

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2017

PHILADELPHIA, THURSDAY, MAY 18, 2017

An **ALM** Publication

## FAMILY LAW

# High-Asset Divorce Case: Getting the Decree Is Only the Beginning

BY JOHN A. ZURZOLA

The management and conclusion of many noncomplex divorce matters with associated litigation share much in common. The parties and attorneys work to sort out custody and support issues, value limited assets and debts and then negotiate to settle or litigate the economic issues in equitable distribution. In what many practitioners term, the “house and pension case,” the number of steps required to conclude a matter for clients might be able to be counted on one hand. Getting an agreement, refinancing and transferring the deed to the marital home, deciding who retains or pays marital debt and securing a firm to draft and coordinate a domestic relations order might be all that is required to bring all issues to full resolution. In cases with assets running into the millions of dollars, however, settlement and full implementation of the terms of the agreement often



*moodboard*

require a seemingly endless number of tasks needed to distribute assets of many different classifications, held by numerous financial services institutions. High-asset cases can often have a multistate real estate component which may present additional issues.

### Retirement Assets

- Defined benefit plans: Less common than they were 20 or 30 years ago, the defined benefit plan is what

most consider a “traditional pension,” where an employer sponsors the “pension plan,” the employer makes contributions to the plan and monthly benefits are paid according to a formula that takes into account salary history (sometimes highest salary earned), time in service in the plan and other factors. The value of a party’s defined benefit pension also takes into account these factors and cannot be reduced to any certain number unless various

assumptions are employed. In order to divide the defined benefit pension in a divorce, a domestic relations order must be drafted according to language approved by the pension plan, signed by a judge and then supplied to the plan as a court order before benefits can be scheduled to be paid.

- **Defined contribution plans:** The most common form of employer sponsored retirement plan, in a defined contribution plan, unlike the defined benefit plan, is an account is set up for the employee to make contributions to investments generally chosen by the employee from a series of investment products and offerings managed by a financial services firm chosen to make the investments by the employer. These plans are created by virtue of the IRS code and are commonly identified by their very code sections, e.g., 401(k), 403(b). The value of a defined contribution plan, unlike a defined benefit pension, can be reduced to a sum certain as it is based on the “amount contributed to the participant’s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant’s account.”

Practitioners must take into account the effect of any loans or early withdrawals that are permitted to be taken from the defined

contribution plan and assess whether any employer contributions are entirely vested.

## **Financial Accounts/ Investments**

Mutual funds can consist of an almost infinite number of investments valued at different amounts, purchased at different times and with a different cost basis. As such, there are tax consequences with splitting the shares of a mutual fund among spouses. While a property settlement agreement should be specific with respect to the percentage or identification of funds to be split and/or transferred, practitioners should take care to include language and instructions that the different funds be apportioned between the parties so that the cost and tax bases of the individual investments is divided as equally as possible to allow for future capital gains taxes. Absent such language and instructions a party receiving certain of the assets could be responsible for more taxes than the other when eventually sold.

As with mutual funds, dividing brokerage accounts made up of stocks and other investments is often made simpler by having the spouse who is receiving assets (or both spouses if a joint account) opening new accounts with the same financial institution already holding the assets. Most financial institutions have a host of situation

and transfer specific forms already developed for the purpose of opening new accounts and dividing assets. For those that do not, an attorney will have to prepare a “letter of instruction” using language approved by the particular financial services company. It is also typical that whether a pre-printed form or letter of instruction is used to transfer stocks, mutual funds and other financial asset products, one of the spouses or both will be required to sign in the presence of a bank representative and obtain a “medallion” signature guarantee that will appear on the form or letter of instruction. In high-asset matters, parties could have assets invested with multiple financial institutions all requiring different procedures to divide and transfer assets.

Employee stock options are routinely given as compensation to employees and are simply the right to purchase company stock at a set price, often and intentionally lower than future share prices of the stock. In this regard and on any given day, the value of stock options may be attempted to be calculated assuming that they will be exercised at that time. Such is not the case when attempting to value stock options in a divorce as their actual value cannot be determined until actually exercised and taxes on the gains are calculated. Additionally, employee

stock options are generally subject to vesting periods which may serve to retain key employees and to provide an incentive for employees to work to make the company and the share price more valuable. Stock options may actually have to be exercised and the taxes paid before they can be accurately divided between the parties. Any other methodology for attempting to value them and offset against other assets would involve speculation, assumptions and guesswork.

Restricted stock units (RSUs) are an employees right to shares of stock valued at the time that they vest. The first inquiry for the practitioner attempting to value the marital estate with RSUs is to understand that their value (like stock options) may not be able to be accurately ascertained if they are not scheduled to vest until after the divorce. Whether they vest at all may also need to be examined as they are subject vesting time periods and performance measures in some cases. Additionally, RSUs are taxed when they vest (unlike stock options that are only taxed when they are exercised) so tax treatment of RSUs cannot be ignored since vesting can devour close to 50 percent of the value of the shares in some cases.

## **Selected Real Estate Issues**

- Transfer tax: A common feature of high-asset divorces are

real estate holdings and vacation homes in states outside Pennsylvania. Many states and municipalities exempt the transfer of property between spouses incident to a divorce, but not all. New York state and New York City stand out in that conveyances of real estate incident to a separation agreement and divorce are subject to transfer tax. As such, property divided in a divorce in New York City is subject to both state and city transfer tax. New Jersey requires that transfers of real estate must be filed within “90 days following the entry of a divorce decree” or transfer taxes may need to be paid.

Cases with out of state (or out of the United States) real estate must be looked at early when valuing assets as a potential transfer tax would certainly impact the value received by the party obtaining the real estate and will color the process of offsetting other assets for real estate.

Additionally, the IRS Code holds that transfers between spouses pursuant to a divorce are exempt from tax and are more akin to a gift. However, these transfers must occur within one year after the cessation of the marriage or taxes on gains and losses may need to be paid.

High-asset cases present unique challenges for the divorce attorney attempting to fully implement the

terms of an agreement or order. Well prior to final settlement, tax and investment professionals should be employed to assess the effect of taxes and to formulate a plan for the transfer and subsequent investment of assets obtained incident to the divorce. •

*Special to the Law Weekly John A. Zurzola is a partner at Weber Gallagher Simpson Stapleton Fires & Newby in the family law group based in Norristown. He concentrates his practice on matters including complex divorce and child custody cases as well as in assisting clients who require prenuptial and post-nuptial agreements.*