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Legal Strategies

What you should know about divorce

Atlanta Business Chronicle - April 23, 2004 by [Dan Kolber](#)

The national divorce rate is almost 50 percent, according to the U.S. Bureau of the Census. The Georgia divorce rate is almost 8 percent higher than the national average. Anyone owning an interest in one of the nation's 25 million small businesses should know these basic issues involving divorce.

1. Don't confuse "alimony" with "equitable division of property." Alimony, from the Latin word "to nourish," is meant to support an ex-spouse after divorce. In Georgia, equitable division of property is the allocation of assets acquired during the marriage to the parties based on their respective equitable interests in those assets. While adultery and other misconduct could preclude a spouse from getting alimony, it doesn't prevent a claim for equitable division of the marital property. However, misconduct could be relevant in dividing up a business if it relates to the value of the business.

2. All property is either real property, such as real estate, or personal property, such as joint savings accounts, annuities, retirement benefits, and ownership in a business. In a divorce in Georgia, all property is divided into either marital or separate property. Only property that is acquired by the parties during the marriage is considered marital property subject to equitable division, with two major exceptions. If you receive a gift or inheritance during the marriage, then this property becomes your separate property and is not subject to equitable division. However, if there is appreciation in value of separate property caused by a spouse during the marriage, then the appreciated value of the property can be considered in making an equitable division. So, if a spouse started a business prior to marriage or inherited the business during marriage, the other spouse can claim an interest if she helped the business grow in some way. [Melissa L. MacLeod, a financial planner with Integrated Financial Group in Sandy Springs, advises her married clients to know the location and value of all marital and separate assets and get copies of tax returns of a family business. This helps if assets start "disappearing."](#)

3. If your business interest is marital property, the judge or jury will divide it based on the following factors:

- Each spouse's separate assets
- The duration of the marriage
- Whether the parties were previously married
- Each party's services to the business, including contribution of capital
- The amount of shares or interests in the business issued to each spouse

"The judge or jury can also award something called 'lump sum alimony,' which in effect allows an

award to a spouse of the other spouse's separate property because it forces a sale of the property in order to pay the alimony," said Atlanta attorney and CPA Michael M. Smith.

4. The court is not obligated to follow an antenuptial or prenuptial agreement dividing a business, although such agreements are relevant and admissible. Prenups are often challenged as being signed under duress or without knowledge of the other party's financial status. Consider using buy-sell agreements among business owners that provide for the business interests to be bought back by the business or co-owners in the event of a divorce.

5. Use mediation to create a settlement agreement that will be part of the divorce decree. Atlanta attorney Robert G. Brazier said: "When owners of a business break up, you are really dealing with two divorces -- the marriage and the business."

His tips for separation agreements:

- The parties can transfer all or a portion of a business to their children, either as gifts during life or by adding provisions in their wills.
- A spouse can transfer only an economic interest in the business and retain the voting rights.
- One spouse can indemnify the other for tax liabilities and other losses related to the business and transferred assets.
- The parties should agree not to disclose sensitive business information during and after the litigation.

6. Consider seeking a court order to prevent the disclosure during litigation of confidential business information.

7. Consult a tax expert. While you are married, transfers of property to each other are generally tax-free. However, if you get half an interest in a business worth \$1 million, your half may be worth less than \$500,000 because you could end up paying over \$75,000 in taxes when you eventually sell your interest. Another tax tip: A payer of money to an ex-spouse is better off characterizing the payments as alimony versus child support. The spouse who pays alimony can take a deduction, while the recipient has taxable income. On the other hand, child support payments are tax-free to the recipient, and the payer doesn't get to take a deduction. However, it is illegal to disguise child support as alimony.

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