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# Alimony

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## What is alimony and who is responsible for paying it?

Alimony is a support payment made to a former (or legally separated) spouse under a divorce decree (or separation instrument) in an attempt to maintain the pre-divorce lifestyle. Alimony is determined by state law and is sometimes called maintenance. It is based on one party's need and the other party's ability to pay.

## What is the basis for receiving alimony?

The decision whether a spouse should receive alimony (and, if so, how much) is based on certain criteria, which can vary from state to state. Alimony essentially allows one spouse with limited means to benefit from the earning power (acquired during the marriage) of the other spouse. In a long-term marriage, for instance, often the wife has not worked outside the home, or perhaps has spent many years at home caring for the children. As a couple, she and her husband may have decided that she would be responsible for caring for the children and/or running the household. These responsibilities limit her ability to build a career and can leave her in dire straits when the marriage ends.

Alimony is awarded based on any of the following criteria:

- Need--One of the most important reasons for alimony is the recipient-spouse's basic need of money for food, shelter, clothing, utilities, and water. Obviously, the state has an interest in keeping residents off public assistance, and, although child support is a separate issue, courts will certainly consider the existence of minor children when considering a spouse's financial need for alimony. In considering the appropriateness of alimony, courts will evaluate a prospective recipient's current sources of income, such as wages or salary, earnings from property received in the property division, and earnings from separate property (such as a trust fund). Debt, both individual and joint, will also be considered.

- Ability to pay--The next consideration is whether the payor-spouse can afford to pay what is needed and still have enough money left over to live on or to support a lifestyle somewhat similar to his or her previous one. The needs of both spouses are important.

- Prior lifestyle--Because courts will also consider how the spouses were accustomed to living during their marriage, it is clear that alimony isn't based simply on need. For instance, if Bill is a Hollywood star earning $3 million per year, he'll have a hard time convincing a judge that his former spouse, Dinah, should only be paid $35,000 per year in alimony.

- Length of marriage--A marriage that lasts for only a year or two may not qualify for alimony, but a 30-year marriage probably will. The spouses may have become quite dependent on one another, and one spouse may have sacrificed a career in order to manage a house and/or raise a child.

- Age and health--Courts will also look at the respective ages and health of the spouses when determining alimony. A judge will want to know whether either party is disabled or retired. If retired, what sources of income exist? If both parties are young, able-bodied, and college-educated, alimony might not be awarded. However, if a wife is a 58-year-old homemaker with health problems, it might be difficult (if not impossible) for her to find adequate employment. In such a case, an award of permanent alimony might be appropriate.

- Contribution to education--The courts will also consider whether a spouse contributed to the education, training, or career advancement of the other spouse. Often, one spouse will work while the other pursues a college or graduate degree. When the degreed spouse obtains a well-paying position, the working spouse might stay home to care for the children or may continue to work in a low-paying job.

## What types of alimony exist?

Alimony may be classified as rehabilitative, permanent, modifiable, or nonmodifiable.

- Rehabilitative--Rehabilitative alimony may be defined as a temporary financial award to help a spouse until such time as he or she can become self-sufficient. If one party was the primary breadwinner, it is unrealistic to expect that the other spouse could automatically earn the same amount of money after the divorce. Rehabilitative alimony can help a former spouse get a college degree or take courses to update old skills. Ideally, the payments would continue while the spouse gained some working experience.

- Permanent--As was mentioned earlier, permanent alimony may be appropriate when the spouses are older and one party has sacrificed career for family. That party simply doesn't have the ability to get hired late in life (with no experience) in a lucrative position. Permanent alimony may also be appropriate when the recipient spouse is disabled or has health problems.

- Modifiable--Modifiable alimony simply means that the alimony award can be changed (i.e., increased, decreased, or terminated). A change in circumstances can warrant a change in alimony. For instance, the payor-spouse may become unemployed, or the recipient-spouse may suddenly become disabled or ill and unable to seek employment. Additionally, the recipient-spouse might win the lottery or receive an inheritance. After the divorce is finalized and an order of support has been made, a modifiable arrangement will allow either spouse to go back to court to ask for a modification.

- Nonmodifiable--Nonmodifiable alimony is not often used, since it is difficult to predict the future. Still, it provides some security or peace of mind for the recipient. If the divorce decree states that the wife is entitled to ten years of nonmodifiable alimony, for instance, she knows she can count on that money and will continue to receive it, even if she gets remarried.

## Do relocation and/or remarriage affect alimony?

Relocation of one or both of the spouses does not affect alimony. If you obtained a judgment in one state and have since moved to another, state laws allow you to enforce the judgment in the second state. However, if the recipient-spouse gets a roommate or shares rent with someone else, the payor-spouse might be able to get a reduction in monthly alimony payments. The presumption is that the recipient-spouse needs less financial support, since his or her rent has been lowered.

Unlike relocation, remarriage does affect alimony. In fact, remarriage of the recipient-spouse will usually cause a termination of the payor's alimony obligation (unless alimony is nonmodifiable). The written agreement between the parties will specify the conditions that will terminate alimony.

## When can alimony be terminated?

Alimony ceases upon the death of the payor or recipient. Alimony can also be terminated on the conditions agreed upon by the parties.

## Is it possible to guarantee alimony payments?

Because alimony terminates on the death of the payor, it is advisable for the recipient to take measures to ensure a continued income stream in the event of the payor's death. This can be accomplished by using such tools as life insurance, disability insurance, and annuities.

- Life insurance--You can stipulate in the divorce decree that life insurance will be purchased on the life of the payor. That way, alimony payments continue in the event of his (or her) death. If you're going to purchase a new policy, however, be sure you do it before the divorce is final, because health or insurability is not predictable. The recipient-spouse should either own the life insurance policy or be an irrevocable beneficiary in order to ensure payment of the premiums, and to create favorable tax treatment for the payor of the premiums. For tax purposes, the insurance premiums will be construed as alimony (i.e., they are tax-deductible to the payor and income to the recipient) if the beneficiary-spouse owns the policy (or is an irrevocable beneficiary) and the premiums are made under a legal obligation imposed by the divorce decree.

- Disability insurance--While a former spouse cannot own a disability policy on the ex-husband (or ex-wife), the former spouse can pay the premiums on the policy to ensure that it stays in force. Disability insurance can be an important consideration.

**Example(s):** Assume Ralph agreed to pay his ex-wife, Diane, $2,000 per month alimony, based on his $7,000 per month salary. While preparing a lobster dinner, Ralph has an accident and becomes disabled. If he has no disability insurance and no salary, he can go back to court to get his alimony obligation modified. If, however, he had appropriate disability insurance, he might receive $5,000 per month tax-free from the insurance, and perhaps could continue paying all of the alimony.

- Annuities--The payor-spouse can also choose to buy an annuity that pays a monthly sum equal to the alimony payment. For instance, the husband can buy a $200,000 annuity that pays out $700 per month (the agreed-upon alimony amount) in interest only. If the payments are interest only, they are taxable to him as income, but also deductible by him as alimony. The payments will be income to his ex-wife.

## How is unpaid alimony collected?

Unfortunately, an award of alimony does not guarantee the actual receipt of alimony. There are a number of methods for enforcing alimony orders, including contempt of court proceedings, garnishment of wages, and the placement of liens on property. In those cases where a spousal award contains both a child support portion and an alimony portion, see our separate topic discussion, Child Support, for additional methods of collecting past-due amounts.

- Contempt of court--If a judge orders a spouse to pay a particular amount of periodic alimony and that order is ignored, the recipient-spouse can file a motion with the court asking that the other party be held in contempt. A hearing will be scheduled, and if the delinquent spouse fails to attend, a warrant may be issued for his or her arrest. The payor-spouse can be jailed, or the judge may order him or her to make future payments in a timely manner, and to pay the arrearage according to a set schedule. The judge can also order that the payor-spouse's wages be garnished, or can place a lien on his or her property.

- Wage garnishment--With this method, a portion of the payor-spouse's wages is removed from his or her paycheck at the source and delivered to the recipient spouse (or to the court). To garnish wages, the recipient-spouse obtains authorization from the court to seize a percentage of wages. Typically, a sheriff notifies the payor-spouse's employer of the garnishment. Once the employer has been instructed to garnish wages, it will inform the employee. Of course, the payor-spouse can request a court hearing to oppose the garnishment, presenting a number of objections. For instance, he or she can assert that the amount owed was computed incorrectly, or that the amount to be taken will leave him or her with too little to live on.

- Property liens--In some states, a spouse who is owed alimony can ask the court to grant a lien on the real or personal property of the payor-spouse. A real estate attachment, for instance, may prevent the property owner from refinancing or selling his or her house until the lien has been paid off. Sometimes, the recipient-spouse can even force a sale of this property to satisfy the lien.

## What are the tax ramifications of alimony, including the recapture rules?

Simply stated, alimony is taxable income to the one who receives it and tax-deductible by the one who pays it. But, to be considered alimony under present tax rules, the payments must meet all of the following requirements:

- All payments must be made in cash, check, or money order--Alimony payments must take the appropriate form. Transfers of services or property do not qualify as alimony.

- A written court order or separation agreement must exist which establishes the terms and amount of the alimony payment.

**Example(s):** Sam is ordered to pay Marian $800 per month in alimony for seven years. Three years after their divorce, Marian loses her job and convinces Sam to increase her alimony for six months so she can find a new position. Sam sends her an extra $200 per month for the next six months. At tax time, Sam tries to deduct the extra $200 as alimony. However, the IRS will disagree. Since only an oral agreement for modification existed, not a written one, Sam cannot deduct the extra money as alimony.

- The couple cannot opt out of alimony tax treatment by agreement--It doesn't matter if a recipient of alimony payments does not wish to report the money as taxable income and the payor-spouse agrees not to take a tax deduction. The payments are still taxable to the recipient and tax-deductible by the payor.

- The divorced couple cannot stay in the same household--Sometimes, a couple gets divorced, but neither party can afford to move out. Consequently, they might agree to live together. If alimony is paid, however, the payor will not be able to deduct it on his or her federal income tax return. Living in the same household prevents this tax treatment.

- Obligation to pay alimony must end at death of spouse--The obligation to make payments ceases upon the death of the payor or payee.

- The former spouses may not file a joint tax return--Many couples mistakenly file a joint return for the year in which they obtain a divorce. This is incorrect because filing status is determined by their marital status on December 31.

- If any portion of the payment is considered child support, that portion cannot be treated as alimony. Sometimes an order for spousal support will not use the words "child support," but a portion of the payment can be inferred to be child support. Different rules may apply if your divorce was finalized before 1986. For more information about previous rules, contact an attorney.

## Recapture rules

The tax deductibility of alimony may encourage spouses to disguise property settlement payments as alimony. Therefore, the law provides alimony recapture rules. Alimony recapture is calculated by looking only at the first three calendar years during which deductible alimony was claimed. Therefore, any alimony payments made after the third calendar year are not subject to the recapture rules.

Alimony recapture rules require deductible alimony payments during the first three years to be structured so that payments are substantially equal. The goal is to prevent "front-loading" of alimony. Deductible alimony payments will be recharacterized as nondeductible property settlement payments to the extent that payments made during the first two years are excessively front-loaded (i.e., if high sums of alimony are paid during the first two years). Essentially, the recapture rules apply if alimony paid in the second or third year of the three-year period drops by more than $15,000, compared to the prior year.

**Example(s):** Assume Ken pays Sue alimony of $60,000 in Year 1, $60,000 in Year 2, and $20,000 in Year 3. The recapture rules apply because the alimony paid in Year 3 was more than $15,000 less than that paid in Year 2. In other words, front-loading is apparent.

There are four exceptions to the recapture rules. Recapture does not apply:

- If either spouse dies during the first three years and the payments cease by reason of that death

- If the recipient-spouse remarries during the first three years and payments cease by reason of the remarriage

- To temporary support payments made pursuant to a court order

- To payments that fluctuate for reasons beyond the control of the payor-spouse

**Example(s):** Ray agrees to pay Dorothy 25 percent of the net income from his farm each year for three years. In the first year, his net income is $120,000, so Dorothy gets $30,000. In the second year, severe weather wipes out many crops, and the net income is only $32,000, so Dorothy gets $8,000. In the third year, the farm suffers a loss, rather than net income, so Dorothy gets nothing. In this case, no recapture will be required.

For more information about the recapture rules, contact an attorney or accountant.

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