

In high-net-worth divorces, dividing assets isn't just about fairness on paper - capital gains taxes can dramatically shift the outcome. While transfers between spouses are typically tax-free under IRC Section 1041, the real cost emerges when assets are later sold and the built-in gains come due.

Capital Gains & Divorce: The Essentials

- ▶▶ **IRC Section 1041 Transfers**
Transfers of property between spouses or incident to divorce are generally non-recognition events. This means no immediate tax is due at the time of transfer. However, the original cost basis and holding period carry over to the receiving spouse.
- ▶▶ **Built-In Gains Trap**
If one spouse receives an asset with significant unrealized gains, and then sells it post-divorce, they may face a large capital gains tax burden — even if they received that asset 'tax-free' during the split.
- ▶▶ **Property Type Matters**
Primary residences, rental properties, stocks, private equity interests, and art/collectibles all carry different rules, exemptions, and tax treatments.
- ▶▶ **State Tax Differences**
If spouses reside in different states, state capital gains treatment can differ widely and should be factored into the settlement strategy.

Attorney's Capital Gains Consideration Checklist

<input type="checkbox"/>	Asset Review Identify all assets with unrealized gains or losses. Determine cost basis and holding periods for each asset. Flag assets with illiquid or complex valuation [business ownership, private equity.]
<input type="checkbox"/>	Equitable + Tax-Efficient Division Ensure division is not just equal in value, but fair in after-tax value. Run hypothetical sale scenarios to project potential capital gains tax burden for each spouse.
<input type="checkbox"/>	Real Estate Considerations Confirm if primary residence exclusion [\$250K per spouse] still applies. Assess whether post-divorce use affects exclusion eligibility. If keeping the house, calculate future capital gains exposure.
<input type="checkbox"/>	Investment & Business Interests Clarify ownership of carried interest, restricted stock, or deferred comp. Address control, voting rights and liquidation potential. Consider installment sale structures or Qualified Domestic Relations Orders where applicable.
<input type="checkbox"/>	Client Preparation Recommend a joint session with a CPA or tax advisor before finalizing settlement. Encourage tax projections to inform decision-making, not just after-the-fact reporting. Emphasize post-divorce tax planning to avoid surprises at sale or filing time.