year gets the deduction
If both are parents and the child lived with each for the same amount of time	The parent with the higher AGI gets the deduction
If neither is a parent	The person with the higher AGI gets the deduction

A word about Head of Household filing status: you want this. There are significant tax advantages when filing under this status. The standard deduction is higher and income is taxed at a lower rate.

To qualify, the filer must be:

1. Unmarried or "considered unmarried" on the last day of the tax year; AND
2. Paid more than half the cost of keeping up a home for the year; AND
3. A "qualifying person" lived with you in the home for more than half the year (except for temporary absences, such as school).

"Considered Unmarried" means

1. You file a separate return; AND
2. You paid more than half the cost for keeping up your home in the tax year; AND
3. Your spouse did not live in the home for the last 6 months of the year (temporary absences or absences under special circumstances do NOT qualify); AND
4. Your home was the main home for a child, step-child or foster-child for more than half the year; AND
5. You must be able to claim an exemption for the child; HOWEVER, there is an exception to this requirement if the noncustodial parent can claim the child pursuant to the rules for children of divorced or separated parents.

The amount claimed for exemptions is reduced with the Adjusted Gross Income (AGI) of the claiming parent reaches certain levels:

Married, filing separate	$119,975
Single	$159,950
Head of Household	$199,950

However, you can lose no more than ½ of the dollar amount of the exemptions.

A word about Earned Income Credit: this is a tax credit for certain people who have earned income under $41,646 with limits on investment income ($2,950). It operates to reduce taxes owed and may also provide an additional refund. The amount of the credit depends on the number of "qualifying children".

"Qualifying Child"

1. Relationship: must be a child, stepchild, fosterchild or a descendant of one of the above (OR certain other family members);
2. Age: under the age of 19 at the end of the tax year, or under 24 and a full-time student, or permanently disabled.
3. Residency: must have lived with you for more than half the year (in the US).

Filing status: you cannot file Married filing separately and claim this credit.

Cannot be claimed by the custodial parent if the noncustodial parent is claiming the children as qualified dependents.

(And recall, the noncustodial parent cannot claim this credit as he or she will not meet the residency requirement).

The Earned Income Credit may actually operate to refund money to parents in excess of their federal tax withholdings.

See *IRS Publication 596: Earned Income Credit* for more information on this.

The Court's involvement with tax considerations for dependents is addressed in the Child Support Guidelines:

"The schedule assumes that the parent who receives child support claims the tax exemptions for the child. If the parent who receives child support has minimal or no income tax liability, the court may consider requiring the custodial parent to assign the exemption to the supporting parent and deviate from the guidelines."

> COMMENT TO STATUTE:
> TRIAL COURT ERRED IN RULING IT HAD NO AUTHORITY TO MODIFY THE INCOME TAX DEDUCTION PROVISION OF THE PARTIES' SEPARATION AGREEMENT as they requested a recalculation of child support, obliging the trial court to apply the entirety of the guidelines, including not only the worksheets, but also the commentary. **Ticconi v. Ticconi, 161 N.C. App. 730, 589 S.E.2d 371 (2003).**

I. Taxable Consequences of Alimony and Spousal Support

Alimony: defined as payment to or for a spouse or former spouse under a written divorce decree or separation instrument.

Does not include voluntary payments

(Note: there are different requirements for time periods before 1984, for 1984-1985, and post 1985. These comments address the post 1985 rules).

The IRS defines **Alimony** and throws that word around a lot in the publications. What they mean is – it's only deductible as alimony if it meets their requirements.

Things that are **NOT** deductible alimony:

1. Child Support
2. Noncash Property Settlements
3. Payments that are part of the spouse's community income
4. Payments to keep up the payer's property
5. Use of the payer's property

Several examples are given in *IRS Publication 504: Divorced or Separated Individuals*.

Of particular interest is Table 5, which addresses IRS handling of payments made to maintain a dwelling on behalf of a spouse or former spouse as an incident of alimony:

In summary:

If the payor owns the property: mortgage payments (principle and interest), taxes, insurance and upkeep on property are not considered deductible alimony. Neither is the value of the use of the home.

If the payor and payee jointly own the home as tenants in common: the ½ of the payments are deductible as alimony and ½ of the real estate taxes and interest are otherwise deductible.

If the payor and payee jointly own the home as tenants by the entirety, then payments are not deductible as alimony, however payor can claim all real estate taxes.

Payments to a third party for the benefit of the spouse may be considered deductible, if they otherwise qualify as “alimony” under the IRS rules.

Things that **ARE** alimony: (according to the IRS)

1. Spouses cannot file a joint return
2. The payments is in cash
3. The payment is pursuant to a legal instrument and the instrument does not designate the payment as NOT alimony
4. The spouses are not members of the same household (although there is an exception to this)
5. There is no liability to make the payment after the death of the recipient spouse
6. The payment is not treated as child support

CASH means checks, money orders or currency

Transfers of services or property, execution of debt instruments or use of property do NOT constitute alimony.

Cash payments to a third party on behalf of a spouse can qualify if the circumstances surrounding the payments is in writing.

Payments can be designated as NOT alimony, but designation AS alimony alone will not make them deductible; they must meet these rules to qualify.

> 3 YEAR RECAPTURE RULE: if payments decrease or terminate in the first 3 calendar years of the instrument, the deduction may be recaptured if alimony paid in the 3d year decreases by more than 15,000 from the 2d year OR if there is a significant decrease from year one to years 2 and 3.
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> - The 3 year time period does not include time for payments made under a temporary support order.
> - Excluded if payments are terminated due to death or remarriage of payee
> - Excludes fixed percentage awards

Alimony as defined by North Carolina law can certainly include property transfers, payments of expenses and execution of debt instruments. These items are just not deductible.

Upchurch v. Upchurch, 34 N.C. App. 658 (1977)

> Defendant contends the trial court erred in concluding that plaintiff is entitled to possession of the home and in awarding possession to her. We find no merit in this contention.
>
> It is clear that HN3 the court has the power to grant the possession of real estate as a part of alimony. G.S. 50-17; 5 Strong's N.C. Index 3d, Divorce and Alimony, **[***10]** § 18.14. *Yearwood v. Yearwood*, 287 N.C. 254, 214 S.E. 2d 95 (1975). Defendant argues that the home in question is considerably larger than plaintiff needs and one that will be expensive to maintain. Here again we have a decision that was in the discretion of the trial judge and we perceive no abuse of discretion.

Whedon v. Whedon, 58 N.C. App. 524 (1982)

The Court held (*in* part) that although the alimony award and property distribution were proper, the trial court erred in ordering the husband to pay the wife's income taxes resultant upon the alimony award.

ALSO: Harris v. Harris 2005 N.C.App. Lexis 1021 unpublished opinion – the trial court considered what the tax implications of an alimony award would be. Even though Plaintiff's expert testified as to the consequences of a higher award, the Court found that the liability would not exceed 28% federal and 7% state where the alimony award and other earnings were considered. The Appellate Court found this to be sufficient.

II. Consideration of tax consequences in Division of Property Cases

Basic Rule: Transfers of property between spouses or between former spouses incident to divorce do not have immediate taxable consequences.

"Incident to divorce" means (1) within one year after the date of divorce or is (2) related to cessation of marriage.

This generally means pursuant to a divorce or separation instrument and the transfer occurs not more than 6 years after the date of divorce.

However, the time limitations are a rebuttable presumption – i.e. if the court orders distributive payments more than 6 years out, the court must make findings of fact of legal or business impediments to meeting the 6 year time frame. (for tax purposes)

For post 1984 transfers: the basis is equal to the transferor's adjusted basis immediately before the transfer.

However, the court has to address "tax considerations" as part of the factors in N.C.G.S. 50-20.

Before amendment in 2005: 50-20(c)(11) required the court to consider "the tax consequences to each party".

The parties have the burden of presenting evidence about tax consequences.

> **Walser v. Walser, 2002 N.C. App. LEXIS 1980 Unpublished**
> Pursuant to N.C. Gen. Stat. § **50-20(c)(11)**(1999), when considering an unequal distribution, the trial court shall consider the tax consequences to each party in its equitable distribution judgment. As the party seeking an unequal division of property, "defendant has the burden of showing that the tax consequences of the distribution were not properly considered." *Wall,* 140 N.C. App. at 312, 536 S.E.2d at 653. **"The trial court is not required to consider tax consequences unless the parties offer evidence about them." *Id.* (*emphasis added)***

But, good lawyers will present such evidence. They will present evidence of not only what WILL happen if you make a certain distribution, but also of what MIGHT happen…

Dolan v. Dolan, 148 N.C. App. 256 (2002)

[*5]** We first address defendant's contention that the trial court erred by considering speculative tax consequences as a factor in determining the distribution of the marital property. HN1 In determining whether an equal distribution of marital property is equitable to the parties, the trial court must consider all of the factors listed in N.C. Gen. Stat. § 50-20(c)(2001). These factors include "the tax consequences to each party." N.C. Gen. Stat. § **50-20(c)(11)**. Our courts have construed this provision "as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders." *Weaver v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985). HN2 It is error for a trial court to consider "hypothetical tax consequences as a distributive factor." *Wilkins v. Wilkins*, 111 N.C. App. 541, 553, 432 S.E.2d 891, 897 (1993).

JUDGE WYNN'S DISSENT:

> WYNN, Judge dissenting.
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> N.C. Gen. Stat. § **50-20(c)(11)** (1999) requires the trial court in determining whether "an equal division is not equitable" to consider as a factor: "The tax consequences to each party." I dissent from the majority holding and *certify* to our Supreme Court under **[***8]** N.C. Gen. Stat. § 7A-30 (1999) the issue of whether the plain language of N.C. Gen. Stat. § **50-20(c)(11)** should be judicially limited to apply only **[*260]** where such taxes are incurred as a direct result of the distributional award. *See Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993); *Weaver v. Weaver*, 72 N.C. App. 409, 324 S.E.2d 915 (1985).
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> "The law has long been that where the plain language of a statute . . . is unambiguous on its face, the court is bound by the clear meaning." *Hamby v. Hamby*, 143 N.C. App. 635, 645, 547 S.E.2d 110, 117, *disc. review denied*, 354 N.C. 69, 553 S.E.2d 39 (2001). "When language used in [a] statute is clear and unambiguous, [the Court] must refrain from judicial construction and accord words undefined in

the statute their plain and definite meaning." *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 327 (1996), (quoting *Poole v. Miller*, 342 N.C. 349, 351, 464 S.E.2d 409, 410 (1995)). "Where the Legislature has made no exception to the positive terms of a statute, the presumption is that it **[***9]** intended to make none, and it is a general rule of construction that the courts have no authority to create, and will not create, exceptions to the provisions of a statute not made by the act itself." *Upchurch v. Funeral Home*, 263 N.C. 560, 565, 140 S.E.2d 17, 21(1965) (quoting 50 Am. Jur. Statutes § 432, p. 453 (1944)). Here, the language of the statute is clear and it is not necessary for us to resolve an ambiguity.

Under N.C. Gen. Stat. § **50-20(c)(11)** the legislature imposed no limitation on the trial court's consideration of the tax consequences as a factor in the distribution of marital property. N.C. Gen. Stat. § 50-20(c) provides in pertinent part that:

There shall be an equal division by using net value of marital property and net value of divisible property unless the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably. Factors the court shall consider under this subsection are as follows:

. . .

(11) The tax consequences to each party.

Moreover, other jurisdictions have not been restrictive in determining when a trial court **[***10]** may consider tax consequences. *See, e.g.*, *In re Bookout*, 833 P.2d 800, 806 (Colo. App. 1991), *cert. denied*, 846 P.2d 189 (Colo. 1993); *Hogan v. Hogan*, 796 S.W.2d 400, 408 (Mo. App. 1990); *White v. White*, 105 N.M. 600, 734 P.2d 1283, 1286 (1987); *Barnes v. Barnes*, 16 Va. App. 98, 428 S.E.2d 294, 300 (1993); *see also* Tracy A. Bateman, Annotation, Divorce and Separation: **[*261]** Consideration of Tax Consequences in Distribution of Marital Property, 9 A.L.R. 5th 568, 592, § 2[a] (1993).

Since the plain language of the statute provides no such limitation on the consideration of tax consequences in determining whether an equal division is not equitable,

I *certify* to our Supreme Court the holdings of this Court to the contrary. N.C. Gen. Stat. § 7A-30.

Dolan AFFIRMED 355 N.C. 484 (2002)

Because of:

Weaver v. Weaver, 72 N.C.App. 409 (1985) *disapproved on other grounds in* Armstrong v. Armstrong, 322 N.C. 396 (1988).

The defendant argues similarly that the trial court failed to consider taxes that defendant might have to pay on the interest in his partnership if he were to withdraw, or to consider the lower taxes his wife will pay on the house the trial judge awarded her. Again, the defendant asks the court to engage in mere speculation. HN4 The trial court is not required to consider possible **[***16]** taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property. *In re Marriage of Fonstein*, 131 Cal. Rptr. 873, 552 P. 2d 1169 (1976); *accord Stern v. Stern*, 66 N.J. 340, 331 A. 2d 257 (1975). We construe HN5 Section 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders.

Harvey v. Harvey, 112 N.C. App. 788 (1993)
In *Weaver*, we held that HN4 "[t]he trial court is not required to consider possible taxes when determining the value of property in the absence of proof that a taxable event has occurred during the marriage or will occur with the division of the marital property." ***Weaver***, 72 N.C. App. at 416, 324 S.E.2d at 920.
In *Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993), we held that it was improper to value the plaintiff's retirement benefits on an after tax basis. We reasoned that calculating the value of the assets based on "hypothetical tax consequences arising from speculative early withdrawals" violated the provision of G.S. § 50-20(b)(1) that vested retirement or pension funds are to be valued as of the date of separation. *Wilkins*, 111 N.C. App. at 549, 432 S.E.2d at 895. These cases stand for the principle that evidence of circumstances not in existence on the date of separation is not competent evidence for the purpose of **[***9]** valuing a marital asset. *Christenson v. Christenson*, **[*793]** 101 N.C. App. 47,

398 S.E.2d 634 (1990). Similarly, in *Weaver* and *Wilkins* we held that it is improper to consider possible tax consequences as a distributive factor under G.S. § 50-20(c)(11) in the absence of evidence that some taxable event has already occurred or that the distribution ordered by the court will itself create some immediate tax consequence to either of the parties. *See, Smith v. Smith*, 104 N.C. App. 788, 411 S.E.2d 197 (1991).

So, the legislature **amended 50-20 (c)(11) in 2005** to read:

> **Chp 50-20 (c)** (11) The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.

The next case to address the issue came out in 2007, but was an appeal of an order entered under the pre-amendment version of the statute.

> **Shaw v. Shaw, 2007 N.C. App. LEXIS 568 unpublished**
> (Appeal by defendant from order entered 13 January 2005)
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> The trial court must make findings concerning those factors enumerated in N.C. Gen. Stat. § 50-20(c) (2005), where evidence has been presented concerning the same. *See Rosario v. Rosario*, 139 N.C. App. 258, 260-61, 533 S.E.2d 274, 275-76 (2000). Section 50-20(c)(11) requires the trial court to "consider tax consequences that will result from the distribution of property that the court actually orders." ***Weaver*** *v. Weaver*, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985), *rev'd on other grounds, Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988); *see also Wilkins v. Wilkins*, 111 N.C. App. 541, 432 S.E.2d 891 (1993).
>
> Before its amendment **[*15]** in 2005, N.C. Gen. Stat. § 50-20(c)(11) (2003) required that the trial court consider "[t]he tax consequences to each party."

> Read *in toto*, the findings of the court **[*21]** reveal its unwillingness to utilize any tax consequences as a distributional factor. This holds true whether the court correctly concluded that the tax consequences were speculative. Put simply, husband's argument that the trial court did not consider the tax consequences of the withdrawals is belied by the court's findings.

So the next case to address the issue is:

Pellom v. Pellom, 669 S.E.2d 323 (2008)

Pursuant to statute, a trial judge shall consider in an equitable distribution matter:
The tax consequences to each party, including those federal and State tax consequences that would have been incurred if the marital and divisible property had been sold or liquidated on the date of valuation. The trial court may, however, in its discretion, consider whether or when such tax consequences are reasonably likely to occur in determining the equitable value deemed appropriate for this factor.
N.C. Gen. Stat. § 50-20(c)(11) (2007).

In applying the above statute, this Court has held:
[*328] The trial court is not required to consider possible taxes when determining the *value* of property in the absence of proof that a taxable event has occurred during the marriage or *will* occur with the division of the marital property. We construe Section 50-20(c)(11) of the General Statutes as requiring the court to consider tax consequences that will result from the distribution of property that the court actually orders.
Weaver v. Weaver, 72 N.C. App. 409, 416, 324 S.E.2d 915, 920 (1985) **[**11]** (internal citations omitted), *disapproved on other grounds by Armstrong v. Armstrong,* 322 N.C. 396, 403-04, 368 S.E.2d 595, 599 (1988).

The trial court complied with the statute by considering the tax consequences to plaintiff. However, plaintiff was ordered to pay a distributive award, not liquidate his interest in DAA, which may have had a significant tax consequence. Furthermore, Mr. Pulliam was correct in not taking into account personal taxes that plaintiff had to pay on his income, but he did consider DAA's entity taxes by evaluating the capitalization rate of DAA and finding that the company paid little to no taxes because it typically disbursed all of its profits every year. Accordingly,

we find no abuse of discretion with regard to this assignment of error.

I hate to say this, but it appears that the Court is explaining the application of the amended statute by using a case decided prior to its amendment, and doesn't really address the meaning of the additional language in the 2005 amended statute.

- I certainly wasn't the first person to notice this and would like to credit attorney Arlene Reardon, who wrote an excellent article about it in the Family Forum Published by the NCBA's Family Law Section, Section Vol. 29, No. 3 April 2009

Additional Point:

- The use of tax considerations in Pellom centered around the valuation method of a business and whether the personal income taxes of the Defendant had been used in the Plaintiff's expert's valuation. The trial court made extensive findings and they included a determination that Plaintiff's expert also considered the "entity-level tax consequences in his valuation of DAA by using Ibbotson Build-Up Method to determine the appropriate capitalization rate". So the court concluded that the trial court had considered tax consequences.

- 50-20 (c) (11) is a factor for the court to consider when determining if an equal division is equitable and if not, how the property should be equitably divided. So it seems that this provision doesn't address the use of possible tax consequences in determining the value of marital property, except such that it might constitute a factor to consider in determining the division of the property.

CONCLUSION

The purpose of the presentation has been informational about the interactions with tax consequences and determinations in family law cases.

Don’t let an attorney tell you to “take judicial notice of the tax code….”

The best part about all of this is… we aren’t presumed to know all of these things and the lawyers will have to present sufficient evidence to you about any relevant tax implications before arguing for a specific action or designation by the court.