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ALVORD, J., concurring. I concur with the majority opinion and only write separately to highlight the possible tax consequences of this decision and to distinguish this case from *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 46 A.3d 112 (2012). In *Tomlinson*, our Supreme Court held that "[u]nder the particular circumstances of [that] case" an unallocated support order could be modified with regard to child support when a change in custody occurred during the minority of the children. Id., 542, 557. In the present case, the plaintiff, Charlotte Malpeso, and the defendant, Pasquale J. Malpeso, have an older son and two daughters who were both born on June 9, 1993. The plaintiff filed a motion for modification of his support payment to $0 on the basis that his daughters reached the age of eighteen on June 9, 2011. His daughters' eighteenth birthday was one year prior to the date that, under the terms of the separation agreement, he would have been able to seek to modify alimony and child support payments pursuant to General Statutes § 46b-84a.

The parties, with the assistance of counsel, had entered into a separation agreement, which was incorporated into their divorce decree. The agreement states in relevant part: "During the lifetime of the [defendant] and until the death, remarriage or cohabitation of the [plaintiff], whichever event shall first occur, the [defendant] shall pay to the [plaintiff] as alimony, or separate maintenance for the support of the minor children the sum of $20,000 per month." It later states: "The amount and term of alimony shall be modifiable only . . . [a]fter July 1, 2012, upon a court of competent jurisdiction's determination that there has been a substantial change in circumstances as provided for in . . . § 46b-84a."[1]

The deductibility of unallocated alimony and support payments is governed by 26 U.S.C. § 215, which provides in relevant part: "[A]n individual . . . shall be allowed as a deduction an amount equal to the alimony or separate maintenance payments paid during such individual's taxable year. . . . [T]he term 'alimony or separate maintenance payment' means any alimony or separate maintenance payment (as defined in section 71 [b]) which is includable in the gross income of the recipient under section 71."[2] Child support, labeled as such, is not deductable to the payor; a tax deduction "shall not apply to that part of any payment which the terms of the divorce or separation instrument fix (in terms of an amount of money or a part of the payment) as a sum which is payable for the support of children of the payor spouse." 26 U.S.C. § 71 (c) (1). Further, if the maintenance agreement reduces the payment amounts either "on the happening of any contingency

specified within the instrument relating to a child (such as attaining a specified age, marrying, dying, leaving school, or a similar contingency), or . . . at a time which can clearly be associated with [such] a contingency . . . an amount equal to the amount of such reduction will be treated as an amount fixed as payable for the support of children of the payor spouse." 26 U.S.C. § 71 (c) (2).

Although *Tomlinson* permits the allocation of a contractually unallocated support order, its holding is limited to its facts, namely, a custody change during the minority of the children. The facts of the present case are inapposite. I concur that the child support pursuant to this agreement can be modified because the restriction on modification within the agreement refers only to alimony, but not because of the precedent created by *Tomlinson* about modifying nonmodifiable child support agreements in the event of a custody change.

Where *Tomlinson* is instructive to this set of facts, is in its directive that a trial court attempting to modify only the child support portion of an unallocated order "must determine what part of the *original* decree constituted modifiable child support and what part constituted nonmodifiable alimony." (Emphasis added.) *Tomlinson* v. *Tomlinson*, supra, 305 Conn. 558. Such a determination would alter the nature of the unallocated support order because it would allocate a fixed sum as child support and, therefore, risk removing that fixed sum from the preferential tax treatment of 26 U.S.C. § 71 (b). Likewise, if a modification is granted on the basis of a substantial change of circumstances pertaining to the happening of a contingency relating to a child—namely, the youngest child reaching the age of majority—such a determination would seemingly implicate tax consequences under 26 U.S.C. § 71 (c) (2). Whether the potential tax consequences of a modification made under these circumstances would be retroactive to the date of the initial decree would, to my knowledge, present an issue of first impression for the taxing authority of this state.

[1] The agreement lists two circumstances that would allow for a modification of alimony before July 1, 2012, neither of which is alleged to have occurred.

[2] Section 71 (b) of title 26 of the United States Code provides in relevant part: "(1) . . . The term 'alimony or separate maintenance payment' means any payment in cash if—(A) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument, (B) the divorce or separation instrument does not designate such payment as a payment which is not includable in gross income under this section and not allowable as a deduction under section 215, (C) in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and (D) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse. (2) . . . The term 'divorce or separation instrument' means—(A) a decree of divorce or separate maintenance or a written instrument incident to such a decree, (B) a written separation agreement, or (C) a decree (not described in subparagraph (A)) requiring a spouse to make payments for the support

or maintenance of the other spouse."