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Basic Rules

- (1) You can prescribe tax treatment in an order but IRS & FTB not bound.
- (2) You can use a tax-intent clause with a fix-it clause in case you are wrong.
- (3) When one client must pay another, get drafting help!

BEFORE RETIREMENT - Gillmore

- (1) Expensive Way: Determine recipients after tax entitlement.¹ Pay that. Problem is getting CPAs and such to agree and also what happens when the tax bracket varies.
- (2) Cheap Way: Make it alimony by meeting the requirements.² Alimony ≠ Support. "Alimony" has nothing to do with support. (IRC § 71) Main requirement - payments must end at death of Gillmore recipient. Problem, in Gillmore period, if A/P dies, P gets a free ride until retirement.³

AFTER RETIREMENT

(E.g., Most Nonqualified Plans Won't Pay A/P; CSRS Delay in Payment)

Make the Participant the constructive trustee. Require that P pay over the A/P's share of gross income and that A/P report A/P's share on tax return, and that P will be able to exclude the payments from P's return. See *Poe v. Seaborn* (1930) 282 U.S. 101, 109 as explained in *Comm. v. Dunkin* (9th Cir., 2007) 500 F.3d 1065.⁴

¹ *In re Marriage of Gillmore* (1981) 29 Cal.3d 418 says nonparticipant spouse is to be made "whole" --not better than whole. The tax bracket of the payor is irrelevant.

² Alimony did not work in *Dunkin* (cited in the body) because the document failed to state that the payment obligation ended on death of recipient.

³Solutions: trade that small risk away for something else in the case. Or in portion of order binding the plan, multiply benefits payable to successors by 1.06 per year between Gillmore payee's death and commencement of retirement benefits.

⁴The constructive trustee payover method did not work in *Dunkin*, because the Gillmored employee was not in pay status.