



Alimony Retrospective: A Discussion on Case Law and Settlement Strategies since the Implementation of the Tax Cuts and Jobs Act

**September 14, 2020
10:00 a.m. – 11:00 a.m.**

**CT Bar Association
Webinar**

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Alimony Retrospective: A Discussion on Case Law and Settlement Strategies since the Implementation of the Tax Cuts and Jobs Act (2020CLC-FL02)

Agenda

60 min Review of Case Law
Dyan M. Kozaczka, Rutkin Oldham & Griffin LLC, Westport
Sarah S. Oldham, Rutkin Oldham & Griffin LLC, Westport

Faculty Biographies

Dyan M. Kozaczka, Rutkin Oldham Griffin LLC

Dyan is known for her persistence, attention to detail and pragmatic approach to cases. She represents individuals in all areas of family law, including divorce, alimony, child support, property division, mediation and post-judgment modifications and contempt. Dyan has extensive experience working on highly complex and sophisticated cases. She often collaborates with forensic accountants to analyze interests in private equity funds, professional practices, and privately held business interests to determine values for equitable distribution.

In addition, Dyan has experience resolving difficult custody disputes. Dyan appreciates that every client and case is different and prepares a strategy to achieve each individual client's particular goals, while also considering the emotional impact of divorce.

Dyan has considerable experience in dealing with both the defense of, and attacks on, prenuptial agreements. In this sophisticated niche of the law, Dyan's ability to formulate strategies, work closely with experts, review financial disclosures, trace assets, assess claims of unconscionability and make cogent arguments as to the specifics of statutory considerations, all serve the interests of clients who have, or are considering entering into, prenuptial agreements.

Before choosing to focus her practice solely on matrimonial law, Dyan litigated complex commercial litigation cases at the trial court, argued before the Appellate court, and represented institutional and individual clients in bankruptcy proceedings.

Dyan has been nominated by her peers for recognition by "*Connecticut Super Lawyers*" as a "Rising Star" each year in the area of family law since 2014. In 2016, she was also selected as a "40 Under 40" recipient by *Fairfield County Business Journal*, an honor which recognizes influential young leaders in the community.

Active in the community, Dyan is a volunteer in Special Olympics of Connecticut, where she often serves as a volunteer and Unified Sports Partner.

Sarah "Sally" Stark Oldham, Rutkin Oldham Griffin LLC

Sally is consistently recognized as one of the top matrimonial attorneys in Connecticut in a variety of peer review surveys.

Sally represents clients in the negotiation and litigation of sophisticated, complex and high-asset family law matters. Her practice includes all areas of family law, including divorce, alimony, child support, and property division. She often analyzes complex financial holdings, closely held businesses, and compensation packages in order to achieve an equitable division of assets and income. Sally helps clients address the financial consequences of divorce while recognizing the psychological impact on those involved.

In addition, Sally has extensive experience resolving, and litigating when necessary, challenging and emotionally charged child custody and relocation disputes. Her seminal advocacy in the case of *Ireland v. Ireland* redefined the rights of parents and children in relocation disputes.

Sally has lectured on a variety of topics including division of stock options, distributing complex executive compensation packages in divorce, the impact of addiction in custody battles, and the validity of prenuptial agreements in a world where most couples cohabit before marriage. She is also co-author of *Connecticut Family Law and Practice*, Volumes 7, 8 and 8A, a handbook for lawyers and judges on domestic relations matters in Connecticut.

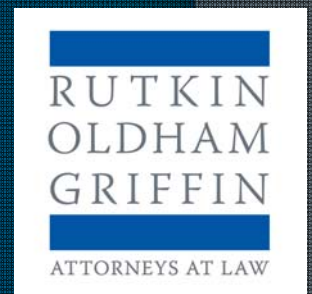
Prior to practicing law, Sally worked for more than a decade as a psychologist in private practice and as a school psychologist in various Connecticut schools. This experience early in her career affords her certain insights and approaches that differ from those of other matrimonial lawyers.

Sally has been practicing family law with Arnold Rutkin since 1994. From 1988-1994, she practiced at the law firm of Day, Berry and Howard in Stamford, now known as Day Pitney. The practice of law is in Sally's blood. Her grandfather was a judge, her father was a lawyer in a major New York firm, and one of her sisters, her brother and her daughter are lawyers.

Sally is a private pilot, licensed since 1984. She has two grown children and five grandchildren.

Alimony Retrospective:
A Discussion on Case Law and Settlement Strategies since
the Implementation of The Tax Cuts and Jobs Act

Sarah Stark Oldham
Dyan M. Kozaczka



- On December 21, 2017, President Trump signed into law the “Tax Cuts and Jobs Act of 2017”, fondly known as the “TCJA”.
- There were no public hearings.
- Last minute changes allowed pre-TCJA agreements to retain the deductibility of alimony payments and postponed the effective date to January 1, 2019, not 2018.

- Alimony was first made deductible by the Revenue Act of 1942.
 - 26 U.S.C. §22(b)(2), 22(K), 23(u), 25(b)(2)(A), 171(a) and (b), 3797(a) (1942)
- The goal was to make payments taxable to the person actually receiving the income.
 - S. Rep. No. 1631, at 83, 77th Cong., 2d Sess. (1942)
- U.S. Census Bureau statistics (as of July 2019) show that approximately 98% of people who receive alimony are women.

**So, for over 75 years,
family law has operated
under this scheme.**

Why change it?

According to the ABA article *“Tax Reform Could Make Divorce a Whole Lot More Taxing”* by Justin T. Miller (American Bar Association, Family Law Section, October 11, 2019), there were four major policy reasons for this change.

First Policy Consideration

End a “tax subsidy” which encourages divorce.

But consider:

Under the TCJA, a married couple can deduct up to \$10,000 in state and local taxes, but if they get divorced, they can each deduct up to \$10,000 in state and local taxes.

And:

Under the TCJA, a married couple can deduct interest on a mortgage up to \$750,000, but if they get divorced, they can each deduct the interest on mortgages up to \$750,000.

Second Policy Consideration

The alimony deduction is costing the U.S. Treasury valuable dollars.

The Joint Committee on Taxation estimated that eliminating the deduction would add \$6.9 B. in revenue over 10 years.

However:

That same committee estimated that the TCJA changes would increase the federal deficit by \$1.5 T. over 10 years.

Third Policy Consideration

Poor compliance with alimony rules.

In 2015 – 184,468 returns had no corresponding declaration of alimony income match

In 2014 – 47% of returns with a deduction for alimony had no match

The Treasury Inspector General for Tax Administration reportedly claimed it had no process to address the substantial gap.

See Treas. Inspector Gen. for Tax Admin., Significant Discrepancies Exist Between Alimony Deductions Claimed by Payers and Income Reported by Recipients (2014), <http://www.treasury.gov/tigta/auditreports/2014reports/201440022fr.pdf>.

Fourth Policy Consideration

The TCJA was to be “Family Friendly Tax Reform”.

“Family Friendly” is supposed to mean it discourages divorce.

Not every state has adopted the (new) federal rule on alimony.

Connecticut: Yes

New York: No

Caselaw – Fixed dollar amount

Pastorelli-Cuseo v. Cuseo, 2019 WL 4860702 (Conn.Sup.Ct.) (2019).

Todd v. Todd, 2019 WL 2262547 (Conn.Sup.Ct.) (2019).

Blondo v. Blondo, 2019 WL 319448 (Conn.Sup.Ct.) (2019).

V.L.S. v. C.J.D., 2019 WL 3557952 (Del.Fam.Ct.) (2019).

In re Alex, 2019 WL 3023628 (Kan.Dist.Ct.) (2019).

Conopask v. Conopask,
Docket No. FBT-FA-16-6056259S (February 4, 2020)

The parties were married September 1, 1996.

The plaintiff's gross annual income was \$112,000. The defendant had an annual base salary of \$150,000 plus a discretionary annual bonus that has averaged \$337,500 over the last four years.

The weekly income of these parties had never been sufficient to pay the family expenses and support their lifestyle and the defendant's bonus income was used to make up the substantial shortfall.

Conopask... (cont'd).

The court ordered the defendant to pay periodic alimony to the plaintiff, until the death of either party, her remarriage, or December 31, 2027, whichever shall first occur.

The defendant was required to pay the plaintiff 35% of his net after tax income exceeding \$150,000 for the term of the award.

Conopask... (cont'd).

The court stated: “Net income should be calculated as the defendant's gross annual income less federal, state, city, social security and Medicare taxes” (p. 10).

The court further held that the taxes attributable to the defendant's income for purposes of the alimony payable to the plaintiff “shall be calculated as a percentage of the defendant's total income from which alimony is to be paid.” *Id.*

This calculation shall be done on an annual basis to “true up” payments made as ordered above in conjunction with the defendant's filing of his federal and state income tax returns. *Id.*

*Wisseman v. Wisseman, 2019 N.Y. Slip Op. 29092
(2019)*

The parties were married July 8, 2006.

The plaintiff-wife was a stay at home mom.

The defendant- husband worked as a highway superintendent.

Wisseman... (cont'd).

The husband was ordered to pay maintenance to the wife in the amount of \$451.04 per month. The statutory award (New York State Guideline award) was reduced by 12%...reflecting a reduction concomitant with the wife's tax bracket and what she would have been obligated to include as taxable income on her tax returns.

Wisseman... (cont'd).

The Court noted that the original purpose of the tax law enabling the payor spouse to deduct maintenance from his or her taxable income was to leave more disposable income available to both parties.

This was accomplished by the spouse in the higher income tax bracket taking the deduction and having the sum deducted includable as income to the spouse in the lower tax bracket.

Now, more tax is paid and the spouses as a unit have less disposable income.

Zimmerman v. Zimmerman, 2020 WL 3397805 (Pa.Super.Ct.) (June 18, 2020)

The parties were married in 1986 and Husband filed for divorce in 2013.

April 3, 2018 divorce decree; appeal taken; alimony award vacated; case remanded.

On remand, on September 4, 2019, trial court modified the alimony order.

Query?

Are the payments deductible by the Husband?

Zimmerman... (cont'd).

The trial court provided a dual calculation (\$1,609 or \$1,287) depending on whether Husband would be allowed to deduct the alimony payments from his federal taxes.

The court did not conclusively rule on the federal tax issue.

Alimony Trends

- More focus on the expense portion of the financial affidavit and the needs of the recipient
- Unallocated alimony and child support payments are more common
- Percentage of gross income as alimony
 - Typically start by agreeing to a net % and converting that to a gross percentage
- Percentage of net income as alimony
- Flat dollar amounts instead of percentage-based amounts

Ways to approach alimony calculation:

- Specific dollar amount
- Percentage of net income
- Percentage of gross income

Specific dollar amount:

Pros

- Predictable
- No need to calculate taxes
- Immediately know if someone is in contempt

Cons

- Does not account for variable income
- Changes in tax law are not self-executing
- Increased likelihood of future litigation

Percentage of Gross Income:

Pros

- Easy to calculate
- Accounts for changes in income
- Do not need to hire an accountant to determine alimony calculation

Cons

- Changes in tax law are not self-executing
- Increased likelihood of future litigation

Percentage of Net Income:

Pros

- The actual division of income will be exactly as the parties have agreed
- Self-effectuating for changes in income
- Self-effectuating regarding changes in tax rates

Percentage of Net Income:

Cons

- Likely need an accountant to determine net income
- If the payor has multiple sources of income, determining the taxes attributable to “income from employment” for alimony purposes can be difficult
- More likely to have future litigation re: calculation of net income
- Need to account for how investment losses, loss carryforwards, deductions, etc. are applied
- Abuse by payor, discord between parties

Issues to consider:

- Future changes in the tax rates
 - intent to share net income based on current percentages
 - Does/does not create grounds for modification
- If alimony becomes deductible
 - revert based on intent/percentages
 - maintain current status unless agreement otherwise

Issues to consider:

- Calculation of taxes applicable to “income from employment”
 - Most common: Review payor’s filed tax return and then prepare tax return removing payor’s “income from employment”, difference in tax obligation is the amount of taxes attributable to the “income from employment”
- Does payor need to use all credits, deductions, and loss carry forwards available to reduce tax liability
- How state taxes affect the calculation of gross or net income

Issues to consider:

- New reality: if the payor is required to pay a percentage of net income, the payor's decisions may affect tax rate and affect amount paid
- Remarriage clause – what happens if the payor gets remarried?
 - prepare a pro forma as single
 - remove the new spouse's income
- Loss of retirement account deduction for recipient

Sarah Stark Oldham



Dyan M. Kozaczka