NRS 125B.070 Amount of payment: Definitions; adjustment of presumptive maximum amount based on change in Consumer Price Index.

1. As used in this section and NRS 125B.080, unless the context otherwise requires:

(a) "Gross monthly income" means the total amount of income received each month from any source of a person who is not self-employed or the gross income from any source of a self-employed person, after deduction of all legitimate business expenses, but without deduction for personal income taxes, contributions for retirement benefits, contributions to a pension or for any other personal expenses.

(b) "Obligation for support" means the sum certain dollar amount determined according to the following schedule:

(1) For one child, 18 percent;

(2) For two children, 25 percent;

(3) For three children, 29 percent;

(4) For four children, 31 percent; and

(5) For each additional child, an additional 2 percent,

of a parent's gross monthly income, but not more than the presumptive maximum amount per month per child set forth for the parent in subsection 2 for an obligation for support determined pursuant to subparagraphs (1) to (4), inclusive, unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080.

2. For the purposes of paragraph (b) of subsection 1, the presumptive maximum amount per month per child for an obligation for support, as adjusted pursuant to subsection 3, is:

INCOME RANGE If the Parent's Gross Monthly Income Is at Least		But Less Than	PRESUMPTIVE MAXIMUM AMOUNT The Presumptive Maximum Amount the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 Is
$0	-	$4,168	$500
4,168	-	6,251	550
6,251	-	8,334	600
8,334	-	10,418	650
10,418	-	12,501	700
12,501	-	14,583	750

If a parent's gross monthly income is equal to or greater than $14,583, the presumptive maximum amount the parent may be required to pay pursuant to paragraph (b) of subsection 1 is $800.

3. The presumptive maximum amounts set forth in subsection 2 for the obligation for support must be adjusted on July 1 of each year for the fiscal year beginning that day and ending June 30 in a rounded dollar amount corresponding to the percentage of increase or decrease in the Consumer Price Index (All Items) published by the United States Department of Labor for the preceding calendar year. On April 1 of each year, the Office of Court Administrator shall determine the amount of the increase or decrease required by this subsection, establish the adjusted amounts to take effect on July 1 of that year and notify each district court of the adjusted amounts.

4. As used in this section, "Office of Court Administrator" means the Office of Court Administrator created pursuant to NRS 1.320.

(Added to NRS by 1987, 2267; A 1991, 1334; 2001, 1865; 2003, 101, 342)

NRS 125B.080 Amount of payment: Determination. Except as otherwise provided in NRS 425.450:

1. A court of this State shall apply the appropriate formula set forth in NRS 125B.070 to:

(a) Determine the required support in any case involving the support of children.

(b) Any request filed after July 1, 1987, to change the amount of the required support of children.

2. If the parties agree as to the amount of support required, the parties shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070. If the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with subsection 9 which justify the deviation to the court, and the court shall make a written finding thereon. Any inaccuracy or falsification of financial information which results in an inappropriate award of support is grounds for a motion to modify or adjust the award.

3. If the parties disagree as to the amount of the gross monthly income of either party, the court shall determine the amount and may direct either party to furnish financial information or other records, including income tax returns for the preceding 3 years. Once a court has established an obligation for support by reference to a formula set forth in NRS 125B.070, any subsequent modification or adjustment of that support, except for any modification or adjustment made pursuant to subsection 3 of NRS 125B.070 or NRS 425.450 or as a result of a review conducted pursuant to subsection 1 of NRS 125B.145, must be based upon changed circumstances.

4. Notwithstanding the formulas set forth in NRS 125B.070, the minimum amount of support that may be awarded by a court in any case is $100 per month per child, unless the court makes a written finding that the obligor is unable to pay the minimum amount. Willful underemployment or unemployment is not a sufficient cause to deviate from the awarding of at least the minimum amount.

5. It is presumed that the basic needs of a child are met by the formulas set forth in NRS 125B.070. This presumption may be rebutted by evidence proving that the needs of a particular child are not met by the applicable formula.

6. If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:

(a) Set forth findings of fact as to the basis for the deviation from the formula; and

(b) Provide in the findings of fact the amount of support that would have been established under the applicable formula.

7. Expenses for health care which are not reimbursed, including expenses for medical, surgical, dental, orthodontic and optical expenses, must be borne equally by both parents in the absence of extraordinary circumstances.

8. If a parent who has an obligation for support is willfully underemployed or unemployed to avoid an obligation for support of a child, that obligation must be based upon the parent's true potential earning capacity.

9. The court shall consider the following factors when adjusting the amount of support of a child upon specific findings of fact:

(a) The cost of health insurance;
(b) The cost of child care;
(c) Any special educational needs of the child;
(d) The age of the child;
(e) The legal responsibility of the parents for the support of others;
(f) The value of services contributed by either parent;
(g) Any public assistance paid to support the child;
(h) Any expenses reasonably related to the mother's pregnancy and confinement;
(i) The cost of transportation of the child to and from visitation if the custodial parent moved with the child from the jurisdiction of the court which ordered the support and the noncustodial parent remained;
(j) The amount of time the child spends with each parent;
(k) Any other necessary expenses for the benefit of the child; and
(l) The relative income of both parents.

(Added to NRS by 1987, 2267; A 1989, 859; 1991, 1334; 1993, 486; 1997, 2295; 2001, 1866)

NRS 125B.085 Order for support to include provision regarding medical support for child.

1. Except as otherwise provided in NRS 125B.012, every court order for the support of a child issued or modified in this State on or after June 2, 2007, must include a provision specifying that one or both parents are required to provide medical support for the child and any details relating to that requirement.

2. As used in this section, "medical support" includes, without limitation, coverage for health care under a plan of insurance that is reasonable in cost and accessible, including, without limitation, the payment of any premium, copayment or deductible and the payment of medical expenses. For the purpose of this subsection:

(a) Payments of cash for medical support or the costs of coverage for health care under a plan of insurance are "reasonable in cost" if:

(1) In the case of payments of cash for medical support, the cost to each parent who is responsible for providing medical support is not more than 5 percent of the gross monthly income of the parent; or

(2) In the case of the costs of coverage for health care under a plan of insurance, the cost of adding a dependent child to any existing coverage for health care or the difference between individual and family coverage, whichever is less, is not more than 5 percent of the gross monthly income of the parent.

(b) Coverage for health care under a plan of insurance is "accessible" if the plan:

(1) Is not limited to coverage within a geographical area; or

(2) Is limited to coverage within a geographical area and the child resides within that geographical area.

PRESUMPTIVE MAXIMUM AMOUNTS (PMA) OF CHILD SUPPORT
EFFECTIVE JULY 1, 2012 - JUNE 30, 2013

NRS 125B.070

PMA increased 3% pursuant to the Consumer Price Index (all items) increase in Calendar Year 2011 (December - December) as published by the U.S. Department of Labor
http://www.bls.gov/cpi/#tables

INCOME RANGE			PRESUMPTIVE MAXIMUM AMOUNT (PMA)
If the Parent's Gross Monthly Income is at Least		*But Less Than*	*The PMA the Parent May Be Required to Pay per Month per Child Pursuant to Paragraph (b) of Subsection 1 is*
$0	-	$4,235	$649
$4,235	-	$6,351	$714
$6,351	-	$8,467	$781
$8,467	-	$10,585	$844
$10,585	-	$12,701	$909
$12,701	-	$14,816	$973
$14,816	-	No Limit	$1,040

The PMA are calculated and published by the Administrative Office of the Courts on or before April 1 of each year in accordance with the provisions of NRS 125B.070 (3). Please contact Deanna Bjork at (775) 684-1708 if you have any questions on how the amounts were calculated. Contact your district court if yo have questions on how the amounts are applied based on circumstances.

Historical PMA are available on the Nevada Judiciary's website at www.nevadajudiciary.us. Type in the word "presumptive" after selecting the "search" option, which is found at the bottom of the website.

126 Nev., Advance Opinion 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY FERNANDEZ,
Appellant,
vs.
JENNIFER FERNANDEZ, N/K/A
JENNIFER ROTHMAN,
Respondent.

No. 51423

FILED

FEB 04 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Appeal from a district court post-decree order denying appellant's motion to modify child support. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Reversed and remanded.

Radford J. Smith, Chtd., and Radford J. Smith, Henderson,
for Appellant.

Lemons Grundy & Eisenberg and Robert Eisenberg, Reno; Ecker & Kainen, Chtd., and Andrew L. Kynaston, Las Vegas.
for Respondent.

BEFORE PARRAGUIRRE, C.J., DOUGLAS and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

This is an appeal by the father of minor children from an order denying a motion to modify child support under NRS 125B.145. The trial court held that it was "not bound" by NRS 125B.145 because the parties "previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support." In the trial court's view, this made the child support order nonmodifiable, so

2/24/10: Corrected per letter to publishers. CS

10-03076

long as the father had "sufficient means (assets and/or income) to meet the agreed upon child support obligations."

The motion to modify alleged that the father's monthly gross income had dropped more than 80 percent, to the point his child support obligation exceeded it. The mother's circumstances, meanwhile, had improved to the extent that her assets and gross monthly income equaled or outmatched his. Declining to apply NRS Chapter 125B's modification provisions to these facts was error. Stipulated or not, the obligation the father sought to modify was incorporated and merged into the decree as an enforceable child support order. State and federal statutes give child support orders super-legal reach. Because children's needs and parents' circumstances can change unpredictably over the life of a child support order, NRS Chapter 125B provides for their periodic review and modification—up or down—as changed circumstances dictate. The statutory scheme does not admit a child support order that cannot be modified based on a material change in circumstances.

The father's motion presented facts that, if true, qualified for relief. He did not need to wait until he was missing court-ordered child support payments or in financial peril before being heard under NRS 125B.145 and its related statutes, NRS 125B.070 and NRS 125B.080. We therefore reverse and remand.

I.

The parties had two children during their brief marriage, which ended in a joint petition for divorce that was granted in August 1998. At the time they divorced, the couple owned two houses free and clear and had no community debt of consequence. They worked in the securities industry, he as a day trader and she in administrative support; both held series 7 (general securities representative) licenses.

The original divorce decree divided the houses and other property between the couple and awarded them joint legal custody of the children, giving primary physical custody to the mother. In addition to alimony, the decree obligated the father to provide health insurance and to pay any uncovered medical expenses for the children, to pay for a housekeeper and either a nanny or day care, and to pay child support of $3,000 per month. Although it stated the child support was "consistent with the provisions of NRS 125B.070," in fact the award exceeded NRS 125B.070's presumptive maximum.[1] Since it did, the decree should have included findings as to the bases for the upward deviation, but didn't.

---

[1]NRS 125B.070 and NRS 125B.080 set presumptive limits on child support, keyed to the number of children and the obligor parent's gross monthly income, with a $100 minimum and $800 maximum per child per month, adjusted to the Consumer Price Index. NRS ~~125B.070(b)(5)~~ 125B.070(1)(b) or requires that a support order that departs from the formula requires "findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080," which provides:

> If the amount of the awarded support for a child is greater or less than the amount which would be established under the applicable formula, the court shall:
>
> (a) Set forth findings of fact as to the basis of the deviation from the formula; and
>
> (b) Provide in the findings of fact that amount of support that would have been established under the applicable formula.

NRS 125B.080(9) lists the permitted factors for deviating from NRS 125B.070's guidelines.

Roughly a year later, in July 1999, the trial court approved a stipulation and order to modify the decree. The modification increased the father's monthly child support obligation from $3,000 to $4,000, to take effect two years later, in July 2001, and continue until the younger child reached age 18. It also added a provision requiring the father to pay for "private elementary (including preschool and kindergarten) and secondary school at a mutually agreed upon private school in Las Vegas, Nevada." The modified decree recited that the increased "child support obligation is consistent with the provisions of NRS 125B.070 and NRS 125B.080(9)." Again, it didn't include findings to explain the bases for awarding more support than the presumptive statutory guideline amounts.[2]

Another year passed in which the parties tried but failed at reconciliation. In June 2000, they returned with a new stipulation and order, which the court approved, again modifying the divorce decree. This stipulation and order replaced the mother's primary physical custody of the children with joint physical custody in both parents. Although it left the amount of the child support obligation unchanged,[3] it was this stipulation and order that purportedly made the child support obligation nonmodifiable, stating that both parties "voluntarily waive any right they may have pursuant to Chapter 125B of the Nevada Revised Statutes to

[2]The parties' respective appellate attorneys did not represent them in the trial court when the original decree was entered and later modified.

[3]If the change from primary physical custody with the mother to joint physical custody with both parents affected the presumptive child support obligation as calculated under the guidelines in NRS 125B.070 and NRS 125B.080, see Wright v. Osborn, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), and therefore the amount by which the support ordered deviated from the guidelines, this wasn't stated.

seek a modification to [father's] child support obligation to [mother]." The waiver was absolute, with one exception: If the mother relocated outside of Nevada with the children without the father's consent, the father could seek to modify support.[4]

The father filed the motion to modify underlying this appeal in 2007. The trial court declined to review the motion under NRS 125B.145. Instead, it ordered a limited hearing to address whether the waiver made the child support order nonmodifiable.

At the hearing, the trial court heard testimony from the father and reviewed current affidavits of financial condition from both parents. Acknowledging that the father's and mother's financial pictures had inverted since child support had been set, the trial court found that, "based on each [party's] purported current income, were the Court to apply the child support formula set forth in NRS 125B.070, . . . neither party would be obligated to pay child support to the other." Even so, the trial court denied the father's motion to modify. It held that "the child support provisions of the [decree and its stipulated modifications] shall not be disturbed by the Court based upon the waivers of the parties set forth therein and upon the fact that [the father] still has the ability to pay said amount from his currently held assets." Elaborating, it decreed that "the Court is not bound by the provision of NRS 125B.145 where the parties

---

[4]The trial judge sua sponte struck this condition as contrary to public policy. On appeal, the mother offers to have the condition reinstated if this will defeat the father's argument that this removed part of the consideration for agreeing to waive statutory modification rights. Because we conclude the stipulation's waiver provision is unenforceable, we do not address this aspect of it separately.

have previously agreed in a stipulation and order modifying the Decree of Divorce that neither party will seek modification of child support."

Because it found the child support order nonmodifiable, the trial court did not fully hear or make findings on the alleged bases for statutory modification. We likewise make no findings, but for purposes of assessing whether they merited further proceedings, we accept arguendo the following proffered facts as true: By 2007, when the father filed the motion to modify, his child support obligations amounted to $80,000 a year ($48,000 in monthly child support payments, $30,000 per year in private school tuition, plus insurance and uncovered medical expenses). In his banner years in the stock market (1995-2001), the father had earned sums ranging from $500,000 in the late 1990s to more than $4,000,000 in 2001. He began losing heavily in the market in 2002. With an adverse report already on his industry record, his losses eventually cost him the leverage needed to trade at the high levels he had. By 2007, he no longer traded and was earning $3,000 a month selling cars, plus interest of like amount on retained assets. The lavish second home he'd bought in Malibu had been sold, and the lion's share of his wealth had gone to retire margin debt. Last but not least, he had remarried, then either divorced or separated, and had a new child to support.

On the mother's side, she had remarried too. Although she no longer worked outside the home, her 2007 affidavit of financial condition showed passive and earned income equal to the father's, taking into account her new husband's earnings. Her household also had an additional child to support, her stepson.

The parties had comparable net worth. Each had recently sold the home s/he had received in the divorce. With the proceeds from these

sales, both had mostly liquid net assets of between $1,000,000 and $1,500,000, hers being somewhat higher than his.

II.

This appeal presents the question of whether parents can, by stipulation, eliminate or abridge a trial court's statutory authority to review and modify a child support order. The mother maintains, as she did in the trial court, that the parties' agreement to nonmodifiable child support should be upheld as a matter of contract law and equity, based on her part performance. In her view, public policy has no place in the analysis when a nonmodifiability provision is invoked to prohibit downward, as opposed to upward, modification of child support.

The father sees the issue differently. In his view, when the parties incorporated the support agreement into the decree, it ceased being a matter of private contract and became a judicially imposed obligation, at which point the statutory modification provisions apply, notwithstanding the parties' agreement to the contrary.[5] He emphasizes

---

[5]The mother does not dispute that the child support order and its stipulated modifications, including its provision waiving the right to seek modification, were incorporated and merged into the decree. This dispositively distinguishes Renshaw v. Renshaw, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980), which was prosecuted "solely [as a] breach of contract action" and upheld a contract term for nonmodifiable support in a case in which the agreement was "neither incorporated in nor merged in the judgment and decree of the trial court." See Day v. Day, 80 Nev. 386, 395 P.2d 321 (1964) (a spousal support agreement is merged into the divorce decree and loses its character as an independent agreement unless both the agreement and decree direct the agreement's survival) (distinguishing Ballin v. Ballin, 78 Nev. 224, 371 P.2d 32 (1962)). Whether and to what extent the "merger" distinction drawn in cases like Renshaw is supportable under modern child support statutes has been

continued on next page . . .

that the statutes do not distinguish between upward and downward deviations from the formula amounts, nor do they expressly permit parties to stipulate to nonmodifiable child support orders. Relying on NRS 125B.145(1)(b), he urges that the award should have been modified to conform to the formulas in NRS 125B.070 and NRS 125B.080 without regard to changed circumstances, since more than three years had passed since the award's last review; failing that, he urges that he demonstrated sufficient change in circumstances to warrant modification.

The father has the better side of the argument on modifiability. While Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 229 (2009), forecloses the father's contention that the mere passage of time entitles him to modification without regard to changed circumstances, his primary argument—that the stipulation waiving the right to seek modification of a support order for changed circumstances as provided in NRS 125B.080(3) and NRS 125B.145(4) is unenforceable—is correct. We conclude that so long as the statutory criteria for modification are met, a "trial court always has the power to modify an existing child support order, either upward or downward, notwithstanding the parties' agreement to the contrary." In re Marriage of Alter, 89 Cal. Rptr. 3d 849, 852 (Ct. App. 2009).

A.

Nevada's child support statutes do not directly address whether parents can stipulate to a nonmodifiable child support order.

. . . continued

questioned, Mazza v. Hollis, 947 A.2d 1177, 1180-81 (D.C. 2008), but that issue is not before the court.

However, they inarguably establish that child support involves more than private contract. By law, "[t]he parents of a child . . . have a duty to provide the child necessary maintenance, health care, education and support." NRS 125B.020(1). This duty "is discharged by complying with a court order for support or with the terms of a judicially approved settlement." NRS 125B.120(1). A trial court in a marital dissolution action has jurisdiction to determine custody and support of the parents' minor children, NRS 125.510; NRS 125B.080, and to award child support even though the parents have agreed none should be paid. Atkins v. Atkins, 50 Nev. 333, 336-37, 259 P. 288, 288-89 (1927) (citing Nev. Rev. Laws § 5840 (1912), a precursor to NRS 125.510), partial abrogation recognized in Lewis v. Hicks, 108 Nev. 1107, 1111-12, 843 P.2d 828, 831 (1992).

Although parents often stipulate to an appropriate child support order, even agreed-upon child support orders must be calculated and reviewed under the statutory child support formula and guidelines in NRS 125B.070 and NRS 125B.080. Thus, NRS 125B.080(2) provides that, if parents agree to a child support order, they "shall certify that the amount of support is consistent with the appropriate formula set forth in NRS 125B.070." "[I]f the amount of support deviates from the formula, the parties must stipulate sufficient facts in accordance with [NRS 125B.080(9)] which justify the deviation to the court, and the court shall make a written finding thereon." NRS 125B.080(2). The factors listed in NRS 125B.080(9) as permitting deviation—whether "greater or less than [the formula] amount," NRS 125B.080(6)—are exclusive, not illustrative. Anastassatos v. Anastassatos, 112 Nev. 317, 320, 913 P.2d 652, 654 (1996); Lewis, 108 Nev. at 1111, 843 P.2d at 831.

The trial court has continuing jurisdiction over its child support orders. See NRS 125.510(1)(b) (once having determined custody, a trial court may "[a]t any time modify or vacate" its support and custody orders). NRS 125B.145(4) declares that "[a]n order for the support of a child may be reviewed at any time on the basis of changed circumstances" and adds that a change of 20 percent or more in a child support obligor's gross monthly income "shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of a child."[6] (Emphases added.) Further, upon the request of a parent or legal guardian, "[a]n order for the support of a child must . . . be reviewed by the court at least every 3 years . . . to determine whether the order should be modified or adjusted." NRS 125B.145(1)(b) (emphasis added). Finally, NRS 125B.145(2)(b) specifies that, "[i]f the court . . . [h]as jurisdiction to modify the order and, taking into account the best interests of the child, determines that modification or adjustment of the order is appropriate, the court shall enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080." (Emphasis added.)

---

[6]The provision equating a 20-percent change in income with "changed circumstances" was added to NRS 125B.145 in 2003. 2003 Nev. Stat., ch. 96, § 2, at 546. Although the amendment postdated the stipulated order in this case, it applies to the motion to modify, since it clarified an existing statute, Norman J. Singer and J.D. Shambie Singer, 1A Sutherland Statutory Construction § 22.34 (7th ed. 2009), and is being invoked prospectively, to child support payments not yet due when the motion to modify was filed. See Ramacciotti v. Ramacciotti, 106 Nev. 529, 532, 795 P.2d 988, 990 (1990).

Although Nevada child support laws contain plain language applying their formula and guideline provisions to parents who stipulate to court-ordered child support, the modification statutes say nothing about whether parties can stipulate around them or, indeed, about parental agreements at all. Had the Legislature wanted to give parents the option of agreeing to a decree providing for nonmodifiable child support, it could have easily provided an exception to NRS 125B.145, as Connecticut did with its support modification statute. See Amodio v. Amodio, 743 A.2d 1135, 1143 (Conn. App. Ct. 2000) (discussing Conn. Gen. Stat. § 46b-86(a), which provides for modification based on changed circumstances "unless and to the extent that the decree precludes modification"). It didn't. Instead, the Nevada Legislature enacted the broadly unqualified modification statutes excerpted above. Because a child support order affects the child's interests, as much or more than the parents', we are disinclined to find that a parent can waive the modification statutes' protections. We thus interpret the modification statutes to mean what they say, with no implied judicial exceptions. The purport of these statutes, as their unqualified language suggests, is that "the jurisdiction of the court never ends in a support matter, as long as the child is supposed to be getting support. If there is a significant change in circumstances in the parties' relative earning capacity, that can always be brought back to the court, and should be." Hearing on A.B. 3 Before the Senate Comm. on Judiciary, 65th Leg. (Nev., May 10, 1989) (Assemblyman Robert Sader's testimony).

Most courts agree that, absent a contrary statutory directive, public policy prevents a court from enforcing a purportedly nonmodifiable child support order, even if the parties stipulate to it. See Armstrong v.

Armstrong, 544 P.2d 941, 943 (Cal. 1976) ("When a child support agreement is incorporated in a child support order, the obligation created is deemed court-imposed rather than contractual, and the order is subsequently modifiable despite the agreement's language to the contrary"); Phillips v. Phillips, 186 P.2d 102, 103 (Kan. 1947) (parties cannot by agreement oust the court of its continuing statutory jurisdiction over child support by agreeing to a nonmodifiable child support order); Grimes v. Grimes, 621 A.2d 211, 213-14 (Vt. 1992) (canvassing cases and holding unenforceable as a matter of public policy "parental agreements prohibiting or limiting the power of the court to modify child support in the future"); Frisch v. Henrichs, 736 N.W.2d 85, 101 (Wis. 2007) ("stipulation, which set a ceiling on child support and prevented modification in the level of child support, is not enforceable and offends public policy"); Lang v. Lang, 252 So. 2d 809, 812 (Fla. Dist. Ct. App. 1971) (public policy prohibits a nonmodifiable child support order); In re Marriage of Rife, 878 N.E.2d 775, 787 (Ill. App. Ct. 2007) (support modification statute's plain language preserved the court's authority to modify child-related provisions of the judgment, precluding any agreement to waive the right to seek child support adjustments).[7]

---

[7]Although not precisely on point, we recognized as much in Willerton v. Bassham, 111 Nev. 10, 25-27, 889 P.2d 823, 832-33 (1995), which concerned whether a stipulated judgment in a paternity suit prevented later judicial modification of the support adjudication. Rejecting the argument that the finality of stipulated judgments made the agreed-upon support obligation nonmodifiable, the court held that "the state has a compelling interest in seeing that any provisions for the support of a child incorporated in . . . settlement agreements are modifiable." Id. at 24, 889 P.2d at 832. The court characterized NRS

continued on next page . . .

The mother invites us to distinguish between the children's and the parents' interests. She concedes that public policy may prohibit a ceiling on child support, since parents cannot contract away a child's right to increased support if the child's needs require it. However, she argues for a different rule where a support obligor seeks a downward adjustment in child support based on changed parental circumstances. Reasoning that more support will always serve a child's interests better than less, she urges that public policy supports nonmodification agreements when applied to preclude downward modification, no matter the impact on the obligor parent who, after all, agreed to the order in the first place.

There are multiple problems with this argument, including a threshold one: The stipulated order here was general; it did not just set a floor on child support, but also a ceiling. Both parents gave up the right to seek modification—upward or downward—no matter whose circumstances changed, be it the mother's, the father's, or the children's. Enforcing the stipulation against the father's request for downward modification sanctions its enforcement against the mother seeking upward modification. The promises were inseparably paired "corresponding equivalents," which takes partial enforcement off the table. See Restatement (Second) of Contracts § 184 cmt. a (1981); Grace McLane Giesel, 15 Corbin on Contracts § 89.6 (rev. ed. 2003).

More fundamentally, neither our statutes nor public policy supports the argument that more court-ordered child support is always

. . . *continued*

Chapter 125B's modification provisions as "protections" that cannot be waived or avoided by agreement. Id. at 26, 889 P.2d at 833.

better for the child than less. The formula and guideline statutes are not designed to produce the highest award possible but rather a child support order that is adequate to the child's needs, fair to both parents, and set at levels that can be met without impoverishing the obligor parent or requiring that enforcement machinery be deployed. See Barbagallo v. Barbagallo, 105 Nev. 546, 551, 779 P.2d 532, 536 (1989) ("what really matters" under the formula and guideline statutes "is whether the children are being taken care of as well as possible under the financial circumstances in which the two parents find themselves"), partially overruled on other grounds by Wright v. Osburn, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998), as recognized in Rivero v. Rivero, 125 Nev. ___, ___, 216 P.3d 213, 232 (2009). This is evident in NRS 125B.080(6), which requires findings to support deviations from the formula—whether the deviation "is greater or less" than the guideline amount; and in NRS 125B.145(4), which defines "changed circumstances" for modification review purposes as "a change of 20 percent or more in the gross monthly income" of the support obligor, whether the 20-percent change was up or down.

The statutes do not equate the child's best interests with perpetuating a supererogatory support order the obligor parent can no longer meet. Our child support statutes, like those in sister states, recognize that

> parents' circumstances are subject to adversities out of their control. A serious accident, catastrophic illness, or a flagging economy and the hard times that go along with it, can all interpose a reversal of fortune that would make it impossible to satisfy a pre-set level of child support. In such a situation, it would not be in a child's best interest to force the parent into a level

> of debt he or she has no ability to pay. . . . We conclude, therefore, that the court always has the power to modify a child support order, upward or downward, regardless of the parents' agreement to the contrary.

In re Marriage of Alter, 89 Cal. Rptr. 3d 849, 858 (Ct. App. 2009) (emphasis added). Accord Grimes v. Grimes, 621 A.2d 211, 214 (Vt. 1992) ("There is a practical side to this issue [since a] clearly excessive child support order may lead . . . to collection difficulties and periodic returns to court"; "[a] support amount that, on paper, appears generous to the children becomes illusory if, for reasons related to the excessive size of the payments, collection must be coerced on a regular basis."); Krieman v. Goldberg, 571 N.W.2d 425, 432 (Wis. Ct. App. 1997) (to "subject a payor parent to an unreviewable stipulation for child support could jeopardize the payor parent's financial future, may have detrimental effects on the parent/child relationship and in this way would ultimately not serve the best interests of the child").

Parents of course are free to—and often do—provide support to their children in sums greater than the statutes require. But this case involves a child support order, enforceable by contempt and intended by both parents to satisfy their legal obligations of support. When agreed-upon support is incorporated into a decree, it becomes a court order. Court-ordered child support is "not a fixed obligation but one that is subject to readjustment as circumstances may direct, and the court's power of adjustment is not limited to changes in the children's favor." Riemer v. Riemer, 73 Nev. 197, 199, 314 P.2d 381, 383 (1957). "There is no merit in th[e] contention" that a nonmodifiable child support obligation serves the child's best interests where, as here, the obligor parent's changed circumstances allegedly make the award unreasonable. Id.

The trial court created its own modification standard when it justified its decision by the fact that the father still had assets he could use to pay child support, even if the support obligation exceeded his gross income. The parents' relative financial means may play a legitimate role in determining the amount of an original or modified support award. Lewis v. Hicks, 108 Nev. 1107, 1114 n.4, 843 P.2d 828, 833 n.4 (1992). However, the modification statutes do not support the exhaustion-of-assets test the trial court fashioned for determining whether to allow modification. The test the trial court fashioned is closer to the "undue hardship" standard in the enforcement statutes, see NRS 125B.140(2)(c) ~~125B.140(c)(2)~~, than the changed circumstances standard in the modification statutes. Although the trial court has discretion in how it applies the child support statutes, it commits legal error when it misinterprets or fails to follow the statutes as written, which is what occurred here. Id. at 1112, 843 P.2d at 831.

B.

Because the trial court erred in declaring the modification statutes not applicable to the father's motion, we reverse and remand for proceedings under NRS 125B.145(4), NRS 125B.070, and NRS 125B.080. Two final issues remain. First, the mother maintains that her part performance of the nonmodifiability stipulation estops the father from contesting its enforceability. We disagree. The property settlement between the parties was concluded and the support obligations were set before the stipulation and order waiving modification rights was entered. The promises that were exchanged—by which the parties reciprocally waived the right to seek modification—were corresponding equivalents that can't be separated. See Restatement (Second) of Contracts § 184

(1979). In these circumstances, estoppel is not available to resurrect a contract right public policy invalidates. Krieman, 571 N.W.2d at 430-32.

The second issue concerns the scope of the proceedings on remand. This case was briefed before Rivero v. Rivero, 125 Nev. ___, 216 P.3d 213 (2009), was decided. Rivero states that, "although a party need not show changed circumstances for the district court to review a support order after three years, changed circumstances are still required for the district court to modify the order." Id. at ___, 216 P.3d at 229 (emphases added). This language forecloses the father's argument that NRS 125B.145(1)(b) entitles him to have the child support order modified to conform to NRS 125B.070 and NRS 125B.080, simply because more than three years passed since its last review.[8] To prevail on his modification motion on remand, Rivero requires the father to demonstrate changed circumstances. Id. Because the parties did not stipulate facts to justify deviating from the formulas and the court did not specify findings to support the initial or modified child support order, opting instead to just recite compliance with NRS 125B.070 and NRS 125B.080(9), the bases for the historical deviation from the formula amounts will have to be reconstructed, unless the father's alleged change in income, which appears to satisfy NRS 125B.145(4), is proved. See supra note 6.

---

[8]NRS 125B.145(1)'s provision for review of child support orders every three years was added to meet federal mandates, see 42 U.S.C. § 666(a)(10). Other states have interpreted their comparable periodic review statutes as not requiring changed circumstances for modification. Allen v. Allen, 980 A.2d 1013 (Me. 2009); see also NRS 125B.080(3).

In their supplemental briefs addressing Rivero, the parties express confusion over its emphasis on NRS 125B.145(2)(b), which refers to the trial court "taking into account the best interests of the child [in] [determin[ing] that modification or adjustment of the order is appropriate." Rivero, 125 Nev. at ___, 216 P.3d at 229. The same public policy considerations that lead us to reject the argument that a downward modification cannot be in the child's best interest answer this concern. Unlike the custody setting, in which NRS 125.480(1) makes the best interest of the child "the sole consideration," in the support setting the parents' and the child's best interests are interwoven. NRS 125B.145(2)'s reference to "taking into account the best interests of the child" originated in the same set of federal mandates that, in 1997, led to the adoption of NRS 125B.145(1)'s three-year review provision and was a direct lift from 42 U.S.C. § 666(10)(A)(i). Hearing on A.B. 401 Before the Assembly Comm. on Judiciary, 69th Leg., Ex. C (Nev., May 13, 1997) (Leg. Counsel Bureau Report, Background Information Regarding the Federal Welfare Reform Law and Child Support Enforcement, Attachment B). It did not change the preexisting legislative judgment that, if changed circumstances merit modification, revising the award to conform to the formula guidelines presumptively meets the child's needs. See NRS 125B.080(5); NRS 125B.145(4) (formerly NRS 125B.145(2)). The child's best interest, in the support setting, is tied to the goal of the support statutes generally, which is to provide fair support, as defined in NRS 125B.070 and 125B.080, in keeping with both parents' relative financial means. Lewis, 108 Nev. at 1114 n.4, 843 P.2d at 833 n.4 (citing Barbagallo, 105 Nev. at 551 n.4, 779 P.2d at 536 n.4). The child's best interest is not served by perpetuating a support order that the

obligor parent's changed circumstances may make unreasonable, especially when, as alleged here, the receiving parent's financial circumstances have materially improved. We therefore reverse and remand for further proceedings consistent herewith.

Pickering, J.

We concur:

Parraguirre, C. J.

Douglas, J.

Supreme Court of Nevada.

WRIGHT v. OSBURN

Sandra D. WRIGHT, f/k/a Sandra Osburn, Appellant, v. David L. OSBURN, Respondent.

No. 28714.

-- December 30, 1998

Bruce I. Shapiro, Ltd., Las Vegas, for appellant.Laura Wightman FitzSimmons, Las Vegas, for respondent.

OPINION

Sandra D. Wright and David L. Osburn were married in April 1982 and divorced in March 1996. They had three children: Robert, born February 1984; Lindsay, born October 1986; and Alexandra, born July 1989. At the time of their marriage, Sandra and David were attending Brigham Young University. In 1983, Sandra obtained a degree in design and David obtained a degree in business and finance. After graduating, Sandra worked while David obtained his masters degree in business administration. Sandra became a full-time homemaker in 1984 after the birth of their first child. David was employed by Bank of America, where he remained at the time of trial. David also teaches accounting at the community college.

The district court awarded the parties joint legal and physical custody of their three children, with physical custody of the children rotated weekly. The district court ordered David to pay Sandra $100 per month per child for child support and $500 per month for five years in rehabilitative spousal support but denied an award for attorney fees. Sandra appeals those portions of the order regarding child support, spousal support and attorney fees.

The child support ordered by the district court was the minimum specified under NRS 125B.070(1), despite the fact that the evidence showed that David's monthly income was

$5,177 per month, while Sandra's income was $1,600 per month. While the district court articulated the necessity of "attempt [ing] to maintain comparable lifestyles for the children between the parents' respective households" when the parents have joint physical custody, its order is at odds with this goal.

In Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), this court discussed the difficulty of fairly allocating child support responsibilities between divorced parents with disparate incomes who share equal physical custody of their children. Unfortunately, Barbagallo did not choose to follow the guidance set forth by the legislature in NRS Chapter 125B as to how the child support responsibilities should be allocated when parents share physical custody equally. The result has been that decisions of the district courts vary widely on similar facts.

This court now returns to the language in NRS Chapter 125B for determining the appropriate allocation of child support in shared physical custody arrangements. In NRS 125B.020 and NRS 125B.070, the legislature set forth an objective standard with regard to the support of minor children. These measures, when read together, require each parent to provide a minimum level of support for his or her children, specified by the legislature as a percentage of gross income, depending on the number of children and absent special circumstances. NRS 125B.020 and 125B.070. This requirement is independent of the custody arrangements. Therefore, when custody is shared equally, the determination of who receives child support payments and the amount of that payment can be determined as follows: Calculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference. In this case, with three children, we would take twenty-nine percent of $1,600, Sandra's monthly income, and twenty-nine percent of $5,177, David's monthly income and subtract the difference. In this case, David would be required to pay Sandra $1,037 each month. This approach embodies the legislative enactment, and provides the uniformity and predictability which was the legislative aim. Of course, the district court also has the option to adjust the amount of the award where special circumstances exist. See NRS 125B.080(9).

Regarding the award of spousal support, the legislature has failed to set forth an objective standard for determining the appropriate amount. Absent such a standard, there appears to be a disparity in the awards for spousal support on similar facts even greater than for child support. In Sprenger v. Sprenger, 110 Nev. 855, 859, 878 P.2d 284, 287 (1994), this court set forth factors for the district court to consider in its determination, but the weight to be given each of the factors is left to the discretion of the district court.

In this case, the district court awarded Sandra rehabilitative spousal support of $500 per month for five years. She had earned a degree in design years ago, but she had not worked in the field for the thirteen years of their marriage. In fact, at the time of the divorce she was employed as a secretary. Sandra had been a homemaker and primary caretaker for the parties' three children during their marriage. She enabled David to obtain an advanced degree and establish a career. David purchased a large home after the divorce, but Sandra was unable to do so and lives in an apartment. It appears very

unlikely that in five years, Sandra will be able to earn an income that will enable her to either maintain the lifestyle she enjoyed during the marriage or a lifestyle commensurate with, although not necessarily equal to, that of David, at least until she remarries or her financial circumstances substantially improve. Id . at 860, 878 P.2d at 287. Considering the relevant factors for determining an appropriate spousal support award outlined in Sprenger, it does not appear that the district court's award was "just and equitable," having regard to the conditions in which the parties will be left by the divorce. See NRS 125.150(1)(a). Therefore, we conclude that the district court abused its discretion in ordering spousal support of only $500 per month for five years.

The disparity in income is also a factor to be considered in the award of attorney fees. It is not clear that the district court took that factor into consideration.

For the foregoing reasons, we reverse those portions of the district court's decree setting child support, spousal support and denying attorney fees and remand this case to the district court for reevaluation of child support, spousal support and attorney fees.

I dissent. I would affirm the judgment of the trial court.

My main objection to the majority opinion is that it unfairly and improvidently conjures out of thin air a new child support formula to be applied in cases of joint, equal custody. I say "thin air" because the court states no basis in law or reason [1] for the carelessly-concocted, "split-the-difference" formula that is adopted here, namely: "Calculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference."

The mother and father of these three children share physical custody jointly and equally. The father earns more than the mother. To give the children the benefit of the father's greater earnings, the trial court correctly followed Barbagallo v. Barbagallo, 105 Nev. 546, 779 P.2d 532 (1989), and required the father to pay to the mother $300.00 per month to make up for the difference. The district court decided, properly, in my opinion, that under the circumstances of this case and under the various NRS 125B.080 factors referred to in Barbagallo that the payment of $100.00 per child would be fair and just in this case. By inventing its own child-support formula, this court will be requiring the father to pay over $1,000.00 per month, almost twice as much as any other legislatively-adopted formula that I have been able to locate.[2] Although I am deeply concerned about the unfairness suffered by this father, what is of most concern to me now is the unfairness that will be suffered by virtually every joint custodian who has greater earning power than the other joint custodian. Once the word gets out that an excessive, judicially-imposed formula is going to be unexceptionably applied to the joint custodian with the greater income, I fear that it will deter parents from entering into joint custody arrangements. Most joint custodial parents would not object to paying child support to the parent earning less income, but after a certain point the child support becomes more of a subsidy to the payee parent than it is a benefit to the children. As things stand, unless the legislature acts to create a reasonable formula to be applied in joint custody cases, I am afraid that

today's ruling will give great pause to the parent who earns more money than the other before agreeing to accept joint custody. I think that this is detrimental to the best interests of Nevada's children.

The district court did not go beyond the bounds of its discretion in deciding this case, and I would affirm the trial court's judgment.

FOOTNOTES

1. As I read the majority opinion, its reasoning seems to be that the legislature favors "requir[ing] each parent to provide a minimum level of support for his or her children, specified by the legislature as a percentage of gross income." The legislature has not provided a formula in cases of joint physical custody; therefore, reasons the majority, in the absence a legislative percentage-of-income formula, this court "should make the determination of . the appropriate percentage." I disfavor the court's enacting a percentage formula of this kind because to do so properly involves taking into account many difficult social issues and policy-setting functions, functions that can be suitably carried out only by the legislative branch of government. It is not the invasion of the legislative prerogative that disturbs me most about this case, however, it is the slipshod, by -guess-and-by-golly way that the court has gone about enacting a new child support formula.

2. The main point that I am trying to make in this dissenting opinion is that if the court is going to legislate it should do so in a measured and fair way. The court should have examined the various legislative formulas that have been adopted in these kinds of cases and selected the optimal approach to be adopted in this state. As things stand, the court did not even pretend to do this.There are many legal and policy matters that must be taken into consideration in the formulation of standards for child support payments that must be made by one parent to another. Most states have adopted one of two approaches, the "income sharing" approach or the Massachusetts approach, sometimes called the "marginal expenditure" model. In adopting a child support model, legislatures necessarily weigh the question of fairness to the child support obligor against the objective of providing adequately for the child. Another consideration is avoiding any shocking disproportion between the standard of living of a child and either of his parents. Formulas cannot be reasonably enacted by legislature or court without giving serious attention to the various alternatives available.The following is an example of how a rationally-devised formula might work in a joint custody case. If the marginal expenditure model were employed, child support payments in this case would be computed as follows: The total statutory child support obligation of both parents would first be calculated ($5,177.00 + $1,600.00 = $6,777.00 x 29% = $1,965.00). The marginal expenditure method adjusts for the additional costs of two households by an arbitrary increase of 50%; thus $1,965.00 plus 50% of $1,965.00 ($982.00) = $2,947.00, calculated as the total child support expenditure of both households. Half of $2,948.00, or $1,474.00, is required in each household. Of the total income of the two parties, the husband earns 69% and the wife earns 31%. Of the $1,474.00 needed in the wife's home, the husband must contribute 69%; thus the husband must pay $1,017.00. Of the

$1,474.00 needed in the husband's home, the wife must pay 31% or $457.00. Setting off these two obligations results in the husband's owing to the wife the difference between $1,017.00 and $457.00 or $560.00 per month. The arbitrary formulation adopted by the majority is grossly unfair to this obligor and to all joint custody obligors in the future.

SHEARING, J.

ROSE, YOUNG, and MAUPIN, JJ., concur.

Supreme Court of Nevada.

WESLEY v. FOSTER

Cassandra WESLEY, Appellant, v. Anthony FOSTER, Respondent.

No. 38639.

-- March 21, 2003

Before SHEARING, LEAVITT and BECKER, JJ.

David J. Roger, District Attorney, and Beth E. Ford, Deputy District Attorney, Clark County, for Appellant.Anthony Foster, Henderson, in Proper Person.

OPINION

In this appeal, we examine whether the statutory presumptive maximum for child support, as provided in NRS 125B.070,[1] should be applied to the support obligation before, or after, application of the calculation set forth in Wright v. Osburn [2] for shared custodial arrangements. We conclude that the Wright calculation should be performed before application of the presumptive maximum support obligation.

FACTS AND PROCEDURAL HISTORY

In 1995, Cassandra Wesley and Anthony Foster had a child out of wedlock. Shortly thereafter, paternity was established and child support was set.

On November 15, 2000, Wesley requested a three-year review and modification of child support, pursuant to NRS 125B.145(1)(b); a hearing was conducted. Foster's gross monthly income was determined to be $5,417. Wesley's gross monthly income was determined to be $1,417. The hearing master calculated the appropriate percentage of each parent's income, subtracted Wesley's obligation from Foster's, pursuant to Wright, and then applied the statutory presumptive maximum (the cap), as provided by NRS 125B.070(1)(b).

Shortly thereafter, Foster filed an objection to the hearing master's recommendation and order, arguing that the child support court's decision was clearly erroneous because the cap should have been applied before performing the Wright calculation. Following a hearing, the district court agreed with Foster's approach and reset his support obligation.

Wesley appealed the district court's ruling, contending that in shared custody arrangements, the cap should be applied after the Wright calculations. We now take this opportunity to clarify our ruling in Wright.

DISCUSSION

NRS 125B.020(1) provides that parents have a duty to support their children. NRS 125B.070(1)(b) provides a formula for calculating child support based on a percentage "of a parent's gross monthly income, but not more than $500 per month per child . unless the court sets forth findings of fact as to the basis for a different amount pursuant to subsection 6 of NRS 125B.080." These two statutes, taken together, set forth an objective standard for establishing child support.[3]

In Wright, this court established a formula for determining which parent receives child support and the amount of support in situations where custody is shared equally.[4] The district court must "[c]alculate the appropriate percentage of gross income for each parent; subtract the difference between the two and require the parent with the higher income to pay the parent with the lower income that difference."[5] In Wright, we did not specifically address the question of when application of the statutory presumptive maximum should occur.[6]

The Wright offset should take place before, not after, application of the cap. This conclusion supports "the general philosophy of NRS 125B.070, which is to make sure adequate monthly support is paid to our children."[7]

As we have previously stated, the fixed child-care expenses incurred by each parent are usually not appreciably diminished as a result of shared custody.[8] "The sad reality that must be faced is that the desirable sharing of custody responsibilities by [another] custodian in joint custody situations has the inevitable result of increasing total child-related expenses."[9] Nonetheless, we must still attempt to maintain the comparable lifestyle of the child between the parents' households.[10]

In this case, there is a disparity in the gross monthly income of the two parents. Consistent with our holding in Wright, Wesley's percentage of gross monthly income should first be subtracted from Foster's percentage of gross monthly income.[11] Then, after this offset is made, the cap should be applied.[12] "Of course, the district court also has the option to adjust the amount of the award where special circumstances exist."[13]

CONCLUSION

We hold that in shared custodial arrangements, the Wright offset should be applied prior to application of the statutory cap. The district court erred by applying the cap prior to performing the offset. Accordingly, we reverse the order of the district court and remand this case for further proceedings consistent with this opinion.

FOOTNOTES

1. The version of NRS 125B.070 that applies in this opinion is the statute in effect through June 30, 2002, providing a presumptive maximum of $500 per month per child. The new version of the statute, effective July 1, 2002, provides a different presumptive maximum amount to each income range, ranging from a presumptive maximum amount of $500 to $800. The new statute also requires that the income range and maximum amounts be adjusted on July 1 of each year based upon the increase or decrease in the Consumer Price Index.

2. 114 Nev. 1367, 970 P.2d 1071 (1998).

3. See Wright, 114 Nev. at 1368, 970 P.2d at 1072.

4. Id. at 1368-69, 970 P.2d at 1072.

5. Id. at 1369, 970 P.2d at 1072.

6. See id. In Wright, we applied the applicable percentage to each parent's gross income and subtracted the lower obligation from the higher obligation. The father's obligation was $1 over the presumptive maximum before subtracting the mother's obligation.

7. Garrett v. Garrett, 111 Nev. 972, 976, 899 P.2d 1112, 1115 (1995) (Rose, J., dissenting).

8. Barbagallo v. Barbagallo, 105 Nev. 546, 549, 779 P.2d 532, 535 (1989).

9. Id.

10. See Wright, 114 Nev. at 1368, 970 P.2d at 1072.

11. 18% of $1,417.00 = $255.06. 18% of $5,417.00 = $975.06. Applying the offset, $975.06 minus $255.06 = $720.00, Foster's child support obligation prior to application of the cap.

12. The version of NRS 125B.070 in effect at the time of the petition for modification provided a $500 cap. Therefore, Foster's obligation for support payments to Wesley is $500 per month.

13. Wright, 114 Nev. at 1369, 970 P.2d at 1072 (citing NRS 125B.080(9)).

PER CURIAM.

NRS 125B.145 Review and modification of order for support: Request for review; jurisdiction; notification of right to request review.

1. An order for the support of a child must, upon the filing of a request for review by:

(a) The Division of Welfare and Supportive Services of the Department of Health and Human Services, its designated representative or the district attorney, if the Division of Welfare and Supportive Services or the district attorney has jurisdiction in the case; or

(b) A parent or legal guardian of the child,

➥ be reviewed by the court at least every 3 years pursuant to this section to determine whether the order should be modified or adjusted. Each review conducted pursuant to this section must be in response to a separate request.

2. If the court:

(a) Does not have jurisdiction to modify the order, the court may forward the request to any court with appropriate jurisdiction.

(b) Has jurisdiction to modify the order and, taking into account the best interests of the child, determines that modification or adjustment of the order is appropriate, the court shall enter an order modifying or adjusting the previous order for support in accordance with the requirements of NRS 125B.070 and 125B.080.

3. The court shall ensure that:

(a) Each person who is subject to an order for the support of a child is notified, not less than once every 3 years, that the person may request a review of the order pursuant to this section; or

(b) An order for the support of a child includes notification that each person who is subject to the order may request a review of the order pursuant to this section.

4. An order for the support of a child may be reviewed at any time on the basis of changed circumstances. For the purposes of this subsection, a change of 20 percent or more in the gross monthly income of a person who is subject to an order for the support of a child shall be deemed to constitute changed circumstances requiring a review for modification of the order for the support of a child.

5. As used in this section:

(a) "Gross monthly income" has the meaning ascribed to it in NRS 125B.070.

(b) "Order for the support of a child" means such an order that was issued or is being enforced by a court of this State.

NRS 125.040 Orders for support and cost of suit during pendency of action.

1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following:

(a) To provide temporary maintenance for the other party;

(b) To provide temporary support for children of the parties; or

(c) To enable the other party to carry on or defend such suit.

2. The court may make any order affecting property of the parties, or either of them, which it may deem necessary or desirable to accomplish the purposes of this section. Such orders shall be made by the court only after taking into consideration the financial situation of each of the parties.

3. The court may make orders pursuant to this section concurrently with orders pursuant to NRS 125.470.

NRS 125.150 Alimony and adjudication of property rights; award of attorney's fee; subsequent modification by court. Except as otherwise provided in NRS 125.155 and unless the action is contrary to a premarital agreement between the parties which is enforceable pursuant to chapter 123A of NRS:

1. In granting a divorce, the court:

(a) May award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable; and

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

2. Except as otherwise provided in this subsection, in granting a divorce, the court shall dispose of any property held in joint tenancy in the manner set forth in subsection 1 for the disposition of community property. If a party has made a contribution of separate property to the acquisition or improvement of property held in joint tenancy, the court may provide for the reimbursement of that party for his or her contribution. The amount of reimbursement must not exceed the amount of the contribution of separate property that can be traced to the acquisition or improvement of property held in joint tenancy, without interest or any adjustment because of an increase in the value of the property held in joint tenancy. The amount of reimbursement must not exceed the value, at the time of the disposition, of the property held in joint tenancy for which the contribution of separate property was made. In determining whether to provide for the reimbursement, in whole or in part, of a party who has contributed separate property, the court shall consider:

(a) The intention of the parties in placing the property in joint tenancy;

(b) The length of the marriage; and

(c) Any other factor which the court deems relevant in making a just and equitable disposition of that property.

➥ As used in this subsection, "contribution" includes, without limitation, a down payment, a payment for the acquisition or improvement of property, and a payment reducing the principal of a loan used to finance the purchase or improvement of property. The term does not include a payment of interest on a loan used to finance the purchase or improvement of property, or a payment made for maintenance, insurance or taxes on property.

3. Except as otherwise provided in NRS 125.141, whether or not application for suit money has been made under the provisions of NRS 125.040, the court may award a reasonable attorney's fee to either party to an action for divorce if those fees are in issue under the pleadings.

4. In granting a divorce, the court may also set apart such portion of the husband's separate property for the wife's support, the wife's separate property for the husband's support or the separate property of either spouse for the support of their children as is deemed just and equitable.

5. In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payments required by the decree must cease, unless it was otherwise ordered by the court.

6. If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof.

7. If a decree of divorce, or an agreement between the parties which was ratified, adopted or approved in a decree of divorce, provides for specified periodic payments of alimony, the decree or agreement is not subject to modification by the court as to accrued payments. Payments pursuant to a decree entered on or after July 1, 1975, which have not accrued at the time a motion for modification is filed may be modified upon a showing of changed circumstances, whether or not the court has expressly retained jurisdiction for the modification. In addition to any other factors the court considers relevant in determining whether to modify the order, the court shall consider whether the income of the spouse who is ordered to pay alimony, as indicated on the spouse's federal income tax return for the preceding calendar year, has been reduced to such a level that the spouse is financially unable to pay the amount of alimony the spouse has been ordered to pay.

8. In addition to any other factors the court considers relevant in determining whether to award alimony and the amount of such an award, the court shall consider:

(a) The financial condition of each spouse;

(b) The nature and value of the respective property of each spouse;

(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;

(d) The duration of the marriage;

(e) The income, earning capacity, age and health of each spouse;

(f) The standard of living during the marriage;

(g) The career before the marriage of the spouse who would receive the alimony;

(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;

(i) The contribution of either spouse as homemaker;

(j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and

(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

9. In granting a divorce, the court shall consider the need to grant alimony to a spouse for the purpose of obtaining training or education relating to a job, career or profession. In addition to any other factors the court considers relevant in determining whether such alimony should be granted, the court shall consider:

(a) Whether the spouse who would pay such alimony has obtained greater job skills or education during the marriage; and

(b) Whether the spouse who would receive such alimony provided financial support while the other spouse obtained job skills or education.

10. If the court determines that alimony should be awarded pursuant to the provisions of subsection 9:

(a) The court, in its order, shall provide for the time within which the spouse who is the recipient of the alimony must commence the training or education relating to a job, career or profession.

(b) The spouse who is ordered to pay the alimony may, upon changed circumstances, file a motion to modify the order.

(c) The spouse who is the recipient of the alimony may be granted, in addition to any other alimony granted by the court, money to provide for:

(1) Testing of the recipient's skills relating to a job, career or profession;

(2) Evaluation of the recipient's abilities and goals relating to a job, career or profession;

(3) Guidance for the recipient in establishing a specific plan for training or education relating to a job, career or profession;

(4) Subsidization of an employer's costs incurred in training the recipient;

(5) Assisting the recipient to search for a job; or

(6) Payment of the costs of tuition, books and fees for:

(I) The equivalent of a high school diploma;

(II) College courses which are directly applicable to the recipient's goals for his or her career; or

(III) Courses of training in skills desirable for employment.

11. For the purposes of this section, a change of 20 percent or more in the gross monthly income of a spouse who is ordered to pay alimony shall be deemed to constitute changed circumstances requiring a review for modification of the payments of alimony. As used in this subsection, "gross monthly income" has the meaning ascribed to it in NRS 125B.070.

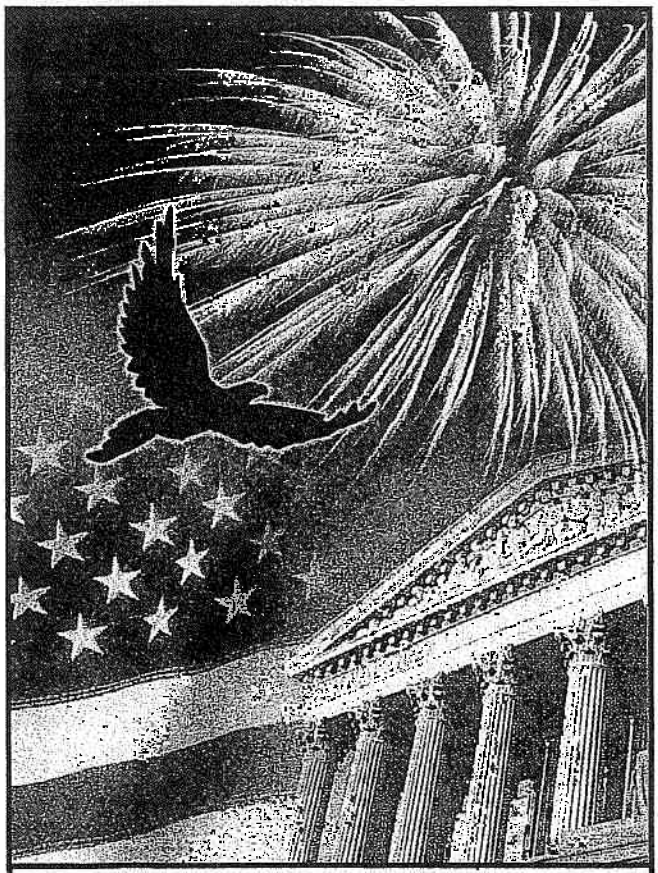
[Part 25:33:1861; A 1939, 18; 1943, 117; 1949, 54; 1943 NCL § 9463]—(NRS A 1961, 401; 1975, 1588; 1979, 1821; 1989, 744, 1005; 1993, 240, 2550; 1995, 1968; 1999, 2023; 2003, 544; 2007, 2479)

Department of the Treasury
Internal Revenue Service

Publication 504
Cat. No. 15006I

Divorced or Separated Individuals

For use in preparing
2011 Returns



Get forms and other information faster and easier by:
Internet IRS.gov

Jan 17, 2012

Contents

Future Developments

The IRS has created a page on IRS.gov for information about Publication 504, at *www.IRS.gov/pub504*. Information about any future developments affecting Publication 504 (such as legislation enacted after we release it) will be posted on that page.

Reminders

Relief from joint liability. In some cases, one spouse may be relieved of joint liability for tax, interest, and penalties on a joint tax return. For more information, see *Relief from joint liability* under *Married Filing Jointly*.

Social security numbers for dependents. You must include on your tax return the taxpayer identification number (generally the social security number) of every person for whom you claim an exemption. See *Exemptions for Dependents* under *Exemptions*, later.

Individual taxpayer identification number (ITIN). The IRS will issue an ITIN to a nonresident or resident alien who does not have and is not eligible to get a social security number (SSN). To apply for an ITIN, file Form W-7, Application for IRS Individual Taxpayer Identification Number, with the IRS. It takes about 6 to 10 weeks to get an ITIN. The ITIN is entered wherever an SSN is requested on a tax return. If you are required to include another person's SSN on your return and that person does not have and cannot get an SSN, enter that person's ITIN.

Change of address. If you change your mailing address, be sure to notify the Internal Revenue Service. You can use Form 8822, Change of Address. Mail it to the Internal Revenue Service Center for your old address. (Addresses for the Service Centers are on the back of the form.)

Change of name. If you change your name, be sure to notify the Social Security Administration using Form SS-5, Application for a Social Security Card.

Change of withholding. If you have been claiming a withholding exemption for your spouse, and you divorce or legally separate, you must give your employer a new Form W-4, Employee's Withholding Allowance Certificate, within 10 days after the divorce or separation showing the correct number of exemptions.

Photographs of missing children. The Internal Revenue Service is a proud partner with the National Center for Missing and Exploited Children. Photographs of missing children selected by the Center may appear in this publication on pages that would otherwise be blank. You can help bring these children home by looking at the photographs and calling 1-800-THE-LOST (1-800-843-5678) if you recognize a child.

Introduction

This publication explains tax rules that apply if you are divorced or separated from your spouse. It covers general filing information and can help you choose your filing status. It also can help you decide which exemptions you are entitled to claim, including exemptions for dependents.

The publication also discusses payments and transfers of property that often occur as a result of divorce and how you must treat them on your tax return. Examples include alimony, child support, other court-ordered payments, property settlements, and transfers of individual retirement arrangements. In addition, this publication also explains deductions allowed for some of the costs of obtaining a divorce and how to handle tax withholding and estimated tax payments.

The last part of the publication explains special rules that may apply to persons who live in community property states.

Comments and suggestions. We welcome your comments about this publication and your suggestions for future editions.

You can write to us at the following address:

Internal Revenue Service
Individual and Specialty Forms and Publications Branch
SE:W:CAR:MP:T:I
1111 Constitution Ave. NW, IR-6526
Washington, DC 20224

We respond to many letters by telephone. Therefore, it would be helpful if you would include your daytime phone number, including the area code, in your correspondence.

You can email us at *taxforms@irs.gov*. Please put "Publications Comment" on the subject line. You can also send us comments from *www.irs.gov/formspubs/*. Select "Comment on Tax Forms and Publications" under "Information About."

Although we cannot respond individually to each comment received, we do appreciate your feedback and will consider your comments as we revise our tax products.

Ordering forms and publications. Visit *www.irs.gov/formspubs/* to download forms and publications, call 1-800-829-3676, or write to the address below and receive a response within 10 days after your request is received.

Internal Revenue Service
1201 N. Mitsubishi Motorway
Bloomington, IL 61705-6613

Tax questions. If you have a tax question, check the information available on IRS.gov or call 1-800-829-1040. We cannot answer tax questions sent to either of the above addresses.

Useful Items

You may want to see:

Publications

- ☐ **501** Exemptions, Standard Deduction, and Filing Information
- ☐ **544** Sales and Other Dispositions of Assets
- ☐ **555** Community Property
- ☐ **590** Individual Retirement Arrangements (IRAs)
- ☐ **971** Innocent Spouse Relief

Form (and Instructions)

- ☐ **8332** Release/Revocation of Release of Claim to Exemption for Child by Custodial Parent
- ☐ **8379** Injured Spouse Allocation
- ☐ **8857** Request for Innocent Spouse Relief

See *How To Get Tax Help* near the end of this publication for information about getting publications and forms.

Filing Status

Your filing status is used in determining whether you must file a return, your standard deduction, and the correct tax. It may also be used in determining whether you can claim certain other deductions and credits. The filing status you

can choose depends partly on your marital status on the last day of your tax year.

Marital status. If you are unmarried, your filing status is single or, if you meet certain requirements, head of household or qualifying widow(er). If you are married, your filing status is either married filing a joint return or married filing a separate return. For information about the single and qualifying widow(er) filing statuses, see Publication 501.

For federal tax purposes, a marriage means only a legal union between a man and a woman as husband and wife. The word "spouse" means a person of the opposite sex who is a husband or a wife.

Unmarried persons. You are unmarried for the whole year if either of the following applies.

- You have obtained a final decree of divorce or separate maintenance by the last day of your tax year. You must follow your state law to determine if you are divorced or legally separated.

  Exception. If you and your spouse obtain a divorce in one year for the sole purpose of filing tax returns as unmarried individuals, and at the time of divorce you intend to remarry each other and do so in the next tax year, you and your spouse must file as married individuals.

- You have obtained a decree of annulment, which holds that no valid marriage ever existed. You must file amended returns (Form 1040X, Amended U.S. Individual Income Tax Return) for all tax years affected by the annulment that are not closed by the statute of limitations. The statute of limitations generally does not end until 3 years after the due date of your original return. On the amended return you will change your filing status to single, or if you meet certain requirements, head of household.

Married persons. You are married for the whole year if you are separated but you have not obtained a final decree of divorce or separate maintenance by the last day of your tax year. An interlocutory decree is not a final decree.

Exception. If you live apart from your spouse, under certain circumstances, you may be considered unmarried and can file as head of household. See *Head of Household*, later.

Married Filing Jointly

If you are married, you and your spouse can choose to file a joint return. If you file jointly, you both must include all your income, exemptions, deductions, and credits on that return. You can file a joint return even if one of you had no income or deductions.

If both you and your spouse have income, you should usually figure your tax on both a joint return and separate returns (using the filing status of married filing separately) to see which gives the two of you the lower combined tax.

Nonresident alien. To file a joint return, at least one of you must be a U.S. citizen or resident alien at the end of the tax year. If either of you was a nonresident alien at any time during the tax year, you can file a joint return only if you agree to treat the nonresident spouse as a resident of the United States. This means that your combined worldwide incomes are subject to U.S. income tax. These rules are explained in Publication 519, U.S. Tax Guide for Aliens.

Signing a joint return. Both you and your spouse generally must sign the return, or it will not be considered a joint return.

Joint and individual liability. Both you and your spouse may be held responsible, jointly and individually, for the tax and any interest or penalty due on your joint return. This means that one spouse may be held liable for all the tax due even if all the income was earned by the other spouse.

Divorced taxpayers. If you are divorced, you are jointly and individually responsible for any tax, interest, and penalties due on a joint return for a tax year ending before your divorce. This responsibility applies even if your divorce decree states that your former spouse will be responsible for any amounts due on previously filed joint returns.

Relief from joint liability. In some cases, a spouse may be relieved of the tax, interest, and penalties on a joint return. You can ask for relief no matter how small the liability.

There are three types of relief available.

- Innocent spouse relief.
- Separation of liability, which applies to joint filers who are divorced, widowed, legally separated, or who have not lived together for the 12 months ending on the date election of this relief is filed.
- Equitable relief.

Married persons who live in community property states, but who did not file joint returns, may also qualify for relief from liability arising from community property law or for equitable relief. See *Relief from liability arising from community property law*, later, under *Community Property*.

Each kind of relief has different requirements. You must file Form 8857 to request relief under any of these categories. Publication 971 explains these kinds of relief and who may qualify for them. You can also find information on our website at IRS.gov.

Tax refund applied to spouse's debts. The overpayment shown on your joint return may be used to pay the past-due amount of your spouse's debts. This includes your spouse's federal tax, state income tax, child or spousal support payments, or a federal nontax debt, such as a student loan. You can get a refund of your share of the overpayment if you qualify as an injured spouse.

Injured spouse. You are an injured spouse if you file a joint return and all or part of your share of the overpayment was, or is expected to be, applied against your spouse's past-due debts. An injured spouse can get a refund for his or her share of the overpayment that would otherwise be used to pay the past-due amount.

To be considered an injured spouse, you must:

1. Have made and reported tax payments (such as federal income tax withheld from wages or estimated tax payments), or claimed a refundable tax credit, such

as the earned income credit or additional child tax credit on the joint return, and

2. Not be legally obligated to pay the past-due amount.

Note. If the injured spouse's permanent home is in a community property state, then the injured spouse must only meet (2). For more information, see Publication 555.

Refunds that involve community property states must be divided according to local law. If you live in a community property state in which all community property is subject to the debts of either spouse, your entire refund is generally used to pay those debts.

If you are an injured spouse, you must file Form 8379 to have your portion of the overpayment refunded to you. Follow the instructions for the form.

If you have not filed your joint return and you know that your joint refund will be offset, file Form 8379 with your return. You should receive your refund within 14 weeks from the date the paper return is filed or within 11 weeks from the date the return is filed electronically.

If you filed your joint return and your joint refund was offset, file Form 8379 by itself. When filed after offset, it can take up to 8 weeks to receive your refund. Do not attach the previously filed tax return, but do include copies of all Forms W-2 and W-2G for both spouses and any Forms 1099 that show income tax withheld.

An injured spouse claim is different from an innocent spouse relief request. An injured spouse uses Form 8379 to request an allocation of the tax overpayment attributed to each spouse. An innocent spouse uses Form 8857 to request relief from joint liability for tax, interest, and penalties on a joint return for items of the other spouse (or former spouse) that were incorrectly reported on or omitted from the joint return. For information on innocent spouses, see Relief from joint liability, *earlier.*

Married Filing Separately

If you and your spouse file separate returns, you should each report only your own income, exemptions, deductions, and credits on your individual return. You can file a separate return even if only one of you had income. For information on exemptions you can claim on your separate return, see *Exemptions*, later.

Community or separate income. If you live in a community property state and file a separate return, your income may be separate income or community income for income tax purposes. For more information, see *Community Income* under *Community Property*, later.

Separate liability. If you and your spouse file separately, you each are responsible only for the tax due on your own return.

Itemized deductions. If you and your spouse file separate returns and one of you itemizes deductions, the other spouse cannot use the standard deduction and should also itemize deductions.

Dividing itemized deductions. You may be able to claim itemized deductions on a separate return for certain expenses that you paid separately or jointly with your spouse. See Table 1, later.

Separate returns may give you a higher tax. Some married couples file separate returns because each wants to be responsible only for his or her own tax. There is no joint liability. But in almost all instances, if you file separate returns, you will pay more combined federal tax than you would with a joint return. This is because the following special rules apply if you file a separate return.

1. Your tax rate generally will be higher than it would be on a joint return.
2. Your exemption amount for figuring the alternative minimum tax will be half of that allowed a joint return filer.
3. You cannot take the credit for child and dependent care expenses in most cases.
4. You cannot take the earned income credit.
5. You cannot take the exclusion or credit for adoption expenses in most instances.
6. You cannot take the credit for higher education expenses (American opportunity and lifetime learning credits), the deduction for student loan interest, or the tuition and fees deduction.
7. You cannot exclude the interest from qualified savings bonds that you used for higher education expenses.
8. If you lived with your spouse at any time during the tax year:
   a. You cannot claim the credit for the elderly or the disabled, and
   b. You will have to include in income more (up to 85%) of any social security or equivalent railroad retirement benefits you received.
9. Your income limits that reduce the child tax credit and the retirement savings contributions credit are half of the limits for a joint return filer.
10. Your capital loss deduction limit is $1,500 (instead of $3,000 on a joint return).
11. Your basic standard deduction, if allowable, is half of that allowed a joint return filer. See *Itemized deductions*, earlier.
12. Your first-time homebuyer credit is limited to $4,000 (instead of $8,000 if you filed a joint return). If the special rule for long-time residents of the same main home applies, the credit is limited to $3,250 (instead of $6,500 if you filed a joint return).

Joint return after separate returns. If either you or your spouse (or both of you) file a separate return, you generally can change to a joint return any time within 3 years from the due date (not including extensions) of the separate return or returns. This applies to a return either of you filed claiming married filing separately, single, or head of household filing status. Use Form 1040X to change your filing status.

Table 1. **Itemized Deductions on Separate Returns** *Keep for Your Records*

This table shows itemized deductions you can claim on your married filing separate return whether you paid the expenses separately with your own funds or jointly with your spouse. ***Caution:*** *If you live in a community property state, these rules do not apply. See* Community Property.

IF you paid ...	AND you ...	THEN you can deduct on your separate federal return...
medical expenses	paid with funds deposited in a joint checking account in which you and your spouse have an equal interest	half of the total medical expenses, subject to certain limits, unless you can show that you alone paid the expenses.
state income tax	file a separate state income tax return	the state income tax you alone paid during the year.
	file a joint state income tax return and you and your spouse are jointly and individually liable for the full amount of the state income tax	the state income tax you alone paid during the year.
	file a joint state income tax return and you are liable for only your own share of state income tax	the smaller of: • the state income tax you alone paid during the year, or • the total state income tax you and your spouse paid during the year multiplied by the following fraction. The numerator is your gross income and the denominator is your combined gross income.
property tax	paid the tax on property held as tenants by the entirety	the property tax you alone paid.
mortgage interest	paid the interest on a qualified home[1] held as tenants by the entirety	the mortgage interest you alone paid.
casualty loss	have a casualty loss on a home you own as tenants by the entirety	half of the loss, subject to the deduction limits. Neither spouse may report the total casualty loss.

[1] For more information on a qualified home and deductible mortgage interest, see Publication 936, Home Mortgage Interest Deduction.

Separate returns after joint return. After the due date of your return, you and your spouse cannot file separate returns if you previously filed a joint return.

Exception. A personal representative for a decedent can change from a joint return elected by the surviving spouse to a separate return for the decedent. The personal representative has 1 year from the due date (including extensions) of the joint return to make the change.

Head of Household

Filing as head of household has the following advantages.

- You can claim the standard deduction even if your spouse files a separate return and itemizes deductions.
- Your standard deduction is higher than is allowed if you claim a filing status of single or married filing separately.
- Your tax rate usually will be lower than it is if you claim a filing status of single or married filing separately.
- You may be able to claim certain credits (such as the dependent care credit and the earned income credit) you cannot claim if your filing status is married filing separately.
- Income limits that reduce your child tax credit and retirement savings contributions credit are higher than the income limits if you claim a filing status of married filing separately.

Requirements. You may be able to file as head of household if you meet all the following requirements.

- You are unmarried or "considered unmarried" on the last day of the year.
- You paid more than half the cost of keeping up a home for the year.

- A "qualifying person" lived with you in the home for more than half the year (except for temporary absences, such as school). However, if the "qualifying person" is your dependent parent, he or she does not have to live with you. See *Special rule for parent*, later, under *Qualifying person*.

Considered unmarried. You are considered unmarried on the last day of the tax year if you meet all the following tests.

- You file a separate return. A separate return includes a return claiming married filing separately, single, or head of household filing status.
- You paid more than half the cost of keeping up your home for the tax year.
- Your spouse did not live in your home during the last 6 months of the tax year. Your spouse is considered to live in your home even if he or she is temporarily absent due to special circumstances. See *Temporary absences*, later.
- Your home was the main home of your child, stepchild, or foster child for more than half the year. (See *Qualifying person*, below, for rules applying to a child's birth, death, or temporary absence during the year.)
- You must be able to claim an exemption for the child. However, you meet this test if you cannot claim the exemption only because the noncustodial parent can claim the child using the rule described later in *Special rule for divorced or separated parents (or parents who live apart)* under *Exemptions for Dependents*. The general rules for claiming an exemption for a dependent are shown later in Table 3.

If you were considered married for part of the year and lived in a community property state (one of the states listed later under Community Property), special rules may apply in determining your income and expenses. See Publication 555 for more information.

Nonresident alien spouse. If your spouse was a nonresident alien at any time during the tax year, and you have not chosen to treat your spouse as a resident alien, you are considered unmarried for head of household purposes. However, your spouse is not a qualifying person for head of household purposes. You must have another qualifying person and meet the other requirements to file as head of household.

Keeping up a home. You are keeping up a home only if you pay more than half the cost of its upkeep for the year. This includes rent, mortgage interest, real estate taxes, insurance on the home, repairs, utilities, and food eaten in the home. This does not include the cost of clothing, education, medical treatment, vacations, life insurance, or transportation for any member of the household.

Qualifying person. Table 2, later, shows who can be a qualifying person. Any person not described in Table 2 is not a qualifying person.

Generally, the qualifying person must live with you for more than half of the year.

Special rule for parent. If your qualifying person is your father or mother, you may be eligible to file as head of household even if your father or mother does not live with you. However, you must be able to claim an exemption for your father or mother. Also, you must pay more than half the cost of keeping up a home that was the main home for the entire year for your father or mother. You are keeping up a main home for your father or mother if you pay more than half the cost of keeping your parent in a rest home or home for the elderly.

Death or birth. You may be eligible to file as head of household if the individual who qualifies you for this filing status is born or dies during the year. You must have provided more than half of the cost of keeping up a home that was the individual's main home for more than half of the year, or, if less, the period during which the individual lived.

Example. You are unmarried. Your mother, for whom you can claim an exemption, lived in an apartment by herself. She died on September 2. The cost of the upkeep of her apartment for the year until her death was $6,000. You paid $4,000 and your brother paid $2,000. Your brother made no other payments towards your mother's support. Your mother had no income. Because you paid more than half of the cost of keeping up your mother's apartment from January 1 until her death, and you can claim an exemption for her, you can file as a head of household.

Temporary absences. You and your qualifying person are considered to live together even if one or both of you are temporarily absent from your home due to special circumstances such as illness, education, business, vacation, or military service. It must be reasonable to assume that the absent person will return to the home after the temporary absence. You must continue to keep up the home during the absence.

Kidnapped child. You may be eligible to file as head of household even if the child who is your qualifying person has been kidnapped. You can claim head of household filing status if all the following statements are true.

- The child must be presumed by law enforcement authorities to have been kidnapped by someone who is not a member of your family or the child's family.
- In the year of the kidnapping, the child lived with you for more than half the part of the year before the kidnapping.
- You would have qualified for head of household filing status if the child had not been kidnapped.

This treatment applies for all years until the child is returned. However, the last year this treatment can apply is the earlier of:

- The year there is a determination that the child is dead, or
- The year the child would have reached age 18.

Table 2. **Who Is a Qualifying Person Qualifying You To File as Head of Household?**[1]

Keep for Your Records

Caution. *See the text of this publication for the other requirements you must meet to claim head of household filing status.*

IF the person is your ...	AND ...	THEN that person is ...
qualifying child (such as a son, daughter, or grandchild who lived with you more than half the year and meets certain other tests)[2]	he or she is single	a qualifying person, whether or not you can claim an exemption for the person.
	he or she is married and you can claim an exemption for him or her	a qualifying person.
	he or she is married and you cannot claim an exemption for him or her	not a qualifying person.[3]
qualifying relative[4] who is your father or mother	you can claim an exemption for him or her[5]	a qualifying person.[5]
	you cannot claim an exemption for him or her	not a qualifying person.
qualifying relative[4] other than your father or mother (such as a grandparent, brother, or sister who meets certain tests)	he or she lived with you more than half the year, and he or she is related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 and you can claim an exemption for him or her[5]	a qualifying person.
	he or she did not live with you more than half the year	not a qualifying person.
	he or she is not related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 and is your qualifying relative only because he or she lived with you all year as a member of your household	not a qualifying person.
	you cannot claim an exemption for him or her	not a qualifying person.

[1] A person cannot qualify more than one taxpayer to use the head of household filing status for the year.

[2] See Table 3, later, for the tests that must be met to be a qualifying child. **Note.** If you are a noncustodial parent, the term "qualifying child" for head of household filing status does not include a child who is your qualifying child for exemption purposes only because of the rules described under *Children of Divorced or Separated Parents (or Parents Who Live Apart)* under *Exemptions for Dependents*, later. If you are the custodial parent and those rules apply, the child is generally your qualifying child for head of household filing status even though the child is not a qualifying child for whom you can claim an exemption.

[3] This person is a qualifying person if the only reason you cannot claim the exemption is that you can be claimed as a dependent on someone else's return.

[4] See Table 3, later, for the tests that must be met to be a qualifying relative.

[5] If you can claim an exemption for a person only because of a multiple support agreement, that person is not a qualifying person. See *Multiple Support Agreement* in Publication 501.

[6] See *Special rule for parent* for an additional requirement.

More information. For more information on filing as head of household, see Publication 501.

Exemptions

You can deduct $3,700 for each exemption you claim in 2011.

There are two types of exemptions: personal exemptions and exemptions for dependents. If you are entitled to claim an exemption for a dependent (such as your child), that dependent cannot claim his or her personal exemption on his or her own tax return.

Personal Exemptions

You can claim your own exemption unless someone else can claim it. If you are married, you may be able to take an exemption for your spouse. These are called personal exemptions.

Exemption for Your Spouse

Your spouse is never considered your dependent.

Joint return. On a joint return, you can claim one exemption for yourself and one for your spouse.

If your spouse had any gross income, you can claim his or her exemption only if you file a joint return.

Separate return. If you file a separate return, you can take an exemption for your spouse only if your spouse had no gross income, is not filing a return, and was not the dependent of another taxpayer. If your spouse is the dependent of another taxpayer, you cannot claim an exemption for your spouse even if the other taxpayer does not actually claim your spouse's exemption.

Alimony paid. If you paid alimony to your spouse, you cannot take an exemption for your spouse. This is because alimony is gross income to the spouse who received it.

Divorced or separated spouse. If you obtained a final decree of divorce or separate maintenance during the year, you cannot take your former spouse's exemption. This rule applies even if you provided all of your former spouse's support.

Exemptions for Dependents

You are allowed one exemption for each person you can claim as a dependent. You can claim an exemption for a dependent even if your dependent files a return.

The term "dependent" means:

- A qualifying child, or
- A qualifying relative.

Table 3 shows the tests that must be met to be either a qualifying child or qualifying relative, plus the additional requirements for claiming an exemption for a dependent. For detailed information, see Publication 501.

Dependent not allowed a personal exemption. *If you can claim an exemption for your dependent, the dependent cannot claim his or her own exemption on his or her own tax return. This is true even if you do not claim the dependent's exemption on your return.*

Table 3. Overview of the Rules for Claiming an Exemption for a Dependent

Caution. *This table is only an overview of the rules. For details, see Publication 501.*

- You cannot claim any dependents if you, or your spouse if filing jointly, could be claimed as a dependent by another taxpayer.
- You cannot claim a married person who files a joint return as a dependent unless that joint return is only a claim for refund and there would be no tax liability for either spouse on separate returns.
- You cannot claim a person as a dependent unless that person is a U.S. citizen, U.S. resident alien, U.S. national, or a resident of Canada or Mexico, for some part of the year.[1]
- You cannot claim a person as a dependent unless that person is your **qualifying child** or **qualifying relative.**

Tests To Be a Qualifying Child	Tests To Be a Qualifying Relative
1. The child must be your son, daughter, stepchild, foster child, brother, sister, half brother, half sister, stepbrother, stepsister, or a descendant of any of them.	1. The person cannot be your qualifying child or the qualifying child of anyone else.
2. The child must be (a) under age 19 at the end of the year and younger than you (or your spouse, if filing jointly), (b) under age 24 at the end of the year, a full-time student, and younger than you (or your spouse, if filing jointly), or (c) any age if permanently and totally disabled.	2. The person either (a) must be related to you in one of the ways listed under *Relatives who do not have to live with you* in Publication 501 or (b) must live with you all year as a member of your household [2] (and your relationship must not violate local law).
3. The child must have lived with you for more than half of the year.[2]	3. The person's gross income for the year must be less than $3,700.[3]
4. The child must not have provided more than half of his or her own support for the year.	4. You must provide more than half of the person's total support for the year.[4]
5. The child is not filing a joint return for the year (unless that joint return is filed only as a claim for refund).	
If the child meets the rules to be a qualifying child of more than one person, only one person can actually treat the child as a qualifying child. See *Special Rule for Qualifying Child of More Than One Person*, later, to find out which person is the person entitled to claim the child as a qualifying child.	

[1] Exception exists for certain adopted children.
[2] Exceptions exist for temporary absences, children who were born or died during the year, children of divorced or separated parents (or parents who live apart), and kidnapped children.
[3] Exception exists for persons who are disabled and have income from a sheltered workshop.
[4] Exceptions exist for multiple support agreements, children of divorced or separated parents (or parents who live apart), and kidnapped children. See Publication 501.

You may be entitled to a child tax credit for each qualifying child who was under age 17 at the end of the year if you claimed an exemption for that child. For more information, see the instructions for the tax form you file (Form 1040, 1040A, or 1040EZ).

Children of Divorced or Separated Parents (or Parents Who Live Apart)

In most cases, because of the residency test (see item 3 under *Tests To Be a Qualifying Child* in Table 3), a child of divorced or separated parents is the qualifying child of the custodial parent. However, the child will be treated as the qualifying child of the noncustodial parent if the special rule (discussed next) applies.

Special rule for divorced or separated parents (or parents who live apart). A child will be treated as the qualifying child of his or her noncustodial parent if all four of the following statements are true.

1. The parents:
   a. Are divorced or legally separated under a decree of divorce or separate maintenance,
   b. Are separated under a written separation agreement, or
   c. Lived apart at all times during the last 6 months of the year, whether or not they are or were married.
2. The child received over half of his or her support for the year from the parents.
3. The child is in the custody of one or both parents for more than half of the year.
4. Either of the following applies.
   a. The custodial parent signs a written declaration, discussed later, that he or she will not claim the child as a dependent for the year, and the noncustodial parent attaches this written declaration to his or her return. (If the decree or agreement went into effect after 1984, see *Divorce decree or separation agreement that went into effect after 1984 and before 2009*, later.
   b. A pre-1985 decree of divorce or separate maintenance or written separation agreement that applies to 2011 states that the noncustodial parent can claim the child as a dependent, the decree or agreement was not changed after 1984 to say the noncustodial parent cannot claim the child as a dependent, and the noncustodial parent provides at least $600 for the child's support during 2011. See *Child support under pre-1985 agreement*, later.

Custodial parent and noncustodial parent. The custodial parent is the parent with whom the child lived for the greater number of nights during the year. The other parent is the noncustodial parent.

If the parents divorced or separated during the year and the child lived with both parents before the separation, the custodial parent is the one with whom the child lived for the greater number of nights during the rest of the year.

A child is treated as living with a parent for a night if the child sleeps:

- At that parent's home, whether or not the parent is present, or
- In the company of the parent, when the child does not sleep at a parent's home (for example, the parent and child are on vacation together).

Equal number of nights. If the child lived with each parent for an equal number of nights during the year, the custodial parent is the parent with the higher adjusted gross income.

December 31. The night of December 31 is treated as part of the year in which it begins. For example, December 31, 2011, is treated as part of 2011.

Emancipated child. If a child is emancipated under state law, the child is treated as not living with either parent. See *Examples 5 and 6*.

Absences. If a child was not with either parent on a particular night (because, for example, the child was staying at a friend's house), the child is treated as living with the parent with whom the child normally would have lived for that night, except for the absence. But if it cannot be determined with which parent the child normally would have lived or if the child would not have lived with either parent that night, the child is treated as not living with either parent that night.

Parent works at night. If, due to a parent's nighttime work schedule, a child lives for a greater number of days but not nights with the parent who works at night, that parent is treated as the custodial parent. On a school day, the child is treated as living at the primary residence registered with the school.

Example 1 – child lived with one parent greater number of nights. You and your child's other parent are divorced. In 2011, your child lived with you 210 nights and with the other parent 155 nights. You are the custodial parent.

Example 2 – child is away at camp. In 2011, your daughter lives with each parent for alternate weeks. In the summer, she spends 6 weeks at summer camp. During the time she is at camp, she is treated as living with you for 3 weeks and with her other parent, your ex-spouse, for 3 weeks because this is how long she would have lived with each parent if she had not attended summer camp.

Example 3 – child lived same number of days with each parent. Your son lived with you 180 nights during the year and lived the same number of nights with his other parent, your ex-spouse. Your adjusted gross income is $40,000. Your ex-spouse's adjusted gross income is $25,000. You are treated as your son's custodial parent because you have the higher adjusted gross income.

Example 4 – child is at parent's home but with other parent. Your son normally lives with you during the week and with his other parent, your ex-spouse, every other weekend. You become ill and are hospitalized. The other parent lives in your home with your son for 10 consecutive days while you are in the hospital. Your son is treated as living with you during this 10-day period because he was living in your home.

Example 5 – child emancipated in May. When your son turned age 18 in May 2011, he became emancipated under the law of the state where he lives. As a result, he is not considered in the custody of his parents for more than half of the year. The special rule for children of divorced or separated parents (or parents who live apart) does not apply.

Example 6 – child emancipated in August. Your daughter lives with you from January 1, 2011, until May 31, 2011, and lives with her other parent, your ex-spouse, from June 1, 2011, through the end of the year. She turns 18 and is emancipated under state law on August 1, 2011. Because she is treated as not living with either parent beginning on August 1, she is treated as living with you the greater number of nights in 2011. You are the custodial parent.

Written declaration. The custodial parent must use either Form 8332 or a similar statement (containing the same information required by the form) to make the written declaration to release the exemption to the noncustodial parent. The noncustodial parent must attach a copy of the form or statement to his or her tax return.

The exemption can be released for 1 year, for a number of specified years (for example, alternate years), or for all future years, as specified in the declaration.

Divorce decree or separation agreement that went into effect after 1984 and before 2009. If the divorce decree or separation agreement went into effect after 1984 and before 2009, the noncustodial parent may be able to attach certain pages from the decree or agreement instead of Form 8332. To be able to do this, the decree or agreement must state all three of the following.

1. The noncustodial parent can claim the child as a dependent without regard to any condition, such as payment of support.
2. The custodial parent will not claim the child as a dependent for the year.
3. The years for which the noncustodial parent, rather than the custodial parent, can claim the child as a dependent.

The noncustodial parent must attach all of the following pages of the decree or agreement to his or her return.

- The cover page (write the other parent's social security number on this page).
- The pages that include all of the information identified in items (1) through (3) above.
- The signature page with the other parent's signature and the date of the agreement.

The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.

Post-2008 divorce decree or separation agreement. If the decree or agreement went into effect after 2008, a noncustodial parent claiming an exemption for a child cannot attach pages from a divorce decree or separation agreement instead of Form 8332. The custodial parent must sign either a Form 8332 or a similar statement. The only purpose of this statement must be to release the custodial parent's claim to the child's exemption. The noncustodial parent must attach a copy to his or her return. The form or statement must release the custodial parent's claim to the child without any conditions. For example, the release must not depend on the noncustodial parent paying support.

The noncustodial parent must attach the required information even if it was filed with a return in an earlier year.

Revocation of release of claim to an exemption. The custodial parent can revoke a release of claim to exemption that he or she previously released to the noncustodial parent on Form 8332 or a similar statement. In order for the revocation to be effective for 2011, the custodial parent must have given (or made reasonable efforts to give) written notice of the revocation to the noncustodial parent in 2010 or earlier. The custodial parent can use Part III of Form 8332 for this purpose and must attach a copy of the revocation to his or her return for each tax year he or she claims the child as a dependent as a result of the revocation.

Remarried parent. If you remarry, the support provided by your new spouse is treated as provided by you.

Child support under pre-1985 agreement. All child support payments actually received from the noncustodial parent under a pre-1985 agreement are considered used for the support of the child, even if such amounts are not actually spent for child support.

Example. Under a pre-1985 agreement, the noncustodial parent provides $1,200 for the child's support. This amount is considered support provided by the noncustodial parent even if the $1,200 was actually spent on things other than support.

Parents who never married. The special rule for divorced or separated parents also applies to parents who never married and lived apart at all times during the last 6 months of the year.

Alimony. Payments to your spouse that are includible in his or her gross income as either alimony, separate maintenance payments, or similar payments from an estate or trust, are not treated as a payment for the support of a dependent.

Special Rule for Qualifying Child of More Than One Person

If your qualifying child is not a qualifying child of anyone else, this special rule does not apply to you and you do not need to read about it. This is also true if your qualifying child is not a qualifying child of anyone else except your spouse with whom you file a joint return.

If a child is treated as the qualifying child of the noncustodial parent under the Special rule for divorced or separated parents (or parents who live apart), *earlier, see* Applying this special rule to divorced or separated parents (or parents who live apart), *later.*

Sometimes, a child meets the relationship, age, residency, support, and joint return tests to be a qualifying child of more than one person. (For a description of these tests, see list items 1 through 5 under *Tests To Be a Qualifying Child* in *Table 3*). Although the child meets the conditions to be a qualifying child of each of these persons, only one person can actually use the child as a qualifying child to take all of the following tax benefits (provided the person is eligible for each benefit).

1. The exemption for the child.
2. The child tax credit.
3. Head of household filing status.
4. The credit for child and dependent care expenses.
5. The exclusion from income for dependent care benefits.
6. The earned income credit.

The other person cannot take any of these benefits based on this qualifying child. In other words, you and the other person cannot agree to divide these tax benefits between you. The other person cannot take any of these tax benefits unless he or she has a different qualifying child.

Tiebreaker rules. To determine which person can treat the child as a qualifying child to claim these six tax benefits, the following tiebreaker rules apply.

- If only one of the persons is the child's parent, the child is treated as the qualifying child of the parent.
- If the parents do not file a joint return together but both parents claim the child as a qualifying child, the IRS will treat the child as the qualifying child of the parent with whom the child lived for the longer period of time during the year. If the child lived with each parent for the same amount of time, the IRS will treat the child as the qualifying child of the parent who had the higher adjusted gross income (AGI) for the year.
- If no parent can claim the child as a qualifying child, the child is treated as the qualifying child of the person who had the highest AGI for the year.
- If a parent can claim the child as a qualifying child but no parent does so claim the child, the child is treated as the qualifying child of the person who had the highest AGI for the year, but only if that person's AGI is higher than the highest AGI of any of the child's parents who can claim the child. If the child's parents file a joint return with each other, this rule can be applied by dividing the parents' total AGI evenly between them; see Pub. 501 for details.

Subject to these tiebreaker rules, you and the other person may be able to choose which of you claims the child as a qualifying child.

Example 1—separated parents. You, your husband, and your 10-year-old son lived together until August 1, 2011, when your husband moved out of the household. In August and September, your son lived with you. For the rest of the year, your son lived with your husband, the boy's father. Your son is a qualifying child of both you and your husband because your son lived with each of you for more than half the year and because he met the relationship, age, support, and joint return tests for both of you. At the end of the year, you and your husband still were not divorced, legally separated, or separated under a written separation agreement, so the special rule for divorced or separated parents (or parents who live apart) does not apply.

You and your husband will file separate returns. Your husband agrees to let you treat your son as a qualifying child. This means, if your husband does not claim your son as a qualifying child, you can claim your son as a dependent and treat him as a qualifying child for the child tax credit and exclusion for dependent care benefits, if you qualify for each of those tax benefits. However, you cannot claim head of household filing status because you and your husband did not live apart the last 6 months of the year. As a result, your filing status is married filing separately, so you cannot claim the earned income credit or the credit for child and dependent care expenses.

Example 2—separated parents claim same child. The facts are the same as in *Example 1* except that you and your husband both claim your son as a qualifying child. In this case, only your husband will be allowed to treat your son as a qualifying child. This is because, during 2011, the boy lived with him longer than with you. If you claimed an exemption, the child tax credit, or the exclusion for dependent care benefits for your son, the IRS will disallow your claim to all these tax benefits, unless you have another qualifying child. In addition, because you and your husband did not live apart the last 6 months of the year, your husband cannot claim head of household filing status. As a result, his filing status is married filing separately, so he cannot claim the earned income credit or the credit for child and dependent care expenses.

Applying this special rule to divorced or separated parents (or parents who live apart). If a child is treated as the qualifying child of the noncustodial parent under the special rule for divorced or separated parents (or parents who live apart) described earlier, only the noncustodial parent can claim an exemption and the child tax credit for the child. However, the noncustodial parent cannot claim the child as a qualifying child for head of household filing status, the credit for child and dependent care expenses,

the exclusion for dependent care benefits, and the earned income credit. Only the custodial parent, if eligible, or another eligible taxpayer can claim the child as a qualifying child for those four tax benefits. If the child is the qualifying child of more than one person for those tax benefits, the tiebreaker rules determine which person can treat the child as a qualifying child.

Example 1. You and your 5-year-old son lived all year with your mother, who paid the entire cost of keeping up the home. Your AGI is $10,000. Your mother's AGI is $25,000. Your son's father does not live with you or your son. Under the rules for children of divorced or separated parents (or parents who live apart), your son is treated as the qualifying child of his father, who can claim an exemption and the child tax credit for the child if he meets all the requirements to do so. Because of this, you cannot claim an exemption or the child tax credit for your son. However, your son's father cannot claim your son as a qualifying child for head of household filing status, the credit for child and dependent care expenses, the exclusion for dependent care benefits, or the earned income credit. You and your mother did not have any child care expenses or dependent care benefits, but the boy is a qualifying child of both you and your mother for head of household filing status and the earned income credit because he meets the relationship, age, residency, support, and joint return tests for both you and your mother. (Note: The support test does not apply for the earned income credit.) However, you agree to let your mother claim your son. This means she can claim him for head of household filing status and the earned income credit if she qualifies for each and if you do not claim him as a qualifying child for the earned income credit. (You cannot claim head of household filing status because your mother paid the entire cost of keeping up the home.)

Example 2. The facts are the same as in *Example 1* except that your AGI is $25,000 and your mother's AGI is $21,000. Your mother cannot claim your son as a qualifying child for any purpose because her AGI is not higher than yours.

Example 3. The facts are the same as in *Example 1* except that you and your mother both claim your son as a qualifying child for the earned income credit. Your mother also claims him as a qualifying child for head of household filing status. You as the child's parent will be the only one allowed to claim your son as a qualifying child for the earned income credit. The IRS will disallow your mother's claim to the earned income credit and head of household filing status unless she has another qualifying child.

Alimony

Alimony is a payment to or for a spouse or former spouse under a divorce or separation instrument. It does not include voluntary payments that are not made under a divorce or separation instrument.

Alimony is deductible by the payer and must be included in the spouse's or former spouse's income. Although this discussion is generally written for the payer of the alimony, the recipient can use the information to determine whether an amount received is alimony.

To be alimony, a payment must meet certain requirements. Different requirements generally apply to payments under instruments executed after 1984 and to payments under instruments executed before 1985. The requirements that apply to payments under post-1984 instruments are discussed later.

Spouse or former spouse. Unless otherwise stated, the term "spouse" includes former spouse.

Divorce or separation instrument. The term "divorce or separation instrument" means:

- A decree of divorce or separate maintenance or a written instrument incident to that decree,
- A written separation agreement, or
- A decree or any type of court order requiring a spouse to make payments for the support or maintenance of the other spouse. This includes a temporary decree, an interlocutory (not final) decree, and a decree of alimony *pendente lite* (while awaiting action on the final decree or agreement).

Invalid decree. Payments under a divorce decree can be alimony even if the decree's validity is in question. A divorce decree is valid for tax purposes until a court having proper jurisdiction holds it invalid.

Amended instrument. An amendment to a divorce decree may change the nature of your payments. Amendments are not ordinarily retroactive for federal tax purposes. However, a retroactive amendment to a divorce decree correcting a clerical error to reflect the original intent of the court will generally be effective retroactively for federal tax purposes.

Example 1. A court order retroactively corrected a mathematical error under your divorce decree to express the original intent to spread the payments over more than 10 years. This change also is effective retroactively for federal tax purposes.

Example 2. Your original divorce decree did not fix any part of the payment as child support. To reflect the true intention of the court, a court order retroactively corrected the error by designating a part of the payment as child support. The amended order is effective retroactively for federal tax purposes.

Deducting alimony paid. You can deduct alimony you paid, whether or not you itemize deductions on your return. You must file Form 1040. You cannot use Form 1040A, 1040EZ, or 1040NR.

Enter the amount of alimony you paid on Form 1040, line 31a. In the space provided on line 31b, enter your spouse's social security number.

If you paid alimony to more than one person, enter the social security number of one of the recipients. Show the social security number and amount paid to each other recipient on an attached statement. Enter your total payments on line 31a.

If you do not provide your spouse's social security number, you may have to pay a $50 penalty and your deduction may be disallowed.

Reporting alimony received. Report alimony as income you received on Form 1040, line 11, or on Schedule NEC (Form 1040NR), line 12. You cannot use Form 1040A, 1040EZ, or 1040NR-EZ.

You must give the person who paid the alimony your social security number. If you do not, you may have to pay a $50 penalty.

Withholding on nonresident aliens. If you are a U.S. citizen or resident alien and you pay alimony to a nonresident alien spouse, you may have to withhold income tax at a rate of 30% on each payment. However, many tax treaties provide for an exemption from withholding for alimony payments. For more information, see Publication 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.

General Rules

The following rules apply to alimony regardless of when the divorce or separation instrument was executed.

Payments not alimony. Not all payments under a divorce or separation instrument are alimony. Alimony does not include:

- Child support,
- Noncash property settlements,
- Payments that are your spouse's part of community income, as explained later under *Community Property*,
- Payments to keep up the payer's property, or
- Use of the payer's property.

Example. Under your written separation agreement, your spouse lives rent-free in a home you own and you must pay the mortgage, real estate taxes, insurance, repairs, and utilities for the home. Because you own the home and the debts are yours, your payments for the mortgage, real estate taxes, insurance, and repairs are not alimony. Neither is the value of your spouse's use of the home.

If they otherwise qualify, you can deduct the payments for utilities as alimony. Your spouse must report them as income. If you itemize deductions, you can deduct the real estate taxes and, if the home is a qualified home, you can also include the interest on the mortgage in figuring your deductible interest. However, if your spouse owned the home, see *Example 2* under *Payments to a third party*, later. If you owned the home jointly with your spouse, see Table 4. For more information on a qualified home and deductible mortgage interest, see Publication 936, Home Mortgage Interest Deduction.

Child support. To determine whether a payment is child support, see the discussion under *Instruments Executed After 1984*, later. If your divorce or separation agreement was executed before 1985, see the 2004 revision of Publication 504 on IRS.gov.

Underpayment. If both alimony and child support payments are called for by your divorce or separation instrument, and you pay less than the total required, the payments apply first to child support and then to alimony.

Example. Your divorce decree calls for you to pay your former spouse $200 a month ($2,400 ($200 x 12) a year)

Table 4. Expenses for a Jointly-Owned Home

Keep for Your Records

Use the table below to find how much of your payment is alimony and how much you can claim as an itemized deduction.

IF you must pay all of the ...	AND your home is ...	THEN you can deduct and your spouse (or former spouse) must include as alimony ...	AND you can claim as an itemized deduction ...
mortgage payments (principal and interest)	jointly owned	half of the total payments	half of the interest as interest expense (if the home is a qualified home).[1]
real estate taxes and home insurance	held as tenants in common	half of the total payments	half of the real estate taxes[2] and none of the home insurance.
	held as tenants by the entirety or in joint tenancy	none of the payments	all of the real estate taxes and none of the home insurance.

[1] Your spouse (or former spouse) can deduct the other half of the interest if the home is a qualified home.
[2] Your spouse (or former spouse) can deduct the other half of the real estate taxes.