

Family Lawyer Magazine

Wealth Shock 2: How COVID Continues to Impact High-Asset Divorce

1. ***The Wealth Shock generated by COVID can seriously impact high-asset divorce settlements; the tax savings associated with creative planning sometimes exceeds the asset's value. Part 2 of a 3-part series.***

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I'm Diana Shepherd, the Editorial Director of *Family Lawyer Magazine*. Today's topic is how the Wealth Shock generated by COVID can impact high-asset divorce settlements, and it's my pleasure to introduce our Roundtable participants to you.

This is Part Two of a three-part series hosted by financial expert Sharon Klein. Sharon sits on *Family Lawyer Magazine's* advisory board, and she heads up Wilmington Trust's National Matrimonial Advisory Practice.

The three respected family lawyers participating in this roundtable are Alton Abramovitz, Marlene Eskind Moses, and John Slowiaczek. All three are past presidents of the American Academy of Matrimonial Lawyers and Diplomates of the American College of Family Trial Lawyers.

And now here's your host, Sharon Klein.

Sharon Klein: Alton, on the topic of COVID – and hopefully, we're past the worst of the pandemic now – it looks like COVID is going to be around indefinitely, and we're going to have to adapt. What do you think are the short and long-term effects of COVID on divorce among high-net-worth couples?

Alton Abramowitz: Initially, during COVID, many families relocated out of urban areas to suburban or rural areas to get away from the congestion. Many people moved to their second homes, which impacted where they proceeded with their divorce filings. Certain areas are more gender-neutral than others in terms of how they divide assets. People are not – at least in the large metropolitan areas – returning to their offices the way they did in the past.

We're finding that the primary wage earner is now doing more childcare work. Several disputes occurred early in the pandemic about whether or not parents should vaccinate their children and who got to make those decisions. There was significant litigation over that.

The impact has been tremendous across the board in terms of how people look at their assets today as opposed to before COVID. Certainly, with the recession and the wild swings in the stock markets, percentages are a much better method of dividing cash equivalents such as stocks and bonds.

Our courts tend to divide those kinds of assets and retirement assets more often than not on a 50-50 basis. Some of our litigation comes in over retirement benefits, particularly pensions, 401(k)s, IRAs, and 403(b) plans where there is premarital money in those assets and monies earned during the marriage. Thus, the courts create what we call in New York "a coverture fraction." This means a relationship between the length of the marriage and the length of time the title holder has been in the retirement plan. Our courts tend to divide the result of the application on a 50-50 basis.

Similarly, we trade off assets. For instance, someone taking the house may be trading that asset and automobiles – like a Mercedes for example – against interest in a business. The courts value businesses in New York at the time of the divorce action because the courts have held that the title holder can influence the asset's value over the course of the litigation, which often runs upwards of two years or longer in today's world. The courts are very conservative in terms of valuing those assets. But if you're going into mediation, as Marlene mentioned, everybody's free to do what they want. You might want to look at the current value of a business. An owner of a cryptocurrency trading exchange interest will certainly argue that their company has lost value over the last couple of years – the same thing with real estate people.

On the other hand, nursing home values have increased with the aging and retirement of the baby boomer generation. We've seen a wholesale retirement factor going on, even in our courthouses where 40% of the court staff – the personnel who support the judges in New York – have retired over the last two years, much earlier than expected.

The lawyer must factor in all of this when helping clients look at their assets and potential income. Factors like their social security benefits, how much their retirement benefits will throw off in terms of income, the ability of the income-producing spouse to pay support for the long term or the short term, and the impact of having young children in the household are all things to be considered.

We see a lot of second-generation families within the same household where people have been married multiple times and have had children with multiple spouses, which complicates things as well.

A lawyer's job is to look at all the details, develop a package they want to promote and be willing to accept trade-offs. Sometimes, you may take more alimony in lieu of a division of certain assets, like an interest in a spouse's business. Those things are essential in determining how to get to the end of the case.

Sharon: One of the comments you made that resonated with me, Alton, is that estate planning and tax solutions are great ways to reduce the tax impact in these high net-worth divorce cases, both pre and post-COVID. You said that the tax savings associated with creative planning could sometimes exceed the value of what's being negotiated.

I have a situation that would have had disastrous tax results if there hadn't been a team of advisors in place. It was a very acrimonious divorce where the wife was putting \$10 million in a trust for the husband – for his lifetime benefit – and on his death, the trust assets were going to pass to the children of that marriage.

There's a section of the internal revenue code providing that if one spouse creates a trust (while both parties are still married), and the other is the beneficiary, it's a so-called grantor trust. The spouse who created the trust is responsible for paying taxes generated by all distributions made to their spouse, even if their partner becomes an ex due to divorce. How is this possible?!

The tax status lasts forever because, for tax purposes, the internal revenue code only looks to the status of the parties at the time the trust is created. It does not look at the status of the parties later if they happen to be divorced.

The divorce is irrelevant. If you had told the wife in my case that she would be liable to pay the taxes on distributions made to her ex-husband forever, she would've been quite horrified. What the attorneys did, in this case, was to create the trust after the divorce decree was final, so the parties were not married when the trust was created. If I had not been speaking to the attorneys about structuring, that surprise tax result likely would not have been discovered until way after the final divorce, which would've made it difficult to undo.

One of the reasons I was involved from the outset was that the parties picked Wilmington Trust as the trustee. Having an objective third-party as a trustee is often the best solution in a divorce scenario when trusts are being set up. You can help eliminate suspicion that might otherwise attach to a friend or family member acting in that role by selecting an independent corporate trustee. For example, this wife wanted her friend to

be a trustee; that would've been an extremely awkward situation for the husband, who would have had to go to his ex-wife's friend every time he had a request. And the friend's actions may be shrouded in suspicion as to whether he was acting in everyone's best interest, or to please the ex-wife.

Planning is crucial, whether you're talking about pre or post-COVID, and the savings just can't be underestimated. Marlene, let me turn to you and ask you about your observations on the short and long-term effects of COVID on high net-worth divorce.

Marlene Eskind Moses: It was amazing, shocking, and a surprise to all of us because in the cases we had already resolved and settled, we thought that everybody had clear instructions about how to proceed, how to get paid, how to determine parenting time, what schools for children to attend and decisions about their medical care. All those instructions went up in flames with COVID because the questions now were:

- Do the children go to school or do they homeschool?
- Can they go to the neighbor's house to play?
- Can they go on vacation?
- Can they see their relatives?
- Should they get vaccinated?
- Should they wear masks?

And so, the area for disagreement enlarged.

The instructions people had in their parenting plans and final decrees were no longer relevant or sufficient for the COVID times. People really needed assistance from family law attorneys to help navigate this difficult and challenging time, and sometimes the courts were accessible to us, and sometimes they weren't.

Fortunately, we were able to work remotely as family law attorneys. Some people couldn't continue their work, but we were able to do so, and we were actually very busy during COVID times. We're still busy. Family law is not seasonal.

Some people could not work and had no money coming in, so they couldn't comply with their previous orders, which was a real problem. Then there were the dependent spouses or the spouses receiving child support who wanted more funds because they had to incur more expenses. It was challenging, but fortunately, people, for the most part, worked together one way or another, and we were able to figure out how to manage it and keep families on track. But there's still litigation, and obviously, we're not

over COVID. It's better in that we're functioning. For example, things aren't shut down as they were, creating less difficulty.

Sharon: And do you see those effects continuing to linger as we transition out of the pandemic?

Marlene: We're not through it all the way, and there are still COVID-related decisions to be made. I don't see it going away. As practitioners, we are more mindful that we need to plan for these kinds of situations that currently exist and that may continue to exist. We have to think about them as we develop agreements or try a case. COVID is not over, and it may never be over. We'll always have challenges, as we've come to learn.

Sharon: John, let me turn to you and ask if you would like to add your thoughts on the COVID impact front.

John Slowiaczek: Everything that Alton and Marlene said is true, but I also think we are more inclined to look at our mortality because of COVID. What we call the gray divorce – people who are older and considering a divorce – are recognizing that change may come to them and could alter their life in a heartbeat. And if their marriage is struggling, they decide to come to see us when they wouldn't have done that before the pandemic. COVID has changed people's perception of ending their relationships as they get older.

The other problem that COVID has created is a backlog in the courts. We were talking earlier about valuation dates being close to the trial – but our courts were clogged because so many people were away and we kept filing cases. Cases were getting backlogged, and they're still slowly working through that system.

We all have to confront a slower process than we were used to in the past. It has increased the anger between couples and, as Marlene said, the conflicts and the difficulties are there for both children and finances. That anger is palatable and we, as lawyers, have to deal with it. It makes our job harder, and it goes back to the expectations we were talking about in the first part of the discussion: we just have to manage it.

Sharon: The point you make about that gray divorce is so important. People appreciate their mortality and consider the consequences of being stuck with someone they don't want to be with for the rest of their lives. Gray divorce can be especially problematic for women who may have been out of the workforce for an extended time caring for children, frequently making it difficult to reenter the workforce, and even if they do, they will often earn less than the breadwinner spouse. And often women may need to

establish or improve their own credit if they have relied on their spouse – they may not have even had a credit card of their own, and they may have been an additional cardholder on their husband's credit cards. Women in this position frequently can be dependent on an ex-spouse for financial support, making the financial analytics that we've been talking about even more important to project out what they are going to need in terms of alimony and settlement proceeds to sustain a desired lifestyle.

Sharon Klein has been inducted into the Estate Planning Hall of Fame, featured as one of the Top 40 Women Wealth Advisors in the US by Forbes, and as one of the Most Notable Women in Financial Advice by Crain's. She is Executive Vice President at Wilmington Trust in NYC. www.wilmingtontrust.com/divorce.

Alton Abramowitz practices matrimonial and family law in Manhattan. A partner at Schwartz Sladkus Reich Greenberg Atlas, he advocated for the reform of New York's divorce laws via a no-fault divorce, and he helped to draft New York's spousal maintenance guidelines statute. www.ssrqa.com.

Marlene Eskind Moses is board certified as a family law trial specialist by the National Board of Trial Advocacy. The immediate Past President of the International Academy of Family Lawyers, Marlene is a partner at Gullet Sanford Robinson & Martin in Nashville, Tennessee. www.gsrml.com.

John Slowiaczek has devoted 48 years to the practice of family law. A respected trial lawyer and President of the American College of Family Trial Lawyers, John is a partner at Slowiaczek Albers in Omaha, Nebraska. www.saalawyers.com.

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