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Calculating "Income" for Domestic Support Obligations in the Wake of the COVID-19 Pandemic

Kimberly S. Krieg

Stephanie L. Tang

CALCULATING "INCOME" FOR DOMESTIC SUPPORT OBLIGATIONS IN THE WAKE OF THE COVID-19 PANDEMIC

KIMBERLY S. KRIEG, PHD, CPA* AND STEPHANIE L. TANG, JD**

Abstract

The COVID-19 pandemic ushered in widespread economic turmoil across the United States. In response, individuals turned to previously seldom-tapped sources of economic relief, including unemployment benefits, one-time withdrawals from retirement accounts, and retained earnings. Additionally, the U.S. government provided unprecedented economic relief, including government stimulus checks, advance child tax credits, and Paycheck Protection Program loans. The introduction of these short-term economic gains creates uncertainty for family courts when calculating a party's "income" for domestic support obligations. Obligors are increasingly attempting to take advantage of reduced income, hardship withdrawals, or corporate distributions. Conversely, recipient spouses are appearing before the court seeking to include stimulus, tax credit, and loan payments in their spouses' incomes.

Meanwhile, Congress has promulgated unique tax rules necessitating Internal Revenue Service ("IRS") guidance to address several of these new sources of economic relief. In particular, the government's approach to the taxation of unemployment compensation and relief of debt during the pandemic has altered the traditional calculation of taxable income. This has further contributed to the disconnect between "income" for tax purposes and "income" for purposes of determining the availability of cash for domestic support obligations.

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* Authors are listed alphabetically with equal contributions to this article. Kimberly S. Krieg, PhD, CPA is an Assistant Professor of Accounting at the University of San Diego Knauss School of Business and teaches courses in taxation; PhD, University of Oregon, BS, University of California, Berkeley.

** Authors are listed alphabetically with equal contributions to this article. Stephanie L. Tang, JD, is an Assistant Professor of Law at Baylor Law School; former Family Law Partner at Kogut & Wilson, L.L.C., Chair of the Illinois State Bar Association Family Law Section Council (2022–2023). J.D., University of Illinois College of Law, B.A., Northwestern University. The author thanks her husband, Mark Scott, and son, Connor Scott, for their continued support.

This Article encourages courts to take an interdisciplinary approach when confronting cases seeking to set domestic support obligations based on artificially inflated or deflated incomes due to various forms of pandemic relief. Specifically, this Article advances a judicial approach to calculate support after considering (1) actual monies received by each parent, (2) whether imputing income is appropriate, (3) any unique tax consequences surrounding the relief, and (4) the addition of explicit language of any contemplated circumstances when entering the support order.

I. Introduction

The COVID-19 pandemic led to historic shutdowns of businesses, skyrocketing unemployment rates, unprecedented shifts to working from home, and substantial government stimulus payments to both individuals and businesses.[1] Following the height of the pandemic, the United States has seen a snail's-pace movement back to reopening and rejoining the workforce.[2] These major workplace changes not only affected lives on an individual basis, but on a family basis as well.[3] Prior to the pandemic, parties already faced difficulties in determining income for purposes of calculating domestic support obligations.[4] Now, even taxation concepts that courts commonly rely on, such as "income," are affected by exceptions in response to the pandemic. Courts will soon begin to struggle even more to reconcile the Internal Revenue Code's concept of "taxable income," which is intended to raise government revenue, with the definition of "income" in family courts, which seeks to maximize actual monies available to support children and former spouses.[5] For couples who were divorcing, or who

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1. *See* Alexander W. Bartik et al., *The Impact of COVID-19 on Small Business Outcomes and Expectations*, 117 PROC. NAT'L ACAD. SCIS. 17656 (2020).

2. *See* Dee-Ann Durbin et al., *Changed by the Pandemic, Many Workers Are Reluctant to Return to Their Old Jobs*, FORTUNE (May 18, 2021, 10:36 AM CDT), https://fortune.com/2021/05/18/many-workers-reluctant-to-return-old-jobs-covid/.

3. CLAIRE ZIPPEL & ARLOC SHERMAN, CTR. ON BUDGET & POL'Y PRIORITIES, BOLSTERING FAMILY INCOME IS ESSENTIAL TO HELPING CHILDREN EMERGE SUCCESSFULLY FROM THE CURRENT CRISIS 1 (2021), https://www.cbpp.org/sites/default/files/2-23-21pov.pdf.

4. *See generally* Brittany Ranson & Andrea Cozza, *Considerations for Establishing Alimony in a COVID-19 World*, A.B.A.: SECTION FAM. L. (Sept. 22, 2020), https://www.americanbar.org/groups/family_law/committees/alimony/alimony_covid/.

5. *See* Timothy M. Todd, *Phantom Income and Domestic Support Obligations*, 67 BUFF. L. REV. 365, 366 (2019).

were divorced with a domestic support obligation, the pandemic opened the door to substantial litigation as to how to define a party's income given the uncertainty and distortions caused by government subsidies and unemployment.[6]

This surge in litigation is best explained by examining the amount of money being paid for spousal and child support on an annual basis. According to a 2013 United States Census Bureau study, 1.8 million people reported they paid alimony or spousal support to their ex-spouses or ex-partners.[7] The mean support provided was $9,958, with a total of $18.3 billion in spousal support payments made in 2013.[8] For child support, there were 6.4 million custodial parents entitled to receive child support as of April 2018.[9] Custodial parents were, on average, supposed to receive $5,519 annually.[10] In total, based on court orders entered, custodial parents were supposed to receive $30 billion in child support payments.[11]

Even prior to the onset of the COVID-19 pandemic, however, obligors sought ways to evade their support obligations to their ex-spouses and children.[12] Even though custodial parents were supposed to receive an aggregate of $30 billion in child support in 2017, they received only $18.6 billion, amounting to only 62.2% of the court-ordered amount.[13] Ex-spouses who do not receive the amounts of support owed to them are forced to either take the hit or attempt to file court petitions seeking enforcement and contempt findings against obligors.[14]

Further confounding these domestic support proceedings is an increasing trend of states using net, after-tax incomes to calculate domestic support

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6. *See* Colloquium, *Roundtable on the Pandemic Divorce: Family Law in the Time of COVID*, CRAIN'S CHI. BUS. (Nov. 2, 2020, 12:00 AM), https://www.chicagobusiness.com/crains-content-studio/roundtable-pandemic-divorce.

7. TIMOTHY GRALL, U.S. CENSUS BUREAU, REPORT NO. P70BR-158, SUPPORT PROVIDERS: 2013, at 4 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/demo/P70BR-158.pdf.

8. *Id.*

9. *See* TIMOTHY GRALL, U.S. CENSUS BUREAU, REPORT NO. P60-269, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2017, at 3 (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf.

10. *Id.* at 9.

11. *Id.* at 10.

12. *See generally id.*

13. *Id.*

14. *See, e.g.*, *Forcing a Parent to Pay Child Support*, ILL. LEGAL AID ONLINE, https://www.illinoislegalaid.org/legal-information/forcing-parent-pay-child-support (last visited June 17, 2022).

obligations.[15] Many states base their child support calculations on net income following delineated allowable deductions.[16] The intersection of domestic support statutes with taxable deductions and exceptions necessitates family courts' continued familiarity with how monies received by a party are taxed under the Internal Revenue Code.

Given the millions of people incentivized to seek support modifications in light of recent changes to their financial circumstances, and considering the already low percentage of people who actually pay the full amount of support owed, it is imperative that courts are equipped with a more uniform methodology to adjudicate the influx of modification requests in the wake of the COVID-19 pandemic. Part II of this Article provides a background for the primary forms of domestic support obligations and their treatment under the tax code. Part III explores several unique monetary fluctuations and relief resulting from the onset of the COVID-19 pandemic and performs a side-by-side comparison of judicial approaches versus treatment under the tax code. Finally, Part IV recommends building upon the existing interconnected framework between the tax code and domestic support statutes to help courts analyze when deviations from domestic support guidelines may be appropriate.

II. Background

A. Domestic Support Obligations

Domestic support obligations are generally defined as debts owed to a spouse, former spouse, or child for alimony, maintenance, or support.[17] There are two primary categories of domestic support obligations: (1) spousal maintenance, otherwise known as "spousal support" or "alimony," and (2) child support.[18]

1. Spousal Maintenance/Alimony

The purpose of spousal maintenance is to maintain the recipient's standard of living at the level enjoyed during the pendency of the parties'

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15. *See* Stephanie L. Tang, *2017-2018 Survey of Illinois Law: Family Law*, 43 S. ILL. U. L.J. 845, 858 (2018) (summarizing the shift to using "net income" for purposes of calculating spousal maintenance commencing January 1, 2019).

16. *See, e.g.*, FLA. STAT. § 61.30 (2021); HAW. REV. STAT § 576D-7 (2021); 750 ILL. COMP. STAT. 5/505 (2021); MINN. STAT. § 518A.35 (2021).

17. 11 U.S.C. § 101(14A).

18. *See id.*

marriage, after considering the recipient spouse's ability to pay.[19] There are three primary categories of maintenance: (1) temporary (fixed-term), (2) indefinite (permanent), and (3) reviewable/rehabilitative maintenance.[20] Temporary (fixed-term) maintenance "encourage[s] the party receiving the award to become self-sustaining by using diligence in procuring training and skills," looking at the probability the receiving spouse will be able to support him or herself.[21] Indefinite (permanent) maintenance is appropriate for "a spouse who is disadvantaged through marriage [to] be enabled to enjoy a standard of living commensurate with that during the marriage."[22] The purpose of rehabilitative maintenance is to facilitate self-sufficiency and independent lives following divorce.[23]

The formula for calculating maintenance varies widely across states, but many rely upon common factors adopted from the Uniform Marriage and Divorce Act. These factors include (1) the duration of marriage; (2) the age and emotional and physical condition of the parties; (3) the standard of living the parties enjoyed during the marriage; (4) the recipient spouse's noneconomic contributions to the marriage; (5) any impairments to the recipient party's earning capacity; and, in fault-based states, (6) "the fault, if any, of the parties."[24]

2. Child Support

The purpose of child support is to provide for the needs of the child, which include food, shelter, and clothing, but also school, activities, entertainment, camps, and health insurance.[25] There are two primary models of child support in the United States: the Percentage of Income Model (used in six states) and the Income Shares Model (used in forty-one

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19. Brett R. Turner, *The Effect of Artificially High and Low Marital Standards of Living on Spousal Support Awards*, 9 DIVORCE LITIG. 125, 125 (1997), 9 No. 7 DIVLIT 125 (Westlaw).

20. *See* Todd, *supra* note 5, at 368.

21. Sommerfield v. Sommerfield, 592 P.2d 771, 774 (Ariz. 1979).

22. Todd, *supra* note5, at 368 (alteration in original) (quoting *In re* Marriage of Schuster, 586 N.E.2d 1345, 1354 (Ill. App. Ct. 1992)).

23. *See* Joan M. Krauskopf, *Rehabilitative Alimony: Uses and Abuses of Limited Duration Alimony*, 21 FAM. L.Q. 573, 581–83 (1988).

24. Todd, *supra* note 5, at 369–70.

25. *Why Pay Child Support?*, OUR FAM. WIZARD, https://www.ourfamilywizard.com/blog/why-pay-child-support (last visited Apr. 12, 2022).

states).[26] In states that follow the Percentage of Income Model, courts apply a percentage certain to the obligor's income to determine the child support amount, without considering the obligor's parenting time or the recipient's income.[27] In states that follow the Income Shares Model, courts consider both the obligor and recipient spouse's incomes and use a statutory table to determine the percentage of the obligor's income based upon average costs to raise a child.[28] These states also commonly consider the number of overnights each parent exercises with the child in determining their child support obligation.[29]

3. Modification of Support

Domestic support obligations are typically entered contemporaneously and contained within the parties' final judgment for dissolution of marriage.[30] Domestic support obligations may generally be modified upon a substantial and material change in circumstances.[31] This change in circumstances needs to be more than just a temporary change, and many state statutes specify that the change must be continuing, with some states specifying how long the change must be expected to last.[32] If a court finds that a spouse is not entitled to receive spousal support at the time of the entry of judgment, that spouse is typically barred from seeking retroactive or future support in that court or any other court.[33] However, if maintenance is awarded, either the recipient or obligor spouse may seek to modify the

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26. *Child Support Guideline Models*, NAT'L CONF. STATE LEGISLATURES (July 10, 2020), http://www.ncsl.org/research/human-services/guideline-models-by-state.aspx.

27. *See* Margaret Bennett et al., *The New Income Shares Child Support Guidelines*, 104 ILL. BAR J. 26, 27 (2016).

28. *See id.* at 28.

29. *See, e.g.*, 750 ILL. COMP. STAT. 5/505 (2021); MINN. STAT. ANN. § 518A.36 (2021).

30. Todd, *supra* note 5, at 372.

31. *See, e.g.*, ALA. R. JUD. ADMIN. 32(A)(3); FLA. STAT. ANN. § 61.30(b) (2021); 750 ILL. COMP. STAT. § 5/510(a-5).

32. *See, e.g.*, ALA. R. JUD. ADMIN. 32(A)(3)(b) ("A party seeking a modification of child support must plead and prove that there has occurred a material change in circumstances that is substantial and continuing since the last order of child support."); NEB. SUP. CT. R. § 4-217 (providing that the circumstances must "have lasted 3 months and can reasonably be expected to last for an additional 6 months" to create a rebuttable presumption of a material change in circumstances).

33. *See* Charles F. Vuotto, Jr., *Alimony Waivers and Modifiability*, VUOTTO.COM, https://vuotto.com/alimony-waivers-and-modifiability/ (last visited Apr. 15, 2022).

award unless otherwise agreed by the parties or ordered by the court.[34] In contrast, a parent can almost always seek to modify child support if he or she meets the requisite statutory burden.[35]

B. Definition of "Income" Under the Federal Tax Code

Following the Sixteenth Amendment to the U.S. Constitution, which gives Congress the power to tax income "from whatever source derived," the federal tax code provides an all-inclusive definition of income.[36] For income tax purposes, "gross income" means "all income from whatever source derived, unless excluded by law."[37] While certain items, such as compensation and interest, are specifically included in gross income, the law is clear that these specific inclusions are not an exhaustive list.[38] Regulations further clarify that gross income is income realized in any form, whether money, property, or services.[39] In sum, based on law and judicial doctrine, taxpayers recognize gross income when (1) they receive an economic benefit, (2) the income is realized, and (3) no law allows for an exclusion or deferral.[40] To arrive at taxable income, taxpayers are then able to reduce gross income by specifically allowed deductions.[41]

Congress designed the tax code to raise revenue for the government, yet it also contains provisions based on certain policy considerations, such as promoting home ownership or higher education.[42] Thus, although the taxpayer has received income and has the funds to pay tax, the law excludes those funds from income. On the other hand, although the realization principle ensures that income is only recognized when a transaction with a measurable change in property rights has occurred, the inclusive definition of income by any form of receipt can lead to instances where the taxpayer

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34. Lina Guillen, *Changing the Amount of Spousal Support*, DIVORCENET, https://www.divorcenet.com/resources/divorce/spousal-support/changing-amount-spousal-support.htm (last visited Apr. 15, 2022).

35. *See generally* 1 AM. JUR. 2D *Proof of Facts* § 1 (1974), 1 AMJUR POF 2d 1 (Westlaw, database updated Apr. 2022).

36. *See generally* U.S. CONST. amend. XVI.

37. 26 C.F.R. § 1.61-1(a) (2022); *see also* I.R.C § 61(a).

38. I.R.C. § 61(a)(1) (compensation); *id.* § 61(a)(4) (interest).

39. 26 C.F.R. § 1.61-1(a).

40. *See, e.g.*, Sproull v. Comm'r, 16 T.C. 244 (1951), *aff'd per curiam*, 194 F.2d 541 (6th Cir. 1952) (illustrating the economic benefit doctrine).

41. I.R.C. § 63(a).

42. *See* I.R.C. § 121 (excluding gain on sale of principal residence from gross income); *id.* § 117 (excluding qualified scholarships from gross income).

has income but no funds or wherewithal to pay tax on that income.[43] In sum, "income" under the federal tax code may exclude items an individual typically considers an increase in wealth, while also including items that a typical individual may overlook. This contrasts the broader definition of "income" for domestic support purposes, where the primary consideration for courts is what monies are available to parents to help support the children.

C. The Tax Code and Domestic Support Obligations

The tax code includes various provisions related to marriage and dependents, as well as to divorce or separation.[44] However, a significant change in the tax treatment of domestic support obligations occurred due to the Tax Cuts and Jobs Act of 2017 ("TCJA").[45]

1. Spousal Maintenance/Alimony

Prior to the TCJA, the recipient of alimony included the payment received in gross income,[46] and the payor of the alimony was entitled to a deduction equal to the amount of alimony paid.[47] This had the effect of shifting income from one former spouse to the other. To be considered alimony under the tax code, a payment had to be a transfer of cash (1) made under a written separation agreement or divorce decree; (2) not designated in the separation agreement or divorce decree as a payment other than alimony; (3) made when the spouses no longer live together; and (4) discontinued after the recipient's death.[48] Due to the TCJA, for separation agreements or divorce decrees executed after December 31, 2018, alimony payments are no longer included in the income of the recipient and are not deductible by the payor.[49] In short, there is no longer any income tax effect of an alimony payment.

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43. *See, e.g.*, I.R.C § 74 (including, specifically, prizes or awards in gross income).

44. *See, e.g.*, I.R.C. § 1 (providing for separate tax treatment depending on a person's marital status).

45. *See generally* Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, 131 Stat. 2054.

46. I.R.C. § 71, *repealed by* Tax Cuts and Jobs Act § 11051(b)(1)(B), 131 Stat. at 2089.

47. I.R.C. § 215, *repealed by* Tax Cuts and Jobs Act § 11051(a), 131 Stat. at 2089.

48. *See* I.R.C. § 71(b), *repealed by* Tax Cuts and Jobs Act § 11051(b)(1)(B), 131 Stat. at 2089.

49. Tax Cuts and Jobs Act § 11051(b)(1)(B), (c)(1), 131 Stat. at 2089–90.

2. Child Support

Although they may be set by a divorce or separation agreement, child support payments do not meet the definition of alimony for tax purposes.[50] Thus, these payments are excluded from income by the recipient and are not deductible by the payor, regardless of the date of the divorce or separation agreement.[51] Therefore, TCJA's changes for alimony payments did not directly impact these child support payments.[52] However, the TCJA did affect other tax provisions for families with children.[53]

For divorced or separated parents, only one parent can be the custodial parent for income tax purposes.[54] This is the parent that spends the most days with the child during the year.[55] The custodial parent has the right to file as head of household, claim the child as a dependent, and claim any dependent tax credits.[56] The custodial parent can release his or her claim of the dependent to the noncustodial parent by signing Form 8332.[57] However, this only allows the noncustodial parent to claim the dependent and any related tax credit; the custodial parent still retains the right to file as head of household.[58] Prior to the TCJA, whichever parent claimed the child as a dependent was entitled to deduct a dependent exemption on his or her

50. I.R.C. § 71(c), *repealed by* Tax Cuts and Jobs Act § 11051(b)(1)(B), 131 Stat. at 2089.

51. *See* INTERNAL REVENUE SERV., PUBL'N 504, DIVORCED OR SEPARATED INDIVIDUALS 16 (Jan. 31, 2022), https://www.irs.gov/pub/irs-pdf/p504.pdf ("A payment that is specifically designated as child support or treated as specifically designated as child support under your divorce or separation instrument isn't alimony. . . . Child support payments aren't deductible by the payer and aren't taxable to the payee.").

52. *See generally* I.R.C. § 71(c), *repealed by* Tax Cuts and Jobs Act § 11051(b)(1)(B), 131 Stat. at 2089.

53. *See How Did the TCJA Change Taxes of Families with Children?*, TAX POL'Y CTR.: BRIEFING BOOK, https://www.taxpolicycenter.org/briefing-book/how-did-tcja-change-taxes-families-children (last visited Apr. 15, 2022) [hereinafter *How Did the TCJA Change Taxes*].

54. *See* I.R.C. § 152(e)(4).

55. *Id.*

56. *See generally id.* § 152(c)(4)(B)(i) (granting to the custodial parent the right to claim a qualifying child as a dependent).

57. *See id.* § 152(e)(2) (permitting the custodial spouse to sign away the dependent right); *About Form 8332, Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent*, IRS, https://www.irs.gov/forms-pubs/about-form-8332 (Dec. 23, 2021).

58. *See* I.R.C. § 2(b)(1)(A)(i) (explaining that "head of household" with respect to a qualifying child is defined independent of I.R.C. § 152(e)).

return, reducing taxable income by $4,050 per dependent in 2017.[59] The TCJA eliminated the exemption by reducing the amount to $0 for taxable years 2018 through 2025.[60] However, the TCJA increased the maximum child tax credit from $1,000 to $2,000 per child under age seventeen and added a $500 dependent tax credit for children and other dependents ineligible for the $2,000 child tax credit.[61]

D. Government Assistance to Individuals and Businesses in Response to the COVID-19 Pandemic

In response to the COVID-19 pandemic, Congress passed three major acts governing the appropriation of government funds to help ameliorate the economic impact felt across the United States.[62] The first of these acts was the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, signed by President Donald Trump on March 27, 2020.[63] The CARES Act was a $2 trillion fund allocation plan that established a $367 billion loan and grant program to support small businesses; expanded unemployment benefits to include furloughed workers, gig workers, and freelancers; and provided the first round of government stimulus checks.[64] Specifically, the CARES Act provided for "[d]irect payments to families of $1,200 per adult and $500 per child for households making up to $75,000."[65]

On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act ("CAA"), which allocated another round of Paycheck Protection Program ("PPP") loans and government stimulus

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59. *IRS Tax Tip 2018-20: Five Things to Remember About Exemptions and Dependents for Tax Year 2017*, IRS (Feb. 7, 2018), https://www.irs.gov/newsroom/five-things-to-remember-about-exemptions-and-dependents-for-tax-year-2017; *see also* I.R.C. § 151(c) (establishing the exemption for dependents); *id.* § 151(d)(4) (indexing the exemption for inflation).

60. I.R.C. § 151(d)(5); Tax Cuts and Jobs Act of 2017, Pub. L. 115-97, § 11041(a)(2), 131 Stat. 2054, 2082.

61. *See How Did the TCJA Change Taxes*, *supra* note 53; Tax Cuts and Jobs Act § 11022(a), 131 Stat. at 2073–74.

62. U.S. DEP'T OF THE TREASURY, TREASURY CORONAVIRUS RELIEF, RESPONSE, AID, AND RECOVERY PROGRAMS: CONGRESSIONAL BUDGET JUSTIFICATION AND ANNUAL PERFORMANCE PLAN AND REPORT FY 2023, at 4 (2022), https://home.treasury.gov/system/files/266/07A.-COVID-FY-2023-CJ.pdf (describing congressional response to the COVID-19 pandemic).

63. *Coronavirus Aid, Relief, and Economic Security (CARES) Act*, INVESTOPEDIA (Oct. 31, 2021), https://www.investopedia.com/coronavirus-aid-relief-and-economic-security-cares-act-4800707.

64. *Id.*

65. *Id.*

checks, this time $600 per person, including dependents age sixteen and under.[66]

The final major act was the American Rescue Plan Act of 2021 ("COVID-19 Stimulus Package"), effective March 11, 2021.[67] This Act allocated nearly $2 trillion to help struggling individuals and business owners get back on their feet.[68] Specifically, the plan allocated stimulus payments of $1,400 to individuals earning $75,000 or less or couples earning $150,000 or less annually, in addition to the previously distributed stimulus payments.[69] The Act further extended Pandemic Unemployment Assistance benefits and Federal Pandemic Unemployment Compensation payments.[70] For parents, the Act further increased the Child Tax Credit maximum from $2,000 to $3,000 annually for each child ages six to seventeen and to $3,600 for each child under six.[71] For business owners, the Act created the Restaurant Revitalization Fund with $28.6 billion in pandemic assistance grants and allocated an additional $7.25 billion towards PPP loans.[72] Finally, the Act extended the 15% increase in the Supplemental Nutrition Assistance Program ("SNAP") benefits.[73]

III. Analysis: Judicial/Legislative Versus Tax Code Approaches

A side-by-side comparison of existing approaches employed by state judiciaries and legislatures with the federal tax code demonstrates the differences in how support obligations and income determinations are analyzed as to the following common areas of COVID-19 pandemic relief: (1) unemployment income, (2) early withdrawals from retirement accounts, (3) distributed retained earnings, (4) government stimulus and advance child tax credit, and (5) PPP loans.

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66. *See* Jim Probasco, *The Consolidated Appropriations Act of 2021: What's in It, What's Not*, INVESTOPEDIA (Dec. 11, 2021), https://www.investopedia.com/congress-agrees-on-second-stimulus-here-s-what-s-in-it-and-what-s-not-5093226.

67. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4.

68. Erik Haagensen, *American Rescue Plan (Biden's $1.9 Trillion Stimulus Package)*, INVESTOPEDIA (May 24, 2021), https://www.investopedia.com/american-rescue-plan-definition-5095694.

69. *Id.*

70. *Id.*

71. *See id.*

72. *Id.*

73. *Id.*

A. Treatment of Unemployment Income

The shutdown of a large percentage of businesses meant many Americans were terminated from their employment and started receiving unemployment income.[74] The number of unemployed Americans shot up from 6.2 million to 20.5 million in May of 2020, a larger increase than during the Great Recession.[75] Luckily, as of summer 2022, the job market is reopening and companies are seeking to hire new employees.[76] Additionally, individuals have reported that employers have demonstrated a new willingness to hire individuals who may have been jobless for an extended period of time, previously seen as a "red flag" in hiring.[77]

However, even as businesses began reopening, many individuals continued to rely on unemployment income as their primary or sole source of income.[78] Following the pandemic, the United States saw a slow move of unemployed workers re-entering the workforce, and early numbers were below projected expectations.[79] There are many differing views on the reasons behind individuals not taking jobs following expiration of their unemployment benefits, ranging from unsustainable professional lives,

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74. Andrew Stettner & Elizabeth Pancotti, *1 in 4 Workers Relied on Unemployment Aid During the Pandemic*, CENTURY FOUND. (Mar. 17, 2021), https://tcf.org/content/commentary/1-in-4-workers-relied-on-unemployment-aid-during-the-pandemic/?agreed=1.

75. Rakesh Kochhar, *Unemployment Rose Higher in Three Months of COVID-19 Than It Did in Two Years of the Great Recession*, PEW RSCH. CTR. (June 11, 2020), https://www.pewresearch.org/fact-tank/2020/06/11/unemployment-rose-higher-in-three-months-of-covid-19-than-it-did-in-two-years-of-the-great-recession/.

76. *See, e.g.*, Sydney Ember, *Jobless for a Year? That Might Be Less of a Problem Now.*, N.Y. TIMES (Dec. 17, 2021), https://www.nytimes.com/2021/12/15/business/economy/employment-resume-gaps.html.

77. *Id.*

78. Stettner & Pancotti, *supra* note 74 (reporting a halt in the decline of unemployment claims at the end of 2020 due to a pandemic surge); John C. Goodman, *Why Americans Are Not Anxious to Get Back to Work*, FORBES (Oct. 12, 2021), https://www.forbes.com/sites/johngoodman/2021/10/12/why-americans-are-not-anxious-to-get-back-to-work/?sh=57deea6340b7 (discussing the high number of unemployment claims in the fall of 2021 despite record-high job openings).

79. Eli Rosenberg, *U.S. Picked Up Just 266,000 Jobs in April, Well Below Expectations as Economy Struggles to Rebound*, WASH. POST (May 7, 2021, 4:33 PM EDT), https://www.washingtonpost.com/business/2021/05/07/april-jobs-report-economy-unemployment/. As of April 2022, unemployment rates had declined closer to pre-pandemic figures. Milton Ezrati, *Economy Still Strong but Slowing*, FORBES (Apr. 4, 2022), https://www.forbes.com/sites/miltonezrati/2022/04/04/economy-still-strong-but-slowing/?sh=7e28f95676f3.

insufficient salary, lack of child care, and poor work-life balance.[80] Whatever the reason, it is necessary to understand what relief spouses have if an obligor is, in fact, voluntarily unemployed without a justifiable reason and how unemployment benefits impact a support calculation.

1. Judicial Approaches

a) Imputation of Income

To prevent voluntarily unemployed or underemployed obligors from skirting their support obligations by solely relying upon unemployment benefits, all states have case law or have implemented statutes or regulations that allow a court to impute income to the obligor.[81] Imputation of income is based on the trial court's determination of potential income, looking at employment potential and probable earnings levels.[82] Case precedent and state statutes direct courts to consider factors that include prevailing job opportunities, earnings levels within the community, and a parent's work history, educational background, ownership of a substantial non-income producing asset, and personal qualifications.[83]

However, courts have limited imputation of income to cases where the evidence indicates the obligor has job opportunities to earn the income imputed to him. In the 2021 Illinois case of *In re Marriage of Sinha*, the husband testified that he managed three businesses during the marriage: an Amazon store and two eBay stores, which he ran by purchasing items in cash and reselling them.[84] Although he had a medical degree from India, the husband testified he could not pass the United States board examinations despite multiple attempts.[85] At trial, the court imputed $125,000 to the husband based on his 2015 income.[86] On appeal, however, the appellate court reversed, finding there was no evidence presented that the husband

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80. Adam Chandler, *No, Unemployment Benefits Don't Stop People from Returning to Work*, WASH. POST (May 13, 2021, 1:30 PM EDT), https://www.washingtonpost.com/outlook/2021/05/13/unemployment-benefits-minimum-wage-work/; Tami Luhby, *More People Looking for -- but Not Taking -- Jobs After Their Unemployment Benefits End Early*, CNN (June 28, 2021, 8:45 AM ET), https://www.cnn.com/2021/06/28/politics/unemployment-benefits-jobs-workers/index.html.

81. *Child Support Guideline Models*, *supra* note 26.

82. *See, e.g.*, 750 ILL. COMP. STAT. 5/505 (2021).

83. *See, e.g.*, *id.*; Ramdas v. Ramdas, 108 N.Y.S.3d 347, 348 (N.Y. App. Div. 2019).

84. *In re* Marriage of Sinha, 2021 IL App (2d) 191129, ¶ 18.

85. *Id.* ¶ 44.

86. *Id.* ¶ 23.

could actually obtain a job earning $125,000 a year.[87] The appellate court found the trial court merely "relied on speculation" rather than evidence of the husband's current job opportunities.[88] Similarly, in the 2020 New York case of *Pilkington v. Pilkington*, the record did not support the amount of income imputed to the plaintiff.[89] In *Pilkington*, the lower court set child support based on an imputed income to the plaintiff, factoring in contributions from his fiancée and income he earned from side jobs.[90] On appeal, however, the court found that the parties' documents were inadequate to determine the amounts earned from these two sources, therefore concluding the matter should be remitted back to the lower court for hearing.[91]

b) Minimum and Zero Income Child Support Orders

Even in cases where a party's sole income is through unemployment benefits or, once the benefits expire, is zero dollars, many states still have a minimum- or zero-income child support order.[92] To first protect the obligor, many states that employ the Income Shares Model of child support incorporate a "Self-Support-Reserve" ("SSR") to "ensure that the obligated parent has sufficient income after payment of the obligation amount to live at least at a subsistence level."[93] The SSR is either disregarded as income to the obligor or is used to adjust the child support award so that the parent is able to meet his or her basic needs.[94] States set the SSR at a percentage based on either the federal poverty guidelines or the state's minimum wage.[95] After contemplation of the SSR, these states also provide a rebuttable presumption of the minimum child support amount to be paid by the obligor even if they are unemployed.[96]

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87. *Id.* ¶ 44.

88. *Id.*

89. Pilkington v. Pilkington, 127 N.Y.S.3d 523, 525 (N.Y. App. Div. 2020).

90. *Id.* at 525–26.

91. *Id.*

92. *See, e.g.*, COLO. REV. STAT. § 14-10-115(7)(a)(II)(D) (2021); N.M. STAT. ANN. § 40-4-11.1(M) (2021); N.Y. DOM. REL. LAW § 240(1-b)(d) (McKinney 2022).

93. JANE VENOHR, CTR. FOR POL'Y RSCH., REVIEW OF THE NEW MEXICO CHILD SUPPORT GUIDELINES 17 (Sept. 9, 2018), https://www.hsd.state.nm.us/wp-content/uploads/FileLinks/22ddd455f2de49089689e333736004e7/Review_of_the_New_Mexico_Child_Support_Guidelines.pdf.

94. *See id.*

95. *Id.* at 17–18.

96. *See id.* at 18.

A two-state comparison illustrates how states incorporate an SSR in practice. In New Hampshire, the SSR is currently set at 115% of the Federal Poverty Line.[97] If an obligor's gross income is less than the SSR, the court must enter a fifty-dollar minimum support order.[98] If the obligor's income is greater than the SSR, but payment of the support—as calculated using the support obligation schedule—would put the obligor's income below the SSR, the child support guidelines provide that the court should order the difference between the SSR and the obligor's adjusted gross income, no less than fifty dollars per month.[99] Notably, the court must find the obligor's income is not voluntarily below the SSR.[100]

In contrast, New York's SSR, set on an annual basis, is 135% of the Federal Poverty Line.[101] New York courts employ a multi-step low-income adjustment method. First, a "preliminary" child support order is determined based on the custodial and non-custodial parents' combined adjusted gross income.[102] Courts then calculate the support amount by multiplying this income by a percentage based on the number of children subject to the support order.[103] The SSR test compares the calculated support amount with the SSR, the amount the obligor (the non-custodial parent) would owe if the income available for child support was reduced to 135% of the Federal Poverty Line.[104] The court then orders the lower amount, with a minimum of fifty dollars per month.[105]

2. Tax Code

Even with the all-inclusive definition of income, the tax code specifically states that, "[i]n the case of an individual, gross income includes unemployment compensation."[106] Most states tax unemployment

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97. N.H. REV. STAT. ANN. § 458-C:2(X) (2022).

98. *Id.* § 458-C:2(V).

99. *Id.* § 458-C:3(IV)(b); *id.* § 458-C:2(V).

100. *Id.* § 458-C:3(IV)(a).

101. *Child Support Standards*, N.Y. STATE, https://www.childsupport.ny.gov/dcse/child_support_standards.html (last visited May 14, 2022) (establishing an SSR of $18,347 with the Federal Poverty Line at $13,590).

102. Jody Gerber & Robert H. Moses, *Child Support*, N.Y. CITY BAR: LEGAL REFERRAL SERV. (July 2020), https://www.nycbar.org/get-legal-help/article/family-law/child-support/.

103. *Id.*

104. *Child Support Calculator*, N.Y.C. HUMAN RES. ADMIN., https://www1.nyc.gov/site/hra/help/child-support-calculator.page (last visited May 14, 2022).

105. *Id.*

106. I.R.C. § 85(a).

compensation as well.[107] Although unemployment compensation has been fully taxable at the federal level since the Tax Reform Act of 1986, average taxpayers may not realize this if they have not previously received these benefits.[108] Due to the COVID-19 pandemic, however, millions of Americans began receiving unemployment benefits, many for the first time. This prompted the IRS to issue a news release in August 2020 reminding taxpayers of the need to withhold tax from their benefits to avoid owing tax when filing their tax returns.[109] Subsequently, in March 2021, in response to the challenges of the pandemic, the American Rescue Plan Act suspended the tax on a portion of unemployment compensation.[110] For the 2020 tax year, taxpayers could exclude up to $10,200 of unemployment compensation from income if their adjusted gross income was less than $150,000.[111] For joint returns, each spouse could exclude up to $10,200 of benefits received.[112]

B. Retirement Account Withdrawals as Income

A 2020 Pew Research study found that a third of Americans had withdrawn monies from a savings or retirement account to pay their bills since the start of the pandemic outbreak.[113] Specifically, 46% of adults who reported that someone in their household had either been laid off or experienced a pay cut because of the outbreak had withdrawn monies from their savings or retirement accounts.[114] Courts have traditionally treated early withdrawals from retirement accounts as income to the withdrawing party, unless the party could show the monies withdrawn were previously assessed as income to them for child support purposes.[115] However, the

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107. Michelle Singletary, *Yes, Your Unemployment Benefit Is Taxable Income. But It Shouldn't Be.*, WASH. POST (Aug. 28, 2020), https://www.washingtonpost.com/business/2020/08/28/unemployment-benefits-are-taxable/.

108. *Id.*

109. I.R.S. News Release IR-2020-185 (Aug. 18, 2020).

110. American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 9042(a), 135 Stat. 4, 122 (codified at I.R.C. § 85(c)).

111. *Id.*

112. *Id.*

113. Kim Parker et al., *Economic Fallout from COVID-19 Continues to Hit Lower-Income Americans the Hardest*, PEW RSCH. CTR. (Sept. 24, 2020), https://www.pewresearch.org/social-trends/2020/09/24/economic-fallout-from-covid-19-continues-to-hit-lower-income-americans-the-hardest/.

114. *Id.*

115. *See, e.g.*, *In re* Marriage of Lindman, 824 N.E.2d 1219, 1226 (Ill. App. Ct. 2005).

CARES Act removed some of the tax consequences of these withdrawals, effectively freeing up more available cash to satisfy domestic support obligations.[116]

1. Judicial Survey

a) Michigan: Borowsky v. Borowsky

In *Borowsky v. Borowsky*, a Michigan court addressed whether $86,000 that a father withdrew as "hardship withdrawals" following his termination from employment should be considered income for purposes of calculating his child support obligation.[117] Regarding distributions from retirement accounts, the Michigan Child Support Formula ("MCSF") provided generally that distributions from Individual Retirement Accounts ("IRAs") be treated as income for purposes of calculating child support.[118] However, the MCSF provided an exception to avoid double counting where, if a payor had retired and received payments from an IRA, income that was previously assessed for child support should be excluded from the payor's income.[119] Here, as the father had not yet retired, the court found it was appropriate to include the withdrawals in the father's income regardless of the circumstances surrounding the withdrawals.[120]

b) Alaska: Mitchell v. Mitchell

In *Mitchell v. Mitchell*, the Supreme Court of Alaska affirmed the trial court's ruling that a one-time withdrawal from an IRA counted as part of the father's income.[121] The father used this withdrawal to pay for a primary residence in Arizona.[122] To avoid double counting, the court emphasized that the question hinged upon whether the withdrawals were previously counted as income for the purposes of calculating child support (i.e., prior voluntary contributions to a retirement account).[123] Because the father was unable to prove the monies withdrawn from his retirement account were

116. *See generally Coronavirus Relief for Retirement Plans and IRAs*, IRS, https://www.irs.gov/newsroom/coronavirus-relief-for-retirement-plans-and-iras (July 21, 2021).

117. Borowsky v. Borowsky, 733 N.W.2d 71, 74, 82 (Mich. Ct. App. 2007).

118. *Id.* at 82 (citing FRIEND OF THE CT. BUREAU, 2004 MICHIGAN CHILD SUPPORT FORMULA MANUAL § 2.01(F)(13) (2004) [hereinafter 2004 MCSF]).

119. *Id.* (citing 2004 MCSF, *supra* note 118, § 2.06(A)).

120. *Id.*

121. Mitchell v. Mitchell, 370 P.3d 1070, 1075, 1084 (Alaska 2016).

122. *Id.* at 1074.

123. *Id.* at 1075 (citing ALASKA R. CIV. P. 90.3 cmt. III.A).

previously counted as income for purposes of calculating his child support obligation, the court found the withdrawal was now properly included in his income for purposes of calculating support.[124] The court explained that, although the lump-sum withdrawal was appropriately included in the father's income, it may have been appropriate for the court to order a time-limited adjustment or deviation of child support to account for this one-time event.[125]

2. Tax Code

Under the all-inclusive definition of income, for tax purposes there is no consideration of the rarity of income.[126] For example, even a prize such as a one-time lottery win is specifically included in income.[127] In general, any amount distributed from a retirement plan is included in gross income.[128] An exception to this exists for "qualified distributions" from Roth accounts, which must occur after an individual reaches fifty-nine-and-a-half years of age.[129] Early distributions from retirement plans are also subject to an additional 10% tax as penalty.[130] Under the CARES Act, the government removed some of the obstacles to withdrawing funds from retirement plans for those affected by COVID-19.[131] Individuals diagnosed with COVID-19, or suffering financially due to work disruptions stemming from COVID-19, were eligible to withdraw up to a combined $100,000 limit from all plans as a coronavirus-related distribution.[132] While these withdrawals were still included in taxable income, taxpayers could elect to pay the tax over three years, instead of entirely in the year of distribution, and were not subject to the additional 10% penalty.[133]

C. Retained Earnings as Income

Whether a business's retained earnings should be included in an obligor shareholder's income for purposes of calculating a domestic support obligation was a frequently litigated issue, even prior to the COVID-19

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124. *Id.* at 1079–80, 1084.
125. *Id.*
126. *See* I.R.C. § 61(a).
127. *See* I.R.C. § 74(a).
128. I.R.C. § 408(d)(1).
129. I.R.C. § 408A(d)(1)–(2).
130. I.R.C. § 72(t)(1).
131. *Coronavirus Relief for Retirement Plans and IRAs*, *supra* note 116.
132. *Id.*
133. *Id.*

pandemic. A business's retained earnings are profits earned by the company minus any dividends paid out to shareholders.[134] One way business-owner spouses may try to manipulate their income for support purposes is by contributing monies into the company's retained earnings rather than taking them as distributions.[135] With businesses facing huge monetary losses during the pandemic, many shareholders did not take distributions due to the deficiency in operating cash.[136] On the flip side, some business owners were forced to dip into their retained earnings and take distributions to pay both personal and increased business expenses.[137]

1. Judicial Survey

In reviewing the extent to which a company's retained earnings are includable in a shareholder parent's income, the foremost consideration is whether the shareholder can direct distributions.[138] To determine the amount of control a shareholder parent holds, courts should consider several factors:

> 1) comparison of the amount of retained income versus the parent/obligor's gross income and percentage of ownership; 2) a history or pattern of past retained income; 3) the company's need to retain income to "maintain or increase past or current levels of income production as opposed to unnecessary premature, unrelated or overly aggressive expansion of business,"; 4) whether the retained income is acquired from the current year's profits or out of past year(s)' savings; 5) comparison of the ordinary rate of return for a similar investment; 6) the ability to receive favorable or fictitious loans (constructive distributions)

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134. Jason Fernando, *Retained Earnings*, INVESTOPEDIA (Apr. 3, 2022), https://www.investopedia.com/terms/r/retainedearnings.asp.

135. *See* Nathan B. Lewis, *Child Support and the "Retained Earnings" Argument*, BOWMAN LEWIS L. (2018), https://www.lrattorney.com/arkansas-child-support-lawyers-retained-earnings/.

136. *See* Robin Wigglesworth et al., *How Covid-19 Sparked a Dividend Drought for Investors*, FIN. TIMES (Sept. 9, 2020), https://www.ft.com/content/2719966c-b228-4300-bdc0-dcbe2f7050fd.

137. *See, e.g.*, Joyanne Pursaga, *Transit Steers Retained Earnings into Pandemic Pothole*, WINNIPEG FREE PRESS (Oct. 7, 2020, 3:06 PM), https://www.winnipegfreepress.com/local/transit-steers-retained-earnings-into-pandemic-pothole-572666722.html.

138. *See, e.g.*, Roberts v. Roberts, 666 N.W.2d 477, 483 (S.D. 2003) (holding that if a shareholder can control a distribution, the court will deem the distribution constructively received for purposes of the child support statute).

> from the company; and 7) "any other factor that bears on the issue of whether the obligor is manipulating his or her income in an effort to avoid the proper payment of child support."[139]

Courts consider these non-exhaustive factors in addition to the totality of the circumstances to determine whether a company's retained earnings should be considered to calculate income for a domestic support obligation.[140]

a) South Dakota: Roberts *and* Nace

The Supreme Court of South Dakota addressed whether retained earnings should be included in income in two seminal cases: *Roberts v. Roberts*[141] and *Nace v. Nace*.[142] In *Roberts*, the court answered in the negative, finding the husband neither received the income nor had any control over the distribution of retained earnings.[143] The only evidence supporting inclusion of the retained earnings in the husband's income was that it was reported on the husband's federal tax return.[144] The court found, however, that the husband did not actually "receive" any income; rather, he merely got stuck paying a distributed federal income tax liability on the retained income that he was not entitled to spend.[145]

In *Nace*, the court found that although a substantial portion of the obligor's company's income was retained, it paid a bonus to the obligor, as well as paying off the obligor's federal income tax liability.[146] The referee acknowledged the bonus was not paid directly to obligor.[147] However, the referee found that the obligor "received" the payment because it reduced his accounts receivable due to the company for a loan used to purchase his percentage share of the company.[148] The referee incorrectly included the bonus in obligor's income for purposes of calculating support without making the requisite finding that the obligor had control over the bonus.[149]

139. Nace v. Nace, 754 N.W.2d 820, 823 (S.D. 2008) (internal citations omitted).
140. *Id.* at 823–24.
141. *Roberts*, 666 N.W.2d at 480–84.
142. *Nace*, 754 N.W.2d at 823–24.
143. *Roberts*, 666 N.W.2d at 483–84.
144. *Id.*
145. *Id.* at 484.
146. *Nace*, 754 N.W.2d at 822.
147. *Id.*
148. *Id.* at 822–23.
149. *Id.* at 824.

Accordingly, the court remanded the case back to the referee for this requisite finding.[150] *Nace* reminds courts that it is not sufficient to simply include retained earnings in a party's income, but rather, the court must provide a basis indicating how the party could receive and use said monies.[151]

b) Vermont: Clark v. Clark *and Missouri:* Boudreau v. Benitz

In *Clark v. Clark*, Justice Johnson of the Supreme Court of Vermont addressed the possibility of imputing income to parents in the amount of the underearned interests when they are shareholders able to control their own distributions.[152] In her own survey of other jurisdictions, Justice Johnson noted that appellate courts in North Dakota, Florida, Indiana, Missouri, and New York had found it appropriate to impute income to parents with significant control over earnings of a corporation, where the corporation had retained earnings that the parent could otherwise distribute to themselves as salary.[153]

To effectuate imputation of income to a shareholder parent, Johnson cited with approval the Missouri case of *Boudreau v. Benitz*.[154] In *Boudreau*, the father/payor owned 100% of a corporation with his new wife.[155] The Missouri Court of Appeals affirmed the trial court's decision to pierce the corporate veil, attributing to the father the amounts listed as retained earnings in the corporation and a "loan from the stockholder" (the father) on a corporate balance sheet.[156] In its analysis, the court found that the father paid various personal expenses using the corporation and that the business expenses listed were excessive.[157]

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150. *Id.*

151. *See id.* at 823–24.

152. Clark v. Clark, 779 A.2d 42, 49 (Vt. 2001) (Johnson, J., concurring in part and dissenting in part).

153. *Id.* at 52 (citing Bleth v. Bleth, 607 N.W.2d 577, 579 (N.D. 2000); Kelley v. Kelley, 656 So. 2d 1343, 1345 (Fla. Dist. Ct. App. 1995); Merrill v. Merrill, 587 N.E.2d 188, 191 (Ind. Ct. App. 1992); Boudreau v. Benitz, 827 S.W.2d 732, 734 (Mo. Ct. App. 1992); Buley v. Buley, 530 N.Y.S.2d 697, 698 (N.Y. App. Div. 1988)).

154. *Id.* at 52–53.

155. *Boudreau*, 827 S.W.2d at 734.

156. *Id.*

157. *Id.*

2. Tax Code

The federal tax code imposes income tax only on individuals and corporations.[158] For all other business entities, such as partnerships, each partner pays tax on his or her distributive share of the business income.[159] Whether or not a partner receives a distribution is not taken into consideration when determining the distributive share of partnership income.[160] In addition, provided that a distribution does not exceed a partner's basis, any distribution is not included in income.[161] In sum, accumulating earnings without distributions has no income tax consequence for flow-through entities, as each owner pays tax on their distributive share of income each year, regardless of distribution.[162]

However, because corporations pay tax on income at the corporate level, the individual shareholders only pay tax when the corporation distributes earnings as dividends.[163] The tax code imposes an accumulated earnings tax if the retained earnings are allowed to accumulate beyond the reasonable needs of the business, unless the corporation can prove the retention is not for the purpose of avoiding income tax with respect to shareholders.[164] Generally, $250,000 of accumulated earnings is presumed reasonable, but additional accumulation may be subject to an accumulated earning tax of 20% if deemed unreasonable, such as due to a lack of regular distributions to shareholders or distributions classified as personal loans.[165]

D. Government Stimulus Checks/Child Tax Credit

As outlined above, the federal government issued three rounds of economic impact payments in response to the COVID-19 pandemic.[166] In March 2020, the CARES Act provided for up to $1,200 per adult and $500 per qualifying child under age seventeen, with payments reduced for individuals with an adjusted gross income ("AGI") greater than $75,000

158. I.R.C. § 1 (individuals); *id.* § 11 (corporations).

159. *See, e.g.*, I.R.C. § 701 (stating that partners, not the partnership, are subject to tax).

160. INTERNAL REVENUE SERV., PUBL'N 541, PARTNERSHIPS (Mar. 2022), https://www.irs.gov/pub/irs-pdf/p541.pdf.

161. *See* I.R.C. § 731(a)(1).

162. *See id.*

163. *See* I.R.C. § 301(c).

164. I.R.C. § 533(a); INTERNAL REVENUE SERV., PUBL'N 542, CORPORATIONS (Jan. 2022), https://www.irs.gov/pub/irs-pdf/p542.pdf [hereinafter I.R.S. PUBL'N 542].

165. I.R.S. PUBL'N 542, *supra* note 164.

166. *See supra* note 62.

and for married couples filing jointly with an AGI greater than $150,000.[167] In late December 2020, the Consolidated Appropriations Act authorized a second payment of up to $600 per adult and $600 per qualifying child under age seventeen, with the same AGI thresholds as under the CARES Act.[168] Lastly, in March 2021, the American Rescue Plan Act authorized a third payment of up to $1,400 per adult and $1,400 for each qualifying dependent (regardless of age), with the same AGI thresholds as the previous two payments.[169]

The Child Tax Credit was allocated to American taxpayers to help support their families.[170] In addition to the economic impact payments, the American Rescue Plan Act increased the Child Tax Credit to a maximum of $3,000 a year for each child ages six to seventeen and to a maximum of $3,600 for each child under six, with payments sent via direct deposit.[171] To help families with ongoing costs, the Act provides for one year of advanced credit payments equal to 50% of the estimated amount, instead of claiming the full credit when they file their taxes.[172]

1. Judicial Survey

a) Considerations of One-Time Payments in Income

Typically, income in domestic relations cases is defined as income from all sources.[173] However, courts vary in how they consider one-time payments (e.g., a stimulus payment or substantial commission) versus

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167. *Economic Impact Payments*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/economic-impact-payments (last visited May 16, 2022).

168. Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, § 271, 134 Stat. 1182, 1965.

169. *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 6428B(b), 135 Stat. 4, 145.

170. Michelle P. Scott, *Child Tax Credit*, INVESTOPEDIA (Jan. 20, 2022), https://www.investopedia.com/terms/c/childtaxcredit.asp.

171. Haagensen, *supra* note 68.

172. *Id.*; *Get This Year's Expanded Child Tax Credit*, CHILDTAXCREDIT.GOV (Apr. 18, 2022), https://www.childtaxcredit.gov/; *see also Child Tax Credit*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-american-families-and-workers/child-tax-credit (last visited June 14, 2022); *Advance Child Tax Credit Payments in 2021*, IRS (May 26, 2022), https://www.irs.gov/credits-deductions/advance-child-tax-credit-payments-in-2021.

173. *See, e.g.*, COLO. REV. STAT. § 14-10-115(5)(a) (2021); 750 ILL. COMP. STAT. § 5/505(a)(3)(A) (2019); KY. REV. STAT. ANN. § 403.212(2)(b) (West 2021); VA. CODE. ANN. § 20-108.2(C) (2022).

consistent, frequent payments (e.g., a guaranteed bonus or gift income) and how they consider whether those payments are for a child's benefit.

b) Illinois: In re Marriage of Rogers, Mayfield v. Mayfield, *and In re* Marriage of Pratt

In *In re Marriage of Rogers,* the Supreme Court of Illinois addressed the question of whether annual cash gifts and "loans" from family members were includable in the recipient's income.[174] The court first emphasized that the Illinois Marriage and Dissolution of Marriage Act defines income as "the total of all income from all sources."[175] The court found that though the father only earned $15,000 per year from his employment, he received an additional $46,000 per year in gifts and loans from his parents.[176] The father testified he had received the gifts and loans from his family "each year over the course of his adult life" and never had to repay any monies towards those loans.[177]

The court first deferred to the "fundamental rule of statutory interpretation," considering the plain and ordinary meaning of the word "income."[178] Based on the *Webster's Third New International Dictionary* definition, the court noted income is not necessarily from employment, but instead, "something that comes in as an increment or addition . . . : a gain or recurrent benefit that is usually measured in money."[179] In its analysis, the court highlighted that the definitions of "income" under the statute would not necessarily be taxable as income under the Internal Revenue Code, as the two statutes serve different purposes.[180] Namely, the Internal Revenue Code is concerned with calculating an amount of taxable income, whereas the Illinois legislature was concerned with determining the sum each parent can pay to support their child.[181] Accordingly, the court affirmed the lower court's ruling to include the annual gifts in the father's income, regardless of whether they were taxable.[182] The court focused instead on the fact that

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174. *In re* Marriage of Rogers, 820 N.E.2d 386, 387 (Ill. 2004).
175. *Id.* at 388.
176. *Id.*
177. *Id.* at 389.
178. *Id.* at 390.
179. *See id.* (citing *Income*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1143 (3d ed. 1986)).
180. *Id.*
181. *See id.* (citing *In re* Marriage of McGowan, 638 N.E.2d 695, 698 (Ill. App. Ct. 1994)).
182. *Id.*

the gifts "enhanced [the father's] wealth and facilitated his ability to support [his child]."[183]

Importantly, within its analysis, the court included guidance on how to approach cases where it is unknown whether the additional income source will continue following entry of the child support order.[184] The *Rogers* court reasoned that whether the income was recurring or not, a court must include it in the parties' incomes for calculating support.[185] However, if either party can introduce evidence that indicates the income will not continue in the future, a court may then consider whether it is appropriate to deviate from statutory guidelines.[186] Further, the court reasoned that if the additional income stream did, in fact, terminate, the affected party could file a petition to modify the support amount.[187]

The Supreme Court of Illinois reaffirmed the *Rogers* decision in the case of *Mayfield v. Mayfield*.[188] In *Mayfield*, the father received a one-time, lump-sum workers' compensation settlement.[189] The court found this was appropriately included in the father's income for purposes of calculating his child support obligation.[190] Similarly, the 2014 case of *In re Marriage of Pratt* provided another example of how one-time payments should be considered when calculating a party's income.[191] In *Pratt*, the father received a one-time distribution of dividend income that he testified he would never receive again.[192] In line with *Rogers*, the court reasoned the one-time payment could be considered income of the party receiving the payment.[193] Both the *Mayfield* and *Pratt* courts stressed that, although the trial court may consider deviating from guidelines in these circumstances where the payment was nonrecurring, the burden is on the party seeking deviation to make this argument.[194]

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183. *Id.*
184. *See id.* at 391.
185. *Id.*
186. *Id.*
187. *Id.*
188. Mayfield v. Mayfield, 989 N.E.2d 601, 607 (Ill. 2013).
189. *Id.* at 603.
190. *Id.* at 607.
191. *In re* Marriage of Pratt, 17 N.E.3d 678 (Ill. App. Ct. 2014).
192. *Id.* at 686–87.
193. *Id.*
194. *Id.*; *Mayfield*, 989 N.E.2d at 607.

c) Colorado: In re A.M.D.

Like Illinois, Colorado courts follow an inclusive approach when determining whether one-time gains should be included in a party's income for purposes of calculating domestic support obligations.[195] In *In re A.M.D.*, the Supreme Court of Colorado considered whether one-time inheritance should be considered income to the recipient spouse.[196] As in *Rogers*, the court began with reviewing the plain language of Colorado's child support guidelines.[197] Similar to Illinois, the Colorado guidelines define "gross income" as "income from any source."[198] Turning to case precedent, the court cited multiple examples of Colorado appellate court cases where one-time gains, including "lottery winnings, capital gains, and personal injury settlement payments," were considered income.[199] The court further noted that even if it did assume any ambiguity in the plain language of the statute, nothing in the legislative history supported excluding one-time payments as income.[200] Like the Illinois courts' approach, the Colorado court advised that trial courts should follow the "rebuttable presumption" set forth by the Colorado statutory guidelines to set child support as a default.[201] Further, the Colorado court similarly advised that litigants could seek a deviation from guidelines before the trial court.[202]

The Colorado court highlighted that Indiana and Virginia likewise include gifts or inheritance as gross income.[203] In summarizing the approaches Indiana and Virginia courts employ when considering whether to deviate from guidelines in contemplation of including a portion of that party's inheritance, the court lauded the courts' weighing of factors that

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195. *See, e.g.*, *In re* A.M.D., 78 P.3d 741, 743 (Colo. 2003) (acknowledging that Colorado courts have adopted the inclusive approach); *In re* Marriage of Armstrong, 831 P.2d 501, 503 (Colo. App. 1992) (finding that a one-time post-decree inheritance should be included in the father's gross income).

196. *In re A.M.D.*, 78 P.3d at 741.

197. *Id.* at 743 (citing COLO. REV. STAT. § 14-10-115(7)(a)).

198. *Id.*

199. *Id.* (citing *In re* Marriage of Bohn, 8 P.3d 539 (Colo. App. 2000) (lottery winnings); *In re* Marriage of Zisch, 967 P.2d 199 (Colo. App. 1998) (capital gains); *In re* Marriage of Fain, 794 P.2d 1086 (Colo. App. 1990) (personal injury settlement payments)).

200. *Id.* at 744.

201. *Id.* at 745.

202. *Id.*

203. *Id.* at 744–45 (citing Gardner v. Yrttima, 743 N.E.2d 353, 357–58 (Ind. Ct. App. 2001); Goldhamer v. Cohen, 525 S.E.2d 599, 602 (Va. Ct. App. 2000); Forsythe v. Forsythe, 41 Va. Cir. 82 (Va. Cir. Ct. 1996)).

examined the "nature and use" of the inheritance.[204] Specifically, in Indiana, trial courts consider whether the payment "affects the 'financial circumstances' of the parent, whether the [payment] will benefit the child, and finally, whether the parent invests the [payment] for a future use."[205] Likewise, in Virginia, trial courts consider factors including "whether the financial resources were used to reduce marital debt, enhance the marital estate or benefit any child; whether the asset is received with regularity; whether the asset is liquid; and whether the asset or property is income-producing."[206]

d) Offsets for Other Government-Backed Dependent Benefits: Social Security Dependent Benefits

In furtherance of looking at the "nature and use" of a one-time gain, it is helpful to also consider how courts address payments the government provides directly for the benefit and use of a minor child. If a parent becomes disabled and qualifies for social security disability benefits, that parent's children may also become eligible to receive dependent benefits based on their record.[207] States are split as to whether these dependent benefits should be credited against the disabled parent's child support obligation or included in the noncustodial parent's income.[208]

New York courts have declined to provide any credit for dependent disability benefits, noting the purpose of child support is to protect children "as much as possible from the overall decline in living standards that results from parents maintaining two households" and maximize collections to reduce the need for public aid assistance.[209] One court opined that if the parties had remained together, the children would enjoy a standard of living

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204. *Id.* at 745–46.

205. *Id.* (quoting *Gardner*, 743 N.E.2d at 358–59).

206. *Id.* at 746 (quoting *Goldhamer*, 525 S.E.2d at 603–04).

207. SOC. SEC. ADMIN., PUB. NO. 05-10029, DISABILITY BENEFITS 10 (2021), https://www.ssa.gov/pubs/EN-05-10029.pdf.

208. *Compare* Hern v. Erhardt, 948 P.2d 1195, 1198 (Nev. 1997) (allowing dependent benefits to be credited against child support obligations), *In re* Marriage of Henry, 622 N.E.2d 803, 809 (Ill. 1993) (holding that dependent benefits should be credited against child support obligations), Farley v. Farley, 412 S.E.2d 261, 265 (W. Va. 1991) (applying a presumption that dependent benefits be credited against child support obligations), *and* Horton v. Horton, 132 S.E.2d 200, 201 (Ga. 1963) (treating disability payments as income), *with* Graby v. Graby, 664 N.E.2d 488, 492 (N.Y. 1996) (declining to treat dependent benefits as income or to credit them against child support obligations).

209. *See, e.g.*, *Graby*, 664 N.E.2d at 491–92.

where they had access to both parties' incomes in addition to the disability benefits.[210]

Conversely, the majority of courts have viewed the purpose of social security dependent benefits as intending to support dependent children and, like child support, the benefit arises from the noncustodial parent's wages and assets.[211] A few states have even enacted specific legislation that requires crediting social security disability payments to children against the disabled parent's child support obligation.[212] Accordingly, payments of dependent benefits are akin to satisfying a child support obligation and should be presumptively credited against a parent's child support obligation. Similarly, because the child tax credit was intended to benefit children, it may be appropriately credited or taken into account for a short-term deviation in a domestic support obligation.

2. Tax Code

a) Reporting Government Stimulus Checks as Income

For income tax purposes, the three rounds of COVID-19 stimulus payments are not considered income, but rather are advance payments of the Recovery Rebate Credit.[213] A similar approach to providing direct cash stimulus payments to Americans had previously been used under the 2009 American Recovery and Reinvestment Act.[214] With this approach, eligibility for the stimulus payments was based on previous years' tax returns, and eligible taxpayers who did not receive a stimulus payment, or who received less than the full amount, were able to claim the remaining Recovery Rebate Credit on their 2020 or 2021 tax returns.[215] Similarly, advanced payments of the expanded 2021 Child Tax Credit were based on information from the 2020 tax return, and taxpayers were able to claim any

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210. *Id.*

211. *See, e.g.*, *In re* Marriage of Henry, 622 N.E.2d at 809.

212. *See, e.g.*, CAL. FAM. CODE § 4504 (West 2022); 750 ILL. COMP. STAT. § 5/505 (2022); UTAH CODE ANN. § 78B-12-203 (West 2022).

213. *See Recovery Rebate Credit*, IRS, https://www.irs.gov/newsroom/recovery-rebate-credit (Mar. 14, 2022).

214. WILLIAM R. MORTON, CONG. RSCH. SERV., IN11254, COVID-19 AND STIMULUS PAYMENTS TO INDIVIDUALS: HOW THE 2009 ECONOMIC RECOVERY PAYMENT WORKED 1 (2020), https://crsreports.congress.gov/product/pdf/IN/IN11254.

215. *See Recovery Rebate Credit*, *supra* note 213.

remaining amounts on their 2021 tax return.[216] The IRS also created a "Non-filer Sign-Up Tool" to ensure that those not filing tax returns were able to claim advance payments.[217] Because the IRS uses prior year tax return information to issue advance payments, parents with shared custody who trade off claiming dependents may not automatically receive the advance payment they are entitled to.[218] According to IRS guidance, a parent ineligible for the 2021 Child Tax Credit needed to disenroll from the advance payments; otherwise, that parent must have repaid any received amounts when filing the 2021 tax return.[219]

b) Recovery Rebate Credit

The Treasury Offset Program ("TOP") collects delinquent debts by holding back, or offsetting, money from a federal payment to the debtor.[220] For example, the TOP can intercept and offset the income tax refund of someone with unpaid child support payments to help satisfy the debt.[221] Under the CARES Act, the TOP can offset the first economic impact payment, up to the amount of child support debt, for that reason only.[222] The second and third economic impact payments, as well as the advance payment portion of the 2021 Child Tax Credit, were not subject to TOP offset for any reason.[223] However, if the debtor receives an income tax refund, including due to stimulus payments not paid in advance but claimed as the Recovery Rebate Credit or the Child Tax Credit, the TOP can offset the full amount.[224]

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216. *See Child Tax Credit Non-Filer Sign-Up Tool*, IRS, https://www.irs.gov/credits-deductions/child-tax-credit-non-filer-sign-up-tool (Feb. 3, 2022).

217. *Id.*

218. *See Fact Sheet FS-2022-17: IRS Updates the 2021 Child Tax Credit and Advance Child Tax Credit Frequently Asked Questions*, IRS (Mar. 8, 2022), https://www.irs.gov/pub/taxpros/fs-2022-17.pdf.

219. *Id.*

220. *What Is the Treasury Offset Program?*, BUREAU FISCAL SERV., https://fiscal.treasury.gov/top/how-top-works.html (Sept. 30, 2020).

221. *Id.*

222. *Frequently Asked Questions on the Treasury Offset Program (TOP), IRS 2021 Child Tax Credit, Economic Impact Payments, and the Recovery Rebate Credit*, BUREAU FISCAL SERV., https://fiscal.treasury.gov/top/faqs-for-the-public-covid-19.html (July 9, 2021).

223. *See id.*

224. *See id.*

E. Paycheck Protection Program Loans

The PPP was first created by the CARES Act, signed by President Donald Trump on March 27, 2020.[225] The CARES Act appropriated $349 billion to help small businesses pay their employees and overhead expenses.[226] After the first round of funding expired, Congress extended a second round of funding of $320 billion.[227] On December 27, 2020, President Trump signed into law the Consolidated Appropriations Act, which allocated a third round of PPP loans.[228] The American Rescue Plan Act of 2021 subsequently allocated another $7.25 billion to the program.[229] According to a 2020 Federal Reserve survey of 9,693 small-employer firms with one to 499 full- or part-time employees, 82% of firms applied for PPP emergency funding and 78% of PPP applicants received all of the funding they sought.[230] Small business support funding under the PPP was provided in the form of small business loans.[231] However, borrowers are able to apply for loan forgiveness if employee and compensation levels were maintained and the funds were used for eligible costs during the covered period following loan disbursement.[232] Under the CARES Act, any forgiven PPP loans are excluded from gross income at the federal level.[233] The opportunity to forgive this debt opens the door to arguments regarding to what extent the forgiveness of debt should be considered income for domestic support obligations.

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225. *See Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *supra* note 63.

226. *Id.*

227. Jim Probasco, *Third-Round Paycheck Protection Program (PPP) Funding: What Is It and How to Apply*, INVESTOPEDIA (May 19, 2022), https://www.investopedia.com/your-guide-to-the-paycheck-protection-program-ppp-and-how-to-apply-4802195#citation-20.

228. *Id.*

229. Haagensen, *supra* note 68.

230. FED. RESERVE BANK OF ATLANTA ET AL., SMALL BUSINESS CREDIT SURVEY: 2021 REPORT ON EMPLOYER FIRMS ii, 7–8 (2021), https://www.fedsmallbusiness.org/medialibrary/FedSmallBusiness/files/2021/2021-sbcs-employer-firms-report.

231. *Paycheck Protection Program*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/coronavirus/assistance-for-small-businesses/paycheck-protection-program (last visited May 17, 2022).

232. *PPP Loan Forgiveness*, U.S. SMALL BUS. ADMIN., https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/ppp-loan-forgiveness (last visited May 17, 2022).

233. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1106(i), 134 Stat. 281, 301 (2020).

1. Judicial Survey

a) California: In re Marriage of Riddle

The California case of *In re Marriage of Riddle* expressly relied upon the Internal Revenue Code definition of income in determining whether forgiven debt should be included in a party's income for purposes of calculating child support.[234] In *Riddle*, the husband's income had two unusual components: (1) forgiveness of debt on an advance his employer gave him during the marriage, and (2) forgiveness of interest on that debt.[235] During the marriage, the husband's employer paid him an "advance" against his future earnings of $1.039 million to entice him to leave his prior employment.[236] The amount was to be repaid in installments of $11,423 plus interest of $2,265.[237] However, according to the husband's earnings statements, this amount and the interest was being forgiven in each month it was supposed to be paid.[238] This allowed the husband to only pay as the debt was forgiven.[239]

In rejecting husband's argument that this forgiven debt should be excluded from his income for purposes of calculating support, the court emphasized that the definition of income under the California Family Code was taken from the Internal Revenue Code and that courts should defer to the Internal Revenue Code to determine whether monies received constitute income.[240] Specifically, since the Internal Revenue Code classifies forgiveness of debt as income, then the amount forgiven should be included in income for the purposes of calculating income for support.[241]

b) Kentucky: Kelley v. Kelley

In contrast, in an unpublished opinion, the Court of Appeals of Kentucky explicitly cautioned against adopting the definition of "taxable income" under the tax code for child support purposes.[242] In *Kelley*, the payor-

234. *In re* Marriage of Riddle, 23 Cal. Rptr. 3d 273, 276–77 (Cal. Ct. App. 2005).
235. *Id.* at 275.
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 276–77 (citing CAL FAM. CODE § 4058(a) (West 2022)).
241. *Id.*
242. Kelley v. Kelley, No. 2012-CA-002213-MR, No. 2013-CA-000266-MR, 2014 WL 5359745, at *5 (Ky. Ct. App. Oct. 3, 2014) (citing Snow v. Snow, 24 S.W.3d 668 (Ky. Ct. App. 2000)); *see also* Rieger v. Rieger, 90 Va. Cir. 29, 30, 34 (2015) (considering the *Kelley*

husband was employed as a recruiter for a financial services firm.[243] When he started his employment, the firm provided him with an interest-free loan of $200,000.[244] The firm forgave a portion of the loan and reported the loan forgiveness as compensation.[245] The trial court found the forgiven portion of the loan was "phantom income" to the husband, as the money had already previously been received and spent, so the husband was not receiving any additional dollars.[246] Affirming the trial court, the court of appeals found that since the husband had received and spent the loan during the marriage, it was appropriately excluded from the husband's income to establish his income for child support.[247]

2. Tax Code

Under the economic benefit doctrine, the receipt of loan proceeds is not considered income for tax purposes, as there is an obligation to repay.[248] However, two instances where a taxpayer may be required to impute income related to a loan include below-market loans and forgiveness of debt. A below-market loan exists when the interest payable on the loan is at a rate less than the applicable federal rate.[249] If the loan is interest-free or not at the applicable federal rate, the borrower is treated as having received an equivalent cash amount from the lender (and then having returned said amount to the lender as interest), with the taxation of this amount varying based on the relationship between the lender and the borrower.[250] For example, for a loan between friends, the imputed amount would be deemed a non-taxable gift to the borrower, whereas for a loan from an employer, the imputed amount would be deemed taxable compensation to the borrower.[251]

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court's approach to "phantom income"). The authors acknowledge that just prior to publication of this Article, the Kentucky legislature passed 2022 Kentucky Laws Ch. 122 (HB 501), amending Kentucky's child support statute, KRS § 403.212, which will take effect on January 1, 2023. *See* H.B. 501, Gen. Assemb., Reg. Sess. § 1 (Ky. 2022) (amending KY. REV. STAT. ANN. § 403.212 (West 2022)). However, the passed changes should not impact the court's analysis of phantom income as discussed here.

243. *Kelley*, 2014 WL 5359745, at *3.

244. *Id.*

245. *Id.* at *4.

246. *Id.*

247. *Id.* at *5–6.

248. *See* Sproull v. Comm'r, 16 T.C. 244, 247–48 (1951) (crystallizing the economic benefit doctrine), *aff'd per curiam*, 194 F.2d 541 (6th Cir. 1952).

249. I.R.C. § 7872(e)(1).

250. *Id.* § 7872(a)(1), (c).

251. *Compare id.* § 7872(c)(2), *with id.* § 7872(c)(3).

Within income's all-inclusive definition, the discharge of indebtedness (or the forgiveness of debt) is specifically included in gross income.[252] While some exceptions exist, such as in the case of debt forgiven under Title 11 bankruptcy, the forgiveness of debt generally results in the taxpayer imputing income, as they have now received an economic benefit.[253] However, due to the COVID-19 pandemic, under the CARES Act, PPP loans that are forgiven are excluded from gross income at the federal level.[254] Under the tax code, expenses are typically not deductible if they relate to tax-exempt income.[255] Thus, initially the IRS issued guidance reminding taxpayers that expenses paid for with proceeds from PPP loans would not be deductible.[256] However, as part of the CAA, Congress specifically made these expenses deductible.[257] Therefore, recipients of PPP loans whose debt is forgiven are essentially "double dipping"; the forgiveness of debt is tax-exempt, and the entire amount also can be deducted as a business expense.[258]

IV. Recommendation

Courts are seeing an influx of litigants seeking to set or modify their domestic support obligations based on what are likely to be temporary changes to their incomes following receipt of various forms of COVID-19 financial relief. This Part suggests courts consider four primary factors when addressing these cases: (1) actual monies received by a parent; (2) whether imputing income may be appropriate; (3) any unique tax consequences surrounding the relief; and (4) the addition of specific language outlining any contemplated circumstances considered when entering the order to help mitigate future litigation.

252. *See id.* § 108(a)(1).

253. *See, e.g.*, *id.* § 108(a)(1)(A).

254. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 1106(c), 134 Stat. 281, 298 (2020).

255. I.R.C. § 265(a)(1).

256. SEAN LOWRY & JANE G. GRAVELLE, CONG. RSCH. SERV., IN11378, IRS GUIDANCE SAYS NO DEDUCTION IS ALLOWED FOR BUSINESS EXPENSES PAID WITH FORGIVEN PPP LOANS 1 (2020), https://crsreports.congress.gov/product/pdf/IN/IN11378.

257. *Id.*; *see also* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 276, 134 Stat. 1182, 1979 (2020) (extending tax relief codified in the CARES ACT).

258. Jason V. Owens, *PPP Loans Create Confusion in Child Support and Alimony Cases*, LYNCH & OWENS (Mar. 4, 2021), https://www.lynchowens.com/blog/2021/march/ppp-loans-create-confusion-in-child-support-and-/.

A. What Monies Were Actually Received by the Parent?

To promote uniformity across courts, courts should initially consider both parties'[259] or the obligor parent's[260] incomes under the "judicial" definition of "income from all sources" as close to the entry of judgment or final support order as possible. In states that have used maintenance or child support guidelines,[261] courts should utilize these guidelines to arrive at an initial presumptive order. Even if the payment is nonrecurring, the court should still consider such payment as part of the recipient parent's income for purposes of calculating support. However, courts should follow the Indiana and Virginia approach of looking at the "nature and use" of any payments,[262] as well as whether the custodial parent receives any portion of said payment or similar payment, when considering whether a deviation may be appropriate.

B. Is It Appropriate to Impute Income?

Courts should carefully analyze all claims made by a party that his or her domestic support obligation should be set based on a reduced income. First, courts should determine whether this reduced income is voluntary. To support that the reduction in income was either voluntary or involuntary, practitioners should consider issuing a subpoena to the party's employer for any personnel records or communications between the employer and party. Issuing a subpoena to an employer may also help a practitioner learn more about how the company's practices have changed due to the pandemic; there may be communications stating that overtime, bonuses, or commissions are terminated or reduced. Conversely, communications may indicate company operations are only suspended temporarily, subject to review after a set period.

Second, courts should consider if there are prevailing job opportunities for the party to obtain gainful employment at a level commensurate to his or her earning potential, educational background, and job experience. Practitioners should consider hiring a vocational expert to complete an objective report on what job opportunities exist in that party's particular field of expertise in the surrounding geographic area and what salary those

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259. *See Child Support Guideline Models*, *supra* note 26 (explaining that this approach is applied in Income Shares Model states).

260. *Id.* (explaining that this approach is applied in Percentage of Income Model states).

261. *See, e.g.*, 750 ILL. COMP STAT. § 5/504, 5/505 (2021).

262. *See supra* notes 204–06 and accompanying text.

opportunities would afford.[263] If there are prevailing opportunities, the court may obligate the party to maintain a job diary with a requisite number of applications per month.[264] With these opportunities, however, courts need to consider if there are any circumstances that would result in the party not being able to maintain employment.[265]

If the party seeking to set support based on a reduced income is a business owner or independent contractor, the court should similarly consider whether the business sought any financial relief through PPP or other Small Business Administration relief. Practitioners and courts should look at each case to determine whether an income- or expense-averaging approach using the past three to five years may be more appropriate than a current income analysis.[266]

C. What Are the Tax Consequences of the Economic Relief Received?

Prior to the pandemic, family courts struggled to reconcile the concept of "taxable income" under the Internal Revenue Code with the determination of "income" for purposes of domestic support obligations.[267] Although courts commonly rely on taxation concepts such as "income," the purpose of the tax code is to raise revenue for the government while promoting certain policy considerations, whereas the focus of the family court is to determine actual monies available to support families and children.[268] While issues such as "phantom income"—which represents amounts taxable without any receipt of cash—are already well discussed,[269] temporary changes to tax law due to the pandemic warrant a deeper review of tax return information. Courts can no longer rely on traditional approaches to taxable income, in particular with regards to the five topics reviewed: (1) unemployment income, (2) early withdrawals from retirement accounts, (3)

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263. Jeff Landers, *Four Reasons Why a Woman Needs a Vocational Expert on Her Divorce Team*, FORBES (Oct. 24, 2012, 12:25 PM EDT), https://www.forbes.com/sites/jefflanders/2012/10/24/four-reasons-why-a-woman-needs-a-vocational-expert-on-her-divorce-team/?sh=2a334bb447de.

264. *See, e.g.*, *Job Search Diary*, ILL. DEP'T HEALTHCARE & FAM. SERV., https://www2.illinois.gov/hfs/ChildSupport/FormsBrochures/Pages/hfs3479.aspx (last visited May 17, 2022).

265. *See* Ranson & Cozza, *supra* note 4.

266. *See, e.g.*, *In re* Marriage of Freesen, 655 N.E.2d 1144, 1149 (Ill. App. Ct. 1995) (considering the three prior years of income).

267. *See supra* notes 4–5 and accompanying text.

268. *Compare* Todd, *supra* note 5, at 375, *with id.* at 366.

269. *See, e.g.*, *id.* at 376–77.

distributed retained earnings, (4) government stimulus and advance child tax credit, and (5) PPP loans.

Specifically, with regards to unemployment, the receipt of unemployment benefits is typically taxable and would be reported on Schedule 1 of Form 1040.[270] However, due to the pandemic, taxpayers were allowed to exclude up to $10,200 of unemployment compensation from taxation in 2020, provided they met certain income levels.[271] If a court is inclined to temporarily reduce or modify a child support obligation based on a party's unemployment compensation and considers net income from prior years of employment, it should carefully consider these allowable exclusions and separate that income out as net dollars when calculating a domestic support obligation. The calculation of this exclusion is done "behind the scenes" by a taxpayer through a worksheet, meaning that the dollar amount reported directly on the return is up to $10,200 lower (per spouse) than actual monies received.[272] Similarly, the court should note that stimulus funds paid to taxpayers in the form of either advanced economic impact payments or partial advanced payments of the 2021 Child Tax Credit reduce the amount claimed on Form 1040 for the Recovery Rebate Credit and Child Tax Credit, respectively. The lack of a Recovery Rebate Credit on the return could indicate that the taxpayer already received the funds as an economic impact payment, or that the taxpayer was not eligible and received no funds at all. Further attention is needed to reconcile the amount and timing of stimulus funds.

While the taxation of retirement withdrawals remains unchanged under the stimulus laws, some obstacles to withdrawing funds were removed. In addition, taxpayers may retain more net cash than they did previously, as the 10% early withdrawal penalty was waived for COVID-19 distributions and taxpayers could elect to spread the associated income tax over three years instead of one. Thus, while still considered income, a withdrawal of retirement funds in the pandemic may result in more cash funds available immediately than in a typical early withdrawal.

Next, although the treatment of retained earnings remains unchanged during the pandemic, courts should, in addition to assessing the factors

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270. *Topic No. 418 Unemployment Compensation*, IRS, https://www.irs.gov/taxtopics/tc418 (Mar. 8, 2022).

271. *Exclusion of Up to $10,200 of Unemployment Compensation for Tax Year 2020 Only*, IRS, https://www.irs.gov/forms-pubs/exclusion-of-up-to-10200-of-unemployment-compensation-for-tax-year-2020-only (Mar. 8, 2022).

272. *See id.*

articulated above, be aware that the definition of a "reasonable" accumulation of earnings may change based on a business's pandemic-related circumstances. In addition, as always, courts should be aware of disguised personal loans to shareholders or partners in an effort to avoid recording a distribution. Overall, reconciling the concept of "taxable income" with "income" for domestic support obligations now becomes even more complex in the pandemic era, necessitating a deeper understanding of tax law changes to accurately determine how much cash is available to support families and children.

Perhaps the largest issue for courts to reconcile is the "double dipping" of tax benefits with regards to the PPP loans.[273] Small business owners with forgiven PPP loans received an economic benefit, yet they are not required to include these amounts in business income.[274] At the same time, all expenses paid with the forgiven loan funds are deductible.[275] In effect, "phantom losses" have been created on the tax return, where overall income is reduced without the taxpayer having to pay cash out of pocket. Thus, reliance on the business income reported on the tax return is insufficient, as it conceals the true economic benefit received.

D. What Specific Circumstances Are Contemplated in Setting This Support Order?

Overall, one of the biggest problems that will likely arise from support orders entered during the pandemic is that an order will be set based on 2020 or 2021 incomes. In such cases, parties will rush back to court as soon as they find out their spouses' pay has been reinstated, their bonuses have returned, or whatever other circumstance may arise. To proactively address this issue, practitioners and courts should consider whether a "true-up" provision may be appropriate. A true-up provision is when support is set based on a percentage certain of a party's income, and on a regular (typically quarterly or annually) basis, the parties true-up their income to determine if there is any additional support due and owing.[276] The obligor and recipient exchange pay information for each period to confirm the calculation.

With or without a true-up provision, courts should delineate any circumstances that are actually contemplated at the time the support order is

273. Owens, *supra* note 258.
274. *Id.*
275. *Id.*
276. *See* I.R.S. Priv. Ltr. Rul. 103656-19 (Dec. 6, 2019).

entered so that it is clear to the court what constitutes a substantial change in circumstances for purposes of modification.[277] If a spouse's income is set based on pre-pandemic income, courts should include language as to the basis of this income determination. If a court contemplates anticipated taxes (or a lack thereof) in determining a party's income, it should note those taxes in the support provision. Courts should also add language requiring the exchange of income information to verify any increase or decrease in future income. Finally, if a court determines a time-limited adjustment or abatement is appropriate, the court should specify the circumstances under which the support would return to the prior order. This will help reduce post-judgment disputes between the parents that may otherwise arise.

V. Conclusion

Family law courts have started experiencing an influx of cases addressing income fluctuations due to the COVID-19 pandemic. Courts should defer to prior judicial approaches that mirror an analysis of similar forms of monetary gains but also consider the unique tax consequences for new forms of pandemic-related relief. By turning to existing standards to calculate income articulated by the Internal Revenue Code and recognizing the aberrations introduced by Congress in response to the pandemic, courts can help litigants foresee and understand the basis for calculation of domestic support obligations.

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277. Owens, *supra* note 258; *see supra* notes 31–32 and accompanying text. *See generally* S.B. 3036, 102d Gen. Assemb., Reg. Sess. (Ill. 2022) (codified as amended at 750 ILL. COMP. STAT. 5/510) ("Contemplation of foreseeability of future events should not be considered as a factor or used as a defense in determining whether a substantial change in circumstances is shown, unless the future event is expressly specified in the court's order or the agreement of the parties incorporated into a court order.").