

ABA SECTION OF FAMILY LAW

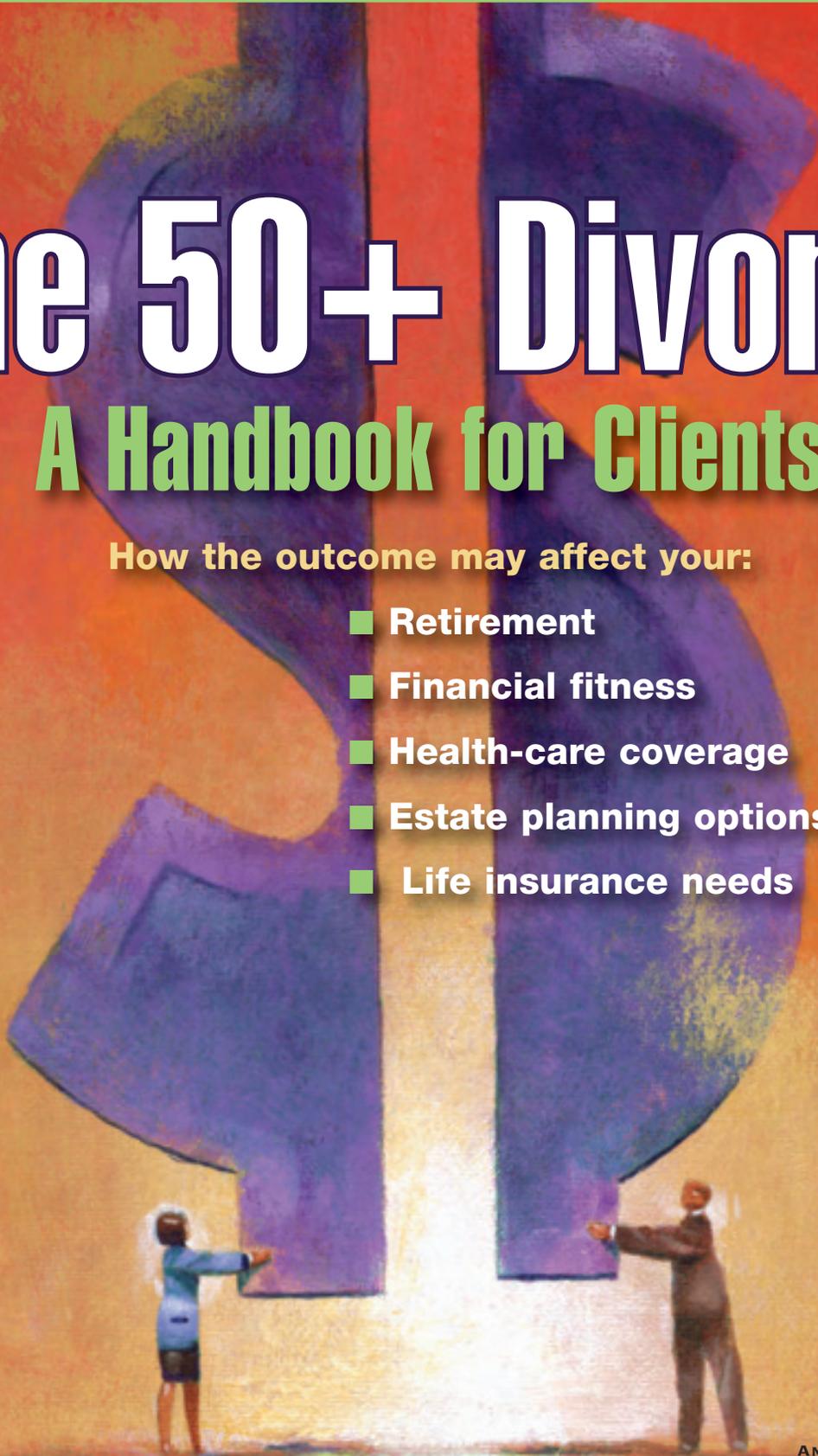
# FAMILY ADVOCATE

## The 50+ Divorce

### A Handbook for Clients

How the outcome may affect your:

- Retirement
- Financial fitness
- Health-care coverage
- Estate planning options
- Life insurance needs



AMERICAN BAR ASSOCIATION

## Features

**6** **A Divorce Detour on Your Road to Retirement**  
by *Ed Ricardo*

**8** **Do We Understand Each Other?**  
When age-related issues get in the way  
by *Ivan Mazzorana*

**10** **A House Divided**  
by *Marcia Soto*

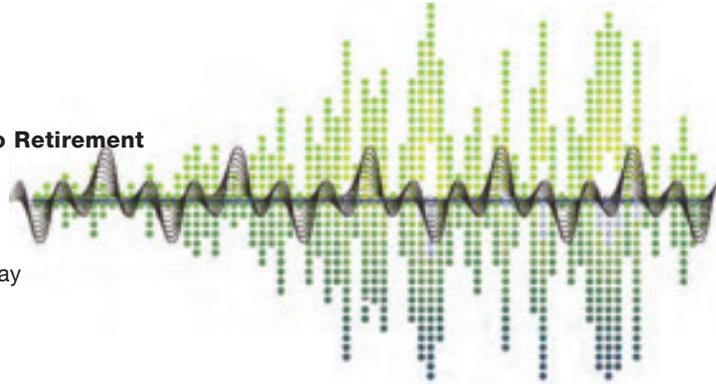


**13** **Will Divorce Be Kind to Your Health-Care Coverage?**  
Predivorce planning to protect your postdivorce options  
by *Jan L. Warner & Matthew E. Steinmetz*



**18** **Promises to Keep**  
Support obligations after age 50  
by *Laura W. Morgan*

**22** **The Grandkids & Your Rights**  
Understanding your role in custody and visitation  
by *James Wilson Douglas*



**25** **What Will Be—Now & Forever**  
Divorce means a new lease on life and a fresh look at your estate plan  
by *Lynne S. Hilowitz*

**28** **Life Insurance as Leverage**  
Using coverage to balance your postdivorce commitments with long-term financial security  
by *Alex Shibicky*

**32** **All Right, I'm Divorced, Now What?**  
by *James Wilson Douglas*

**36** **Books & More**  
A 50+ Divorce Bibliography



**SERVING AS THE NATIONAL LEADER IN THE FIELD OF MARITAL AND FAMILY LAW**  
**KNOWLEDGE • EXPERTISE • NETWORKING**

FAMILY ADVOCATE (ISSN 0163-710X) (USPS 481-210) is published quarterly by the Section of Family Law, American Bar Association, 321 N. Clark St., Chicago, IL 60654-7598. Periodicals postage paid at Chicago, IL, and additional mailing offices. Single copy price for members and nonmembers is \$12.95. Quantity discounts are available. Authors' views have not been approved or endorsed by the ABA House of Delegates, the Board of Governors, the Section of Family Law, or the *Family Advocate* Editorial Board and, accordingly, should not be construed as representing the policy or preferences of the ABA. © 2008 American Bar Association. All rights reserved. This issue and the contents herein may not be reproduced or disseminated, in full or in part, without express permission from the American Bar Association. Please send reprint requests to Manager, Copyright and Licensing, via e-mail to [copyright@abanet.org](mailto:copyright@abanet.org), or via fax to 312/988-6030.

Excerpted from *Family Advocate*, Summer 2008 (Vol. 31, No. 1)

**To order extra copies, see back cover.**

**WWW.**

[www.abanet.org/family/advocate](http://www.abanet.org/family/advocate)

**Editorial Board**

**EDITOR IN CHIEF**

Willard H. DaSilva  
585 Stewart Ave.  
Garden City, NY 11530

**SENIOR EDITOR**

Norman N. Robbins  
West Bloomfield, MI

**ISSUE EDITORS**

Carl Gilmore, McHenry, IL  
Jacqueline M. Valdespino, Coconut Grove, FL

**BOARD MEMBERS**

Joy Feinberg, Chicago, IL  
Melvyn B. Frumkes, Miami, FL  
Bob Guyot, Traverse City, MI  
Ann M. Haralambie, Tucson, AZ  
Kathleen A. Hogan, Denver, CO  
Ruth-Arlene Howe, Newton, MA  
Laura W. Morgan, Charlottesville, VA  
Peggy L. Podell, Milwaukee, WI  
Timothy B. Walker, Littleton, CO

**LAW PRACTICE MANAGEMENT EDITORS**

Stephen J. Harhai, Denver, CO  
Lee S. Rosen, Raleigh, NC

**EX-OFFICIO**

Linda Elrod, Topeka, KS

**EDITOR**

Deborah Eisel  
1600 S. Main Street  
Racine, WI 53403  
262-619-1334  
Fax: 262-619-1335  
EiselD@sbcglobal.net

**DESIGN/PRODUCTION**

TJS Design Inc., Chicago, IL

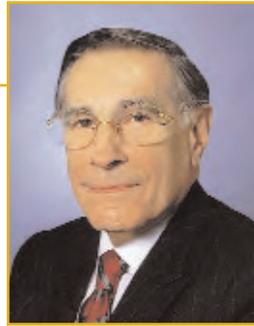
**EDITORIAL POLICY**

*Family Advocate*, published by the American Bar Association Section of Family Law, offers practical, practice-oriented articles for family lawyers, their clients, and other professionals involved in divorce, child custody, adoption, and other family-law related issues. The articles in *Family Advocate* do not express the official policy of the ABA or the Section of Family Law. They represent the views of thoughtful members of the bench and bar who are interested in effective advocacy and the American family.

[www.abanet.org/family](http://www.abanet.org/family)

From the **Editor**

Single Again—Older,  
but Wiser



BY **WILLARD H. DASILVA**

**T**his issue of the *Family Advocate* is a primer for anyone who is becoming or has recently become divorced in middle life. The articles contained in this publication are designed to help you avoid potential problems as time goes by. In the pages that follow are samplings of some of the issues you may confront and helpful suggestions to facilitate the economic transformation from married life to that of a single person. The articles will provide clues to issues that may arise and how to avoid problems and find solutions to them.

“A Divorce Detour on Your Road to Retirement” by Ed Ricardo describes how a divorce may affect retirement planning. He explains how to assess your current expenses and project whether you will have enough income and financial resources to retire, how to adjust investment strategies, how the divorce will affect any support obligations you may have, and how to facilitate sensible decisions that will affect your future.

Ivan Mazzorana, M.D., talks in his article “Do We Understand Each Other?” about the stress of divorce and what to do if you become overwhelmed by the process and cannot grasp and retain your options. He explains how a divorce

client can work with his or her attorney to overcome age-related impairments (judgment). He also explains what to do if you believe that a soon-to-be former spouse may be suffering from dementia or other age-related problems that may compromise that person’s competence.

In “A House Divided,” Marcia Soto helps you to think through the dilemma of whether staying in the family home makes good sense or not. She looks at the emotional issues, as well as the financial facts

**What to do if you believe that a soon-to-be former spouse may be suffering from dementia**

of the mortgage and the cost of maintaining the house, what it is worth, what it may be worth in the future, and whether owning the house will be an obstacle or a valuable asset in the future and on the road to retirement.

**Health insurance**

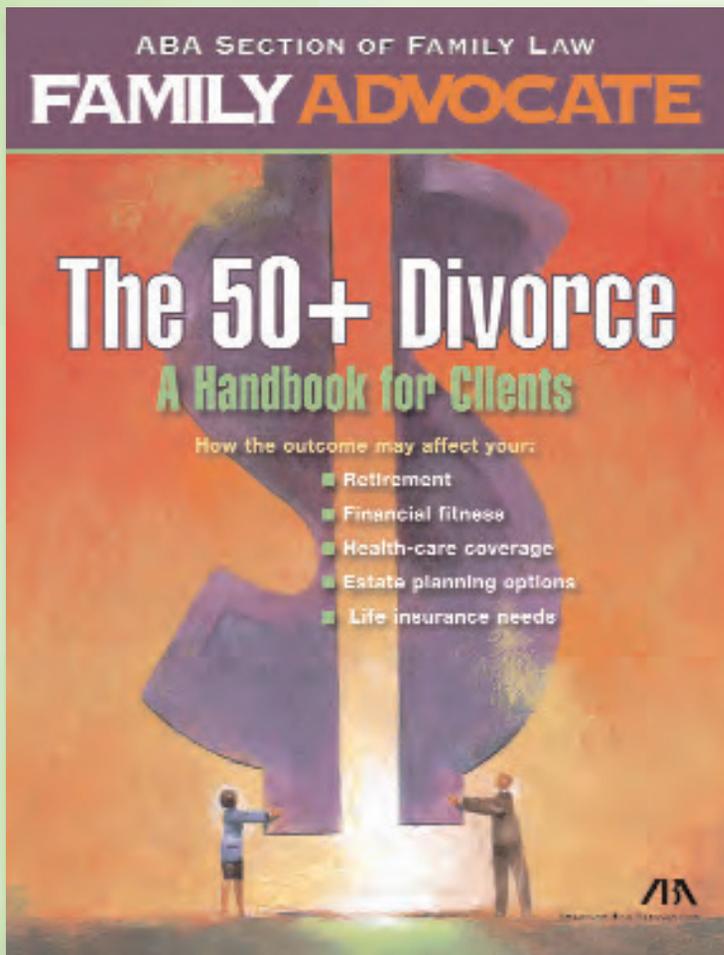
Predivorce planning to protect your postdivorce options is the subject of “Will Divorce Be Kind to Your Health-Care Coverage?” by Jan L. Warner and Matthew E. Steinmetz. The authors summarize very important health insurance coverage and the options that may be available

*(Continued on page 4)*

# Dear Client,

This handbook has been created by the American Bar Association Section of Family Law. It is a special gift for you from your lawyer. We have tried to anticipate your questions and the range of issues that may surface during and after your divorce.

We hope that the experiences, explanations, and suggestions of our authors will help you manage your feelings and trigger productive and helpful discussions between you and your lawyer. Our goal is to help you feel more comfortable and confident as you work through the divorce process and anticipate how your life may change in the future.



Divorce is difficult at any age, but when it comes later in life, it is further complicated by retirement planning, the reality that fewer years left in your working life mean less time to offset new financial obligations resulting from the divorce, and the increasingly common problem of securing or extending affordable health-care coverage.

As you think through these complicated issues, do not hesitate to contact your lawyer with important legal questions or a mental-health professional to help you deal with your feelings. Our hope is that with this handbook in hand you will emerge from your divorce—single again—older perhaps, and wiser for sure.

Wishing you all the best.

*ABA Section of Family Law*

[ Afix lawyer's business card here. ]

## From the Editor

(Continued from page 2)

for those over age 50. They cover private health insurance, COBRA, Medicare, Medicaid, as well as a living will, medical power of attorney, durable power of attorney, and what you should do to protect the confidentiality of your medical information.

Laura Morgan, in “Promises to Keep,” examines support obligations, particularly after age 50, and how a divorce can impact obligations to provide maintenance and child support into your retirement years.

“The Grandkids & Your Rights” by James Wilson Douglas helps to provide an understanding of custody and visitation issues. The author helps to sort out the state of the law regarding grandparent visitation and custody and explains that grandparents are not on an equal footing with biological parents, no matter how involved, loved, or caring they are. He provides suggestions for documenting your role in the children’s lives and how to demonstrate

to the court a need for grandparent visitation.

A divorce for anyone usually destroys a preexisting estate plan, if one was ever in place. In “What *Will* Be—Now and Forever,” Lynne S. Hilowitz recognizes that a divorce, particularly for persons over the age of 50 years, means a new lease on life and requires a fresh look at your estate plan. The article examines wills, trusts, and beneficiary designations and, particularly, what they are designed to do for you, especially in later years.

“Life Insurance as Leverage” by Alex Shibicky provides tips on using life insurance coverage to enhance your postdivorce financial security. This article provides an overview of various types of life insurance and suggests which ones may be preferred later in life. He also poses seven questions that you should ask from a financial and life insurance planning perspective to prevent unintended consequences.

### Now what?

What the newly divorced person should do after the divorce

judgment is the subject of “All Right, I’m Divorced, Now What?” by James Wilson Douglas. He covers extending existing insurance coverage and obtaining new policies; changing beneficiaries; changing your name; changing your address with the IRS and Social Security, as well as on your driver’s license, voter registration, passport, visa, etc.

## This issue will help you to recognize some of the problems unique to older persons and how to deal with them

As with most writings that provide a survey of issues and suggestions to help resolve them, the articles that follow are not designed to provide intense and in-depth information. Rather, they highlight basic problems and offer suggestions to consider in resolving them with the aid of qualified professionals. This issue of *Family Advocate* will help you to recognize some of the problems unique to older persons and how to deal with them.

Any professional, particularly an attorney, financial planner, or insurance expert, will appreciate your inquiries, work with you to enhance your basic understanding of the problems, and help you to find solutions that will work best for you and your family.

In closing, if you find this handbook helpful, take a look at others designed to address a variety of divorce-related issues. See the back cover of this handbook for a complete list of *Family Advocate* client handbooks, with pricing and ordering information. **FA**

## Thank you, Steve

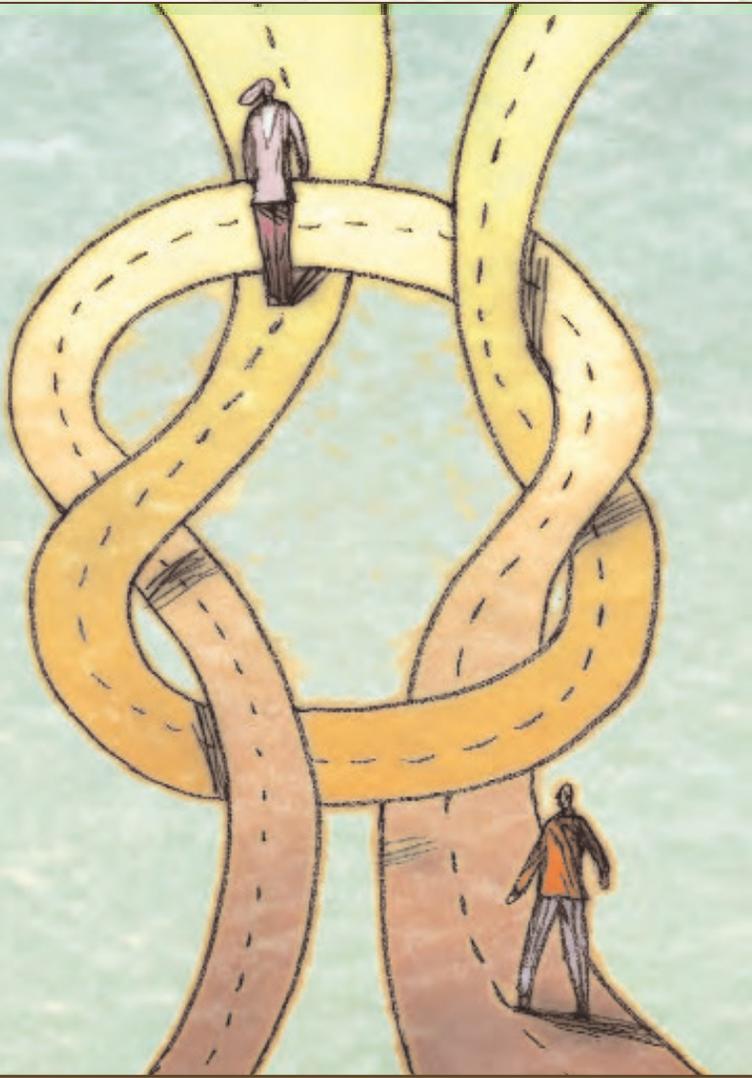
**S**tephen J. Harhai began as a contributor to *Family Advocate*’s Tools of the Trade column back in 1993. Before long, Steve and Lee Rosen had teamed up as rotating columnists, each writing two columns a year. For fifteen years, they covered the changing landscape of law-office management and technology. They led by example and exposition as they shared their small-firm experiences in transforming their offices with computer software and hardware, e-mail solutions and Web site technologies, as well as family-law software packages, online back-up and storage options, virtual office tools, and much more. With the Spring 2008 issue, Steve has put down his pen. He claims to have run out of ideas, but we know better.



Thank you, Steve. We wish you well as you pursue new adventures, and thank you for your professionalism, good humor, and tenacious commitment to the column and to *Family Advocate*.

# A Divorce Detour on YOUR ROAD TO RETIREMENT

BY ED RICARDO



**F**or most Americans, divorce and retirement are two major life-changing events that can have significant financial impact in their golden years.

Most of us start dreaming of retirement long before it becomes a reality. However, when a long-term marriage ends in divorce later in life, those dreams of retiring to a life of travel and leisure may need to be adjusted and often delayed. Divorce creates even greater stress for those who

anticipated a better lifestyle in retirement. The practical reality of a late-in-life divorce is that the parties are generally not able to maintain even the same standard of living they enjoyed during the marriage, given that the same fixed income now must be stretched to sustain two separate households.

According to the U.S. Census 2008 Statistical Abstract Report, life expectancy in 1960 was approximately 60 years for a man and 68 years for a woman; in 2004, those numbers increased by approximately nine years. Americans are living longer, but marriages are not faring as well. Statistics show that divorce in the golden years is steadily increasing. People are living longer, women are less financially dependent, and couples may have long sacrificed their personal happiness for the best interests of the family. Thus, many want out of unhappy marriages.

When a man or woman age 50+ chooses divorce, the financial challenges present in any marital dissolution are intensified. Generally, the children of the marriage are adults and, therefore, custody, child support, and college funding are not at issue. However, retirement savings now must be divided and provide support for two separate households. The older the couple, the less likely they are to recover financially postdivorce, and the more likely their standard of living will decrease. Careful consideration must be given to the financial consequences of a later-in-life divorce.

If you are considering divorce, gather all financial documents, including bank statements; pay stubs; car, boat, and real estate titles; pension and insurance documents; and records of assets and liabilities, including mortgage statements, tax returns, etc. These documents will be used to create a financial affidavit, which is a compilation of your current living expenses. The financial affidavit will include current assets and liabilities. When valuing assets, unless the asset is being divided equally between divorcing spouses, it is imperative that income taxes be considered and that the division of assets reflect the tax burden. The financial affidavit should include your actual income and expenses during the marriage. Track spending carefully; use your checkbook and credit card statements to ensure that you are picking up all expenditures in a realistic manner.

Generally assets acquired prior to marriage are nonmarital. However, when older couples divorce, premarital assets

may have been commingled over the years or subsumed into the marital estate. For example, either party may have received an inheritance. As long as the inheritance exists, is not commingled, and did not supply a stream of income upon which the parties relied, the inheritance will maintain its status as nonmarital property. If premarital or nonmarital assets exist and are identifiable, the value of those assets should be included in the financial affidavit. Any income derived from those assets should be included. As a general rule, although nonmarital assets are not divisible, income from those assets may be considered for support obligations.

After completing a financial affidavit, determine what your expenses will be following the divorce. Then create a budget showing what your projected expenses are likely to be. This budget will be used to determine your need for and/or ability to pay alimony or support. Include all available income and tax impact to reach the net available income. Remember to calculate and include all tax credits, including those available to clients age 65 and older. When estimating the return on investments, use a realistic percentage rate. Include any available Social Security benefits. The age 62 and older client is entitled to collect Social Security, pursuant to his or her Social Security earnings record, or

## When a man or woman age 50+ chooses divorce, the financial challenges present in any marital dissolution are intensified

may elect to receive one half of the ex-spouse's retirement benefits if the marriage lasted at least 10 years and if the ex is entitled to benefits. If the wage earner is not collecting, the divorced spouse must wait to collect. The wage earner's benefits are not reduced because of the ex-spouse's election to receive benefits as a former spouse.

Estimating what your postdivorce cash flow will be will help you make sound financial decisions during the divorce process. Often when facing a divorce, a party wants to keep the house, but has not carefully considered the financial burdens of that choice. Consider not only the mortgage payment, but also real estate taxes, real estate insurance, maintenance and repairs, utilities and other expenses associated with owning your home.

Couples of all ages are often compelled to trade retirement benefits for the home. Although choosing to retain the home instead of moving ahead with retirement plans is rarely the right choice, the younger the person, the more time he or she has to recoup lost (or traded away) retirement benefits. However, if the party receiving the home instead of the pension is already in the golden years, it is unlikely that retirement benefits will be recouped. In valuing the home, consider the capital gains tax: presently only the first \$250,000 of profit is excluded from capital gains tax for a

single person (double the exclusion is available to a married couple selling a home).

If retirement benefits need to be divided, generally they will require entry of a Qualified Domestic Relations Order (QDRO). These orders spell out division of the pension and must be approved by the pension plan administrator. Often QDROs must be entered in the final divorce judgment. State and federal government, foreign service, military, and railroad retirement plans mandate very specific language and have special rules governing distribution of pension benefits. Make sure that the appropriate steps are taken and that the person preparing the QDRO is knowledgeable and experienced.

Once you receive your share of the pension, do not forget to evaluate retirement benefits and determine if your funds need diversification. Following a divorce, you may want to be more or less aggressive with investment objectives. This is the time to re-evaluate investment strategies and make any necessary changes.

After the assets are divided and all income available to both parties is considered, the court determines your need for and ability to pay maintenance/alimony. Alimony may be awarded for a number of reasons. The recipient may not have enough income to sustain the desired standard of living or may need additional education or training to enter the workforce. However, when the parties are elderly, rehabilitative alimony may not be a consideration, because the recipient's age would obviate the possibility of re-entering the workforce and becoming marketable or self-sufficient.

The payment of alimony, when made pursuant to a court order or agreement, is deductible from the income of the payor and taxable to the recipient when it meets all requirements of the law. Transfer of the tax liability reduces the "cost" of the payment to the payor. However, when divorce happens in the golden years and the paying spouse faces imminent retirement, the duration of support and/or the conditions that will trigger termination or automatic reduction become paramount negotiable issues. It is important that the court order or settlement agreement establish the factors that trigger a termination or reduction of support.

The issues facing older divorcing couples are similar to those facing any couples, however, the pressure of time and the increased needs attributable solely to age and lost expectations regarding the golden years make resolving these issues critical. Discuss these issues with your lawyer, financial planner, CPA, and family so that you and your lawyer can plan a strategy to follow in the divorce. Having a clear understanding of your assets and needs is critical to meeting your expectations from a financial perspective. **FA**



**Ed Ricardo, CPA**, is a principal with the accounting firm of Jordan Castellon Ricardo in Coral Gables, Florida.

# Do We Understand



## WHEN AGE-RELATED ISSUES GET IN THE WAY

BY IVAN MAZZORANA

**H**ow can this be happening to me, said Felicity, a 69-year-old woman going through a bitter divorce. This is her second marriage. Her first husband of 40 years died and left her comfortably with a sizable inheritance. After a few years of being a widow, she remarried a man name George, with children from a former marriage. They were married 10 years before his feelings for her changed, and George filed for divorce. Felicity is now faced with having to deal with divorce proceedings and finds it a daunting experience. In fact, there are times when Felicity is so overwhelmed by emotions that she finds it difficult to comprehend what her attorney is saying and she struggles with decision-making. Her attorney is concerned that this may be something more than just a reaction to her situation, or even a lack of legal sophistication, as there are moments when Felicity is so forgetful that she repeatedly asks the same questions.

If you find yourself unable to focus on what your attorney is saying or are so nervous and upset that you cannot sleep well or concentrate during the day, this is not an uncommon reaction to the stress of divorce, particularly if you are over age 50. Felicity's story illustrates several points. First, divorce is a time of unexpected change and challenge. Second, divorce introduces conflict as both parties try to position themselves for best financial advantage or to protect loved ones. Third, divorce brings into question the potential problems regarding mental acuteness and a level of sophistication on matters of grave significance at a time of great vulnerability.

Although divorce may understandably be a time of confusion, rather than clarity, it is also a period ripe for certain conditions, such as depression. **Depression** is characterized by chemical changes in the brain brought on by many factors, including stress. It actually causes a change in a person's ability to function. An individual may complain of a loss of

interest, changes in appetite and weight, changes in energy level, impaired concentration, forgetfulness, fatigue, altered sleep patterns, and, at times, even thoughts of self harm.

A depressed person may appear to lack spontaneity, and seem indecisive and sluggish. The stress of divorce may also uncover underlying memory problems that were not evident before. If your hearing or sight is diminished and you use a hearing aid or cannot see clearly or read, even with eyeglasses, you should alert your attorney. Such conditions could impair your ability to participate effectively and coherently in your divorce process.

If you have a **hearing impairment** or use a hearing aide or **cannot see clearly** or read, even with eyeglasses, tell your lawyer so that he or she can make adjustments in the process and get you the help you need. If you feel a need to have an adult child or friend or relative accompany you to meetings with you lawyer, again, talk with your lawyer first. There may be issues of confidentiality that your lawyer will want to discuss before you make a decision to involve another person in the intimate details of your divorce case.

There are many **medical conditions** other than depression that can affect one's thinking. These include a history of stroke, long-term effects of diabetes, thyroid disease, heart disease, coronary artery bypass surgery, and the excessive use of alcohol. Another very important illness to consider is dementia. Dementia means loss of memory. The word dementia is used interchangeably with Alzheimer's disease because Alzheimer's is the most common form of dementia.

**Alzheimer's disease** has a progressive and irreversible course. In the early stages, Alzheimer's affects the ability to retain and store information. Therefore, short-term memory becomes impaired. Without the ability to store and retain information, a person is unable to process information in the normal sense and, therefore, loses the ability to weigh options and consider choices. As the disease progresses, more areas of the brain are affected, and the person eventually loses the ability to recognize, plan, and even execute a thought.

# Each Other?

Alzheimer's disease is a complex illness that can lead to episodes of depression, psychosis, and mania. In the more extreme cases, depending on the stage of the disease, agitation and aggression may be present. The causes of Alzheimer's disease are varied. This is an illness that is more readily recognized by trained professionals. There is also good news: new treatments can improve one's ability to function and delay the ravaging effects of this disease. In addition, several, all good, medications are available for Alzheimer's disease.

Do not assume that **forgetfulness** is always a normal part of aging. As we age, the speed at which we process information declines. However the healthy brain is not a forgetful organ. Our bodies age at different rates, and age-related changes are affected by genetics, diet, and physical activity. Just ask Jack LaLanne, the fitness guru. How a person ages physically and mentally depends on his or her own unique biology, exposure to infections, tobacco, and alcohol.

If you suspect your spouse may be suffering from such a disease or your attorney, or even a family member, raises the issue of your comprehension, the reasonable response would be to have a neuropsychological evaluation to assess mental capacity. The term **mental capacity** is simply a cluster of mental skills that we use in everyday life, such as memory, logic, the ability to calculate, and the flexibility to turn our attention from one task to another. It is what allows us to be able to understand concepts and weigh our choices.

The **neuropsychological examination**, on the other hand, will test these critical areas of thinking and reasoning. These tests are comprised of a series of mental exercises that will indirectly evaluate how the different parts of the brain are functioning. It does this by establishing a pattern of the brain's general health. As part of the complete evaluation, it is important to have a medical evaluation with brain imaging studies that will test for disease states such as strokes, tumors, degeneration of the brain, etc.

These examinations are generally covered by most major insurance carriers, and certainly by Medicare. The issue of insurability and how a diagnosis of Alzheimer's or other diseases would affect it would depend on the insurance company and is a matter for discussion with your insurance agent. If you do not have an insurance agent, your lawyer

may offer a referral. A lack of insurability also would be an important issue for you to discuss with your attorney, as it may be relevant to the issue of alimony.

## What can you do to improve your sense of well-being during this process?

In the absence of a major medical or psychiatric condition that would clearly require treatment, you can do several proactive things.

**1 Exercise**, which can take many forms, including working out at a gym, walking, riding a bicycle, yoga, Tai Chi, and even meditation. It is a well-known scientific fact that exercise causes the release of endorphins in our bodies. These are naturally occurring morphine-like substances, produced by our brain, which give us a feeling of mild euphoria. The feeling is short-lived, and there is no risk of dependence.

**2 Another important wellness technique is to avoid excessive use of alcohol, tobacco, or even certain over-the-counter medications**, specifically sleep aids. Many of these medications contain antihistamines, which cause mental impairment, including delirium.

**3 Get a good night's sleep**, which can be accomplished through exercise and proper eating. Support groups and individual therapy also may be helpful for those having difficulty coping.

It is essential that you understand what your attorney advises, and conversely, it is important that your attorney believes you can make informed, rational decisions. Do not construe your attorney's concern or referral to a doctor as humiliating or an indication that you are in any way defective. Divorce is a stressful process that can be complicated by the effects of aging. Medical and mental health referrals are part of the solution and are in your best interest. They are simply tools to help you resolve the issues in your divorce case and get on with the rest of your life. **FA**



**Ivan Mazzorana, M.D.**, is a board certified adult and geriatric psychiatrist practicing in Fort Myers, Florida. He is a member of the Twentieth Judicial Circuit committee, where he provides expert independent opinions in cases involving capacity.

# A House D i V i D E D

BY MARCIA SOTO

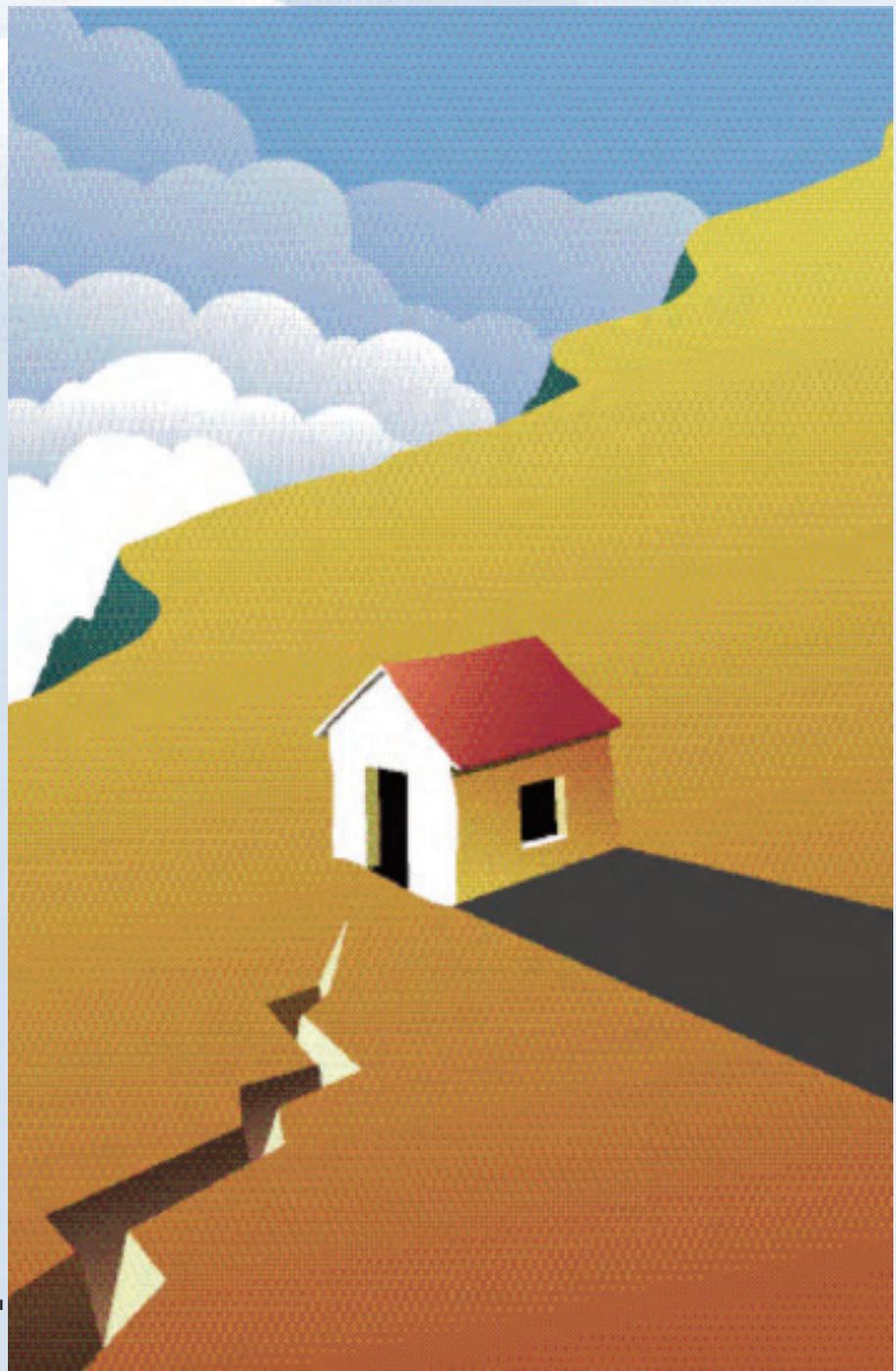
## If you are divorcing, over age 50, and own your own home, consider these options

**T**he marital home has always taken center stage in divorce proceedings. Often the home is the couple's most valuable asset, and one or both have an emotional or strategic attachment to it. When the children are young, the home often is tied to custody proceedings. As spouses age, one or both may have an attachment to the home because of the perceived stability staying in the same dwelling seems to provide.

During real estate booms, divorcing couples are able to cash out the equity in their home in relatively short order. Although doing so raises other issues, at least these couples are able to sever ties and move on. In the current nationwide housing decline and mortgage crisis, property is sitting on the market longer, and clients are facing the reality that they may not be able to cash out quickly.

### To buy or sell

As housing values drop, the asset becomes less "liquid" and refinancing or buying out the other spouse becomes more difficult. A study by the Joint Center for Housing Studies at Harvard University reveals that today's seniors are carrying mortgages well



into their golden years. The number of homeowners carrying a mortgage as they approach retirement is increasing steadily. When these couples divorce, the issues raised by the home are not driven by the “best interest” of the children, but rather by the economic realities of the divorce. Can one party afford to stay in the home? Is it a sound financial decision to trade other assets in exchange for equity in the home? Is it a viable option to stay in the home, given the maintenance and upkeep costs?

One option is for one spouse to buy out the other’s equity in the home. In this scenario one party pays cash or trades assets for the other’s share of the home equity. Because of the current housing crisis, one of the most difficult issues today when considering a buyout is agreeing on the fair market value of the home. Obviously, the buyer will want to purchase the home at the lowest possible price, and the seller will want to get yesterday’s higher price. The trick here is to agree on a number that will satisfy both of you. Many divorcing couples use a real estate appraiser to determine the value. If buying is the best option for you, take into consideration that you will be saving real estate commissions and closing costs. Also the transfer of interest is a nontaxable event; the person being bought out will not pay income tax on the funds received from the other spouse for a share of the home. The spouse retaining the home may, however, owe capital gains taxes if he or she sells the home in the future.

If one party will buy out the other’s interest and an existing mortgage secures the property in both names, divorcing spouses must agree on what will happen with the mortgage. Transfer of the home to your spouse does not relieve you of liability to the lender. If your ex does not pay the mortgage, the lender can look to you for payment. Also, if you are obligated for the mortgage, the liability will appear on your credit report and affect your credit rating. The best course of action is for the party keeping the home to refinance the existing mortgage or assume the mortgage under his or her name alone. Not all lending institutions allow assumption of the mortgage; so contact your lender about your options. An assumption can be less costly and may require less financial documentation as a new loan.

If you are keeping the home, you may want to consider a reverse mortgage. A reverse mortgage can be used to buy out your ex-spouse’s interest, supplement retirement income, or pay for healthcare expenses. If you have a traditional mortgage, you make monthly payments toward principal and interest. In a reverse mortgage, you convert equity in your home to “cash” without having to make monthly payments or sell. You must be at least age 62 and live in the home to qualify for a reverse mortgage. As a general proposition, the older you are, the more equity you have in your home. The less you owe on your home, the larger your reverse mortgage “loan” will be. In a reverse mortgage, you receive money from the lender and generally need not pay it back for as

long as you live in your home. The loan is repaid when you die, sell your home, or no longer live in the home. Keep in mind this may mean that the home will ultimately pass to the lender and not to your heirs.

Before you decide on a reverse mortgage, use the reverse mortgage calculator at the AARP Web site, [www.rmaarp.com](http://www.rmaarp.com), to determine the amount you could borrow. Before you commit to a reverse mortgage, shop around and be sure to ask any potential lender the following questions:

1. What are the origination fees and other closing costs?
2. Are any service fees charged during the term of the mortgage?
3. What interest rate is charged during the term of the outstanding mortgage?
4. Is the interest rate fixed or adjustable?

A reverse mortgage allows you to retain title to your home and, therefore, you remain responsible for property taxes, property insurance, and any and all maintenance costs. Unlike in a traditional mortgage, interest on a reverse mortgage is not deductible until the loan is paid off in part or whole. Once you assume sole responsibility for the liability, make sure that your former spouse signs a deed transferring the property to you and get it recorded.

If you are near or in retirement, retaining your home and assuming the mortgage may not be a viable option because your postdivorce income may be too low to pay for the loan. If the existing mortgage cannot be changed from two spouses to one or one spouse cannot qualify for a new mortgage, consider selling. When the home is sold, the existing mortgage is paid from the sale proceeds and any remaining funds are divided between the parties.

In today’s declining housing market, a spouse may be less willing to sell immediately because of the belief that waiting could ensure a better price in the future. If one spouse does not want to sell, preferring to wait for the market to rebound, and the other prefers to sell now, a judge would have to decide that dispute and could order the home sold, but in the future. Usually the time for listing the home for sale would be tied to a specific future date or event. If this happens, you must decide what to do while the home is on the market or being held for a future sale. One option would be to vacate the home and rent it out if the rent will cover the mortgage. Another possibility would be to remain in the home and rent out a room. Keep in mind that additional income may reduce your need for support and affect alimony. Discuss such rentals with your attorney.

If you are planning to vacate the home, consult your accountant about capital gains taxes. You may not be entitled to the exclusion on profit for capital gains purposes if the property is sold more than five years from the date the spouse vacated the residence or if the home has not been used as your principal residence for a period of two years. Ask your accountant whether you can claim the mortgage interest deduction during the time the home is on the market for sale.

## If Your Home Is Near Foreclosure

- 1 Call the lender** and attempt to renegotiate the loan by adding any past-due amounts to the principal balance, or by paying interest only during the divorce proceedings or until the home sells.
- 2 Negotiate with your spouse** to immediately list the home for sale. If you cannot get an agreement on the listing, seek court intervention.
- 3** If the home does not sell, **consider a short sale** where the lender accepts a purchase price less than the loan amount. However, consult with your accountant because the lender may issue a 1099 for the difference between the sale price and the loan amount.
- 4 Always alert your divorce lawyers** to the possibility of foreclosure.

## If Bankruptcy Is Possible

- 1** Consult with bankruptcy counsel first before proceeding to file and alert your divorce lawyer to a potential bankruptcy.
- 2** If your residence is your homestead, it will be excluded from the bankruptcy estate so long as the loan is being paid.
- 3** If your spouse seeks to discharge a joint obligation in bankruptcy, and you did not join in the bankruptcy, you will continue to be liable on the debt.

— M.S.

## A buyer's market

One reality of the current real estate market is that property remains unsold for longer periods of time; it is a buyer's market. Unfortunately, for older couples living on a fixed income, it may be impossible to live separately and support two households. Often the elder couple does not have family to move in with and, thus, there is no place else to go. Throughout the country divorced couples are remaining together in the home during and after the dissolution and pending a sale.

Continuing to cohabit with an ex-spouse is not the best option. If you and your spouse must continue to live together until the home is sold, alimony payments are not deductible by the payer for the period of time you live together. For alimony payments to be deductible, spouses cannot be members of the same household. Likewise, remaining under the same roof is not a viable option if there is a history of domestic violence.

Notwithstanding the drawbacks, couples nationwide are remaining together under one roof because of the economic realities. If this is your only option, have your ex-spouse sign a written agreement that clearly delineates each person's

rights and responsibilities. Specify financial responsibilities as well as routine obligations: How will the housework and maintenance be shared? How will expenses be paid? What rules should be in place regarding overnight guests? How will major repairs be handled, and what is the procedure for obtaining approval for an expense? What is the mechanism for accepting offers and/or lowering the selling price if no offers are received? Any agreements regarding the listing and selling prices should not be filed with the court or made part of a public document. If such agreements are made public, a savvy buyer may use the contents of the agreement to make low offers.

## Tax consequences

If you and your spouse agree to sell the home, speak with your accountant or financial advisor about the tax consequences of selling the home as a married couple versus as a single person. As long as the home is owned and used as a principal residence for two out of five years prior to the sale, a married couple is currently not taxed on the first \$500,000 of gain, and a person filing separately or single is not taxed on the first \$250,000 of profit. If the gain from the sale of the home exceeds the applicable exclusion amount, such gain will be subject to income tax at the current capital gains tax rate of 15 percent. Depending on the tax consequences, it may be financially beneficial to withhold entry of the divorce decree until the home is sold.

If the home is going to be sold, since homes are remaining on the market for longer periods of time, you and your ex must decide:

- 1.** Who lives in the home until it sells?
- 2.** How is the home maintained?
- 3.** Does paying the mortgage increase the payer's equity?
- 4.** Who gets the mortgage interest deduction until the home is sold?
- 5.** What is the procedure in the event repairs are required?
- 6.** How is the listing/selling price determined?
- 7.** Will there be a buyout clause, wherein one person will have the right to buy out the other's interest prior to a sale to a third party?
- 8.** If real estate taxes and/or property insurance are not escrowed, how will those be paid?

Whatever you decide to do with your home during this unstable real estate market, carefully consider all options. Although selling your home at this time may not yield the maximum you had hoped for, it may be the best option because the market will set the selling price and neither you nor your ex will assume any risk. **FA**

---

**Marcia Soto** has practiced family law for 22 years in Miami, Florida. She is Board Certified in Marital and Family Law, and is a Fellow of the American Academy of Matrimonial Lawyers.



## ➔ Health insurance

Private health insurance (if available), Medicare, and Medicaid are the three primary sources of funds to pay for medical expenses.

■ **Private health insurance.** More often than not, private health insurance is provided through employer-sponsored benefit plans. Individuals not covered by a group plan may obtain coverage through the individual policy market. If you will need health insurance, consider how much you can afford in terms of a premium—the amount you must pay each month or billing period to maintain your policy; what kind of deductible you can tolerate, that is, for out-of-pocket expenses before your health-care provider contributes to your coverage; and what type of co-payment you will be comfortable paying each and every time you visit a doctor's office.

Additional issues to consider include whether the policy excludes procedures, services, or treatments you anticipate needing. Typically, the policy will cover a maximum amount, but may not cover preexisting conditions. When comparing policies, give careful consideration to your prospective health-care needs. Further information regarding private health insurance is available from the American Association of Retired Persons (AARP) at [www.aarp.org](http://www.aarp.org).

■ **COBRA.** The Consolidated Omnibus Budget Reconciliation Act (COBRA) protects individuals covered by group health insurance and is designed to provide a continuation of coverage when there is a change in circumstances or a “qualifying event.”

COBRA is not a panacea for a divorcing spouse because the length of time for which coverage can be continued is generally limited to 18 months. In some circumstances, such as a second qualifying event or a disability, the continuation benefit may be extended. A plan also may choose to provide a longer continuation period than those mandated by COBRA.

In short, COBRA acts as a way to ensure that individuals and their spouses, in businesses with 20 or more employees, are provided with continued group health insurance coverage for a finite period during times of change, including job loss and divorce. It is important to note, however, that there are specific notice and time requirements as to when a beneficiary or spouse must be notified of a “qualifying event” and what constitutes a “qualifying event.”

With respect to divorce, the U.S. Department of Labor provides:

Under COBRA, participants, covered spouses and dependent children may continue their plan coverage for a limited time when they would otherwise lose coverage due to a particular event, such as divorce (or legal separation). A covered employee's spouse who would lose coverage due to a divorce may elect continuation coverage under the plan *for a maximum of*

*36 months.* A qualified beneficiary must notify the plan administrator of a *qualifying event within 60 days after divorce or legal separation.* After being notified of a divorce, the plan administrator must give *notice, generally within 14 days,* to the qualified beneficiary of the right to elect COBRA continuation coverage.

Divorced spouses may call their plan administrator or the federal Employee Benefit Security Administration (EBSA) toll-free number, 1/866-444-EBSA (3272) if they have questions about COBRA continuation coverage or their rights under ERISA.

Visit [www.dol.gov/ebsa/faqs/faq\\_consumer\\_cobra.html](http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html) for more information regarding COBRA.

Because continuation of benefits under a COBRA election generally results in the insured having to pay the entire premium for all plan costs, without any assistance from the

## ➔ COBRA Coverage

### The U.S. Department of Labor provides an overview of COBRA.

The Consolidated Omnibus Budget Reconciliation Act (COBRA) gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances such as voluntary or involuntary job loss, reduction in the hours worked, transition between jobs, death, divorce, and other life events. Qualified individuals may be required to pay the entire premium for coverage up to 102 percent of the cost to the plan.

*COBRA generally requires that group health plans sponsored by employers with 20 or more employees in the prior year offer employees and their families the opportunity for a temporary extension of health coverage (called continuation coverage) in certain instances where coverage under the plan would otherwise end.* [Emphasis added.]

Visit the U. S. Department of Labor's Web site at [www.dol.gov](http://www.dol.gov) for information regarding COBRA and notification requirements to continue health insurance coverage.

In further outlining who qualifies for continued coverage of group health insurance under COBRA, the U.S. Department of Labor provides:

There are three elements to qualifying for COBRA benefits. COBRA establishes specific criteria for plans, qualified beneficiaries, and qualifying events:

**Plan Coverage:** Group health plans for employers with 20 or more employees on more than 50 percent of its typical business days in the previous calendar year are subject to COBRA. Both full and part-time employees are counted to determine whether a plan is subject to COBRA. Each part-time employee counts as a fraction of an employee,

COBRA Coverage



employer, that individual's ability to pay those premiums may be an issue that merits significant consideration in structuring the financial terms of a divorce settlement. Because divorce is complex and plan requirements vary, consult with a qualified professional about the effect of your divorce on continued group health-insurance benefits under your specific plan.

■ **Medicare.** In its publication, *Medicare and You*, the U.S. Department of Health and Human Services provides that "Medicare is health insurance for people age 65 or older, under age 65 with certain disabilities, and any age with End-Stage Renal Disease (permanent kidney failure requiring dialysis or a kidney transplant)."

Visit the U.S. Department of Health and Human Services Web site at [www.medicare.gov](http://www.medicare.gov), for a copy of *Medicare and You* in pdf format or call 1/800-633-4227.

with the fraction equal to the number of hours that the part-time employee worked, divided by the hours an employee must work to be considered full time.

**Qualified Beneficiaries:** A qualified beneficiary generally is an individual covered by a group health plan on the day before a qualifying event, who is either an employee, the employee's spouse, or an employee's dependent child. In certain cases, a retired employee, the retired employee's spouse, and the retired employee's dependent children may be qualified beneficiaries. In addition, any child born to or placed for adoption with a covered employee during the period of COBRA coverage is considered a qualified beneficiary. Agents, independent contractors, and directors who participate in the group health plan may also be qualified beneficiaries.

**Qualifying Events:** Qualifying events are certain events that would cause an individual to lose health coverage. The type of qualifying event will determine who the qualified beneficiaries are and the amount of time that a plan must offer the health coverage to them under COBRA. A plan, at its discretion, may provide longer periods of continuation coverage.

#### Qualifying Events for Employee

- Voluntary or involuntary termination of employment for reasons other than gross misconduct
- Reduction in the number of hours of employment

#### Qualifying Events for Spouses

- Voluntary or involuntary termination of the covered employee's employment for any reason other than gross misconduct
- Reduction in the hours worked by the covered employee
- Covered employee's becoming entitled to Medicare

Visit [www.dol.gov/ebsa/faqs/faq\\_consumer\\_cobra.html](http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html) for more information regarding who qualifies for continuation of group health insurance coverage under COBRA.

— M.E.S. & J.L.W.

Although Medicare is not a "means-tested" program that considers income or assets, an individual generally must have accumulated enough work credits to qualify or be the spouse or a widow(er) of someone who has. Thus, marriage often plays an important role in determining whether a person—particularly a "stay-at-home" spouse—is entitled to Medicare coverage. Fortunately, when a couple divorces, a spouse who lacks the necessary work record to qualify for Medicare will not necessarily lose entitlement based on ending the marriage.

A person aged 65 or older may be eligible for Medicare as the divorced spouse of a worker under certain conditions. The ex-spouse must be:

- validly married under state law;
- married for at least 10 years before the divorce was final;
- unmarried, or remarried after reaching age 60; *and*
- ineligible for monthly Social Security retirement or disability benefits on his or her own, which are greater than one-half of benefits payable on the account of the former spouse.

The worker's spouse must be at least age 62, but need not be entitled to Social Security retirement benefits if the couple has been divorced for at least two years. Even if the divorced "worker spouse" has died, the surviving divorced spouse may be entitled to Medicare coverage at age 65 or older (or age 50 if disabled) under certain specific conditions. The surviving divorced spouse must have been:

- validly married under state law;
- married for at least 10 years before the divorce was final;
- unmarried, or remarried after age 60 (or after age 50 if disabled) and after the "worker spouse's" death; *and*
- ineligible for Social Security retirement benefits greater than those benefits he or she would receive on the record of the deceased former spouse.

Because income and assets do not factor into eligibility for Medicare, there are generally no significant Medicare issues in structuring the financial terms of a divorce settlement. However, the requirement of at least a 10-year marriage may lead an individual who is close to this anniversary to consider postponing the final divorce decree until after the 10 years has been achieved, thereby providing the "non-worker" divorced spouse an opportunity to apply at a later date for Social Security benefits on the record of the "worker spouse."

## Medicaid

The important thing to remember about Medicaid is that qualification does consider income and resources. (For eligibility details, see the box on page 17.) As a result, financial terms of a divorce can significantly impact an individual's eligibility for benefits. In negotiating divorce settle-

ments, the income and asset levels for various categories of Medicaid coverage may need to be a significant consideration, particularly with respect to long-term care needs, such as nursing-home care.

In some cases, an individual who could qualify for Medicaid as part of a couple may suddenly be ineligible as a divorced individual as a result of having to meet lower income and resource limits. Likewise, one who experiences

concern that the payor spouse may be destined for nursing home care and Medicaid eligibility. Because Medicaid is not a party to the divorce, it will not be constrained by the terms of the divorce and may not easily recognize the supporting spouse's obligation to make alimony payments (preferring instead to have the supporting spouse channel all of his or her recurring income toward the cost of care, thereby reducing Medicaid's obligation). A savvy settlement negotiator

may include a provision for securing future support payments with specific assets of the payor spouse, or provide a means of terminating future payments upon the conveyance of certain assets to the payee spouse.

When planning to preserve your assets in the context of Medicaid eligibility and long-term care needs, couples often have more flexibility than single individuals, due in large measure to the fact that spouses can freely transfer assets back and forth from one to the other without triggering Medicaid eligibility penalties. A divorce will result in the loss of much of this flexibility. As a result, an impending nursing home admission for a spouse contemplating a divorce may require some predivorce measures to maximize planning opportunities that may ultimately benefit both spouses—and potentially their respective progeny.

Again, due to the complex nature of divorce and because Medicaid eligibility requirements can vary greatly from state to state, consult with a qualified professional who can advise you about the effect a divorce will have on the present and future availability of such benefits.

## ➔ The A-B-C-D's of Medicare

### Medicare falls into four basic categories:

- 1 **Medicare Part A** covers in-patient medical care, treatment at skilled nursing facilities, hospice, and home-health care if you meet certain conditions;
- 2 **Medicare Part B** covers medically necessary services, such as doctors' services and some preventative services;
- 3 **Medicare Part C** (a/k/a Medicare Advantage) is essentially Medicare's version of an HMO, covering Part A and Part B services (but often with different co-insurance, co-payments, and deductibles), as well as often including some version of Part D drug coverage; and
- 4 **Medicare Part D** helps to cover prescription drugs.

— J.L.W. & M.E.S.



Medicare

a decrease in income or assets as a result of a divorce may become eligible for the first time.

In attempting to qualify for Medicaid, excess assets can generally be "spent down" in purchasing legitimate goods or services needed by the individual or converted into other assets that do not "count" for Medicaid eligibility purposes. For example, a primary residence, an automobile, and pre-need funeral contracts, among others.

However, having income that exceeds the Medicaid eligibility limit may be more problematic. In structuring a divorce settlement, it may be more advantageous in some circumstances to take a lesser amount of spousal support to remain below a Medicaid income limit if and when the need arises. In such a case, less alimony could be counterbalanced by a larger slice of the marital assets pie.

The nature of the assets a party receives also may be a consideration, as some assets are "excluded" in a Medicaid eligibility determination, whereas others are "counted." A party also may want to consider a larger share of marital assets in exchange for smaller support payments if there is

## ➔ Health-care decisions

One issue that often arises during a divorce is who will make health-care decisions should you become incapacitated before, during, or after your divorce. Generally, a person may set out in writing what care he or she would like to receive and who should make health-care decisions by way of a living will, a medical power of attorney, or a durable power of attorney.

■ **A living will** is a signed document that states an individual's medical-care wishes in the event he or she becomes incapacitated. It also may outline any heroic measures doctors may take on the person's behalf as well as decisions about life support and resuscitation.

Usually, a copy of a living will is given to a trusted family member, often a spouse, but its terms cannot be overridden by family members. If your soon-to-be ex-spouse holds your living will, during contentious divorce proceedings it is advisable to revoke the previously executed document and execute a new one to be left in the possession of another trusted person.

## Who Qualifies for Medicaid?

The U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services provides an overview of whom and what is covered by Medicaid.

Medicaid is available only to certain low-income individuals and families who fit into an eligibility group that is recognized by federal and state law. Medicaid does not pay money to you; instead, it sends payments directly to your health care providers. Depending on your state's rules, you may also be asked to pay a small part of the cost (co-payment) for some medical services.

Medicaid is a state administered program and each state sets its own guidelines regarding eligibility and services. Read more about your state Medicaid program.

Many groups of people are covered by Medicaid. Even within these groups, though, certain requirements must be met.

For specific information about enrolling in Medicaid, eligibility requirements, coverage and services for your state, contact your local Medicaid office.

Visit the U.S. Department of Health and Human Services Centers for Medicare and Medicaid Services Web site at [www.cms.hhs.gov](http://www.cms.hhs.gov) or contact your state Medicaid provider or health department for more information. Contact information for state health departments can generally be found in the government section of your local telephone book or by visiting <http://www.cms.hhs.gov/ContactCMS/>.

— J.L.W. & M.E.S.



Medicaid

naming your spouse and execute a new one naming another trusted person.

Typically powers of attorney and living wills require that the documents be witnessed and notarized, and because the execution requirements vary from state to state, it is best to consult with a local attorney to assure that the document does what you intend.

## Protection of medical information

The Health Insurance Portability and Accountability Act (HIPAA) is a federal statute enacted for the purpose of regulating the keeping and dissemination of medical records and information. Under the statute, an individual is entitled, among other things, to access his or her medical records and be assured that information contained in those records will be maintained in a confidential manner.

A treating entity, such as a hospital or doctor, may ask for your consent to make this information available to other individuals if the need arises. This consent or waiver must be in writing, must be signed, and must designate what information may be disclosed, who may disclose it, and to whom it may be disclosed.

If you have previously named your spouse as a person who has access to your medical information, it may be advisable in contentious divorce proceedings to end that arrangement. Contact your medical provider with new instructions and re-execute your consent waiver. For more information about HIPAA, go to [www.hhs.gov/ocr/hipaa/](http://www.hhs.gov/ocr/hipaa/).

Older Americans face a complex world. When divorce is thrown into the mix, more careful planning is required to address these difficult health concerns. **FA**

■ **A medical power of attorney** unlike a living will, gives another person the authority to make medical decisions on your behalf should you become unable to do so.

■ **A durable power of attorney** like a medical power of attorney, is a document that remains effective after the incapacity of the individual who executed it. The durable power of attorney designates an individual to act in your place should you become incapacitated. The powers can be limited to finances or medical decisions or some combination of both.

■ **A springing durable power of attorney** is similar to a durable power of attorney, but typically does not become effective until the person who executed it actually becomes incapacitated. Again, during contentious divorce proceedings, it is wise to revoke any previously executed medical power of attorney or durable power of attorney



**Jan L. Warner (top)** is a principal of Warner, Payne & Black, LLP in Columbia, South Carolina, and a founding member of ElderLaw Services, Inc. **Matthew E. Steinmetz (below)** is a



member of Warner, Payne & Black, LLP. This article provides an overview of the effects of divorce with respect to medical issue. It is not intended to take the place of advice or guidance from your attorney, financial planner, or medical professionals.

# Promises to



**The Golden Years.** The time to start winding down, maybe reduce hours at the office, take advantage of that nest egg and retirement fund, start traveling, maybe buy that second home. While those between the ages of 25 to 39 make up 60 percent of all divorces, those who divorce over the age of 50 make up a sizable minority, and numbers continue to increase. This increase partly reflects the longer duration of marriages and the marked trend toward later marriages, which started in the early 1970s. (The median age at divorce in 2001 was 41.9 years for men and 39.3 years for women. In 1990, the median age at divorce for men was 35.9 years, or 2.7 years older than in 1970. Women's median age at the time of their divorce in 1990 was 33.2, up 3.4 years from 1970.)

One of the most common concerns for those who divorce over the age of 50 is what support obligations may result from the divorce. This concern is real, and scary, because significant support obligations may have an impact on retirement funds and even on your ability to retire when you feel ready.



**Support for minor children.** Because second marriages for men are more common than they used to be, a good number of men age 50 and older have child support obligations (which include the obligation to provide health insurance or pay health care costs for children) at divorce. Women who delay child bearing also can have child support obligations over the age of 50, although this is less common. These are the facts about child support for those 50 and older.



## **Social Security**

- Social Security disability or retirement benefits, payable to a parent (due to his or her own disability or retirement), is considered income for purposes of figuring child support. It is not excluded from the mix.
- Social Security disability or retirement benefits, payable to a minor child for a parent's disability or retirement, are considered income to that parent.
- The parent is usually entitled to a dollar-for-dollar credit against his or her child support obligation for Social Security benefits the child receives on that parent's account.

- Supplemental Security Income (SSI) is not the same as Social Security. SSI is need based and is not considered in the child support mix.

More information on Social Security can be found at <http://www.ssa.gov/> and at [http://www.aarp.org/money/social\\_security/](http://www.aarp.org/money/social_security/).



## **Pensions**

- Pension payouts are considered income for purposes of calculating child support.
- Voluntary contributions to pensions are not deducted from income when figuring child support; it is as though you still had the funds as income.
- Interest earned on 401(k) and IRA accounts also can be considered income when figuring child support.



## **Retirement**

- Courts don't like it when parents retire before the "normal" retirement age of 65 if they have minor children who are counting on them for support. Don't plan on quitting a job or "retiring" to avoid child support.
- However, do try to reach an agreement with your spouse as to when you can retire and then change your child support obligation upon your retirement to reflect a reduced income due to retirement.



## **Stepchildren.**

Once parents are divorced, a stepparent does not have an obligation to support a stepchild. However, if you want to contribute to a stepchild's support, do so by reaching a financial agreement with your spouse. Stepparents can be just as close to their stepchildren as biological parents are to their natural children, and such love and affection should not be curtailed in the event of divorce.



## **Special needs children**

- Parents have a duty to provide child support for their children until the children reach majority (in many states, age 21), and, in some states, through college.

# Keep

Support obligations after age

50

BY LAURA W. MORGAN



- Children who are disabled and unable to earn enough to support themselves are entitled to support from their parents as an “adult disabled child” in most states. Check the law of your state at <http://www.childsupportguidelines.com/links.html>.
- Adult disabled children are entitled to Social Security benefits of their own, as well as Supplemental Security Income benefits. These benefits can reduce the amount of support a parent is obligated to provide.

 **Security for the obligation.** Courts can order a parent to maintain a life insurance policy with a child as beneficiary as security for a child support obligation.

 **When does this all end?** The law concerning the age of majority varies from state to state. Talk with your lawyer about when your child support obligation ends, and consider whether you want to extend that obligation.

 **College expenses.** Roughly half the states now allow a court to order a parent to contribute to the college tuition and expenses of a child. In the other half, parents are encouraged to reach an agreement to contribute to such costs. Even in states where a court can order a parent to pay such costs, the parties should strive to agree as to how those expenses should be shared and with details, such as:

- For how much, or what percentage, is each parent responsible?
- For what type of expense is each parent responsible?
- Must the child maintain a certain grade point average?
- Should the child be obligated to seek financial aid and scholarships?

Remember, it is always better to decide an issue for yourselves, rather than have the court do so, if you can.

 **Spousal support.** The law of spousal support (also called alimony or maintenance) varies widely from state to state. Spousal support is based on a panoply of factors, and its amount is sometime as predictable as a game of roulette. Only your attorney can fully apprise you of the law and all the nuances the law comprises. For those 50 or older, however, the most important issue is how retirement will impact the spousal support obligation.



### Facts you should know

- Courts expect parties to retire at some point. Retirement is not totally unforeseen. Unless the court (or your agreement) specifically and explicitly notes future retirement, however, retirement is a “change of circumstance” that can warrant modification of a spousal support award.
- Think about addressing the issue of retirement in a property settlement agreement and how retirement will affect spousal support obligations. This can cut both ways, of course. You may want to require that your ex-spouse not retire until age 65, or that you retire at age 55.
- As in the case of child support, however, courts frown on early retirement when one can still earn a good living. Courts often view this kind of retirement as shirking, a way to avoid a support obligation.

## Courts frown on early retirement when one can still earn a good living

- The common measure of spousal support is to provide support sufficient to allow the supported spouse to live at “the marital standard of living.” This is impossible in most cases, since two households cannot be supported as cheaply as one. Thus, a dependent spouse, even after a long marriage without significant employment, can be obligated to go out and find employment to contribute to his or her own support.
- Pensions, savings, retirement funds, Social Security, indeed almost anything, can be considered a means for providing support to a spouse or to oneself. (Some states do not allow a court to consider a pension as a stream of income for support if that same pension was divided in the property award. Consult your attorney on the law of your state.)



### Health-care obligations

- It is a good idea for a spouse to carry an ex-spouse on health insurance under the provisions of COBRA. See also, Warner & Steinmetz, page 14. In the alternative, a spouse who can afford to provide health insurance for a dependent spouse should do so when the dependent spouse cannot afford such health care.
- Courts also can order a party to name the ex-spouse as

a beneficiary on a life insurance policy to secure a support obligation. (Do not confuse this with survivor benefits to a pension.) Consider how affordable such security is and whether it is necessary.



### Supporting elderly parents

- Many states (27 at last count) have statutes that require adult children to provide support to their indigent elderly parents. These are called “filial support” laws.
- The filial support laws currently on the books are of three basic types. First, some statutes are criminal non-support statutes, imposing criminal sanctions for failure to support indigent parents where the children are able to support them. Fourteen states have this type of statute.
- Second, some statutes are reimbursement statutes, requiring the children to reimburse government agencies that provide support for indigent parents. In the same manner that child support obligors may be required to reimburse a state welfare agency, adult children may be required to reimburse a state that has been satisfying the elderly parent’s need for support.
- Third, some statutes are civil statutes, requiring children to support their needy parents to the extent they are able. This last type of statute is often referred to as a mutual support statute, in that a mutual obligation of support is imposed on children to support indigent parents, and upon parents to support indigent adult children, especially where support consists of medical services. Mutual support laws are based on the premise that support is a reciprocal obligation: since the parent supports the child, the adult child owes support to the needy parent.
- Find out from your attorney if your state has a filial support law and if you need to take advantage of it. Further, there are many other avenues of support for those 50 and older: Social Security (disability, retirement), Supplemental Security Income (need based), Medicare, Medicaid, and other federal programs. Your attorney can help you decide if you should be receiving any of these types of assistance.

Divorce is always difficult. Divorce after a long-term marriage and, thus, at a more mature age, can be especially heart wrenching. But whether you are divorcing your high-school sweetheart after 40 years of marriage or seeking a divorce after a marriage of a few years, it is best to know your support obligations upfront before negotiating and signing the final divorce settlement agreement. **FA**

---

**Laura W. Morgan** is a law-firm consultant in Charlottesville, Virginia, and author of *Child Support Guidelines: Interpretation and Application*.

# The Grand- & kids Your Rights

BY JAMES WILSON  
DOUGLAS

Understanding your role in custody and visitation

There is a misconception that the current state of the law across the country puts grandparents on an equal footing with biological parents on the issue of child custody. There is no grandparent “inside track” to custody. Unfortunately, the love of a child, the assumption of parental duties, and the financial support of a child do not determine the outcome of child custody litigation. Yet, grandparents often have more money, more free time, more influence, and more community respect than their absent or irresponsible offspring.

Conflicts over who should be a child’s residential parent in a divorce are the most common and most publicized disputes, but custody fights are increasing between one biological parent and the grandparents—by blood or marriage. At first glance, such contests may appear a consequence of population growth; however, absence, death, multiple marriages, together with the harshness of immigration regulations, changing family values, and a now highly mobile and regional workforce have acted in concert to cause grandparents, by design or by default, to assume the role of primary parent to grandchildren and step-grandchildren. The sad truth is that often there is no one else to do the job of child rearing.

## Grandparents as caretakers

A grandparent may be nominated as a *guardian*. This is a legal role that places the grandparent as the responsible adult

for a child who has been declared a ward of the adult. The grandparent’s principal responsibility is the day-to-day supervision and welfare of the child, including overseeing the child’s money and property.

A grandparent who is awarded a right to *visitation* is given a regular or scheduled, but limited, parenting-time right under a legislative statute, wherein possession of the child is temporary, and any far-reaching determinations regarding the child are on an emergency basis only. Neither guardianship nor court-ordered visitation is a custodial designation.

An award of *custody* is a judicial determination that affords the adult nearly all decision making, parenting functions, and caretaking responsibilities for a child, to the exclusion of other adults. The court makes such determinations based on the best interests of a particular child, with a preference given to the long-term residence of the child and legal precedents well established in other custody suits.

A child’s lengthy exposure to a grandparent-headed family, on the other hand, must still be subject to a constitutional principle: Natural parents have an almost exclusive liberty interest in the custody and rearing of their children, free of infringement or interference, which is often referred to as “parental autonomy” and is derived from the *substantive* due-process parts of the United States Constitution.

Thus, since the year 2000, few grandparents in adversarial parenting cases have been awarded visitation rights, except



by statute or agreement, and they have received no custodial preferences at all. An entertaining film and a fairly accurate depiction of the approach of the law to third-party custody can be seen in the picture *Losing Isaiah*, featuring Halle Berry, Jessica Lange, and Samuel Jackson. The cinematic and real lesson is that once a natural father or mother asserts status as a biological parent, the burden of proof lies squarely on the grandparent to prove, usually by a heightened standard, why it is in the child's best interests not to be returned to the birth parents and to be placed instead with the grandparents. This usually is a difficult burden of proof in the courtroom.

Before undertaking a seemingly interminable and costly visitation/custody contest, grandparent litigants must face the realities of their present health and mental status, as well as their ability to relate to the grandchild if he or she is in or on the threshold of adolescence. Courts *will* look at whether the grandparent is sufficiently ambulatory; mobile; mentally alert; lucid; and able to ensure the grandchild's safety, control, and discipline. Even if the care-giving grandparent is otherwise healthy in body and mind, the presence of an impaired

or incapacitated spouse, who may demand equal attention from the caregiver, will weigh against the grandparent seeking custody.

Not to be judicially ignored is the age difference between the grandparent and the grandchild. Can an 80-year-old grandfather supply the same measure of interaction, guidance, and decision making as a 55-year-old grandfather? Will the age differential ensure that a six-year-old child will not be subjected to another custody dispute when he is at the volatile age of 16, because his 75-year-old petitioning grandmother may die at or before that time? These are emotionally charged and sensitive areas of examination, which courts must consider.

### Visitation and custody litigation

If grandparents, nevertheless, embark upon expensive litigation to seize or be awarded custody of grandchildren, they must have standing to do so. *Standing* is the legally recognized status of a party in a custody lawsuit. Simply put, "standing" is the legal right to be in the fight. This requirement is born of the view that divorce and family litigation are private matters and that courts should be disinclined to allow outside intervention in domestic disputes.

How then does one go about proving that a grandparent should have custody, and how much proof is enough? The first step is to request a fitness evaluation of the natural parents. Has the father or mother or both been arrested or convicted of a crime, especially a felony or one involving child abuse? Has a social services agency initiated civil proceedings against the biological parents for child neglect or substandard care? Has either natural

**Simply put,  
"standing"  
is the legal right  
to be in the fight**

parent or both been cited, reprimanded, suspended, or terminated from employment due to illicit drug use?

This line of inquiry is more productive in cases involving a single natural parent. In a two-biological-parent family, if one parent proves unfit and the other is deemed fit—even if in the home and a passive witness to the other parent's misbehavior—the "innocent" or nonoffending parent generally will be at the top of the list of presumed custodians of the child.

However, if a birth parent moves to another geographical

location and leaves a child with the grandparents for an extended period of time, with little or no financial support or subsequent meaningful contact from the natural parent, an argument can be made that the child has, in fact, been abandoned. Of course, the death of a biological parent, in most states, elevates the deceased parent's parents, or the grandparents, to a slightly stronger position in a visitation case, especially where there are strained relations or no communication between the surviving natural parent and the grandparents. Custody battles initiated by grandparents, however, absent a parental fitness issue, are not generally aided by the death of a natural parent.

The single most important factor in marshaling proof for a grandparent visitation or custody case is evidence of a close relationship between the grandparents and the grandchild. The second most important factor is documenting the timeline of that close relationship. Although the burden of proof hinges on proving that the grandparent is the "psychological parent" of the child, expert testimony will be essential to

## The single most important factor in marshaling proof for a grandparent visitation or custody case is evidence of a close relationship between the grandparents and the grandchild

establishing that the close relationship between grandparent and grandchild is mutual. This reciprocity will be confirmed best by greeting cards, school projects, or drawings dedicated to "Grandma."

A grandparent seeking custody can never take too many photos or videos depicting the depth and duration of the grandparent-child relationship. To establish that the connection between them has been for an extended period, a handwritten and dated diary, blog, or digital-photo-album upload may prove extremely helpful in carrying the day in court.

In addition, the day-to-day parental functions performed by the grandparents must be documented and corroborated. Make sure that the office records of dentist, doctor, hospital, and emergency room reflect that the grandparent was the presenting party on behalf of the child, or that the grandparent was the adult who gave consent for treatment or proce-

dures. Likewise, never neglect the sign-in procedures at school events, such as parent-teacher conferences, sporting events, and extracurricular activities. Record daily financial expenditures on behalf of the child, such as clothing, uniforms, school lunches, and alternative care providers, etc. In addition, maintain copies of letters, e-mails, or text messages to or from the biological parent seeking assistance with support or requesting that the natural parent call or visit the grandchild.

If community corroboration of the relationship between grandparent and child should prove necessary (*i.e.*, from teachers, ministers, coaches, and family friends), the grandparent should have a well-known and transparent history of physical and social support of the grandchild in public, such as attendance at concerts, church, mosque, or synagogue, benefit dinners, athletic games, and family nights at the local restaurant, etc.

### Conclusions

Grandparent visitation is a much easier objective than is grandparent custody, because state laws usually give a direct cause of action to the grandparents; however, state supreme courts insist on specific findings before any visitation award can be made. In terms of a quest to be awarded custody of a grandchild over the objection of biological parents, the connection of blood does not give the grandparents a preferred place at the litigation table.

Grandparents seeking custody of a grandchild must (1) have a long-term relationship with the child; (2) have demonstrated a psychological bond with the child who must be older than an infant; and (3) be realistic about their prospects and know that if a fit natural parent objects, the grandparents will likely fail. **FA**



**James Wilson Douglas** is a solo practitioner in Sutton, West Virginia, where he focuses his practice in divorce and family law.

# What Will Be— Now & Forever

**Divorce means a new lease on life and a fresh look at your estate plan**

BY LYNNE S. HILOWITZ

**T**he time to address estate planning is during or shortly after your divorce. Sound estate planning makes for a smooth and tax-conscious transition of assets to your heirs upon your death. A new or updated will or estate plan will help establish (1) the maximum amount your soon-to-be ex-spouse will get should you die before the divorce is final (assuming that you have not signed a prenuptial or postnuptial agreement); and (2) prevent your soon to be ex from inheriting your estate because you failed to change your beneficiary designations and the titles to your property.

## **Take steps now to address the following:**

**Joint ownership and/or beneficiary designations.** Talk with your lawyer about removing your ex-spouse (or soon-to-be ex) as a beneficiary on *everything* you own. For example, life insurance, all financial accounts (including, but not limited to, bank accounts, individual retirement accounts (IRAs), pensions, stocks, mutual funds, bonds, etc.); safe deposit boxes; revocable and irrevocable trusts (consider dissolving or not funding irrevocable trusts for which you cannot change the beneficiary). Note: You may want to consider making your children the beneficiaries of your IRA, rather than your estate, to avoid income taxes due upon your death. Beneficiary designations should be in the nature of a trust to deal more effectively with contingencies.

**Change fiduciary designations,** such as executor/personal representative, lifetime or testamentary trustee, guardian for minor children, agent-in-fact for your power of attorney, and your health-care proxy or agent (if you do not want your ex-spouse to make decisions for you, such as whether to “pull the plug” or determine whether you are incapacitated).



**T**rusts for children become even more important upon divorce. Consider the amount of wealth you will transfer at your death and evaluate (1) the necessity of a trust and (2) the duration of the trust. Many clients opt to leave a child one-third of the principal of a trust at age 22, one-half of the balance at age 25, and the remainder at age 28 or 30. Caution your children to keep any inheritance separate from monies to be shared with a spouse or future spouse. If the child should later divorce, any inheritance that has been “commingled” with marital monies will be subject to division with a spouse. It also is imperative to keep earnings separate from an inheritance. Having just been through a divorce yourself, you can readily understand the seriousness of this issue.

### General rules

A “will” (formally called a “Last Will and Testament”) is a written document in which an individual (the “testator,” if male, “testatrix,” if female) instructs how property should be distributed upon his or her death, appoints individuals (fiduciaries) who will administer the terms of the will, and sets forth instructions. A will *does not dispose of all* property. For example, property owned jointly with another person passes automatically to the surviving owner. Another example of property passing “outside of will” or by “operation of law” is insurance that is payable to a named beneficiary (*i.e.*, other than to the decedent’s estate). Yet another example is property held in trust for a child. Upon the death of the decedent, the property or money belongs to the child.

The terms used to differentiate between property of a decedent passing through the will, or outside the will, are “probative assets” and “nonprobative assets,” the former being property subject to a will, and

the latter being property not subject to the will. Beneficiary designations are not as powerful as will clauses because a will can be more explicit and detailed about contingencies. You also can designate more comprehensively the payout ages and distribution methods for assets passing to children and/or grandchildren.

**A Marital Deduction:** A married person can pass an *unlimited* amount of property to a spouse during one’s lifetime or at death without triggering taxation. This is due to the “marital deduction.” According to federal estate tax rules, all monies left by one spouse for the benefit of another are deductible from the adjusted gross estate of the deceased. For example, if a spouse’s gross estate were valued at \$1.6 million, after deducting administrative costs and funeral expenses of \$100,000, the adjusted gross estate would equal \$1.5 million. If the deceased left \$500,000 or more to a surviving spouse, the taxable estate would be reduced to \$1 million. With a “unified credit trust,” the

### Caution your children to keep any inheritance separate from monies to be shared with a spouse or future spouse

federal estate tax would be zero. Obviously, the “marital deduction” is one of the most important devices for estate and tax planning. If there is no spouse, there can be no marital deduction and no postponement of estate taxes. The only saving grace as far as estate taxes are concerned will be application of the unified credit.

**A Unified Credit or Federal Exemption:** A “unified credit” offsets gift and estate taxes. An estate tax is imposed on a person’s estate based on the value of the estate assets. The value of assets that will escape federal estate taxes in 2008, for example, is \$2 million. The applicable unified credit amount will be applied against

\$2 million of assets to produce a zero federal estate tax. (This does *not* include state estate taxes.)

Lifetime gifts in excess of the “annual exclusion amounts” generate a gift tax in addition to the estate tax. The amount of the annual exclusion from gift tax is currently \$12,000 or \$24,000 for combined spousal gifting. For gifts made after the year 2001, the applicable total lifetime gift-tax exclusion amount is \$1 million. No increases in the gift-tax exclusion are scheduled. If gifts are made after the year 2009, the top gift-tax rate will be the same as the highest individual income tax rate.

**Residuary Bequests:** These cover all estate assets not disposed of elsewhere, either by specific or general bequests. Usually such a provision addresses all property not otherwise disposed of, conditional gifts that fail to take effect, and legacies that are renounced. The residuary bequest may be made in some wills or in a trust, and sometimes are in the form of an extended trust arrangement providing for children and grandchildren.

### Fiduciary provisions

A “fiduciary” is a general term for a person named as an executor, trustee, or guardian under a will. Fiduciaries may be individuals or banks, one person, or several persons acting in the same capacity. Every person must name an *executor*; and if the will contains any trust provisions, a *trustee*. *Guardians* are normally appointed only when minor children are involved. In addition to naming the initial fiduciaries, substitute fiduciaries must be named in the event the original fiduciary has died or is incompetent or unwilling to serve.

**Executor (or Executrix):** The “executor” is the fiduciary named in a will that has the responsibility to cause the will to be probated, to collect the assets of the estate, and to dispose of them according to the will. The executor has the responsibility

of filing federal and state estate tax returns and income tax returns, filing a final accounting, disposing of claims against the estate, and many other details, as set forth in the will, sometimes even including funeral arrangements for the deceased. Where the testator is the owner or partner in a business or businesses, the executor may have the additional responsibility of running the business

### The duties of an executor may extend from several months to several years

or disposing of it. The duties of an executor may extend from several months to several years, depending on the assets of the estate and the latitude given by the deceased.

**Trustee:** A “trustee” is a fiduciary that is given legal title to property disposed of by trust. The trustee has the obligation to obtain the trust property from the executor of the will and, thereafter, invest it according to the powers granted in the will. The trustee must periodically account for trust assets and must pay or apply the interest or profits earned by the trust principal as specified and to the person specified in the trust. Often a trustee has discretionary powers. For example, if the deceased makes a gift in trust for a minor child and directs the trustee to pay only the income earned by the trust principal to the child until he or she reaches majority (the age of majority varies by state), with the additional authorization that if the trustee believes it is in the best interests of the minor, he may pay part of the money before the child reaches the age of majority. This authority is common where the deceased parent was particularly concerned with the education of an infant.

**Guardian:** A “guardian” is a fiduciary appointed to take custody of minor children and the children’s property. A surviving spouse general-

ly is the guardian of infant children by law. Where both spouses die, the will or trust must appoint guardians and alternate guardians. Exercise extreme care in appointing guardians because, in effect, a guardian will replace the parents, and the children will live with and become members of the guardian’s household. In selecting a guardian, consider his or her age, views on education, physical capabilities to cope with the children, and whether he or she will accept the full responsibility of the position.

In the case of a divorce, a surviving parent usually will be the guardian for the couple’s children. However, a will or trust can designate a guardian *of your children’s property*, which they are inheriting from you. This guardian is known as the “guardian of the property.” This guardian does not have to be your ex-spouse and often is not.

### Health care/estate planning tools

**A Living Will:** This is a document that confirms end-of-life wishes, such as whether you want to be kept alive by artificial means if there is no likelihood of recovery to a meaningful life. It may contain organ-donation wishes and directions regarding hospital stays or home care in the final days of your life. Some states have living will statutes.

**A Health-Care Proxy:** This is a document that appoints an individual(s) as your agent(s) to carry out your health-care wishes contained in a living will. Some practitioners combine a living will and a health care proxy in the same instrument.

**A Durable Power of Attorney:** This is a document that delegates to another responsibility to make gifts, real estate and/or personal property transfers, access your accounts, etc. It should be made “durable” if you wish it to remain effective in the event of your disability. Powers of attorney can be “springing,” which means that they take effect at a later date or are

effective immediately. A power of attorney is a powerful tool that ends at your death but can be revoked at any time. This instrument can avoid expensive and time-wasting conservatorship/guardianship proceedings.

### Conclusion

Seek the counsel of a skilled trusts and estates attorney to help you with your estate plan, and recognize that assets in “joint” names or with beneficiary designations will pass “outside of your will” or by “operation of law.” Your newly drafted last will and testament or trust thus will be given *no* effect.

Another important thing to remember is to actually transfer assets to your trust if it is your intention for the trust to own those assets. In other words, if you own real estate in another state, a trust that owns the real estate will avoid “ancillary administration” in that other state. However, a deed from you, as grantor, to the trustee of the trust, as grantee, must be recorded in the state where the real property is located.

How a thorough inventory of your assets to your estate-planning attorney to avoid any misunderstandings or pitfalls. Provide your attorney with *actual* copies of your deeds, account statements, life insurance beneficiary designations, etc., so that he or she can help you plan your estate. Without this complete inventory, your estate plan may exist in a vacuum. There really is no such thing as a “simple will” because life and the law are both complex. Thus, be guided accordingly in planning your estate. **FA**



**Lynne S. Hilowitz** is a member of the firm of **DaSilva, Hilowitz & McEvily LLP** of New City and Garden City, NY. She concentrates her practice in the area of trusts and estates.

# Life Insurance as Leverage

## Using coverage to balance your postdivorce commitments with long-term financial security

BY ALEX SHIBICKY



If you are divorcing, over age 50, and reassessing your long-term financial plan, risk management is one of the core components in maintaining a strong foundation for retirement and your postdivorce financial future. Life insurance is at the heart of any such strategy and, more than most goods and services you buy, is closely tied to the circumstances of your life.

If you are like most people your age, you bought life insurance initially to protect your family from financial loss in the event of your death. You tied the amount of your insurance to the money your family would need to pay off debts, provide an income, put children through college, and/or cover other financial commitments. The same equations would apply in a post-divorce world—only with different answers.

There are many ways to buy life insurance, depending upon how long you may need it. If the need is only for a few years, there is a Yearly Renewable Term (YRT) product that would be most cost effective, but its cost increases each year. For longer periods of coverage, there are 10-, 15-, 20- and 30-year level premium term policies available in the marketplace.

Term insurance is for a period of time—one year, two years, 10, 15, etc. There also is a different type of life

insurance that is generally referred to as permanent insurance because it is designed to be in effect for your entire life—even if you live to age 100 or older. There are three basic variations of permanent insurance, each having its own nuances. A detailed analysis of those is beyond the scope of this discussion. However, in summary, they are:

- **Whole Life**, which has guaranteed death benefits, premiums, and cash values, as well as nonguaranteed dividends that can be used to reduce costs or increase benefits;
- **Universal Life (UL)**, which can be construed as term insurance and a side fund that is invested at current interest rates;
- **Variable Universal Life (VUL)**, which could be construed as term insurance and a side fund that is invested in subaccounts that can be allocated to investments managed by money managers, within the structure of the policy.

It is important to remember that life insurance is just that—life insurance and should not be considered an investment. Because this is a gross oversimplification, it is imperative that anyone considering a life insurance purchase consult with an experienced life insurance professional—preferably one with a Chartered Life Underwriter (CLU) designation.

One benefit of many permanent life insurance policies is the accumulation of cash values. Books have been written on this subject. The subtleties of risks and guarantees are, again, beyond the scope of this article, but the following is a simple overview. Cash values in a life insurance policy are foremost designed to keep that policy in force. If the death benefit is no longer required, the cash values can be used for “living benefits,” such as education expenses or supplementing retirement income. One very good benefit of having cash values accumulate in a life insurance policy is that the growth is tax deferred. When the cash value is accessed, it is taxed under FIFO (first in, first out), meaning the first dollars out are a return of premiums, which can be tax free if the policy is not classified as a Modified Endowment Contract (MEC).

Annuities also can provide tax-deferred growth, but are taxed as LIFO (last in, first out) and, additionally, carry a premature distribution penalty of 10 percent if accessed prior to age 59½, just as an IRA. Savings accounts are not only taxable but, by definition, are not considered good long-term wealth accumulation vehicles. Mutual funds are good long-term wealth accumulation products, but lack the tax-deferred status of a quality life insurance policy. Understand that permanent life insurance is a long-term commitment for death-benefit coverage and, again, should not be purchased solely as an investment.

If you are already purchasing term life insurance and looking to save money, consider purchasing permanent insurance (which would require

additional premium dollars) to capitalize on tax-deferred growth and FIFO taxation. If it makes sense to purchase a permanent life insurance policy, the younger your age at purchase, the better, because premiums are based on age and health. Typically, the younger you are, the healthier you are, too. Depending upon the amount of premium, your income would need to be adequate for the long-term nature of the commitment. A well-designed life insurance policy could be dovetailed into a large or small accumulation of assets. That is where good professional advice from a CLU would be invaluable. An additional feature available on some policies, Waiver of Premium, would pay the life insurance premiums if you were to become totally disabled, allowing for the buildup of cash values, even if you are unable to work. This does not exist with any 401(k), mutual fund, or savings account. Should disaster strike in the form of total disability, this feature could mean the difference between financial dignity or not.

As with any major life event, divorce is an important reason to review a life insurance portfolio, especially if you are closer to the end of your working life than the beginning and if child support or alimony becomes part of your final divorce settlement. Sometimes courts require the purchase of additional life insurance as security for a financial obligation, such as child support or alimony. Because of the significant impact divorce has on a family’s financial circumstances, it frequently necessitates changes in one’s life insurance—most commonly changes in beneficiary designations, ownership, and amounts of coverage.

### Seven areas of inquiry

If you are divorcing, here are seven considerations that may prevent even more unintended consequences from a financial and life insurance planning perspective.

**1 Tell your insurance carrier.** As soon as a divorce action is filed, make sure your financial representative or insurance company knows about your changed circumstances.

**2 Make sure the ownership and beneficiaries are correct.** If your ex-spouse was named as beneficiary before the divorce and you don’t change it, the insurance company will pay the proceeds to your ex-spouse upon your death, unless, of course, your spouse dies first. In many states, the death of a party during the divorce makes the

## Ownership of a policy can be critical. The owner of the policy has all the rights associated with it.

legal process of divorce moot, and the surviving spouse gets everything.

This is true, regardless of your new circumstances or intent—and irrespective of what the parties may have agreed to in a marital settlement agreement or what the final judgment may provide. By changing the beneficiary at the onset of the divorce (it can always be changed again later), you protect against that windfall.

Having instructions in a will or trust document, directing the proceeds of a life insurance policy, will be irrelevant too if the beneficiary designation is not correct. Likewise, if a beneficiary designation simply reads “wife of the insured” or “husband of the insured” and there is no spouse, the secondary or contingent beneficiary will receive the proceeds. In some states a divorce automatically changes your beneficiary designations (and your appointments of trustees, UTMA custodians, etc.); quite possibly to someone you would not choose yourself.

Ownership of a policy, too, can be critical. Whether or not the policy is term (no cash value) or permanent (with cash value) is only part of the equation. The owner of the policy has all the rights associated with it, such as the ability to change beneficiaries, access cash values, to control timely premium payments, etc.

**3 Is it alimony?** If the premium payments are to be classed as alimony for federal income tax purposes, it is important to consult with your attorney to be sure that both the policy ownership arrangements and the insurance provisions of the property settlement agreement meet the requirements of the Internal Revenue Code.

**4 Does the existing protection match the divorce decree requirements?** Life insurance may be required as part of a property settlement agreement or to guarantee the continuation of spousal or child support payments. This may involve the transfer of ownership of an existing policy, the purchase of a new policy by you or your ex-spouse on your life, or changing the beneficiary on existing policies you already own. It is very important that any life insurance provisions in the decree be followed precisely.

**5 Do you live in a community or marital property law state?** It is extremely important that terms of your divorce decree or property settlement agreement specifically cover the ownership of

your life insurance. The law may actually grant an ex-spouse more rights in a policy than he or she had during the marriage if the decree or settlement agreement does not specifically dispose of the policies.

**6 Do you own a joint life policy?** Also called survivorship, a joint life policy insures two people and pays out when the second insured dies. Some companies allow you to split the policy into two separate contracts, each insuring one spouse. While splitting the policy may trigger income tax, it may be worthwhile given the costs associated with purchasing new policies.

**7 Consider setting up a trust.** If you feel your spouse needs help managing money on behalf of your children, you might want to think about naming a trust as the beneficiary of insurance proceeds. This allows a trustee to manage proceeds and distributions. If life insurance is being purchased in your fifties or sixties, pursuant to a divorce decree, keep in mind that your age affects the cost of the protection and your health affects your insurability. There are policies that just provide a death benefit and those that provide a cash value buildup. The additional cost of a cash value policy is offset by the “living benefits” discussed above. A customized financial plan will take into account all of the nuances of each individual’s situation. One size does not fit all.

Although divorce proceedings may force you to make many choices, deal with a lot of emotions, and complete loads of paperwork, life insurance is one area that should not be overlooked. If you are contemplating divorce, you may have many alternatives with respect to your life insurance coverage. To help ensure that after the divorce is final the financial end result is what you intended, talk with your financial/insurance advisor. This may be a critical step in knowing all of your options, taking the right actions, and (re)building a plan for a financially secure future. **FA**

---

**Alex Shibicky, CLU, ChFC, is a financial advisor with Northwestern Mutual Financial Network, the marketing name for the sales and distribution arm of The Northwestern Mutual Life Insurance Company (NM), Milwaukee, Wisconsin, its affiliates, and subsidiaries. He is an agent of NM based in Skokie, Illinois. Contact Alex Shibicky at [alex.shibicky@nmfn.com](mailto:alex.shibicky@nmfn.com) or visit his Web site at**

# All Right, I'm Divorced,

The trauma of the divorce is over. A final decree has been entered, ending a short or long-time union or partnership. Many say the experience is the emotional equivalent of an extended terminal illness of a spouse or other close family member. But in divorce as in death, life goes on.

Several daunting issues and many seemingly difficult questions have survived the legal process. What about my health insurance? Will I still be covered? What about my insurance policies? Do I name beneficiaries or do I name my estate? What about my credit rating? Do I have a credit rating; or, even worse, what do I do if the divorce ruined my credit rating? What do I do with the money I received from the divorce? Should I cash in the pension distribution I received from my partner's retirement plan? Do I need a power of attorney now that the spouse is gone? Should or must I draft a new will? Where and with whom should I register my new divorce status or announce a resumption of my maiden or former married name?

These legitimate and practical questions are as universal as they are relevant to your status as a newly divorced person, irrespective of gender, social class, education, or ethnic background. Following are some pragmatic approaches to helping with these postdivorce decisions.

## Continuation of health-care benefits

The aftermath of a divorce is difficult at any age; however, the 50+ divorce litigant faces unique challenges. Foremost is the continuation of health insurance coverage at an age when buying a new policy could be cost prohibitive, especially given preexisting or chronic health conditions. Thus, health insurance becomes the primary, if not paramount, issue for the newly single person.

Under federal law, if you have been covered under a spouse's employment-related insurance, identical coverage can be continued for 36 months in most cases, as long as strict timelines are met. The employer and/or insurer must be notified of the divorce within 60 days of the final decree. Although there is some argument as to who is responsible for notifying the carrier, there is no question that the depen-

dent spouse has the most to lose if notification is not made. If you have been covered by a spouse's insurance during the marriage, talk with your lawyer about taking the initiative to continue coverage as soon as the divorce is final.

After being advised that a divorce has occurred, the administrator of the insurance plan has 14 days to notify the uninsured spouse of his or her right to continue employment-related coverage. The dependent spouse or beneficiary must then notify the employer and the carrier within 60 days of his or her intent to continue coverage, and, of course, pay the premium, which can be up to 102 percent of the current premium.

## Insurance policy adjustments

According to many state laws, a divorce litigant is not permitted to change beneficiary designations, insurance coverage, or deductibles prior to the final divorce decree. Therefore, following the final divorce decree, and presuming no appeal, change the beneficiaries on any policy received as part of the divorce settlement. Talk with your tax planner about whether to designate an individual or your trust or estate, along with whether to take the cash surrender value (CSR) of a clearly owned whole life policy. Usually, a child or grandchild will be named beneficiary; and given the historically low interest rates and diminishing coverage of a whole life policy, the CSR should often be taken and reinvested elsewhere. To avoid probate, a testamentary estate should not be designated as the beneficiary.

If you were a nonemployed spouse and your postdivorce income permits, maintaining the 36 months of coverage allowed by law may be the most economical way to meet your health-care needs. On the other hand, if you qualify for Medicare, purchasing a supplemental policy, such as the low-cost options available through the American Association of Retired Persons (AARP), may be advisable. The best investment for the "mature" divorcee, however, will be a "long-term" care (nursing home) policy, which pays a daily rate for in-home, assisted-living, or facility care in the event you should become incapacitated. The object of such a policy is to provide for your twilight years without dissipating your life savings and your children's inheritance, and protecting your heirs from the increasingly vigilant and baleful eye of Medicaid recovery.

Should you still be employed and not have imminent retirement plans, you may want to consider buying a supplemental disability policy, if your health history warrants,





off each month or making triple monthly payments until it is paid. In addition, establish credit locally by making sure the grocer, the insurance agent, the water company, the auto mechanic, the neighborhood bank, and the family lawyer, to name a few, are paid in full and on time. Then give these persons or businesses as credit references. The amounts owed locally are likely to be smaller and thus more manageable, when compared with credit card balances.

In addition, if your soon-to-be ex-spouse has a pension or retirement plan, in all probability, you will receive part of it via a qualified domestic relations order (QDRO). Your share will generally be exempt from the 10-percent early withdrawal penalty to which your spouse will be subjected. Therefore, unless you have other flexible funds or want to maintain an additional retirement resource, never agree to a provision in a divorce decree or a QDRO that requires your portion of the pension or retirement plan to be made payable to another qualified retirement plan. To do so would subject any emergency withdrawal you make to a 10-percent withdrawal penalty and restrict your ability to borrow based on these funds in the future. Strive too to maintain any property received through the divorce in an unencumbered state so as to have it available as collateral for personal or commercial loans.

# Now What?

After the judgment, take these **steps** to move on

BY JAMES WILSON DOUGLAS

to replace lost income in the case of a future disability, because you will no longer be able to depend on a spouse's income. Such policies normally pay a set monthly amount over a five-year period, which may enable you to reach the Medicare age threshold.

## Creditworthiness and QDROs

After a long-term marriage, a stay-at-home spouse may discover that although he or she does not have a negative credit history, having no credit history at all has the same practical effect as a bad credit rating. To escape this credit phantom zone, begin to establish credit in your own name by applying for a low-limit credit card and paying the balance

The next dilemma will be what to do with monies that will generate additional income: how to keep them readily available for daily needs, unexpected expenses, or true emergencies and, at the same time, not injure an established or fledgling good credit rating. Short-term certificates of deposit generally have poor rates of return, but the relatively abbreviated maturity dates allow for easy access and the ability to take advantage of improving interest rates after the initial investment term has expired. If you belong to a credit union, deposits as well as withdrawals can be made with little adverse consequence.

Maintaining a healthy or even a nominal savings account balance along with a credit union account will show not



only diversification, but will indicate the existence of multiple assets that will enhance your credit rating and provide collateral for contemplated future loans. Of course, the savings account interest rate will be less than stellar; however, the proverbial “bottom line” is that, just as in cashing a check, financial institutions are more likely to extend consumer credit to those who have accounts with them.

Another difficult scenario is recovering from a bad credit rating that results when the other spouse or his or her significant other runs up a jointly held credit card after separation or fails to pay off a credit card that was consigned to them by the family court judge. Federal regulatory law and most state consumer protection acts require credit rating agencies or companies to accept the innocent spouse’s *written* explanation of how the nonpayment issue came about. In other words, those companies that earn their money by rating creditworthiness must place one’s written (not over the telephone) side of the story in their files. On this basis, the rating may be modified or, more likely, the potential creditor may make an in-house adjustment of its assessment of risk in extending an innocent, but adversely affected, former spouse credit in a moderate amount.

Finally, as maddening as the dinnertime calls and form letters are, always respond in writing to a collection agency as to why a debt is not owed. One’s written response must be maintained in the agency’s records of the transaction.

### Advance directives

Notwithstanding that many hospitals and health-care providers have become efficient in obtaining standard or “boilerplate” powers of attorney from prospective patients, called “advance directives,” the older divorce client should address his or her specific need by consulting with appropriate, trained legal counsel. Advance directives consist primarily of statutorily regulated living wills, powers of attorney, or medical powers of attorney. A living will merely directs that the maker’s life should not be artificially prolonged, and the document prescribes when life-sustaining procedures should be withdrawn or discontinued. A general power of attorney commonly is concerned with appointing a person or a legal entity to transact business in the maker’s place, which is usually effective from the moment of execution. The opposite is true of a *medical* power of attorney, which gives a third party the authority to make or carry out medical decisions, including giving consents for treatment when the maker has become medically unable to do so at a future time. (See also Warner & Steinmetz on page 13.)

### Estate planning

Although we do not generally like to think about it, the ultimate major event in an older person’s life will be death. Obviously, the average parent wants to transfer as much material wealth as possible to children or grandchildren.

In 2008, the annual maximum amount transferrable to a single person, without tax liability, is \$12,000. Consult with a tax attorney or CPA to draft the appropriate trust instrument to maximize the amount transferred to your heirs and minimize tax liability.

In some jurisdictions, a divorce revokes certain aspects of a will executed prior to the divorce. Ask your lawyer whether you need to consult with a trusts and estate lawyer about having a codicil (supplement to a will) drafted and executed, or a new will. (See also Hilowitz, page 25.)

### Protecting your privacy

Leaving for a moment the morbid subject of death and estate planning and the complexities of credit and retirement strategies, other seemingly trivial, but indispensable, measures need to be taken to ensure privacy protection at the conclusion of a divorce. First, update all public records and private databases as to your postdivorce status as a newly single person, including resumption of a former or maiden surname, change of address, voter’s registration, passport, visas, driver’s license, business permits, and taxpayer identification.

For example, an unexpected model of government efficiency can change your name with both the Social Security Administration and the IRS by the filing of one document, SSA Form SS-5. This is essentially a one-page application for a new SSA card that can be found either online or at your local Social Security Administration office. Once the SS-5 form is filled out and filed with the SSA, the IRS is immediately notified, and in approximately 10 days follows suit with the name change.

The most important protection one can undertake is the most overlooked and yet potentially damaging, especially in the context of postdivorce litigation, such as contempt and modification—identity theft initiated or caused by an ex-spouse. To avoid this nightmare, promptly withdraw all written consents for the former spouse to access one’s medical or financial records. Simultaneously, change all ATM, credit card, commercial Web site, and computer passwords to something totally nonsensical. After all, it is a good bet that your former spouse knows your birth date, your Great Dane’s name, and how you think.

Lastly, though protected by the attorney–client privilege, your client file should be retrieved once the divorce is final, along with all of your medical, computerized, and financial records. After all, natural disasters, such as floods, fires, tornadoes, hurricanes, and thefts, also can ravage lawyers’ offices, and could cause unexpected dissemination of your most private materials.

**FA**



**James Wilson Douglas is a solo practitioner in Sutton, West Virginia, where he focuses his practice in divorce and family law.**



# Books & More

## The 50+ Divorce Bibliography

### Divorce

*ABA Family Legal Guide* (3rd ed)  
(2004) \$39.95 at [www.ababooks.org](http://www.ababooks.org)

AARP articles and resources  
<http://www.aarpmagazine.org/family/Articles/a2004-05-26-mag-divorce.html>

★ *ADR Options: A Client Manual*  
from *Family Advocate*  
(PC51311002404) \$12.95 at  
[www.abanet.org/advocate/home.html](http://www.abanet.org/advocate/home.html)

Bair, Deirdre, *Calling It Quits*  
(Random House 2007). *See review,*  
*page 35.*

★ *Coparenting During and After  
Divorce: A Client Manual* from  
*Family Advocate* (PC51311003001)  
\$12.95 at [www.abanet.org/advocate/home.html](http://www.abanet.org/advocate/home.html)

★ *Divorce Forms: Fact-Gathering to  
Help Your Lawyer: A Client Manual*  
from *Family Advocate*  
(PC51311002401) \$12.95 at  
[www.abanet.org/advocate/home.html](http://www.abanet.org/advocate/home.html)

Divorcenet.com  
[www.divorcenet.com](http://www.divorcenet.com)  
A collection of state-specific articles  
on many aspects of divorce.

★ *FAQs—200+ Answers to Frequently  
Asked Questions About Divorce:  
A Client Manual* from *Family  
Advocate* (PC51311002801) \$12.95  
at [www.abanet.org/advocate/home.html](http://www.abanet.org/advocate/home.html)

★ *Surviving Your Divorce and Beyond:  
A Client Manual* from *Family  
Advocate* (PC51311002701) \$12.95  
at [www.abanet.org/advocate/home.html](http://www.abanet.org/advocate/home.html).

### Estate planning

**AARP on estate planning**  
[http://www.aarp.org/bulletin/your-money/Articles/a2004-03-17-estate\\_planning.html](http://www.aarp.org/bulletin/your-money/Articles/a2004-03-17-estate_planning.html)

★ *Estate Planning FAQs* and the  
*ABA Probate and Property Magazine*,  
ABA Real Property, Probate and Trust  
Law Section at [www.abanet.org/rppt](http://www.abanet.org/rppt).

**FindLaw** site at [www.findlaw.com](http://www.findlaw.com)  
Resources and articles on various  
aspects of estate planning and divorce.

### Grandparent rights

AARP Grandparenting  
Tips & Resources  
[http://www.aarp.org/family/grandparenting/articles/grandparent\\_tip\\_sheet.html](http://www.aarp.org/family/grandparenting/articles/grandparent_tip_sheet.html)

Divorce Source  
[www.divorcesource.com/](http://www.divorcesource.com/)  
Resources on divorce, grandparents  
rights, various state laws, etc.

Grandparents Rights Org.  
[www.grandparentsrights.org](http://www.grandparentsrights.org)  
Advocacy site for grandparent rights.

### Health insurance

AARP FAQs about health insurance  
and drug benefit  
<http://www.aarphealthcare.com/about/faq.aspx>

Age 50–64 health insurance options  
<http://www.aarphealthcare.com/default.aspx>

Information about COBRA at  
U.S. Department of Labor Web site,  
[www.dol.gov/dol/topic/health-plans/cobra.htm](http://www.dol.gov/dol/topic/health-plans/cobra.htm)

*2008 COBRA Handbook*, Aspen  
Publishers

Employee Benefit Security Admin.  
To find out about COBRA-  
continuation coverage under  
ERISA, call 1/800-444-3272.

### HIPAA

For more information about the  
Health Insurance Portability  
and Accountability Act, go to  
[www.cms.hhs.gov/ocr/hipaa/](http://www.cms.hhs.gov/ocr/hipaa/).

For information about who qualifies  
for continuation of group health  
insurance coverage.

[http://www.dol.gov/ebsa/faqs/faq\\_consumer\\_cobra.html](http://www.dol.gov/ebsa/faqs/faq_consumer_cobra.html)

### Medicare and Medicaid

Information about Medicare and  
Medicaid services and eligibility.  
[www.cms.hhs.gov](http://www.cms.hhs.gov) or your state  
Medicaid provider or health  
department or <http://www.cms.hhs.gov/ContactsCMS/>.

For a copy of *Medicare and You*,  
call 1/800-633-4227 or go to  
[www.medicare.gov](http://www.medicare.gov)

### Real estate

AARP reverse mortgage calculator  
[www.rmaarp.com](http://www.rmaarp.com)

### Social Security

Get a new Social Security card or  
change your name at <http://www.ssa.gov/online/ss-5.html>

For more information about  
Social Security generally at  
[www.ssa.gov](http://www.ssa.gov)