

What We Know

ARTICLES & INSIGHTS

ABOUT THE AUTHOR

[John Narron](#) is a Board Certified Family Law Specialist and has been practicing law in North Carolina since 1977, with a practice concentration in all manner of civil disputes that frequently involve complex equitable distribution proceedings, alimony trials, will caveats, employment disputes, personal injury trials and negotiations, and a wide variety of commercial business disputes.

John has served as a mediator in more than 200 family law disputes in Wake County, Franklin County, Johnston County, Wayne County, Guilford County, Forsyth County, and Pender County.

When Financial Planning Meets Family Law

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Late 2016, the Minnesota Supreme Court decided the case of *Curtis v. Curtis* (887 N.W.2d 249) and in so doing provided a lesson in how to invest \$2,000,000.00 to maximize your return in an [alimony](#) case.

The wife in the Curtis case was seeking alimony from her former husband. As a part of the division of their property, she also received an Ameritrade account containing over \$2,000,000.00 of liquid assets. However, the Ameritrade account was invested in growth-oriented securities and produced an income of less than \$3,000.00 per year. There were substantial unrealized gains in the account which counted in part for the fact that it had grown to \$2,000,000.00.

The trial court in Curtis had ruled in favor of the husband, finding that the Ameritrade account could be reinvested in income-oriented securities at a rate of 7% per year and in effect earn \$9,500.00 per month for the wife. With that much monthly income, the wife was no longer a dependent spouse, and the trial court did not require the husband to pay wife alimony. The trial court did not address the issue of the unrealized gain in the account that would become taxable when the Ameritrade account was reinvested in income-producing securities.

The wife appealed the Trial Court decision, contending that the Order required her to diminish her assets in order to provide for her own support. It is a principal of law in Minnesota as well as in most states that a dependent spouse is not required to liquidate her assets in order to provide for her own support. In Minnesota, the Court ruled that “the income from the account, however, is a different matter.” Specifically, the Court ruled that a trial court has the discretion to consider “what income an asset can provide.”

The Court in Curtis went on at some length to distinguish liquid from non-liquid assets. It stated that the most liquid of all assets is cash which the Court would expect a spouse who is seeking alimony to invest in an effort to meet that spouse’s reasonable needs. On the other end of the liquidity continuum is residential real estate, which the Court described as the least liquid of all assets. The Court pointed out that it would be improper in almost every circumstance to require a spouse seeking alimony to sell a residence in order to meet his or her reasonable expenses. The result is that a rule

requiring that investments be made to maximize income applies primarily to liquid assets such as cash and investment accounts and not to other non-liquid assets such as real estate.

While the Minnesota Supreme Court agreed with the trial court in Curtis on the foregoing issues, it did not like the fact that the trial court ignored the unrealized gains in the Ameritrade account. It pointed out that selling the assets within the Ameritrade account and converting the proceeds to income producing assets would incur as much as \$150,000.00 in capital gains taxes. While the Supreme Court approved of the requirement that these assets be invested to produce income it remanded the case to the trial court with directions to consider how the payment of the capital gains taxes would be treated in connection with the reallocation of the Ameritrade account to an income producing status.

I now turn to whether this rule in Minnesota applies in North Carolina.

There is little or no case law in our appellate courts that addresses directly the issues that were very clearly addressed and discussed in the Curtis case in Minnesota. The closest cases that I could find dealing with the issue of whether someone has appropriately invested their assets in an income producing manner were both unpublished opinions from the Court of Appeals. In *Gatlin v. Gatlin*, 208 N.C. App. LEXIS 4, NO. COA 06-858 the Court of Appeals reviewed a trial court decision from Pasquotank County. The trial court, in that case, had made a finding of the fact that the former husband had a certificate of deposit valued at approximately \$66,000.00. The Court found that this money “could very conservatively” be invested in today’s market and generate a monthly income of \$300.00 per month. The trial court used that hypothetical \$300.00 per month income in setting the former husband’s alimony obligation. However, the court of appeals reversed the finding because there was no evidence in the record to support the view that \$66,000 properly invested could produce \$300.00 per month in 2008. The case was remanded to the trial court and never subsequently appealed, so the rest of the story is known only to the lawyers and the participants in the Gatlin case.

In my experience in handling alimony cases in North Carolina, the trial courts and arbitrators do consider a reasonable return on the liquid assets of the dependent spouse as part of the alimony decision. There can certainly be testimony about how these liquid assets could be more appropriately invested. Expert testimony from a Financial Planner that proposes a 4 to 5% annual return on properly invested liquid assets would certainly be reasonable. That income would be reasonably imputed to a spouse seeking alimony. I believe that most judges and arbitrators in North Carolina would agree with that assessment.

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