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## When Divorces Go Grey

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# When Divorces Go Grey

By Diana P. Zitser and Tyler C. Vanderpool

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“Grey divorces” have seen a significant amount of growth due to an aging baby boomer population. In 2010, after forty years of marriage and to the shock of friends and family, former Vice President Al Gore and his wife Tipper Gore announced that they were divorcing.





By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 34.

**W**HILE A VICE PRESIDENT divorcing is certainly shocking, what appeared to be the most surprising was the duration of the marriage and how in spite of it, they chose to separate.

These divorces are often referred to as “grey divorces” or “later-in-life divorces.” Such divorces are characterized by three constants: (1) a long-term marriage (2) which has failed and is now ending in a divorce (3) between persons who are typically age 50 or older. For a family law attorney, these type of separations result in several issues that are not common with traditional divorces.

### **The Rise of Grey Divorces**

The U.S. Human Resources Services Administration has reported that Americans over the age of 50 are divorcing in higher numbers than ever before. One may think that this statistic is merely a product of a general rise in divorces. However, the rate of divorce in the last 20 years has remained relatively constant while divorces among those aged 50-64 have actually risen.

This is exacerbated not only by the fact that this generation enjoyed an unprecedented level of prosperity, but also because modern advancements in health and medicine are adding additional years of life expectancy to those involved. Thus, the amount at stake in a grey divorce is at an all-time high.

### **Dividing the Community**

With so much at stake, negotiations and proceedings are going to remain anchored around the division of assets. Because of the duration of time invested in the marriage, a community estate in a grey divorce can become substantial and complex. Such divorces routinely involve family homes, vacation homes, rental and investment

properties, furnishings, jewelry, bank accounts, life insurance policies, stocks, bonds, retirement and pension plans, and IRAs. The more substantial the estate, the higher the probability that a forensic accountant and experienced appraiser will need to be brought in to provide an expert opinion of what truly is at stake.

An additional complication may arise due to the inordinate amount emotional stress of ending a marriage of above-average longevity. Personal attachments to specific items will cause seemingly benign items to become central to the distribution of the estate. The family law attorney must be able to deal with these considerations during the proceedings and also be aware of the implications these decisions will have after the divorce is final.

When looking at the assets, two key factors should be considered. The first is the financial valuation of the asset. As noted above, this can be quite complex and given the duration of the marriage, there is a greater probability of requiring sophisticated expertise in determining the proper value. The second is the importance of the asset at present value as compared to a later point in time. It is vital to approach the division of the community estate by recognizing the various complex financial considerations at play, as well as the sensitivity of appreciating the emotional stresses and attachments inherent in the dissolution of a long-term marriage.

### **The Family Home**

The family home will remain an important asset when dividing the community. The market value of the home should be relatively easy to determine. However, the asset’s importance at the time of separation may not truly be apparent. Several tax benefits, personal financing opportunities (e.g., reverse mortgages)

and their impact on social and retirement benefits may not be realized until a person reaches a particular age or elects to retire.

Furthermore, the emotional attachment to the home is typically of great consideration. The parties may disagree as to who should get the home and whether to sell it to cash out the estate. Typically, the equity in the home will prove to be a substantial asset in the community and thus will be integral to proper asset division. The family law attorney should develop multiple models and explore all options to ensure the most equitable outcome for the client.

### **Retirement Benefits and Stock Holdings**

Retirement benefits, including pensions, retirement accounts and stock holdings, become even more important in grey divorces than in their traditional counterparts. Many investments will have finally reached maturity and are typically at their peak value at this period of the client’s life. Because the retirement investment vehicles are typically assigned to a single primary holder with a named beneficiary, changing the characterization of these assets can be tricky at times.

A Qualified Domestic Relations Order (QRDO) may be required to divide the benefits as necessary and outline the rights and privileges of the parties involved. There are also important tax considerations to be accounted for when valuing these assets.

Pensions represent a unique concern when approaching this classification of assets. The federal government enacted the Employee Income Retirement Security Act (ERISA) as a means to protect pensions. Generally speaking, private pension plans are subject to ERISA, whereas

government plans are not. ERISA and non-ERISA plans present different approaches for the family law attorney seeking a QDRO because of the standards to which the request and the pensions themselves must comply.

One main issue in the QDRO's wording will be the exact division that will occur. In California, pensions will be valued based on the amount of pension benefits that accrued during marriage. After valuation, a pension may be cashed out based on the estimated future value or jurisdiction or may be reserved so that upon retirement, a percentage of each check given to the pension holder is awarded to his or her spouse. Retirement is not limited to the actual date of retirement but the court may order that the benefits shall be awarded at a time when the pension holder could retire.

Disability has also emerged as an emerging issue in grey divorces. Recent case law has begun to distinguish between disability allowance payments and disability retirement payments. While both are in fact disability benefits, courts are more apt to

characterize the former as separate property. This is because rather than provide for retirement, the allowances are meant to replace lost wages as a result of the disability. The family law attorney should be quick to distinguish the two if such an issue arises.

### **Social Security**

Social Security can play a minor, but important role in later-in-life/grey divorces. After the age of 62, a party may be entitled to benefits from the former spouse. This is a heavily complicated area and thus the family law attorney should be well-versed in the current Social Security Administration's guidelines.

### **The Impacts of the Divorce**

The potential for tremendous emotional impact of divorce should be handled extremely sensitively and proactively. A poorly handled case may cause not only emotional difficulties during the primary proceedings, but can also wreak havoc on the lives of the ex-partners after the divorce decree is completed. A well-thought out strategic

divorce plan should consider all risk factors mentioned above as well as the implications of future estate planning and quality of life for the client.

### **Financial Independence**

Because later-in-life divorces can involve retirees or those on the cusp of retirement, the prospect of securing financial independence is an especially trying concern. While appropriate asset division remains the chief mechanism of protecting client's financial future, there are other sources of future income that should be considered.

As discussed above, the equity in the marital home is likely to be the substantial portion of the community value. How the valuation is performed is a pivotal issue in assuring financial independence. For various reasons, a deferred sale of home order may be requested so that the family home may stay within the possession of one of the parties until a specified date. This too will extend the transitional period after the divorce is final.


When one party is the chief provider, spousal support is the typical remedy for assuring financial independence. Since later-in-life divorces typically represent long-term marriages, the length of the support is typically proportional to the term of the marriage, often resulting in lifetime support awards. However, such an award may overly burden the providing spouse if the court fails to consider his or her planned retirement age.

The fact that the providing spouse will eventually stop working must be taken into consideration when evaluating spousal support scenarios. A poorly planned spousal support model may require a future modification order which again would add ongoing stress to both parties.

The primary authority for evaluating spousal support awards is California Family Code §4320. This section balances a number of factors including but not limited to: contributions to the supporting spouses education, training or career; the ability to pay; the needs of each party based upon the marital standard of living; the obligations and assets of the parties; the duration of the marriage; the ability

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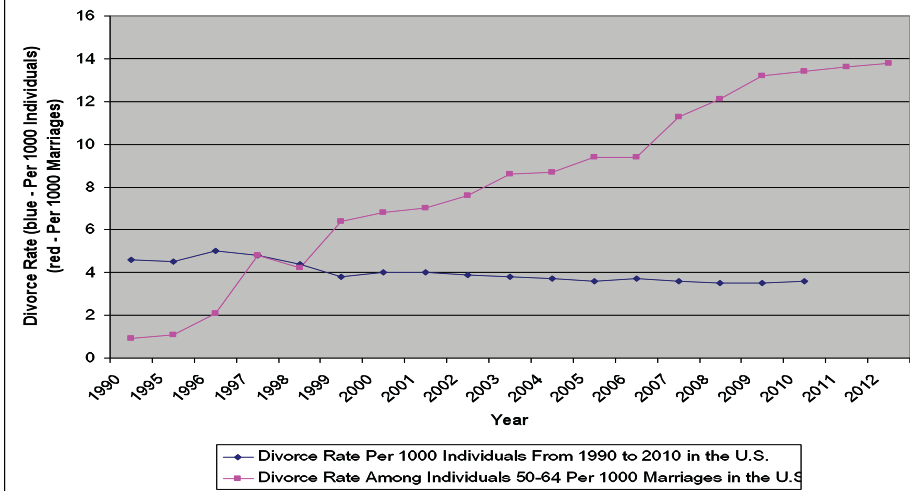


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**Later In Life Divorce Rate Has Increased While National Divorce Rate Has Remained Constant From 1990-2012**



\*Sources:<sup>1</sup> Chart created by the Law Offices of Diana Zitser based on source data.

to earn; the age and health of the parties; tax issues; and a balancing of the hardships. The court will balance these factors with the ultimate goal of financial independence.

**Health Care and Coverage**

While moving on with one’s life may seem beneficial from a theoretical perspective, the harsh reality is that a particular standard of living has been established and may be difficult to maintain on one’s own. If one has been accustomed to having their medical expenses paid for or particular conditions treated with the assistance of one’s spouse, how these are handled after the divorce should be considered during the divorce process.

In California, a person is entitled to remain covered by his or her spouse’s insurance until the date when the divorce becomes final. It is rather common for tempers to flare and for one to remove the benefits of another. Such actions must be closely monitored to ensure coverage is maintained throughout the proceedings. The attorney should also be sure to request that expenses be covered if one party relied on such care throughout the marriage.

**Estate Planning**

Note should also be taken of what documents exist as to the distribution of each party’s personal estate after their passing. In grey divorces, these are likely to include wills, trusts, life insurance policies and other transfers of assets upon the death of one or both of the parties. In the event these need to be modified, it must be assured that the intent of the parties to the various documents remains consistent after the divorce proceedings are finalized.

In some cases, the parties may advocate for their grandchildren’s well-being or for their adult children’s financial security. This too should be considered in the modification of estate planning documents so as to reflect the intent of both parties.

**Miscellaneous Issues**

There are various other issues that must be taken into account during the negotiation period. Both parties may have committed more than half of their lives to the marriage and the psychological ramifications that may arise can be great even if not readily apparent. All alternatives should be considered and explored to minimize the trauma on all parties involved.

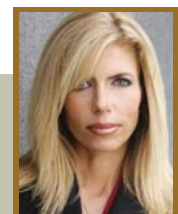
As an alternative to divorce proceedings, the family law attorney may wish to explore with the client the benefit of a formal separation with a well-spelled out separation agreement. Additionally, all possible future scenarios should be fully explored and accounted for. As an example, the parties may ultimately remarry, and a prenuptial agreement for the second marriage may be appropriate.

Later-in-life/grey divorces present unique challenges and considerations not found with their younger counterparts. It is the attorney’s job to remain mindful of the complexity that a long-term marriage may represent to the issues of support and division of the community estate.

Implications inherent in the later-in-life divorces include complex issues such as tax liability for assets at present and future values, as well as its impact on the client’s own financial independence as well as the effect on other parties involved.

During the course of representation, the attorney should remain compassionate and mindful of the stress and hardship the proceedings may have on each party. This may be one of the most difficult times in the person’s life and while it may be difficult to think about the future, failure to do so can have devastating results.

During this very trying period of a client’s life, attorneys should focus on eliminating any unnecessary conflicts, any destructive “game-playing” and generally focus on maintaining integrity in the process and minimize cost and emotional stress. The priority of the divorce process should be to focus on client’s protection and empowerment and to assure improvement of his or her quality of life and well-being. 🐾



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# Test No. 45

## MCLE Answer Sheet No. 45

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Grey divorces typically involve short-term marriages between persons age 50 or older.  
 True  False
2. In the last 20 years, the rate of divorces of all ages has risen at the same rate as grey divorces.  
 True  False
3. In dividing assets, the importance of the asset to the parties now and the importance of the asset to the parties at a future point in time should both be considered.  
 True  False
4. California law does not consider tax implications in the division of assets in grey divorces.  
 True  False
5. For dividing retirement benefits and stock holdings, a Qualified Domestic Relations Order (QDRO) may be necessary.  
 True  False
6. Generally, private pension plans are not subject to the Employee Income Retirement Security Act (ERISA), whereas government plans are.  
 True  False
7. In California, all pensions are divided immediately upon the dissolution of marriage.  
 True  False
8. Disability allowance benefits and disability retirement payments are always treated as community property.  
 True  False
9. A spouse may be entitled to the Social Security benefits of his or her spouse in a grey divorce.  
 True  False
10. California Family Code §4320 does not consider the financial obligations of the parties when making an award of spousal support.  
 True  False
11. California Family Code §4320 does consider the standard of living established during the marriage when making an award of spousal support.  
 True  False
12. A deferred sale of home order may be requested and granted in a grey divorce.  
 True  False
13. The value of the pension is established from the time it was created until the date of retirement regardless of the length of the marriage.  
 True  False
14. If a person is awarded benefits from his or her spouse's pension, the court may order such benefits be given when the holder is able to retire rather than when they actually retire.  
 True  False
15. In modifying a spousal support order, the court may consider the fact that retirement will create a change in the amount of income the supporting party will earn.  
 True  False
16. Grey divorces are more likely to result in temporary spousal support orders rather than lifetime support orders.  
 True  False
17. After the initial request for dissolution of marriage is filed, a party is entitled to remain on his or her spouse's health insurance plan.  
 True  False
18. An alternative to a grey divorce is a formal separation coupled with a separation agreement.  
 True  False
19. A Qualified Domestic Relations Order (QDRO) in California does not have to comply with the Employee Income Retirement Security Act (ERISA).  
 True  False
20. The family law attorney should be mindful of the impact the divorce may have on estate planning documents.  
 True  False

### INSTRUCTIONS:

1. Accurately complete this form.
2. Study the MCLE article in this issue.
3. Answer the test questions by marking the appropriate boxes below.
4. Mail this form and the \$15 testing fee for SFVBA members (or \$25 for non-SFVBA members) to:

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6. Correct answers and a CLE certificate will be mailed to you within 2 weeks. If you have any questions, please contact our office at (818) 227-0490, ext. 105.

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### ANSWERS:

Mark your answers by checking the appropriate box. Each question only has one answer.

1. \_\_\_\_\_  True  False

2. \_\_\_\_\_  True  False

3. \_\_\_\_\_  True  False

4. \_\_\_\_\_  True  False

5. \_\_\_\_\_  True  False

6. \_\_\_\_\_  True  False

7. \_\_\_\_\_  True  False

8. \_\_\_\_\_  True  False

9. \_\_\_\_\_  True  False

10. \_\_\_\_\_  True  False

11. \_\_\_\_\_  True  False

12. \_\_\_\_\_  True  False

13. \_\_\_\_\_  True  False

14. \_\_\_\_\_  True  False

15. \_\_\_\_\_  True  False

16. \_\_\_\_\_  True  False

17. \_\_\_\_\_  True  False

18. \_\_\_\_\_  True  False

19. \_\_\_\_\_  True  False

20. \_\_\_\_\_  True  False