Navigating the Complexities of Divorce through the Partnership of Legal and Financial Advisors

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Abstract: The article reviews a few areas of potential conflict and misunderstanding that may arise during the separation and divorce of high-net-worth couples. The authors discuss several areas of concern where cooperation and guidance from financial and legal advisors may offer a more attractive and concise resolution. By adopting a working relationship among attorneys, wealth advisors, and CPAs, our clients may find a more favorable joint outcome.

As trusted advisors, we are often asked to provide insight on a variety of potentially sensitive topics. When a client is in the midst of a divorce or separation, the provision of this guidance may be complicated by the client’s emotion, potential conflicts of interest, and the legal framework in which the divorce is proceeding. When advising high-net-worth individuals or executives with multifaceted compensation plans, these complications may be exacerbated by the complexity of the issues in play.

Divorce is an emotionally difficult time. Even if the parties can agree on how to value and separate assets, they may find themselves limited by account restrictions and legal realities set forth by the SEC, the tax codes, and ERISA, just to name a few. Just when a couple has made the decision to part ways permanently, they may find themselves entangled for longer than anticipated when it comes to income tax planning, wealth transfer, and the distribution of certain assets associated with employment.

In this article, we offer commentary on a select number of issues that have the potential to present themselves in the context of a high-net-worth divorce and which may require particularly careful planning and management. Our topics have been selected based, in part, on the probability for interaction and collaboration between attorneys and financial professionals. The issues include discussions of income tax filings after a couple separates but prior to legal divorce; issues posed by the inability to transfer ownership of executive compensation plans; and separating vacation/business property, donor-advised programs, and 529 accounts.

The discussion points are offered merely to assist
with issue-spotting on a subset of certain topics; they are not substitutes for research by, and consultation with, appropriately qualified legal and financial professionals, including accountants. Our comments are directed to the financial planning community to provide a background for those who may be asked to assist with or comment on potential asset separation strategies.

**Issues Related to the Filing of Income Tax Returns**

The filing of federal and state income tax returns can be complicated by a marital separation, particularly when there are children involved. Individual clients who find themselves in a divorce situation should be encouraged to seek professional advice from a qualified CPA. While it is beyond the scope of this article to provide an in-depth analysis of the full spectrum of income tax ramifications of marital separation and divorce, there are some common themes related to tax filing of which financial professionals should be aware. For further reading on these and other important tax implications of separation and divorce, the IRS provides an excellent and easy-to-understand publication for divorced and separated individuals.

**Selection of Filing Status**

The parties to a divorce will have several filing-status options pending the issuance of their divorce decree. They may continue to file tax returns as “Married Filing Jointly.” Both parties may file “Married Filing Separately.” A party may also qualify for “Head of Household” status, if certain criteria are met. The relevant date of inquiry for any filing status is December 31 of the tax year at issue. Therefore, if the parties obtain their decree of divorce on December 30, they will not be eligible to file as married persons. Lawyers and advisors need to be mindful of these dates, as the issuance of the decree may be within the parties’ control, and they should be advised of its tax consequences.

Many couples still elect to file joint returns even while separated because of the favorable treatment as compared to filing as separated. IRS Publication 504 provides a concise list of the reasons behind the higher tax generally associated with a separate return. However, there are a number of issues that will influence this decision between the parties. By way of example only, one party may be paying support or separate maintenance to the other that would be tax deductible if he or she filed a separate return. Those payments would not be deductible on a joint return. If only one spouse has earned income from employment, and the other spouse would be qualified to file Head of Household and would have as income only whatever he or she received in support, the support recipient may be disinclined to participate in a joint filing that results in more overall taxes.

It is common for the spouse with superior earnings (often also the spouse with less child custody time) to benefit substantially from a joint filing; however, as a general legal matter, a spouse cannot be compelled to file a joint tax return. In these situations, it is often still economically advantageous for the superior earner to ameliorate the potential loss to the other spouse in some way and to pay taxes at the “Married Filing Jointly” rate, rather than to file separately. Consider the following example: Wife is eligible for Head of Household status with two qualifying dependents. She anticipates a $4,500 tax refund. Husband, on the other hand, has a $7,500 federal tax liability if he files “Married Filing Separately.” If they file together, there is a $2,000 liability on the joint return. In this scenario, Husband can still enjoy some tax savings—even if he offers to make a payment to Wife to ameliorate her loss from participating in the joint filing.

To the extent economically feasible, parties should consider early on in the tax season which status will benefit them most, and should approach the issue with flexibility. Perhaps they could create an income tax reconciliation worksheet whereby the calculated joint federal tax is apportioned between the two parties based on their respective hypothetical taxable income. One advantage of a reconciliation worksheet is that individual, or joint, item/deduction items can be allocated between the parties as agreed, not specifically limited to how they are listed on the associated income tax filing worksheets.

**Deductions and Exemptions**

To the extent a divorcing couple files separate returns, there will often be a question of how certain exemptions and deductions should be allocated between them. These questions pose challenges for lawyers and advisors alike, and each issue must be examined on its
facts. If the parties are both making payments to support a marital expense, such as the mortgage on a second home, then they should agree in advance about how to share the deductions. Again, this is an area where the IRS also provides guidance.

One area that is often controversial is the allocation of dependency exemptions. While the IRS Rules about this are very clear, and should make it uncontroversial, issues can nevertheless arise. Generally, the right to claim the dependency exemption for a child rests solely with the custodial parent, unless he or she waives the right to claim the exemption, which can be done. This is another area that is ripe for negotiation. Also, it is more and more common for parents to share custody of a child equally, so that a determination regarding which of them had custody of the child more than half of the days of the year is not an easy one to make. In some states, such as Pennsylvania, a court may allocate the dependency exemption between the parties as part of a child support action. Again, parties should make clear and thoughtful determinations about the exemption in advance, which may include a calculation as to which party obtains a greater tax savings.

As with many issues that divorced and separated individuals face, emotion can work its way into financial decision-making. All too often, one party will unilaterally determine filing status, exemptions, or deductions, and if communication is lacking, this unilateral action may subject the parties to audit and unnecessary taxes and interest and penalties, in addition to legal and accounting fees. To the extent possible, couples should consider by the end of the calendar year at issue, how they will file their taxes. If one party has traditionally interfaced almost exclusively with a family accountant, the other should be encouraged to secure an independent accountant to facilitate this process. Parties can also address these issues with their counsel, as in some jurisdictions the equitable powers of the court may extend to resolution of some of these issues.

Taxes and Refunds

If a separated or divorcing couple has committed to filing a joint return, they will need to consider how to pay any taxes due and how to divide any refund owed to them. This is another area of potential debate, the end result of which can vary depending on the facts, the emotional maturity of the couple, and the jurisdiction. In many instances, a federal tax refund on a joint return will be considered marital property subject to division, even if the return is filed postseparation. The question in equitable distribution jurisdictions then becomes, how is it most fair to divide it? This may depend on what produced the refund. Was it a variety of deductions or capital losses related to marital property? Did one spouse overwithhold tax throughout the year thinking she or he may need to file separately? Was there one spouse earning income, or two? All of these issues may impact the end result. If a refund is being electronically distributed to an account, it may be wise for advisors to suggest it be segregated when the issue of its division remains unresolved. In community property jurisdictions, there are different inquiries at issue, and, if either spouse has tax or other debt to which a refund will automatically be applied, this presents still another set of issues.

Although the payment of taxes may be somewhat simpler to resolve, the same issues will often impact the outcome. If a tax burden is created by the earned income of one party, and that party is paying less in taxes as a result of the joint filing status, there is almost never any question that this spouse alone should be responsible for the payment of the taxes. There are, however, situations where both parties will have income and tax due. While a simple way to resolve the debate might be for them to share the tax in proportion to each of their incomes, this approach may not always produce an accurate result, depending on how taxes have been withheld by each of them throughout the year. The assessment can be further complicated where one party has separate assets that have produced taxable income. In these cases, the tax associated with each particular asset or category of income may need to be separately determined before an accurate assessment of each party’s individual liability can be made.

Risks Posed by Joint Filings

While a joint return may bring tax savings with it, it also generally brings along joint and several liability. While the IRS offers a few different types of relief from this liability, if faced with this concern by a client, it is generally good practice not to assume the client will qualify for the
relief. Particularly, where a spouse is self-employed or has numerous separate assets, the other spouse may be reluctant to file joint tax returns for fear that he or she has an insufficient knowledge or understanding of the other party’s income and deductions. It is possible for a spouse to make the filing of the joint return conditional on an indemnification from the other spouse. This would give the concerned party assurance that in the event of any future issue, the other spouse would be responsible for the taxes, fees, penalties, and (if well drafted) associated accounting and legal fees. The affected spouse should consult with counsel before executing any indemnification. It is also important to note the indemnification is only effective between the spouses. It will not stop the IRS from pursuing both parties with regard to the particular return, but it will provide the indemnified spouse with recourse in civil court to collect from the indemnifying spouse.

Untangling Executive Compensation

Cases involving executive compensation packages raise a variety of different issues, and advisors are routinely called upon to assist both parties and counsel with identifying, valuing, and dividing these forms of compensation and with understanding their tax consequences. Specifically, the financial professional’s guidance may be sought in understanding the nature of the compensation, confirming vesting schedules, and potentially correlating statements and award histories produced by the employer in discovery with financial statements from another institution where vested holdings are maintained until sale.

While a court’s pattern or preference regarding the treatment of executive compensation varies among jurisdictions and requires inquiry as to the specific facts of the case, there are some common issues and themes that typically will need to be addressed in any case. Advisors should be aware of the issues set forth in this section, especially where there is a relationship by both parties that could be compromised or conflicted by the provision of strategic advice.

Categorizing Executive Compensation

When executive compensation is at issue, one of counsel’s first tasks is to determine whether it is properly included as marital or community property. The other possibility is that the compensation is simply treated as the recipient spouse’s income. Generally, an argument can be made that the same stream of income cannot be both divided between spouses as an asset, and attributed to a spouse as income, although there are exceptions to this rule. This is called a “double dip.”

With regard to stock options, there is considerable jurisprudence on the issue of determining whether or not the award qualifies as marital or community property. In many states, the reason for the award will play a role in the determination. In a majority of states, a stock option awarded for service rendered during the parties’ marriage will be included as an asset. Where the award is more incentive-based or specifically awarded for future services, there is greater jurisdictional variation in the method employed to determine what portion of the award is properly included as marital or community property. Some jurisdictions will prorate options in accordance with their vesting schedule by applying “coverture fractions” or “time rules.” The same reasoning employed by courts regarding options may be similarly applied to restricted stock and other deferred compensation.

Depending on the nature of the compensation, in order to avoid miscategorizing compensation, particularly if a marital separation year and an award year for the employee spouse overlap, counsel may need assistance dividing the recipient spouse’s income into categories. For example, if an attorney obtains a support order based on the employee spouse’s most recent W-2, without recognizing that some of the income represents the vesting of a restricted stock award or some other taxable event associated with executive compensation that could be marital property, the attorney may be doing a serious dis-service to the nonemployee spouse.

These categorization issues may continue to present problems for the couple even after they are divorced. While certain stock options, restricted stock, or deferred compensation may have been awarded to the employee spouse in the divorce, depending on the nature of the compensation, it may not be until later that there is any tangible cash gain or even taxable event to the employee. If there is a modifiable alimony award or continuing child support to be paid, the employee spouse may need to provide a court with competent evidence that this income was already considered between the parties in

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their divorce to avoid it being counted again as available for support. This reverse identification conundrum can be further complicated if there has been gain on the compensation since the time of the divorce. Determining the market value and applicable taxes at the appropriate points in time may be central to resolving the issue.

Valuation of Executive Compensation

Executive compensation, and particularly restricted stock and stock options, can be very difficult to value. Once the portion of executive compensation properly included in the marital or community asset pool has been determined, the next logical step is to determine its worth. In so doing, there will be a question of whether a present value can be attributed to the compensation and to what extent the present value will be accurate. In addition, there is a question of calculating taxes. Here, there can be a substantial difference between what serves as an acceptable valuation for purposes of financial statements in the corporate world, and what will serve as satisfactory evidence of value in a divorce case.

Some jurisdictions may consider expert testimony and attempt to put a value on the stock or options. Other jurisdictions may disfavor such valuations. For example, in Pennsylvania, the Supreme Court has held that the Black/Scholes method of valuation for stock options may not be used to value stock options in equitable distribution cases. While intrinsic values may be used in some jurisdictions, these too present serious issues, given market volatility. In many cases, all options may be “under water” at the time of divorce if viewed in this manner, despite the potential for considerable gain later based on business plans for the corporation or market changes. Intrinsic values for options in particular are often too speculative for one or both spouses to be satisfied.

Potential present value of the compensation is only one-half of the relevant value equation. Determining applicable taxes when no actual transaction has taken place constitutes the second challenge to valuation. It is difficult to predict tax rates, the nature of the employee spouse’s other income in the future, and when in the year a taxable event associated with the compensation may take place. Moreover, applicable taxes and their timing will vary depending on the nature of the compensation, including, but not limited to, whether it is qualified or nonqualified, an incentive stock option, or restricted stock. It is also not unusual for an employee spouse to have a combination of awards, each of which is subject to different tax rules. Depending on the jurisdiction and decision-maker, these taxes may be considered generally, in terms of the overall property award to the employee spouse, or specifically, and the Court may take testimony from an expert regarding the taxes the employee spouse is likely to pay.

The foregoing issues offer just a taste of the complexities that come with executive compensation valuation in divorce cases. As a result, there has been a trend to either divide this compensation “in-kind” between the spouses where possible, or to have the employee spouse essentially act as a trustee of the other spouse’s share of the asset even after the divorce. While present valuation affords the spouses the policy advantage of being disentangled from one another, it may be unfair for the value to be used to offset another asset with a less speculative present value, such as a bank account or home equity. This trend of division upon receipt likely has been further encouraged by the recent economic downturn. Spouses do not want to pay for expensive expert valuations, and both are forced to acknowledge that circumstances may change substantially. Indeed, an unvested award today could be nonexistent tomorrow.

“Division” of Executive Compensation

While the wait-and-see or in-kind approaches to the division of restricted stock and/or options have the advantage of eliminating speculation and expensive valuations, these approaches have their own sets of challenges, and are increasingly likely to result in financial advisors and accountants arbitrating disputes regarding division and tax obligations. Generally, stock options, restricted stock, and other employee stock plans are non-transferable. Therefore, where the nonemployee spouse is awarded a percentage of certain awards, to some extent, the employee spouse will necessarily act as a trustee of the assets until such time as they are vested, exercised, or sold, as applicable, depending on the asset. Such divisions can pose challenging tax problems, only a few of which are examined here. Lawyers should be calling on advisors
and accountants to review proposed agreements to ensure that they cover all applicable issues, and advisors should be conscious of the fact that many of these issues may be overlooked by attorneys.

With regard to restricted stock, once vested, some plans may permit transfer of actual shares and such shares may even be held in accounts at institutions where other marital assets are held. Even if the vested stock can be transferred, however, the accurate basis for the stock needs to be determined, and this may require the cooperation of the employee spouse. Certain unvested stock may trigger ordinary income tax to the employee spouse upon vesting. In this situation, it will need to be determined how the transferee spouse pays his or her share of that tax. The employee spouse may have the option to sell a sufficient amount of stock at the time of vesting to cover the associated income taxes. This reduces the total stock available to divide between the parties but may simplify tax matters. If the plan does not allow for this or it otherwise cannot be accomplished, there is then a question of mechanics in terms of how to get the taxes paid.

Nontransferable stock options pose similar issues. Depending on the nature of the option, a certain portion may be taxable upon exercise at the employee spouse’s ordinary income tax rate, and may be subject to FICA. If the employee is exercising an option and/or selling stock on behalf of the nonemployee spouse, inevitably there will be a question of how much the employee spouse can appropriately withhold for taxes from the other spouse’s share of the proceeds. They can select an arbitrary percentage based on the history of the employee spouse’s income or they can develop a method to “true up” when the spouse has finalized his or her return for the year, so that the actual taxes attributable to the exercise can more accurately be determined.

In all of these scenarios, the parties should be directed to consult with tax advisors. In some circumstances, it may be possible for the compensation to actually be transferred in kind to the nonemployee spouse. The IRS has issued Revenue Rulings regarding the allocation of taxes to the nonemployee spouse under these circumstances. Further, even when the income associated with the transaction at issue is reported on an employee spouse’s W-2, the nonemployee spouse may need to report the income if the transaction has taken place on his or her behalf.

This is an area where forethought and teamwork between attorneys and advisors are essential.

### Other Challenging Divisions of Assets of High-Net-Worth Couples

In addition to the two areas discussed above, divorcing couples may face a series of other scenarios that complicate the division of their assets. Accounts or assets that may appear easy to split from a legal perspective at the time of divorce may require additional care and attention to avoid potential future issues.

### Family Vacation Homes

One such issue is the treatment of the family vacation home. Sometimes held in a different light compared to the primary marital residence, vacation homes may carry additional sentimental value and both parties may have a strong desire to maintain the home in the family, notwithstanding the divorce. This desire is often increased when adult children and/or grandchildren are involved. The couple may feel that maintaining the home for the benefit of younger generations is an important goal. While the legal separation of title is rather straightforward, via a transfer from joint tenants with survivorship to a joint tenants agreement with an ownership agreement, the treatment of time used and payment for continuing expenses becomes more complex. The use of a trust agreement to hold the property, coupled with an expense account funded to cover anticipated taxes or expenses may be sufficient. However, consideration should be given to issues concerning the desire of one party to buy out the other party, use of a life estate for the surviving individual, and agreed upon transfer of trust shares to younger generations (as compared to directed by future estate plans).

### Children’s Educational and Custodial Accounts

Another area of concern is the treatment of pre-funded custodial accounts and educational savings accounts, whether established under the Uniform Transfer to Minors Act or as a Qualified Tuition Plan or “529 account.” For both types of accounts the issue of ownership may not be as pressing as the future use of the funds.
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For custodial accounts, the minor is the legal owner of the assets and will take possession of the assets free of trust at the age of majority. However, while the owner is a minor, the custodian has the ability to direct funds for the benefit of the child (not limited to educational expenses). As such, one party may view the account as a future benefit for the child for a down payment on a home or other use at the child’s discretion. However, the other party may feel that the account should be used during the age of minority for general support and maintenance and to supplement the use of parental assets for the child’s care. The mentality of how a child should be raised and level of future inheritance, regardless of age of the child, can often be concerns for divorcing parents. While the parties cannot change permissible expenses under the Act, they may consider making part of their property settlement agreement shared permissible uses of the funds.

With regard to noncustodial 529 accounts, the current account owner is likely one of the two parents. The account owner is given the right to direct distributions, name successor owners, and/or change the beneficiary of the account. Further, the account owner has the ability to reclaim the assets in the 529 for his or her personal use, subject to potential IRS penalty. As such, if the 529 is not addressed in divorce, the account owner would have the ability to change the beneficiary of the account from the marital child to a beneficiary of his or her choosing in the future and not direct the assets, which were funded from marital assets, to the children of the marriage. If the account-owner spouse were willing to pay the penalty, he or she could also reclaim the funds for personal use. It is therefore extremely important that the existence of these accounts is acknowledged and considered as part of the overall resolution of the divorce and that spouses consider, with their counsel, appropriate protections to ensure to the maximum extent the use of the funds as originally intended.

Charitable Funds

As the use of donor-advised funds or charitable endowment funds increases, careful attention should be given to the current ownership of the fund, which was likely funded during marriage with marital assets, and to who will remain as the director of the fund and make recommendations of charitable transfers going forward. While the couple’s current charitable intentions may be consistent, it is possible that their respective future charitable focus may differ substantially. The division of the fund into two separately managed funds may be most appropriate to allow each spouse maximum flexibility in the future and to avoid future disputes. Along these same lines, the family may have created charitable pledges with future funding requirements from annual gifts to transfers at death. Consideration should be given to who will be required to meet these pledges and receive the associated income tax deductions.

Alternative Investments

Alternative investments may also create the need for careful planning. Private equity investments may carry substantial future capital commitments; private equity may be an asset with an associated liability attached. These holdings may be both illiquid and difficult to appraise. This is another type of investment that can be extremely challenging to value presently, and therefore may not be appropriate to offset against other assets in a division. The unique aspects of private equity holdings may make the asset unsuitable for transfer, and the associated risks pose challenges even if both parties are willing to hold on to the asset postdivorce.

Advisors may be called upon to help the couple consider whether a sale or transfer to a third party is possible. In the event the divorcing couple elects to hold the asset and to divide it if and when a desirable gain is realized, consideration should be given to the level of funding needed and the ability of both parties to meet the respective commitments of their separate shares. Advisors and attorneys can work together to determine how best to meet these commitments, whether by carving out a separate fund from other marital assets or by crafting agreements that anticipate one spouse advancing additional investments and recouping those advances at the time investment gain is realized. Where there is considerable risk, a carve-out for claw-backs may also be appropriate.

Portfolio Management

As divorce negotiations and settlement agreements may take months or years to complete, the management of the portfolio during the time of separation could
become complex. The need for current cash flow may require changes to the marital asset allocation, or selling investment holdings to allow for interim distributions. Advisors should act with caution and in close cooperation with their respective compliance departments. Requesting joint approval for transactions involving joint accounts and informing both parties’ legal counsels of individual accounts may be appropriate. Each party’s legal counselor may choose to notify the respective custodians of individual accounts (taxable or tax deferred) of the pending separation and seek to receive duplicate statements and trade confirmations, and to limit transaction requests made from only one party without approval of the nonowner of the account.

These aspects could become more complicated in the event the portfolio allocation is either unbalanced, even with good cause, or no longer appropriate for one of the parties. For example, a corporate executive may have a concentrated position in his/her company stock. While the concentration may be appropriate, and perhaps unavoidable for the executive, the spouse may seek a more balanced investment portfolio. The parties may wish to find ways to reduce the overall risk profile of the marital assets during separation to allow the nonexecutive spouse comfort. However, this may be difficult if the executive is a corporate insider and subject to trading restrictions. Further, thought should be given to the difference in allowable FDIC coverage, home sale gain exclusion, and other factors with respect to the higher allowable levels for married/joint accounts as compared to the levels for individual owners.

Postdivorce Planning Objectives

After the divorce, each party should revisit their own estate planning documents, account titles, and beneficiary designations. As these documents/designations are fluid and can be updated at any time, each party should be comfortable that their respective goals/objectives are met regardless of the other party’s actions. For example, one party could increase or reduce the level of assets passing to heirs, charities, or individuals postdivorce through the addition, cancelation, or alteration of wills, trusts, life insurance policies, and beneficiary designations. Individual feelings and intentions change over time and each party should be comfortable that their estate-related goals are met regardless of the actions of their former spouses.

Issues with Providing Joint Support and Advice

In the event an advisor finds himself or herself providing guidance and service to both parties, as a married couple, he/she may be requested to remain as a trusted advisor to both parties as individuals going forward. The advisor may be best suited to provide summary reports of marital assets, maintain a deep understanding of complex assets, and provide guidance on each party’s financial needs. As their fiduciary, the advisor’s intentions remain focused on the best for each individual and their dependents. Careful planning and consideration should be given prior to agreeing to remain as an advisor. Further, an agreement between the parties should be drafted (in accordance with the advisor’s compliance officer) outlining how confidentiality will be maintained in the event he/she is providing guidance to both parties. Further, it is suggested that a process is in place to document suggestions, calculations, and communications between the parties in the event this information is requested by legal subpoena in the midst of the divorce process.

Conclusion

Unwinding the marital affairs of high-net-worth individuals can be complex and the parties may encounter numerous legal or regulatory issues. The combined expertise of financial and legal professionals may serve not only to avoid pitfalls, but also to provide countless benefits to the separating parties. While this article summarizes some areas of concern, additional issues related to divorce will likely arise and further emphasize the need for continued cooperation among advisors. While divorce may bring challenges, it can also provide an opportunity to strengthen the advisor-client relationship.

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(2) In some jurisdictions, this “double dip” may be permissible, particularly if child support is at issue.

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