
How to Protect Assets in High-Net Worth Divorce

by Debra Schoenberg, 4/21/20

Advisor Perspectives *welcomes guest contributions. The views presented here do not necessarily represent those of Advisor Perspectives.*

A divorce can be just as draining on your bank account as it is on your emotions. A newly divorced couple is often very concerned about finances and will turn to a financial advisor to help minimize conflict. Even if the reasons for a split may be amicable, the methods of dividing the assets may not be. When it comes to equitable distribution among couples – especially high-net worth couples – there are details to know before approaching the negotiation table. This includes the value of:



- Your client's spouse's earnings.
- Family assets.
- Retirement accounts, such as 401k, 403b, and IRA.
- Non-qualified investments, like stocks (and those not in a retirement account).
- Future pensions.
- Family debt, like a personal loan or mortgage.

Conducting a thorough asset and debt inventory will enable a divorce attorney to secure the amount your client deserves – whether they are the family's primary earner or the less-monied spouse. Matters can get trickier depending on your client's age, the length of their marriage and the professional achievements of each spouse.

Amid an overall decline in the divorces, one particular age group is experiencing a dramatic rise in marital breakdowns – baby boomers. As a family and matrimonial lawyer, I've seen, "the gray divorce revolution" firsthand, as an increasing number of people more than 50 years old are calling it quits.

My professional experience mirrors the hard data. According to the National Center for Family and Marriage Research, "[t]he divorce rate among adults ages 50 and older doubled between 1990 and 2010." It has largely remained this way for the past decade, as well. One in four people getting divorced is 50 or older. And in many of the matters my firm has handled, these folks have accumulated substantial wealth.

Whether they were business owners, beneficiaries or simply saved wisely during their careers and have hefty pensions or retirement plans, their finances are at stake amid a divorce. We have represented parties on both sides of divorces and can offer some additional, practical tips for those divorcing later in life.

Tax liabilities

If a couple filed their taxes jointly over the years, there's a good chance that one person was making all the decisions while the other just signed off on them. If this scenario sounds familiar, your client must understand that each spouse is liable for the actions that occurred during the marriage. The spouse made decisions that will impact both parties and it should serve as a catalyst for the debt exploration mentioned earlier.

Future capital gains can be problematic years after a divorce. When a home is sold during or after the divorce, the sale may be subject to a capital gains tax. If the couple's home was their primary residence and your client lived in the home for two of the preceding five years, your client may be eligible to exclude up to \$250,000 of the gain on the sale of the home. If both spouses meet the ownership and residence tests, the couple may be eligible to exclude up to \$500,000 of the gain.

For example, I've seen clients who agree to award their ex the proceeds from the sale of their home valued at \$200,000 after the real estate commission and will instead take the stock portfolio which is also valued at \$200,000. After the split, the client decides to sell the stock. It's still valued at \$200,000 but the ex-husband learns that its original price (cost basis) was \$120,000 and that he must pay capital gains tax of 15% on the \$80,000 of gain. The ex-husband pays \$12,000 in capital gains tax, leaving his ex-wife with \$188,000. On the flip side, the ex-husband sells the marital home but pays no capital gains tax because he qualified for the \$250,000 exemption and keeps the full \$200,000.

Retirement accounts

Retirement savings are one of the most valuable assets that your client owns and it's important for divorcing spouses to understand how much they stand to gain or lose from the division of retirement funds. Retirement plans include pensions, 401(k)s and individual retirement accounts (IRAs). The courts treat retirement plans the same as all other assets accrued during the marriage, meaning these plans are considered community property and need to be divided upon divorce.

Licenses

A fair number of high-net worth individuals have licenses; doctors, accountants, lawyers, and other professionals need certifications and designations to be formally recognized by their industries. They add to the prestige of a professional profile and in most cases, require continuing education credits to be maintained. Consequently, the value of these licenses likely increased. Perhaps most importantly for high-net worth individuals, it can represent the stock ownership of a business.

Consider this example. If a couple got married 45 years ago and the husband earned a professional license five years later – and started his own business or sole proprietorship – the spouse without the license may be entitled to half of its worth. During divorce settlement negotiations, that claim could be made, especially if the man's wife had made her professional sacrifices to ensure his success – such as leaving her job to raise their family.

Ultimately, the value of the license varies based on current and future income and that is where all negotiations come in.

Legal costs

Divorce matters can be costly and can drag on, but there is some support. The less-monied spouse can petition the court to receive reasonable coverage for legal fees and living expenses until a divorce agreement is finalized. This is known as *pendente lite relief* or temporary support and is something you and your counsel might consider, especially if you were not the main revenue generator.

Strategic negotiations

Actuarial science should also influence the decisions made at the negotiation table. In the past century, life expectancy in the United States has increased dramatically. In general, we are taking better care of ourselves so that we can enjoy life – particularly in our golden years. As many baby boomers are aware, 60 is the new 40 and more people than ever before are working well into their 70s. Make sure your clients give strategic thought to what they are seeking from a settlement, and what they are willing to part with.

Urge your clients to be honest and upfront about who owns certain assets and properties. And perhaps more importantly, encourage them to consider, for example, will a special car have more long-term value to them than a deed to an apartment? High net worth couples may need to make these sorts of decisions.

Financial matters often heighten the complications that come with a divorce. The complexity can increase further when it comes to high-net worth couples, particularly those who have spent the majority of their lives together but are unable to make their marriages last. A prenuptial agreement can be a good starting point in protecting themselves, but not all are ironclad and not everyone has them.

High-net worth couples in their 50s and older entering into a divorce are faced with unique circumstances; in many situations, business and family were wittingly and unwittingly mixed and the legal complications can be reminiscent of a Gordianknot.

Approaching the settlement with a way to untie that knot is the best strategy. Having an informed, qualified legal professional in court or at the negotiating table is the best way to protect your client's interests.

Debra Schoenberg is a family law attorney and founder of Schoenberg Family Law Group P.C.

With more than 30 years of experience and expertise, Ms. Schoenberg handles legal matters that range from complex financial issues and extensive marital estates, to high-conflict custody matters.