Forensic and Valuation Services Section

Quick reference guide

to divorce-related tax matters

Filing status
Filing status chart
Children and dependency exemptions
Children and dependency exemptions (continued)
Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Filing status

Filing status for tax purposes is determined as of the last day of the year for the entire year. So, even if a divorce was finalized Dec. 31, the parties are considered unmarried for the entire year.

Married	Unmarried
1. Married and living together	1. Unmarried
2. Living together in a common law marriage	2. Legally separated under a divorce or separate maintenance decree (which is based on state law)
3. Married and living apart, but not legally separated under a divorce decree or separate maintenance agreement	3. Divorced
4. Separated under an interlocutory (not final) divorce decree	
5. Spouse died during year	
Filing statuses available:	**Filing statuses available:**
Filing jointly (Married filing jointly)	Single (if no qualifying person living in home)
Filing separately (Married filing separately)	Head of household (if qualifying person living in home)
Head of household	

Marriage of same-sex couples is treated the same as the marriage of a man and woman. Couples who entered into domestic partnerships, civil unions or similar relationships who are not considered married under their state's law are not considered married for federal tax purposes.

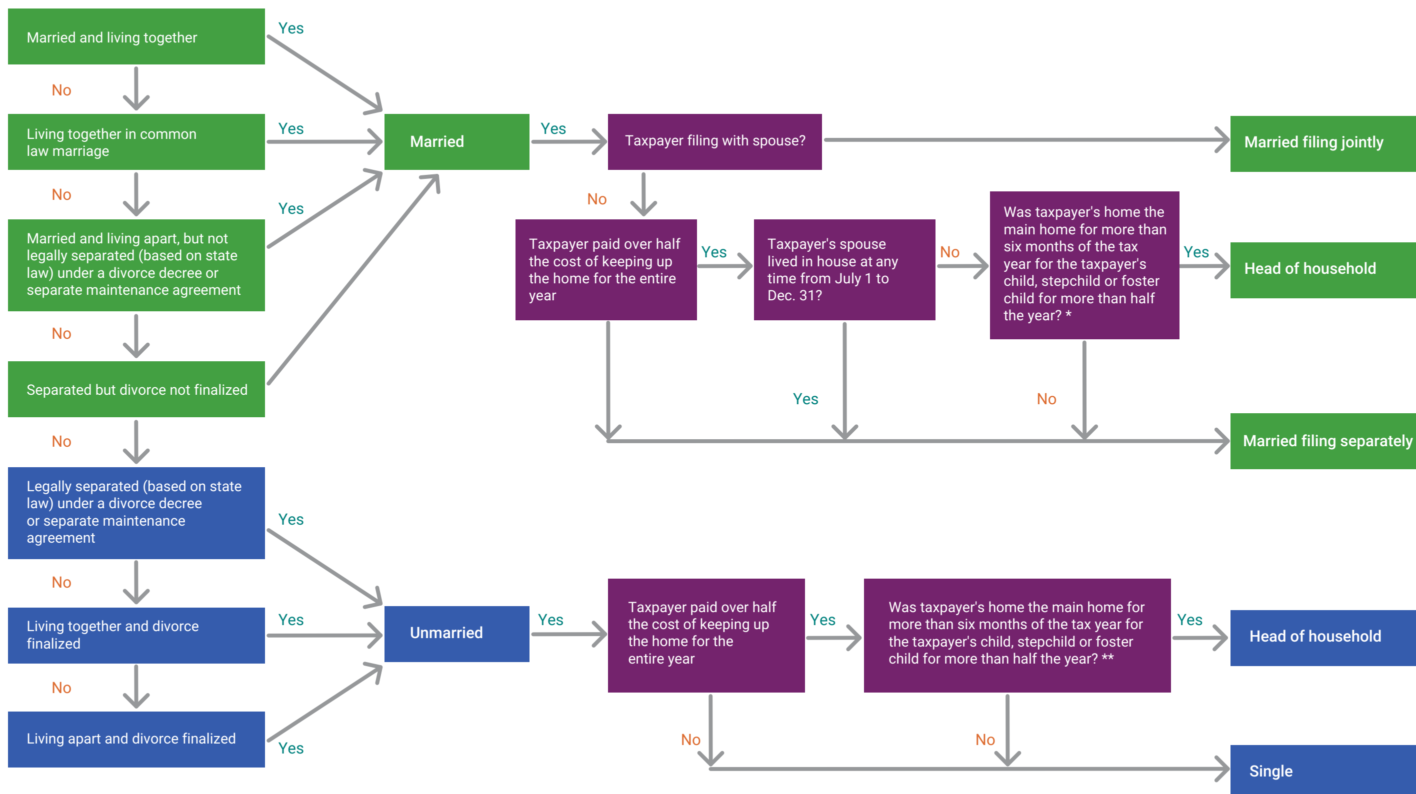
When filing separately, both parties must either itemize their deductions or use the standard deduction. The first party to do so establishes the requirement of the other to do the same.

A jointly filed return cannot be amended to file separate returns after the due date of the return. However, if either spouse filed a separate return (whether it is married filing separately, single or head of household), they can be amended to file a joint return within three years from the due date (not including extensions) of the separate return or returns.

Back to top

Filing status
Filing status chart
Children and dependency exemptions
Children and dependency exemptions (continued)
Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Filing status chart



*Includes a child for whom the taxpayer has signed a declaration, such as Form 8332, allowing the noncustodial parent to claim the exemption or for whom the noncustodial parent pays at least $600 a year support and is entitled to the exemption because of a pre-1985 agreement.

**If qualifying person is a dependent parent who does not live with the taxpayer, the taxpayer must have paid more than half the costs for the principal residence of the parent for the entire year.

Back to top

Filing status chart
Children and dependency exemptions
Children and dependency exemptions (continued)
Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Children and dependency exemptions

To claim a child as a dependent, all the following tests must be met:

Relationship

Son, daughter, stepchild, foster child, adopted child, brother, sister, stepbrother, stepsister or a descendant of any of these individuals

Age

1. Under age 19 at the end of the year and younger than taxpayer/spouse
2. A student under age 24 at the end of the year and younger than taxpayer/spouse, or
3. Permanently and totally disabled at any time during the year, regardless of age

Residency

Reside with the taxpayer for greater than half of the year. There are exceptions for temporary absences due to education, illness, business, vacation or military service.

Support

A child cannot provide more than half of their own support.

Citizenship test

U.S. citizen, U.S. resident alien, U.S. national, or a resident of Canada or Mexico

Joint return

A qualifying child cannot file a joint return with another individual.

Generally, a child is the qualifying child of the custodial parent. The custodial parent is the parent with whom the child lived for the longer period during the year. Where the custodial parent has released the exemption to the noncustodial parent, a child may be treated as the qualifying child of two taxpayers, under the following rules: A noncustodial parent may claim the child as a qualifying child only for the child tax credit.* But a noncustodial parent may not claim the child as a qualifying child in determining: (1) head-of-household filing status, (2) the EIC, (3) the child and dependent care credit or (4) the exclusion for dependent care assistance. Only the custodial parent (or other eligible taxpayer) may claim the child as a qualifying child for (1) through (4). The chart below should clarify when the noncustodial parent gets the benefits described above.

The following chart indicates possible tax benefits available for parents.

* Prior to Tax Cuts and Job Act of 2017, a noncustodial parent could claim for purposes of the dependency exemption deduction.

Back to top

Children and dependency exemptions
Children and dependency exemptions (continued)
Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Children and dependency exemptions (continued)

Tax benefit	Age	Relationship	Other
Child tax credit	Under 17	Must be claimed as dependent on tax return	First $1,400 of $2,000 credit is nonrefundable
Family credit	N/A	Qualifying dependent who is not a qualifying child	1. Nonrefundable 2. Support test 3. Income limits apply
Child and dependent care credit	Under 13, unless physically or mentally incapable	Only custodial parent may claim	1. Support test 2. Not available for MFS. If MFJ, both parents must be employed.
Higher education credits or deductions	1. Under 19 (and younger than taxpayer/spouse) 2. Under 24 if a student (and younger than taxpayer/spouse) 3. Any age if permanently or totally disabled	Must be claimed as dependent on tax return	1. Not available for MFS 2. If someone other than the taxpayer or the student (such as a relative or former spouse) pays qualified educational expenses directly to the institution, the student is treated as receiving the payment and paying the institution. Therefore, if the taxpayer is eligible to claim an exemption for the student, he/she is considered to have paid the expenses.
Earned income credit	1. Under 19 (and younger than taxpayer/spouse) 2. Under 24 if a student (and younger than taxpayer/spouse) 3. Any age if permanently or totally disabled	Son, daughter, stepchild, foster child, adopted child, brother, sister, stepbrother, stepsister or a descendant of any of these individuals	1. Not available for MFS 2. Income limits apply
Section 529 plans	No restriction on age	No restriction on relationship	Allows distributions for up to $10,000 (per student) in expenses for tuition for a public, private or religious elementary or secondary student for (1) curriculum and curricular materials; (2) books or other instructional materials; (3) online educational materials; (4) tuition for tutoring or educational classes outside of the home (but only if the tutor or instructor is not related to the student); (5) dual enrollment in an institution of higher education; and (6) educational therapies for students with disabilities.

All the above tax benefits are available to the custodial parent, if the requirements are met. Not all tax benefits are available to the non-custodial parent.

Custodial or non-custodial parent	Must be custodial parent
Dependency exemption Child tax credit Higher education credits or deductions	Head of household filing status Child and dependent care credit Earned income credit Health coverage tax credit

Back to top

Children and dependency exemptions (continued)
Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Retirement plans and IRAs

A Qualified Domestic Order (QDRO) is a court order allowing funds in a qualified retirement plan to be distributed to an alternate payee. QDROs can be very complicated and costly to set up, and a specialist is typically hired to prepare them. The transfer will be tax-free to the account holder if the divorce decree or separation agreement state the transfer is intended to be tax free under the IRC §408(d)(6).

If the alternate payee spouse rolls the distribution into an IRA or another qualified plan, there would be no tax or penalty on that distribution either. If the alternate payee spouse uses the funds in any other way, income taxes will be due on the distribution, but there will be no 10% early withdrawal penalty.

IRA transfers made pursuant to a divorce or separation decree are also not taxable. Methods of transfers include simply changing the name on the account or making a direct trustee-to-trustee transfer of the IRA assets. QDROs do not apply to IRAs.

Withdrawing funds from an IRA to satisfy a divorce judgment cause the IRA owner to be taxed on the distribution, and if applicable, the imposition of the 10% early-withdrawal penalty. The 10% early-withdrawal penalty can be avoided if the withdrawals are "annuitized" over the recipient's life expectancy. Once a series of withdrawals commence, they must continue at least until the IRA owner reaches 59½.

If a divorce decree if finalized by the end of the tax year, a spouse cannot deduct contributions made to a former spouse's IRA.

Stock options and restricted stock units

Stock options

According to IRS Rev. Rul. 2002-22, an employee spouse who transfers an interest in vested non-statutory stock options and vested non-qualified deferred compensation to the employee's spouse or former spouse incident to divorce is not required to include an amount in gross income upon the transfer.

Additionally, the former spouse, and not the employee spouse, is required to include the taxable amount in gross income when the former spouse exercises the stock options or when the deferred compensation is paid or made available to the former spouse.

The same conclusion applies when an employee transfers a statutory stock option (such as those governed by §422 or 423(b)) contrary to its terms to a spouse or former spouse in connection with divorce.

The option would be disqualified as a statutory stock option, see §422(b)(5) and 423(b)(9), and treated in the same manner as other non-statutory stock options. §424(c)(4) provides a §1041(a) transfer of stock acquired on the exercise of a statutory stock option is not a disqualifying disposition and does not apply to a transfer of the stock option.

This ruling does not apply to transfers of property between spouses other than in connection with divorce. This ruling also does not apply to transfers of non-statutory stock options, unfunded deferred compensation rights or other future income rights to the extent such options or rights are unvested at the time of transfer or to the extent that the transferor's rights to such income are subject to substantial contingencies at the time of the transfer.

Restricted stock units

Restricted stock units (RSUs) have become increasingly popular in recent years. They are less complicated and less risky to the employee than stock options. Typically, RSUs vest fully in one to three years. Upon vesting (lapsing of restrictions), the RSUs are taxable to the employee spouse.

The value (and taxable income) from vested RSUs is equal to the share value of the stock upon lapse of the restrictions. Gain or loss on a subsequent sale is measured by the increase or decrease in share value when the restrictions lapse when the RSUs are vested.

Back to top

Retirement plans and IRAs
Stock options and restricted stock units
Personal residence
Transferring/redeeming stock of a closely held company
Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Personal residence

Exclusion for gain on sale of personal residence

For income tax purpose, there is a capital gain exclusion of $250,000 (single) and $500,000 (married) for the sale of a principal residence. “Principal residence” is defined as the home where the taxpayer lived for any two of the last five years. The home must be sold within three years after the departing spouse moves out for exclusion to apply to the departing spouse.

If the home remains jointly titled, both parties can take advantage of their full personal residence exclusion of $250,000 as long as one of them continues to use it as a personal residence pursuant to the divorce decree or separation agreement.

In other words, the remaining spouse’s residence in the house will be counted as the departing spouse’s residence for purposes of calculating the two-year requirement.

Deductions for mortgage interest and real estate taxes

The Tax Cut and Jobs Act limits the amount of state and local income taxes and property taxes deductible by a taxpayer to $10,000 per year. Additionally, for mortgage debt incurred after Dec. 15, 2017, the limit on the amount of deductible mortgage interest is limited based on a mortgage of $750,000 (married filing jointly) or $375,000 for married filing separately).

Generally, the joint owner who makes the payment is entitled to the deduction. If payments are made from a joint account, there is a rebuttable presumption that the payment is made 50% by each party.

Example: If husband pays 70% of the payment and wife pays 30%, the deductible portion of the payment is allocated in the same proportion.

In a divorce context, if payments are not made pursuant to a divorce decree or separation agreement, the following rules are applicable:

Jointly owned and obligated on mortgage and non-occupant pays occupant spouse

- Half qualifies as alimony provided the requirements of IRC §71 are met.
- Half of the mortgage interest and real estate taxes are deductible by each party. This may be a way to take advantage of more of the property tax deduction that would not be available otherwise because of the $10,000 limit.

Occupant owns home and non-occupant still obligated on mortgage

- Half of the mortgage interest would be deductible by non-occupant provided a minor child of the marriage resides in the home with the occupant.
- Non-occupant cannot deduct any of the real estate taxes however, since has no ownership interest.

Non-occupant owns home

If non-occupant makes the payments to mortgage company:

- Non-occupant may deduct 100% of the mortgage interest and real estate taxes (subject to limits in Tax Cut and Jobs Act).
- Payments would not qualify as alimony to the occupant.

If occupant makes the payments to mortgage company:

- May be treated as taxable/deductible alimony
- Non-occupant may deduct 100% of the mortgage interest and real estate taxes.

Transferring/redeeming stock of a closely held company

Often there is insufficient cash or other property to satisfy a division of marital assets when there is a closely held family corporation in the marital estate. When the desired result is the sole ownership of the business by one of the parties, the transfer of stock ownership for cash in divorce may involve two steps:

1. Transfer of stock from one spouse to the other, followed by
2. The recipient spouse transferring the shares to the corporation in redemption of all the shares received from the soon to be ex-spouse

Carryover rules related to basis and holding period of the transferred shares apply in determining any gain on the redemption. Structured properly, redemption at capital gain rates to the non-owner spouse can be accomplished.

Structured improperly, the spouse retaining the business can be deemed to have received a constructive dividend (currently taxed at a maximum tax rate of 20%) but did not receive any cash to pay the tax. IRS Reg. §1.1041-2 indicates that if a divorce or separation agreement between the spouses or former spouses includes the following, the transferor spouse will be taxable.

- Both spouses or former spouses intend for the redemption to be treated, for federal income tax purposes, as a redemption distribution to the transferor spouse; and
- Such instrument or agreement supersedes any other instrument or agreement concerning the purchase, sale, redemption, or other disposition of the stock that is subject to the redemption.

If the divorce decree or separation agreement sets forth the following agreements between the parties, the transfer will be treated as a constructive distribution to the non-transferor spouse:

- Both spouses or former spouses intend for the redemption to be treated, for federal income tax purposes, as resulting in a constructive distribution to the non-transferor spouse; and
- Such instrument or agreement supersedes any other instrument or agreement concerning the purchase, sale, redemption, or other distribution of the stock that is the subject of the redemption.

Innocent spouse and separate liability relief

Both parties are responsible for the tax liability, interest and penalties of a jointly filed return regardless of what the divorce decree states or who earned the income. Three types of relief from joint tax liability are available.

The burden of proof is on the taxpayer requesting relief (IRC §6015(c)(2)) and IRS Form 8857 (Request for Innocent Spouse Relief) is used to request these types of relief. If an individual signs a joint return under duress, Reg. §1.6013-4(d) states the election to file jointly is invalid.

Innocent spouse relief (IRC §6015(b) and IRS Publication 971) provides relief from the payment of additional tax if a joint return was filed and all the following conditions are met:

1. The understatement of tax was solely attributable to spouse's erroneous items (for example: improper reporting of income, expenses, basis or deductions).
2. At the time the joint return was signed/filed, the individual did not know, and had no reason to know, there was an understatement of taxes.
3. Based on "all the facts and circumstances, it would be unfair to hold" the individual "liable for the understatement of tax."

Innocent spouse relief must be requested no later than two years after the date the IRS first attempted to collect the tax. Different deadlines apply in community property states.

Separation of Liability Relief (IRC §6015(c)) provides for the allocation of taxes owed between an individual and their former (or current) spouse when an item was not reported properly on a joint return if the individual did not have actual knowledge of the item resulting in the understatement of tax when the return was signed. The individual will be responsible for the taxes allocated to them, rather than the entire balance if this type of relief is granted.

One of the following requirements must be met to receive Separation of Liability Relief:

1. Divorced or legally separated
2. Widowed
3. Not a member of the same household at any time during the 12-month period prior to electing separate liability. To be a member of the same household, both parties must reside in the same residence or reside in separate residences due to a temporary absence, but the return is anticipated.

Separation of liability relief must be requested no later than two years after the date the IRS first attempted to collect the tax.

Equitable Relief (IRC §6015(f) and Rev. Proc. 2013-34) may apply when a taxpayer does not qualify for innocent spouse relief or separation of liability relief and "under all the facts and circumstances, it would be unfair to hold" the individual "liable for the understatement or underpayment of tax."

Rev. Proc. 2013-34 made streamlined relief available for spouses requesting relief if the requesting individual:

1. is no longer married,
2. would suffer economic hardship if relief is not granted, and
3. did not know or have reason to know of the understatement or deficiency or the underpayment of tax. Depending on the facts and circumstances, if abuse or financial control is present, the requesting spouse may still be granted relief even if he/she had knowledge or reason to know.

Additional factors identified in Rev. Proc. 2013-34 for determining whether equitable relief should be granted are:

1. the requesting spouse must not have knowingly filed a fraudulent joint return,
2. the legal obligation of each party to pay tax liabilities,
3. whether the person seeking relief received any significant benefits from the unpaid or understated tax,
4. requesting spouse's compliance with Federal income tax laws after request, and
5. mental or physical health.

Rev. Proc. 2013-34 also explains no one factor should be weighed more than another.

Generally, when a credit or refund is sought, equitable relief must be requested within three years after the date the return is filed or two years following the payment of the tax, whichever is later. If there is a balance due, relief should be requested within 10 years from the date the tax liability was assessed.

Back to top

Innocent spouse and separate liability relief
Alimony
Alimony (continued)
Costs of getting a divorce

Alimony

Amounts paid to a former spouse may be treated as alimony for federal tax purposes if all the following qualifications specified in IRC §71(b) are met:

- Cash payments (including check or money order);
- Payments must be required by written divorce decree or separation agreement;
- Payment may not be designated as "not alimony" in the divorce decree or separation agreement;
- Spouses may not be members of the same household when the payment is made;
- Payments are not treated as child support or property settlement;
- Payments must cease upon death of the recipient; and
- Parties may not file a joint return with each other.

For divorce or separation agreements entered into on or before Dec. 31, 2018, alimony is deductible by the payer and included in the recipient's income for tax purposes. Parties divorced before this date are "grandfathered in" and the alimony will continue to be tax deductible into the future for pre-2019 divorces.

There are still some payments that will not qualify as taxable or deductible alimony, such as:

Payments not qualifying as taxable/deductible alimony

- Child support;
- Non-cash payments or property settlements (in lump sum or installments);
- Payments that are the spouse's part of community property income;
- Payments to keep up the payer's property;
- Use of the payer's property; or
- Voluntary payments (those not required by a divorce decree or separation agreement).

Spouses may "elect out" of taxable/deductible alimony treatment. Typically, this is done when the payer has little or no gross income or when the payer's other deductions exceed their gross income.

The Tax Cuts and Job Act made changes to the tax treatment of alimony. For divorce or separation agreements entered into after Dec. 31, 2018, alimony payments are not deductible to the payer or taxable to the recipient.

In addition, parties who modify divorce or separation agreements entered into on or before Dec. 31, 2018, may continue to treat alimony as taxable/deductible, even if the modification judgment is entered into after 2019. In other words, tax-deductible/includable alimony will continue to be available for all divorced before 2019.

Alimony recapture

Alimony recapture is designed to disallow a property settlement from being disguised as taxable/deductible alimony. With the elimination of taxable/deductible alimony with the Tax Cuts and Job Act, the need to determine alimony recapture will no longer be necessary for divorces entered into after Dec. 31, 2017. An agreement modified after Dec. 31, 2018 could cause recapture for alimony paid/received in earlier years.

Recapture rules may apply if alimony payments decrease or terminate during the first three calendar years. If subject to recapture, the payer must include in income part of the alimony previously deducted. The recipient can deduct part of the alimony previously included in income.

There must be less than a $15,000 difference between alimony in year 2 and year 3. If not, the additional amount must be recaptured. Additionally, year 1 alimony must be less than $15,000 greater than the average of year 2 and year 3 alimony (after adjusting for any necessary recapture in the first step.

Two examples are illustrated in the following schedule.

		Example A	Example B
	Year 1 alimony	$60,000	$50,000
	Year 2 alimony	$24,000	$39,000
	Year 3 alimony	$6,000	$28,000
Recapture calculation			
1. Alimony paid in 2nd calendar year		$24,000	$39,000
2. Alimony paid in 3rd calendar year		6,000	28,000
3. Floor	$15,000		
4. Line 2 + line 3		21,000	43,000
5. Recapture for 2nd-year payments* (line 1 – line 4)		3,000	0
6. Alimony paid in 1st calendar year		60,000	50,000
7. Adjusted alimony paid in 2nd year (line 1 – line 5)		21,000	39,000
8. Alimony paid in 3rd calendar year		6,000	28,000
9. Line 7 + line 8		27,000	67,000
10. Average alimony paid in 2nd and 3rd years (line 9 ÷ 2)		13,500	33,500
11. Floor	$15,000		
12. Line 10 + line 11		28,500	48,500
13. Recapture for 1st-year payments* (line 6 – line 12)		31,500	1,500
14. Total recaptured alimony (line 5 + line 13)		34,500	1,500

Back to top

Alimony

Alimony (continued)

Costs of getting a divorce

Alimony (continued)

When applicable, the payer includes the amount on line 14 on the "alimony received" line of Form 1040 while the recipient deducts this amount on the "alimony paid" line of Form 1040.

The recapture rule does not apply in four situations:

1. Temporary support payments;
2. Death of either spouse;
3. Remarriage of recipient spouse; or
4. When alimony is based on payer's variable income.

The first three years of alimony could be paid over a 367-day period.

For example:

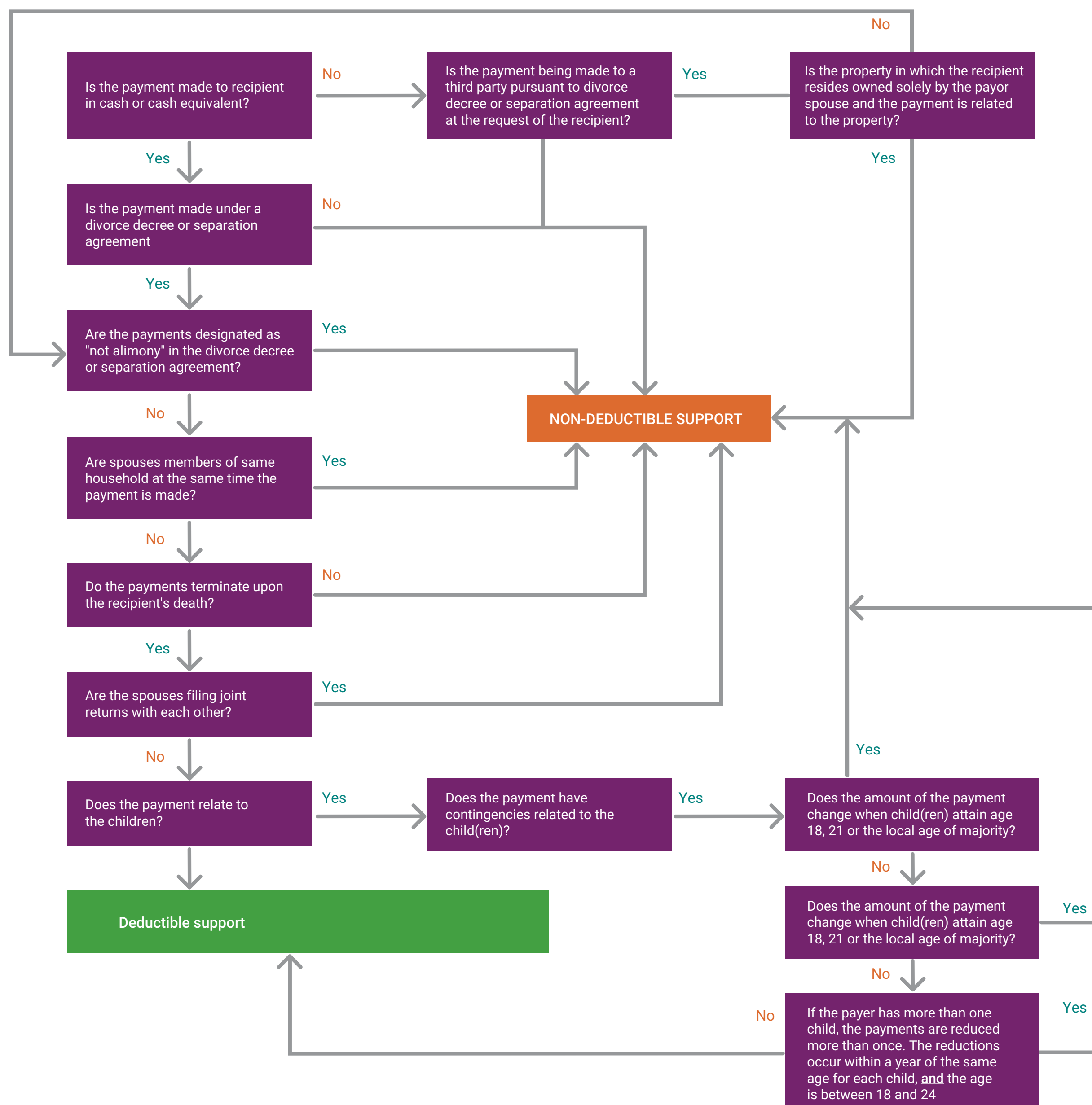
Year 1 alimony paid on Dec. 31, 20X1

Year 2 alimony paid on Jan. 1, 20X2

Year 3 alimony paid on Jan. 1, 20X3

Payment shortfalls

If an individual is obligated to pay both alimony and child support, but pays less than the entire monthly amount due, the payments are first applied to satisfy the child support obligation and any remainder is considered alimony.



Back to top

Costs of getting a divorce

Legal and professional fees as well as court costs related to getting a divorce are generally not deductible. The payment of a former spouse's attorney or professional fees is also not deductible, unless they meet the requirements of deductible alimony under IRC §71.

Nondeductible costs:

- Expenses paid for arranging child custody and support
- Expenses paid in arriving at a financial settlement and retaining the income-producing property

Deductible costs (legal or accounting for divorces entered into before Jan. 1, 2018, and after Dec. 31, 2025, per the Tax Cuts and Job Act):

- Fees paid for tax advice related to a divorce
- Fees paid to determine or collect alimony
- Fees paid to determine the estate tax consequences of a property settlement
- Fees paid to professionals such as appraisers and actuaries if the services were performed to determine the correct amount of tax or to assist in obtaining alimony

When allowed, the above deductions may be taken as itemized deductions. The taxpayer should obtain itemized bills from any attorneys or accountants providing the services for which the deductions are being taken.

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Back to top