

ALIMONY vs. PROPERTY SETTLEMENT

Pros and Cons

by

Gregory D. Golden

DIVISION OF PROPERTY

How is marital property equitably divided?

Unique issues surrounding equitable division of property

Issues to consider in determining an equitable division of property

ALIMONY

How is alimony determined?

How is it determined if alimony is tax deductible?

What is front-loading?

Issues to consider in determining the amount and duration of alimony

WHAT OBLIGATIONS ARE DISCHARGEABLE IN BANKRUPTCY?

CONCLUSION

According to Black's Law Dictionary (6th ed.), the term "alimony" comes from the Latin term *alimonia*, meaning "sustenance or support of the wife by her divorced husband." According to the late comic Robin Williams, "alimony" is a contraction of the phrase "all my money". How many times have you had a client come into your office and emphatically state that he "is not going to pay alimony under any circumstances!" Is alimony really thought of as such a malevolent term by the general public? If it is, it shouldn't be and it is our job, as domestic attorneys, to be able to explain the advantages and disadvantages of alimony when compared to a property settlement.

The terms "alimony" and "property settlement" (read: equitable division of property) are terms of art that are not one and the same. Alimony is an allowance out of one party's estate, made for the support of the other party, when living separately. O.C.G.A. § 19-6-1(a). Conversely, a property settlement refers to the determination of who owns property when its title is disputed as well as the partitioning of jointly owned property. Daniel vs. Daniel, 277 Ga. 871, 596 S.E.2d 608 (2004). Parties, their

respective attorneys, and judges can get confused because the same property and/or money can potentially be awarded as either one. Similarly confusing is the notion that property and/or money that could not be awarded as an equitable division of property can be awarded as alimony. Even more potentially confusing is that the courts are not bound by the nomenclature of such awards of property and/or money; even though an agreement may term the payment of funds as alimony, the court is not bound by the parties' nomenclature. Crawford vs. Schelver, 226 Ga. 105, 172 S.E.2d 686 (1970). It is important to understand the characteristics and requirements for each type of an award in order to protect your client's interests.

DIVISION OF PROPERTY

How is marital property equitably divided?

As a general rule, it is only the real and personal property acquired during the term of the parties' marriage that is considered to be marital property and subject to equitable division. Payson vs. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001). The authority to equitably divide the property titled in the name of one spouse to the other spouse does not rely upon fraud or trust theories but arises from the marital relationship. Daniel vs. Daniel, 277 Ga. 871, 596 S.E.2d 608 (2004). The purpose behind the doctrine of equitable division of marital property is to assure that property accumulated during the marriage will be fairly distributed between the parties. Only property acquired as a direct result of the labor and investments of the parties during the marriage is subject to equitable division. Payson vs. Payson, 274 Ga. 231, 552 S.E.2d 839 (2001).

To determine the manner in which marital property is to be divided, the trier of fact (whether it is a judge, jury, or the actual parties) can consider any of the following factors in such a determination, to-wit:

- 1) the age and health of each party;
- 2) the occupation and income of each party;
- 3) the duration of the marriage;
- 4) the contribution of service of each to the family unit;

- 5) the separate estate (assets) of each party;
- 6) the indebtedness of each party;
- 7) the present income, future earning capacity, and financial resources of each party;
- 8) the causes which led to the separation and the conduct of the parties toward each other;
- 9) the needs of each of the parties;
- 10) the contribution of each party to the acquisition and maintenance of the property (which includes monetary contributions of a spouse as a homemaker);
- 11) the purpose and intent of the parties regarding the ownership of the property; and
- 12) any other facts and circumstances described by the evidence that you deem to be relevant to the making of such a decision.

Halpern vs. Halpern, 256 Ga. 639, 352 S.E.2d 753 (1987).

An equitable division of marital property is not necessarily an equal division, but a fair one. Driver vs. Driver, 292 Ga. 800, 741 S.E.2d 631 (2013). The State of Georgia is not a “community” property state, where property acquired during the marriage (with some exceptions) is equally divided between the parties at the time of divorce. It is important to note that property rights that are fixed and vested in a divorce decree are *not* subject to modification by the court. Spivey vs. McClellan, 259 Ga. 181, 378 S.E.2d 123 (1989).

Unique issues surrounding equitable division of property

- While the commission of adultery by a spouse may be a bar to an award of alimony, adultery will not preclude his or her claim for an equitable division of the other spouse's property. Peters vs. Peters, 248 Ga. 490, 283 S.E.2d 454 (1981).

- The rule that separate property is not subject to equitable division is subject to this qualification: where separate property of a spouse increases in value during the marriage, and that increase in value is due to the efforts of such spouse, although the property itself is not subject to equitable division, the increase in value of such property may be equitably divided between the parties. Halpern vs. Halpern, 256 Ga. 639, (1987)

- A court has the authority to make an award of cash to one spouse as an equitable division of property even though there is no evidence of any cash available from which to satisfy such an award. Clements vs. Clements, 255 Ga. 714, 342 S.E.2d 463 (1986).

- A former spouse remains responsible for the payment of a debt encumbering property awarded to the other spouse, as an equitable division, even after the property is sold to a third party. In Bryant vs. Cole, the parties' divorce agreement required the husband to be responsible for the payment of the principal and interest of the mortgage on the wife's residence. 266 Ga. 535, 468 S.E.2d 361 (1996). The wife subsequently sold the residence and the principal amount owing on the mortgage was paid at closing. The trial court denied the wife's petition seeking a declaratory judgment requiring the husband to pay her the remaining balance of the mortgage paid at the closing. The Supreme Court of Georgia reversed the trial court. Although there was no language requiring the husband to pay the mortgage in full, his responsibility to pay the principal amount owing did not end when the property was sold and the balance paid at closing. There was no limitation on his obligation.

- Where equitable division of property is in issue, the conduct of the parties, both during the marriage and with reference to the cause of the divorce, is relevant and may be considered in the determination of an equitable division of property. Peters vs. Peters, 248 Ga. 490, 283 S.E.2d 454 (1981).

- Contingent fee arrangements are too remote, speculative and uncertain, and should not be considered as marital property for the purpose of arriving at an equitable division of the marital property of the parties. Goldstein vs. Goldstein, 262 Ga. 136, 414 S.E.2d 474 (1992).

- The last date upon which assets may be acquired by these parties and considered to be marital property, thus being subject to equitable division, is the date that a final decree of divorce is entered. Friedman vs. Friedman, 259 Ga. 530, 384 S.E.2d 641 (1989) (overturned on other grounds). For example, if a spouse purchased a house after the parties' separation but before a divorce was granted, the house (or equity contained therein) would be subject to equitable division.

- The right to claim an equitable division of property arises from the marital relationship. Once that relationship ceases, so does the right to an equitable division. If a spouse dies before the parties are divorced, his/her estate does not have a right to claim an equitable division of the marital assets. Owens vs. Owens, 248 Ga. 720, 286 S.E.2d 25 (1982).

- Gifts made between spouses are marital property and not the separate property of the spouse receiving the gift. Therefore, such gifts must be considered for the purpose of arriving at an equitable division of the marital property of the parties. McArthur vs. McArthur, 256 Ga. 762, 353 S.E.2d 486 (1987).

- A final judgment and decree which conveys property has the same force and effect as a deed, and establishes title, whether or not the decree is recorded. United Community Bank vs. Pack, 320 Ga. App. 484, 740 S.E.2d 228 (2013); see also O.C.G.A. § 9-11-70.

- In any personal injury award, the portion of the award for pain and suffering is the separate property of the injured spouse; however, any portion determined to have been awarded as compensation for medical expenses or lost wages constitutes marital property which is subject to equitable division. Johnson vs. Johnson, 259 Ga. 658, 386 S.E.2d 136 (1989). Similarly, any amount attributable to loss of consortium is not an asset of the marriage but is the separate property of the spouse who suffered the loss of consortium. Campbell vs. Campbell, 255 Ga. 461, 339 S.E.2d 591 (1986).

- A license to practice a profession, such as medicine or law, is not a marital asset within the context of what is normally considered to be marital property, and therefore should not be considered for the purpose of arriving at an equitable division of the marital property of the parties. Lowery vs. Lowery, 262 Ga. 20, 413 S.E.2d 731 (1992).

- Title 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. Stanley vs. Stanley, 281 Ga. 672, 642 S.E.2d 94 (2007).

Issues to consider in determining an equitable division of property

- Foreclosure of real property: In any situation in which one party is retaining real property which is titled in joint names or the other party is receiving a portion of the equity, it is the attorney's duty to include as much protection as possible for his/her client in the event of a foreclosure causing the loss of the real property. Such protections may include the payment of support directly to the mortgage company until a refinancing or sale occurs, or a provision for the immediate sale of the real property if the mortgage is late by a certain number of days. Clients are not only interested in making certain that they receive the proceeds from the equity in their real estate but are also interested in protecting their credit rating.

- Future encumbrances of property: Unless there is a specific prohibition against it, a party can borrow against property that may be jointly owned. Typically, this may occur in the context of a home equity line of credit or second mortgage against a marital residence. Such encumbrances may not require the consent of the former spouse. Even if such encumbrances will be considered in the ultimate, post-divorce division of equity, it can have a profound impact on a party's motivation to sell the property or his/her ability to maintain the debt service without affecting the former spouse's credit.

- Bankruptcy: Whether it is ever voiced during the litigation or not, the filing of bankruptcy by the former spouse should always be considered. In any divorce action, it is the ultimate goal of the parties to sever their financial bonds. As part of their divorce decree, there may be joint assets that have to be sold at later date or joint debts that one party agrees to pay. In such situations, you want to protect your client as much as possible in the event of his/her former spouse filing of bankruptcy. In order for such marital obligations not to be discharged in bankruptcy, they have to be in “the nature of alimony, maintenance or support.” Rogers vs. McGahee, 278 Ga. 287, 602 S.E.2d 582 (2004). In settlement agreements in which such issues arise, it may be advisable to include the following sample language with regard to a pay-out of equity in a marital asset, to-wit:

“[s]olely in consideration of the above-described payments that the Wife is to receive, the Wife waives any claim she may have to receive alimony from the Husband. The Husband acknowledges that if the Wife were not receiving the equitable division payments provided for in this Paragraph, it would be necessary for her to seek and receive alimony from the Husband. The parties have also taken into account the fact that upon the Wife’s receipt of these payments, said funds can generate additional income for her support. Therefore, it is the parties’ intention that if the Husband should ever seek bankruptcy protection, the amounts payable under this Paragraph shall not be dischargeable in bankruptcy under 11 U.S.C. § 523(a)(5), as the payments are in the nature of alimony, support and maintenance.”

- Future sale or transfer of a marital asset: If a spouse is not specifically prohibited from selling or transferring a particular marital asset, he/she is free to do so. Any divorce decree should include specific terms for the sale of marital assets (e.g., sales price, timing, any reduction in sales price, etc.) People can get very creative in ways not to share, including the use of “straw men.” An example of such creativity occurred in the case of Cubbedge vs. Cubbedge, in which the wife was awarded a twenty (20%) interest in any inheritance that the husband received from his parents. 287 Ga.App. 149, 650 S.E.2d 805 (2007). Subsequently, the husband and his parents arranged for an *inter vivos* transfer of their property into a trust. After the wife filed an action to recover twenty (20%) of the assets in the trust, the Court of Appeals of Georgia held that the property received by the husband through operation of the trust was not an inheritance and the wife was not entitled to twenty (20%) of the assets in the trust.

ALIMONY

How is alimony determined?

The award of alimony is actually a two (2) step process. First, it must be determined if an award of alimony is appropriate. To do so, you must consult O.C.G.A. § 19-6-1(c), which states, in pertinent part, that

“[i]n all other cases in which alimony is sought, alimony is authorized, but is not required, to be awarded to either party in accordance with the needs of the party and the ability of the other party to pay. In determining whether or not to grant alimony, the court shall consider evidence of the conduct of each party toward the other.”

Once it is determined that alimony is authorized, there are eight (8) factors used to determine the amount of alimony to be awarded, as described in O.C.G.A. § 19-6-5(a), to-wit:

- “(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 may be paid on a periodic basis or as a lump-sum; even if it is awarded as a lump-sum, it can be paid over time. Lump-sum alimony payments consist of a stated or variable amount of money, either designated or undesignated as to its source, either payable at once or by specified installments or intervals. Stone vs. Stone, 254 Ga. 519, 330 S.E.2d 887 (1985). Thus, if the words creating the obligation state the exact amount of each payment and the exact number of payments to be made without other limitations, conditions, or statements of intent, the obligation is one for lump-sum alimony payable in installments. Winokur vs. Winokur, 258 Ga. 88, 365 S.E.2d 94 (1988).

Only periodic payments of permanent alimony are subject to modification by a trial court. Winokur vs. Winokur, 258 Ga. 88, 365 S.E.2d 94 (1988). Lump-sum payments are not modifiable. O.C.G.A. § 19-6-21. A judgment for permanent alimony for the support of a spouse, pursuant to O.C.G.A. § 19-6-19, is subject to modification upon a petition filed by either former spouse showing a change in the income *and* financial status of either former spouse. In such a case, it is not an issue as to whether the payee is entitled to alimony or not; the only issue is whether there has been a change in the income *and* financial status of either former spouse. O.C.G.A. § 19-6-20. As with child support, once a modification of alimony is obtained by a former spouse, he/she is prohibited from filing another modification for two (2) years. The prevailing party, in such an action, may request an award of attorney’s fees and expenses of litigation.

O.C.G.A. § 19-6-19(d).

In addition to permanent alimony being modifiable for financial reasons of one or both parties, such payments can also be modified due to the payee spouse entering into a meretricious relationship. O.C.G.A. § 19-6-19(b) states, in pertinent part, that

“[s]ubsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse. As used in this subsection, the word “cohabitation” means dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person. In the event the petitioner does not prevail in the petition for modification on the ground set forth in this subsection, the petitioner shall be liable for reasonable attorney’s fees incurred by the respondent for the defense of the action.”

Such a condition for termination of an alimony obligation is not automatic, and it may be prudent to specifically address this issue in any potential settlement agreement.

How is it determined if alimony is tax deductible?

One of the major advantages to a payor spouse for making periodic alimony payments is the deductibility of such payments for Federal income tax purposes. 26 U.S.C. § 215(a) provides that a deduction to the payor’s income shall be allowed equal to the alimony payments actually paid during the payor’s taxable year. Under the Internal Revenue Code, payments qualify as periodic alimony if they meet the following factors, to-wit:

- such payment is received by (or on behalf of) a spouse under a divorce or separation instrument,
 - the divorce or separation instrument does not designate such payment as a payment which is not includible in gross income under this section and not allowable as a deduction under section [215](#),
 - in the case of an individual legally separated from his spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and
 - there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.
- 26 U.S.C. § 71.

What is front-loading?

The Tax Reform Act of 1984 (later amended by the Tax Reform Act of 1986) includes provisions that are intended to limit the disproportionate “front-loading” of alimony payments. “Front-loading” is the payment of large sums of alimony over a short period of time. Why would the Internal Revenue Service be interested in how alimony is paid? The simple answer is that it wants to make sure that it is receiving the appropriate amount of tax revenue. The purpose of the “front-loading” provisions is to prevent the payment of nondeductible property settlements as deductible alimony; this is accomplished by “recapturing” excess amounts of deductible alimony. The excess amount of alimony is subsequently included in the payor spouse’s income. As a result, the payor spouse will be required to report this excess amount as additional income upon which he/she will be required to pay taxes; similarly, the payee spouse will be able to deduct this excess amount from his/her income. “Excess alimony” is defined as the sum of the excess payments made in the first post-separation year plus the excess payments made in the second post-separation year.

The computation is statutorily defined in 26 U.S.C. § 71(f) which states, in pertinent part, that

“(1) If there are excess alimony payments—

(A) the payor spouse shall include the amount of such excess payments in gross income for the payor spouse’s taxable year beginning in the 3rd post-separation year, and

(B) the payee spouse shall be allowed a deduction in computing adjusted gross income for the amount of such excess payments for the payee’s taxable year beginning in the 3rd post-separation year.

(2) Excess alimony payments - For purposes of this subsection, the term “excess alimony payments” mean the sum of—

(A) the excess payments for the 1st post-separation year, and

(B) the excess payments for the 2nd post-separation year.

(3) Excess payments for 1st post-separation year - For purposes of this subsection, the amount of the excess payments for the 1st post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 1st post-separation year, over

(B) the sum of—

(i) the average of—

(I) the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, reduced by the excess payments for the 2nd post-separation year, and

(II) the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) \$15,000.

(4) Excess payments for 2nd post-separation year - For purposes of this subsection, the amount of the excess payments for the 2nd post-separation year is the excess (if any) of—

(A) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 2nd post-separation year, over

(B) the sum of—

(i) the amount of the alimony or separate maintenance payments paid by the payor spouse during the 3rd post-separation year, plus

(ii) \$15,000.”

The Internal Revenue Service, in Publication 504, has created the following chart to calculate whether any excess amount of alimony must be re-captured:

Worksheet 1. Recapture of Alimony

Keep for Your Records 

Note. Do not enter less than -0- on any line.

1. Alimony paid in 2nd year	1.	_____
2. Alimony paid in 3rd year	2.	_____
3. Floor	3.	<u>\$15,000</u>
4. Add lines 2 and 3	4.	_____
5. Subtract line 4 from line 1. If zero or less, enter -0-	5.	_____
6. Alimony paid in 1st year	6.	_____
7. Adjusted alimony paid in 2nd year (line 1 minus line 5)	7.	_____
8. Alimony paid in 3rd year	8.	_____
9. Add lines 7 and 8	9.	_____
10. Divide line 9 by 2	10.	_____
11. Floor	11.	<u>\$15,000</u>
12. Add lines 10 and 11	12.	_____
13. Subtract line 12 from line 6	13.	_____
14. Recaptured alimony. Add lines 5 and 13	*14.	_____

* If you deducted alimony paid, report this amount as income on Form 1040, line 11.
If you reported alimony received, deduct this amount on Form 1040, line 31a.

For example, husband pays \$50,000.00 in periodic alimony to wife during the first year, \$39,000.00 in periodic alimony during the second year, and \$28,000.00 in periodic alimony during the third year. In all of those years, husband deducts the stated amounts on his tax returns and wife includes the stated amounts on her tax returns. These amounts can be easily inserted in Worksheet 1, *supra.*, and after the brief calculations, it is determined that there was an “excess amount” of alimony paid. In such a scenario, husband would ultimately be required to “recapture” an additional \$1,500.00 in income for the third year and wife would be allowed to deduct \$1,500.00 from her income in the third year. Thus, if you are representing a payor of periodic alimony, you will want to perform this calculation (or have it performed by an accountant) to make sure that there will not be any additional tax liability for such payments.

Issues to consider in determining the amount and duration of alimony

- Notwithstanding lack of legal obligation on part of either party to divorce, anticipated expenses related to adult son's education were relevant to wife's financial condition with regard to the issue of alimony. McDonald vs. McDonald, 248 Ga. 702, 285 S.E.2d 702 (1982).
- Although conduct is relevant to determine if a party is entitled to alimony, conduct is *not* relevant in determining the amount of alimony to be awarded. McCurry vs. McCurry, 223 Ga. 334, 155 S.E.2d 378 (1967).
- The duration or period during which alimony is to be paid is *not* modifiable. Temple vs. Temple, 262 Ga. 779, 425 S.E.2d 851 (1993).
- If alimony is awarded, it should be consistent with the payee's needs and the payor's ability to pay. Thus, a token award of alimony in the amount of One (\$1.00) Dollar per month is improper. Lowry vs. Lowry, 238 Ga. 593, 234 S.E.2d 509 (1977).
- An award of alimony may be made from a spouse's non-marital assets, either in the form of periodic payments or use of property (personal or real). Smelser vs. Smelser, 280 Ga. 92, 623 S.E.2d 480 (2006).

WHAT OBLIGATIONS ARE DISCHARGEABLE IN BANKRUPTCY?

A division of property is subject to being discharged in bankruptcy. Daniel vs. Daniel, 277, Ga. 871, 596 S.E.2d 608 (2004). For example, if a wife were required to make sixty (60) monthly payments of \$500.00 to the husband, representing his interest in their former marital home, and she filed for bankruptcy, she potentially could be discharged from this "debt" to the husband, and the husband would not be able to collect these payments; the Bankruptcy court essentially views the wife's obligation as an unsecured debt subject to discharge. In contrast, an award of alimony is expressly exempt from being discharged in bankruptcy. Young vs. Young, 234 Ga. 256, 215 S.E.2d 258 (1975); 11 U.S.C. § 523 *et seq.* However, the label of a particular obligation is not determinative of its dischargeability. A classification under state law of claims, as either alimony or a property settlement, is not dispositive of the question of whether the

claims are dischargeable in bankruptcy. Arrearages for alimony, maintenance, or support of a spouse or child are not dischargeable in bankruptcy. 11 U.S.C. § 523(a)(5). It is entirely conceivable that the purpose of a property settlement might be to provide the former wife with maintenance or support; if so, the obligation of the former husband to effectuate the property settlement agreement, or comply with the decree in which it is embodied, would not be dischargeable in bankruptcy. Horner vs. Horner, 222 B.R. 918 (S.D. Ga. 1998).

It is clear that periodic alimony (and child support) are not dischargeable in bankruptcy. What is not clear is whether lump-sum alimony payments (as well as obligations to effectuate an equitable division of property) are dischargeable in bankruptcy. In Daniel vs. Daniel, the Supreme Court of Georgia held that the controlling issue as to the dischargeability of lump-sum alimony turns on whether such payments are for a spouse's maintenance, or support or are in the "nature" of a property settlement; in making this determination, a trial court is permitted

“to look behind the judgment to the record to ascertain from the facts and circumstances of the marital situation whether the obligation imposed on the [ex-spouse] ... is dischargeable in bankruptcy. To ascertain the intent of the parties and the substance and function of the obligation, a judge may consider any or all of the following factors:

- (1) The amount of alimony, if any, ... and the adequacy of any such award;
- (2) the need for support and the relative income of the parties at the time the divorce decree was entered;
- (3) the number and age of children;
- (4) the length of the marriage;
- (5) whether the obligation terminates on death or remarriage of the former spouse;

- (6) whether the obligation is payable over a long period of time;
- (7) the age, health, education, and work experience of both parties;
- (8) whether the payments are intended as economic security or retirement benefits;
- (9) the standard of living established during the marriage.” (Citations omitted.)

277 Ga. 871, 596 S.E.2d 608 (2004). In addition, it has been recognized that the trial court is authorized to consider “the tax treatment of the payments, the character of the payments as a sum certain over a specified period, and the state court's characterization of the obligation as lump sum alimony.” Horner vs. Horner, 222 B.R. 918 (S.D. Ga. 1998). Thus, the courts will look at the totality of the circumstances in determining whether such payments are in the nature of support or not. But which court makes this determination?

Whether a debt is non-dischargeable under 11 U.S.C. § 523(a)(5) because it is in the nature of alimony, maintenance, or support is a question of federal law, with state law providing guidance in determining whether the obligation should be considered “support” under 11 U.S.C. § 523(a)(5). Cummings vs. Cummings, 244 F.3d 1263 (11th Cir. 2001) (Citations omitted). However, state courts have concurrent jurisdiction with federal bankruptcy courts to determine whether a debt is in the nature of alimony, maintenance, or support. Manuel vs. Manuel, 239 Ga. 685, 238 S.E.2d 328 (1977); Rogers vs. McGahee, 278 Ga. 287, 602 S.E.2d 582 (2004). If either the debtor spouse or the creditor spouse files a complaint in the bankruptcy court to obtain a determination of the dischargeability of the debts under 11 U.S.C. § 523(a)(5), the bankruptcy court's adjudication of the complaint for determination of dischargeability is *res judicata* in state court; if no complaint seeking a specific determination of the dischargeability of a debt under 11 U.S.C. § 523(a)(5) is filed, “the issue of dischargeability may then be tried in the appropriate state court.” Rogers vs. McGahee, 278 Ga. 287, 602 S.E.2d 582 (2004). Regardless of which court is hearing the issue, the party seeking to hold the debt

nondischargeable has the burden of proving by a preponderance of the evidence that the parties intended the obligation as support. Cummings vs. Cummings, 244 F.3d 1263 (11th Cir. 2001).

CONCLUSION

By listening to a client with regard to his/her short-term and long-term goals, an attorney will get a sense as to the issues in the divorce action. Determinations will be made as to whether immediate cash flow is more important than the accumulation of assets. Examination of the parties' financial positions will determine the client's potential liability for secured as well as unsecured debts. From all of this information, the attorney will be able to advise the client as to the advantages and disadvantages in framing a potential settlement offer or arguing a certain position to the court concerning alimony and an equitable division of property. In addition, there are other issues that are outside of the parties' control. When there is a bankruptcy filing, it doesn't matter what nomenclature the parties use in describing alimony and property division, a court (whether state or Federal) will look "peak behind the curtain" to determine the intended purpose of the payments to determine if the obligation is dischargeable or not. Simply stated, in divorce cases, there are no "right" or "wrong" answers, only what is best for the client based upon the information that is available at the time.

COMPARISON TABLE OF ALIMONY AND PROPERTY DIVISION

	Periodic alimony	Lump sum alimony	Property division
Dischargeable in bankruptcy	No	No	Yes
Modifiable due to financial reasons	Yes, unless parties agree otherwise	No	No
Modifiable due to meretricious relationship	Yes, unless parties agree otherwise	No, unless parties agree otherwise	No
Terminated by remarriage	Yes	No, unless conditioned upon remarriage	No
Terminated by death of payee spouse	Yes	No, unless parties otherwise agree	No
Deductible by payor and taxable to payee	Yes, unless parties agree otherwise	No	No