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Divorce Mediation For Small Business And Family Business Owners

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Massachusetts mediator Nicole K. Levy reviews how divorce mediation can protect small businesses and family businesses while generating fair outcomes for both spouses.



Divorces can be messy enough on their own, but if you or your spouse own a family business, separating that business can pose a significant challenge. Many attorneys refer to cases involving small businesses as a “divorce within a divorce” due to the complexity of dividing this asset, as well as the challenges of determining issues like child support and alimony, which are based on each spouse’s earnings. [Litigating a divorce involving a](#)

small business can certainly increase the stress, cost, and time investment that comes along with cases in the Probate and Family Court. *Mediating* divorce cases involving family businesses can provide *flexibility, sensitivity and creativity* that is often lacking in divorce litigation. Mediation provides a forum in for you and your spouse can work through the divorce process without interrupting or undermining business operations, and to craft reasonable and practical solutions based on the unique needs and concerns that you face with your family business.

How Litigation Divides a Family Business in a Divorce

Should you or your spouse move forward with litigation, the first issues that may arise is *time*. The court works on its own schedule which may not work for your business. Courts generally views small businesses as “*marital asset*” and seek to divide the asset equitably, even if there is no ascertainable dollar amount that can be attributed to the business. Depending on where you fall in the fiscal year, the court’s schedule may disrupt business in a way that can be detrimental to both you and your spouse. Litigating an *asset division* when the asset is (1) your source of income and (2) fluctuating daily due to operations can ultimately prevent the business from functioning properly both during litigation and even after. Alternatively, either you or your spouse could choose to “buy out” the other person’s interest from the business, whether by paying a lump sum or by sacrificing an equal amount of other marital assets to cover the purchase. In order to calculate a buyout, however, negotiation and analysis is needed to determine the value of the business, as well as the other marital assets that may be used to offset the value of one spouse retaining the business after the divorce. Of course, while all of this is pending, the business likely still needs to continue to run. This is particularly difficult if you and your spouse work together at the business - while you are simultaneously on opposite sides of the litigation. The situation presents complex and often contentious issues on who gets to make which decisions on its behalf. Worse, Probate and Family Court judges may need to intervene in an attempt to preserve the business for its eventual separation or

prevent one spouse from using the business for their own ends, which adds in another layer of difficulty. This can sometimes do more harm than good, despite the court's best intentions, as they are not an expert in how your particular business maintains its day-to-day operations.

Determining Self-Employment Income for Child Support and Alimony Purposes

One great challenge in divorce cases in which one or both spouses are work in a business is determine each party's [self-employment income for the purposes of calculating child support or alimony](#). In Massachusetts, gross income for child support and alimony is calculated based on the [2018 Massachusetts Child Support Guidelines](#), which provide:

*Income from self-employment, rent, royalties, proprietorship of a business, or joint ownership of a partnership or closely-held corporation is defined as gross receipts minus ordinary and necessary expenses required to produce income. In general, income and expenses from self-employment or operation of a business should be carefully reviewed to determine the appropriate level of gross income available to the parent to satisfy a child support obligation. In many cases, this amount **will differ from a determination of business income for tax purposes**. (Emphasis added.)*

As noted in the bold text above, the calculation of income under the Guidelines is often different from the calculation of state and federal taxable business income. Routine business expenses, such as real estate depreciation, may be deductible for income tax purposes, but not for [child support](#) or [alimony](#) purposes. Business expenses that reduce the personal costs of the business owner – such as auto, cell phone and home office deductions – may also be counted as income in the child support or alimony analysis. Most divorce lawyers will tell you that there is not perfect formula for calculating self-employment

income for alimony or child support purposes. Determining the appropriate figure is a mix of technical knowledge, common sense and negotiation. One reason that divorce mediation is often preferable for small business owners is because mediation allows spouses to avoid public litigation and controversy over prior year tax filings of the business. With a divorce underway, the last thing many spouses need is to trigger a state or federal audit by claiming that a small business has been underreporting its income. In the mediation context, spouses can negotiate reasonable levels of support without the adversarial, confrontational impact of litigation.

The Use of Outside Experts and Specialists in Mediation

Obviously, many spouses – even business-owning spouses – are not qualified to place a value on a small business. Nor is it appropriate for a mediator – who is an unbiased neutral party – to suggest a specific value for a business for division of assets purposes. When [valuing and dividing complex assets in a divorce](#), our mediators consult with a network of experts, including:

[A] wide range of valuation experts, ranging from commercial and residential real estate appraisers, business valuers, and other financial experts with expertise that fit the unique assets of the marriage.

Mediation enables spouses to select a mutually-agreed on expert to assist in the business valuation process, as well as the determination of business income for support purposes. Compared to the cost of two attorneys and competing experts hired by each party, mediation enables parties to minimize professional costs and streamline the valuation process as much as possible.

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The Flexibility of Mediation Helps Resolve Divorce for Small Business Owners

A major flaw in proceeding with litigation in these scenarios is that litigation cannot account for the nuances and unique intricacies of your business. Family operated businesses—especially small businesses—all have particular ways of running that originated years before a divorce. In most cases, only you and/or your spouse have a full understanding of what your business does, how it handles certain situations, and why. Keeping the decision-making process out of the court, even if the family is separating, can make a big difference, by making a small impact on the business, while the divorce is pending. Mediation can also assist with the eventual division of the family business, whether that means dividing the entire business or one party buying out the other. Businesses can sometimes be broken down into sections or departments. Additionally, spouses involved in the family business are rarely intrigued by all aspects of the venture—one spouse might “specialize” in one corner of the business, while another spends their time in another. These unique dynamics of the company and the family can all provide avenues for [creative solutions](#) that the mediation process is designed to find.

Nicole is a divorce mediator and mediation coach for South Shore Divorce Mediation, with offices in Hingham, Massachusetts and East Sandwich, Massachusetts. She is also a collaborative law attorney Senior Associate Attorney for Lynch & Owens, P.C., where she specializes in divorce and family law issues. Nicole is a statutory

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