



# THE ECONOMICS OF DIVORCE

PRESENTATION BY ALEXANDER R. CUTLER  
PARTNER – GRAY EITREIM MARTIN, LLC

# Divorce Is An Emotionally Charged Business Transaction

## WHAT WE WILL COVER:

1. Role of Financial Advisors and Analysts in Divorce Matters
2. Equitable Division
3. Martial vs. Separate Property
4. Economic Support
5. Prenuptial Agreements
6. Tax Considerations

## WHAT WE WILL NOT COVER

1. Child Custody
2. Child Support

# 3 THINGS DIVORCE IS ABOUT (OTHER THAN CHILD CUSTODY)

## 1. MONEY

- i. How much will I receive?
- ii. How much will I have to pay?

## 2. MONEY

- i. How long will I be able to rely on what I receive?
- ii. How long do I need to work to pay what I am required to pay?

## 3. MONEY (because it just is).

# Role of Financial Analysts and Advisors in Divorce Matters.

## Fact Pattern

John and Sally were married 30 years ago. There is no Prenuptial Agreement. John is 61 years old. Sally is 57 years old.

At the time of the parties' marriage John was an associate at a large law firm making \$70,000 per year. After 5 years of marriage, John was named a non-equity partner making \$200,000 per year. After 12 years of marriage, he was made a full equity partner. For the last 18 years of marriage, John's income has averaged in excess of \$800,000 per year. John expects that he has another 5 to 7 years at which he can expect to earn at this level before firm policy will move him into a reduced, less lucrative role as he reaches retirement age.

At the time of the marriage, Sally was also an associate attorney, though at a smaller firm. Sally was making \$50,000 per year and had been out of law school four years less than John.

John and Sally had a child after 3 years of marriage. Sally decided to go back to work after the baby was born.

Two years later, Sally gave birth to twins, one of whom had some special needs. As the birth of the twins coincided with John's promotion to non-equity partner, and the associated increase in income, John and Sally decided that Sally would leave her practice of law and focus her efforts on raising the children, including taking the lead on caring for their special needs child.

When John became a non-equity partner, he began working with Karen, a financial advisor and analyst at a large investment firm. Karen and John, working together over the last 25 years, have managed to grow John and Sally's total net worth to over \$12,000,000.

John and Sally's net worth is generally broken down as follows:

\$3,000,000 in retirement

\$500,000 in a money market

\$150,000 in cash

\$4,000,000 in investment accounts

\$1,000,000 in John's capital account with his firm

\$2,000,000 in equity in the marital home in Atlanta

\$1,200,000 in equity in a vacation home in Rosemary Beach, FL.

\$500,000 in various business interests in which the parties are invested.

The kids are now grown and living on their own.

About 8 months ago John had a month long relationship with another woman. Sally has decided to file for divorce.

# Economic Assessment

1. What are the assets and liabilities that are going to be equitably divided?
  - A. Are there any assets that we are not going to be able to divide?
  - B. Are there any assets that Sally may want to stay away from?
2. What is Sally's ability to contribute to her own economic needs?
3. Is this an alimony case?
4. Who do we need to bring on to help value any non-liquid assets?
5. How much is Sally going to need to receive to meet her economic needs?
6. Who can help us ensure that Sally is not going to run out of money (and is that even possible)?

# Equitable Division of Property

In Georgia all marital property is subject to equitable division by the Court. Stokes v. Stokes, 246 Ga. 765 (1980).

Equitable division does not mean an equal division; it means a fair division.

Only marital property is subject to equitable division by the Court.

Marital property is defined as follows:

“Only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division.” Payson v. Payson, 274 Ga. 231,232 (2001).

# Equitable Division of Property

Separate, non-marital property is not subject to equitable division by the Court. Separate property is generally defined as follows:

1. Property owned by a party prior to the marriage and all appreciation thereon that was not caused by the labor and investments of the parties during the marriage.
2. Property received by one party during the marriage as a non-spousal gift during the marriage.
3. Property that was received by one party as the result of an inheritance or bequest.
4. Other: Certain trust assets, certain aspects of personal injury settlements.

# Equitable Division of Property

Practical tip for Financial Professionals:

If separate assets are placed in joint names, it can be argued that the asset has been “Lerch-ed.” Once property is placed in joint names, there is a rebuttable presumption that the property has been gifted to the marriage.

Therefore, when doing any financial planning for a client, you need to be aware that how accounts are titled may subject those accounts to division in a subsequent divorce.

# Equitable Division of Property

How Do We Analyze the Assets from Sally's Perspective?:

1. Are liquid assets better?
2. How do we value John's interest in the law firm or the business interests?
  - A. What experts do we need to hire?
  - B. Are the assets worth valuing?
3. What is Sally's economic risk tolerance?
  - A. Does Sally know about the investments or want to ride along.
4. What are Sally's economic needs?
  - A. Can Sally keep the same lifestyle?
  - B. Can Sally's economic needs be met with reasonable certainty?
5. Can the assets be grown by a significant amount such that Sally is not going to run out of money.

# Alimony

Alimony is based primarily on two things: Need and Ability to Pay

There are three types of alimony:

1. Periodic alimony
2. Lump-Sum alimony
3. Alimony in-kind

The only way that a Court can give a spouse the other spouse's separate property is as alimony.

As far as alimony is concerned, the world changed on December 31, 2018.

# Alimony

Prior to December 31, 2018, periodic alimony was tax deductible by the payor and taxable as income to the payee.

As part of the Tax Cuts and Jobs Act of 2017, the deduction for alimony was eliminated.

Why is this important?: Making alimony deductible incentivized spouses to pay alimony. By eliminating the deduction, monied spouses are far less willing to pay alimony to his or her ex-spouse.

There was time where a monied spouse would have preferred to pay taxable alimony because he or she could reap the benefits of the tax deduction and hold on to assets that were tax advantaged.

# Alimony

Whereas in the past, the taxable nature of alimony would have made it potentially more advantageous to shape settlements that focused on providing the non-monied spouse with a greater percentage of the assets, it now may make more sense for the non-monied spouse to receive alimony.

- For example, in past years, if a spouse was presented with the option of receiving alimony that will be taxed at a total ordinary income tax rate of 35% or receiving an asset that was to be taxed at a lower capital gains rate, it would often make sense to take the asset over the alimony.
- Now, fully non-taxable alimony may be more advantageous to the non-monied spouse. This can create conflicts divorce lawyers could historically avoid

# Alimony

Alimony Factors to Be Considered Pursuant to O.C.G.A. § 19-6-5:

- (1) The standard of living established during the marriage;
- (2) The duration of the marriage;
- (3) The age and the physical and emotional condition of both parties;
- (4) The financial resources of each party;
- (5) Where applicable, the time necessary for either party to acquire sufficient education or training to enable him to find appropriate employment;
- (6) The contribution of each party to the marriage, including, but not limited to, services rendered in homemaking, child care, education, and career building of the other party;
- (7) The condition of the parties, including the separate estate, earning capacity, and fixed liabilities of the parties; and
- (8) Such other relevant factors as the court deems equitable and proper.

# Alimony

Looking at Sally's case:

We can assume that under these facts she is likely to receive no less than half the assets if we go to Court. There is no indication that Sally has engaged in any conduct or behaviors that would warrant Sally receiving less than 50% of the assets.

This means she should leave the marriage with assets valued at over \$6,000,000.

Whether there is a need for alimony may depend on whether that more than \$6,000,000, prudently invested, will provide sufficient income to pay Sally's expenses. It is likely that whatever asset division Sally receives will not be \$6,000,000 net of taxes.

# Alimony

How long is John going to have to pay alimony?

- John thinks he is going to be forced out of the high income job in five to seven years.
- Modern courts generally don't generally believe in indentured servitude or lifetime alimony.
- Can John afford a big alimony payment now that he can't deduct his alimony?
- John's going to have at least five years to earn, Sally does not.

# Prenuptial Agreements

Prenuptial Agreements are enforceable in Georgia. Scherer v. Scherer, 249 Ga. 635 (1982).

Under Scherer, to have a valid prenuptial agreement in Georgia, a three-prong test must be satisfied:

1. Was the agreement obtained through fraud, duress, or mistake or through misrepresentation or nondisclosure of material facts?
2. Is the agreement unconscionable?
3. Have facts and circumstances changed so as to make enforcement of the prenuptial agreement unfair or unreasonable.

# Prenuptial Agreements

## Duty to Disclose, Not to Investigate

“Georgia law, like that of virtually every other State in the Union, imposes an affirmative duty of disclosure on both parties to an antenuptial agreement. In essence, the law writes into every antenuptial agreement a provision requiring both parties to disclose all material facts. *Absent ‘full and fair disclosure’ of the parties’ financial condition prior to execution, enforcement of the antenuptial agreement would violate Georgia public policy*”

Blige v. Blige, 283 Ga. 65, 68-69 (2008) (emphasis added).

A party has no duty to investigate the other parties’ assets before signing an antenuptial agreement. Kwon v. Kwon, 333 Ga. App. 130, 135 (2015).

# Prenuptial Agreements

Listing assets, but not values of those assets, in a financial disclosure made in connection with an antenuptial agreement has been found by the Supreme Court of Georgia to not be a sufficient financial disclosure to satisfy the first prong of the Scherer test. See Dodson v. Dodson, 298 Ga. 117, 118-119 (2015).

**TAKEAWAY FOR ALL FINANCIAL PROFESSIONALS AND DIVORCE LAWYERS: MAKE SURE YOU DISCLOSE EVERYTHING!**

# Prenuptial Agreements

## Purposes of Prenuptial Agreements:

1. Protect premarital and non-marital assets.
2. Eliminate uncertainty as to division of assets and financial support (other than child support).
3. Protect income derived from separate assets (even if there have been marital efforts by the income earning spouse). Possibly protect marital income derived from employment.
4. Allocate contributions to the marital unit through operating accounts.
5. Choice of law provisions.



**GRAY EITREIM MARTIN, LLC**

Alexander R. Cutler, Esq | Partner

Direct Line: (770) 225-7012 | Fax: (770) 225-7001

100 Galleria Parkway, Suite 1120 | Atlanta, GA 30339

[acutler@gemfamilylaw.com](mailto:acutler@gemfamilylaw.com)

[GemFamilyLaw.com](http://GemFamilyLaw.com)