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Splitting Complex Assets In A High Net Worth Divorce Mediation

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Divorce mediator Kimberley Keyes reviews the challenges posed by complex financial assets in divorce.



High net worth couples – often defined as those earning more than \$500,000 per year and with assets eclipsing \$5 million – frequently hold complex financial assets. From investments in stocks and bonds to real estate to pensions to retirement accounts and stock options, these financial assets can cover a significant portion of the [marital estate that needs to be divided equitably](#) in the event of a [divorce](#). Simply dividing these [complex financial assets](#) dollar-for-dollar can create unfair results due

to the differing tax implications and liquidity issues affecting complex assets. Accurate valuations of complex assets can sometimes differ substantially from the a given asset's face value. Just consider the following three examples:

Investments and the Capital Gains Tax

Imagine a traditional money market account that holds \$100,000 in a diverse mix of stocks and bonds. Unlike other investment holdings that were designed to achieve a specific goal, like retirement or college savings accounts, run-of-the-mill investment accounts are accessible at any time: Owners can cash out whenever they want. However, cashing out an investment account may be subject to the [capital gains tax](#). Depending on your income, the capital gains tax can drastically reduce the value of a traditional investment account. What was worth \$100,000 in the market can become \$80,000 in your pocket. Whether it stays in the market or gets liquidated in the divorce, then, alters how much it is worth. Similar capital gains issues can arise with the real estate investment properties. One of the great advantages of owning rental property is the ability to claim a depreciation tax deduction on the property each year. However, rental property owners who sell their property must be aware of "[depreciation recapture](#)" at the time of the sale. Depreciation recapture – an obscure cousin of the ordinary capital gains tax – forces investment property sellers to pay a higher tax rate after a sale than the ordinary capital gains rate. This additional tax can put a substantial dent in the real world value of investment property that appears valuable on paper.

Pensions versus 401(k) Plans

Pensions and 401(k) plans are both [retirement vehicles](#) provided by many employers (although pensions by private employers are becoming less and less common). However, there are important differences between the two that make identical face values misleading. While both defined benefit and defined contribution retirement plan are relatively inaccessible before retirement – at least

when compared to a typical investment account – pensions present relatively little risk (at least in theory) because the employer controls the account and guarantees, to some extent, a return. In contrast, 401(k) plans are more subject to market forces that can drastically diminish (or increase the value) due to Wall Street’s ebbs and flows. Of course, since traditional pensions generally only paid out on a monthly basis – while 401(k) can be withdrawn in full at any time, subject to taxes – it can be very difficult to compare the value of a pension with a 401(k). Generating a fair market value for a traditional pension requires the use of actuarial tables and a good deal of imagination – since the pension will only realize its value if the pension holder lives long enough to collect all of those monthly payments. These risks can add complexity to dividing such assets in a mediated divorce. A \$50,000 pension plan can have a starkly different true value than a 401(k) plan with \$50,000 in it.

Profit Sharing, RSUs and Business Ownership Interests

Another area of confusion centers are around “stock”. In the divorce context, the word “stock” can apply to range of assets, from direct ownership of shares in a company to various forms of deferred compensation, such as stock options and restricted stock units (RSUs). Valuing a closely held company is among the most challenging tasks that a divorce attorney must undertake. Meanwhile, determining *whether stock options and RSUs are assets that are subject to division – or sources of income available for the payment of alimony or child support* – offers a separate set of complexities. Determining the value of stock, as well as the most efficient way to divide the asset, requires multidisciplinary professional expertise.



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How Mediation Handles the Problem

Above are only a few examples of how assets that appear to be similar can actually have very different values in the divorce context. In high net worth divorces, simply trading one account for another because they have the same face value is an unscientific method of dividing such assets, and can lead to an inequitable result. Contrary to popular belief, though, [divorce mediation is just as adept as litigation at solving this problem](#). Both dispute resolution mechanisms have access to the same set of professionals who are able to value complex financial assets such as these.

Kim is a divorce mediator for South Shore Divorce Mediation, located in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a Senior Associate Attorney for Lynch & Owens, P.C., where she specializes in divorce and family law issues. Kim is a statutory mediator under M.G.L. Ch. 233, s. 23C and a proud member of the Massachusetts Council on Family Mediation. To read more from Kim Keyes, check out [her author page on the Lynch & Owens Blog](#). Disclaimer: The information you obtain at this site is not, nor is it intended to be, legal advice. You should meet with an attorney for advice regarding your individual situation. You are invited to contact our office. Contacting the office does not create an attorney-client or mediator-client relationship. Please do not send any confidential information to the office until such time as an attorney-client or mediator-client relationship has been established. This blog is considered an advertisement for the Law Office of Lynch & Owens, P.C. d/b/a South Shore Divorce Mediation. The Massachusetts Rules of Professional Conduct broadly govern all advertisements and communications made by attorneys and law firms in the Commonwealth. Generally, legal websites and any other content published on the internet by lawyers are considered a type of communication and an advertisement, according to the Comments to Rule 7.2.

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