STATE OF WISCONSIN

TAX APPEALS COMMISSION

BRENDA MANTSCH	**DOCKET NO. 09-I-140 (P-I)**
and	
GREGORY O. PALO and JUANITA M. STRADER	**DOCKET NO. 09-I-152-SC (P-I)**
and	
GREGORY O. PALO,	**DOCKET NO. 09-I-153-SC (P-I)**
Petitioners,	
vs.	**RULING & ORDER**
WISCONSIN DEPARTMENT OF REVENUE,	
Respondent.	

THOMAS J. MCADAMS, COMMISSIONER:

These cases come before the Commission on Petitioner Mantsch's Motion for Summary Judgment and on Petitioners Palo and Strader's Motion for Partial Summary Judgment.[1] Ms. Mantsch appears *pro se* in this matter and has filed briefs with exhibits in support of her motion. Mr. Palo and Ms. Strader are represented by Attorney Jed A. Roher of the Madison office of the law firm of Godfrey & Kahn, and have also filed briefs and exhibits. The Respondent in these matters, the Wisconsin Department of Revenue (hereinafter referred to as "the Department"), is represented by

[1] The Commission ordered joinder of the three cases on its own motion.

Attorney John R. Evans, of Madison, Wisconsin, and has also filed briefs with affidavits and exhibits in opposition to both motions. In brief, Ms. Mantsch and Mr. Palo divorced in 2001 after a 19-year marriage and the legal issue in this case involves the Wisconsin income tax treatment of the monthly payments from Mr. Palo to Ms. Mantsch during the years 2003 through 2007. As the Petitioners treated the payments inconsistently, the Department issued the assessments in the alternative, as allowed by Wis. Stat. § 71.74(9). Both taxpayers appealed to the Commission.

FACTS[2]

A. Jurisdictional Facts for Mr. Palo and Ms. Strader

1. Relating to Docket No. 09-I-152-SC, the Department issued a Notice of Amount Due in the alternative under Wis. Stat. § 71.74(9) on October 17, 2008; Mr. Palo and Ms. Strader filed a Petition for Redetermination dated December 15, 2008; The Department issued a denial letter dated June 15, 2009. Respondent's Exhibit 14.

2. Relating to Docket No. 09-I-153-SC, the Department issued a Notice of Amount Due in the alternative dated October 17, 2008; Mr. Palo filed his Petition for Redetermination on December 15, 2008; and the Department issued a denial letter dated June 15, 2009. Respondent's Exhibit 15.

3. The Petitions for Review were filed on August 11, 2009, with the Wisconsin Tax Appeals Commission for Docket No. 09-I-152-SC and Docket No. 09-I-153-SC. Respondent's Exhibit 17.

[2] The Facts are compiled from the parties' submissions, with revisions made by the Commission for form, clarity, and punctuation.

B. Jurisdictional Facts for Ms. Mantsch

4. The Notice of Assessment for Docket No. 09-I-140 was issued in the alternative by the Department on October 16, 2008. Respondent's Exhibit 16.

5. The Petition for Redetermination was filed on December 12, 2008. Respondent's Exhibit 16.

6. The Department denied the Petition for Redetermination on May 29, 2009. Respondent's Exhibit 16.

7. Ms. Mantsch filed a timely petition to the Tax Appeals Commission on July 30, 2009. Respondent's Exhibit 19.

C. Material Facts

8. Mr. Gregory Palo is an adult resident of the State of Wisconsin and was so for all periods of time relevant to the above-captioned matters, and, as such, was subject to the Wisconsin Statutes for all such periods of time. Petitioner Palo's August 11, 2009 Petition to the Commission, ¶1.

9. Ms. Juanita Strader is an adult resident of the State of Wisconsin and was so for all periods of time relevant to the above-captioned matters, and, as such, was subject to the Wisconsin Statutes for all such periods of time. Mr. Palo and Ms. Strader were married sometime around 2005.[3] Petitioner Strader's August 11, 2009 Petition to the Commission, ¶1.

[3] For the reader's convenience, we will generally refer only to Mr. Palo in this opinion, except where the context demands otherwise. The exact date of the marriage between Mr. Palo and Ms. Strader is not in the Commission's file, but prior to 2005, Mr. Palo filed his income tax returns as "Head of Household." In 2005, Mr. Palo filed joint returns with Ms. Strader.

10. From 1982 to 2001, Mr. Palo was married to Ms. Brenda Palo, a/k/a Brenda Mantsch. On or about August 21, 2001, a Judgment of Divorce was entered dissolving the marriage by the Wisconsin Circuit Court, Milwaukee County, Family Court Branch ("Court"), the Findings of Fact, Conclusions of Law and Judgment of Divorce with margin notations dated August 16, 2001. Respondent's Exhibit 1.

11. Ms. Mantsch was an adult resident of the State of Wisconsin and was so for all periods of time relevant to the above-captioned matters and, as such, was subject to the Wisconsin Statutes for all such periods of time.[4] Petitioner Mantsch's Exhibit C, ¶1.

12. During the marriage of Mr. Palo and Ms. Mantsch, the following children were born to Mr. Palo and Ms. Mantsch or were otherwise under their guardianship:

Children	Date of Birth
J.P.	1/13/1984
E.P.	8/12/1986
T.P.	6/28/1990
G.B.	12/9/1993
G.M.P.	9/26/1997

Petitioners Palo and Strader's August 11, 2009 Petition to the Commission, Exhibit B, ¶5.

13. The Circuit Court of Milwaukee County held a hearing on May 31, 2001 which resulted in the Judgment of Divorce dated August 21, 2001. The case was called on the record several times during the day and transcripts of some of those

[4] Ms. Mantsch appears to live in Florida at this time.

hearings are incorporated into the record here. Petitioner Palo's Exhibit C with August 11, 2009 Petition and Petitioner Mantsch's Exhibit E to February 11, 2010 Submission to the Commission.

14. The August 21, 2001 Judgment of Divorce states the following in paragraph 13:

> **Family Support**. Commencing June 1, 2001, Respondent [Palo] shall pay to Petitioner [Mantsch] Family Support in the amount of $1,250 per month for a period of 42 months. Then commencing December 1, 2004 and until November 1, 2012 Respondent shall pay to Petitioner the sum of $850 per month as Family Support. At that time, Family Support will terminate and the parties may return to Court for a determination of child support for the remaining minor child, [G.M.P.]. Said Family Support shall be modifiable only upon a change in placement of the three younger children.

Petitioner Palo and Strader's August 11, 2009 Petition, Exhibit B, ¶13.

15. Mr. Gregory Palo was audited by the Internal Revenue Service ("IRS") for 2002 and 2005 regarding Mr. Palo's tax returns filed subsequent to the divorce, and the IRS allowed Mr. Palo to deduct the amounts and payments as "alimony." Petitioner Palo and Strader's March 29, 2010 Brief at 3.

16. The August 21, 2001 Judgment of Divorce incorporated the Partial Stipulation and Order as to Custody and Placement dated March 9, 2001, which provided a shared placement arrangement for the 5 children. That latter document has a typed paragraph entitled "child support," but the paragraph is crossed out and handwritten (but indecipherable) notations appear in the margin on the right. Respondent's Exhibit 13.

17. Pursuant to the Divorce Order, each "family support" payment was to be made to the Wisconsin Support Collections Trust Fund,[5] which was in turn to disburse the "family support" payment to Petitioner Mantsch. Petition of Mr. Gregory Palo and Juanita Strader in Docket No. 09-I-152-SC, Ex. B at 7-8.

18. After the May 31, 2001 hearing, the Guardian *Ad Litem* and the attorneys for Ms. Mantsch and Mr. Palo exchanged correspondence concerning a proposed Judgment of Divorce. That correspondence indicates post-hearing disagreement between the attorneys concerning some of the terms of the divorce and some of the statements made in the transcript. Ultimately, no transcript was incorporated with the August 21, 2001 Judgment of Divorce. Respondent's Exhibit 4 to April 23, 2010 Brief.

19. During the years 2003 through 2006, inclusive, Mr. Palo made "family support" payments of $15,002, $15,024, $10,200 and $10,992, respectively. Mr. Palo's March 26, 2010 Affidavit ("Palo Aff."), ¶ 6.

20. Mr. Palo deducted the "family support" payments he made in 2003 through 2006 from his gross income for both federal and Wisconsin income tax purposes. Palo Aff., ¶7.

21. Ms. Mantsch did not report the "family support" payments as "alimony" on her federal income tax returns. Affidavit of John R. Evans, ¶8.

22. The Internal Revenue Service ("IRS") audited Mr. Palo's federal income tax returns for 2002 and 2005, each time examining his deduction of the "family

[5] The Wisconsin Support trust receives both child support and alimony.

support" payments. Each audit resulted in the IRS issuing a "No change" letter. Palo Aff., ¶¶8 and 9. Exhibit A.

23. Mr. Palo and Ms. Strader filed Case No. 5000-08 in the U.S. Tax Court concerning 2006 and that case resulted in a U.S. Tax Court Decision entered by Judge Elizabeth Crewson Paris on March 31, 2009, which states in its entirety as follows:

> Pursuant to the agreement of the parties in this case, it is Ordered and Decided: That there is no deficiency in income tax due from, nor overpayment due to, petitioners for the taxable year 2006.

Petitioner Palo's Exhibit B.

24. The IRS audited Ms. Mantsch's federal income tax returns and on March 6, 2006 issued a "no change" letter to her for the tax period ending December 31, 2003. Petitioner Mantsch's February 23, 2010 Filing, Exhibit B.

CONCLUSIONS OF LAW

The "family support" payments for the years at issue constituted "child support" under Section 71 of the Internal Revenue Code and, as such, were not deductible by Mr. Palo and were not includible in Ms. Mantsch's gross income.

INTRODUCTION

As mentioned above, Ms. Mantsch and Mr. Palo divorced in 2001. The family included five children and at the time the divorce was granted, the children were 17, 14, 10, 7, and 3 years old. In 2001, Mr. Palo was employed full time and Ms. Mantsch was not working outside the home. The 2001 written settlement agreement issued by the circuit court judge set monthly "family support" payments of $1250 from

Mr. Palo to Ms. Mantsch until 2004, and monthly "family support" payments of $850 from 2004 until 2012. For the years after 2012, the document describes further payments as "child support" for the one remaining child who will be under 18 years of age. Section 71 of the Internal Revenue Code ("IRC ") allows the payor to deduct "alimony"[6] and the income tax is paid by the recipient. On the other hand, "child support" is paid from post-tax income and the recipient is not taxed on the payments. In sum, if the payments at issue here are "alimony" under the IRC, Ms. Mantsch owes $2,556.49 in Wisconsin income tax.[7] If, on the other hand, the payments are "child support," Mr. Palo owes $3,571 in Wisconsin income tax.[8] Thus, we must determine which category the payments fit in. The first part of this opinion will summarize the applicable law. The second part of this opinion will set forth the legal arguments made by the parties. The third part of this opinion will discuss why we grant Ms. Mantsch's motion and why we deny Mr. Palo's motion.

I. Applicable Law

A. The Role of the Commission in this Case

The Commission's responsibilities are set forth in Chapter 73 of the Wisconsin Statutes. The Commission's main responsibility is to decide questions of law and of fact concerning statutory assessments. Both Wis. Stat. § 73.01(4) and the case law

[6] The Divorce Reform Act of 1977 changed the term "alimony" to "maintenance payments" throughout the Wisconsin Statutes.

[7] $1,965 is tax and $601.49 is the interest as of October 16, 2008, covering the years 2004, 2005, 2006, and 2007 for Ms. Mantsch.

[8] As to Case No. 09-I-152-SC, the amount assessed is $1,783.35 ($1,417.85 in tax and $365.50 in interest). As to Case No. 09-I-153, the amount at issue is $1,787.65 ($1229 in tax and $558.65 in interest). The years covered by these assessments are 2003, 2004, 2005, and 2006.

establish that the Commission is the final authority on all the facts and questions of law regarding the tax code. *Dep't of Revenue v. Menasha Corporation*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 275 (2008).[9]

On numerous occasions, the Commission has been called upon to construe and to apply statutes and regulations. *See, generally*, *Milwaukee Symphony Orchestra v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-959 (WTAC 2006); *Xerox v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-999 (WTAC 2007); *Menasha Corp. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-719 (WTAC 2003).[10] In addition to our role in interpreting statutes and regulations, the Commission is frequently called upon to construe wills, trusts and settlement agreements to determine the tax implications of private transactions. *Gilson v. Dep't. of Revenue*, 246 Wis. 2d 669, 630 N.W.2d 275 (Ct. App. 2001). This case requires us to construe a judgment of divorce entered into in 2001.

B. Summary Judgment

A motion for summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Wis. Stat. § 802.08(2). The party moving for summary judgment has the burden to establish the absence of a

[9] Commission decisions are, of course, subject to judicial review.

[10] These cases were affirmed by the appellate courts. *Menasha Corp. v. Dep't. of Revenue,* 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95; *Milwaukee Symphony v. Dep't. of Revenue*, 2010 WI 33, 324 Wis. 2d 68, 781 N.W.2d 674; *Xerox Corp. v. Dep't. of Revenue*, 2009 WI App 113, 321 Wis. 2d 181, 772 N.W.2d 677.

genuine issue as to any material fact. *Grams v. Boss,* 97 Wis.2d 332, 338-39, 294 N.W.2d 473 (1980). If a moving party establishes a *prima facie* case for summary judgment, the court then examines the affidavits in opposition to the motion to see if the other party's affidavits show facts sufficient to entitle that party to a trial. *Artmar, Inc. v. United Fire & Casualty Co.,* 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). Once a *prima facie* case is established, "the party in opposition to the motion may not rest upon the mere allegation or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." *Board of Regents v. Mussallem,* 94 Wis. 2d 657, 673, 289 N.W.2d 801, 809 (1980), *citing* Wis. Stat. § 802.08(3). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar,* 34 Wis. 2d at 188. The court must view the evidence, or the inferences therefrom, in the light most favorable to the party opposing the motion. *Kraemer Bros. v. United States Fire Ins. Co.,* 89 Wis. 2d 555, 567, 278 N.W.2d 857, 862 (1979). Where the party opposing summary judgment fails to respond or raise an issue of material fact, the trial court is authorized to grant summary judgment pursuant to Wis. Stat. § 802.08(3). *Board of Regents,* 94 Wis. 2d at 673. The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

C. IRC § 71

This case requires us to construe a written agreement and determine if the monthly "family support" payments are treated as "child support" or as "alimony" for tax purposes. Wisconsin generally follows federal law for income tax purposes. Here, although the parties and certain Wisconsin statutes describe the payments at issue as "family support," applicable federal and Wisconsin income tax statutes require us to categorize the payments as either "alimony" or "child support." The Commission's prior cases in this area, most of which are discussed below, have analyzed the question here by applying IRC § 71.

We begin by a brief review of the applicable law.[11] "Alimony" is deductible by the payor under IRC § 215 and includible in gross income by the recipient under IRC § 71(a). IRC § 215 provides:

> Sec. 215. ALIMONY, ETC., PAYMENTS
>
> (a) GENERAL RULE. — In the case of an individual, there shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year.
>
> (b) ALIMONY OR SEPARATE MAINTENANCE PAYMENTS DEFINED. — For purposes of this section, the term "alimony or separate maintenance payment" means any alimony or separate maintenance payment (as defined in section 71(b)) which is includible in the gross income of the recipient under section 71.

[11]Articles are available about this topic. *See*, Laura Bigler, *A Change Is Needed: The Taxation of Alimony and Child Support*, 48 Clev. St. L. Rev. 361 (2000); Reginald Mombrun, *An End to the Deadbeat Dad Dilemma? – Puncturing the Paradigm by Allowing a Deduction for Child Support Payments*, 13 Fordham J. Corp. & Fin. L. 211 (2008).

IRC § 71 provides:

> Sec. 71. ALIMONY AND SEPARATE MAINTENANCE PAYMENTS
>
> (a) GENERAL RULE. — Gross income includes amounts received as alimony or separate maintenance payments.
>
> (b) ALIMONY OR SEPARATE MAINTENANCE PAYMENTS DEFINED. — For purposes of this section —
>
> (1) IN GENERAL. — The term "alimony or separate maintenance payment" means any payment in cash if —
>
> (A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
>
> (B) the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section 215,
>
> (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
>
> (D) there is no 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 (in cash or property) as a substitute for such payments after the death of the payee spouse.

Ms. Mantsch asserts that the payments are child support payments under IRC § 71(c), which states:

> (c) PAYMENTS TO SUPPORT CHILDREN -
>
> (1) IN GENERAL. - Subsection (a) shall not apply to 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 children of the payor spouse.
>
> (2) TREATMENT OF CERTAIN REDUCTIONS RELATED TO CONTINGENCIES INVOLVING CHILD. - For purposes of paragraph (1), if any amount specified in the instrument will be reduced –
>
> (A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or
>
> (B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

This case requires that we apply these tests to determine the Wisconsin income tax nature of the monthly payments for the years at issue.[12]

D. Family Support and "Lesterizing"

Unallocated "family support" is a technique sometimes used in domestic relations cases to encourage cash-flow planning between separated spouses. This practice is sometimes referred to as "Lesterizing." *See Commissioner v. Lester,* 366 U.S. 299 (1961). If used correctly, the technique enables the parties to achieve a higher net transfer of funds to the payee spouse because the payor spouse, who is generally in a higher tax bracket, reaps an economic benefit from the larger tax deduction obtained

[12] We are, of course, limited in these cases to determining the tax nature of the payments to Ms. Mantsch for the years 2004 through 2007 and, for Mr. Palo, we are limited to 2003 through 2006. *Community Service Agency v. City of Montreal,* 2010 WI App 119, ___ Wis. 2d ___, 789 N.W.2d 392 (circuit court exceeded scope of its authority when it declared taxpayer was exempt from property taxes in years not before the court).

when unallocated family support payments are structured to be deductible as alimony. *See, generally*, H. Rept. 98-432 (Part 2), at 1495 (1984). These unallocated payments, while typically temporary, can facilitate the economic transition that must occur as a result of a divorce or separation, *provided* the parties understand and agree to the tax consequences. *Miller v. Comm'r*, T.C. Memo 1999-273, *aff'd. sub nom. Lovejoy v. Comm'r*, 293 F.3d 1208, 1212 (10th Cir. 2002).

In this case, however, the 2001 written divorce agreement is silent regarding the tax consequences to the parties and does not allocate the "family support" payments to "maintenance" and "child support" components. Although the Petitioners could have agreed to the tax consequences of the payments, they failed to do so. *See* IRC § 71(b)(1)(B) and IRC § 71(c).

E. Tax Appeals Commission Cases

Since the Wisconsin Divorce Reform Act was passed in 1987, the Tax Appeals Commission has considered IRC § 71 and the tax nature of various types of payments on several occasions.[13] In some cases, we have found "family support" payments to be "child support" and in some cases we have found "family support" to be "alimony." In sum, the tax result is dependent on the facts of the given case before the Commission, especially the text of the written agreement. Principles from those cases, however, will guide our analysis below.

[13] There are federal cases which consider this issue. *See, e.g., Beale v. Comm'r*, T.C. Memo. 2000-158 (Wisconsin case where family support held to be alimony where divorce decree stated that the payments were taxable to the recipient.)

For example, in *Alan and Patricia Smith v. Dep't of Revenue,* Wis. Tax Rptr. ¶400-003 (CCH) (WTAC 1993) payments received by Ms. Smith from her former husband (Mr. Richter) as "family support" payments under a 1982 divorce judgment were held by the Commission to be tax-exempt payments to Ms. Smith to support their minor children rather than taxable maintenance payments. In 1985, Ms. Smith sought to reopen the divorce decree to recharacterize the "family support" payments as "child support," but her former husband rejected the proposal. Initially, Ms. Smith reported the money on her returns as alimony received, but subsequently she filed amended returns for 1986, 1987, and 1988 excluding the money from income as child support. The IRS conducted a simultaneous examination and determined to allow the deduction of alimony by her former husband and to deny Ms. Smith's claim for refund.

In *Smith*, the divorce agreement had both a "no maintenance" paragraph and a "child support" paragraph that used the term "family support." In interpreting the judgment language, the Tax Appeals Commission ruled that the parties clearly intended to deny maintenance to either party and that the "family support" language was intended to mean a "substitute for child support." Using the rules of statutory construction, the Commission held that this construction allowed harmonization of the "no maintenance" and "family support" clauses. Thus, the "family support" payments were found to be tax-exempt child support payments, and Ms. Smith, who had been reporting the payments entirely as taxable alimony income on joint returns filed with

her new husband, was entitled to income tax refunds for years 1986 through 1988.[14] While *Smith* is a pre-1986 IRC case, it is important because it states that analyzing the divorce judgment is tantamount to construing a contract.

In *LaVern Oehler and Michael S. and Ann M. Udvare v. Dep't of Revenue,* Wis. Tax Rptr. (CCH) ¶400-114 (WTAC 1995), "family support" payments concerning the four children were held by the Commission to be "child support." In that case, the 1986 divorce agreement purported to make "family maintenance" payments deductible to Mr. LaVern Oehler as alimony under IRC Sec. 71(a). The particular clause at issue stated the following:

> The payment of family maintenance shall be deductible to petitioner and taxable to respondent on their respective state and federal income tax returns whether they file single or joint returns.

In 1992, after the parties consented to a modification concerning arrearages and adjusting the payments to 29% of Mr. Oehler's earnings, the Udvares inquired of the IRS about the tax status of the "family maintenance" payments. When the IRS indicated that "family maintenance" contingent upon the children reaching 18 makes the payments "child support," the Udvares filed amended returns for 1989, 1990, and 1991. In 1993, the Wisconsin Department of Revenue issued assessments in the alternative against Mr. Oehler and against Ms. Udvare.

The Commission held that the payments made by Mr. Oehler to Ms. Udvare were properly characterized as nondeductible child support payments under

[14] The Commission applied the pre-1986 Internal Revenue Code.

IRC § 71(c). The Commission started by noting that generally, the taxable income of a natural person for state tax purposes is defined by reference to the IRC. In *Oehler*, the payments satisfied all the criteria for deduction as "alimony" payments under IRC § 71(b). Indeed, the divorce instrument specifically provided that the payments were includable in the gross income of the former wife and deductible by the payor spouse. However, because the divorce agreement also provided that the payments would terminate when the youngest child reached 18, the payments were properly characterized as "child support" payments under IRC § 71(c) and, therefore, were denied treatment as "alimony." Thus, the payments were not deductible by Mr. Oehler and, conversely, did not constitute taxable income to Ms. Udvare, even though the written agreement provided for the exact opposite.

In *Melvin O. Seamans et al. v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-583 (WTAC 2002), the issue was whether under IRC § 71 certain payments were "alimony" or part of a property division. The written agreement waived maintenance to both parties and required a $900 monthly payment from Mr. Melvin Seamans to Ms. Leah Seamans. There was no provision in the document relating to the tax treatment of the parties and neither reported the money as income on his or her respective returns.

The Commission stated that for income tax purposes, Mr. Seamans' cash payments to his ex-wife constituted "alimony" payments under IRC § 71 because the payments were paid under a divorce instrument, were not designated by the instrument as excludable from the ex-wife's gross income and nondeductible by the taxpayer, and terminated upon the ex-wife's death. In deciding the case, the

Commission noted that the Wisconsin income tax treatment of alimony is the same as the federal income tax treatment of alimony. While state law governs the interests of divorcing parties, federal law governs the federal tax treatment of property division and alimony. The terms used in a divorce decree do not necessarily determine the federal tax treatment. The Commission rejected Ms. Seamans' argument that the intent of the parties controls, noting that the 1986 revisions to IRC § 71 eliminated subjective inquiries by the courts into intent and the nature of payments in favor of a simpler, more objective test. Thus, the intent of the parties is not controlling and the payments were includable in Ms. Seamans' gross income and deductible from Mr. Seamans' gross income.

In *Linton v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-598 (WTAC 2002), the Commission held that "family support" payments constituted "alimony" rather than "child support." The 1985 divorce agreement stated the following:

> As and for family support, for the support, welfare and maintenance of [Verdell] and the [three] minor children of the parties hereto, [Lynn] shall pay the sum of $500 per month, ...

The judgment of divorce contained no other material terms concerning family support, child support, or maintenance. There was no termination date for the payments in the agreement, but Mr. Lynn Linton stopped paying when the children were 18. Neither party reported the income. In 2000, the Department issued assessments in the alternative against Ms. Verdell Linton and Mr. Lynn Linton.

Ms. Verdell Linton argued that the payments were "child support" based on the intent of the parties and the fact that Mr. Lynn Linton stopped the payments when the children were 18. The Commission began by applying IRC § 71(b) to the written judgment, noting that Wisconsin law on its own supplied the last element.[15] The Commission, however, refused to consider the actual stoppage of the payments as evidence the payments were "child support" because its review was limited to the written document, and not the real life actions of the parties or the parties' intent.

Finally, in *Carran v. Dep't of Revenue*, Wis. Tax Rptr. (CCH) ¶400-922 (WTAC 2006), the Commission held that "family support" payments for the two children constituted "child support" rather than "alimony." In that case, neither party reported the money as income on their respective federal tax returns. The 2000 divorce agreement provided as follows:

[II.] Family Support

> Joseph Carran is to pay a fixed sum of $1,500 per month as nonmodifiable family support through and including the earlier of June 1, 2006 or the death of either party. Susan Carran is permanently waiving maintenance in reliance on the agreement to pay $1,500 per month until June 1, 2006 as well as the parties' agreement to each equally divide the costs of tuition, ... for both children through and including [the younger son's] graduation ... which is expected on or about June 1, 2006. If for any reason [the younger son] does not graduate on that timetable, the family support payments shall nevertheless terminate with the last payment on June 1, 2006...

[15] In Wisconsin, the general principle is that alimony ceases upon the death of the payee spouse. *Estate of Traver*, 2 Wis. 2d 509, 87 N.W.2d 269 (1958); *Kuether v. Kuether,* 174 Wis. 538, 183 N.W. 695 (1921); *Yates v. Yates*, 165 Wis. 250, 161 N.W. 743 (1917); *In re Rooney's Estate,* 19 Wis.2d 89, 119 N.W.2d 313 (1963).

The Commission found that the payments met all of the elements for "alimony" under IRC § 71(a). Ms. Carran asserted, however, that the payments were "child support" because the written agreement contained a contingency relating to a child. The agreement as a whole was silent on the tax reporting of the payments. Both parties eventually received "no change" letters from the IRS in 2005, but in 2004 the Department had issued assessments to both.

Before the Commission, Ms. Carran asserted that the payments were for "child support" because their cessation was related to two contingencies involving a child (i.e., the child's eighteenth birthday and anticipated graduation date). Based on the six-month rebuttable presumption in Temporary Treasury Reg. § 1.71 – 1T, the Commission held that the cessation related to their son's 18th birthday. The Commission held that Mr. Carran failed to offer any evidence the cessation date was determined independently of any contingencies relating to the children. Specifically, the Commission rejected Mr. Carran's reliance on a partial transcript of the divorce hearing, in which Ms. Carran acknowledged on the record that the payments would be taxable to her. The Commission also rejected the notion that the use of the term "family support" in the decree meant the payments were necessarily deductible by Mr. Carran. The fact that the payments did not decrease upon the first child turning 18 was also not determinative, as under IRS regulations a contingency need only relate to one child. Finally, the fact that the IRS permitted Mr. Carran to deduct the payments as "alimony," while simultaneously allowing Ms. Carran to report the payments as "child support," did not bind Wisconsin to the same "inexplicable and inconsistent result."

From these cases, the following principles emerge to be applied here. First, in *Smith*, the Commission used the principles of statutory construction to construe the written agreement, noting the agreement was tantamount to a contract. Second, in *Oehler,* IRC § 71 controlled the tax result, not the language used by the parties in the agreement. In fact, the tax result under IRC § 71 may be the opposite of what the parties placed in the agreement. As *Seamans* states, the analysis under IRC § 71 is objective, not subjective. Third, the analysis begins by determining if the payments are alimony under IRC § 71. Then, the payments must be analyzed in light of the test for child support in IRC § 71(c). Fourth, what was said at the hearing by the parties is not determinative, and may not in a given case even be relevant. Fifth, as in *Carran*, the IRS's determination of the tax treatment of the payments for federal income tax purposes does not determine the result for Wisconsin purposes. Finally, the *Carran* case confirms that the six-month and one-year presumptions in the Treasury Regulations may be rebutted by the taxpayer.

II. The Arguments Made by the Parties

A. Ms. Mantsch's Arguments

Ms. Mantsch makes numerous points in support of her Motion for Summary Judgment. First, Ms. Mantsch posits that the divorce decree is very clear: the paragraph that pertains to family support never mentions "alimony" or "spousal support" or "maintenance." It never alludes to a change in support due to the wife's death or remarriage. Instead, the support pertains directly to, and only to, the children.

The "family support" date change directly coincides to within one year of two of the children turning 18. The paragraph states that when G.M.P. is the only remaining minor that the parties will return to court to determine "child support." The paragraph goes on to state that only upon a change in placement of the three younger children would "family support" be modifiable. Second, Ms. Mantsch points out that Mr. Palo paid only a reduced amount of "child support" and this is why the payments were only adjusted twice, to help compensate for the fact that Ms. Mantsch was getting reduced "child support," even though all 5 children lived with her. Ms. Mantsch points out that a simple calculation based on what Mr. Palo's earnings were at the time makes it clear that Mr. Palo has paid only a reduced amount of "child support." Ms. Mantsch claims that under Wisconsin law, the amount she should have received based on Mr. Palo's 2001 monthly earnings of $4,593 was approximately $1,500 per month.

As to the transcript submitted by Mr. Palo, Ms. Mantsch argues that there were at least three hearings on the record the day of the trial and other meetings off the record. Ms. Mantsch argues that in the end, mistakes were made during the last trial of the day, and the Judge himself questioned the legality of child support being taxable to Ms. Mantsch. After trial, there were several letters sent back and forth by the attorneys, and the transcripts ultimately were not attached to the final document, as they conflicted with one another. Ms. Mantsch submits for the Commission's consideration additional pages of transcript from earlier in the day to show how the payments were reduced by a 3/5 calculation which did not include the three older children. Ms.

Mantsch argues that instead of relying on isolated statements in the transcripts, the Commission ultimately must look to the decree itself.

Finally, Ms. Mantsch argues that federal rules require a decision in her favor. She points out that no alimony is outlined in the decree and the entire paragraph dealing with support revolves specifically around the children, and that federal rules clearly outline that if alimony is not specifically addressed, then any portion of a payment not specifically designated as "alimony" is considered "child support." Ms. Mantsch argues that the divorce decree clearly outlines that "family support" is reduced within the confines of the children reaching certain milestones.

B. Mr. Palo's Arguments

Mr. Palo argues that Ms. Mantsch is not entitled to judgment.[16] First, Mr. Palo argues that amounts that qualify as alimony must be explicitly labeled as "child support" in a divorce or separation instrument before those amounts can be conclusively treated as "child support." Second, Mr. Palo argues that the divorce order does not specifically designate any portion of the "family support" payments as "child support" and does not specify a child-related contingency that causes a reduction in the family support payments. Third, the court transcript reflects the parties' clear understanding on the taxation of the family support payments and the transcript submitted by Ms. Mantsch has no probative value. Fourth, the family support payments were not reduced at a time that can be clearly associated with a child-related

[16] Petitioner Palo's July 26, 2010 filing states that the parties agree on the basic facts, adding that the facts in the Department's second reply brief relating to the military pension issue are not germane to their Motion for Partial Summary Judgment. Petitioner Palo's July 26, 2010 Brief at 4.

contingency. While the timing of the payments appears to cause the payments to be captured by the rebuttable presumption set forth in the Treasury Regulations,[17] it is far more plausible that the reduction in family support payments was set to allow Ms. Mantsch to adjust to being a primary wage earner[18] and that any relationship to the ages of the five children is coincidental.

C. The Department's Arguments

As the assessments were issued in the alternative, the Department argues against both motions for summary judgment. However, the Commission treats the assessments as mutually exclusive, in that one is correct and the other is incorrect, i.e. the payments were either "alimony" or they were "child support."

1. The Department's Reply to Ms. Mantsch's Motion

The Department argues that the payments to Ms. Mantsch are taxable pursuant to IRC § 71. The payments are not associated with child support in the agreement and Ms. Mantsch acknowledged she was taxable on the payments in the transcript in open court as her lawyer explained the agreement to her. The Department states that arguably, some part is alimony, particularly the portion of the payments

[17] Petitioners Palo and Strader describe the regulation as an "exceedingly broad trap for the unwary--a trap that is particularly lightly sprung for divorcing couples with multiple children." These Petitioners also posit that the ease with which the presumption is triggered reduces the value of the presumption, but offer no legal support for this assertion.

[18] Petitioners Palo and Strader attempt to support this assertion by submitting an affidavit from Mr. Palo, noting that he "was there." The affidavit, however, is self-serving and the explanation for the reduction dates in the affidavit was not offered to the circuit court judge at the 2001 hearing.

when there would be no minor child in Ms. Mantsch's household.[19] The Department argues there is no way to determine or designate which part of the monthly payment is "maintenance" or "child support," citing federal cases. The judgment, which was signed about two months later, does not alter the original agreement or the trial testimony. Arguably, the "family support" provision does not fit within the "associated with a contingency" child support default provision of IRC § 71 in that it is not symmetrical, and is inconsistent at best. Finally, the IRS tax actions are inconclusive, but, if anything, favor Mr. Palo as his was a Tax Court decision[20] and not an audit determination.

2. The Department's Reply to Mr. Palo's Motion

The Department asserts that Mr. Palo has not met his burden of showing the payments are deductible "alimony," arguing that the payments here do not meet the third and fourth prongs of the test in IRC § 71(b)(1).[21] The payments are ambiguous as to whether they terminate with Ms. Mantsch's death or remarriage, as to whether they are related to the children obtaining crucial ages, and as to whether they reflect the statutory obligation under Chapter 767, Stats., to set child support. Also, the payments are for a specific period of time. The Department argues that it is difficult to read the

[19] The 2001 divorce agreement incorporates the March 9, 2001 Partial Stipulation and Order as to Custody and Placement which contemplates a "true shared placement arrangement" subject to a "mutual agreement between [two of the daughters] and [their] Father."

[20] The Tax Court judgment, which is dated March 31, 2009, does not explain the reasons for the decision, and appears to be a resolution agreed upon by the parties.

[21] The Department argues that it is unclear from the decree and the transcript which household has which children. As to the fourth prong, the Department indicates its skepticism that in Wisconsin death terminates alimony.

decree in its entirety, with five minor children, and not determine that the money is for "child support." The Department argues that Mr. Palo's reliance on *Lester* is misplaced and the current rules of IRC § 71 apply regardless of Wisconsin's § 767.503, Stats. Section 767.511(a), Stats., requires "child support" when there are minor children, so it is unlikely that the court would have neglected "child support" as such or as a statutory component of 'family support." In the Department's view, the transcripts reveal that the parties knew that the payments were "child support." Finally, the Department argues that the Tax Court determination is inconclusive here due to the inconsistent result as respects Ms. Mantsch.

III. Why We Grant Ms. Mantsch's Motion

In brief, this dispute arose because the parties failed to agree in 2001 on the tax consequences of their divorce. Before the Commission, Ms. Mantsch cites the federal regulations and the language of the document. On the other hand, Mr. Palo asserts that the intent in 2001 was to make the payments taxable to Ms. Mantsch. The Department, although opposing both Motions for Summary Judgment, notes that Ms. Mantsch has the better position of the two based on the fixed number of payments. Based on applying IRC § 71 and our independent review of Wisconsin law, we conclude that the disputed payments made during the years at issue here were "child support." In brief, Ms. Mantsch prevails for two reasons. First, the IRC § 71 has a one-year presumption that covers these payments and Mr. Palo fails to rebut that presumption. Second, in ordinary circumstances, Wisconsin law requires child support.

A. Applying IRC § 71

1. IRC §§ 71(b)(1) and 71(c)

Having reviewed the submissions of the parties, we conclude that the monthly payments meet the four prongs in IRC § 71(b)(1). First, the August 21, 2001 judgment of divorce qualifies as a divorce or separation instrument. Second, under Wisconsin case law, the payments terminate upon death. Third, Mr. Palo and Ms. Mantsch were not members of the same household at the time the payments were made. Finally, nothing in the divorce judgment or marital settlement agreement designates the payments as not includible in Ms. Mantsch's gross income or not deductible to Mr. Palo.

Ms. Mantsch asserts, however, that the payments are nonetheless child support payments under IRC § 71(c), which states:

> (c) PAYMENTS TO SUPPORT CHILDREN -
>
> (1) IN GENERAL. - Subsection (a) shall not apply to 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 children of the payor spouse.
>
> (2) TREATMENT OF CERTAIN REDUCTIONS RELATED TO CONTINGENCIES INVOLVING CHILD. - For purposes of paragraph (1), if any amount specified in the instrument will be reduced -
>
> (A) on the happening of a contingency specified in the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or

> (B) at a time which can clearly be associated with a contingency of a kind specified in subparagraph (A), an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse.

Temporary Regulations § 1.71-1T (Alimony and separate maintenance payments) provides further clarification for defining what contingencies relate to a child. Question 17 asks, "When does a contingency relate to a child of the payor?" The Answer instructs:

> A-17 - For this purpose, a contingency relates to a child of the payor if it depends on any event relating to that child, regardless of whether such event is certain or likely to occur. Events that relate to a child of the payor include the following: the child's attaining a specified age or income level, dying, marrying leaving school, leaving the spouse's household, or gaining employment.

Thus, the issue here becomes if the contingencies in the written Judgment of Divorce relate to a child.

In this case, the monthly payments decrease in December, 2004 and November, 2012 and the problem for Mr. Palo is that both of these dates occur within one year (before or after) of two of the children turning 18.[22] Temporary Regulations 1.71-1T outlines when payments are considered reduced at a time related to a child:

> Q-18 - When will a payment be treated as to be reduced at a time which can clearly be associated with the happening of a contingency related to a child of the payor?

[22] The first reduction in the "family support" payments occurred in December of 2004 when E.P. was 18 years, 3 months and 19 days old. The second reduction will occur in November of 2012 when G.B. is 8 days away from his 19th birthday. None of the parties dispute that 18 is the relevant age of majority.

A-18 - There are two situations, described below, in which payments which would otherwise qualify as alimony or separate payments will be presumed to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor. In all other situations, reductions in payments will not be treated as clearly associated with the happening of a contingency relating to a child of the payor.

The first situation referred to above is where the payments are to be reduced not more than 6 months before or after the date the child is to attain the age of 18, 21, or local age of majority. **The second situation is where the 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 in the preceding sentence must be the same for each such child, but need not be a whole number of years.

The presumption in the two situations described above that payments are to be reduced at a time clearly associated with the happening of a contingency relating to a child of the payor may be rebutted (either by the Service or by taxpayers) by showing that the time at which the payments are to be reduced was determined independently of any contingencies relating to the children of the payor. The presumption in the first situation will be rebutted conclusively if the reduction is a complete cessation of alimony or separate maintenance payments during the sixth post-separation year (described in A-21) or upon the expiration of a 72-month period. The presumption may also be rebutted in other circumstances, for example, by showing that alimony payments are to be made for a period customarily provided in the local jurisdiction, such as a period equal to one-half the duration of the marriage.

[emphasis added].

Thus, in these cases, based on the second situation in the material quoted above, the presumption arises that the reduction dates are child support related.[23]

2. Rebuttal of the Presumption

The presumption may be rebutted, however, by showing that the time at which the payments are to be reduced was "determined independently of any contingencies relating to the children of the payor."[24] Here, Mr. Palo argues for rebuttal two ways. First, Mr. Palo introduces his 2010 affidavit stating that the dates in the divorce judgment were related to Ms. Mantsch getting financially established. Second, he argues for rebuttal based on the fact the decree uses the term "family support" and based on statements made by Ms. Mantsch on May 31, 2001 at the trial. We consider each contention in turn.

a. The Affidavit from Mr. Palo

The 2010 affidavit that Petitioner Palo submitted for our consideration in this case reads in relevant part as follows:

> 4. As part of our divorce order, I was ordered to pay Petitioner Mantsch Family Support of $1,250 per month for 3 ½ years, and then $850 per month for 8 years.
>
> 5. The Family Support payments started high and then were reduced in order to give Petitioner Mantsch some time to find a job and adjust to supporting herself.

[23] Petitioner Palo points out that any date between 2001 and 2012 would have run afoul of the presumption in Temporary Reg. 1.71.

[24] The Department discusses whether summary judgment is appropriate where rebuttal of the presumption is involved, but acknowledges in its discussion that any additional facts presented to the Commission at this point concerning the meaning of the 2001 document would be self-serving and after the fact. Respondent's April 23, 2010 Brief at 17. We agree that there is no genuine issue of material fact here requiring a trial.

There are at least two problems with using this affidavit for rebuttal purposes. First, the affidavit is not contemporaneous with the divorce decree. While we respect the fact that Mr. Palo was actually at the hearing in 2001 where the issues were considered by the circuit court, the explanation in the 2010 affidavit does not square with what Mr. Palo stated at the hearing in 2001, which is reproduced verbatim below. Second, there is other evidence in the case that suggests other motivations for the selection of the reduction dates. For example, the petition Ms. Mantsch filed with the Commission on July 30, 2009[25] states that the dates were chosen randomly and Petitioner Palo's December 15, 2008 letter to the Department that is Respondent's Exhibit 14 indicates that the dates were "carefully crafted to avoid reclassification by the Internal Revenue Service." These statements indicate to us that Ms. Mantsch's financial adjustment was, in fact, not the motivation for the reduction dates in 2004 and 2012. At best, Mr. Palo's affidavit is a neutral factor toward rebuttal.

b. The Terms Used in the Decree

Mr. Palo also points to the fact that the decree clearly uses the term "family support" and there would be no reason to use the term "family support" if the intent was to have the monthly payments be taxable entirely to Mr. Palo. This is, in our view, Mr. Palo's strongest argument, and one we will therefore consider below in detail. *See Huhn v. Stuckman*, 2009 WI App 127, 321 Wis. 2d 169, 772 N.W.2d 744.[26] We will

[25] The Petition is also Exhibit 19 to the Respondent's April 23, 2010 filing in this case.
[26] To paraphrase the *Huhn* Court, if the "family support" encompassed only "child support," there would be no added tax benefit to awarding it as "family support."

first discuss the decree and then discuss what was said at the trial as it sheds light on intent.

Wisconsin law permits those going through a divorce to agree on the tax consequences of the divorce. Wisconsin Judicial Benchbook*: Family Law,* FA 11 (2010). The parties are allowed to attempt to shift tax burdens by designating the payments as "family support."[27] This device reportedly works when the parties agree and the appropriate tax is paid. The Benchbook, however, states the following about "family support":

> [The] enormity of potential taxes and penalties, together with [the] complexity of child-related contingencies, demands great caution when using family support.

Id. Here, the parties do not appear ever to have reached a consensus and treated the payments inconsistently on their respective returns.

The agreement provides as follows:

> 13. **Family Support**. Commencing June 1, 2001, Respondent [Mr. Palo] shall pay to Petitioner [Ms. Mantsch] Family Support in the amount of $1,250 per month for a period of 42 months. Then commencing December 1, 2004 and until November 1, 2012 Respondent shall pay to Petitioner the sum of $850 per month as Family Support. At that time, Family Support will terminate and the parties may return to Court for a determination of child support for the remaining minor child, [G.M.P.]. Said Family Support shall be modifiable only upon a change in placement of the three younger children.

It will be necessary to consider this paragraph of the agreement closely.

[27] The attempt is, of course, subject to audit.

We note several issues. First, the written agreement in question never uses the term "maintenance" or "alimony." Second, the paragraph above begins by addressing "family support," and then by its own terms the monthly payments convert in 2012 from "family support" into "child support." Third, the dates the payments are reduced do not appear to coincide with anything in particular that we have been made aware of. Fourth, there is no reference to Mr. Palo's income, which has increased since 2001. For that matter, there is no reference to Ms. Mantsch's income either. Fifth, the payments do not appear to cease, or even to reduce, should Ms. Mantsch remarry. When considered as a whole, the document is ambiguous as to the income tax nature of the monthly payments.

When a contract is ambiguous, the rules of construction enter the picture. A cardinal rule of contract construction is to ascertain the intention of the contracting parties and to give effect to that intent if it can be done consistently with legal principles. *Jacksonville Terminal Co. v. Railway Express Agency*, 296 F.2d 256, 259 (5th Cir. 1962). When language in a contract is ambiguous, we may rely on extrinsic aids to determine the parties' intent. *County of Dane v. LIRC*, 2009 WI 9, ¶48, 315 Wis. 2d 293, 759 N.W.2d 571. In a nutshell, Ms. Mantsch argues that the evidence in the case shows that "family support" within the context of the agreement means "child support" under the IRC. On the other hand, Mr. Palo argues that the evidence in the case shows that "family support" here means what the IRC calls "alimony."

In order to clarify what is in the document, the parties point to the transcripts of the hearings to support their respective positions as to the income tax

treatment of the monthly payments. Mr. Palo points to a part of the transcripts[28] where the following exchange occurred:

> [Ms. Mantsch's Attorney] Q. You understand that family support is taxable to you and deductible to Mr. Palo?
>
> [Ms. Mantsch] A. Correct
>
> THE COURT: Let me ask you a question. Is [the] IRS going to stand for this with these limitations put on it?
>
> [Ms. Mantsch's Attorney]: Well, this is not Section 71 payments. I don't think there will be a problem.

Transcript of May 31 hearing, p. 13, lines 13-15.

In response, Ms. Mantsch directs us to the following passage, which appears to have taken place at an earlier point in the proceedings of May 31, 2001:

> [Mr. Palo's Attorney]: No your Honor, my client is adamant about supporting his family and not giving Brenda money to support the children, so Greg will pay Family Support to continue to provide for his family.
>
> [Mr. Palo]: Because child support represents that we had one child- we have more than one child- it is a family that's being supported by my money.
>
> [Mr. Palo's Attorney]: ... yes your Honor Greg wants to pay family support.
>
> [The Court]: Is that alright with your client...?
>
> [Mrs. Palo]: What does that mean? What is the difference between child support and family support?

[28] We will refer to the transcript Mr. Palo submitted with his petition as the "first transcript." The transcript Ms. Mantsch later submitted will be referred to as the "second transcript." Although it appears the second transcript records a hearing which took place earlier in the day on May 31, 2001, the second transcript is paginated 80 through 84 and the first transcript is paginated 1 through 69. We are unable to explain the discrepancy.

> [Ms. Mantsch's Attorney]: There's not any. Judge is there any ramification to Brenda if we call the payments family support rather than child support?
>
> [The Court]: I don't see any problems with calling it family support especially since it is part and parcel of the entire Marital Settlement Agreement which includes division of estate and family visitation.

Second Transcript of the May 31 hearing, p. 82-3.[29]

In addition to the passages we are directed to by the respective Petitioners, we note the following exchange, which appears to have taken place in the afternoon session:

> [The Court] Q. You understand that if this Court had ordered child support and maintenance you may not be paying as much as you are paying now?
>
> [Mr. Palo] A. Yes.

First Transcript of May 31 hearing, p. 34, lines 16-18.

Additionally, the following excerpt is in the transcript of the morning session:

> [The Court]: I agree ... but I am trying to figure out why Respondent is retaining the preponderance of the marital estate, paying reduced child support even though two of the

[29] The briefs discuss the relative weight to be given to the two transcripts, in part because the second transcript lacks a certification by the reporter. We have decided, however, that the second transcript should be considered here as relevant to the parties' intent for two reasons. First, the Commission's rule TA 1.53 excludes only evidence that is irrelevant, immaterial, or unduly repetitious. The second transcript is none of those things. Second, Wisconsin's rule of completeness generally requires the introduction of the remainder of related writings, including otherwise inadmissible evidence, which ought in fairness to be considered. *See* Wis. Stat. § 901.07; *see State v. Sharp*, 180 Wis. 2d 640, 511 N.W.2d 316 (Ct. App. 1993). As to authentication, it appears that in 2005, Ms. Mantsch's attorney filed the second transcript with the circuit court.

> children will be with your client full time and the other three with her half time, and why when he makes significantly more income.
>
> [Ms. Mantsch's Attorney]: Part of the Marital Settlement Agreement judge will include that child support not end with each child reaching majority but –ah will extend –will continue until after [E.P.] graduates a couple of months to give her time to get on her own feet and then won't be reduced until the oldest boy is out of school for a few months to give time – well at which time the parties will need to return to court Judge to determine child support for the remaining minor child [G. B.].

Second Transcript of the May 31 hearing, p. 80.

Finally, the following exchange is also in the transcript from the morning:

> [The Court]: Mr. Palo you understand that the funds are going to your wife for the children's support?
>
> Mr. Palo: No the funds are being taken from my pay and turned over to the State.
>
> [The Court]: yes, that is right but you understand that eventually that money is for Mrs. Palo to support the children.
>
> [Mr. Palo's Attorney]: my client understands your honor.
>
> [The Court]: Mr. Palo?
>
> Mr. Palo: Yeah yeah.
>
> [The Court]: Ok now what about the current maintenance.
>
> [Mr. Palo's Attorney]: There is no continued maintenance provision your Honor.
>
> [The Court]: Mrs. Palo have you agreed to the provision of discontinuing any maintenance payments to you?
>
> Mrs. Palo: Yes.

Second Transcript of the May 31 hearing, p. 84.

There are several problems with the use of the transcripts for rebuttal. First, based on the selected excerpts above, there does not appear to have been a consensus. Second, the transcripts are partial. At best, the parties have provided the Commission with about one-third of the total pages.[30] Third, the attorneys who were at the hearing later wrote in correspondence between themselves and the court that there were mistakes in the afternoon transcript. Specifically, the Guardian *Ad Litem* reviewed the afternoon transcript and then wrote to the court in June, 2001 to object to the afternoon transcripts' inclusion with the judgment. Ultimately, the afternoon transcript was not incorporated into the Judgment of Divorce.[31]

To the degree that the afternoon transcript is helpful here in rebutting the presumption, we believe it reflects that the court's primary concern was not tax considerations. Near the end of the hearing, the court said the following:

> This is not about you anymore. You are divorced. We have taken care of your first promise, the breaking of that first promise [to each other]. I am telling you right now. I demand as a judge in this community and having jurisdiction of this case that you keep that second promise to your children. That you make a household for them, a home. It is going to be two separate areas. But you two get

[30] There is a 2005 letter in the record from Ms. Mantsch's trial attorney indicating that he was sending her a few pages of the transcript, which he describes as being "hundreds of pages in length." The Commission would like to make several points here. First, an appellant has the burden to ensure that the record is sufficient to address the issues raised in an appeal. *See State Bank of Hartland v. Arndt*, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986). Second, when an appellate record is incomplete in connection with an issue raised by the appellant, we can assume that the missing material supports the court's ruling. *See Duhame v. Duhame*, 154 Wis. 2d 258, 269, 453 N.W.2d 149, 153 (Ct. App. 1989).

[31] One of the letters proposes a teleconference between the attorneys and the judge to discuss the alleged errors in the transcript. The record is unclear if that teleconference ever occurred.

> along now, that you put behind you the emotional problems you have had, and you be fair to one another, and you treat each other with respect so these children can see that.
>
> Isn't that fair to them? ... Shouldn't they have the promise that there is going to be a family, a functional family?... Again, you couldn't keep that first promise, but you made this promise to these children, and I will hold you to that. But I want you two to stop being upset with each other, and start thinking about how I can put a family together where they will see me treating the other person with respect, the other person that they love.
>
> ...
>
> Please, this is not just words. Please do this for the sake of these children. I see far too many children coming back here again and again where their parents keep fighting and the children are devastated because of that. You are divorced. You are no longer a wife, ma'am. And you are no longer a husband, but you are still parents. Please do that. I wish you both luck. All right.

Transcript of May 31, 2001 Hearing, p. 66-69.

The court, however, expressed little or no concern over "alimony" and "maintenance" and from our reading of the transcripts we have, tax considerations to Mr. Palo were a minor concern, if a concern at all. Frankly, much of the discussion between the parties reproduced above is at least as ambiguous as the document, and the use of the term "family support" by the attorneys at the hearing appears inexact. Thus, neither the terms in the decree nor the transcripts support rebuttal of the presumption.

C. Applying Wisconsin Law

As discussed above, it is clear that the Judgment of Divorce does not, in fact, explicitly set the income tax treatment of the payments. Further, the conversations

between the three attorneys in court that were reproduced above are not helpful here. As the tax treatment of the payments was not made clear at the time of the divorce in 2001, each petitioner here attempts to characterize the family support payments in this case as either "alimony" or "child support." However, neither petitioner provides compelling evidence that the agreed upon "family support," which is generally intended to cover both maintenance and child support, encompassed only one of these components. While federal law controls how income from property interests is taxed, State law controls how property interests are created. *United States v. Mitchell,* 403 U .S. 190 (1971). In making such a determination, we look to the substance of the rights created, rather than the names given to the interests and rights by the parties. *Morgan v. Commissioner,* 309 U.S. 78, 80-81, (1940). Thus, we examine Wisconsin law to confirm the determination that these payments are "child support." Here, even when we look to Wisconsin law, the monthly payments are entirely "child support" for two reasons. First, the Wisconsin statutes state that child support shall be set in certain amounts. Second, the Wisconsin courts have indicated that state policy is to set child support.

First, by statute some of this payment stream must be child support. Pursuant to Wis. Stat. § 767.511(1), when the court approves a stipulation for child support under Wis. Stat. § 767.34 or enters a judgment of divorce, "the court shall ... [o]rder either or both parents to pay an amount reasonable or necessary to fulfill a duty to support a child." In determining child support payments, the court may consider all relevant information, financial and otherwise, but "*shall* determine child support

payments by using the percentage standard established by the [DCF] under [Wis. Stat. §] 49.22(9)." [32] DCF Reg. § 150.03 Support Orders provides as follows:

> **(1)** DETERMINING CHILD SUPPORT USING THE PERCENTAGE STANDARD. The court shall determine a parent's monthly income available for child support by adding together the parent's annual gross income or, if applicable, the parent's annual income modified for business expenses; the parent's annual income imputed based on earning capacity; and the parent's annual income imputed from assets, and dividing that total by 12. This may be done by completing the worksheet in Appendix B, although use of the worksheet for this purpose is not required. Except as provided in s. DCF 150.04 (4) and (5), the percentage of the parent's monthly income available for child support or adjusted monthly income available for child support that constitutes the child support obligation shall be:
>
> (a) 17% for one child;
>
> (b) 25% for 2 children;
>
> (c) 29% for 3 children;
>
> (d) 31% for 4 children; and
>
> (e) 34% for 5 or more children.
>
> .....
>
> **(6)** DETERMINE CHILD SUPPORT BEFORE MAINTENANCE. If a payer will have obligations for both child support and maintenance to the same payee, the court shall determine the payer's child support obligation under this chapter

[32] Wis. Stat. Ch. 767 governing actions affecting the family was substantially renumbered by 2005 Wis. Act 443, which was generally effective on January 1, 2007. As the provisions relevant to this appeal do not appear to have undergone substantive changes, we will refer to the more current version of the statutes. At the time of the divorce, Wis. Stat. § 767.511, governing child support, was numbered Wis. Stat. § 767.25 (2001-02); Wis. Stat. § 767.34, governing court approved stipulations, was numbered Wis. Stat. § 767.10 (2001-02); and Wis. Stat. § 767.531, governing family support, was numbered Wis. Stat. § 767.261 (2001-02).

> before determining the payer's maintenance obligation under s. 767.56, Stats.
>
> **(7)** CALCULATION OF FAMILY SUPPORT. When the standard under sub. (1) is used to calculate support under s. 767.531, Stats., the amount determined shall be increased by the amount necessary to provide a net family support payment, after state and federal income taxes are paid, of at least the amount of a child support payment under the standard.[33]

Wis. Stats. §§ 767.511(1g) and (1j). If a party requests deviation from the guidelines, the trial court may modify the amount of child support payments if the court finds by the greater weight of credible evidence that the use of the percentage standard is unfair to either the child or to any of the parties. Wis. Stat. § 767.511(1m). Consistent with this requirement, Wis. Stat. § 767.34, governing stipulations in a divorce action, provides:

> (2) LIMITATIONS ON COURT APPROVAL. (a) A court may not approve a stipulation for child support or family support unless the stipulation provides for payment of child support determined in a manner consistent with [Wis. Stat. §§ 767.511 or 767.89 [governing paternity].

Applying this standard here, the income tax returns filed by Mr. Palo reflect that in 2001 his gross monthly income was approximately $4,600 per month. Thirty-four percent of that number would be approximately $1,500 per month. The payments of $1,250 per month here, as pointed out by Ms. Mantsch, fall below that

[33] In Wisconsin, an administrative rule issued pursuant to rule-making authority has the effect of law under Wis. Stat. § 227.01(13). *Orion Flight Services, Inc. v. Basler Flight Service*, 2006 WI 51, 290 Wis. 2d 421, 714 N.W.2d 130.

amount and, therefore, must be considered in substance and reality[34] for tax purposes to be entirely "child support."[35]

In Wisconsin, a "family support" award must comply with administrative regulations which require that a "family support" award meet or exceed the amount of child support that would have been available under the percentage guidelines. The Wisconsin Judicial Benchbook makes the following statement:

> After tax family support amount must be at least amount of child support payment under percentage standard.

Wisconsin Judicial Benchbook: Family Law FA 11-5 (2010). A family support order that does not comply is subject to being set aside on appeal. *Vlies v. Brookman*, 2005 WI App 158, 285 Wis. 2d 411, 701 N.W.2d 642. In that case, the Wisconsin Court of Appeals held that a circuit court must separately calculate child support and maintenance as a condition precedent to calculating "family support." The trial court's failure in *Vlies* to explain how it arrived at the figure of $7,500 per month in family support was held to be erroneous, and the appellate court remanded the case back to the trial court to set forth its analysis. As the trial court was required to determine child support before

[34] On numerous occasions, the Tax Appeals Commission has applied a substance and realities test. *See, e.g., Manpower v. Dep't of Revenue*, Wis. Tax Rptr. (CCH)¶401-223 (WTAC 2009).

[35] The Wisconsin Judicial Benchbook makes the following observation which we reproduce verbatim:

> Caveat: IRS does not appear to favor full deductibility of family support. For example, former position of Milwaukee District IRS Office was
>
> a. amount of family support equaling percentage standard under Wis. Adm. Code DCF 150 considered child support.
>
> b. amount beyond standard considered maintenance.

Wisconsin Judicial Benchbook: *Family Law* FA 7-8 Tax Checklist (2010).

calculating maintenance, the trial court's maintenance considerations in the absence of a full child support computation were premature. Thus, like *Vlies*, the paragraph in the Judgment of Divorce Mr. Palo relies on does not comply with the Wisconsin statutes because it does not allocate a proper amount to child support.

The parties refer us to three federal cases where taxpayers litigated the allocation of payments between "alimony" and "child support." In *Freyere v. U.S.A.*, 135 Fed. Appx. 863 (6th Circ. 2005), a preliminary agreement designated that Mr. Freyere pay $1460 a month in "child support." By the time the final agreement was drafted, the language (perhaps inadvertently) became "as and for support." After prevailing in the trial court, the government lost in the Sixth Circuit, which noted that while it seemed inequitable to give the taxpayer an alimony deduction based on an omission in the document, the tax code requires that the divorce instrument "specifically designate" the payment as "child support." In the second case, *Shepherd v. Comm'r*, T.C. Memo 2000-174, Ms. Shepherd contended that payments labeled in the agreement as "alimony" were "child support" because the payments would terminate within six months of her daughter's 18th birthday. The government argued, however, that the presumption Ms. Shepherd relied on was overcome based on the fact that the parties negotiated a 10-year term and the agreement never mentioned the daughter's 18th birthday. The court noted that there had been a delay in the acceptance of the agreement, and that delay caused the expiration of the 10- year period to fall within six months of the daughter's 18th birthday. Third, in *Hill v. Comm'r*, T.C. Memo 1996-179, two divorced people renegotiated their divorce agreement so that one of the parties could remarry. After

extensive negotiations directly between the parties in writing, they came to an agreement lasting three years. The last payment fell within six months of their daughter turning 18. After hearing the testimony, the Tax Court came to the conclusion that the payments were "alimony," and the end date of the payments falling within six months of the daughter's birthday was coincidental.

These cases are distinguishable in the following ways. First, none of them is an unallocated "family support" case. Second, these cases do not involve the application of the statutory presumptions that Wisconsin has. Third, the factual record in this case is considerably less clear than the records in *Hill* and in *Shepherd*.

Apart from our statutory analysis, we also note what the Wisconsin courts have stated is the public policy in Wisconsin regarding the imposition of child support. For example, the Wisconsin Court of Appeals recently stated the following in the context of family support orders which purport to be non-modifiable:

> It is evident from the statutory framework and the purpose of family support that at least a portion of the family support ordered in this case—as in any case involving minor children—was child support.

Huhn, 321 Wis. 2d at 178. In *Huhn,* the court was reviewing a provision in a decree which purported to make an award of family support non-modifiable. The former husband filed a motion to modify family support awarded to his former wife, claiming a substantial change in circumstances. The trial court denied the motion on the grounds of estoppel, finding that the parties had stipulated that the family support be nonmodifiable. The appellate court, however, after reviewing the same statutes cited

above, held that a marital settlement provision that precluded the parties from seeking to modify child support violates public policy, and estoppel will not be applied.

Numerous other Wisconsin cases confirm the existence of this policy. *See, Frisch v. Henrichs*, 2007 WI 102, 304 Wis. 2d 1, 736 N.W.2d 85 (a post-divorce stipulation setting a ceiling on child support for the next four years was unenforceable because the stipulation was not in the best interests of the children, and, therefore, the stipulation was contrary to Wisconsin public policy); *Jalovec v. Jalovec*, 2007 WI App 206, 305 Wis. 2d, 739 N.W.2d 834 (the child's best interests are paramount, and divorcing parties must look to means other than child support to resolve the financial issues between them upon dissolution of their marriage); *Krieman v. Goldberg*, 214 Wis. 2d 163, 571 N.W. 2d 425 (Ct. App. 1997) (the policy recognizes the importance of the best interests of the child when support issues are considered and allows a court to modify the support award when unforeseen circumstances occur); *Ondrasek v. Tenneson*, 158 Wis.2d 690, 462 N.W.2d 915 (Ct. App. 1990) (the child's best interests transcend an agreement or stipulation of the parties because of the public interest in the welfare of children). While the context here is not identical, the underlying policy of Wisconsin courts imposing appropriate child support remains the same. Thus, based on our review of the state law and the record before us, we must reject Mr. Palo's argument that his unallocated payments were entirely "alimony" and that no "child support" was set.

CONCLUSION

The payments Mr. Palo made in this case during the years at issue are properly treated as child support under IRC § 71 and related Wisconsin tax statutes. In

brief, the dates the payments are reduced in 2004 and 2012 fall within the presumptive period as a child-related contingency. In rebuttal of the presumption, Mr. Palo offers no support for his argument that the dates were determined independently of any child-related contingency. The written agreement is ambiguous and the transcripts do not support his contention that the payments are entirely "alimony." Wisconsin statutes and case law require a child support component in a family support payment, and the amounts of the payments combined with the number of children involved indicate that the payments are properly treated as "child support" for purposes of Wisconsin income tax.

ORDERS

1. Ms. Mantsch's Motion for Summary Judgment in Docket No. 09-I-140 as to years 2004 through 2007 is granted, and the Department's action in this matter is reversed.

2. Mr. Palo's Motion for Partial Summary Judgment in Docket No.'s 09-I-152-SC and 09-I-153-SC as to years 2003 through 2006 is denied, and the Department's actions related to the characterization of the family support payments at issue as child support payments in these matters are affirmed.

3. The Commission will contact the parties in Docket No.'s 09-I-152-SC and 09-I-153-SC for further proceedings in those matters.

Dated at Madison, Wisconsin, this 14th day of January, 2011.

WISCONSIN TAX APPEALS COMMISSION

David C. Swanson, Chairperson

Roger W. Le Grand, Commissioner

Thomas J. McAdams, Commissioner