Great outcomes.
Done well.

# Four exceptions to the recapture or front-loading of maintenance.

The tax Reform Act of 1984 enacted rules designed to prevent excess front-loading of maintenance payments. Recapture under §71(f) can occur only in the third post-separation year.

The Internal Revenue Code under Section §71(f)(5) provides four exceptions where the alimony recapture rules do not apply:

1. **Either spouse *dies* before the end of the third post-separation year or the spouse entitled to receive the payments *remarries* before the end of the third post-separation year.** [§71(f)(5)(A)(i)]

2. **The amount of payments fluctuates for reasons *not in control* of the payor spouse.** For example, the payments might be a fixed percentage of income from a business or property, or from compensation for employment or self-employment.

   **Example 1**
   Mark agreed to pay Felicia 50% of the net income from his manufacturing business each year for a period of five years. In the first year, the net income from the business was $320,000 and Mark sent Felicia checks totaling $160,000. During the second year, his business was sued for a faulty product and the receipts declined. That year, the business's net income was only $240,000 so Felicia received a total of $120,000. In the third year, due to pending lawsuits, his business suffered a loss so Mark did not make a payment to Felicia that year. In this case, the reduction was not in Mark's control so no recapture is required. Even if his business recovered and he was able to make substantial payments in years four and five, the first three years are the only ones that are considered.

   **Example 2**
   Kyle, who sold insurance, was ordered to pay his ex-wife 35% of his income from his commissions annually for the next four years. Twelve months after the final decree, Kyle decided he was tired of paying his ex-wife so he stopped selling insurance and started working for a friend's business at a much lower income. Kyle will not be able to avoid recapture because the fluctuation was within his control.

3. **The payments are temporary support payments**

   **Example 3**
   While divorce negotiations were going on, Brian sent Lucy $5,000 per month ($60,000 per year) for family support and to cover a very high mortgage payment.

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When the divorce was final, Lucy moved to a less expensive home. She also received a large stock account in return for lower maintenance in the amount of $1,000 per month ($12,000 per year). Even though maintenance declined from $60,000 to $12,000 in the first year after the divorce was final, the $60,000 was temporary maintenance and does not trigger recapture.

4. **The alimony payments decline for $15,000 or less over the three year period.**

**Example 4**
The divorce decree says that Brent pays Bunny alimony as follows: $36,000 in 2002, $30,000 in 2003, and $24,000 in 2004, 2005, and 2006. The recapture provisions do not apply since the alimony payments over the first three year period do not decrease by more than $15,000.