Wealth Shock:
High Asset Divorce, Volatile Markets, and COVID


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Three AAML past Presidents – Alton Abramowitz, Marlene Eskind Moses, and John Slowiaczek – join host and financial expert Sharon Klein to discuss how the wealth shock generated by volatile real estate and stock markets as well as COVID can impact high asset divorce settlements in this special *Family Lawyer Magazine* Roundtable.

Sharon Klein: John, I'd like to start by asking about the so-called "wealth shock," which is how the volatile stock and real estate markets can impact property division in high asset divorces. For example, Mark Zuckerberg of META at one point was reportedly down $5.7 billion. When you're trying to divide assets in a divorce – which can include security accounts, homes, and other assets – how does wealth shock impact property division?

John Slowiaczek: A normal divorce in most communities takes approximately a year or more. Not only are couples dealing with valuation issues at the time of the divorce – when it's filed or initiated – but they also have to deal with the evidence presented to the court. The real estate market is sometimes the most volatile in the beginning because someone usually has to move. In today's market, people are having difficulty with rent and some are moving out of the family home into another property. The initial shock deals with the family home. Who will live there, and how long are they going to stay? Then they start looking at their assets and the business and property valuations – including the history of the finances and the income for the company.

Wealthier people generally have a better understanding of their cash flow and stock portfolios and they're more used to riding out the storms, but they are more troubled by fundamental issues, including whether they will be paying their divorce obligations with today's dollars or tomorrow's dollars.

When people come to us, our responsibility is to manage their expectations. The courts want us to try to value assets as close to the trial date as possible, which takes a year from our first appointment with the client to when we ultimately present evidence to the court.

Sharon: What you've said really underscores to me how important it is to run financial projections when someone is getting divorced. Working at a financial advisory organization, this is something I see helping clients every day.

How do you project different scenarios? How are things going to play out in the future? Including cash flow projections and risk assessments are so important for two reasons: one is to give family lawyers ammunition at the negotiating table, and two, after the divorce is final, to be able to invest the assets in a way that's going to sustain a desired lifestyle.

The wealth shock you were talking about makes those analytics even more important because you could build additional layers of risk-to-stress test outcomes and see how they hold up to those shocks.

Alton, what are your thoughts on the impact of wealth shock on asset division in high net-worth divorces?

Alton Abramowitz: It has had a significant impact because the current economy is very uncertain; for instance, someone who had significant wealth in the form of cryptocurrency a year ago may have lost a substantial portion of that wealth today.

Residential real estate is increasing in value; retail real estate, on the other hand, is very difficult to value because of the impact of Amazon, which has hurt the retail industry terrifically. Also, not as many people are working in their offices in New York City as before. Rental residential real estate has become inflated, and some clients face demands from their landlords asking for 40% or more in terms of increases in their lease renewal.

We have to work with financial professionals to try and predict different scenarios depending on what the markets will do not only today but also 10 years from now.

Sharon: Marlene, is there anything you would like to add to the wealth shock discussion?

Marlene Eskind Moses: It's critical to ensure that you and your financial experts are getting the most up-to-date valuations at every important juncture.

You may have a financial disclosure valuing assets and liabilities at one set of numbers, and then you might go to mediation and have a completely different set of numbers. Family lawyers must know that these values are fluid – particularly on days when some businesses increase in value while others decrease or even go out of business. Lawyers need to be prepared and flexible to work with their financial advisors at every juncture.

Whether it's mediation or arbitration or a settlement conference or a trial, update the numbers and ensure you have the underlying documentation necessary to substantiate the differences at each juncture.

A good practice tip would be to use percentages of accounts as opposed to using fixed numbers because they're going to vary from day to day. The percentages will also give you a more realistic picture of how the asset should be divided.

Sharon: Alton, how has COVID impacted high-net-worth divorce in both the short and long term?

Alton: Initially, many families relocated out of urban areas to suburban or rural areas to get away from the congestion. Many high-net-worth couples moved to their second homes, which impacted where they proceeded with their divorce filings.

The impact has been tremendous across the board in terms of how people look at their assets today as opposed to before COVID. 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 than fixed numbers. Our courts tend to divide those kinds of assets and retirement assets 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.

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.

Sharon: Marlene, what are your observations on the short and long-term effects of COVID on high-net-worth divorce?

Marlene: It was shocking 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, and what schools the children would attend, etc. All those instructions went up in flames with COVID because the questions now became:

- 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 COVID times. People really needed assistance from family law attorneys to help navigate this difficult and challenging time.

As practitioners, we are more mindful that we need to plan for these kinds of extraordinary situations. COVID is not over, and it may never be over. We'll always have challenges, as we've come to learn.

Sharon: John, would you like to add your thoughts on COVID's impact on divorce?

John: I think we are more inclined to look at our mortality because of COVID. What we call "gray divorce" has increased because older people now recognize that unexpected change could alter their lives in a heartbeat. And if their marriage is struggling, they decide to see a divorce lawyer when they wouldn't have done that before the pandemic. COVID has changed people's perception of ending their relationships as they get older.

Sharon: Yes, people now 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. 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.

Marlene, what's the best way to agree on financial matters during a high-asset divorce?

Marlene: The best way is to prepare immediately when your client walks through the door. It's important to ascertain what the assets and the liabilities are and to have some clear notion about what will need to be done in the divorce case, then clearly communicate that information to the trier of fact, the mediator, or the arbitrator.

You need to determine what team to assemble for the client to get the maximum result. That team needs to have a financial person who clearly understands the financial assets, how they increase or decrease, and how assets should be divided. You may need a business valuator. The financial expert needs to have tax capabilities and understanding.

It's also important that you have an estate planner, someone who can help analyze the trusts and understand the trust's purpose, who the trustee is, and who the beneficiary is.

Questions to consider are:

- How can you unravel the trust if you need to?
- Is it revocable? Is it irrevocable?
- What do you need to do now?
- Does the trust need to be divided?

The best way to get a settlement is to be prepared and strong in your work, and have your experts up-to-speed and clear about their numbers so they're advocating for your clients from a position of strength.

Sharon: In my experience, trusts are typically included in most high-net-worth divorces. A big issue I've encountered is whether trust assets in an irrevocable trust are reachable in divorce.

A court will look at factors like:

- Who created the trust? Was it a party to the marriage who now says the assets are off the marital balance sheet?
- Is it an independent trustee, or is it someone's buddy?
- Under what circumstances can trustees make distributions?
- Who has control powers like removing and replacing trustees or making distributions?
- What was the distribution history?

Courts will look at patterns and ask, "Did the couple rely on trust assets to support their lifestyle during their marriage?" If so, the trust assets might be vulnerable in a divorce. Legitimate estate planning – including transfers to irrevocable trusts – can, depending on state laws, successfully remove assets from the marital balance sheet. But that's not necessarily bulletproof because the family court is a court of equity and family lawyers will try to poke holes in the planning to tell a story and convince the court of equity that trust assets should be considered.

John, do you have any tips about the best way to agree on financial matters with a high-net-worth divorcing couple?

John: One of the bigger problems is when people start cherry-picking the assets they want because it shifts the whole focus to risk and reward.

We have to deal with transaction costs, and when you're taking this cherry-picking approach, the courts are generally not going to factor in transaction costs – either the cost of the sale of the business or the real estate commissions – unless the deal is imminent. It can have substantial tax implications when people look at the value we've established somewhere, and then they don't realize the impact of the taxes on that value as they start cherry-picking and filling up their bucket to get to their supposed 50-50 split of the assets.

Sharon: Alton, what are your tips for facilitating an agreement on financial matters during a high-asset divorce?

Alton: The most important thing that a lawyer can do when a new client comes into their office in a high net-worth case – or the regular middle-class family case – is to treat the case as if you're preparing for trial from day one, but have the ultimate goal of trying to get the case settled.

The reality is many of our clients in our end of the practice are people with significant wealth and have much more at stake in terms of economics. But our main objective is to evaluate our clients' lifestyles and where they're going to be afterward and try to set them up to live the best life possible after divorce. ■

***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.

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