

FAMILY LAW SECTION NEWSLETTER

CHAIR'S COLUMN The View From the Edge

Looking out my window, at Canada, from the isolation of a ferry-serviced island on the northwest edge of Washington, my thoughts go to the future of family law practice here in Washington. FLEC (Family Law Executive Committee) was busy in the first 3 months of our current term of office, but in January we went to a

Our Board of Governors has been wrestling with the [WSBA Governance Task Force Report of June 25, 2014] for nearly a year, and has been expecting input from Bar members. This is about your professional future, and you should exercise a voice in how WSBA is to proceed.

higher level with draft legislation pouring into our modems. This has been the long legislative session of the biennium, and there were numerous bills proposed in the effort to right the apparent wrongs of the courts, fill the gaps in the statutes, and integrate state law with related federal law. Inquiring minds want to know: Will the *Troxel* dilemma ever be remedied? Will the last (2011) Child Support Workgroup's recommendations ever be adopted, now that the 2015 Workgroup is about to move forward? Will Guardians ad Litem really face criminal penalties? Keep your finger on Olympia's pulse by visiting leg.wa.gov.

FLEC has continued to work on the draft Plain Language Forms, and provide our input to the Access to Justice Board Pro Se Project Forms Review Work Group. Note that there are 113 draft Plain Language Forms available for your comment on the AOC website, www.courts.wa.gov. Though your FLEC team has developed a body of comments, we don't have all the answers, and encourage you to comment individually on any or all of the draft forms that are posted there for public comment. Silence is often taken as affirmation,

so comment away, and help to move the forms toward a better place. And bear in mind that there are at least 70 more forms in the works, for future review and comment. FLEC members Doug Becker, Rhea Rolfe, Nancy Koptur, and Mark Alexander have continued to work within the Work Group. Our Shelley Brandt remains active on the Pattern Forms Committee, which is the statutory "forms group" under whose umbrella the Plain Language Forms Work Group, arguably, has been working.

Our annual meeting in November with the Superior Court Judge's Association Family and Juvenile Law Committee is always enlightening. The judiciary remains concerned that the Bar has an obligation to maintain and improve the level of professionalism and asks that we mentor the newer attorneys. Then Nooksack Tribal Court Judge Raquel Montoya-Lewis was a presenter and shared her concerns that there was a better flow of relevant information between Washington and British Columbia law enforcement than there is between Washington and Tribal law enforcement. Ironically she was appointed to the Whatcom Superior Bench a few weeks later, the first Native American Superior Court Judge in Washington State history. Hopefully that will afford her more leverage in resolving the communication quandary, to the benefit of all Washingtonians.

The dues referendum that was passed by the members of the WSBA has led to significant consequences at WSBA headquarters, and the "shrinking pains" have had significant impact on WSBA staff, in downsizing and job reassignments that have made it more challenging for the Sections. We found out in January that our annual 2 day Family Law Skills Training Institute, which FLEC typically provides at low cost to attorneys with less than 5 years of practice, would no longer be allowed to be put on by FLEC through the

WSBA CLE department, but that we could go forward with this annual service project to assist “young lawyers”, particularly of moderate means, if we could find an outside sponsoring agency. Fortunately the Chelan-Douglas County Volunteer Attorney Services (VAS) volunteered to serve as sponsor, but the weekend that worked for everyone in April turned out to be a weekend in which there were only 6 hotel rooms available in the greater Wenatchee area. As such, we have postponed Skills Training until September, but still look forward to doing it in Wenatchee through VAS.

The shrinking pains at WSBA included the loss of the entire in-house legislative staff early in the session, which made our efforts to work with the legislature very challenging. FLEC worked overtime to keep itself apprised of the legislation this year, and did our best to represent the interests of family law attorneys and their clients, as well as society generally. My observation is that draft legislation often consists of flawed efforts to correct anomalies, and FLEC is left taking the difficult position of opposing well-meant, poorly written bills that can't simply be amended to make them reasonable or viable.

We, particularly co-Chairs Jon Lee and Jeannie Cotton, have been working diligently to get the 2015 Family Law Midyear put together. The Midyear will be at the Davenport Hotel in Spokane, June 18-21, the last three days of the U.S. Open (golf) in Tacoma. All Section members who didn't qualify to play in the U.S. Open are encouraged to attend. Not only will this be 3 days of valuable CLE presentations and information aimed at intermediate level practitioners, but an invaluable opportunity to network and build professional relationships with other family law attorneys around the state, from counties in which you don't regularly practice. For those whose families will be coming along, there are numerous recreational activities in the greater Spokane and Coeur D'Alene area, and we will be

providing after-hours opportunities to access some of those.

The annual meeting of the Family Law Section will be held at noon, on Saturday, June 19 at the Midyear luncheon. It will be brief, and beyond introductions there are generally only 2 business items: the awards for Attorney, Jurist, and Professional of the Year, and nominations for positions on FLEC. This year we expect that there will be five three-year positions on FLEC up for election. Any member of the Family Law Section who is an active or emeritus member of the WSBA and who is in good standing in the Section as of June 1, 2015, may be nominated as a candidate for a position on FLEC. The elections will be held later in the summer. Anyone interested in serving on FLEC should contact a FLEC member to research what that service entails, before seeking or accepting a nomination at the Midyear.

Last, if you haven't yet reviewed it, I strongly recommend that you review the WSBA Governance Task Force Report of June 25, 2014. Among other places you can find it in the files on the WSBA-Family-Law website which hosts our list-serve, that you have access to as a Family Law Section member. If you don't have time to read the whole report, at least read the recommendations. This Report is the result of the dues referendum, and appears to me to contend that the WSBA is intended to only regulate, not represent, attorneys, and that the interests of attorneys are represented by the local Bar associations. Our Board of Governors has been wrestling with the report for nearly a year, and has been expecting input from Bar members. This is about your professional future, and you should exercise a voice in how WSBA is to proceed.

Regards from the edge.

John Wickham, Chair, FLEC

INNOCENT SPOUSE RELIEF by Robert V. Boeshaar, LL.M., PLLC

Since 1918, married couples have been able to file one joint return and compute their tax on their aggregate income. However, in 1938 spouses became jointly and severally liable for the tax owed. Joint and several liability means that the IRS may collect the entire liability from either spouse, or may collect a portion of the liability from each spouse.

Your client may have been unfairly stuck with a tax bill from a failed marriage. Perhaps your client found out that their former spouse was embezzling money from

their business, or their former spouse did not pay your joint tax liabilities as they had said. After the divorce your client may find themselves with large tax bills for prior years.

What Kinds of Relief are Available?

There are four kinds of relief from joint and several liability that are available. The relief available depends on whether or not a joint tax return has been filed by the spouses. The kinds of relief are:

- Innocent Spouse Relief
- Allocation of Liability Relief
- Equitable Relief
- Relief from Tax Liability arising from Community Property Income

If a joint tax return has been filed by spouses, a spouse may elect to seek relief from joint and several liability on such return under Internal Revenue Code section 6015. Relief is available if the IRS has determined that the tax was understated on the tax return, the spouse did not know, or have reason to know, of the understatement, and it is inequitable to hold the spouse liable for the tax.

If spouses are no longer married, legally separated, or have not been members of the same household for the last twelve months, it may be possible to obtain an allocation of an understatement of tax attributable to one of spouse's incomes.

If spouses did not file a joint tax return, relief may still be available. Under Internal Revenue Code section 66(c), an individual who lives in a community property state, such as Washington State, may be able to obtain relief if he or she did not know about the income attributable to the other spouse.

Innocent Spouse Relief under Section 6015

Background

I.R.C. section 6015 was enacted as part of the IRS Restructuring and Reform Act of 1998. As previously discussed, when spouses file a joint tax return, they become jointly and severally liable for the tax owed for that tax year.

To be eligible for relief from joint and several liability under section 6015, spouses must file a joint income tax return for the year in issue. Generally, a joint income tax return must be signed by both spouses. However, an income tax return may qualify as a joint return if the spouses intended to file a joint return. For instance, the fact that spouses have a history of filing jointly for many years may show an intent to file a joint return.

Three Kinds of Relief Available

If a joint return has been filed, there are three kinds of relief which may be available under I.R.C. section 6015.

The first is **innocent spouse relief** and provides relief from additional tax the IRS has determined that a person owes because their spouse (from whom they are separated) or their former spouse failed to report income, reported income improperly, or claimed improper deductions or credits.

Erroneous items are any deductions, credits, or bases incorrectly stated on the return, and any income not reported on the return.

An understatement of tax is generally the difference between the total amount of tax that should have been shown and the amount of tax actually shown on the return. For example, if there is \$2,500 total tax reported and the IRS later determines in an audit that the total tax is actually \$3,000, this results in a \$500 understatement.

The second is **separation of liability relief** and provides for an allocation of the additional tax owed because an item attributable to a spouse or former spouse was not properly reported on the joint return.

The third is **equitable relief** and provides for relief from an item attributable to a spouse or former spouse if the tax liability is understated or if the tax is not paid and taking into account all the facts and circumstances, it would be unfair to hold the spouse liable for the understatement of tax.

1) *Innocent Spouse Relief*

The first kind of relief which may be available under I.R.C. section 6015 is generic innocent spouse relief. There are three requirements to qualify for this relief.

First, a spouse must have filed a joint tax return which the IRS has determined understated their joint tax liability. An understatement of tax is generally the difference between the total amount of tax that should have been shown on a person's tax return and the amount of tax actually shown on the tax return. This understatement must be due to an erroneous item of a spouse or former spouse. An "erroneous item" can be income the spouse received and failed to report on the joint return, or any deductions or credits that were incorrectly reported on the joint return.

Second, a spouse must establish that at the time he or she signed the joint return they did not know, or have reason to know, of the understatement of tax.

Third, in light of all the facts and circumstances it would be **unfair** to hold the spouse liable for the understatement of tax.

To obtain relief, you must file a Form 8857, Request for Innocent Spouse Relief, with the IRS within two years after the IRS takes collection action.

2) *Separation of Liability Relief*

There are also three requirements to qualify for separation of liability relief.

First, a spouse must have filed a joint tax return which the IRS has determined understated their joint tax liability.

Second, at the time of requesting relief, the spouses must be divorced, legally separated, or have not been members of the same household for the past twelve months.

Third, the spouse must not have had actual knowledge of the item causing the understatement of tax when they signed the joint tax return.

3) *Equitable Relief*

The IRS may grant equitable relief from joint and several liability if a joint tax liability is understated or the tax is not paid, and after considering all the facts and circumstances, it would be unfair to hold a spouse liable for the tax.

Threshold Requirements

To qualify for equitable relief, a spouse must first meet the threshold requirements. They must (1) file a joint tax return, (2) not qualify for “Innocent Spouse Relief” or “Separation of Liability Relief,” (3) timely file a claim for relief before the expiration of the collection statute or the period for credit or refund, (4) not transfer assets to their spouse as part of a fraudulent scheme, (5) not transfer assets to their spouse to avoid taxes, (6) not knowingly participate in filing a fraudulent tax return, and (7) (with a few exceptions) the tax liability must be attributable to the other spouse’s unreported income or erroneous deduction. If a portion of the tax liability is attributable to the requesting spouse’s income, the IRS may only grant partial relief – for the portion of the liability attributable to the other spouse’s income.

Equitable Factors

The IRS looks at a number of factors when determining whether or not to grant equitable relief. These factors are listed in IRS Revenue Procedure 2013-34. The factors are:

(1) the spouses’ marital status;

The spouses must be:

- a. Divorced;
- b. Legally Separated;
- c. Spouse is a widow or widower and not an heir to the other spouse’s estate if the estate has sufficient assets to pay the liability; or
- d. Spouses are not members of the same household at any time during the 12 months before requesting relief.

(2) whether the spouse requesting relief will suffer economic hardship so as to be unable to pay his or her reasonable living expenses if relief is not granted;

- a. The IRS will compare the requesting spouses’ income to the Federal poverty guidelines in making this determination.
- b. If the denial of equitable relief will cause an economic hardship, this factor will favor relief, but it will not weigh against relief if denying relief will not cause the requesting spouse to suffer economic hardship.

(3) whether the spouse had knowledge or reason to know of the unreported income or the erroneous deduction or that the other spouse would not pay the liability on the tax return;

This factor will weigh in favor of relief even if the requesting spouse knew or had reason to know of the item or nonpayment if:

- a. The other spouse abused the requesting spouse or maintained control over the household finances by restricting access to financial information, and
- b. This caused the requesting spouse to be unable to challenge the treatment of any items on the joint return, or to question the assurance that the taxes were paid for fear of retaliation.

(4) whether a divorce decree makes one spouse liable to pay the taxes;

- a. The IRS is not bound by any written agreements between the spouses, but a spouse who is not to be held responsible pursuant to a court agreement can sue the former spouse.
- b. The IRS can collect from either spouse since they are jointly and severally liable for the tax.

(5) whether the spouse significantly benefited by not paying the tax;

- a. A significant benefit is something beyond normal support, such as owning luxury assets and taking expensive vacations.
- b. The presence of abuse will mitigate this factor so that it is neutral.

(6) whether the spouse has made a good faith effort to comply with Federal income tax laws in later years; and

(7) whether the spouse was in poor mental or physical health when he or she signed the tax return.

The IRS also considers whether or not the spouse requesting relief was abused by the other spouse or denied access to the couple's finances when evaluating these factors. In addition, the IRS may look at other factors it considers to be relevant to a specific case.

Relief from Tax on Community Property Income

In community property states, such as Washington State, a spouse is taxable on half of the community income, including the other spouse's income. However, a spouse may be relieved of liability for taxes on their spouse's income if they did not file a tax return, the spouse did not include the income attributable to the other spouse on their own return, they did not know, and had no reason to know of, the income, and it would be unfair to tax them on their spouse's income in light of all the facts and circumstances.

Furthermore, if a spouse fails to meet these requirements, it is still possible for the Internal Revenue Service to grant equitable relief from joint and several liability to prevent an unfair result. To make this determination, the IRS will use the equitable factors in Revenue Procedure 2013-34 that were discussed in the last section.

Injured Spouse Relief

A person may be entitled to relief as an injured spouse if

1. they filed a joint tax return;
2. they and their spouse were entitled to a refund;
3. they made and reported tax payments, such as federal income tax withholding or estimated tax payments, or claimed a refundable tax credit on the joint return, such as the earned income credit or additional child tax credit;
4. the IRS used the refund to pay a legally enforceable past-due debt(s) owed only by their spouse such as:
 - a) Federal tax
 - b) State income tax
 - c) State unemployment compensation
 - d) Child support
 - e) Spousal support, or
 - f) Federal nontax debt (such as a student loan); and

5. they are not legally obligated to pay this past-due debt.

To claim injured spouse relief, one must file a Form 8379, Injured Spouse Allocation, with the Internal Revenue Service.

How Do I Get Relief for my Client?

To get innocent spouse relief, one must file a Form 8857, Request for Innocent Spouse Relief, with the Internal Revenue Service. Generally, the IRS will make a determination as to whether or not a spouse qualifies for relief within 6 months. However, if the IRS does not respond to the request within 6 months, you can file a petition with the United States Tax Court to ask the Tax Court to determine that your client qualifies for relief from joint and several liability.

You can also make a claim that your client is entitled to innocent spouse relief in response to a notice of deficiency from the IRS asserting that your client owes additional taxes or in response to a notice of lien or levy. You will still need to submit a Request for Innocent Spouse Relief to enable the IRS to evaluate your client's case.

To claim injured spouse relief, to claim a spouse's proper share of a tax refund, a Form 8379, Injured Spouse Allocation, must be filed with the Internal Revenue Service.

When Must One Request Relief?

For "Innocent Spouse Relief" and "Separation of Liability Relief" relief one must request relief within two years after the IRS takes action to collect the tax liability. For "Equitable Relief" a claim must be filed before the expiration of the collection statute. To get a refund one must file before the expiration of the period for credit or refund.

What Happens if the IRS Rejects the Claim?

When a Form 8857 is filed, it is reviewed by IRS Cincinnati Centralized Innocent Spouse Operation (aka "CCISO"). If the IRS rejects the innocent spouse claim, you will have the opportunity to dispute the disallowance with the IRS Appeals Office. If Appeals also rejects your client's claim, a petition may be filed with the United States Tax Court to dispute this. The Tax Court will review the evidence presented to the IRS, as well as your client's testimony, and any additional evidence submitted at trial.

Robert V. Boeshaar helps individuals and small businesses resolve their disputes with the IRS. Prior to opening his own practice, he was an attorney with the IRS for over 14 years.

All opinions and comments in this publication represent the views of the authors, and not those of the Washington State Bar Association nor its officers or agents.

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