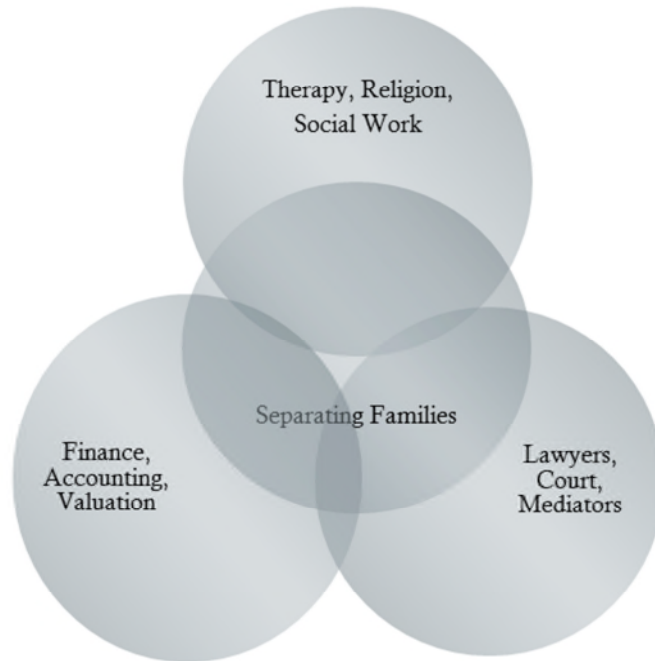


SENSIBLE SEPARATION

EDITOR, GREG KINCAID

JULY, 2015



Sensible Separation is an interdisciplinary newsletter for professionals assisting families with divorce or separation. If you would like to contribute an article, please submit to gkincaid@hrkklaw.com. For more information about divorce mediation, please visit www.SensibleSeparation.com. Another opportunity to share helpful thoughts or insights about our work exists on the *Sensible Separation* FACEBOOK page, which is located at www.facebook.com/sensibleseparation. Please visit our site. We are just getting it started and would appreciate the traffic and any helpful information that you would like to share.

This issue of *Sensible Separation* will focus on Gray divorce.

Medicaid Divorce By Stacey Janssen

This article explains a unique aspect of divorce for Gray families

Gray Divorce By Carly Boothe

With the increasing rates of divorce among Baby Boomers, the area of family law has had to adapt & accommodate to these unique needs.

Dividing Assets By Deann Shinkle

The assets and liabilities mix of an older family can be very different from a younger family.

1. Medicaid Divorces

By Stacy Janssen

The news that a loved one needs long term care is both sad and frightening. It is never easy to watch someone you love suffer. The cost of long term care can frighten even the most well



prepared family. To cover these costs, many families look to Medicaid to pay for long term care. Medicaid is a welfare program jointly funded by the federal government and the states and eligibility rules can be daunting. Historically, divorce was the only way that one spouse could qualify for Medicaid to pay for long term care without impoverishing the well spouse remaining in the community. Today, the Spousal Impoverishment Law, also known as Division of Assets, provides income and asset protections for the well, or community spouse. For many families, these protections relieve the need to consider divorce as a means of protecting the financial well-being of the community spouse. Unfortunately not all families find protection in the Division of Assets law and some couples decide to divorce as a means of protecting assets from the expense of long term care. This article will address several reasons that couples may consider divorce rather than relying on Division of Assets laws.

Second Marriages - For those persons in their second or third marriage, the Division of Assets law may not prove satisfactory. When one or both spouses have children from a previous marriage, they often intended to pass their separate assets to their respective children. The Division of Assets law involves transferring all or most of the assets to the community spouse with limits on how much they can keep. There is also the possibility of Medicaid estate recovery liens and claims against the estate of the survivor. Both the limitation on how much can kept and estate recovery can frustrate the desire of the community spouse to leave assets to children from a prior marriage. In this case, divorce may provide better protection for the community spouse, as well as protect the inheritance for the children.

Inherited/Gifted Assets - The results of the Division of Assets law may also prove undesirable when the community spouse has received significant assets through gift or inheritance. The Division of Assets law does not give any special protection to assets inherited or gifted to the community spouse. These assets will be counted towards Medicaid eligibility and subject to estate recovery. In a divorce proceeding, however, the court has discretion to set aside inherited or gifted assets to the community spouse.

Differences in Age/Younger Children - When the community spouse is significantly younger than the spouse seeking Medicaid eligibility it may be in that person's best interest to end the marriage relationship. This is especially true if the community spouse is working and plans to acquire additional wealth over time. Divorce will allow the younger spouse freedom from the

restrictive Medicaid rules and risk of estate recovery. If the couple has younger children, they must consider that Medicaid rules make provisions for minors, but not for college age children. Divorce will make providing support for college age children much more feasible for the community spouse. In a divorce proceeding the difference in age and child rearing obligations may be a reason for a court to allow a greater amount of the assets to be set aside for the community spouse and the children.

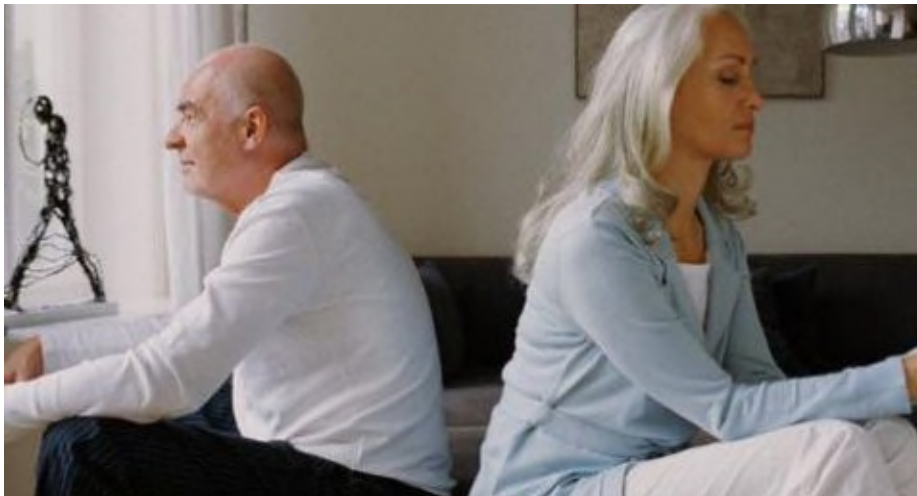
Medicaid rules offer significant protections for the well spouse. These protections may not meet the needs of every family. There are times when a divorce will better protect the family's assets. The process of divorce does not have to be long or difficult, especially if the couple entered into a prenuptial agreement or kept their assets separate. Although it is important to keep in mind that Medicaid does not honor the terms of a prenuptial agreement with regard to property ownership, only an order from the Court is sufficient to set aside assets per the terms of a prenuptial agreement. A consultation with an elder law attorney may help your family determine the best course of action to protect assets from the expense of long term care.

Stacey Janssen

stacey@staceyjanssenlaw.com

2. The Increasing Trend of Gray Divorce

By Carly Boothe



The Baby Boomers are taking over the family law arena, so much so that a phrase “Gray Divorce” has been coined. In fact, according to a 2012 Bowling Green State University study, Americans over 50 are twice as likely to get divorced as people of that age were 20 years ago. Further, roughly 1 in 4 divorces in 2010 occurred to persons ages 50 and older.

Many reasons have been given for these rising rates including increased economic independence in women; longer life spans (I might have to live with him/her for 30 more years?!); and the fact that subsequent marriages are more likely to end in divorce than first marriages.

When working with a Gray Divorce, there are several considerations that you may not encounter with a younger divorcing family:

1. Social security benefits – After a ten-plus year marriage, one can receive benefits from his/her ex-spouse, after age sixty-two. There are many considerations as to when to begin receiving these benefits, but you will want to keep this income in mind when calculating spousal maintenance.

2. Drafting and enforcing pre-nuptial & post-nuptial agreements – Consider: Is there a competency issue with either partner? Who benefits (usually it's ultimately the adult children)? Do the adult children need to be specifically named? Is it consistent with existing wills, trusts & estate plans? Should we include a health care proxy and funeral directive?

3. Dividing up more “stuff” – The value of the family's “stuff” will likely be higher. In other words, there may be more equity in the house, more retirement, and maybe a vacation home or three.

This doesn't always mean that there is more cash available, as the money may be tied up and not easy to access. If the parties cannot yet pull from retirement without paying the ten percent early withdrawal penalty, you can utilize 26 U.S. Code 72(t) of the Internal Revenue Code. This permits the recipient of his/her spouse's retirement to withdraw from the plan without having to pay the early withdrawal penalty. This can free up some funds for the down payment on a new home for the spouse who is not staying in the marital residence.

When working with a family who has resided in their marital residence for more than five years, consider the amount of equity in the home. It may be necessary to include a provision in the settlement agreement that distributes the capital gain of the marital residence in excess of \$250,000 between the divorcing spouses under 26 U.S. Code 121(b)(3)(B). This provision permits each spouse to exclude up to \$250,000.

4. Adult children – Suddenly, your client will have several “experts” on his/her side. These experts are actually Susie and Johnny, the parties' adult children, and they will strongly believe they have a say in the divorce. Keep them far, far away. Even adult children should not be asked to take sides, but instead should be encouraged to maintain their relationship with both parents.

Adult children are an important reason why a family should consider utilizing a mediator instead of “lawyering up.” Even when the children have grown up and left the house, parents are still parents. There will be weddings, grandbabies, family reunions, and numerous other events at which the parties will need to downplay animosities and resentments. A skilled mediator will assist the divorcing family to maintain an amicable spirit as they work together to separate the family into two separate homes.

Carly Boothe
Carly@BootheLaw.com

3. Dividing Assets in a Gray Divorce

By Deann Shinkle

There are a lot of Gray areas when it comes to divorce, but the term “Gray Divorce” is popping up more frequently. What is a “Gray Divorce” and how does it affect me?

The term “Gray Divorce” refers to a couple who chooses to divorce after many years of marriage. They couple will typically be older with adult children, so often it is thought of as an easy process. Nothing could be further from the truth.



Mature couples will have to think about more than just the marital home, contents and collectibles. Vacation homes, rental properties, and multiple vehicles will need to be valued and divided. Business assets (and liabilities) need to be given special scrutiny, especially with a family owned business. Brokerage accounts, stocks, bonds, and all investments need to be analyzed, not just for current value, but also for tax obligations upon liquidation.

Retirement plans including IRA, 401(K), 403(b), 457, and ESOP accounts will need to be divided with Qualified Domestic Relation Orders (QDRO). Employer Stock Options need valued with a strategy for exercise dates. Pension options need to verified and examined to find the best option for both parties.

An often overlooked asset is life insurance. Mature couples may have been paying premiums for an extended time and have policies with large cash values. Life insurance is often used as part of an Estate Plan, meant to fund a family trust. Who will keep the policy, pay premiums, and be named as beneficiary? Mature couples need to be careful not to let policies lapse as it could be difficult to obtain new insurance due to age and health factors.

The financial decisions faced in a “Gray Divorce” can prove overwhelming. A Certified Financial Planner (CFP®) or a Certified Divorce Financial Analyst (CDFA) are trained to help you though the process and will prove a valuable member or your team.

Deann Shinkle

deann@frontierwealth.com

Sensible Separation is a Quarterly Newsletter, edited by Greg Kincaid. Submissions are welcome. If you would like to contribute, I may be reached at (913) 782 2350 or at gkincaid@hrkklaw.com. My web address is www.sensibleseparation.com. If you would like to initiate a dialogue on a issue of interest to you, where others can participate, please do so at www.facebook.com/sensibleseparation.