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Considerations for the Gray Divorce

It's never too early to start planning for retirement. However, most couples generally do not plan for divorce during or as they approach their later years in life. In his Divorce Law column, Alton Abramowitz discusses what makes the job of the attorney for older matrimonial clients different than when representing clients "in the prime of their lives."

By **Alton L. Abramowitz** | August 16, 2021

"You are never too old to set another goal or to dream a new dream."

—C.S. Lewis.

In 1967, the Beatles famously sang: *"Send me a postcard, drop me a line, stating point of view, indicate precisely what you mean to say, yours sincerely, wasting away, give me your answer, fill in a form, mine for evermore, will you still need me, will you still feed me when I'm sixty-four?"* Fifty-four years later, in 2021, with the "baby boom" generation, its predecessors and successors, retired and retiring, and dying at an ever accelerating rate, accompanied by the realization that lifespans in the United States (and elsewhere) oftentimes extend to ages ranging from the late 80's through people's 90's and beyond into the 110's, it seems to many observers that older Americans, spurred on by the lockdowns resulting from the COVID-19 pandemic, are divorcing at a much higher rate than most people had anticipated.

For those attorneys practicing in the fields of matrimonial and family law this requires a modification of their approach to resolving their clients' matters in ways that those clients had not envisioned when they determined that "life is too short" to spend it with someone whom they no longer love, find interesting, deem attractive, perceive as abrasive, too old, lacking in vigor, unadventurous, stodgy, humorless, set in their ways, need a caretaker or nurse, etc. The fact is that many of those clients have come to learn that they did not truly understand what was in store for them when they uttered those words, "for better or worse, in sickness and in health, until death do us part."

The increasing incidence of "gray divorce" has recently been highlighted by the high-profile divorces of aging mega-billionaire couples such as Jeff Bezos and Mackenzie Scott, and Bill Gates and Melinda French Gates. One example of the kind of publicity these breakups have engendered is a New York Post article from June 8, 2020, the heading for which trumpeted *"Jeff Bezos would now be worth \$200 billion if he hadn't divorced."* The average divorcing couple in their 50's, 60's and older do not have the advantage of unimaginable wealth to provide for themselves and their families in what society has termed their "golden years." Therefore, careful thought and consideration that is nuanced differently from the divorces of younger couples must go into any approach to resolving the financial issues when an older couple divorces and is faced with the prospect that their income on a going forward basis is not as significant as they had imagined

as they approached their retirement years and that their wealth, no matter its size, is now going to be divided in a way that will have a significant negative impact on the lifestyle that they envisioned for themselves as an intact couple.

The gray divorce presents a multitude of questions for each of the parties and their respective lawyers that should be considered before proceeding to settlement, or, worse, to trial. One question that will permeate a gray divorce as it progresses towards conclusion in the same manner as any other divorce matter is whether to settle for less than one had hoped to achieve or to go to trial. The answer will always lie in an assessment of all of the factors one must consider in making this determination by doing a “cost benefit analysis.”

In other words, do the costs of litigation and trial exceed the difference in the results of a not fully satisfactory settlement as opposed to the possible, but not guaranteed, outcome after trial. For most people and particularly for those who are “risk adverse” the answer is invariably the case should or must be settled. The proverb that “a bird in the hand is worth two in the bush” is particularly apt for older people facing this conundrum.

In assessing a financial settlement or trial outcome, it may make sense for the parties to engage the services of a financial planner, either individually or jointly, to look at various scenarios based on the actual or projected income of each of the parties, their respective expenses, and the assets and liabilities that must be divided in order to achieve an equitable distribution of property rights. Simply put, most lawyers do not have the training, knowledge, and expertise to provide their clients with the kind of analysis that is part and parcel of the everyday work of a personal financial planner.

When considering the parties’ future in the gray divorce scenario, one of the key facets that must be addressed early on is the income of the parties, including current and future sources. Is one or both of the spouses still employed? Are either or both retired? If still employed, how much longer will the party or parties continue to work? This is a particularly vexing question when one of the spouses has been out of the workforce for years or decades, while the other has continued to pursue their career. If there is only one wage earner, how much longer is that person going to be able to work before they want to or are forced to retire?

In many of these late in life divorces, the income producing spouse may need to continue to be employed well past the age at which they thought they would retire. If that is the case, one way to structure a settlement is to require that person to pay spousal maintenance for a limited, fixed period of time, and then, if they continue to work beyond that timeframe, to provide for the unemployed spouse to receive a percentage of the working spouse’s income for as long as they remain employed or until a fixed point in time is reached.

What retirement benefits are available to the parties? Is there a pension or other retirement assets? Are the other assets that are being divided income producing and, if they are, what would be a reasonable rate of return to ascribe to those assets for the remainder of a party’s life? Can they continue to make retirement plan contributions following the divorce? Does it make sense to transfer a greater share of the retirement assets to the unemployed spouse in return for a reduced obligation to pay spousal support?

Consideration must also be given to the availability and amount of Social Security Retirement Benefits. Where both spouses have worked and paid into Social Security one important question for the spouse that

was the lesser earner is whether they will receive more benefits under their own Social Security account or as a spouse under the higher earning spouse's account. (Another issue may be the impact of a claim for spousal benefits by a former spouse in addition to the claim of a current spouse.)

In addition to dividing bank accounts, mutual funds, securities accounts, investments, etc., thought must also be focused on whether the marital home or homes should be sold in order to generate more available funds to support the parties, whether the costs of continuing to own a home are lesser or greater than rent, whether a life estate may make sense, whether purchasing a replacement home in order to downsize or to relocate to a lower cost of living and/or lower income tax venue would be beneficial, etc.

Importantly, the need and availability of health care and its costs must be considered. Are the parties eligible for Medicare? Should they be purchasing Medicare and prescription supplemental coverage? Do they have or should they purchase long-term care insurance? Is an assisted living facility or nursing home care required or imminent? If there is life insurance for the recipient if the spouse who pays spousal maintenance dies unexpectedly?

It is never too early to start planning for retirement. However, most couples generally do not plan for divorce during or as they approach their later years in life, which makes the job of the attorney for older matrimonial clients different in perspective than when representing clients "in the prime of their lives." What is set forth above is only "the tip of the iceberg" when considering the issues facing people in the realm of the "gray divorce." Ultimately, the words of the poet Robert Browning, "Grow old with me! The best is yet to be ..." may ring hollow when people are facing a gray divorce.

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