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Timothy M. Todd

Liberty University School of Law

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Phantom Income and Domestic Support Obligations

TIMOTHY M. TODD†

ABSTRACT

The tax code is designed to raise government revenue. Domestic support obligations (DSOs)—namely, child support and spousal support—are designed to ameliorate the financial burdens that arise upon divorce. To determine the amount of domestic support obligations, statutes often refer to commonly used taxation concepts, such as “income.”

Courts determining domestic support obligations have been confronted with the question of how to treat “phantom income”—that is, amounts that are includible as gross income under the federal tax code but that have not resulted in any actual current cash receipt. Individuals obligated to make domestic support payments have argued that phantom income should not be included when calculating or modifying such obligations because the individual’s ability to pay has not materially changed. This Article analyzes the intersection of federal tax law and domestic support obligations concerning phantom income.

This Article considers several solutions—judicial and legislative—to address the phantom income issue in the domestic support context. Notably, this Article evaluates the current judicial decisional framework to examine the potential tax and DSO asymmetries. Finally, this Article advances a legislative proposal for a charging-order type remedy specific to domestic support obligations—one that would resolve the phantom income issue in

† Associate Dean for Academic Affairs and Professor of Law, Liberty University School of Law. I wish to thank Professor F. Philip Manns for his thoughts on this Article and his continued mentorship; Ms. Whitney Rutherford for her research assistance; the participants of the 2017 Mid-Atlantic Junior Faculty Forum for their comments; and the editors and staff of the *Buffalo Law Review*.

many situations.

I. INTRODUCTION

The tax code is designed to raise government revenue. Domestic support obligations, or DSOs—namely child support and spousal support—are intended to ameliorate the financial burdens that arise upon divorce or separation. To determine the amount of domestic support obligations, statutes often refer to commonly used taxation concepts, such as “income.”

Courts determining the amount of domestic support obligations have been confronted with the question of how to treat “phantom income”—that is, amounts that are includible as income under the federal tax code but that have not resulted in any actual current cash receipt. Consequently, individuals obligated to make domestic support payments have argued that phantom income should not be included when calculating such obligations because the individual’s ability to pay has not materially changed. This Article analyzes the intersection of federal tax law and domestic support obligations concerning phantom income.

This Article proposes several solutions—judicial and legislative—to address the phantom income issue in the domestic support context. Notably, this Article evaluates the current judicial decisional framework to examine the potential tax and DSO asymmetries. This Article will also advance a legislative proposal for a charging-order type remedy specific to domestic support obligations—one that would resolve the phantom income issue in many situations.

II. BACKGROUND

A domestic support obligation¹ is an umbrella term

1. In the Bankruptcy Code, for example, a “domestic support obligation” is defined as follows:

a debt . . . that is—

generally used to refer to two types of support: (1) spousal support (or alimony) and (2) child support.

A. *Spousal Support and Alimony*

Spousal support or alimony is “an allowance for support and maintenance, having no other purpose and provided for no other object”;² it is “a substitute for marital support.”³ It is “designed to compensate the spouse who is economically disadvantaged through her or his role in the marriage and not to equalize income in every circumstance.”⁴ The historic

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- (A) owed to or recoverable by—
 - (i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or
 - (ii) a governmental unit;
 - (B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;
 - (C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—
 - (i) a separation agreement, divorce decree, or property settlement agreement;
 - (ii) an order of a court of record; or
 - (iii) a determination made in accordance with applicable nonbankruptcy law by a governmental unit;

11 U.S.C. § 101(14A) (2012).

2. *Romaine v. Chauncey*, 129 N.Y. 566, 569 (1892). As explained by the court in *Romaine*:

Like the *alimentum* of the civil law, from which the word was evidently derived, it respects a provision for food, clothing and a habitation, or the necessary support of the wife after the marriage bond has been severed; and since what is thus necessary has more or less of relation to the condition, habit of life, and social position of the individual, it is graded in the judgment of a court of equity somewhat by regard for these circumstances, but never loses its distinctive character.

Id. at 569–70.

3. *Warner v. Warner*, 17 N.W.2d 58, 63 (Minn. 1944).

4. MARIAN F. DOBBS, DETERMINING CHILD & SPOUSAL SUPPORT § 3:1, Westlaw (Database updated Aug. 2018).

rationale is that a homemaker's inward focus—i.e., on the home and the children—may leave him or her at a disadvantage in the modern workforce.⁵ Consequently, courts and legislatures have devised different types of spousal support to ameliorate this disadvantage. The common thread, though, is for spousal support to “provide a sum for such period of time as needed to maintain the spouse in the manner to which the spouse was accustomed during the marriage, balanced against the other spouse's ability to pay.”⁶

There are three general types of alimony:⁷ (1) temporary alimony,⁸ (2) permanent alimony, and (3) rehabilitative alimony.⁹ Temporary alimony “is designed to assist the claimant spouse in sustaining the same style or standard of living that he or she enjoyed while residing with the other spouse, pending the litigation of the divorce.”¹⁰ Permanent alimony is designed generally for “a spouse who is disadvantaged through marriage [to] be enabled to enjoy a standard of living commensurate with that during the marriage.”¹¹ Stated otherwise, the “central objective of alimony is, subject to the availability of resources, maintenance of the more dependent spouse in an economic style close to which the spouse had become accustomed during the marriage.”¹² Rehabilitative alimony “allows a

5. *Id.*

6. *Blank v. Blank*, 389 S.E.2d 723, 724 (Va. 1990).

7. This even varies by state. For example, Florida has six types of alimony. DOBBS, *supra* note 4, § 3:3 (describing Florida's temporary, bridge, lump sum, rehabilitative, durational, and permanent alimony regime).

8. This may also be referred to as alimony pendente lite or interim support, among other terms. 24A AM. JUR. 2D *Divorce and Separation* § 579, Westlaw (database updated Feb. 2019).

9. *Id.* § 570.

10. *Speight v. Speight*, 2003-1152 (La. App. 3 Cir. 2/4/04); 866 So. 2d 344, 346.

11. *In re Marriage of Schuster*, 586 N.E.2d 1345, 1354 (Ill. App. Ct. 1992).

12. *Rosenberg v. Rosenberg*, 595 N.E.2d 792, 793 (Mass. App. Ct. 1992); *see also Lentz v. Lentz*, 660 So. 2d 1012, 1013 (Ala. Civ. App. 1995) (“The purpose of

party needing assistance to become self-supporting without becoming destitute in the interim.”¹³ Indeed, its purpose is “to enable the disadvantaged spouse to acquire additional job skills, education, or training that will enable him or her to be more self-sufficient.”¹⁴ Thus, rehabilitative alimony is a temporary measure.

Spousal support is calculated differently from state to state, but there are some common themes. Most calculations include a variety of factors¹⁵—for example, the Uniform Marriage and Divorce Act provides for courts to consider the duration of the marriage; the age, emotional, and physical condition of the parties; and the ability of the payor-spouse to meet his or her own needs.¹⁶ Other common factors across the states include the duration of the marriage;¹⁷ the parties’ standard of living;¹⁸ the payee’s noneconomic contributions to the marriage;¹⁹ impairment of the payee’s earning capacity;²⁰ the value of contributions allowing the payor to increase earning capacity;²¹ the health of the parties; the age

periodic alimony is to preserve the status the parties enjoyed during the marriage.”).

13. *Hubbard v. Hubbard*, 656 So. 2d 124, 130 (Miss. 1995); *see also* DOBBS, *supra* note 4, § 3:1.

14. *Anderton v. Anderton*, 988 S.W.2d 675, 682 (Tenn. Ct. App. 1998); DOBBS, *supra* note 4, § 3:1.

15. *See, e.g.,* *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993); *Scherer v. Scherer*, 2015 S.D. 32, ¶ 10, 864 N.W.2d 490, 494; *Richardson v. Richardson*, 2008 UT 57, ¶ 6, 201 P.3d 942, 943; 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 667; DOBBS, *supra* note 4, § 3:3.

16. UNIF. MARRIAGE & DIVORCE ACT § 308 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1974).

17. *See, e.g.,* *Armstrong*, 618 So. 2d at 1280.

18. DOBBS, *supra* note 4, § 3:3.

19. *See, e.g.,* 27B C.J.S. *Divorce* § 628, Westlaw (database updated Mar. 2019).

20. *See* *Armstrong*, 618 So. 2d at 1280.

21. *See, e.g.,* DOBBS, *supra* note 4, § 3.35 (“Spouses who obtain additional education or training during the marriage clearly benefit by an increase in their lifetime earning potential.”).

of the parties;²² and the fault, if any, of the parties.²³

B. *Child Support*

Parents have an absolute duty to provide for their children.²⁴ This duty emanates from both the common law and state statutes.²⁵ The Elizabethan Poor Law of 1601 called for the imprisonment of fathers who failed to care for their children.²⁶ Indeed, “[p]arental support is a fundamental right of all minor children The right of support is inherent and cannot be waived, even by agreement.”²⁷ As deftly stated by the Kansas Child Support Guidelines:

The purpose of child support is to provide for the needs of the child. The needs of the child are not limited to direct needs for food, clothing, school, and entertainment. Child support is also to be used to provide for housing, utilities, transportation, and other indirect expenses related to the day-to-day care and well-being of the child.²⁸

Although child support is for the sole benefit of the child, it is paid to the custodial parent.²⁹ The recipient custodial parent, moreover, holds those funds as a fiduciary for the

22. *Armstrong*, 618 So. 2d at 1280; *see also* *Kosobud v. Kosobud*, 2012 ND 122, ¶ 17, 817 N.W.2d 384, 393 (“A spousal support obligor’s nearing the age of retirement does not immunize the obligor from paying spousal support.”).

23. *Armstrong*, 618 So. 2d at 1280.

24. *E.g.*, 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 867.

25. *Id.*

26. CHILD SUPPORT GUIDELINES (STATUTES), 50 STATE STATUTORY SURVEYS: FAMILY LAW: CHILD CUSTODY AND SUPPORT (2017), Westlaw 0080 Surveys 4a [hereinafter CHILD SUPPORT GUIDELINES SURVEY].

27. *Abel v. Abel*, 824 So. 2d 767, 768 (Ala. Civ. App. 2001) (quoting *Ex parte* Univ. of South Alabama, 541 So. 2d 535, 537 (Ala. 1989)).

28. KAN. SUPREME COURT, CHILD SUPPORT GUIDELINES 2 (2012).

29. *See, e.g.*, *State ex rel. Shellhouse v. Bentley*, 666 So. 2d 517, 518 (Ala. Civ. App. 1995) (“Although child support is paid to the custodial parent, it is for the sole benefit of the minor children.”); *Howard v. Howard*, 2006-CA-00350-COA (¶ 24) (Miss. 2007), 968 So. 2d 961, 972 (“Though child support payments are made to the custodial parent, the payments are for the benefit of the child.”).

child³⁰—a duty that has been compared to that of trustee.³¹ The determination of child support rests with the discretion of the court.³² The court must “determine a support amount that best balances the child’s needs and the parent’s ability to pay[.]”³³ Nevertheless, “[t]he court’s paramount concern when awarding child support is the best interest of the [child].”³⁴

Child support determinations generally start with prescribed guidelines.³⁵ Normally, these guidelines set child support as a percentage of an income figure—for example, gross monthly income.³⁶ Thus, determining items and amounts of income are paramount.³⁷ Courts can depart from the guidelines for a variety of factors,³⁸ such as special needs, the available support from other family members, and other

30. See, e.g., DEL. CODE ANN. tit. 13, § 518 (2019); *Holmes v. Wooley*, 792 A.2d 1018, 1021 (Del. Super. Ct. 2001); 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 867.

31. *Holmes*, 792 A.2d at 1021 (“It is an interest akin to a trustee’s interest in the corpus of a trust.”); *Shipman v. N.Y.C. Support Collection Unit*, 703 N.Y.S.2d 389, 394 (2000) (“[T]he child’s custodial parent[] stands as trustee of the funds, administering money as she deems appropriate for the needs and welfare of the child.”); *Davidson v. Naranjo*, 904 P.2d 354, 356 (Wyo. 1995) (quoting *Cranston v. Cranston*, 879 P.2d 345, 349 (Wyo. 1994) (“A support payment is the children’s money administered in trust by [the custodial parent] for their benefit.”)).

32. 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, §§ 868, 884.

33. *Ga. Dep’t of Human Resources v. Prater*, 630 S.E.2d 145, 147 (Ga. Ct. App. 2006); see also 24A AM. JUR. 2D *DIVORCE AND SEPARATION*, *supra* note 8, § 884.

34. *Stiles v. Stiles*, 632 S.E.2d 607, 611 (Va. Ct. App. 2006); see also *L.C.S. v. S.A.S.*, 453 S.E.2d 580, 584 (Va. Ct. App. 1995) (“In setting an award of child support, the ‘primary issue before a trial judge is the welfare and best interests of the child, not the convenience or personal preference of a parent.’” (quoting *Brody v. Brody*, 432 S.E.2d 20, 22 (Va. Ct. App. 1993))).

35. E.g., FLA. STAT. § 61.30 (2018); N.C. GEN. STAT. § 50-13.4 (2018); VA. CODE ANN. § 20-108.2 (2018); see also *CHILD SUPPORT GUIDELINES SURVEY*, *supra* note 26.

36. E.g., VA. CODE ANN. § 20-108.2.

37. See, e.g., LAURA W. MORGAN, *CHILD SUPPORT GUIDELINES INTERPRETATION & APPLICATION* § 4.02 (2018), Westlaw CSGIA.

38. See generally 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 888.

considerations.³⁹ The Uniform Marriage and Divorce Act, for example, requires courts to consider the financial resources of the custodial parent, the standard of living the child would have had but for the divorce, and the child's educational needs, among other things.⁴⁰ Although courts are not bound by such guidelines, they often serve as rebuttable presumptions to the correct amount.⁴¹

C. *Modifying Domestic Support Obligations*

Spousal support is typically determined at the time the court enters the dissolution or divorce decree.⁴² If a spouse is not entitled to support at that time, normally there is no second bite at the eligibility apple.⁴³ However, if a spouse is awarded support, it is not uncommon for the support award to be modified later in light of a change in circumstances.⁴⁴ The ability to modify support is normally based on an express statutory grant.⁴⁵

Typically, spousal support is subject to modification on "showing of materially changed circumstances."⁴⁶ In the absence of changed circumstances, "a motion for modification

39. See, e.g., VA. CODE ANN. § 20-108.1.

40. UNIF. MARRIAGE & DIVORCE ACT § 309 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1974).

41. E.g., *Brooks v. Rogers*, 445 S.E.2d 725, 728 (Va. Ct. App. 1994); see also 24A AM. JUR. 2D *Divorce and Separation*, supra note 8, § 887.

42. See, e.g., *DOBBS*, supra note 4, § 3:1.

43. See, e.g., *id.* ("There is no statutory authority for the trial court to reevaluate, postpone, or defer its determination of whether a spouse meets the statutory criteria based on a decision or act of an outside entity that occurs after the final dissolution decree has been entered.")

44. See, e.g., *id.* § 6:1.

45. See, e.g., ARIZ. REV. STAT. ANN. § 25-327 (2018); MO. REV. STAT. § 452.370 (2019); VA. CODE ANN. § 20-109 (2018).

46. *Ramsdell v. Ramsdell*, 454 N.W.2d 522, 524 (N.D. 1990); see also *Blaufuss v. Ball*, 305 P.3d 281, 285 (Alaska 2013) ("Generally, modification of a support order is warranted only after a party shows a material and substantial change in circumstances."); *Street v. Street*, 480 S.E.2d 112, 116 (Va. Ct. App. 1997); *DOBBS*, supra note 4, § 6:1.

is nothing more than an impermissible collateral attack”⁴⁷ The changed circumstances, moreover, must be more than temporary.⁴⁸ Because support is based on the parties’ needs and ability to pay, the modification analysis focuses on those elements.⁴⁹ Although ability to pay is a factor, it generally cannot be the sole basis for an increase.⁵⁰

The standards used to determine any modification are generally the same standards used to set the original award.⁵¹ Other factors include, for example, a serious health or physical impairment (and the attending medical expenses).⁵² If, on the other hand, the supported spouse’s circumstances change—for example, if he or she obtains new employment after divorce—that may be a basis for a reduction in support.⁵³ Often, remarriage is an agreed-upon ground to terminate or reduce support payments.⁵⁴ Spousal support modifications rest within the trial court’s

47. *In re Marriage of Smith*, 225 Cal. App. 3d 469, 480 (1990).

48. *See generally* 32 AM. JUR. 2D 491 *Proof of Facts* § 6, Westlaw (database updated Feb. 2019); M. L. Cross, *Change in Financial Condition or Needs of Husband or Wife as Grounds for Modification of Decree for Alimony or Maintenance*, 18 A.L.R.2d 10 § 4.

49. 32 AM. JUR. 2D 491 *Proof of Facts* § 6, Westlaw (database updated Feb. 2019).

50. *See, e.g., Sheridan v. Sheridan*, 267 A.2d 343, 346–47 (D.C. 1970) (“The criteria by which support payments can be decreased are not applicable in a motion to increase. A motion to increase must be founded on the increased needs of the children. Indeed, the father’s ability to pay is relevant in granting or denying the increase, but it is not the basis on which an increase is initiated or founded.”).

51. 32 AM. JUR. 2D 491 *Proof of Facts*, *supra* note 49, § 6.

52. 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 701. *See, e.g.,* 32 AM. JUR. 2D 491 *Proof of Facts*, *supra* note 49, § 9.

53. 32 AM. JUR. 2D 491 *Proof of Facts*, *supra* note 49, § 9; 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 701.

54. 32 AM. JUR. 2D 491 *Proof of Facts*, *supra* note 49, § 10 (“It is quite common to provide, in an agreement between the parties, the decree, or both, that remarriage of the supported spouse will terminate support provided in regular periodic payments.”); 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 701 (“The remarriage of a dependent spouse is a consideration for modifying a support obligation”).

discretion.⁵⁵ It may be possible, in limited jurisdictions, for the parties to contractually limit the ability to modify support payments.⁵⁶

Modifying child support is similar to modifying spousal support;⁵⁷ it is based generally on a “material change in circumstances occur[ing] after the decree.”⁵⁸ Moreover, “[t]he change must be one that cannot have been reasonably anticipated at the time of the original decree and one that reasonably affects the parties’ ability to abide by the original decree.”⁵⁹ As with spousal support, “[t]he court may consider the parties’ relative financial condition and earning capacities in determining whether a material change in circumstances has occurred.”⁶⁰

D. Federal Tax Background

The federal tax code levies an individual income tax on individual taxable income.⁶¹ Taxable income is defined as

55. *Wall v. Wall*, 611 So. 2d 1107, 1108 (Ala. Civ. App. 1992) (“[W]e note that alimony and child support modifications are matters that rest within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.”); *Keller v. O’Brien*, 652 N.E.2d 589, 594 (Mass. 1995) (“We generally defer to the probate judge’s sound discretion in determining whether modification of an alimony judgment is appropriate.”). *See generally* 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 693.

56. *See, e.g., In re Marriage of Aronow*, 480 N.W.2d 87, 89 (Iowa Ct. App. 1991) (“Parties can contract and dissolution courts can provide alimony is not modifiable, does not terminate on remarriage, or is payable in a lesser sum on remarriage.”); 32 AM. JUR. 2D 491 *Proof of Facts*, *supra* note 49, § 2. The Uniform Marriage and Divorce Act, moreover, provides that “[e]xcept for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides.” UNIF. MARRIAGE & DIVORCE ACT § 306(f) (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1974).

57. *See, e.g.,* 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 944.

58. *Howard v. Howard*, 2006-CA-00350-COA (¶ 24) (Miss. 2007), 968 So. 2d 961, 972.

59. *Id.* (citing *Poole v. Poole*, 96-CA-01124-SCT (¶¶ 19, 21) (Miss. 1997), 701 So. 2d 813, 818).

60. *Howard*, 968 So. 2d at 972.

61. I.R.C. § 1(a)–(e) (2012).

gross income less allowed deductions.⁶² The Code has many provisions that subsidize socially beneficial behavior or promote desirable social policy, such as home ownership⁶³ or higher education.⁶⁴

Undoubtedly, this is true in the family context. Historically, the Code has provided incentives for marriage,⁶⁵ child-rearing,⁶⁶ and dependent care,⁶⁷ among others. The Code also recognizes that not all marriages will last until death, and consequently, it provides special rules for property distributions upon divorce,⁶⁸ and—more relevant to this Article—provides for the tax treatment of alimony and support payments.⁶⁹ This section will explore the taxation of alimony both before and after the Tax Cuts and Jobs Act (TCJA),⁷⁰ which dramatically changed the taxation of alimony.

Before the TCJA, in a nutshell, the Code allowed the payor a deduction for alimony payments⁷¹ and required the payee to include the same.⁷² Under the Code, alimony requires (1) a payment in cash, (2) that is received by (or on behalf of) a spouse (or former spouse), (3) under a divorce or separation instrument, (4) that is not disclaimed as alimony,

62. *Id.* § 63(a).

63. *See, e.g., id.* § 121 (excluding from gross income the gain from certain home sales); *id.* § 163(h) (allowing a deduction for qualified residence interest).

64. *See, e.g., id.* §§ 25A, 222, 529. *See generally* F. Philip Manns, Jr. & Timothy M. Todd, *Higher Education Savings and Planning: Tax and Nontax Considerations*, 5 TEX. A&M L. REV. 343 (2018).

65. *See, e.g., I.R.C.* § 1 (combined tax table for married filing jointly).

66. *See, e.g., id.* § 152 (dependency exemption).

67. *See, e.g., id.* § 21.

68. *See, e.g., id.* § 1041.

69. *See, e.g., id.* § 71, *repealed by* Tax Cuts and Jobs Act, Pub.L. 115-97, § 11051(b)(1)(B), 131 Stat. 2054, 2089 (2017); I.R.C. § 215, *repealed by* Tax Cuts and Jobs Act, Pub.L. 115-97, § 11051(a) 131 Stat. 2054, 2089 (2017).

70. Tax Cuts and Job Act, Pub. L. 115-97 § 11001, 131 Stat. 2054, 2055 (2018).

71. I.R.C. § 215.

72. *Id.* § 71(a).

(5) and that there is no liability to make a payment after the death of the payee spouse.⁷³ If the individuals are legally separated, moreover, they cannot be members of the same household for a payment to be considered alimony.⁷⁴

On the other hand, no deduction is allowed and no inclusion is required for child-support payments.⁷⁵ For child-support payments, the law presumes a parental obligation to support a child to the age of majority notwithstanding divorce. Consequently, in the pre-TCJA divorce context, much planning went into the proper structuring and negotiation of alimony and support payments—just from a federal taxation perspective, not to mention the actual economic consequences of such payments. However, under the TCJA, alimony is no longer deductible by the payor.

Other tax concepts are relevant, too, because many state domestic-support statutes refer to familiar tax concepts, such as “income.” In the tax context, gross income, as famously elucidated by the Supreme Court in *Commissioner v. Glenshaw Glass*,⁷⁶ means “undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”⁷⁷ Consequently, gross income can include non-cash transactions or items that may not strike the ordinary person as taxable, such as bargain sales,⁷⁸ barter transactions,⁷⁹ or prizes.⁸⁰

E. *Phantom Income*

The term *phantom income* is used colloquially when a

73. *Id.* § 71(b)(1)(A)–(D).

74. *Id.* § 71(b)(1)(C).

75. *See id.* § 71(c).

76. 348 U.S. 426 (1955).

77. *Id.* at 431.

78. *E.g.*, Treas. Reg. § 1.61-2(d)(2) (2018).

79. *E.g.*, Rev. Rul. 79-24, 1979-1 C.B. 60.

80. I.R.C. § 74.

taxpayer receives taxable income but does not presently receive cash or other tangible economic benefits.⁸¹ Simply put, phantom income is having to pay taxes on something without receiving, at that time, any commensurate asset with which to pay those taxes. In an individual and family context, phantom income can arise from a variety of sources, such as business pass-through income, discharge of indebtedness, and original issue discount.

1. Business Pass-Through Income

Business pass-through income is the paradigmatic type of phantom income. Generally, partnerships and S corporations do not pay income taxes at the entity level.⁸² Rather, the net income of the entity is allocated to the entity owners,⁸³ who then report that income on their individual tax returns.⁸⁴ The entity reports the income allocation to the owners (and sends a copy to the IRS) via Schedule K-1.⁸⁵

Although an entity may have positive net income (from a tax perspective) that it reports to the owners, that does not necessarily mean that the owners have received that same amount of cash during the year. In other words, the concepts of accounting (taxable) income and cash flow are not synonymous. For example, an S corporation that has generated positive net taxable income—which the owners

81. See, e.g., Ronald J. Gilson & David M. Schizer, *Understanding Venture Capital Structure: A Tax Explanation for Convertible Preferred Stock*, 116 HARV. L. REV. 874, 902 (2003) (noting that phantom income is “income that is taxable before any cash is received”).

82. I.R.C. § 701 (for partnerships); *id.* § 1366 (2012 & Supp. 2018) (for S corporations)—although some recent developments in partnership taxation can make it such that the partnership, as an entity, has an affirmative payment obligation. See, e.g., RIBSTEIN & KEATINGE ON LIMITED LIABILITY COMPANIES § 17:19, Westlaw (database updated Dec. 2018).

83. *Id.* § 702 (2012); *id.* § 1366.

84. *Id.* § 61.

85. INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, U.S. INCOME TAX RETURN FOR AN S CORPORATION FORM 1120S (2018), <https://www.irs.gov/pub/irs-pdf/f1120s.pdf>; INTERNAL REVENUE SERV., DEP’T OF THE TREASURY, SCHEDULE K-1 (2018), <https://www.irs.gov/pub/irs-pdf/f1065sk1.pdf>.

must report on their individual returns—may decide to not pay any dividends so that it can reinvest the cash in the business and expand it. In this case, the owners will have to report that taxable income on their individual tax returns, yet the business has distributed no cash to them with which to pay that resulting tax liability. This is phantom income. Indeed, it is entirely possible that the owner may *never* see any cash from the enterprise, despite annual individual income-tax obligations arising from the entity. It may be the case, too, for the owner to receive some cash from the entity, but not enough to satisfy the tax obligation.⁸⁶

2. Cancellation of Debt Income

In the individual and family context, another common tax issue related to phantom income is discharge of indebtedness, colloquially known as cancellation of debt (COD) income. COD income arises when an outstanding debt is satisfied (or forgiven) at less than face value. This principle is made clear by the Supreme Court's decision in *United States v. Kirby Lumber Company*.⁸⁷

In that case, Kirby Lumber issued bonds for which it received the par value in exchange; later that same year, it was able to buy back the bonds at less than par, saving more than \$100,000.⁸⁸ Holding that the savings constituted gross income, the Supreme Court explained: "Here there was no shrinkage of assets and the taxpayer made a clear gain. As a result of its dealings it made available \$137,521.30 [in] assets previously offset by the obligation of bonds now extinct."⁸⁹

One rationale advanced in support of taxable COD

86. Planning, therefore, is paramount with pass-through entities to ensure that the owners protect themselves against this phenomenon. This is normally achieved via required "tax distributions" that are drafted as part of a shareholders' agreement or operating agreement.

87. 284 U.S. 1 (1931).

88. *Id.* at 2.

89. *Id.* at 3.

income is the “freeing of assets” theory. As explained by the Ninth Circuit, “[u]nder this theory, a taxpayer realizes gain when a debt is discharged because after the discharge the taxpayer has fewer liabilities to offset her assets. The taxpayer’s existing assets, which otherwise would have gone toward repaying the debt, are freed.”⁹⁰ Congress statutorily embraced *Kirby Lumber* in 1954 by adding section 61(a)(12), which codified the inclusion of COD income.

3. Below-Market Loans and Original Issue Discount

Phantom income in the individual context also encompasses original-issue discount and “interest-free” loans. The contemporary tax code⁹¹ generally does not recognize interest-free loans: The Code requires a loan to have adequate stated interest, and if it does not, the Code will “impute” (create) an interest element.⁹² Section 7872 applies to “below-market loans,” which are defined, in effect, as loans with either no stated interest or interest that is payable at a rate less than the applicable Federal rate.⁹³

As deftly explained by the Joint Committee on Taxation,

Loans that are subject to [Section 7872] . . . are recharacterized as an arm’s-length transaction in which the lender made a loan to the borrower in exchange for a note requiring the payment of interest at the applicable Federal rate. This rule results in the parties being treated as if: (1) The borrower paid interest to the lender that may be deductible to the borrower and is included in income by the lender; and (2) The lender (a) made a gift subject to the gift tax (in

90. *Merkel v. Comm’r*, 192 F.3d 844, 849 (9th Cir. 1999).

91. Historically, the Tax Court allowed interest-free loans, with no corresponding income imputation. In *Dean v. Commissioner*, the Tax Court held:

We have heretofore given full force to interest-free loans for tax purposes, holding that they result in no interest deduction for the borrower nor interest to the lender. We think it to be equally true that an interest-free loan results in no taxable gain to the borrower[.]

35 T.C. 1083, 1090 (1961), *nonacq.* (citations omitted). Section 7872, however, now disallows this result. See I.R.C. § 7872 (2012).

92. See I.R.C. § 7872.

93. *Id.* § 7872(e).

the case of a gratuitous transaction), or (b) paid a dividend or made a capital contribution (in the case of a loan between a corporation and a shareholder), or (c) paid compensation (in the case of a loan to a person providing services). . . .⁹⁴

Although the specific contours and applications to below-market loans and original-issue discounts are complex—and beyond the scope of this Article—the main point is that the imputation could result in taxable income without necessarily producing a corresponding cash inflow.

III. THE ISSUE OF PHANTOM INCOME IN DOMESTIC SUPPORT CALCULATIONS

The issue addressed by this Article is how parties and courts treat phantom income when there is no cash inflow with which to fund increased domestic support obligations. In some cases, a spouse seeking an increased support adjustment may achieve only a Pyrrhic victory if he or she invests time and money in domestic support litigation, prevails in court, and then finds out that the payor has no actual cash to fund that judgment. As the next section demonstrates, also problematic is the fact that phantom income is not treated uniformly by courts.

A. *Judicial Survey*

Courts have reached divergent conclusions on whether to include phantom income in domestic support obligations. This section surveys the cases that have expressly wrestled with the intersection of phantom income and domestic support obligations.

1. *Kelley v. Kelley*

In *Kelley*, the payee-parent challenged the trial court's calculation of child support, arguing that it abused its

94. STAFF OF JOINT COMM. ON TAXATION, 98TH CONG., GEN. EXPLANATION OF THE REVENUE PROVISIONS OF THE DEFICIT REDUCTION ACT OF 1984 528–29 (Joint Comm. Print 1985); see also J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 848–49 (12th ed. 2018).

discretion.⁹⁵ The payor-parent was a recruiter for a financial services firm; a part of his compensation package was an interest-free loan.⁹⁶ The firm, though, forgave a portion of the loan, and consistent with tax principles, reported the loan forgiveness as compensation.⁹⁷

The trial court classified the loan forgiveness amounts as “phantom income” because “the money was previously received and spent, plus [the payee] is not receiving any compensation, that is, dollars for it.”⁹⁸ The trial court, then, did not include loan forgiveness from gross income in its child-support calculations.⁹⁹

On appeal, the Kentucky Court of Appeals started with the child-support statute, which defines “gross income”:

“Gross income” includes income from any source, except as excluded in this subsection, and includes but is not limited to income from salaries, wages, retirement and pension funds, commissions, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, Social Security benefits, workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, Supplemental Security Income (SSI), gifts, prizes, and alimony or maintenance received.¹⁰⁰

The court, commenting on this definition, remarked, “[o]bviously, the statute does not specifically address whether loan forgiveness is income, and further, no Kentucky case has addressed this question.”¹⁰¹ The court asserted that “the loan forgiveness amount was not *actual income* but was merely listed for purposes of income tax.”¹⁰²

95. *Kelley v. Kelley*, No. 2012-CA-002213-MR, 2014 WL 5359745, at *3 (Ky. Ct. App. Oct. 3, 2014).

96. *Id.*

97. *Id.* at *4; *see also* I.R.C. § 108 (2012).

98. *Kelley*, 2014 WL 5359745, at *4.

99. *Id.*

100. *Id.* at *5 (quoting KY. REV. STAT. ANN. § 403.212(2)(b)).

101. The tax code, for instance, would include loan forgiveness implicit in the word “income.”

102. *Kelley*, 2014 WL 5359745, at *5 (emphasis added).

The appeals court reasoned that tax statutes and child support serve different purposes;¹⁰³ therefore, a “wholesale” adoption of the taxable income¹⁰⁴ concept was not necessary.¹⁰⁵ Consequently, the child-support statute’s definition of gross income did not include compensatory loan forgiveness because it was an “in-kind benefit.”¹⁰⁶

2. *Rieger v. Rieger*

The same issue—the treatment of compensatory forgivable loans in calculating child support—recently confronted a Virginia Circuit Court. This case also involved a forgivable loan made by a financial services employer. Unlike the Kentucky Court of Appeals, however, in *Rieger v. Rieger*, the Fairfax County Circuit Court held that a forgivable loan is includible in gross income for child-support purposes.¹⁰⁷

The court started with the family law statutory definition of gross income, namely, “all income from all sources”—

and shall include, but not limited to, income from salaries, wages, commissions, royalties, bonuses, dividends, severance pay, pensions, interest, trust income, annuities, capital gains, social security...workers’ compensation benefits, unemployment insurance benefits, disability insurance benefits, veterans’ benefits, spousal support, rental income, gifts, prizes or awards.¹⁰⁸

The court concluded that neither the express text of the statute nor its legislative history provided insight into

103. *Id.* (quoting *Snow v. Snow*, 24 S.W.3d 668, 672 (Ky. Ct. App. 2000)).

104. This is a poor choice of words; taxable income and gross income are two different things. Something can be gross income as defined by section 61 (i.e., an accession to wealth), yet be statutorily excluded elsewhere in the tax code for myriad economic, administrative, and public policy reasons (e.g., gifts, fringe benefits, etc.). *See, e.g.*, I.R.C. § 102 (2012) (gifts); *id.* § 132 (fringe benefits).

105. *Kelley*, 2014 WL 5359745, at *5.

106. *Id.*

107. 90 Va. Cir. 29, 36 (2015).

108. *Rieger*, 90 Va. Cir. at 31 (quoting VA. CODE ANN. § 20-108.2(C)).

whether “phantom income” is included.¹⁰⁹ After surveying some of the case law, the court concluded that “a forgivable loan, given to Defendant as a benefit of his employment, constitutes gross income for purposes of calculating child support.”¹¹⁰ The court compared the loan to a bonus or income, both of which would be includible under the statute.¹¹¹ Stated otherwise, “this amount of money constitutes nonmonetary income to the Defendant. This is a benefit that Defendant receives because of his employment and as compensation for his services.”¹¹² Astutely, the court added, “loan forgiveness’ saves Defendant an amount of money every month that he would otherwise spend repaying the ‘loan.’”¹¹³

3. *In re Marriage of Kirk*

In *In re Marriage of Kirk*, the husband formerly owned an automobile dealership; he had a large outstanding debt to the dealership and entered into a contract with the new owners for repayment of the debt.¹¹⁴ Based on the agreement, the husband was entitled to an annual bonus which would then be automatically used to reduce the indebtedness.¹¹⁵ The trial court determined that it would *not* consider as part of the husband’s gross income amounts attributable to debt reduction owed to an employer.¹¹⁶ The ex-wife appealed.¹¹⁷

The California Court of Appeals framed the issue as “[w]e are here faced with a contractual shift of disposable income from child support to the payment of third party

109. *Id.* at 32.

110. *Id.* at 36.

111. *Id.* at 36–37.

112. *Id.* at 37.

113. *Id.*

114. 266 Cal. Rptr. 76, 77 (Ct. App. 1990).

115. *Id.*

116. *Id.* at 77.

117. *Id.*

debt.”¹¹⁸ In the very next sentence, the court concluded, “[o]n its face, this is not permissible.”¹¹⁹ The court reasoned that “an indebted parent cannot escape liability for the paramount obligation to support the parent’s children because of indebtedness such parent has created.”¹²⁰ The court described the arrangement as “a contractual obligation to shift \$4,450 per month, from total gross income of \$9,450 per month, from funds available for child support to the repayment of debt.”¹²¹ Importantly, “[t]here is nothing to suggest that this obligation was sham, unenforceable or undertaken as a ruse to avoid child support.”¹²²

Although the appeals court agreed that, under the contract, the \$4,450 was not available to pay child support, “[t]he error of the court was in failing to consider that the only rational inference derivable from the paperwork before the court was that this shift was a voluntary diversion of income to pay debt, resulting in deprivation of funds for child support.”¹²³ The court therefore reversed the trial court and explained its rationale as follows:

Were we to sanction this sort of transaction we can envision all manner of special contracts, with employers or others who owe money to a supporting parent, which shift funds from available income to utilization for other purposes benefiting the parent (such as savings plans, retirement plans, miscellaneous fringe benefits), resulting in the contention that the support order must be reduced.¹²⁴

4. *Riddle v. Riddle*

In *Riddle v. Riddle*, a California court was confronted

118. *Id.* at 81.

119. *Id.*

120. *Id.* (quoting *In re Marriage of Muldrow*, 132 Cal. Rptr. 48, 52 (Ct. App. 1976)).

121. *Id.*

122. *Id.*

123. *Id.* at 82.

124. *Id.*

with the divergence between concepts of cash flow and income.¹²⁵ The husband was a financial advisor, and as part of his compensation, he was given an advance against his future earnings.¹²⁶ That amount, though, was periodically forgiven and treated as discharge-of-indebtedness income by his employer.¹²⁷ The court explained this system as follows: “The reason for this convoluted system of payment is fairly obvious: It allowed the employer to pay Husband big bucks up front, but spread out the payment of tax on the payment over time so as to circumvent the progressivity of the tax codes.”¹²⁸

The court rejected the husband’s argument that his income for support purposes should equal his “cash flow.”¹²⁹ The court noted, “[w]hile we recognize that family lawyers and forensic accountants sometimes use the phrase ‘cash flow’ as a sloppy synonym for the word ‘income’ as it appears in the support statutes, it isn’t.”¹³⁰ Indeed, the court emphasized that, for child-support purposes, the term income “was ‘lifted’ straight from the Internal Revenue Code.”¹³¹ Therefore, it continued, “[t]hat means that if the tax laws say you have income because of the forgiveness-of-debt, you have income, and that forgiveness-of-debt income must go into the calculation of adjusted gross income under [the California child-support statutes].”¹³² Now, the California child-support statutes did offer some deductions from income—such as for job-related expenses¹³³—but, as the court emphasized, “that doesn’t mean that so-called

125. 23 Cal. Rptr. 3d 273 (Ct. App. 2005).

126. *Id.* at 275.

127. *Id.*; see I.R.C. § 108 (2012).

128. *Riddle*, 23 Cal. Rptr. 3d at 275.

129. *Id.* at 276.

130. *Id.*

131. *Id.*

132. *Id.* at 276–77.

133. CAL. FAM. CODE § 4059(f) (West 2019).

‘phantom’ income as imputed by the tax laws is any less ‘income[.]’¹³⁴

5. *Poiting v. Poiting*

The appellant in *Poiting v. Poiting* argued that he had never actually received the cash amounts reported to him on a Form K-1, although he acknowledged that those amounts were includible as income for tax purposes.¹³⁵ The Ohio Court of Appeals, with little discussion, rejected that argument; the court summarily noted that

[w]hile Appellant introduced tax records in support of his claim, Appellant has cited no authority in support of his argument, and [the Ohio statute on award and modification of spousal support] is silent as to whether ‘phantom income’ should be included in a party’s gross income for the purpose of calculating spousal support.¹³⁶

Because there could also be concerns of income manipulation, the court ruled that “[t]he trial court was in a better position than [the court of appeals] to make the credibility assessments essential to such a determination.”¹³⁷

6. *Cyr v. Cyr*

In *Cyr v. Cyr*,¹³⁸ the issue was whether a living cost differential,¹³⁹ an expatriate premium,¹⁴⁰ and a hypothetical

134. *Riddle*, 23 Cal. Rptr. 3d at 277.

135. *Poiting v. Poiting*, 2005-Ohio-2680, at ¶ 18.

136. *Id.*

137. *Id.*

138. *Cyr v. Cyr*, 2005-Ohio-504.

139. This payment was designed to “enable employees to maintain a lifestyle which is broadly comparable to that in their home country, taking account of differences in cost-of-living, taxation and social security. . . . [A] living-cost-differential (LCD) is paid in order to protect the purchasing power of the employee’s income in the host location.” *Id.* ¶ 28.

140. This payment was designed to “recognize the disruption an employee, and their [sic] accompanying family, experience as a result of an international assignment, and as a contribution to costs not addressed elsewhere.” *Id.* ¶ 29.

tax payment¹⁴¹ made by an employer were includible as income for support payment calculations. The husband argued that “these payments and deductions are not part of his gross pay because they exist only to equalize his pay to what he would receive for the same work in the U.S.”¹⁴²

The court noted that the governing child-support statute defined gross income as “the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable. . . .”¹⁴³ Although the statute lists various items of income, the court noted that “[i]t does not limit sources of income to the types listed.”¹⁴⁴ The court concluded that, “[a]lthough the purpose of the extra payments husband received over and above his base salary was to equalize husband’s salary to its net worth in the U.S., they still qualify as income received.”¹⁴⁵

7. *In re Marriage of Stress*

In this case,¹⁴⁶ the father appealed an order modifying his support payments to include expatriate payments.¹⁴⁷ The expatriate payments included (1) a foreign-services premium, designed to offset the cost of living in the foreign locale, and (2) the payment of the foreign country taxes, described as a tax equalization payment.¹⁴⁸ The Colorado

141. This payment is “actually a deduction taken from the employee’s check, similar to the withholding taken from an American company’s paycheck, to cover taxes incurred by the employee in both his home country as well as the host country.” *Id.* ¶ 30.

142. *Id.* ¶ 31.

143. *Id.* (quoting OHIO REV. CODE ANN. § 3119.01(C)(7)).

144. *Cyr v. Cyr*, 2005-Ohio-504, at ¶ 34.

145. *Id.* The court further explained that “[w]e understand that this extra income was intended to make his pay substantially equivalent in his host country to what it would be in his home country. Nonetheless, there is no statutory allowance for exempting this income from his gross income for child support calculations.” *Id.*

146. *In re Marriage of Stress*, 939 P.2d 500 (Colo. App. 1997).

147. *Id.* at 501.

148. *Id.*

statute for child support defined gross income as “income from ‘any source,’ with the limited and specified exclusion of funds received from public assistance or voluntary overtime pay.”¹⁴⁹

The father argued that “the tax equalization payment is only ‘phantom income’ which is not reasonably available to him for child-support payments and, thus, is not properly included in his gross income for child support purposes.”¹⁵⁰ The court disagreed, and held that “the tax equalization payment constituted a lump-sum addition to salary to offset a lump-sum withholding tax.”¹⁵¹ The court noted, “[t]hat [the] father did not actually receive the lump-sum payment prior to its submission to the Canadian tax authorities is no different in effect from the more common system of incremental withholding for tax purposes. . . .”¹⁵² Indeed, the court emphasized that the Colorado support statute “does not provide for deduction of federal and state income taxes or FICA taxes in computing gross income for purposes of calculating child support.”¹⁵³ The court found no authority “that would require an inconsistent treatment of [the] father’s Canadian income taxes.”¹⁵⁴

8. *Marron v. Marron*

In this case,¹⁵⁵ the husband appealed the trial court’s determination of his income for spousal and child support.¹⁵⁶ The husband owned several corporations, all of which were

149. *Id.* at 502 (citing COLO. REV. STAT. § 14-10-115(7)(a) (1996 cum. supp.)); see also *In re Marriage of Campbell*, 905 P.2d 19, 20 (Colo. App. 1995); *In re Marriage of Tessmer*, 903 P.2d 1194 (Colo. App. 1995) (noting that exceptions are provided in the statute).

150. *Stress*, 939 P.2d at 502.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Marron v. Marron*, 2014-Ohio-2121.

156. *Id.* ¶ 9.

taxed as S corporations.¹⁵⁷ The husband argued that the trial court erred by including the phantom income from the S corporations in the support calculations—in particular, “that the K-1 income retained by the corporations should not be included in his income because he did not receive it, he had no legal right to demand it, and he had never received any cash distribution from these companies with the exception of a tax draw in later years.”¹⁵⁸

Here, the support statute defined gross income as:

the total of all earned and unearned income from all sources during a calendar year, whether or not the income is taxable, and includes income from salaries, wages, overtime pay, and bonuses to the extent described in [Section 3119.05(D) of the statute]; commissions; royalties; tips; rents; dividends; severance pay; pensions; interest . . . and all other sources of income. ‘Gross income’ includes . . . self-generated income; and potential cash flow from any source.¹⁵⁹

Furthermore, the support statute defined the term “self-generated income” as “gross receipts received by a parent from . . . [a] closely held corporation, and rents minus ordinary and necessary expenses incurred by the parent in generating the gross receipts.”¹⁶⁰

The appeals court sustained the trial court’s judgment to include the K-1 income. The court reasoned that “whether or not Husband received a cash distribution from the K-1 income, the retained K-1 income increased Husband’s wealth through his ownership interest in the companies.”¹⁶¹ Moreover, the court also explained that:

There was evidence that Husband exercised significant control over the companies. Husband was able to convince his father to make distributions from the family-owned corporations to cover the tax liabilities associated with the K-1 income contrary to the previous

157. *Id.* ¶ 3.

158. *Id.* ¶ 9.

159. *Id.* ¶ 12 (quoting OHIO REV. CODE ANN. § 3119.01(C)(7)).

160. *Id.* (quoting § 3119.01(C)(13)).

161. *Id.* ¶ 22.

custom. The “tax distributions” were significantly larger than taxes due on the K-1 income. Further, Wife testified that Husband’s family had shaped the companies to minimize a spouse’s support obligation in a divorce.¹⁶²

B. *Analysis of the Case Law*

As the above demonstrates, there are several key issues present in most of the cases, the chief of which is the statutory construction surrounding the term “gross income” or “income” in the state support statute. Another issue and concern raised by the courts is the specter of financial gamesmanship by the recipient of the phantom income—i.e., intentionally not receiving cash to save on the support obligation. These issues will be discussed in turn.

1. Using the Federal Tax Definition of Income

The goal in interpreting any statute is to “[give] effect to the text that the lawmakers have adopted.”¹⁶³ A key interpretation canon is the supremacy-of-text principle, which provides that “[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.”¹⁶⁴ Effectuating that goal, moreover, the ordinary-meaning canon provides “[w]ords are to be understood in their ordinary, everyday meanings—*unless the context indicates that they bear a technical sense.*”¹⁶⁵ This canon, then, introduces an interesting wrinkle to the interpretation analysis: Should the term “income” (and related terms) in support statutes be construed in the “everyday” sense of the word, or in its technical federal tax

162. *Id.*

163. ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 29 (2012); *see also* Timothy M. Todd, *The Tail that Wags the Dog: The Problem of Pre-Merit-Decision Interim Fees and Moral Hazard in the National Vaccine Injury Compensation Program*, 63 KAN. L. REV. 1, 27 (2014).

164. SCALIA & GARNER, *supra* note 163, at 56.

165. *Id.* at 69 (emphasis added). Justice Scalia and Bryan Garner further wrote that “[t]he ordinary-meaning rule is the most fundamental semantic rule of interpretation.” *Id.*

meaning? Naturally, different states define “income” differently for support purposes.¹⁶⁶

Well, that issue raises another sensible question: Are those two definitions (the everyday definition of “income” and the technical tax definition of “income”) even different? *Merriam-Webster’s Collegiate Dictionary* defines “income,” as relevant here, as “a gain or recurrent benefit [usually] measured in money that derives from capital or labor; also: the amount of such gain received in a period of time.”¹⁶⁷ *The Oxford English Dictionary* defines “income” as “[t]hat which comes in as the periodical produce of one’s work, business, lands, or investments (considered in reference to its amount, and commonly expressed in terms of money); annual or periodical receipts accruing to a person or corporation; revenue.”¹⁶⁸

Those definitions *are* different, at least at the margins. Interestingly, the federal tax definition of income has not enjoyed a static definition; actually, quite the opposite is true. The genesis for the modern federal income tax is the Sixteenth Amendment, which was passed in 1913.¹⁶⁹ It provides that “[t]he Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”¹⁷⁰ A few years later, the Supreme Court addressed the tax concept of “income” in *Eisner v. Macomber*.¹⁷¹

In *Eisner*, the Court was confronted with the issue of whether “Congress has the power to tax, as *income* of the

166. See, e.g., DETERMINATION OF INCOME FOR CALCULATING CHILD SUPPORT, 50 STATE STATUTORY SURVEYS: FAMILY LAW: CHILD CUSTODY AND SUPPORT (2018), Westlaw 0080 Surveys 5.

167. *Income*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2003).

168. *Income*, OXFORD ENGLISH DICTIONARY (2d ed. 1989).

169. See BURKE & FRIEL, *supra* note 94, at 5.

170. U.S. CONST. amend. XVI.

171. 252 U.S. 189 (1920).

stockholder and without apportionment, a stock dividend made lawfully and in good faith against profits accumulated by [a] corporation”¹⁷² The Court described income as “the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets.”¹⁷³ The Court concluded, in effect, that because the shareholder received “nothing out of the company’s assets for his separate use and benefit[,]” the stock dividend was not income.¹⁷⁴

A few years after *Macomber*, the Board of Tax Appeals further explained the concept of income for taxing purposes. In *Hawkins v. Commissioner*, in deciding whether a settlement for libel and slander is taxable, the Board noted:

it is conceivable that since the income tax is primarily an application of the idea of measuring taxes by financial ability to pay, as indicated by the net accretions to one’s economic wealth during the year, there may be cases in which taxable income will be judicially found although outside the precise scope of the description already given.¹⁷⁵

The modern and most famous tax definition of income is found in *Commissioner v. Glenshaw Glass*.¹⁷⁶ In *Glenshaw*, the Court was confronted with the question of whether the receipt of antitrust exemplary damages constituted gross income.¹⁷⁷ Noting that Congress desired to exert “the full measure of its taxing power,”¹⁷⁸ the Court held that the damages were gross income because they represented

172. *Id.* at 199 (emphasis added).

173. *Id.* at 207 (internal quotations omitted).

174. *Id.* at 211. A stock dividend does not change a shareholder’s investment in a company; it merely redistributes his current investment among a different number of shares—i.e., the total investment remains the same.

175. 6 B.T.A. 1023, 1024 (1927).

176. 348 U.S. 426 (1955).

177. *Id.* at 427.

178. *Id.* at 429; *see also* *Helvering v. Clifford*, 309 U.S. 331, 334 (1940); *Helvering v. Midland Mutual Life Ins. Co.*, 300 U.S. 216, 223 (1937); *Douglas v. Willcuts*, 296 U.S. 1, 9 (1935); *Irwin v. Gavit*, 268 U.S. 161, 166 (1925).

“instances of undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion.”¹⁷⁹ Under *Glenshaw*, a pure windfall—even one divorced from one’s capital or labor, contrary to *Macomber*—is income subject to taxation.¹⁸⁰ Despite departing from *Macomber*’s capital and labor distinction, *Glenshaw* still retained the historical realization requirement.¹⁸¹

Some differences exist between the dictionary definitions and the tax definition of income. Consider, for example, *Merriam-Webster*’s definition, which is effectively the *Macomber* definition. However, under *Macomber* and *Merriam-Webster*, the antitrust damages would *not* be income, as they do not originate from capital or labor. Similarly, it does not appear as though the *Oxford* definition would capture *Glenshaw*’s damages either, as they did not arise from “one’s work, business, lands, or investments”

Also interesting is that neither dictionary definition contemplates the *realization* element, which is expressed in *Glenshaw*’s definition for something to be income. The realization concept “was developed soon after the ratification of the sixteenth amendment and the passage of the Tariff Act of 1913.”¹⁸² In its early form, the realization requirement meant that “appreciation in the value of an asset does not constitute income under the sixteenth amendment in the absence of an event that separates the appreciation from the related capital.”¹⁸³ Normally, this event occurs with a sale or

179. *Glenshaw*, 348 U.S. at 431.

180. See Alice G. Abreu & Richard K. Greenstein, *Defining Income*, 11 FLA. TAX REV. 295, 301 (2011) (“Because windfalls do not proceed from the recipient’s labor or capital or both combined, the punitive damages received by *Glenshaw Glass* could not be income under the *Macomber* definition . . .”).

181. *Id.* at 303 (“The *Glenshaw Glass* definition preserves the realization requirement but is broad enough to encompass windfall gains . . .”).

182. Loren D. Prescott, Jr., *Cottage Savings Association v. Commissioner: Refining the Concept of Realization*, 60 FORDHAM L. REV. 437, 439 (1991) (footnotes omitted).

183. *Id.* at 439–40.

disposition of property.¹⁸⁴

A classic realization case is *Helvering v. Horst*.¹⁸⁵ The Supreme Court explained:

Admittedly not all economic gain of the taxpayer is taxable income. From the beginning the revenue laws have been interpreted as defining 'realization' of income as the taxable event, rather than the acquisition of the right to receive it. And 'realization' is not deemed to occur until the income is paid. But the decisions and regulations have consistently recognized that receipt in cash or property is not the only characteristic of realization of income to a taxpayer on the cash receipts basis. Where the taxpayer does not receive payment of income in money or property realization may occur when the last step is taken by which he obtains the fruition of the economic gain which has already accrued to him.¹⁸⁶

Stated simply, not all economic gains are taxable gross income because the gain is not yet realized in tangible form. The simplest example is year-to-year fluctuations in stock owned by a taxpayer; those fluctuations are not income (in the tax sense); the "income" for tax purposes arises only when that stock is sold or otherwise disposed, i.e., when there is a realization event.¹⁸⁷

2. Economic Definitions of Income

Yet another wrinkle in defining income is that economists have an entirely different definition of income than tax attorneys do. Probably the most famous economic view of income is that of Robert Haig and Henry Simons, referred to as the Haig-Simons definition of income.¹⁸⁸ Robert Haig first proposed the definition of income as

[T]he increase or accretion in one's power to satisfy his wants in a given period in so far as that power consists of (a) money itself, or (b) anything susceptible of valuation in terms of money. More simply stated, the definition of income which the economist offers is

184. See I.R.C. § 1001 (2012).

185. 311 U.S. 112 (1940).

186. *Id.* at 115.

187. I.R.C. § 1001.

188. See Abreu & Greenstein, *supra* note 180, at 304.

this: Income is *the money value of the net accretion to one's economic power between two points of time*.¹⁸⁹

Henry Simons published his definition—considered a refinement of Haig's definition—which defined income as “the algebraic sum of (1) the market value of rights exercised in consumption and (2) the change in the value of the store of property rights between the beginning and end of the period in question.”¹⁹⁰ As Simons further noted, “in other words, [income] is merely the result obtained by adding consumption during the period to ‘wealth’ at the end of the period and then subtracting ‘wealth’ at the beginning.”¹⁹¹ As tax commentators have argued, the Haig-Simons broad definition “allows it to serve the goal of raising maximum revenue while also being maximally equitable and efficient and therefore serving two important tax policy objectives.”¹⁹² In effect, Haig-Simons includes all accessions to wealth, whether realized or not.¹⁹³

3. The Wrinkle of Exemptions

Another issue that could readily arise is, does strict tax incorporation apply in other contexts? What about an item of income that is exempted for tax purposes—does that exemption carry over into the support context? Section 102 is the most basic example.

Section 102 provides that “[g]ross income does not include the value of property acquired by gift, bequest, devise, or inheritance.”¹⁹⁴ Therefore, gifts are not subject to

189. Robert M. Haig, *The Concept of Income—Economic and Legal Aspects*, in *THE FEDERAL INCOME TAX* 1, 7 (Robert M. Haig, ed., 1921); *see also* Christopher H. Hanna, *Tax Theories and Tax Reform*, 59 *SMU L. REV.* 435, 437 (2006).

190. HENRY C. SIMONS, *PERSONAL INCOME TAXATION* 50 (1938); *see also* Abreu & Greenstein, *supra* note 180, at 304; Hanna, *supra* note 189, at 437.

191. SIMONS, *supra* note 192, at 50; *see also* Hanna, *supra* note 189, at 437. *See generally* Abreu & Greenstein, *supra* note 180.

192. Abreu & Greenstein, *supra* note 180, at 304.

193. *See id.*

194. I.R.C. § 102(a) (2012).

income tax,¹⁹⁵ so received gifts would *never* show on the Form 1040 of an individual recipient. Nevertheless, gifts are undoubtedly increases in economic assets (increases in the store of property rights, *à la* Haig-Simons). How, then, should gifts factor into the phantom-income analysis for domestic support obligations? If the strict incorporation argument wins the day—arguing that tax definitions control—gifts are not an *item of income*. From a policy perspective, though, this seems incongruous, as a gift represents an increase in assets that could be shared with the payees.

Section 121 is another prime example. Section 121 provides that “[g]ross income shall not include gain from the sale or exchange of property if, during the 5-year period ending on the date of the sale or exchange, such property has been owned and used by the taxpayer as the taxpayer’s principal residence for periods aggregating 2 years or more.”¹⁹⁶ This exclusion is limited to either \$250,000 or \$500,000 of gain, depending on the taxpayer’s filing status.¹⁹⁷ Consider the example, then, of a recently divorced person who sells his or her home for \$300,000, having purchased it many years ago for \$100,000. Of the \$200,000 in economic gain,¹⁹⁸ none of it is taxable due to the operation of section 121.

From an economic (Haig-Simons) or colloquial perspective, the \$200,000 seems like income, but from a tax perspective, no gross income is involved (due to the statutory exclusion). Which definition should control? Do the same rationales that support the section 121 exclusion—namely, providing for a fluid and dynamic housing market (reducing barriers to selling one’s home)—justify not including the

195. There could, of course, be gift taxes that are owed primarily by the donor.

196. I.R.C. § 121(a).

197. I.R.C. § 121(b)(1)–(2).

198. That is, the amount realized from the transaction less the basis (i.e., investment in the property).

profits from the sale in support calculations?

Section 74 is also relevant. This section provides that “[e]xcept as otherwise provided in this section, or in section 117 (relating to qualified scholarships), gross income includes amounts received as prizes and awards.”¹⁹⁹ This restates the general rule in *Glenshaw* and section 61: all accessions to wealth, clearly realized, are gross income. However, due to various (largely political) reasons, section 74(d) then provides “[g]ross income shall not include the value of any medal awarded in, or any prize money received from the United States Olympic Committee on account of, competition in the Olympic Games or Paralympic Games.”²⁰⁰

On a net basis, then, an Olympic award is not gross income for tax purposes, but should it be considered income for support purposes? Do the same political reasons that underline the tax exclusion justify an exclusion for domestic support purposes? The answer is likely “no.”

4. The Wrinkle of Administrative Practicalities

Despite section 61 and *Glenshaw Glass*'s broad reach, the government has administratively retracted it in part. One such example is the general welfare exception (GWE).²⁰¹ Under this doctrine, “some government payments do not constitute gross income to the recipients.”²⁰² For example, “the classic example of the GWE’s application is a government payment made to victims of a natural disaster.”²⁰³ The general welfare exception first appeared in 1938, “when the IRS determined that welfare payments (from the then-recently enacted Social Security Act) could be

199. I.R.C. § 74.

200. I.R.C. § 74(d)(1). *But see id.* § 74(d)(2) (limiting the exclusion to taxpayers with AGI of \$1,000,000 or less).

201. *See generally* Robert W. Wood & Richard C. Morris, *The General Welfare Exception to Gross Income*, 109 TAX NOTES 203 (2005); Robert W. Wood, *Updating General Welfare Exception Authorities*, 123 TAX NOTES 1443 (2009).

202. Wood & Morris, *supra* note 201, at 203.

203. *Id.*

excluded from gross income.”²⁰⁴ The IRS, moreover, has expressly invoked the general welfare exception. For example, in Revenue Ruling 63-163, the IRS determined:

Benefit payments made under the Area Redevelopment Act and the Manpower Development and Training Act of 1962 are intended to aid the recipients in their efforts to acquire new skills that will enable them to obtain better employment opportunities, and, as such, fall in the same category as other unemployment relief payments *made for the promotion of the general welfare*.²⁰⁵

Indeed, the IRS has explained the general welfare exception as follows: “[P]ayments under legislatively provided social benefit programs for the promotion of general welfare are not includible in an individual’s gross income.”²⁰⁶ The general welfare exception elements are that the payments must “(1) be made from a governmental general welfare fund; (2) be for the promotion of the general welfare (*i.e.*, on the basis of need rather than to all residents without regard to, for example, financial status, health, educational background, or employment status) and (3) not be made with respect to services rendered by the recipient.”²⁰⁷

Another income exception, and one that is incredibly ad hoc, occurs when the IRS pronounces that a certain item will not be considered income, even though it otherwise fits within *Glenshaw* and section 61’s definition. A classic example is the treatment of frequent flyer miles earned through business travel.²⁰⁸ The IRS has basically thrown in the towel on trying to tax these items. In Announcement 2002-18, the IRS stated that “[c]onsistent with prior practice, the IRS will not assert that any taxpayer has understated his federal tax liability by reason of the receipt or personal

204. *Id.* at 204 (citing I.T. 3194, 1938-1 C.B. 114 and I.T. 3230, 1938-2 C.B. 136). *But see* I.R.C. § 86 (including, in part, social security benefits).

205. Rev. Rul. 63-136, 1963-2 C.B. 19 (emphasis added).

206. I.R.S. Chief Couns. Mem. 200021036 (May 26, 2000).

207. *Id.*

208. For example, a business traveler earns “points” that can then be used on personal travel.

use of frequent flyer miles or other in-kind promotional benefits attributable to the taxpayer's business or official travel."²⁰⁹ Under *Glenshaw Glass*, though, these items seem to be "accessions to wealth" and are "clearly realized" (that is, something of value that the taxpayer has control over). Are they still gross income in the context of domestic support obligations?

As demonstrated, then, there are now at least three different operable definitions of income: (1) the colloquial meaning, (2) the tax attorney's definition, and (3) the economist's definition. However, just arriving at a general definition does not solve the issue, as the tax attorney definition has even more wrinkles, many of which have not been contemplated by the phantom-income cases. Consequently, it is unwise and possibly over- or under-inclusive to simply incorporate the full tax literature and concepts of income into the domestic support analysis, as the two contexts are not necessarily coterminous.

5. Phantom Income Ipse Dixit

Another issue is that the cases and litigants sometimes call things phantom income that are not phantom income in reality—at least not from the perspective of a tax attorney. This muddies the waters and makes it harder to clarify and resolve true cases of phantom income.

Consider *Cyr v. Cyr*, which considered the effect of a living cost differential, an expatriate premium, and a hypothetical tax payment on the support obligation.²¹⁰ The husband argued that these items constituted phantom income.²¹¹ The court explained the hypothetical tax payment as basically a withholding requirement, noting "[t]hat although the employee never receives it, it is still gross

209. I.R.S. Announcement 2002-18.

210. 2005-Ohio-504, at ¶ 4.

211. *Id.*

income to the employee.”²¹² Withholdings are not phantom income. Withholdings are not received by the taxpayer because they are paid to another to satisfy the taxpayer’s obligation to the payee. Stated otherwise, *cash is transferred* in these situations, just not to the wage earner; in true phantom-income cases, there is no present cash transfer to any payee.

Similarly, in *In re Marriage of Stress*, the court considered an equalization payment, which the father argued constituted phantom income.²¹³ The equalization payment was “credited in a lump sum to father’s final paycheck each year, and at the same time deducted for payment of father’s Canadian income taxes.”²¹⁴ The father argued that such a payment is “not reasonably available to him for child support payments and, thus, is not properly included in his gross income for child support purposes.”²¹⁵ Again, the court did not argue with the classification of the payment as phantom income. Even though the court concluded that the amounts were income for support purposes, it missed an opportunity to clarify whether or not such amounts are classified properly as “phantom.”

In both of the above cases, employers actually transferred cash, even though the wage earners were not the ultimate payees (the taxing authorities were). This is markedly different from the prototypical Schedule K-1 pass-through phantom income (pure phantom income), when an entity has (perhaps) accrual taxable income and resultant pass-through income, with potentially no actual cash transfer. For example, if a corporate customer buys goods on credit from an accrual-basis corporation, that corporation has income that is taxable, even though no cash actually changes hands. In the case of a pass-through entity, the

212. *Id.* ¶ 30.

213. 939 P.2d 500, 502 (Colo. App. 1997).

214. *Id.* at 501.

215. *Id.* at 502.

owner would need to report that income, even though no cash is involved (only potential future cash is involved).

6. Timing Asymmetries

At bottom, there appear to be at least two time-based issues that need to be resolved in connection with the timing asymmetry between cash receipt and income inclusion (particularly when incorporating tax principles). First, there are situations in which cash was received in the past, but the “income” occurs now; for example, cancellation of debt income (henceforth *Category 1 asymmetries*). Second, there are situations in which the income occurs now, but cash may (or may not) be received in the future, such as pass-through business income (henceforth *Category 2 asymmetries*). The judicial and charging-order-type remedies will consider these timing asymmetries.

IV. SOLUTIONS TO THE PHANTOM INCOME ISSUE IN DOMESTIC SUPPORT OBLIGATIONS CONTEXT

This Article addresses two possible solutions to the phantom income issue in the domestic support context. The first is to keep the status quo rule that implicitly (and sometimes explicitly) incorporates the tax definition of income and includes phantom income in support calculations; the second is to implement a charging-order-type remedy to balance the concerns of payors and payees vis-à-vis phantom income.

A. *Incorporating Tax Definitions*

The first option is simply to incorporate federal tax definitions of income into the phantom income/domestic support obligation context. As the case survey demonstrates, this is the apparent majority rule,²¹⁶ and naturally, this is

216. That is, of the cases surveyed in this Article, seven of them included phantom income as income for DSO purposes and one did not. (This Article does not purport to be an exhaustive survey of all related cases.)

the simplest and easiest option. However, this solution does not truly solve the two categories of asymmetry, nor does it solve the other issues identified earlier when incorporating tax principles—i.e., the tax-incorporation option does not provide clear answers to issues such as tax exclusions, administrative exclusions, and other issues that are specific to tax policy and administration but have no analog in domestic support contexts.

Consider, for example, the cancellation-of-indebtedness income example. When the loan (and its cash) is extended, no taxable income results, because there was no accession to wealth.²¹⁷ Although the taxpayer's assets were increased by the amount of the cash borrowed, this gain was offset by the increased loan liability. If the loan is later forgiven (in whole or in part), the Code includes in gross income the difference between the loaned amount and that forgiven.²¹⁸

It may even be the case that the family did benefit from the cash (when it was not taxed as loan proceeds) if the loan was extended pre-separation—that is, if the family had the opportunity to consume it. To also include the COD income post-separation for domestic support obligations would be akin to double consumption by the DSO payee; that is, they were able to consume the loan proceeds and then also consume the later-in-time DSO payment. In sum, there are asymmetries and timing differences between taxation and consumption that would result from total incorporation of tax principles in DSO calculations.

Moreover, tax concepts may cut both ways and may actually work to the disadvantage of DSO payees in certain situations in which the tax and DSO policies diverge. Consider, for example, the inequity of a whole incorporation of tax concepts when factoring in exclusions. Gifts are income-tax free,²¹⁹ but represent a true asset (or cash)

217. See *Comm'r v. Glenshaw Glass*, 348 U.S. 426, 431 (1955).

218. Unless an exception applies. See I.R.C. § 108 (2012).

219. I.R.C. § 102(a).

increase. In the main, the receipt of a gift represents additional assets a family could use for consumption but that are outside the definition of gross income. Similarly, Roth IRA distributions—which are received tax-free if planned properly—are designed to be used as retirement consumption but are outside the definition of gross income. In both cases, though, those funds could readily be consumed by the family. In sum, a strict incorporation of tax concepts does not solve all the phantom-income issues and related issues. Fortunately, there are cases that recognize that income for tax purposes and income for DSO purposes (especially for child support) are not coterminous.²²⁰

B. *Charging-Order Type Remedy*

Another solution is for legislatures to embrace a charging-order-type remedy specific for domestic support obligations. A charging order refers to “the discrete remedy of diverting distributions attributable to the interest charged to the creditor until the amount owed is satisfied. . . .”²²¹ Under a charging order, when cash distributions are made from the entity, the distributions for the debtor-member are paid to the holder of the charging order (the creditor). The

220. See, e.g., Morgan, *supra* note 37, § 4.03; see also *In re Marriage of Fain*, 794 P.2d 1086, 1087 (Colo. App. 1990) (“[The guideline], by its plain language, also includes all payments from a financial resource, whatever the source thereof. In addition, the more specific definition of ‘gross income’ in [the guideline] prevails over other definitions for federal and state income purposes.”); *Cummings v. Cummings*, 897 P.2d 685, 687 (Ariz. Ct. App. 1994) (“Because the Guidelines are based upon assumptions about spending patterns of families at various income levels, gross income for child support purposes is not determined by the gross income shown on the parties’ income tax returns, but rather on the actual money or cash-like benefits received by the household which is available for expenditures.”); *In re Marriage of Moorthy & Arjuna*, 2015 IL App (1st) 132077, ¶ 38, 29 N.E.3d 604, 616 (“[I]ncome’ for purposes of child support determinations may include ‘a variety of payments [that] will qualify as ‘income’ for purposes of section 505(a)(3) of the Act that would not be taxable as income under the Internal Revenue Code,’ which is designed to achieve different purposes than the child support provisions of the Act.”).

221. PETER SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS, ¶ 9.02 (2019).

charging order arose under partnership law to balance the need of the creditor to attach assets of the debtor (like the partnership interest), while reducing the disruption to the underlying business; such an order prevents the creditor from asserting management or control rights.²²²

Interestingly, the issues faced by creditors of LLC members are similar to the issues faced by former spouses in the above-mentioned cases. For example, the debtor (i.e., the LLC member) can have taxable income (such as partnership income flow-through) but may not necessarily have a corresponding cash distribution. This is similar to the situation of the debtor former spouse who has potentially phantom income without a corresponding cash flow. A related concern is the issue of cash gamesmanship; that is, the LLC—which may be controlled completely by the debtor—may decide to not distribute cash for fear it will be collected by a creditor. This concern has been raised in the above cases as well.

Consequently, the presence of a charging-order-type remedy specific to domestic support obligations could provide a common-sense solution in complex scenarios, balancing the competing claims of increased taxable income and uncertain cash flow. A charging-order-type remedy is ideal in Category 2 situations—those in which there is the potential for a cash flow in the future. The charging order can be applied against the source of that potential future cash flow.

In the partnership/LLC context, the charging order is applied specifically, i.e., with respect to a particular business entity. Such a clean demarcation is not always present in the domestic support context. However, the remedy could still be applied in many instances. For example, in the above cases of *Poitinger* and *Marron*, the sources of the phantom income were actual business entities; thus, a charging order could be specific to cash distributions from those businesses or from later stock sales (if the payor is an equity holder).

222. See, e.g., *id.*

But what about those cases in which a charging order cannot be aimed toward a specific asset or business enterprise? Those cases are more problematic, and the charging-order remedy may not be an effective fix.²²³ In such cases, the court may need to craft a payment schedule after extensive fact-finding regarding actual changes in cash flow, if any. It may be that there is a close proxy for an underlying asset. Consider, for example, *Kelley*, in which there was COD income arising out of an employment-based loan. There, the ex-spouse/payor owned stock in the employer. The charging order could be directed at cash flows and receipts from the ex-spouse's later stock sales of that company.

V. CONCLUSION

This Article addressed the developing intersection between the federal income-tax concept of phantom income and its impact on domestic support obligations. As shown, the tax code and support statutes have different goals and objectives; thus, a simple incorporation adoption of equivalent terms and definitions may not be an optimal solution. In addition, two timing asymmetries highlight the thorny intersection between tax principles and domestic support obligations—and in some of the cases, true phantom income is not even at issue (despite its invocation). This Article thus suggests a DSO-specific charging-order-type remedy to help balance the concerns expressed by the case law. While the charging-order solution may not fit all circumstances, it nevertheless advances the literature and provides a workable solution in many true phantom income cases.

223. In any event, there may be other remedies available depending on state law, such as a basic lien for support obligations. *See generally* 24A AM. JUR. 2D *Divorce and Separation*, *supra* note 8, § 753. However, a basic lien may be a less elegant solution as it is not necessarily aimed at the specific asset or item generating the phantom income. In other words, if state law provided, as a matter of law, a lien for support payments on real property (like it generally does for judgment creditors), the real property is not generating the basis for modifying the support payment.