Revisiting the Tax Perils of Temporary Unallocated Family Support

by Richard I. Zuber

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This commentary updates a 2001 article on the tax perils of using unallocated family support provisions in Temporary Order stipulations. A 2002 Tenth Circuit case is discussed in the context of Colorado case law, and practical approaches are suggested for dealing with the current status of the law.

This article is an updated commentary,[1] illustrating for the unwary practitioner, the tax perils associated with the improvident use in Temporary Orders of unallocated family support provisions. The focal point is the Tenth Circuit Court of Appeals case of *Lovejoy v. Commissioner*,[2] a perplexing decision, but nonetheless leading precedent in this rapidly changing area of divorce taxation. This article also suggests possible approaches available to practitioners who wish to minimize the risks while maximizing the tax savings for their clients through the use of temporary unallocated family support provisions.

BACKGROUND

Prior to the enactment of the Tax Reform Act of 1984 ("Tax Act"),[3] and often relying on the 1961 U.S. Supreme Court decision in *Commissioner v. Lester*,[4] family law practitioners frequently used provisions in separation agreements calling for the payment of "family support." The family support provisions customarily lumped together spousal support and child support without allocating or "fixing" the amount paid for each. In addition, prior to 1984, it was a common practice for divorce decrees or separation agreements to provide that this unallocated family support amount be reduced when the payor's child support obligations would have ended.[5]

The primary justification for the use of these unallocated family support provisions was to increase the after-tax dollars available to the parties and to the family unit. This was accomplished by making the recipient's entire combined support amount includable in the gross income of the payee spouse, as structured alimony, and making it deductible by the payor, thereby maximizing the shifting of income from the spouse in the higher bracket to the one in the lower bracket.[6]

Ignoring what family law practitioners historically had considered to be sensible cash flow planning between separated spouses, Congress sought to override *Lester* by enacting Internal Revenue Code ("Code" or "IRC") § 71(c)(2) as part of the Tax Act.[7] This Code section sought to eliminate the deductibility (as maintenance) of unallocated family support payments by expanding the concept of what would be considered an amount "fixed" or payable for the support of children. IRC § 71(c)(2) provides, *inter alia*, that if the unallocated family support payment would be reduced on the happening of an event clearly associated with a child, the amount of the reduction would be treated as nontaxable/nondeductible child support.

Although some practitioners initially believed the statute was broad enough to repeal *Lester* by expanding the concept of what would be considered an amount fixed as child support, both tax commentators and tax courts have come to realize that the Internal Revenue Service ("IRS") has, surprisingly, retained *Lester*.[8] As one commentator

notes: "[T]his is especially the case where the parties are willing to structure the payment schedules so as to fall outside the scope of Code § 71(c)(2)."[9] Nevertheless, by reason of the 1999 U.S. Tax Court decision in *Miller v. Commissioner*,[10] it became clear to Colorado attorneys that structuring the unallocated family support payment schedule to fall outside IRC § 71(c)(2) was insufficient to escape the scrutiny of the IRS.

The *Miller* Case

On August 12, 1999, in *Miller*,[11] the Tax Court addressed the issue of whether any portion of temporary unallocated family support payments, made pursuant to a written stipulation and a Colorado court order, qualified under the Code as taxable/deductible alimony.[12] The Temporary Orders stipulation of the parties provided in part:

> As temporary support . . . [the husband] shall pay . . . [the wife] unallocated child support and maintenance in an amount equal to fifty-five percent of his net income. . . . [The husband's] temporary support payments herein shall include his contributions toward the son's attendance at Denver Academy and toward the skating activities of the daughter. . . .[13]

After reviewing the parties' Temporary Orders stipulation, the Tax Court found that: (1) the unallocated child support and maintenance language used by the parties was to be construed as an attempt to provide for unallocated family support; (2) the Temporary Orders did not state how the parties were to treat the temporary unallocated payments to the wife for tax purposes; (3) the stipulation did not specify what portion, if any, of the temporary unallocated child support and maintenance payments was for child support;[14] and (4) despite the references to the children, the Temporary Orders did not include any contingencies related to the children that would reduce or terminate the payments or any portion thereof.[15]

The Tax Court focused on whether the *Miller* temporary unallocated family support order satisfied the alimony requirements as defined in IRC § 71(b).[16] In making its analysis, the Tax Court's primary concern was whether the husband would have had a continuing liability to make any temporary unallocated family support payments *under the divorce instrument* should his wife die during the pendency of Temporary Orders.[17] This concern arose because the Temporary Orders stipulation failed to contain any language that provided for the termination of the unallocated family support payments on the death of the wife. Instead, the Temporary Orders simply provided that the payments would continue *until further order of court*.[18]

Although the parties' omission of termination language was problematic, it was not dispositive. The Tax Court acknowledged that, under existing law, the *Miller* Temporary Orders agreement need not expressly state that the payment obligation terminates on the death of the wife, if termination would occur by operation of state law.[19]

The Tax Court found that Colorado's version of the Uniform Dissolution of Marriage Act ("UDMA") provided for automatic termination of maintenance or alimony provisions on the death of the payee spouse.[20] However, the Tax Court indicated that the Colorado statute did not contain language regarding the automatic termination of provisions calling for the payment of "temporary unallocated family support." Further, the Tax Court determined that in Colorado, Temporary Orders, in a generic sense, did not automatically abate upon the death of a spouse.[21] The Tax Court found that Colorado's UDMA provided that Temporary Orders

> terminate when the final decree is entered, unless continued by the court for good cause to a date certain or when the Petition for Dissolution or Legal Separation is voluntarily dismissed.[22]

Finally, the Tax Court determined that the husband had failed to establish that he would have no liability under Colorado law to make any further temporary unallocated family support payments if the wife died during the pendency of Temporary Orders and prior to the entry of a voluntary dismissal order. The Tax Court held that the husband's failure to satisfy the alimony termination requirements of IRC § 71(b)(1)(D) also was fatal to the IRS's argument that the unallocated family support payments to the wife should have been included in her income as alimony under the IRC § 71.[23]

New Wrinkles

After the decision in *Miller*, the Tax Court and two different circuits of the U.S. Court of Appeals added new wrinkles to the already perilous minefield of temporary unallocated family support orders. First, in the case of *Gonzales v. Commissioner*,[24] the Tax Court again considered the issue of whether any portion of "temporary unallocated family support" payments, made to the wife pursuant to a written stipulation and a New Jersey court order, constituted taxable alimony under IRC § 71(a).

The parties' Temporary Orders stipulation (consent order), in relevant part, provided:

> . . . [P]ending the resolution of this matter . . . [the husband] shall pay $7,500.00 per month unallocated . . . as and for the support of [the wife] and the infant children of the marriage, from which sum . . . [the wife] shall pay all family expenses, including the mortgage, children's school expenses and unreimbursed medical expenses and her schooling. . . .[25]

Analogous to its findings in the *Miller* case, the Tax Court in *Gonzales* preliminarily found that the Temporary Orders stipulation failed to indicate: (1) how the payments would be treated for tax purposes; (2) whether the payments would terminate at the payee spouse's death; and (3) what portion thereof represented child support. The Tax Court determined that the termination-at-death require-

ment of IRC § 71(b)(1)(D) would be the dispositive issue. In attempting to resolve the termination-at-death issue, the Tax Court noted:

> [I]f the payor is liable to make even one otherwise qualifying payment after the recipient's death, none of the related payments required before death will be alimony.[26]

The Tax Court also stated:

> Whether such an obligation exists may be determined by the terms of the applicable instrument, or if the instrument is silent on the matter, by looking at State law.[27] (*Citations omitted.*)

In reviewing New Jersey statutory law on the termination-at-death issue, the Tax Court initially concluded that although divorce instrument provisions providing for "alimony" end at the recipient's death, there was no statutory authority providing for the automatic termination at death of unallocated family support provisions.[28] Thus, the Tax Court implicitly again adopted the *Miller* case rationale. It suggested that the payor spouse's liability to make temporary unallocated family support payments might continue after the death of the payee spouse. Also, such payment might at least continue until the entry of permanent orders, a voluntary dismissal order, or a further order of court after a plenary hearing.[29]

Moreover, the Tax Court found that the New Jersey Rules of Court gave additional authority for New Jersey courts to enter, on a showing of good cause, temporary unallocated family support orders in lieu of separate and distinct alimony and child support orders.[30] The Tax Court noted that New Jersey precedent existed to permit a domestic relations court to retroactively "modify" a temporary unallocated family support order based on a change of circumstance occurring as to the children.[31]

Thus, as a new wrinkle, the Tax Court reasoned that the husband could possibly be liable in the future to make reduced family support payments under a future "modified" retroactive court order for the benefit of his children and after the death of his spouse. Of note, the identity of the person who would receive such payments for the children was not discussed in the decision.

The slippery slope for practitioners arising from the decisions of the Tax Court in *Miller* and *Gonzales* was ameliorated somewhat by the 2003 Tax Court decision of *Kean v. Commissioner*.[32] In *Kean*, the Tax Court considered the taxability/deductibility of temporary unallocated family support payments, again arising out of a New Jersey dissolution action. In this case, the Commissioner changed course from his earlier position in the *Gonzales* case.[33] He argued that New Jersey's abatement rules should in fact cause a termination of the obligation at the death of the payee spouse, thereby rendering temporary unallocated family support payments taxable/deductible as alimony.[34]

Surprisingly, the Commissioner of Internal Revenue and Kean argued that the Tax Court had "wrongly decided *Gonzales*."[35] Although not acknowledging error in *Gonzales*, the Tax Court held that the unallocated family support payments would, under the facts of *Kean*, abate immediately at the death of the payee spouse, thereby satisfying the termination requirement of IRC § 71(b)(1)(D).[36] This abatement would generally be allowed absent the "unusual circumstances" of *Gonzales* and where there was "no logical reason" under New Jersey law for the payor

spouse, as joint custodian, to continue to pay support after the death of the payee spouse.[37]

Tax Perils in Temporary Unallocated Support Provisions

The Tax Court decisions in *Miller, Gonzales*, and *Kean* demonstrate the serious tax perils inherent in improvidently using temporary unallocated family support provisions. Some of these perils are evident from either the inconsistent rulings of the Tax Court or positions of the Internal Revenue Commissioner in each of these decisions. Further, even where both spouses intend to maximize tax savings for the family by shifting, in part, the tax burden to the spouse in the lower tax bracket, drafting errors may result in adverse tax consequences for both spouses.

It also appears from these decisions that the Tax Court was not entirely comfortable with the tax uncertainty inherent in the concept of unallocated family support. For example, while acknowledging that the concept is used in domestic relations cases to "encourage sensible cash flow planning between separated spouses," the *Miller* Tax Court showed no hesitancy in suggesting arguments the Commissioner could use in the future that would maximize a recovery of tax from the "sensible" taxpayers.[38] Similarly, the *Gonzales* Tax Court was willing to speculate on an otherwise remote circumstance —that is, the surviving parent not receiving custody of his children—so as negate the potential, but unknown tax benefit that would be derived by the payor spouse from the unallocated temporary family support provisions.[39]

In addressing the termination-at-death issue, the *Miller* and *Gonzales* cases made it clear that neither Colorado's nor New Jersey's statutory scheme in the domestic relations area was entirely compatible with the use of unallocated family support terminology.[40] Other perils are not immediately apparent from reading the decisions. For instance, in both the *Miller* and *Gonzales* Tax Court cases, and as will be seen in the Tenth Circuit's decision in *Lovejoy*,[41] a federal court was compelled to interpret a state's domestic relations laws on the termination-at-death issue.

A real danger exists for the practitioner and client when faced with such an eventuality. The basis for this concern could not be more evident than in the questionable results reached by the Tax Court in the *Miller, Gonzales*, and *Kean* decisions. For example, as discussed above, the *Miller* Tax Court found, after relying on Colorado state law, that the husband's liability to make temporary unallocated family support payments could survive the death of the payee spouse, at least until a further order of court was entered in the divorce proceeding.[42]

However, the *Miller* Tax Court apparently did not seriously consider Colorado case law on the issue of abatement of a pending dissolution of marriage case. In the 1947 case of *McLaughlin v. Craig*,[43] the Colorado Supreme court stated, in *dicta*:

> [T]he general rule of law is that a divorce action immediately abates for the objects sought to be obtained by final decree already is accomplished by the prior death of one of the parties, and there remains *no status of marriage upon which a final decree of divorce may operate*.[44]

In the 1997 case of *Estate of Burford v. Burford*,[45] the Court reaffirmed the rule by citing *McLaughlin*, as well as the 1994 case of *Marriage of Connell*.[46]

In *Connell*,[47] the Colorado Court of Appeals directly addressed the issue of whether a divorce court had subject matter jurisdiction to enter further orders after the death of a spouse and prior to the entry of a final decree. The court found no reason why the abatement rule would be altered by Colorado's adoption of the UDMA in 1971.[48] The *Connell* court held that " . . . if either spouse dies prior to the entry of a valid decree, the marriage is terminated as a matter of law and the trial court is divested of jurisdiction to proceed further in the dissolution."[49]

From the foregoing Colorado appellate decisions, it seemed clear that: (1) the trial court in the *Miller* dissolution proceeding would have lacked subject matter jurisdiction to enter further support or enforcement orders after the death of the payee spouse; and (2) any existing temporary support orders would have immediately abated at the death of the payee spouse. As a result, the husband's temporary unallocated family support obligation should ultimately have been treated by the Tax Court as taxable/deductible alimony.[50] However, the U.S. Court of Appeals in the Tenth and Third Circuits, in two distinct opinions[51] resulting from each court's interpretations of state law, called into question what otherwise appeared to be clear law as to the effect of abatement in the domestic relations setting.

The *Miller* Appeal (*Lovejoy v. Commissioner*)

The tax perils associated with a federal court interpreting a state's domestic relations law were not ameliorated by the resulting appeal of the *Miller* Tax Court decision—*Lovejoy*.[52] The former husband, John Lovejoy, contended that his temporary unallocated family support payments satisfied all the requirements for taxable/deductible alimony under the Code, including the termination-at-death requirement of IRC § 71(b)(1)(D).

Regarding the latter requirement, Lovejoy argued that under Colorado case law, if his wife had died during the pendency of the dissolution proceeding, her death would have abated the dissolution proceeding and divested the trial court of jurisdiction to enter further orders in the divorce action.[53] Thus, Lovejoy maintained that his Temporary Orders obligation would have immediately abated and he would not have had a continuing liability to pay the temporary unallocated family support required by the trial court's Temporary Orders. The Tenth Circuit, in a perplexing decision, disagreed with the husband's arguments and affirmed the *Miller* Tax Court decision based on the following rationale.

The Abatement Question

Despite its awareness of Colorado case law on abatement, the Tenth Circuit found Colorado law "unclear" on whether abatement occasioned by the death of a spouse would occur as to a temporary child support order, where the non-fixed child support amount was encompassed within an unallocated temporary family support provision.[54] The *Lovejoy* court indicated that this lack of clarity was based, in part, on CRS § 14-10-122(3), which provides, *inter alia*, that "provisions for the support of a child are terminated by the emancipation of the child but not by the death of a parent obligated to support the child." Pursuant to the foregoing statute, the court reasoned that "it is not clear which rule trumps the other"—that is, abatement versus the ongoing duty of the surviving parent and the deceased parent's estate to provide a minor child with support.[55]

Similarly, the Tenth Circuit reaffirmed the *Miller* Tax Court's finding of another statutory ambiguity in Colorado law pertaining to the termination of Temporary Orders. CRS § 14-10-108(c) provides that a temporary order or temporary injunc-

tion terminates when the final decree is entered, unless continued by the court for good cause, to a date certain or when the petition for dissolution of marriage is voluntarily dismissed. Thus, the court reasoned, if either or both of the foregoing statutes trumped the law of abatement, Lovejoy would have had a continuing liability (either under the divorce instrument or as "substitute" payment) to make the temporary unallocated support payments after the death of the payee spouse.

After finding the foregoing ambiguities in Colorado state law, the Tenth Circuit subjectively "predicted" what the Colorado Supreme Court would rule if confronted with the abatement of a temporary non-fixed child support order. The *Lovejoy* court stated that the Colorado Supreme Court would ultimately hold that Temporary Orders providing for a non-fixed child support amount (even when included in a general unallocated family support provision), and the resulting liability, would survive the death of the recipient spouse.[56] The Tenth Circuit relied on the federal tax case of *Hoover v. Commissioner*[57] as authority to justify its prediction of future Colorado state law. The *Hoover* case held:

> [W]hen state family law is ambiguous as to the termination of payments upon the death of the payee, a federal court will not engage in complex, subjective inquiries under state law; rather the Court will read the divorce instrument and make its own determination based on the language of the document.[58]

Public Policy Considerations

In making "its own determination" of Colorado state law, the Tenth Circuit relied on the "public policy considerations" underlying Colorado's version of the UDMA.[59] Specifically, the court found the Colorado UDMA to provide that "Colorado divorce laws should be liberally construed to mitigate the potential harm to spouses and their children caused by the process of legal dissolution of marriage."[60]

These policy considerations, the court reasoned, should not be limited only to post-decree matters. The court found that they were equally applicable to protect minor children from intervening periods of non-support caused by abatement due to the death of a parent during the pendency of the dissolution proceeding.[61]

The Instrument is Determinative

The Tenth Circuit reviewed the *Lovejoy/Miller* "divorce instrument" and found the parties had agreed that the temporary unallocated family support obligation would continue "until further Order of Court." The court then found "there is no reason to believe the death of a spouse negates this language."[62]

Analysis of *Lovejoy*

The decision of the Tenth Circuit in *Lovejoy* is perplexing in many respects. First, the decision rests with the Tenth Circuit's finding that Colorado law was "ambiguous" on the issue of abatement of temporary child support orders, albeit disguised as temporary unallocated family support orders. However, the *Lovejoy* court considered but disregarded two decisions of the Colorado Supreme Court, as well as the *Connell* decision, that seemed to clearly set forth the consequences of abatement on temporary support orders in pending pre-decree dissolution proceedings.[63]

For example, in 1997, the Colorado Supreme Court, as previously noted, decided the case of *Estate of Burford*.[64] In *Burford*, the Court's *dicta* specifically and unambiguously suggested the effect abatement would have on temporary support obligations arising by reason of a spouse's death during a pre-decree dissolution proceeding.

> The determination of the parties' marital status forms the heart of the dissolution proceeding. The court's power to issue orders relative to property and *support is merely incidental to the primary object* of dissolving the parties' marital status.[65] (*Emphasis added*.)

Moreover, in characterizing Lovejoy's unallocated family support obligation as having a child support component, the Tenth Circuit elected to disregard long-standing federal precedent holding otherwise. Specifically, as noted above, the U.S. Supreme Court decision in *Lester*[66] was not completely overruled by the Tax Act.[67] Further, the Tenth Circuit appeared to give little or no weight to federal precedent pertaining to procedures federal courts should follow when interpreting a state's substantive law. For example, an oft-cited federal precedent holds:

> When examining a matter of state substantive law, federal courts will look to a state's highest court (and in some instances, intermediate state appellate court rulings) to determine the rights of parties under state law.[68]

In 2003, this federal precedent was found to be applicable by the Tax Court in its analysis of abatement pertaining to a temporary unallocated family support order in a Pennsylvania dissolution proceeding.[69]

A possible hypothesis behind the Tenth Circuit's apparent oversight in not considering the above-quoted *dicta* from the *Burford* decision may have rested on its belief that the Colorado Supreme Court, in *Burford*, was actually referring to "spousal support" and not "child support" as being "merely incidental" to the primary objective of a divorce proceeding. In other words, the Tenth Circuit may have concluded from a reading of the quoted *dicta* that Colorado law, for purposes of abatement, treats temporary spousal support orders and child support orders differently. Alternatively, the Tenth Circuit may have simply concluded that the Colorado Supreme Court's failure to identify the type of "support" it was referring to as being "merely incidental" rendered existing Colorado law ambiguous at the time of the *Lovejoy* decision.

What the author finds most perplexing about the *Lovejoy* decision is that there appears to be no ambiguity in Colorado law pertaining to the abatement of all temporary support orders where one of the parties dies during the pendency of the pre-decree proceeding. A fair reading of the fact pattern in the *Connell* case[70] (from whence the quoted *Burford dicta* was derived) reveals that in addition to the wife being disabled during the dissolution proceeding, the Connells also had two minor children at the time of the wife's untimely death. This death occurred during the pendency of the pre-decree dissolution proceeding and *prior* to the submission to the trial court of a separation agreement signed by both parties.

It is clear that Connell's obligation imposed by law to support his spouse terminated immediately at her death. Therefore, the only type of support obligation that could have been material to the *Connell/Burford* court's finding that support was "merely incidental" to the abated dissolution proceeding's primary objective was child support. The child support obligation imposed by statute on Connell for the continuing support of his two minor children after his wife's death was undoubtedly memorialized in the abated separation agreement.

The child support provisions of the abated separation agreement were thus found to be "merely incidental" to the Connell dissolution proceeding's primary objective of dissolving the status of the parties.[71] It is also noteworthy that the

Court of Appeals in *Connell* found that "although Colorado has a general survivability statute [CRS § 13-20-101], . . . this statute has not been interpreted to preempt the traditional rule of abatement in divorce actions."[72]

A second concern regarding the Tenth Circuit's decision in *Lovejoy* is the propriety of the court's *prediction* of future Colorado law and its strong reliance on public policy considerations. The Tenth Circuit overlooked the circumstance that could arise if the temporary unallocated family support order survived the death of the payee spouse. Under the holding in *Connell*, the divorce court would have been divested, as a matter of law, of jurisdiction to enter further enforcement or support orders upon the abatement of the dissolution proceeding.[73]

Under the reasoning of the Tenth Circuit and assuming the accuracy of its prediction, the Lovejoy minor children would have had a support right under a temporary unallocated family support order, which would not have been abated by the death of the payee spouse. However, such a right would have been unenforceable in the abated dissolution proceeding and, likely, in any other statutorily authorized proceeding in Colorado.

For example, although Colorado has statutory procedures for the enforcement of existing child support orders (separate and apart from enforcement actions under the UDMA), these procedures contemplate establishing, enforcing, or modifying child support orders.[74] However, they do not specifically address a temporary unallocated family support order where the child support amount is not fixed and where federal precedent generally characterizes such an order as taxable alimony.[75]

A third, and no less perplexing aspect of the *Lovejoy* decision was the Tenth Circuit's unwillingness to distinguish between two mutually exclusive legal principles. A well-established principle exists under Colorado statutory law that a parent has a duty to continue to provide support for dependent minor children after the other parent's death. This duty is not abated by the termination of the pending pre-decree dissolution proceeding.[76] However, under abatement principles, not only is the pending dissolution proceeding being abated, but also any Temporary Order, including a temporary unallocated family support order.

Further, neither the child's right to support nor the child's remedy of seeking the establishment and enforcement of a new support order in a different proceeding is being extinguished.[77] If a gap period of time occurs where a dependent child does not receive support following the abatement of the dissolution proceeding, the gap is likely to be inconsequential. This is based on the rare circumstance of the surviving parent not receiving or taking residential care of the minor children following the death of the custodial parent.

It is important to remember that IRC § 71(b)(1)(D) refers to a liability to make any "such payment" for any period after the death of the payee spouse and there is no liability to make any payment as a substitute for "such payment" after the death of the payee spouse. In reviewing the whole statute (IRC § 71(b)), the words "such payment" clearly suggest qualifying payments should be made pursuant to a written divorce and separation instrument.[78] The *Lovejoy* case, however, sug-

gested that a written document was not necessary as long as there was a liability to continue to provide a dependent child with support as a *substitute* payment.[79]

Also, as noted previously, the Tenth Circuit in the *Lovejoy* case[80] elected to base its holding, in part, on its "prediction" of a future ruling by the Colorado Supreme Court. What remains perplexing with the *Lovejoy* decision, and its value as precedent, is the Tenth Circuit's failure to obtain a definitive answer by certifying the question of ambiguity directly to the Colorado Supreme Court. This certification procedure is authorized by C.A.R. 21.1 and was successfully employed previously by the U.S. District Court in a tax-related family law matter.[81]

Finally, in a 2004 case delineated "not precedential," the Third Circuit Court of Appeals in *Hawley*[82] added a further wrinkle to the inherent tax perils associated with the use of temporary unallocated support provisions. The *Hawley* court, citing *Lovejoy* as authority,[83] held that even if, under Pennsylvania law, the payor spouse's obligation to make payments to the wife would have ended on her death (by reason of abatement), his obligation to make "substitute" payments would have continued, because the payor would have been required to continue to support his children in a generic sense.

The *Hawley* court's characterization of a generic obligation of a parent to provide support for his minor children (after the death of the payee spouse) as being equivalent to a "substitute" payment under IRC § 71(b)(1)(D) could inevitably result in all unallocated temporary family support orders being nontaxable/nondeductible. This would be the case even if the unallocated temporary support order contained termination-at-death language. Similarly, all temporary maintenance/alimony orders with termination-at-death language would arguably also be nontaxable/nondeductible, at least where the maintenance obligor had minor children to support at the time of the order.

The foregoing harsh consequences directly result from the possibility that the temporary maintenance obligee could die prior to the children's emancipation. If that occurred, the payor spouse would be required to make a "substitute" payment after the death of the payee spouse by simply providing support to his children.

Practical Approaches

Tax commentators have considered the perils raised by the Tax Court in the *Miller* and *Gonzales* decisions and the perplexities of the holding in *Lovejoy*. They have suggested the following approaches to family law practitioners who contemplate tax savings through the use of temporary unallocated family support provisions:

1. The Temporary Orders stipulation must unequivocally state that all unallocated family support payments will terminate on the death of the payee spouse. The parties should not allow the determination imposed by state law to govern by default.[84]
2. "The parties should agree on intended tax consequences and make provisions for an adjustment if the results are otherwise."[85]
3. "If the payments are to be non-taxable/non-deductible, designate as such."[86]

Although it is not certain that Tax Court litigation can be avoided through the use of the above approaches, the *Miller* Tax Court suggested that the likelihood of an audit stemming from the filing of inconsistent returns should be minimized.[87] Finally, in light of the nonprecedential *Hawley* decision and its reliance on *Lovejoy*, it is no longer certain that the first two approaches are still viable.

Conclusion

The family law practitioner who is considering the use of temporary unallocated family support terminology, without negotiating any tax-safe provisions, would be well served to reflect on the resulting tax consequences suffered by the taxpayers in *Lovejoy* and *Hawley*. The primary motivation behind practitioners' use of unallocated family support provisions is to increase the after-tax dollars available to the family unit. This objective might be thwarted by the high cost of tax litigation that likely would result from a lack of agreement between counsel as to the tax consequences when negotiating the use of temporary unallocated family support provisions. No less a peril for practitioners is overlooking the fact that this is an area of tax law that is in an ongoing state of change and should be monitored.

NOTES

1. *See* Zuber, "Exploring the Tax Perils of Temporary Unallocated Family Support," 30 *The Colorado Lawyer* 57 (April 2001).

2. *Lovejoy*, 293 F.3d. 1208 (10th Cir. 2002).

3. The Tax Reform Act of 1984 (*hereafter*, "Tax Act") was part of the Deficit Reduction Act of 1984 (Pub.L. No. 98-369).

4. *Lester*, 366 U.S. 299 (1961) (where divorce instrument failed to specifically allocate or fix amount for child support, no portion of payments under instrument would be treated as non-taxable child support, even if inference could be drawn by reduction in payments that some portion of payments were related to support of children). This case allowed practitioners to structure divorce agreements creatively by using "unallocated family support terminology" in a way that would realize a tax benefit for payments otherwise constituting non-taxable/nondeductible child support.

5. Amyx *et al., California Marital Settlement and Other Family Agreements*, 2d ed. (San Francisco, CA: Univ. of Calif. and State Bar of California, CEB, 2004) at § 8.31.
6. *Id*.
7. Tax Act, *supra*, note 3. *See also* Wofford, *Tax Management Portfolios Divorce and Separation* (Wash, D.C.: BNA, Inc., 1999) at A-14.
8. *Id*. Wofford, *supra*, note 7, states that although the statute was broadly drawn, the temporary regulations read IRC § 71(c)(2) narrowly. *See* Temp. Treas. Reg. § 1.71-1T(c), Q&A-18.
9. Wofford, *supra*, note 7.
10. *Miller*, T.C. Mem. 1999-273, *aff'd sub nom., Lovejoy, supra*, note 2.
11. *Id.*
12. *Id.* (Commissioner issued separate and inconsistent notices of deficiency to former spouses, claiming wife failed to report as income alimony payments received and asserting husband's payments to wife not deductible by husband as alimony).
13. *Id.* at 308.
14. IRC § 71(c)(1) provides that a taxpayer's gross income shall not include as alimony or separate maintenance payments "that part of any payment which the terms of the divorce or separation instrument *fix* (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of the children of the payor spouse." (*Emphasis added*.)
15. *Miller, supra*, note 10 at 308.
16. *See* Frumkes, *On Divorce Taxation*, 4th ed. (Costa Mesa, CA: James Pub., 2003), at Chap. 3, for a discussion of seven requirements for taxable/deductible alimony under IRC §§ 71 and 215.
17. *See* IRC § 71(b)(1)(D).
18. *Miller, supra*, note 10.
19. IRS Notice 87-9, 1987-1 C.B. 421, 422.
20. *Miller, supra*, note 10 at 310. The Tax Court inaccurately interpreted the Colorado version of the UDMA (CRS §§ 14-10-101 *et seq*.), stating: "[U]nder the UDMA as enacted in Colorado, the obligation to pay future maintenance terminates upon the death of either party or the remarriage of either spouse (unless otherwise agreed in writing or expressly provided in the decree)." *Id*. The automatic termination provision of CRS § 14-10-122(2) provides for termination "on the death of either party or *the remarriage of the party receiving maintenance*. . . ." (*Emphasis added*.)
21. *Miller, supra*, note 10 at 311.
22. *Id., citing* CRS § 14-10-108(5)(c).
23. *See* Frumkes, *supra*, note 16.
24. *Gonzales*, T.C. Mem.1999-332.
25. *Id.* at 527.
26. *Gonzales, supra*, note 24 at 528, *citing* Temp. Treas. Reg. § 1.71-1T(b), Q&A 13, 49 Fed. Reg. 34,456 (Aug. 31, 1984).
27. *Gonzales, supra*, note 24, *citing Morgan v. Comm'r*, 309 U.S. 78, 80 (1940).
28. *Id.* at 529.
29. *Id.* at 530.
30. *Gonzales, supra*, note 24 at 529, *citing* N.J. Ct.R. 5:7-4(a).
31. *Id., citing Farmilette v. Farmilette*, 566 A.2d 835 (N.J. Super.Ct.Ch.Div. 1989).
32. *Kean*, T.C. Mem. 2003-163.
33. *Gonzales, supra*, note 24.
34. *Kean, supra*, note 32.
35. *Id*.
36. *Id*.
37. *Id*. *In accord, Hawley v. Comm'r*, USTC ¶ 50,2247 (3d Cir. 2004) (as to joint custody exception).
38. *Miller, supra*, note 10 at 312 n.9.
39. *Gonzales, supra*, note 24.
40. *Miller, supra*, note 10; *Gonzales, supra*, note 24.
41. *Lovejoy, supra*, note 2.
42. *Miller, supra*, note 10.
43. *McLaughlin*, 184 P.2d 130 (Colo. 1947).
44. *Id.*
45. *Burford*, 935 P.2d 943 (Colo. 1997).
46. *Connell*, 870 P.2d 632 (Colo.App. 1994).
47. *Id*.
48. CRS §§ 14-10-101 *et seq*.
49. *Connell, supra*, note 46 at 634. *But see In re Marriage of Heil*, 33 P.3d 1270 (Colo.App. 2001) (abatement caused by death of spouse does not divest trial court of jurisdiction to award guardian *ad litem* fees because authority for fees based on sources outside of UDMA).
50. Frumkes, *supra*, note 16 at § 4.7. ("In most jurisdictions, a pending divorce proceeding abates upon the death of either party. Therefore, the liability for payments pursuant to a temporary or *pendente lite* order or decree in such proceedings, in fact, ceases upon the death of the payee." (*Citations omitted*.)) *See also Heckaman v. Comm'r*, T.C. Mem. 2000-85.
51. *See Lovejoy, supra*, note 2; *Hawley v. Comm'r*, 94 Fed.Appx. 126 (3d Cir. 2004) (non-precedential).
52. *Lovejoy, supra*, note 2.
53. *McLaughlin, supra*, note 43; *Burford, supra*, note 45; *Connell, supra*, note 46.
54. *Lovejoy, supra*, note 2.
55. *Id*. at 1211.
56. *Id.*
57. *Hoover*, 102 F.3d 846 (6th Cir. 1996).
58. *Id.*
59. CRS §§ 14-10-101 *et seq*.
60. *Lovejoy, supra*, note 2 at 1212, *citing* CRS § 14-10-102(1) and (2)(b).
61. *Id*.
62. *Id.*
63. *Id.* at 1211; *McLaughlin*, *supra*, note 43; *Burford, supra*, note 45; *Connell, supra*, note. 46.
64. *Burford, supra*, note 45 at 952.
65. *Id., quoting Connell, supra*, note 46 at 633.
66. *Lester, supra*, note 4.
67. *See* Wofford, *supra*, note 7; Tax Act, *supra*, note 3.
68. *Estate of Bosch*, 387 U.S 456, 465 (1967).
69. *Gilbert v. Comm'r*, T.C. Mem. 2003-92 (2003).
70. *See Connell, supra*, note 46.
71. *Id.*
72. *Id.*
73. *Id.*
74. Child Support Enforcement Act, CRS §§ 26-13-101 *et seq*.; Colorado Administrative Procedure Act for the Establishment and Enforcement of Child Support, CRS §§ 26-13.5-101 *et seq*.; Child Support Enforcement Procedures Act, CRS §§ 14-14-101 *et seq*.
75. *Id*.
76. CRS § 14-6-101; *Abrams v. Connelly*, 781 P.2d 651, 656-57 (Colo. 1989).
77. *Supra*, notes 74 and 76.
78. *See* IRC § 71(b)(1)(A).
79. *Lovejoy, supra*, note 2.
80. *Id.*
81. *See In re Questions Submitted by U.S. District Court concerning C.R.S. 1963, 41-1-5*, 517 P.2d 1331 (Colo. 1974); *see also Imel v. U.S.*, 523 F.2d 853 (10th Cir. 1975).
82. *Hawley, supra*, note 51.
83. *Lovejoy, supra*, note 2.
84. Wofford, *supra*, note 7 at A-8.
85. Frumkes, *supra*, note 16 at § 4.7. *See also Miller, supra*, note 10 at 311.
86. *Id*.
87. *Miller, supra*, note 10. ■