



The Gray Divorce Phenomenon

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An 82-year-old client wanted a divorce from her husband of 57 years. When asked why, she responded, "I want to live a little before I die."

A study conducted in 2014 reveals that the divorce rate for individuals 50 and older has doubled in the last 20 years.¹ Two decades ago, individuals 50 and older accounted for about 10 percent of divorces.² Recently, the divorce rate for this age group spiked to approximately 25 percent.³ What's more, approximately half of those divorces occurred in first marriages.⁴

When baby boomers walked down the aisle, they typically considered it was "til death do us part." However, in the intervening years, divorce has become widespread and destigmatized. As a result, divorce rates for people in their 50s, 60s, and older—so called "gray divorces"—have soared.

Common reasons cited for gray divorces: the parties have grown apart; their children have moved out of the house; the parties desire to pursue self-fulfillment and personal goals; or the parties have experienced a change in their circumstances, such as their health or employment status. In addition, improved medical care and increased life expectancy may provide an incentive to exit an unhappy marriage and to pursue a new chapter.

This article will address the particular challenges that present themselves when older couples divorce.

Property Division

In long-term marriages, one or both spouses may have been in the workforce for many years. As a result, a substantial portion of their lifetime earnings may be subject to division in the event of a divorce at an older age.

At any age, divorce can have a devastating financial impact, but it can be especially difficult when it transpires later in life. Individuals who earmarked a certain amount of assets for savings and retirement can face a daunting challenge when their marital assets are split. When older couples divorce, there is less time to compensate for financial losses and rebuild savings.

Income and assets that had been used to pay for one household need to be stretched to support two households after divorce. In certain cases, such as where a spouse has been out of the workforce for a long duration, the financial settlement from a divorce may be his/her primary nest egg. The lump sum divorce settlement may even constitute the sole source of funds during retirement.

In order to help maximize assets, it is often helpful to consult with knowledgeable financial advisors both during divorce negotiations and on an ongoing basis after the divorce is finalized. Furthermore, financial advisors can prepare a budget, which can provide a roadmap for prudent spending in post-divorce life.

Marital Residence

Individuals often become emotionally attached to their homes, especially if they have lived in the same home for a long period of time and raised their children

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there. Many harbor a desire to keep a large home for when their adult children and grandchildren come to visit. As a result, there may be strong disagreement about who will retain the home in a divorce settlement or it may be a source of dissension if one party wants to retain the home while the other party wants to sell it.

Of course, the parties may both prefer to downsize or otherwise start afresh. In certain cases, the only viable option is to sell the marital residence because it may be a couple's primary asset. When approaching retirement, it may be necessary to sell the home in order to obtain liquid assets for self-support.

Retirement Planning

For individuals over 50, retirement accounts often comprise a significant portion of the marital pot. Retirement plans can be turned upside down as parties may need to delay their date of retirement, work part-time and/or reduce their projected retirement lifestyle. Accordingly, the efficient and tax-free division of retirement assets can be critical.

Certain qualified retirement accounts, such as

401(k) or defined pension plans, may be divided on a tax-free basis pursuant to a Qualified Domestic Relations Order (QDRO).⁵ The QDRO sets forth how a retirement account is to be divided between the parties and may account for earnings and losses thereon until the distribution is made. Further, it can provide for the disposition of the benefits in the event of death.

With regard to other retirement assets, such as IRAs, a QDRO is not required to effectuate a tax free rollover, provided the transfer is made incident to divorce.⁶ The divorce agreement can spell out the terms for the division of the IRA, and the recipient party can designate an account into which the funds should be transferred. If the funds from an IRA are not rolled into another IRA incident to the divorce, the recipient may face a tax liability.

Spousal Support

In 2015, in an effort to provide greater stability and consistency, statutory law was amended to include guidelines governing the duration of post-divorce spousal maintenance.⁷ The new legislation includes an advisory schedule pertaining to the length of spousal support payments: (1) 0-15 years of marriage—15 percent to 30 percent of the length of the marriage; (2) 15 or more to 20 years of marriage—30 percent to 40 percent of the length of the marriage; and (3) over 20 years of marriage—35 percent to 50 percent of the length of the marriage.⁸ It remains to be seen over time how the guideline durational amounts for spousal support will be interpreted by the courts.

On the one hand, one spouse may have been a stay-at-home parent for most or all of the marriage and have little or no employability at the time of a divorce. Also, there could be a great disparity between the earnings capacity of both spouses, and the less monied spouse may have been accustomed to a certain lifestyle over the course of a long-term marriage. In order to subsist, a spouse may require spousal support going forward for a long duration, especially if sufficient savings have not been amassed.

On the other hand, if, for example, a couple is divorcing at age 60 and have been married for 30 years, pursuant to the duration guidelines, a spouse may otherwise be required to pay support beyond his/her retirement age. In order to address this potential pitfall, the statute provides that the court shall take into account "anticipated retirement assets, benefits, and retirement eligibility age at the time of the decision."⁹

Social Security

If an individual was married for 10 or more years, he/she may receive Social Security benefits based upon a former spouse's employment record. In order to qualify, the individual must be at least 62 years old and unmarried, the former spouse must be entitled to receive Social Security benefits, and the benefit the individual is entitled to receive based on his/her own work is less than the benefit based on the former spouse's work.¹⁰

The benefit is equal to half of the former spouse's full social security benefit, which does not reduce the amount of social security benefits the higher earning spouse will receive.¹¹ Moreover, remarriage by the higher-earning spouse does not impact the lower-earning spouse's eligibility for social security benefits.

Health and Long-Term Care Insurance

During the marriage, one spouse may have relied upon the other spouse for health insurance benefits because he/she has been out of the workforce or has never worked outside of the home. A divorce agreement can specify how such a spouse will receive health coverage post-divorce.

An individual is eligible to receive COBRA benefits for three years following a divorce.¹² A divorce agreement may set forth who is to pay for the cost of COBRA. If divorcing parties are within three years of attaining age 65, they generally will be eligible for Medicare after the expiration of the COBRA period. However, issues arise if a non-working spouse divorces

prior to age 62 and there is a gap between the expiration of the COBRA period and the commencement of Medicare coverage. In this situation, it becomes necessary to figure out how to obtain medical insurance during the "gap" period

support despite having the means to do so.

Likewise, EPTL §5-1.4 pertains to the revocation of wills and revocable trust provisions, beneficiary designations, and fiduciary appointments. However,

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and who will pay for the coverage. Sometimes the parties may even delay the divorce to avoid a gap period.

The divorce agreement can also make provisions for payment of unreimbursed health expenses, which can be an enormous expense for older couples.

Divorce can radically transform preconceived notions of caregiving in the event of illness. It may be advantageous for older couples to maintain their long-term care insurance and to specify in the divorce agreement the allocation of those costs. If the long-term care insurance is not already procured, it can be mandated as part of the divorce process and the payment of its costs also set forth as part of the settlement agreement.

Estate Planning

Under New York state's intestacy law, the surviving spouse receives \$50,000 plus one-half of the estate if the decedent has children and 100 percent of the estate if the decedent does not have any children. Pursuant to New York's Estate's Powers and Trusts Law (EPTL) §5-1.2, a surviving spouse is only disqualified for intestacy purposes if: (1) there is a final decree or judgment of divorce, annulment or nullity or dissolving the marriage on the ground of absence; (2) the marriage was void; (3) there is a final decree or judgment of separation; (4) there is abandonment of the deceased spouse by the surviving spouse that continued until the time of death; or (5) the surviving spouse who, having the duty to support the deceased spouse, failed or refused to provide such

this revocation only takes effect upon divorce, judicial separation or annulment, rather than upon the commencement of a divorce case.

A long period of time may transpire between when a divorce is commenced and when it is finalized. Therefore, in each case, but especially when an older couple is divorcing, estate planning documents should be reviewed and reassessed.

Notably, there are automatic statutory restraints that go into effect at the commencement of a divorce case.¹³ These automatic restraints include prohibitions regarding changes in beneficiary designations on life insurance policies, changes of title of joint accounts, as well as certain other actions unless both parties consent in writing or there is a court order.

Under New York law, if the deceased party has a will, a surviving spouse is entitled to an elective share of one-third of the deceased spouse's estate outright.¹⁴ The surviving spouse retains the right to claim the elective share during the pendency of a divorce proceeding.

Federal law requires qualified plans to provide that a surviving spouse receive at least half, and in many cases all, of the deceased participant's benefits. A surviving spouse may waive these rights with acknowledged consent,¹⁵ but typically this is not done until there is a divorce settlement.

Impact on Adult Children

In light of gray divorces, the number of adults with divorced parents has exponentially expanded. The divorce of parents can have a profound impact on children even

when they are adults.¹⁶ A parental divorce is considered a high stressor for adult children, and many of them may grieve about the loss of their long intact familial unit. They also may tend to reflect and question their lives, and whether their parents perpetuated the marriage for them until they were grown.

Child support in New York is mandated until age 21, unless an earlier emancipation event has occurred.¹⁷ Custody is an issue in New York until a child is 18.¹⁸ Accordingly, legal issues of child support, custody and access often do not loom large in gray divorces (although issues regarding the payment of college and graduate school tuition, as well as wedding expenses, often arise).

As a result of their age, adult children may be more likely to be drawn into the divorce and hear details from each parent. Further, the divorce may alter existing inter-family financial relationships.

For example, parents who divorce later in life may require financial assistance from their children. A parent may need a place to stay, even if temporarily, or may require financial contributions in order to help make ends meet. Alternatively, the parties may have been providing assistance to their children and may not be able to afford to continue to do so. In addition, the parties may hold differing views as to how much largesse they should bestow upon their adult children both during lifetime and upon death.

Effect on Prenuptial Agreements

"Sunset" clauses are commonly used in prenuptial agreements. These clauses provide for the automatic expiration of a prenuptial agreement upon the occurrence of a certain event (such as child-bearing) or after the passage of a certain period of time. A common benchmark is 10 years. In light of the gray divorce phenomenon, it may be advisable to forgo a sunset clause altogether or provide for the prenuptial agreement to "sunset" after a longer period of time.

Love may be in the air once again after a gray divorce. A prenuptial agreement can provide numerous benefits in a second marriage. For example, the prenuptial agreement may contain provisions regarding what will

transpire upon death in order to accommodate children from a first marriage as well as a new spouse. It can also contain provisions to protect separate property assets from being slashed further in the event of another divorce.

Conclusions

For a myriad of reasons, there is a proliferation of divorce among couples who have been married for many years. It is important to obtain sound financial and legal advice during and after a divorce in order to help maximize assets and prepare for the future. If remarrying, a prenuptial agreement can balance the need to protect children from a prior marriage, preserve assets for retirement, and provide for a new spouse. Life is not over. A new chapter lies ahead.

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2. Kristin Haugk, "Divorce While Retired: Three Ways to Avoid More Pain," The Oxford Club (May 16, 2016), <http://wealthyretirement.com/gray-divorce-retirement-three-financial-strategies-preserve-wealth/>.

3. *Id.*

4. *Id.*

5. 26 U.S.C.A. §414(p) (West 2016).

6. 26 U.S.C.A. §408(d)(6) (West 2016).

7. N.Y. Dom. Rel. Law §236(B)(6) (McKinney 2016).

8. N.Y. Dom. Rel. Law §236(B)(6)f) (McKinney 2016).

9. N.Y. Dom. Rel. Law §236(B)(6)(f)(4) (McKinney 2016).

10. "Retirement Planner: If You Are Divorced," Social Security Administration, <https://www.ssa.gov/planners/retire/div-spouse.html>.

11. *Id.*

12. U.S. Department of Labor, Employee Benefits Security Administration, Consolidated Omnibus Budget Reconciliation Act (COBRA), <https://www.dol.gov/ebsa/newsroom/fscobra.html>.

13. N.Y. Dom. Rel. Law §236(B)2(b) (McKinney 2016).

14. N.Y. Est. Powers & Trusts Law §5-1.1-A (McKinney 2016).

15. 26 U.S.C.A. §417(a) (West 2016).

16. Jane Gordon Julien, "Never Too Old to Hurt From Parents' Divorce," (April 21, 2016), http://www.nytimes.com/2016/04/24/fashion/weddings/never-too-old-to-hurt-from-parents-divorce.html?_r=0.

17. N.Y. Dom. Rel. Law §240(1-b)(b)(2) (McKinney 2016).

18. N.Y. Dom. Rel. Law §2 (McKinney 2016); N.Y. Fam. Ct. Act §119(c) (McKinney 2016); N.Y. Fam. Ct. Act. §651(a) (McKinney 2016).

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