

EQUITABLE DIVISION OF PROPERTY IN DIVORCE - USEFUL CITATIONS

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Equitable division of property is a part of nearly every divorce case. Most of the applicable law is found in appellate cases. This article presents a number of citations on principles of equitable division of property that should be useful to trial lawyers.

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I. Overview

The equitable division of property is an allocation to the parties of the assets acquired during the marriage, based on the parties' respective equitable interests. Byers v. Caldwell, 273 Ga. 228, 229, 539 S.E.2d 141 (2000). The purpose behind the doctrine of equitable division of marital property is "to assure that property accumulated during the marriage be fairly distributed between the parties." Campbell v. Campbell, 255 Ga. 461, 462, 339 S.E.2d 591 (1986). Only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division." McArthur v. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987), Payson v. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001).

II. What is not marital property.

"A property interest brought to the marriage by one of the marriage partners is a non-marital asset and is not subject to equitable division since it was in no sense generated by the marriage. Campbell

v. Campbell, *supra*, 255 Ga. at 462, 339 S.E.2d 591. See also Moore v. Moore, 249 Ga. 27(2), 287 S.E.2d 185 (1982). It is a question of law for the court whether a particular category of property may legally constitute a marital or non-marital asset, but whether a particular item of property actually is a marital or non-marital asset may be a question of fact for the trier of fact. Franklin v. Franklin, 267 Ga. 82(2), 475 S.E.2d 890 (1996); Janelle v. Janelle, 265 Ga. 116(1), 454 S.E.2d 133 (1995); Bass v. Bass, 264 Ga. 506, 448 S.E.2d 366. The appreciation in value of a non-marital asset during the marriage is a marital asset subject to equitable division if the appreciation is the result of the efforts of either spouse or both spouses, but to the extent the appreciation is only the result of market forces, it is a non-marital asset and therefore not subject to equitable division. Bass v. Bass, 264 Ga. at 508, 448 S.E.2d 366. Whether the appreciation in value of the non-marital asset is due to market forces or to the individual or joint efforts of the spouses is a question of fact”, Payson v. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001).

III. Gifts to one spouse and inherited property received by one spouse are generally not marital property.

- a) A gift made to only one spouse by a third party during the marriage will be considered the separate property of the recipient spouse. Bailey v. Bailey, 250 Ga. 15 (1982).
- b) A gift given to the marital couple by a third party is deemed to be marital property absent evidence of a contrary intent by the donor. Braly v. Braly, 244 Ga. 773 (1979).
- c) A gift between spouses of property acquired during the marriage will remain marital property subject to equitable division, McArthur v. McArthur, 256 Ga. 762 (1987).
- d) But, a gift of separate property by a spouse to the marital unit will result in the entire property becoming marital subject to equitable division., Lerch v. Lerch, 278 Ga. 885, 886, 608 S.E.2d 223 (2005).
- e) “Our case law suggests that when a spouse pays down a mortgage on a home, that spouse has made a gift to the marital estate that has the status of marital property, but that spouse can only receive an equitable division from the portion of the marital estate to which the gift has been contributed if the value of the home itself increases”, Mallard v. Mallard, 297 Ga. 274, 277–278, 773 S.E.2d 274(2015) (concurring opinion).
- f) “While in some circumstances the payment of a debt may be a gift to the marital estate so that the payment itself becomes subject to equitable division, such payment does not convert the property associated with the debt into marital property, itself subject to equitable division.” See Mallard v. Mallard, *supra*, cited by Horton v. Horton, 299 Ga. 46, 785 S.E.2d 891 (Ga., 2016)(footnote 5).

IV. Methods of Equitable Division

From Pattern Jury charges-22.170 Methods of Equitable Division

If you decide to make an equitable division of property in this case, you should bear in mind that the law permits an equitable division of property in several different ways:

- a) You may make an equitable division of specific personal property or real property.
- b) That is, you may designate the specific property (such as so many shares of stock in a named company or a certain house or tract of land) to be awarded as equitable division of property.
- c) You may make an equitable division of property in cash. That is, you may designate
- d) a certain sum of money to be awarded as equitable division of property, even though that sum of money is not presently in the form of cash.
- e) You may make an equitable division of property by awarding specific items of property and also awarding an amount of cash.
- f) Furthermore, you have the power to award percentages of property to spouses or to require the parties to sell property in equitably dividing the marital property.

Clements v. Clements, 255 Ga. 714 (1986)

V. Proving that an asset is marital property, burden of proof.

“Each had the burden to prove entitlement to equitable division according to his or her plan. If both fail to meet their separate burdens, then neither is entitled to equitable division, and their ownership of property remains as it existed before trial”. Barber v. Barber. 257 Ga. 488 360 S.E.2d 574 (1987).

A related matter is what happens if a ruling is not obtained on whether property is marital or separate? “[T]itle to property, including jointly owned property, not described in the verdict and judgment is unaffected by the divorce decree and remains titled in the name of the owner or owners before the decree was entered. Any future issues as to the management, division or disposal of [any] jointly owned property should be treated as they arise, without regard to the previous status of the parties as husband and wife. Cale v. Cale, 242 Ga. 600, 601(1), 250 S.E.2d 467 (1978).

VI. Value of property-evidence of the value of marital property - Expert testimony

Expert testimony may be preferable and carry weight, but it is not required. Opinion of the value of the marital home at this time may be offered pursuant to OCGA § 24-7-701 (b), which provides that direct testimony as to market value is in the nature of opinion evidence. A witness need not be an expert or dealer in an article or property to testify as to its value if he or she has had an opportunity to form a reasoned opinion.

Also, a person need not be a licensed real estate broker, appraiser, or salesman to qualify as an expert sufficiently qualified to give an opinion on the value of property, Longino v. City of Atlanta, 127 Ga. App. 299, 300 (1972).

Expert testimony is not binding on the trier of fact. It is well settled that "[t]he trier of fact is always free to reject expert testimony." Dabney v. Ammons, 150 Ga. App. 737, 738, 258 S.E.2d 551 (1979), Atlantic States Const., Inc. v. Beavers, 314 S.E.2d 245, 169 Ga. App. 584 (Ga. App., 1984).

Opinion testimony does not establish any fact as a matter of law; the court is not bound by such testimony, even if uncontradicted, Sullivan v. Sullivan, 295 Georgia 24, 757 S. E second 129, (2014).

"The facts upon which an expert bases his or her opinion are admissible on either direct or cross-examination, and such bases go to the weight given the testimony by the [factfinder], rather than to its admissibility." Popham v. Popham, 278 Ga. 852, 853(3), 607 S.E.2d 575 (2005), cited in Miller v. Miller 2 Cases), 288 Ga. 274, 705 S.E.2d 839 (Ga., 2010)

There are limits on expert testimony. OCGA § 24-7-704(a) provides "Except as provided in subsection (b) of this Code section, testimony in the form of an opinion or inference otherwise admissible shall not be objectionable because it embraces an ultimate issue to be decided by the trier of fact. This does not go so far as allowing testimony on an ultimate issue of law. An expert may not testify to legal conclusion. Earlier case law says the same about questions of mixed law and fact, Agnor's Georgia Evidence, § 9-3. Opinion evidence is not admissible if the inference drawn is a mixture of law and fact, Lawhorne v. Soltis, 259 Ga. 502, 384 S.E.2d 662 (Ga., 1989).

VII. Separate property can become marital by appreciation or paydown of mortgage.

Evidence of spousal effort is required to show appreciation is a marital asset. "In order for the fact-finder to come to the conclusion, reached in the case at bar, that *all* the appreciation on non-marital property is marital property subject to equitable division, the fact-finder must determine that *all* the appreciation is attributable to the individual or joint efforts of the spouses and none of the appreciation is due to market forces, since any appreciation found to be attributable to market forces is not a marital asset subject to equitable division. Bass v. Bass, *supra*. There is no dispute that *some* of the appreciation in value of Mrs. Payson's stock was due solely to market forces, making it error to include *all* the appreciation in value as marital property. See *id*. Payson v. Payson, *supra*.

As to analysis of whether efforts of parties or market forces caused the appreciation: ..."the superior court found that there was no evidence presented as to what role, if any, Husband played in the increase in value of the stock; there was no evidence that Wife was the cause of any appreciation in the stock value, and that inasmuch as there was no evidence presented as to the value of the 100 shares of stock at the time of the parties' marriage, there was no evidence of

appreciation in value occurring during the marriage for the court to consider. Consequently, the superior court awarded the entirety of the 100 shares of stock and any appreciation to Husband. In this case, the Supreme Court ruled that the husband did not actively cause the value of the corporate stock to increase. Since this stock was acquired by the husband through gift and inheritance and is considered separate property, the appreciation that is not caused by his efforts during the marriage is not a marital asset and is not distributable at dissolution.” Sullivan v. Sullivan, 295 Ga. 24, 757 S.E.2d 129 (Ga., 2014) Citing Halpern v. Halpern, 256 Ga. 639, 352 S.E.2d 753 (1987).

But see –a premarital business that reinvests rather than distributes profits may be marital property. “The lower court was correct in treating the appreciation of stock as marital property, because the corporation had paid for substantial improvements that increased the corporate value, in lieu of distributing profits to its owners as income. We explained that "had the corporation not made substantial investments in improving its facility, the value of the stock may have remained about the same but this respondent would have received additional income resulting in marital assets which would be subject to division at the time of the dissolution." Stephens v. Stephens, 297 Neb. 188 (Neb., 2017) citing Horton v. Horton, 299 Ga. 46, 785 S.E.2d 891 (Ga., 2016).

Paydown of a mortgage with marital funds can be marital property, Hubby v. Hubby, 274 Ga. 525, 556 S.E.2d 127 (2001).

VIII. Source of funds rule -ratio calculation of marital shares

The spouse who contributes a home as non-marital property to the marriage, in the event of its appreciation during the marriage as a marital asset, “is entitled to an interest in the property in the ratio of the non-marital investment to the total non-marital and marital investment in the property.”

“In this State, trial courts must apply the “source of the funds” rule when equitably dividing a home that one of the parties brought to the marriage. Under this rule, a trial court “must determine the contribution of the spouse who brought the home to the marriage, and weigh it against the total non-marital and marital investment in the property.” Horsley v. Horsley, 268 Ga. 460, 490 S.E.2d 392 (1997), accord, Hubby v. Hubby, supra); Thomas v. Thomas, supra. But a simple splitting the amount of appreciation is not necessarily what is called for. The spouse who contributes a home as non-marital property to the marriage “is entitled to an interest in the property in the ratio of the non-marital investment to the total non-marital and marital investment in the property.” Thomas, supra, quoting Harper v. Harper, 294 Md. 54, 448 A.2d 916, 929 (1982). This interest is considered the non-marital property of the contributing spouse, and “[t]he remaining property is characterized

as marital property and its value is subject to equitable distribution.” Thomas, supra, Snowden v. Alexander-Snowden, 277 Ga. 153, 587 S.E.2d 54 (2003).

IX. Calculation and proof of the ratio of the non-marital investment to the total non-marital and marital investment in the property

In the situation where nonmarital property such as a home is brought into the marriage, and marital funds are used to pay down the mortgage, and there is appreciation, all these factors must be taken into account in the calculation. These factors in the calculation method are explained well in Hubby v. Hubby, supra. The Court of Appeals explains how all factors must be taken into account in this opinion.

X. Evidence required- Computing appreciation- general rule is that value evidence required, at time of the marriage and time of the divorce.

“... in order for a trial court to determine that an asset appreciated in value during a marriage, there must be evidence of the value of the asset at the time of the marriage and its value at the time of the divorce.” Jones-Shaw v. Shaw, 291 Ga. 252, 253; 728 S.E.2d 646 (2012)

However, there is case law that provides proof of value can be found without proof of value at the time of the marriage.

“(Husband) contends that because there was no evidence of the value of the property at the time of the marriage and no evidence of the amount necessary to pay off the mortgage on the property at the time of the marriage, it was impossible for the jury to calculate the net equity in the property and determine how much of that equity was marital property subject to equitable division. However, as noted above, evidence of record established the pertinent dates, the amount paid for the property, the amount of the down payment, the number of payments made, and the balance remaining at the time of trial. Using the same method of calculation demonstrated above, all the essential elements necessary to establish the extent to which the value of the property could be classified as marital property could be derived from the evidence of record.” Maddox v. Maddox, 278 Ga. 606, 604 S.E.2d 784 (Ga., 2004); Snowden v. Alexander-Snowden, 277 Ga. 153, 587 S.E.2d 54 (2003).

The court found the value of the appreciation of premarital property by subtracting the value at time acquired from the value at time of marriage. The amount of appreciation that is marital is found by the total number of years owned by the number of years of the marriage.

Both Jones-Shaw and Maddox have recently been cited with approval, Horton v. Horton, supra.

XI. Business Asset division and valuation.

A business that either started or appreciated in value during the marriage due to efforts of a party or the parties is subject to equitable division. Interests in corporations, LLCs, or partnerships can be awarded to the other party (under present GA law on partnerships, conveyance of a partnership interest does not dissolve the partnership, unless the partnership agreement provides for that, OCGA §14-8-27).

A buy-sell agreement may call for a buyout of the business interest in event of divorce. However, such an agreement is not binding on the court as far as the value of the interest. "Indeed, we have held that not even a buy-sell agreement is binding when valuing a closely-held corporation for purposes of equitable division," Barton v. Barton, 281 Ga. 565, 639 S.E.2d 481 (2007), Miller v. Miller 2 Cases), 288 Ga. 274, 705 S.E.2d 839 (Ga., 2010).

The court can award shares of stock under Clement, *supra* and the Pattern Jury charges-22.170, Methods of Equitable Division quoted above. It would seem that the court could also award a right to a share of profits or dividends.

If a company is incorporated, the court cannot award corporate assets owned by the business directly to the other spouse. The court can look to what income is realized from the corporation by the owning party, and also whether the corporation does not distribute income but reinvests it, which can increase the value of corporate shares, see Stephens, *supra*.

In Anson v. Anson, 772 So.2d 52 (2000), the District Court of Appeal of Florida "a stockholder's interest in a corporation is limited to the legal rights flowing from the ownership of capital stock. Those rights do not include a pro-rata interest in corporate assets. The corporation, as a legally recognized entity, holds title to its assets. The earnings of a corporation do not become a marital asset upon marriage. Assets acquired through corporate earnings are corporate assets until payments are made for services or dividends. If a shareholder-spouse devotes work efforts to a corporation during marriage, the corporation's income is not immediately converted into marital income. If the corporation retains assets acquired from earnings of a corporation rather than distributing them as dividends to shareholders, the value of the outstanding stock should appreciate in value." Anson at 54-55.

The court can award cash payment for the business interest rather than a direct award of part of the business interest. Also if one spouse is awarded a valuable business, the other spouse can be awarded proportionately more property to balance the division equitably, see Clement, *supra*.

The three accepted methods of business valuation are the income or capitalized earnings method, the market approach method, and the cost approach method. The trial court has the discretion to choose which valuation method it will employ. Sullivan versus Sullivan, 295 Georgia 24, 757 S. E second 129, (2014).

The valuation methods and general valuation issues are discussed in detail in Miller v. Miller 2 Cases), 288 Ga. 274, 705 S.E.2d 839 (Ga., 2010), which includes the following analysis:

“ ‘[T]hree principal methods ... can be used for developing a value for ownership in a closely held corporation....’ [Cit.] Those are the income or capitalized earnings method, the market approach method, and the cost approach method. [Cit.]’” Steneken v. Steneken, 183 N.J. 290, 873 A.2d 501, 505(II) (2005). Wife's expert, who is a forensic accountant and business valuation analyst, utilized all three approaches, referring to the latter as the asset approach, pursuant to which she capitalized “excess earnings,” whereas she capitalized total earnings when using the income approach. She weighted each approach differently, after analyzing how appropriate each one is for Husband's practice. “ ‘[V]aluation is an art rather than a science (that) ... requires consideration of proof of value by any techniques or methods which are generally acceptable in the financial community and otherwise admissible in court.’ [Cit.]” Steneken v. Steneken, *supra*.

“[T]here is no single best approach to valuing a professional association or practice, and various approaches or valuation methods can and have been used. [Cits.]” Poore v. Poore, 75 N.C.App. 414, 331 S.E.2d 266, 270 (1985). “[G]oodwill may be measured by any legitimate method of evaluation that measures its present value by taking into account some past result, so long as the evidence legitimately establishes value. [Cit.]” Barth H. Goldberg, Valuation of Divorce Assets, Revised Edition § 8:4. It is not required that “only one method be used in isolation.” In re Marriage of Hall, 103 Wash.2d 236, 692 P.2d 175, 180 (1984). See also Skrabak v. Skrabak, 108 Md.App. 633, 673 A.2d 732, 737(I) (1996); Martin J. McMahon, Valuation of Goodwill of Professional Practice for Distribution on Divorce, 8 AmJur. Proof of Facts 3d 215, § 3 (1990) (citing In re Marriage of Hall, *supra*).

“The decision as to which valuation method to rely on is a factual determination to be made by the trial court. A trial court may select the valuation of property presented by one party over the valuation offered by the other, or assess value based upon its own calculations. The weight to be given to valuation techniques used by experts is for the trial court to decide.” [Cit.]Goldberg, supra at § 8.3 (quoting from In re Marriage of Nevarez, 170 P.3d 808, 812(II)(A)(2), (3)(a) (Colo.App.2007)).

Professional practices and their goodwill subject to valuation as a marital asset. “Wife's expert testified that she used two national databases and that utilization of such databases is a generally accepted method for valuing medical practices. Indeed, many states treat the market approach as

one of several possible approaches for valuing a professional practice and its goodwill. Christopher A. Tiso, Present Positions on Professional Goodwill: More Focus or Simply More Hocus Pocus?, 20 J. Am. Acad. Matrim. Law 51, 65(III)(D) (2006). See also Goldberg, *supra*. “[I]n recent years, the overall marketability of medical practices has been increasing.” 2 Brett R. Turner, Equit. Distrib. of Property, 3d § 6:73 (the law looks to “value at a sale in the due course of business, even if [it] might require some expenditure of time and effort in order to find a suitable buyer”). The differences in geographical locations and dates of sale go to the weight, rather than admissibility, of the comparable sales on which Wife's expert relied.” See Popham v. Popham, *supra*; Jones v. Chatham County Bd. of Tax Assessors, 270 Ga.App. 483, 486(3), 606 S.E.2d 673 (2004); 2 Turner, *supra* at § 7:26.” Miller v. Miller 2 Cases), 288 Ga. 274, 705 S.E.2d 839 (Ga., 2010).

XI. Minority interests

If a business owner owns less than a majority of stock, in a close corporation, the value of the stock can be affected (this does not apply to publicly traded stock). The Supreme Court of Georgia has recognized that there is no market for sale of a minority interest in close corporation stock unless the majority shareholders wish to buy it, see Comolli v. Comilli, 241 GA 471, 246 S.E.2d 278 (1978).

Therefore there may be no practical way to convert the minority interest into cash for immediate distribution. If there are sufficient other assets the court can award some of those to the non-owner, to balance the shares of marital property where the owning party is to keep the business interest. Or, a division of stock in kind may be preferred as an equitable distribution, Clement, *supra*; the court can award a share of the business to the non-owning party. However, the other business partners or shareholders are often averse to having a former spouse of an owner as a co-owner with them (this may offer incentive for the other owners to buy out the other owner in whole or part). The court can award some interest in the property and some cash or other property, Clement, *supra*.

Business valuation experts can apply a discount in valuation of company stock if it is a minority interest. In Atlantic States, *supra*, the court held that it is permissible to apply a discount for a minority interest because of its lack of control in the company organization. Proof of lack of marketability, and the effect of minority status on value, can be proved by a valuation expert or business broker. Use of these discounts is important in reaching a fair market valuation for corporations not publicly traded, and minority interests in privately held corporations.

Atlantic States is a corporate shareholder dispute case. Use of minority or marketability concerning in divorce cases concerning asset valuation has not been significantly addressed in Georgia case

law, see Williams v. Williams, 268 Ga. 126, 485 S.E.2d 772 (Ga., 1997), and see Sullivan v. Sullivan, 295 Ga. 24, 757 S.E.2d 129 (Ga., 2014).

A competent expert can point out that in divorce cases, the concept of fair market value is used in the valuation of stock. This is different from the concept of fair value, which applies in dissenting shareholder cases such as Atlantic States. Discounts are used more freely in calculating fair market value. Atlantic States holds discounts should be used with caution in shareholder cases when finding fair value. In divorce cases, finding fair market value, discounts can be used more freely.

Case law of other states can be illustrative. In the valuation of minority business interests, the valuation expert should the value for lack of control as a minority owner, and lack of marketability. The use of discounts is generally accepted in the business valuation profession. Most states permit use of a minority discount when valuing a minority interest in a close corporation. See Crismon v. Crismon, 72 Ark. App. 116, 34 S.W.3d 763 (2000) (applying 12% discount in valuing husband's 50% interest in partnership); Trost-Steffen v. Steffen, 772 N.E.2d 500 (Ind. Ct. App. 2002) (30% discount for minority status and lack of marketability); Rattee v. Rattee, 146 N.H. 44, 767 A.2d 415 (2001) (28.5%); Haymes v. Haymes, 298 A.D.2d 117, 748 N.Y.S.2d 542 (1st Dep't 2002) (unspecified discount); Cerretani v. Cerretani, 289 A.D.2d 753, 734 N.Y.S.2d 324 (3d Dep't 2001) (30%); Ellis v. Ellis, 235 A.D.2d 1002, 653 N.Y.S.2d 180 (3d Dep't 1997) (making 25% minority discount); Priebe v. Priebe, 1996 SD 136, 556 N.W.2d 78 (S.D. 1996) (making 40% minority discount; good discussion of minority discounts generally).

XII. Pensions Valuation and Division

This part applies to the division of defined benefit plans, which pay a benefit for an indeterminate time period, usually the life of the pension beneficiary. Defined contribution plans, 401k plans IRAs and the like have a stated value and do not present the same complexity as defined benefit plans. The defined benefit plan may have a current account value showing the contributions and earnings to date, but the value of the stream of benefits can be computed to a present value which is different, and likely higher than the account value. Because these valuations involve numerous variables such as life expectancy, and current interest rates for the present value calculation, an actuary is normally needed.

There is not a great amount of Georgia case law on the subject. Hammond v. Hammond, 12 FCDR 338, 290 Ga. 518, 722 S.E.2d 729 (2012), does cite an out of state case that has a detailed discussion of the valuation and distribution approaches, including some discussion of which method best fits different situations.

Three methods of distribution are utilized by courts in order to divide a pension plan upon dissolution: (1) net present value; (2) deferred distribution; (3) and reserve jurisdiction. Brett R. Turner, Equitable Distribution of Property § 6.11 (2d ed. 1994 & 1995 Supp.) (hereinafter "Turner") , In re Marriage of Hunt, 909 P.2d 525, 531 (Colo.1995), cited by Hammond v. Hammond, *supra*. Hammond discusses the "time rule" which involves the court calculating a fraction of the present value or payment for the marital portion of the asset. The Hammond court approved, but did not require the use of the time rule. The Hammond court declined to use the net present value or "time rule" method. Instead, alimony was awarded to start at the time the pension payout started.

The Hunt opinion discusses all three methods:

"The first method, net present value, results in immediate distribution to the nonemployee spouse. This method also is referred to as "immediate offset" because the lump sum that represents the net present value of the future benefit may be offset by the value of other property in the marital estate. If using this method, the trial court, guided by actuarial data, values the future benefit, considers a number of different factors, including certain risks (depending on the type of pension plan), and accords a present value to the future benefit. The net present value method is used most often when the value of the pension is low because the employee spouse has worked only a few qualifying years during the marriage, has held a low paying job, or both....The length of the marriage during employment comes into play in two ways. First, it is relevant to the determination of the method by which the pension is divided. A short term marriage often permits immediate distribution of the pension under the present value method."

"If, however, the circumstances do not warrant immediate distribution because there are insufficient assets in the estate to permit offset, or the present value of the future benefit is too difficult to ascertain, the trial court may find it necessary to utilize either the deferred distribution or the reserve jurisdiction method." Hammond, supra,), citing In re Marriage of Hunt, 909 P.2d 525, 531 (Colo.1995).

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