

## FAMILY LAW

# To Divorce or Not to Divorce in the Age of #MeToo and 'Time's Up'

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In a movement that began after the *New York Times* and *The New Yorker* broke the news that Harvey Weinstein allegedly sexually assaulted dozens of women, victims began speaking out publicly against their own abusers. The accusations resulted in prominent figures—in politics, entertainment, journalism and music—losing their jobs and facing potential financial exposure for their alleged actions. The #MeToo and “Time’s Up” movements generated a juggernaut of dialogue about these important issues and even pervaded the recent Golden Globes presentation. New allegations surface weekly and will likely continue to impact families.

This article explores how a practitioner should handle what will almost certainly be considered by anyone facing private or



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public disclosure of workplace sexual misconduct committed by their spouse. Ultimately, these disclosures will drive the question of whether to divorce or not divorce. Abusers are no longer escaping scrutiny and settling the matter confidentially. These individuals are now more likely to be immediately terminated and could even face legal civil or criminal action which would undoubtedly have severe financial consequences to the family. In light of the rapidly changing times, it may not be a financially prudent decision for

a wife to “stand by her man”—especially if she is the supported spouse. Consequently, when consulting with a client contemplating divorce due to accusations against her spouse as a result of sexual misconduct or abuse to another, it is important to advise the client of her rights in today’s climate. Three major components of a divorce could be affected: equitable distribution, alimony and child support.

Assume a supported spouse consults with you because she is considering divorce. Her husband of many years is the primary wage

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earner, and the shareholder of a successful business started during the marriage (a valuable marital asset). The couple has three children. The wife recently became aware that her husband engaged in an extramarital affair with a co-worker, and she suspects his behavior may not have been consensual. Considering the widespread impacts of the #MeToo and Time's Up movements, it is more likely that the victim will take action or even publicize the allegations. In either of these instances, what are some of the topics to discuss with the client?

The timing of an action for divorce is important. With some exceptions, the filing of the complaint establishes both a termination date for the marital estate as well as certain statutory claims against marital assets. Like any other civil matter, the date of the complaint and final judgment is critical, especially when there is a risk that other creditors may emerge in the near future. Consequently, if the client is considering divorce, it may be advisable to immediately file a complaint and move forward with divorce proceedings before that individual's share of marital assets and income are put at risk. Filing a formal action against a spouse for child support, alimony, equitable distribution of assets, and dissolution of the marriage will help to secure one's claims against the marital

assets and protect the plaintiff spouse from some of the scenarios discussed below.

One major component of any divorce is equitable distribution. A business owner accused of sexual misconduct could be at risk for losing his shares in the business and/or his source of income as a result of an immediate termination or other adverse action by the employer or company. This scenario is currently playing out in the media for several famous business owners, such as celebrity chef Mario Batali and music producer/entrepreneur Russell Simmons. Batali was recently accused of sexual misconduct and fired by ABC as a result of the allegations. Both Batali and Simmons also stepped away from their businesses. Besides the immediate loss of income, the value of an abuser's business interests could be at risk. In addition, customers or clients of a business may boycott the enterprise in solidarity with the abused, which could impact the overall value of a business. In those situations, individuals could be forced to divest their ownership interest in a business—often at a significant discount. For example, in our hypothetical situation above, the husband's ownership interest in his business may have a fair value of \$100,000. However, due to the husband's sexual misconduct and the damage to the business' reputation, his partners might have the

ability to compel a corporate buyout at \$50,000, thereby reducing the overall value of the marital estate and ultimately affecting the wife's equitable distribution.

In the case of *Goldman v. Goldman*, 248 N.J. Super. 10 (Ch. Div. 1991), the husband invested significant marital assets into a car dealership that ultimately lost all of its value while the couple's divorce was pending. The court determined the husband's investment was made in good faith, and that the asset did not decrease in value through any fault of the husband's. Consequently, for purposes of equitable distribution, the asset was valued at the time of divorce (with a value of zero). In our hypo, the wife would argue that the \$50,000 buyout was not in good faith because it was the result of the husband's intentional actions; i.e., his sexual misconduct. That situation presents a fact-sensitive issue which would require the wife to engage in costly discovery—especially if the business is willing to go to great lengths to protect its image and confidentiality.

The potential loss of income could also significantly affect alimony. For example, after 20 years at NBC's *Today Show* where he reportedly earned over \$20 million per year, Matt Lauer abruptly lost his job after being accused of sexual misconduct. It is unlikely that he will ever be able to achieve the same earning status, and certainly not in the near future. If his wife pursues

a divorce, his loss of income could result in significantly less alimony to her. However, it is worth noting that a spouse's conduct may be given less weight (for purposes of determining alimony) if the other spouse was aware of the harassment and simply tolerated the behavior throughout the marriage. If that spouse knowingly stayed silent in order to reap the benefits of her husband's financial success, a judge could determine that she assumed the risk and is not entitled to the higher level of alimony.

New Jersey courts have the ability to impute income to either party when calculating alimony. This is usually done in cases where a spouse intentionally reduces his or her income during the pendency of a divorce for purposes of manipulating the support calculations. In imputing income, the court must consider the reason for the husband's unemployment. However, even if the wife is able to prove the husband is at fault, an imputation of income may not necessarily mirror the payor's most recent salary level.

While Lauer's circumstances are extreme, the situation could arise in any industry and affect those at any income level. For example, in the case of *Storey*

*v. Storey*, 373 N.J. Super. 464 (App. Div. 2004), the husband was earning \$111,000 per year as a computer specialist when he lost his job due to a reduction in force. He then began working as a massage therapist earning \$300 per week. The husband moved for a downward modification of alimony based on his changed circumstances. While the court did not utilize his current earnings, income was also not imputed to him at his prior salary rate of \$111,000. Instead, the court compromised and utilized income of \$60,000 per year for the husband; the average prevailing rate for computer specialists in the area at that time. In Lauer's case, a court might find it inequitable to impute income of \$20 million, and may instead consider a lesser salary commensurate with a non-celebrity television journalist.

Finally, child support may also be affected. Child support is determined largely through a formula based on the parties' respective incomes. Therefore, the calculation could change drastically if one parent loses his or her job. Courts are generally more willing to impute income for purposes of calculating child

support versus spousal support. But a loss of income—whether the result of sexual misconduct in the workplace or otherwise—could still result in a reduced child support award. In those cases, the recipient spouse often faces difficulties in demonstrating whether and to what extent an imputation of income is warranted. For this reason, the wife may want to consider estate planning options to protect certain assets for the children who remain blameless in these cases. This can be done through trusts, designated accounts for the children such as 529 accounts, fully funding insurance policies with the children as beneficiaries, and even pre-payment of school and college tuition. Because every family's situation is unique, clients should be directed to a trusts and estates attorney to determine the best way to protect assets for the benefit of the children.

In today's climate, sexual abusers are finally being held responsible for their actions. If an innocent spouse is contemplating divorce, she should be advised of the risks, and counsel should carefully explain all of the options for protecting her rights and the rights of their children. ■