

Inside Counsel – Gray Divorce

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1. Why are baby boomers divorcing at an unprecedented rate?

According to a study done by the National Center for Family and Marriage Research at Bowling Green State University in Ohio, researchers Susan Brown and I-Fen Lin found that the divorce rate for Americans over the age of 50 doubled between 1990 and 2010 and the divorce rate for those over 65 has more than doubled. One in four divorces are couples over the age of 50, while one in ten divorces are couples aged 65 and older.¹ This trend has prompted the catch phrase: “Gray Divorce.”

The rise in “Gray Divorces” can be attributed to the elimination of what was once the social stigma of divorce, increased life expectancies, the changing socioeconomic status of women, and increased opportunities to find a new and potentially more satisfying partner.

A stigma no more. Divorce was once a social stigma considered by society to be a shameful failure by one or both parties. We are now living in an enlightened era where even the Catholic Church is reassessing and potentially softening their position on divorce and annulment; late-life divorce no longer portends life as a social or religious outcast.

Increased Life Expectancy. As individuals are living longer, they are more likely to leave their marriage if they are unsatisfied. After their children grow up and leave the home, couples in their 50s and 60s find themselves asking if they really want to spend the next 20, 25, or 30+ years with each other.

¹ Susan L. Brown, I-Fen Lin, & K.K. Payne, *Age Variation in the Divorce Rate, 1990-2012*. National Center for Family & Marriage Research, 2014, available at <http://www.bgsu.edu/content/dam/BGSU/college-ofarts-and-sciences/NCFMR/documents/FP/FP-14-16-agevariation-divorce.pdf>. See also Mary Beth Franklin, *Gray divorce boosts poverty level for women*, Investment News, January 12, 2016, available at <http://www.investmentnews.com/article/20160112/BLOG05/160119983/gray-divorce-boosts-poverty-level-for-women>.

Changing Status of Women. According to AARP, women initiate 60% of divorces after the age of 40.² As women have become more independent and financially solvent, they can afford to leave a marriage in which they are unhappy.

Increased Opportunity. Americans now have higher standards for their relationships and expect to experience more personal satisfaction. With the increase of online dating sites for older Americans, there are now more opportunities than ever before for people over the age of 50 to find new partners.³

2. What important financial issues does gray divorce create?

Without sound legal advice and careful financial planning, late-life divorcées risk becoming economically disadvantaged in comparison to their single or married counterparts.

Despite the recent strides made by women toward wage equality and socioeconomic gains, the economic disparity between men and women widens with age. Although more than 50% of women between the ages of 55 to 64 are employed, women still earn less than men. Combined with the fact that women also tend to live longer than men, women face a greater financial risk compared to men.

Moreover, studies show that Gray-Divorces have had a disproportionate effect on women: 27% of Gray-Divorced women live below the poverty line compared to just 11% of Gray-Divorced men.⁴ In addition, on average, Gray-Divorced women receive less Social Security benefits than Gray-Divorced men and other single women.⁵

The possibility of receiving or paying spousal support/alimony needs to be carefully assessed. In Maryland, temporary alimony, which is intended to provide financial support just long enough for the lower earning spouse to get back on their feet, is more common among younger couples. In contrast, the role of spousal support/alimony for those exiting long-term marriages, late in life, could be much different.

² Abby Ellin, *After Full Lives Together, More Older Couples Are Divorcing*, New York Times, October 30, 2015 http://www.nytimes.com/2015/10/31/your-money/after-full-lives-together-more-older-couples-are-divorcing.html?_r=0

³ Brown & Lin, *Gray Divorce: A Growing Risk*, *supra*.

⁴ Franklin, *supra*.

⁵ Ellin, *supra*.

3. How is gray divorce affecting the legal industry?

In the wake of Gray-Divorces, it is more important than ever for divorce attorneys to team up with estate planners, financial advisers, accountants, elder law attorneys and other professionals to ensure that their clients' financial futures are as secure as possible.

Individuals may have acquired insurance policies during the marriage, drafted a will or power of attorney that benefit the other spouse, or that name the other spouse as an executor or personal representative. Before filing for divorce, the client should discuss these issues with their attorney to determine if changes should be made sooner rather than later.

In addition, new legal questions particularly affecting late-life divorces are emerging. For example, in Maryland, there is a case currently pending before its Court of Appeals to determine whether a trial judge dividing assets in a divorce case should consider offsetting one spouse's potential Social Security benefits against another spouse's pension where the pensioner is ineligible to receive Social Security benefits.

4. What issues does the splitting of pensions, IRA's, properties, etc. cause? How can this be rectified?

For older adults, divorce brings the realization that their carefully nurtured nest egg will have to be divided between them, and this can be painful. Gray-Divorces also present financial security issues because divorcing couples have fewer years remaining in their lives to recoup the financial losses occasioned by divorce.

Therefore, the division of retirement funds is integral to divorce settlements. Social security and Medicare options should be thoroughly explored and while it might be beneficial for the parties to maintain a life insurance policy on the other after divorce, it may no longer be affordable.⁶

Individuals dividing pensions should pay particular attention to the numerous elections and options available, including the election of a former-

⁶ Tara Fass, *Grey Divorce and Conscious Aging: 7 Ideas to Consider*, Huffington Post, November 10, 2014, available at http://www.huffingtonpost.com/tara-fass/grey-divorce-what-to-cons_b_6129132.html.

spouse survivor benefit annuity. Individuals dividing other assets need to make sure that tax consequences are reviewed prior to finalizing a settlement to insure neither spouse ends up with a tax bill that could have been reduced or avoided. To split retirement assets, a divorcing couple will need a specialized pension Court Order, *e.g.* a Qualified Domestic Relations Order (QDRO) designed to accomplish the division of these assets and to insure a tax-free transfer.

5. Can people maintain their lifestyle after this big split?

For economically secure, healthy adults, a divorce may have a minimal negative impact. However, it is typically more expensive for two people to live separately than for those two people to live together. Expenses will increase when each has to pay for their own health insurance, housing and everyday expenses like utilities and auto insurance.

The cost burden can become unnerving and each spouse may have to face the decision to either return to the workforce, delay retirement, or reduce their standard of living.

Receiving sound advice, early on, from a divorce attorney who understands the likelihood of an award of alimony/spousal support and the effects of dividing assets, including retirement assets, and who will work closely with your financial planner to analyze your options under the law will go a long way toward future financial security.

6. As a lawyer, what is your advice on the subject to other lawyers, as well as to people going through a gray divorce?

First and foremost, divorce attorneys should be aware of their client's current and future needs and carefully assess all assets and the client's sources of income before and after retirement. Careful consideration should also be given to issues such as: the valuation and/or division of business interests, each spouse's potential Social Security benefits, how to effectuate a division of joint investments and retirement plans, survivor benefit annuity options, etc. Divorce attorneys should familiarize themselves with the benefits and pitfalls of reverse mortgages for divorcing clients who want to remain in the marital home but may not be able to afford it. Attorneys should always remember there is a wealth of information available by consulting loan officers, accountants, financial planners, and other professionals when advising their clients.

For those going through a Gray Divorce, you'll want to do a thorough and honest assessment of your projected post-divorce income and expenses. You will also want to consider to what extent you wish to include, as part of any settlement discussions with your spouse, issues relating to your adult children, including financial support for higher education, weddings, or grandchildren. Ultimately, you may have to accept that your lifestyle can change after divorce and while picking up and starting over can be emotionally and financially challenging, seeking the advice of an experienced divorce lawyer will help to ensure that the next chapter of your life gets off on the right foot.