

THE SPIKE IN SILVER SPLITTERS: EXAMINING SPECIAL CONSIDERATIONS FOR GRAYING DIVORCES

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As the population of individuals aged sixty-five and older continues to increase in the United States, it is no surprise that the percentage of divorces for this age group has also dramatically increased. From notable couples like Al and Tipper Gore to Clint Eastwood and Dina Ruiz, an increase in the older population and the spotlight on graying divorces are two of multiple features contributing to a worldwide phenomenon known as the “gray divorce revolution.”

This Article examines and compares the trend of graying divorces in the United States with countries such as Japan, India, and the United Kingdom. Furthermore, this Article investigates the factors and reasons which contribute to the increase in “graying divorces.” Moreover, this Article focuses on recommendations for individuals and practitioners who face the issues that arise when dealing with cases involving graying divorces.

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I. INTRODUCTION

The aging of the “baby boomer”¹ generation has led to direct increases in the prevalence of certain issues, from nursing home care to an increase in Social Security and Medicare expenditures, and now, to an increase of “graying divorces.”² “Graying divorce” refers to the phenomenon of the increase in splits or separation of older couples (over fifty) who have been married for a long time.³ Between 1950 and 2006, the U.S. population roughly doubled, while the population over age sixty-five nearly tripled.⁴ It is projected that by 2030, the total U.S. population aged sixty-five to seventy-four years old will increase from 6% to 10%.⁵ Along with the overall increase in baby boomers, it is estimated that the risk of divorce has more than doubled since 1990 for individuals aged sixty-five and older.⁶ It is estimated that for fifty-five to sixty-four-year olds, the divorce rate increased from five divorces per one thousand marriages to more than fifteen divorces per one thousand marriages.⁷ Recently, famous couples have started making headlines of being prime examples of graying divorces, including Jeff and MacKenzie Bezos, Al and Tipper Gore, and Clint Eastwood and Dina Ruiz.⁸ The

1. Mark Mather et al., *Aging Baby Boomers to Face Caregiving, Obesity, Inequality Challenges*, POPULATION REFERENCE BUREAU (Jan. 13, 2016), <https://www.prb.org/unitedstates-population-bulletin/> (explaining for purposes of this Article, “baby boomers” are defined as individuals born between 1946 and 1964).

2. *See id.*

3. Marguerita Cheng, *Grey Divorce: Its Reasons & Its Implications*, FORBES (Feb. 26, 2019, 1:23 PM), <https://www.forbes.com/sites/margueritacheng/2019/02/26/grey-divorce-its-reasons-its-implications/#6f5bdec54acd> [hereinafter Cheng].

4. Douglas Mossman, *Incompetence to Maintain a Divorce Action: When Breaking Up Is Odd to Do*, 84 ST. JOHN’S L. REV. 117, 127 (2010) [hereinafter Mossman].

5. *Id.*

6. Susan L. Brown & I-Fen Lin, *Gray Divorce: A Growing Risk Regardless of Class or Education*, COUNCIL CONTEMPORARY FAMILIES (Oct. 8, 2014), <https://contemporaryfamilies.org/growing-risk-brief-report/> [hereinafter Brown & Lin *Divorce*]; Neale Godfrey, *Show Me the Money: How to Protect Yourself in Gray Divorce*, KIPLINGER (Aug. 29, 2019), <https://www.kiplinger.com/article/retirement/T065-C032-S014-show-me-the-money-protect-yourself-in-gray-divorce.html> [hereinafter Godfrey *Money*].

7. Kaylee McGhee, *To Have and to Hold*, WASH. EXAMINER (Nov. 7, 2019, 11:00 PM), <https://www.washingtonexaminer.com/opinion/to-have-and-to-hold>.

8. Christie D’Zurilla, *Clint Eastwood’s Divorce from Dina Eastwood Is Final*, L.A. TIMES (Dec. 23, 2014, 3:16 PM), <https://www.latimes.com/entertainment/gossip/la-et-mg-clint-eastwood-divorce-final-20141223-story.html>; Neale Godfrey, *The Rise of Gray Divorce: Why and Why Not?*, KIPLINGER (Jan. 23, 2019), <https://www.kiplinger.com/article/retirement/T065-C032-S014-the-rise-of-gray-divorce-why-and-why-not.html> [hereinafter Godfrey *Divorce*]; Ben Steverman, *Divorce Is Destroying the Finances of Americans Over 50*, BLOOMBERG (July 19, 2019, 8:21 AM), <https://>

growth of the older population and publicity of graying divorces are just two contributing factors to what is now referred to as the “gray divorce revolution.”⁹

The surge in graying divorces worldwide has paired hand in hand with new considerations and issues for spouses contemplating divorce to plan how to best protect and divide their assets so they are prepared for retirement and beyond.¹⁰ Couples who have grown used to tackling financial issues jointly during their marriage are now faced with the reality that what is best for one spouse may not be in the other spouse’s best interests.¹¹ For example, one spouse may be eligible to receive spousal support from the other in accordance with the standard of living the parties enjoyed during the marriage.¹² Additionally, if the couple resides in one of the majority of states that follows an “equitable distribution” model for property division, one spouse may be entitled to receive a disproportionate portion of the parties’ marital assets.¹³ Overall, researchers have found that older adults are unlikely to recoup the financial losses from divorce, particularly for spouses who have been out of the labor force for decades.¹⁴ This research indicates older divorced couples have only 20% as much wealth as older married couples.¹⁵ These statistics highlight the need for older couples undergoing divorce to carefully look at their assets and liabilities and determine what steps they should try to take to preserve them.

This Article addresses specific issues that arise when dealing with graying divorces and recommendations for individuals and practitioners in Illinois who face them. Part II lays out background information surrounding the prevalence of graying divorces worldwide and possible reasons explaining the increase of divorces in older populations. Part III examines special considerations that both individuals and practitioners face when dealing with graying divorces. Finally, Part IV advocates for specific tools that can be leveraged by individuals and

www.bloomberg.com/news/articles/2019-07-19/divorce-destroys-finances-of-americans-over-50-studies-show.

9. See Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990–2010*, 67 J. GERONTOLOGY 731 (Nov. 2012), available at <https://doi.org/10.1093/geronb/gbs089> [hereinafter Brown & Lin].

10. Godfrey *Divorce*, *supra* note 8; Godfrey *Money*, *supra* note 6.

11. See Godfrey *Money*, *supra* note 6.

12. See *id.*

13. *Id.*

14. Brown & Lin, *supra* note 9.

15. *Id.*

practitioners facing issues in graying divorces, including prenuptial and postnuptial agreements, estate plans, and careful drafting of divorce settlement agreements.

II. BACKGROUND

A. The Worldwide Phenomenon of Graying Divorces

The graying divorce trend has not only been observed in the United States, but rather, appears to be increasing worldwide. Specifically, researchers in the United States, the United Kingdom, Japan, and India are documenting sharp increases in gray divorces in their respective baby boomer populations.¹⁶ This section will explore the trends in these four countries.

1. UNITED STATES

The United States has one of the highest divorce rates in the world, with roughly 45% of all marriages expecting to end in divorce.¹⁷ However, while the rate has risen dramatically for Americans over fifty, there has actually been a decline in the rate for those between the ages of twenty-five and thirty-nine.¹⁸ This may in part be attributable to the recent trends of millennials getting married at a later age, cohabitating together before marriage, or not getting married at all.¹⁹ The belief is that as millennials are frequently the children of divorced parents due to the large number of baby boomers who underwent divorce early on, they now fear going through one themselves.²⁰ Consequently, they are spending more time to find “Mr. or Mrs. Right” and spending a longer time in a relationship before diving into marriages.²¹ Statistics

16. Sierra Bein, *Grey Divorce: Why Are More Baby Boomers Ending Their Marriages When They Get Older?*, NAT'L POST (July 24, 2018, 10:32 AM), <https://nationalpost.com/news/canada/grey-divorce-why-are-more-baby-boomers-splitting-up-their-marriages-as-they-get-older>; *Japan retired divorce rate soars*, BBC NEWS (Feb. 22, 2006, 6:05 PM), <http://news.bbc.co.uk/2/hi/asia-pacific/4741018.stm>.

17. Brown & Lin, *supra* note 9.

18. Naomi Cahn & June Carbone, *Who Is at Risk for a Gray Divorce? It Depends*, INST. FOR FAMILY STUDIES (May 1, 2017), <https://ifstudies.org/blog/who-is-at-risk-for-a-gray-divorce-it-depends>.

19. Hillary Hoffower, *7 Ways Millennials Are Changing Marriage, from Signing Prenups to Staying Together Longer Than Past Generations*, BUS. INSIDER (Feb. 4, 2020, 8:43 AM), <https://www.businessinsider.com/how-millennials-are-changing-marriage-divorce-weddings-prenups-2019-5> [hereinafter Hoffower].

20. *Id.*

21. *See id.*

suggest that these millennial trends are driving the estimated 24% decline in the divorce rate in the United States since the 1980s.²²

Meanwhile, the divorce rate has nearly doubled among the U.S. population over the age of fifty²³ and roughly tripled among the U.S. population aged sixty-five and older.²⁴ A 2010 study found that roughly one in four divorces in 2010 occurred between persons ages fifty or older.²⁵ Further, the rate of divorce was 2.5 times higher for remarriages (more likely in the older populations) than first marriages.²⁶ The rationale may be that people who have already undergone divorce are more willing to go through the process again if their second marriage becomes dissatisfactory.²⁷ Finally, the study found that on top of the older population divorcing at a higher rate, more than half of these gray divorces are between couples who have been married over twenty years.²⁸ Interestingly, the researchers found no correlation between level of education and their likelihood of getting a divorce.²⁹

To arguably perpetuate the issue further, people are now trying to capitalize on the increased divorce rates among baby boomers by setting up opportunities for these newly separated individuals to connect with each other.³⁰ One such program is known as the Rebuilding Seminar, in Boulder, Colorado, where recently separated individuals can attend a ten-week seminar with other recently separated individuals.³¹ At these seminars, the individuals participate in a wide variety of events including meditation, dinner and a movie, and writing goodbye letters to their former lives and loves.³² These types of programs

22. *Id.*

23. Godfrey *Divorce*, *supra* note 8.

24. Renee Stepler, *Led By Baby Boomers, Divorce Rates Climb for America's 50+ Population*, PEW RESEARCH CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/> [hereinafter Stepler].

25. Brown & Lin, *supra* note 9.

26. *Id.*

27. Brown & Lin *Divorce*, *supra* note 6.

28. Brown & Lin, *supra* note 9.

29. Brown & Lin *Divorce*, *supra* note 6.

30. Ina Jaffe, *Older Americans' Breakups Are Causing a 'Graying' Divorce Trend*, NPR (Feb. 24, 2014, 4:00 PM), <https://www.npr.org/2014/02/24/282105022/older-americans-breakups-are-causing-a-graying-divorce-trend> [hereinafter Jaffe].

31. *Winter Rebuilding Seminar*, REBUILDING SEMINARS <https://www.rebuildingseminars.com/product/sunday-winter-rebuilding-seminar/> (last visited Jan. 27, 2020).

32. Jaffe, *supra* note 30.

encourage divorced individuals to start their next chapter, and potentially, their next marriages as well.³³

2. UNITED KINGDOM

In addition to experiencing the graying divorce trend themselves, the United Kingdom has also seen some unforeseen consequences related to gray divorcees. According to the Office for National Statistics, the number of people in the United Kingdom getting divorced over the age of sixty has risen by three-quarters in the past twenty years.³⁴ This has led to a record number of older renters because post-divorce, older divorcees are unable to buy new homes.³⁵ This follows the trend observed for older adults that following a divorce, they are unlikely to recoup financial losses associated with that divorce.³⁶ This is particularly true for women who were out of the labor force for a period of time during their marriages.³⁷

Further, divorce laws in England and Wales are now being amended to change the timeline of a fault-based versus no-fault divorce.³⁸ Prior to this change, fault-based divorces could take as short as three to six months to complete, whereas no-fault divorces required couples in Scotland to prove they lived apart for at least one year and couples in the rest of the United Kingdom to prove they lived apart at least two years.³⁹ This shift is an example of an external amendment to the law that will inevitably also remove barriers for people, elderly included, throughout the United Kingdom to move forward with filing a divorce action.

33. *Id.*

34. John Bingham, *'Til Retirement Us to Part: 'Silver Splitter' Divorces Up By Three Quarters in Generation*, THE TELEGRAPH (Aug. 6, 2013, 11:44 AM), <https://www.telegraph.co.uk/women/sex/divorce/10225335/Til-retirement-us-do-part-silver-splitter-divorces-up-by-three-quarters-in-generation.html>.

35. *Rise in Pensioner Bachelor Pads as 'Silver Splitters' Lead to a Record Number of Older Renters*, THE TELEGRAPH (June 12, 2017, 12:01 AM), <https://www.telegraph.co.uk/news/2017/06/11/rise-pensioner-bachelor-pads-silver-splitters-lead-record-number/>; *'Silver Splitters'—Are Over-60s Divorcees Creating a New Generation Rent?*, THE GUARDIAN (June 12, 2017), <https://www.theguardian.com/lifeandstyle/shortcuts/2017/jun/12/rise-silver-splitters-elderly-renters-retired-divorcees-trend>.

36. Brown & Lin, *supra* note 9.

37. *Id.*

38. *Divorce Law: Reforms to End 'Blame Game' Between Couples*, BBC NEWS (Apr. 9, 2019), <https://www.bbc.com/news/uk-47860144>.

39. *Id.*

3. JAPAN

Overall, the divorce rate has increased over the past few decades in Japan, a country that has traditionally valued subservience and the credence of “breed, not lead.”⁴⁰ However, Japan has also seen the spike particularly amongst older couples, with divorces among couples married twenty-five years or longer accounting for 6.4% of divorces in Japan, triple the rate from 1980.⁴¹ This trend has been observed most drastically in women who are married to husbands older than sixty, the national retirement age in Japan.⁴² Specifically, these women begin showing symptoms of depression, skin rashes, asthma, ulcers, and high blood pressure.⁴³ The unprecedented rise in divorces in Japan is so prevalent that there is a specific Japanese concept to describe the reasoning behind it. Known as the “retired husband syndrome” in Japanese, it translates into English as “stress syndrome from having the husband at home.”⁴⁴ Dr. Nobuo Kurokawa, head of the Psychosomatic Medicine Laboratory in Osaka, Japan, first coined the term “retired husband syndrome” after treating Japanese women with these symptoms for over a decade.⁴⁵ Dr. Kurokawa shared that if these symptoms are ignored, they will likely worsen.⁴⁶ Despite this documented phenomenon, divorce is still a relatively taboo concept in Japan.⁴⁷ In spite of this, Japan has started acknowledging the increase in gray divorces in their population, including recently amending their pension laws to entitle women to up to half of their ex-husband’s pension.⁴⁸ Additionally,

40. Patty English, *Major Causes of Divorce: Japan Gaining on USA and Canada 2005-2020*, OWLCATION (Feb. 26, 2019), https://owlcation.com/social-sciences/Major_Causes_Of_Divorce.

41. Merrill Goozner, *Retired Spouses Drive Japanese Women Up Walls and Into Clinic*, CHI. TRIB. (Mar. 6, 1994), <https://www.chicagotribune.com/news/ct-xpm-1994-03-06-9403060240-story.html> [hereinafter Goozner].

42. Paul Kenyon, *Retired Husband Syndrome*, BBC NEWS (Nov. 13, 2006, 4:14 PM), http://news.bbc.co.uk/2/hi/programmes/this_world/6143010.stm [hereinafter Kenyon].

43. *Id.*

44. Marco Bertoni & Giorgio Brunello, *Pappa Ante Portas: The Retired Husband Syndrome in Japan*, IZA Discussion Paper No. 8350, 2 (July 2014), available at <http://ftp.iza.org/dp8350.pdf>.

45. Anthony Faiola, *Sick of Their Husbands in Graying Japan*, WASH. POST (Oct. 17, 2005), <https://www.washingtonpost.com/wp-dyn/content/article/2005/10/16/AR2005101601145.html>; Goozner, *supra* note 42.

46. Kenyon, *supra* note 42.

47. *Id.*

48. Justin McCurry, *Japan Enters the Age of Silver Divorces*, THE GUARDIAN (Oct. 18, 2007), <https://www.theguardian.com/news/2007/oct/18/internationalnews>

Okagi Kyoritsu Bank recently became the first Japanese bank to offer lump sum “divorce loans” of between 100,000 and 5,000,000 yen to cover the costs of alimony, distribution of property, and court action.⁴⁹ These trends suggest that even traditional countries like Japan are adopting measures to address the graying divorce revolution.

4. INDIA

In contrast to the United States, India has the lowest divorce rate in the world, with less than 1% of marriages ending in divorce.⁵⁰ This low divorce rate is commonly associated with the high amount of shame and stigma surrounding divorce, the societal pressure to remain married, and the high rates of arranged marriages that involve the families of the couple rather than just the individuals.⁵¹ However, even India is not immune to the graying divorce trend. Statistics show the percentage of older divorce cases has almost doubled in India.⁵²

Like Japan, cultural considerations and external factors seem to play a large role in the rising rates of divorce in India overall. Divorce is still highly stigmatized in India and is often seen as a sign of failure.⁵³ Nevertheless, recent statistics indicate women’s rights and economic autonomy have increased in all regions of India.⁵⁴ Part of this movement for advancing women’s rights has been standing up to fight the stigma surrounding divorce.⁵⁵ This includes an increasing number of support groups on social media websites like Instagram and Facebook

(explaining how prior to 2007, a divorced woman forewent any portion of her husband’s pension in Japan).

49. *Id.*

50. *India Has the Lowest Divorce Rate in the World: Countries with Lowest and Highest Divorce Rates*, INDIA TODAY (Nov. 20, 2018), <https://www.indiatoday.in/education-today/gk-current-affairs/story/india-has-the-lowest-divorce-rate-in-the-world-1392407-2018-11-20>.

51. *Id.*

52. Nona Walia, *Silver Separators*, INDIA TIMES (Jan. 22, 2017, 12:10 AM), <https://timesofindia.indiatimes.com/life-style/relationships/love-sex/silver-separators/articleshow/56684289.cms>.

53. Shephali Bhatt, *Happily Divorced: Indian Women Are Breaking the Stigma Around Separation Like Never Before*, ECON. TIMES (Jan. 27, 2019, 3:44 PM), <https://economictimes.indiatimes.com/magazines/panache/happily-divorced-indian-women-are-breaking-the-stigma-around-separation-like-never-before/articleshow/67704287.cms?from=mdr> [hereinafter Bhatt].

54. Neetu Chandra Sharma, *Non-marriage Very Rare in India but Divorces Doubled in Past Two Decades: Report*, LIVEMINT (June 25, 2019, 11:45 PM), <https://www.livemint.com/news/india/non-marriage-very-rare-in-india-but-divorces-doubled-in-past-two-decades-report-1561486297890.html>.

55. Bhatt, *supra* note 53.

where women considering divorce can talk to like-minded individuals and “normalize” the process.⁵⁶ As these women age and divorce becomes more commonly accepted, it is likely these women will break off their unhappy relationships and by finding support in their peers, will push the divorce rates up for all age groups.

B. Reasons Behind Graying Divorces

On top of the typical culprits of financial mismanagement, addictions, and infidelity, graying divorces have some underlying factors that are more specific to older individuals.⁵⁷ This section explores some of the reasons the older populations are experiencing an increase in divorce rates.

1. RETIREMENT/EMPTY NEST SYNDROME

Overall, older couples seeking a divorce are more likely to have older children who have emancipated and left home, leaving their parents to either reconnect or discover they do not have much in common.⁵⁸ Similarly, older couples undergoing divorce are closer to retirement age or may have already retired and have more free time at home. During this period of time, people may discover they have a difference in routines, underlying values, expectations for the rest of their lives, and annoying habits, that can lead to the deterioration of the marriage.⁵⁹ Retirement and empty nesting are both considered points of “marital adjustment” that can prompt people to reassess their satisfaction and happiness in their marriages.⁶⁰ Studies have found women in particular have higher expectations for their emotional lives, no longer finding “adequate” sufficient to sustain them in a marriage.⁶¹ As a result, women initiate about 60% of divorces after age forty, according to the AARP.⁶²

56. *Id.*

57. Cheng, *supra* note 3.

58. *Gray Divorce Has Huge Impact in the Retirement Years*, SYDNEY MORNING HERALD (May 27, 2015, 2:11 PM), <https://www.smh.com.au/money/planning-and-budgeting/grey-divorce-has-huge-impact-in-the-retirement-years-20150527-ghah6i.html>.

59. *Id.*

60. Brown & Lin, *supra* note 9.

61. Abby Ellin, *After Full Lives Together, More Older Couples Are Divorcing*, N.Y. TIMES (Oct. 30, 2015), <https://www.nytimes.com/2015/10/31/your-money/after-full-lives-together-more-older-couples-are-divorcing.html> [hereinafter Ellin].

62. *Id.*

2. BETTER HEALTH/LIFE EXPECTANCY RATES

Up until recently, life expectancy rates were steadily on the rise.⁶³ This meant people had more time to consider whether they wanted to be with their spouse for the rest of their lives. Further, that time period that constituted the “rest of their life” was also longer. This ties in directly with advances in medical technology and procedures being able to prolong people’s lives far longer than a few decades ago. Dr. Pepper Schwartz opines that despite couples feeling that their marriages are “not horrible . . . they are no longer satisfying or loving. They may not be ugly but you say, ‘Do I really want thirty more years of this?’”⁶⁴ On the flipside, when couples previously had lower life expectancies, they figured they likely would not have enough time to enjoy life or find a new spouse after divorce and may as well stay together.⁶⁵

3. EASE OF MEETING PEOPLE ONLINE

In the age of technology, older adults are now turning more to software applications and websites to find love and try online dating.⁶⁶ These applications and websites allow greater opportunities for older individuals to meet new partners in a more accessible way.⁶⁷ Online dating is now considered an acceptable way of starting a relationship for all age groups, including seniors.⁶⁸ There are now specific websites catered towards singles ages fifty or older and comparison guides for individuals who may not be as comfortable navigating the world of online dating.⁶⁹ A recent Pew study found that from 2013 to 2015, the

63. Uptin Saiidi, *U.S. Life Expectancy Has Been Declining. Here’s Why*, CNBC (July 9, 2019, 7:17 AM), <https://www.cnbc.com/2019/07/09/us-life-expectancy-has-been-declining-heres-why.html>.

64. Ellin, *supra* note 61.

65. Josh D. Simon, *Higher Life Expectancy Linked to Divorce: Study*, DIVORCE MAG. (Mar. 17, 2015), <https://www.divorcemag.com/articles/higher-life-expectancy-linked-to-divorce-study>.

66. Alison Bowen, *Forget Meeting IRL. Older Singles Are Using Dating Apps, Websites for Potential Partners*, CHI. TRIB. (Jan. 4, 2019, 8:20 AM), <https://www.chicagotribune.com/lifestyles/sc-fam-seniors-online-dating-apps-0108-story.html>.

67. Brown & Lin *Divorce*, *supra* note 6.

68. Godfrey *Divorce*, *supra* note 8.

69. *The Best Dating Sites for Seniors*, TOP10.COM, https://www.top10seniordatingsites.com/?utm_source=google&kw=senior%20online%20dating%20sites&c=279692881595&t=search&p=&m=e&adpos=1t2&dev=c&devmod=&mobval=0&network=g&campaignid=68133067&adgroupid=16719157267&targetid=kwd-893843448&interest=&physical=1016367&feedid=&a=12&ts=&topic=senior&gender=&age=&agerange=&audience=&glid=Cj0KCCQiA5dPuBRCrARIsAJL7oeg8vaQTD0Zo-CGNNB9vk6p5ldDScE4E7798E-wZGWot3xM3eO6nsJB EaAtUZEALw_wcB (last visited Jan. 27, 2020).

number of online dating website users aged fifty-five to sixty-four-years old doubled from 6% to 12%.⁷⁰ Older individuals have reported they feel safe dating online in part because of their perceived ability to control the pace of the conversation and build a relationship with the other person before deciding to meet.⁷¹ With an expanded access and ease of finding a new mate following divorce, older individuals feel more comfortable moving forward with the divorce process in hopes they can find a new person to spend the rest of their lives with.⁷²

4. REMOVAL OF STIGMA SURROUNDING DIVORCE

Across the United States and worldwide, divorce has become more widely accepted and less stigmatized over the past few decades.⁷³ As discussed above, in countries like Japan and India, divorce has started to become “normalized” among the general population instead of just isolated pockets.⁷⁴ Even the Pope and the Catholic Church are revisiting and reopening doors that were previously closed to divorced Catholics.⁷⁵ For older individuals who previously may have felt ashamed in their communities to seek divorce given its associated stigma, the “normalization” of divorce in their later lives can now encourage them to take steps to leave unsatisfying relationships.⁷⁶

5. INCREASED FEMALE LABOR FORCE PARTICIPATION

Long gone are the days where women were expected to stay at home and rely upon their husbands for financial stability and economic gain. According to the Bureau of Labor Statistics, the labor force participation rate of women aged fifty-five to sixty-four increased by 6.6 percentage points from 51.9% in 2000 to 58.5% in 2015, and it is projected

70. Aaron Smith, *15% of American Adults Have Used Online Dating Sites or Mobile Dating Apps*, PEW RES. CTR. (Feb. 11, 2016), <https://www.pewresearch.org/internet/2016/02/11/15-percent-of-american-adults-have-used-online-dating-sites-or-mobile-dating-apps/>.

71. Laura Roman & Ashley Brown, *Dating Apps Can Help Older Adults Meet—No Time Machine Necessary*, NPR (Jan. 30, 2018, 5:03 AM), <https://www.npr.org/2018/01/30/581043485/dating-apps-can-help-older-adults-meet-no-time-machine-necessary>.

72. *Id.*

73. Godfrey *Divorce*, *supra* note 8.

74. Bhatt, *supra* note 53.

75. Stephanie Kirchgaessner, *Pope Endorsement Softens Stance on Divorced Catholics*, THE GUARDIAN (Sept. 13, 2016), <https://www.theguardian.com/world/2016/sep/13/pope-endorsement-softens-stance-on-divorced-catholics>.

76. Mossman, *supra* note 4, at 126.

to continue growing.⁷⁷ As more and more older women are reentering the workforce and building up their own independent finances, they are no longer forced to “choose between a bad marriage and poverty.”⁷⁸ This allows them to have the autonomy to choose whether to consider moving forward with divorce.

6. REPEATED BEHAVIOR OF “MARITAL INSTABILITY”

Baby boomers were the first generation to divorce and remarry in large numbers during young adulthood.⁷⁹ Now that they are aging into their fifties and sixties, a growing number of boomers will reasonably experience divorce because remarriages are statistically more likely than first marriages to end in divorce.⁸⁰ The saying of “old habits die hard” takes a new meaning as marital instability and volatility from early on in boomers’ lives now are leading to marital instability in the boomer population later in life as well.⁸¹ A 2014 study conducted by Sheela Kennedy and Steven Ruggles found that this same generation that had unprecedented divorce rates in their twenties and thirties are now continuing their patterns of high marital instability into their forties, fifties, and sixties.⁸²

7. DELAYED AGE OF FIRST MARRIAGES

Given the delay in marriage amongst millennials, it follows that the divorce rates are likely to increase in the older population overall just by nature of the younger population not yet getting married.⁸³ Interestingly, a 2015 study of recent statistics found that past the age of thirty-two into the late thirties, the odds of divorce increase by 5% per

77. Mitra Toossi & Teresa L. Morisi, *Women in the Workforce Before, During, and After the Great Recession*, BUREAU OF LAB. STATS. (July 2017), available at <https://www.bls.gov/spotlight/2017/women-in-the-workforce-before-during-and-after-the-great-recession/pdf/women-in-the-workforce-before-during-and-after-the-great-recession.pdf>.

78. Jaffe, *supra* note 30.

79. Brown & Lin, *supra* note 9.

80. *Id.*

81. Stepler, *supra* note 24.

82. Christopher Ingraham, *Divorce Is Actually On the Rise, and It's the Baby Boomers' Fault*, WASH. POST. (Mar. 27, 2014, 11:46 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/03/27/divorce-is-actually-on-the-rise-and-its-the-baby-boomers-fault/>.

83. Hoffower, *supra* note 19.

year of age at marriage.⁸⁴ This study suggested that this was potentially because people who wed after their early thirties are not “well suited to succeed at matrimony” or feel comfortable being single or not getting married.⁸⁵

III. SPECIAL CONSIDERATIONS FOR GRAYING DIVORCES

A. Social Security Benefits

One major potential source of income for older couples that is often overlooked or unknown by divorcing individuals is the receipt of Social Security benefits, despite the finalization of a divorce.⁸⁶ As this is a federal government benefit, it is often not mentioned in state divorce decrees. Even if an individual is divorced, he or she may still be entitled to receive Social Security benefits on the ex-spouse’s record, even if the ex-spouse is remarried.⁸⁷ To qualify, a marriage must have lasted ten years or longer, the individual must not have remarried, one must be age sixty-two or older, the ex-spouse must be entitled to Social Security retirement or disability benefits, and the benefit the individual is entitled to receive, based on their own work, must be less than the benefit received from their ex-spouse’s work.⁸⁸ The amount of benefit a divorced spouse could currently receive is equal to one-half of their ex-spouse’s full retirement amount (or disability benefit) if the divorced spouse starts receiving benefits at their “full retirement age.”⁸⁹ To collect on an ex-spouse’s Social Security benefits, an individual does not have to wait until their ex-spouse applies for their benefits.⁹⁰ In fact, an individual does not even have to inform their ex-spouse that they are

84. Nicholas Wolfinger, *Want to Avoid Divorce? Wait to Get Married, But Not Too Long*, INST. FOR FAM. STUD. (July 16, 2015), <https://ifstudies.org/blog/want-to-avoid-divorce-wait-to-get-married-but-not-too-long/>.

85. *Id.*

86. Katie Young & Sharon Epperson, *Want One Last Dig at Your Ex? Then Collect on Their Social Security*, CNBC (May 11, 2017, 3:36 PM), <https://www.cnbc.com/2017/05/11/yes-you-can-collect-on-your-exs-social-security.html> [hereinafter Young & Epperson].

87. *If You Are Divorced*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/divspouse.html> (last visited Jan. 27, 2020) [hereinafter *If You Are Divorced*].

88. *Id.*

89. *Id.*; *Full Retirement Age*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/retirechart.html> (last visited Feb. 12, 2020).

90. Young & Epperson, *supra* note 86.

applying for benefits.⁹¹ However, if an individual starts collecting benefits prior to reaching full retirement age, that will permanently lower the amount of benefits he or she is entitled to receive.⁹² Although divorce decrees typically do not allocate Social Security benefits or payments, divorcing individuals should still note estimated benefits they may receive from Social Security. First, when negotiating division of liquid (i.e. bank accounts) versus illiquid (i.e. real estate) assets, spouses can consider if they will soon be entitled to receive additional cash through Social Security that may help them meet their monthly expenses following the divorce and how soon they may be entitled to receive those benefits. Second, spouses should consider that Social Security income will likely be considered as that spouse's income for purposes of calculation and modification of spousal support awards, discussed in greater detail below. Finally, an individual should consider that if they remarry, they may no longer qualify for Social Security or spousal support payments, which may substantially impact their cash flow.⁹³

B. Amount and Duration of Spousal Support

1. FACTORS FOR SPOUSAL SUPPORT AWARDS

One common misconception older couples have when contemplating divorce is that due to their old age, neither spouse will have to pay alimony or spousal support.⁹⁴ It is true that "rehabilitative alimony" is more commonly awarded in younger couples getting a divorce, which allows the recipient spouse to receive alimony for a fixed term until they are able to support themselves.⁹⁵ However, for older couples in long-term marriages, the possibility that one spouse will have to pay permanent maintenance or maintenance for at least the length of the marriage is much greater.⁹⁶ This can largely be explained

91. *Id.*

92. *Id.*

93. Kelly Frawley & Emily Pollock, *Gray Divorce: How Divorcing Later in Life Can Affect Your Retirement Plans*, FORBES (Feb. 25, 2019, 2:12 PM), <https://www.forbes.com/sites/frawleypollock/2019/02/25/gray-divorce-how-divorcing-later-in-life-can-affect-your-retirement-plans/#3e351b412498> [hereinafter Frawley & Pollock].

94. In some states, alimony is known as maintenance. See 750 ILL. COMP. STAT. 5/504.

95. Godfrey *Divorce*, *supra* note 8.

96. *Id.*

by turning to underlying statutes and factors courts consider when awarding spousal support.

First, states consider the duration of the marriage, with courts more likely to award alimony for a longer period of time for a longer marriage.⁹⁷ Further, states also consider the age, physical and emotional health, and employment or income history of the parties in a divorce action.⁹⁸ For an older couple, it is less likely that a spouse, who has stayed home to take care of the household and children for the majority of the marriage and been out of work for a significant period of time, could re-enter the workforce and build their earning potential.⁹⁹ Often-times one spouse will have taken a step back in their professional career to support their spouse's career. Therefore, under these circumstances, it is common for a court to award the unemployed or lower income spouse some level of support.¹⁰⁰

Additionally, the majority of states consider the standard of living the parties established during the marriage as a factor in determining whether to award maintenance.¹⁰¹ The "standard of living" considers what a spouse's quality of life was during the course of the parties'

97. See ALA. CODE § 30-2-51 (2019); ALASKA STAT. § 25.24.160 (2019); ARIZ. REV. STAT. ANN. § 25-319 (2019); ARK. CODE ANN. § 9-12-312 (West 2019); CAL. FAM. CODE § 4320 (West 2019); COLO. REV. STAT. § 14-10-114 (2019); CONN. GEN. STAT. § 46B-82(A) (2019); DEL. CODE ANN. tit. 13 § 1512 (2019); D.C. CODE § 16-913 (2019); FLA. STAT. § 61.08 (2019); GA. CODE ANN. § 19-6-5(a)(2) (2019); HAW. REV. STAT. § 580-47 (2019); IDAHO CODE ANN. § 32-705 (West 2019); 750 ILL. COMP. STAT. 5/504 (2019); IND. CODE § 31-15-7-2 (2019); IOWA CODE § 598.21A (2019); KAN. STAT. ANN. § 23-2902 (2019); KY. REV. STAT. ANN. § 403.200 (West 2019); LA. CIV. CODE ANN. art. 112 (2019); ME. REV. STAT. tit. 19-A § 951-A (2019); MD. CODE ANN., FAM. LAW § 11-106 (West 2019); MASS. GEN. LAWS ch. 208 § 53 (2019); MICH. COMP. LAWS § 552. 23 (2019); MINN. STAT. § 518.552 (2019); MISS. CODE ANN. § 93-5-23 (2019); MO. REV. STAT. § 452.335 (2019); MONT. CODE ANN. § 40-4-203 (2019); NEB. REV. STAT. § 42-365 (2019); NEV. REV. STAT. § 125.150 (2019); N.H. REV. STAT. ANN. § 458:19 (2019); N.J. STAT. ANN. § 2A:34-23 (West 2019); N.M. STAT. ANN. § 40-4-7 (2019); N.Y. DOM. REL. LAW § 236B (West 2019); N.C. GEN. STAT. ANN. § 50-16.1A (2019); N.D. CENT. CODE § 14-05-24.1 (2019); OHIO REV. CODE ANN. § 3105.18 (West 2019); OKLA. STAT. tit. 43, § 121 (2019); OR. REV. STAT. § 107.105 (2019); 23 PA. CONS. STAT. § 3701 (2019); 15 R.I. GEN. LAWS § 15-5-16 (2019); S.C. CODE ANN. § 20-3-130 (2019); S.D. CODIFIED LAWS § 25-4-41 (2019); TENN. CODE ANN. § 36-5-121 (2019); TEX. FAM. CODE ANN. § 8.052 (West 2019); UTAH CODE ANN. § 30-3-5 (West 2019); VT. STAT. ANN. tit. 15, § 752 (2019); VA. CODE ANN. § 20-107.1 (2019); WASH. REV. CODE § 26.09.090 (2020); W.VA. CODE § 48-6-301 (2019); WIS. STAT. § 767.56 (2019); WYO. STAT. ANN. § 20-2-114 (2019).

98. *Id.*

99. Brown & Lin, *supra* note 6.

100. Godfrey *Divorce*, *supra* note 8.

101. *Alimony Laws By State*, MARITAL LAWS, <https://www.maritallaws.com/laws/alimony> (last visited Jan. 27, 2020).

marriage and what that spouse's quality of life would be if the parties did not separate.¹⁰² This includes basic amenities as well as luxuries enjoyed.¹⁰³ Again, for older couples who have grown their wealth together and commingled their assets and incomes, they are likely to have a more definite and measurable standard of living for which a court can determine whether a spousal support award would be appropriate.¹⁰⁴ This factor is looked heavily upon in analyzing whether spousal support should be awarded, and parties sometimes hire financial experts to conduct a "lifestyle analysis" to demonstrate standard of living.¹⁰⁵ This analysis projects out a visual of both parties' incomes and expenses over their remaining lifespans to determine what funds are required to maintain the standard of living established by the parties during the marriage.¹⁰⁶ Oftentimes this requires an in-depth analysis of the parties' respective cash inputs and outputs over several years through examination of years of bank and credit card statements.¹⁰⁷

2. DEFINITION OF "INCOME" WHEN CALCULATING SPOUSAL SUPPORT

Another misconception older couples may have is that once they retire, their spousal support obligation will cease. However, this fails to address other sources of income a spouse may receive following retirement, including pension and Social Security income. For example, a husband may believe that since his wife already received a portion of his pension or retirement account, to consider any income he receives from said account following a divorce for purposes of calculating spousal support would be "double dipping."¹⁰⁸ Also, as discussed above, a divorced spouse may be entitled to receive a large benefit based on their spouse's employment record.¹⁰⁹ The benefit they receive may be considered as "income" for purposes of calculating spousal support.¹¹⁰

102. *Id.*

103. *Id.*; see, e.g., *Bodrey v. Bodrey*, 269 S.E.2d 14 (1980).

104. 750 ILL. COMP. STAT. 5/504 (2019).

105. Karolina Calhoun, *What Is a Lifestyle Analysis and Why Is It So Important?*, MERCER CAPITAL (2019), <https://mercercapital.com/article/what-is-a-lifestyle-analysis-and-why-is-it-important/> [hereinafter Calhoun].

106. *Id.*

107. *Id.*

108. See Reuben A. Bernick, *When Property Becomes Income in Post-Judgment Divorce Litigation*, 98 ILL. B.J. 310 (2010) [hereinafter Bernick].

109. See *supra* Part III.A.

110. Bernick, *supra* note 108.

Further, as noted above, courts do still consider what funds are available to help maintain the parties' standard of living established during the marriage.¹¹¹ This may mean that even if a party is not receiving substantial retirement income, but has access to substantial assets, he or she may still be obligated to pay spousal support. In the 2017 Illinois case, *In re Marriage of Bernay*, the court followed such an analysis.¹¹² In *Bernay*, the court first noted the vast discrepancy in the parties' respective incomes and assets. Notably, the wife was employed as a nurse earning approximately \$42,000 annually, had \$2100 in a retirement account and \$24,000 in a money market account.¹¹³ In contrast, the husband had an average annual salary of \$225,000, earned an annual investment income of \$40,000, held investment accounts of approximately \$1.6 million, held real estate with approximately \$288,000 in equity, and had \$328,000 in his retirement account.¹¹⁴ The appellate court highlighted that in a previous unpublished order,¹¹⁵ it had already made several findings as to the parties' standard of living during the marriage.¹¹⁶ Specifically, the court noted the family took multiple vacations, held season tickets for the Bulls, dined out several times a week, had memberships to health clubs, hosted parties at their home, and attended concerts, museums, Cubs and Blackhawks games, and movies on a regular basis.¹¹⁷ In reversing the trial court's decision, the *Bernay* court observed that the trial court failed to consider the long-supported policy in Illinois that a spouse is entitled to maintain a "reasonable approximation of the standard of living established during the marriage."¹¹⁸ Applying the analysis from *In re Marriage of Shen*,¹¹⁹ the court found the trial court abused its discretion by not considering if the payor spouse had sufficient assets to meet his or her needs and the needs of the former spouse.¹²⁰ Ultimately, the court held that a recipient of permanent maintenance was still entitled to continue receiving

111. Calhoun, *supra* note 105.

112. See *In re Marriage of Bernay*, 2017 Ill. App. (2d) 160583 [hereinafter *Bernay* 2017].

113. *Id.*

114. *Id.*

115. See *In re Marriage of Bernay*, No. 2-06-0697, 952 N.E.2d 731 (Sept. 27, 2007).

116. *Bernay* 2017, *supra* note 114, at ¶ 23.

117. See *In re Marriage of Bernay*, No. 2-06-0697, 952 N.E.2d 731 (Sept. 27, 2007).

118. *Id.* ¶ 17 (quoting *In re Marriage of Dunseth*, 633 N.E.2d 82, 95 (4th Dist. 1994)).

119. *Id.* ¶ 23 (quoting *In re Marriage of Shen*, 2015 Ill. App. (1st) 130733, ¶¶ 17, 23).

120. *Id.*

maintenance from a payor spouse as long as the payor spouse had sufficient assets to meet his needs and the needs of his former spouse.¹²¹

3. CONSIDERATIONS FOR DISABLED SPOUSES

A wrench is thrown into the analysis of the marital standard of living where one spouse is disabled and they can no longer enjoy the marital standard of living due to the limitations imposed by their disability.¹²² Disability rates are rising as the baby boomers age, with about 28% defined as disabled within two years before death for those who die after the age of fifty.¹²³ Oftentimes in such cases, the analysis as to amount and duration of spousal support may hinge more on the need of the disabled spouse to enhance their quality of life within the limitations of the disability.¹²⁴ The court may be more inclined to award permanent spousal support in these scenarios because the disabled spouse is unlikely to be able to “rehabilitate” themselves. Further, in these circumstances, practitioners must again turn to the definition of what is included in income to determine if it is possible for the disabled spouse to apply for and receive any other sources of income, including Supplemental Security Income (“SSI”) or Social Security Disability Insurance (“SSDI”).¹²⁵

Another consideration as to the interplay between government benefits and spousal support is whether spousal support payments may reduce availability of public benefits to a disabled spouse.¹²⁶ For example, payments of spousal support will reduce SSI dollar for dollar after \$20 is set aside unless the funds are paid into a Special Needs Trust.¹²⁷ In these instances, it may be beneficial for spousal support payments to be made to a trustee of a Special Needs Trust to hold the assets

121. *Id.*

122. See generally, Shawn Leamon, *Divorcing a Disabled Spouse: 3 Things You Should Consider First (Recommended)*, DIVORCE AND YOUR MONEY (July 17, 2017), <https://divorceandyourmoney.com/blogs/divorce-a-disabled-spouse/> [hereinafter Leamon].

123. Paula Span, *High Disability Rates Persist in Old Age*, N.Y. TIMES BLOG (July 8, 2013, 4:20 PM), <https://newoldage.blogs.nytimes.com/2013/07/08/high-disability-rates-persist-in-old-age/>.

124. *Id.*

125. Leamon, *supra* note 122.

126. *Using Public Benefits to Pay for Matrimonial Settlements*, HOOK LAW CTR., <https://www.hooklawcenter.com/publications/special-needs-planning/using-public-benefits-to-pay-for-matrimonial-settlements/> (last visited Jan. 27, 2020).

127. *Id.*

and use them for the benefit of the disabled spouse.¹²⁸ This way, the trusts can be used for transfer of assets to supplement, instead of to replace government benefits received by the disabled spouse.¹²⁹

C. Division of Property

1. EQUITABLE DISTRIBUTION OF ASSETS

The majority of states follow an “equitable distribution” property division scheme for dividing marital assets.¹³⁰ This means that property is not necessarily divided equally between the parties, but rather, is divided based on a variety of factors.¹³¹ These factors commonly include length of the marriage, age and health of the parties, and contributions of the parties during the marriage.¹³² If the couple has only been married for a short period of time, the court may be less likely to give one spouse money earned by the other.¹³³ On the other hand, for a longer duration marriage typical of older couples who have intermingled their economic resources and accounts, courts are more inclined to divide all marital accounts equally.¹³⁴ This follows the general concept that economic and noneconomic contributions of each spouse should be granted equal weight in the economic partnership of marriage.¹³⁵ However, if one spouse is suffering from certain health issues that require a greater distribution of property, a court may consider awarding a larger share of the marital estate to that spouse.¹³⁶

It is also important for divorcing couples to understand the potential impact of taxes on the division of assets and liabilities. Receiving \$100,000 in a cash asset (such as a bank account) is not equivalent to

128. *Id.*

129. *Id.*; 42 U.S.C. § 1396p(d)(4) (2012).

130. David Centeno, *Why Where You Divorce Matters: Equitable Distribution vs. Community Property*, HUFFINGTON POST (Aug. 28, 2013, 12:20 PM), https://www.huffpost.com/entry/why-where-you-divorce-mat_b_3824647 [hereinafter Centeno].

131. *Id.*

132. *See, e.g.*, 750 ILL. COMP. STAT. 5/503; N.Y. DOM. REL. § 236.

133. Centeno, *supra* note 130.

134. Charles P. Inclima, *Introduction to Equitable Distribution and Maintenance*, N.Y. ST. B. ASS'N 388 (2010), <https://www.nysba.org/workarea/downloadasset.aspx?id=43737>.

135. *Id.*

136. *Id.*

receiving \$100,000 from a retirement account.¹³⁷ The spouse receiving the retirement account monies will be subject to mandatory withdrawal penalties and taxes once they dip into the account following the divorce.¹³⁸ Parties should both look at the after-tax estimated values of their assets to ensure a truly “equitable distribution” of assets.¹³⁹

2. COMMINGLING AND TRANSMUTATION OF SEPARATE PROPERTY

All states make a distinction between “separate property” of a spouse versus “marital property” in the event of a divorce.¹⁴⁰ This means a spouse will have to produce documentation to prove whether specific accounts or portions of accounts should be awarded solely to them as their separate property or subject to division as marital property.¹⁴¹ On the most basic level, spouses in longer term marriages will likely have difficulty finding statements showing what their account balances were as of the date of marriage and that these balances have been kept separate during the marriage.¹⁴² In states like Illinois and New York, there is a rebuttable presumption that a spouse’s separate funds are transmuted into marital property when commingled with marital property.¹⁴³ This presumption can only be overcome if a spouse establishes by clear and convincing evidence that the account falls under the definition of separate property or some other limited circumstance.¹⁴⁴ Meeting this burden can be particularly challenging in longer

137. Dawn Doebler, *Over 65? How to Know If you Can Afford a ‘Gray Divorce’*, WTOP (Feb. 21, 2017, 6:31 PM), <https://wtop.com/business-finance/2017/02/65-know-can-afford-grey-divorce/> [hereinafter Doebler].

138. *Id.*

139. *Id.*

140. *Separate and Community Property During Marriage: Who Owns What?*, NOLO, <https://www.nolo.com/legal-encyclopedia/separate-community-property-during-marriage-29921.html> (last visited Jan. 27, 2020).

141. Joel R. Brandes, *Clarifying the Concepts of ‘Transmutation’ and ‘Commingling’*, N.Y. L. J. (Aug. 21, 2019, 11:00 AM), <https://www.law.com/newyorklawjournal/2019/08/21/clarifying-the-concepts-of-transmutation-and-commingling/?sreturn=20191022102710> [hereinafter Brandes].

142. Megan Leonhardt, *Separate Bank Accounts Will Not Protect Your Money In a Divorce—Here’s What Will*, CNBC: MAKEIT (June 26, 2019, 11:36 AM), <https://www.cnbc.com/2019/06/26/separate-bank-accounts-do-not-protect-you-in-a-divorce-here-is-what-will.html> [hereinafter Leonhardt].

143. *Id.*; see also 750 ILL. COMP. STAT. 5/503 (2019).

144. Leonhardt, *supra* note 142. In Illinois, the presumption may also be rebutted if the spouse can show it was done “for estate or tax planning purposes or for other reasons that establish that a transfer between spouses was not intended to be a gift.” 750 ILL. COMP. STAT. 5/503(b)(1) (2019).

marriages where the commingling of funds was done years ago and the spouse no longer has records related to the transfers.¹⁴⁵

3. PREMATURE DEPLETION OF RETIREMENT FUNDS

When a younger couple divorces and one spouse is awarded an asset (such as a home or business) that costs more to maintain than they are able to afford, it is more likely that if they are forced to draw from their retirement funds, they could recoup that loss and replenish the fund prior to their ultimate retirement.¹⁴⁶ For an older individual, drawing down on retirement to meet monthly expenses could mean permanently depleting their retirement savings so they do not have enough when they retire a few short years later.¹⁴⁷ Moreover, oftentimes individuals do not factor in potential tax consequences of early withdrawal of funds or their changing tax brackets following a divorce.¹⁴⁸ If a married couple had not planned to access their retirement funds until age sixty-five but now need to make earlier withdrawals, the funds may now be taxed at a higher tax rate than if they had waited.¹⁴⁹ To address these concerns, many plan providers like Vanguard and Fidelity now offer online calculators to calculate how much an individual will need to save to meet their retirement savings goal after divorce.¹⁵⁰ As an additional consideration, individuals age fifty and older can contribute an additional \$6000 to a 401(k) or other employer plan and up to \$6000 into an Individual Retirement Account.¹⁵¹

D. Health Insurance

Another often-overlooked concern in graying divorces is the cost of health insurance coverage following the divorce. Once a divorce is finalized, spouses can no longer be covered under each other's health insurance policy.¹⁵² However, if parties opt for a legal separation

145. Brandes, *supra* note 141.

146. Frawley & Pollock, *supra* note 93.

147. *Id.*

148. Sarah Max, *Don't Let 'Gray Divorce' Derail Your Retirement*, BARRON'S (May 28, 2019), <https://www.barrons.com/articles/gray-divorce-retirement-51551454226>.

149. Frawley & Pollock, *supra* note 93.

150. *Id.*

151. *Id.*

152. Jeff Landers, *Three of the Most Frequently Asked Questions About Health Insurance, Life Insurance and Social Security After Divorce*, FORBES (June 5, 2012, 2:22 PM), <https://www.forbes.com/sites/jefflanders/2012/06/05/three-of-the-most-frequently->

instead, a spouse may still receive health insurance coverage after separation, but potentially at a higher rate.¹⁵³ Older couples contemplating divorce should consider post-divorce costs of maintaining health insurance and whether they may qualify for alternative coverage such as Medicare.¹⁵⁴ Individuals may also qualify to receive coverage through their spouse's employer through the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").¹⁵⁵ However, this coverage is temporary and only lasts up until thirty-six months.¹⁵⁶ If an individual develops a pre-existing condition while on COBRA, their future health insurance plans may use this as a basis for denying coverage.¹⁵⁷

E. Competency Concerns

As individuals grow older, they are more likely to develop medical conditions that may affect their competency to proceed with a divorce action.¹⁵⁸ In 2007, approximately four million persons aged sixty-five and older suffered from some type of mental disability.¹⁵⁹ In these cases, most states bar an incompetent person from suing for divorce through a guardian or intermediary.¹⁶⁰ However, two states (Alabama and Massachusetts) allow an incompetent petitioner to maintain a divorce action through a representative.¹⁶¹ Other states have started carving out exceptions for "high functioning wards" or wards who have evidenced a clear desire for divorce.¹⁶² In the former scenario, a guardian may file for divorce on behalf of a ward if the ward is capable of (1) exercising reasonable judgment regarding personal decisions; (2) expressing a desire to be divorced; (3) understanding the nature of a divorce action; and (4) testifying at the divorce proceeding.¹⁶³

asked-questions-about-health-insurance-life-insurance-and-social-security-after-divorce/#41685274220d.

153. *Id.*

154. *People Are Stalling Their Divorce So They Don't Lose Health Care*, MONEY.COM (July 24, 2017) <http://money.com/money/4871186/people-are-stalling-their-divorce-so-they-dont-lose-health-care/>.

155. *Id.*

156. *Id.*

157. *Id.*

158. *See* Mossman, *supra* note 4.

159. *Id.* at 127. These numbers only include persons within the household population, not housed in institutions.

160. *Id.* at 154.

161. *Id.*

162. *See* Syno v. Syno, 594 A.2d 307, 311 (Pa. Super. Ct. 1991).

163. *Id.*

Similarly, other courts have turned to testimony from third parties about the ward's pre-incapacitation comments regarding dissolution of their marriage and then have made a substituted judgment as to what it believes the ward would want to do.¹⁶⁴ Finally, several courts have reasoned that their guardianship statutes are broad enough that absent a statute that bars a guardian from initiating a divorce action, the court may have the power to do so.¹⁶⁵

F. Increased Care Expenses

Finally, in addition to rising health insurance and direct healthcare costs, older individuals are more likely to face higher costs associated with care generally.¹⁶⁶ A 2007 report prepared by the National Alliance for Caregiving found the costs for a caregiver range from approximately \$4570 to \$8728 per year, including household goods, food and meals, travel costs, and medical care co-pays and pharmaceuticals.¹⁶⁷ The average cost to renovate a home to accommodate for mobility issues is around \$6226.¹⁶⁸ The costs for nursing home and assisted living facility care are even higher, averaging \$225 a day for a semi-private room and \$253 a day for a private room.¹⁶⁹ The national average cost of assisted living facility care is \$3293 per month.¹⁷⁰ Older couples contemplating divorce should consider the impact of potential care costs on future cash flow and whether they may be eligible to receive Medicaid or long-term care insurance to finance the costs of future care.

164. See *Ruvalcaba v. Ruvalcaba*, 850 P.2d 674, 683 (Ariz. Ct. App. 1993).

165. Margaret C. Benson, *The Demise of Drews: The Right of a Guardian To File for Divorce on Behalf of a Ward*, ILL. ST. B. ASS'N (Feb. 2013), <https://www.isba.org/sections/elderlaw/newsletter/2013/02/thedemiseofdrewstherightofaguardian>.

166. Seniors Suffering, Ctr. for Am. Progress (Sept. 30, 2009, 9:00 AM), <https://www.americanprogress.org/issues/healthcare/reports/2009/09/30/6627/seniors-suffering/>.

167. *Family Caregivers—What They Spend, What They Sacrifice*, EVERCARE 1, 24 (2007), http://www.caregiving.org/data/Evercare_NAC_CaregiverCostStudy_FINAL20111907.pdf.

168. *What Is the True Cost of Caregiving*, CARING VILLAGE, <https://www.caringvillage.com/2018/07/02/what-is-the-true-cost-of-caregiving/> (last visited Jan. 27, 2020).

169. *Costs of Care*, U.S. DEP'T HUM. & HEALTH SERVS., <https://longtermcare.acl.gov/costs-how-to-pay/costs-of-care.html> (last modified Nov. 10, 2017).

170. *Costs of Assisted Living in Illinois*, SENIORGUIDANCE.ORG, <https://www.seniorguidance.org/assisted-living/illinois/> (last visited Jan. 27, 2020).

IV. RECOMMENDATIONS

A. Prenuptial/Postnuptial Agreements

A recent study found the rate of divorce was 2.5 times higher for remarriages (more likely in the older populations) than first marriages.¹⁷¹ Additionally, older individuals considering remarriage typically have saved up significant assets, retirement funds, and sometimes own businesses and have children from prior marriages that they want to protect financially in the event of a divorce.¹⁷² Therefore, it is prudent for older individuals who are considering remarriage to consider entering into a prenuptial agreement before tying the knot again. Alternatively, postnuptial agreements are also becoming increasingly popular in the United States to protect assets following a marriage from potential future divorce.¹⁷³ Both prenuptial and postnuptial agreements override the default state law if enforced in a divorce and allow spouses to have autonomy in negotiating their own terms for disposition of assets and spousal support in the event of divorce.¹⁷⁴

Prenuptial and postnuptial agreements have several distinct advantages and may be used to reduce potential future litigation in the event of a divorce.¹⁷⁵ Couples can use these agreements to ensure a share of their assets is preserved for their children in the event of a divorce or where they anticipate receiving a large inheritance, gift, or business interest they want to preserve as their own in the event of a divorce.¹⁷⁶ Similarly, a prenuptial or postnuptial agreement can also protect a spouse from being liable for any debts the other spouse brings into a marriage.¹⁷⁷ Finally, and perhaps most relevant to older couples, prenuptial and postnuptial agreements also allow signers to determine what share of their assets their spouse will receive if they die.¹⁷⁸

171. Brown & Lin, *supra* note 9.

172. Laurie Israel, *The pros and cons of a prenup for a second marriage*, MARKETWATCH (Feb. 19, 2019, 11:09 AM), <https://www.marketwatch.com/story/the-pros-and-cons-of-a-prenup-for-a-second-marriage-2019-02-19>.

173. Amy Bell, *Prenup vs. Postnup: How Are They Different?*, INVESTOPEDIA (Aug. 20, 2019), <https://www.investopedia.com/articles/personal-finance/070815/postnup-vs-prenup-how-they-differ.asp> [hereinafter Bell].

174. Steve Hartnett, *Prenuptial Agreements Can Provide Remarriage Protection*, AM. ACAD. OF EST. PLAN. ATT'YS (Oct. 15, 2018), <https://www.aaepa.com/2018/10/pre-nuptial-agreements-can-provide-remarriage-protection/> [hereinafter Hartnett].

175. *See* Bell, *supra* note 173.

176. *Id.*

177. *Id.*

178. *Id.*

It is important to note that prenuptial and postnuptial agreements are not automatically enforceable.¹⁷⁹ Couples should take several steps to help increase the probability a court will enforce their agreement. First, both parties should be represented by independent counsel who can explain the terms of the agreement to them.¹⁸⁰ Second, the parties should make a list of their assets, liabilities, incomes, and known future inheritances to incorporate into the agreement.¹⁸¹ States vary in terms of whether they require a “full and complete” disclosure of assets or a “fair and reasonable” disclosure.¹⁸² Either way, a court is more likely to enforce an agreement if it finds that both spouses were fully aware of each other’s assets, liabilities, and income when they entered into the agreement.¹⁸³ Finally, both parties should have sufficient time to consider and negotiate the agreement to eliminate potential arguments of duress or coercion at the time of signing.¹⁸⁴ If a couple is rushed when negotiating a prenuptial agreement, they can always convert it into a postnuptial agreement.¹⁸⁵ However, opting for a postnuptial agreement may give the spouse with a larger estate less leverage since the other spouse will have fewer incentives to sign the postnuptial agreement.¹⁸⁶

B. Preparation of a Separate Estate Plan

Older individuals should strongly consider setting up a separate estate plan to further restrict disbursement of their assets and protect them in the event of a divorce. There are several vehicles through which an estate plan can help those contemplating divorce.

179. Hartnett, *supra* note 174.

180. *Id.*

181. *Id.*

182. *See, e.g.*, 750 ILL. COMP. STAT. 10/1 (2019).

183. Hartnett, *supra* note 174.

184. *Id.*

185. Bell, *supra* note 173.

186. Constance Gustke, *Remarrying? Shower kids with love, and a Good Prenup*, CNBC (Feb. 12, 2015, 12:31 PM), <https://www.cnbc.com/2015/02/12/remarrying-protect-your-kids-assets-with-an-airtight-prenup.html>.

1. DESIGNATING FINANCIAL AND HEALTH CARE POWERS OF ATTORNEY

Powers of attorney are legal documents that allow a person to appoint an agent to act on their behalf should they become incapacitated.¹⁸⁷ For older couples contemplating divorce, spouses should consider executing powers of attorney to designate agents to make financial decisions and health care decisions for them in the event they are unable to do so. A health care power of attorney allows a principal to name an agent to make health care decisions including administration of end-of-life care or other special treatment options.¹⁸⁸ A financial power of attorney can grant the agent powers to open and close financial accounts, change beneficiary designations, buy and sell real estate, and generally manage financial accounts.¹⁸⁹ Both documents can help ensure that an individual's ex-spouse does not end up with control over these types of decisions and can give the principal more control over the disposition of their assets.

2. SETTING UP TRUSTS

In addition to setting up special needs trusts to supplement receipt of government benefits, certain types of trusts can also be established to allocate funds to certain beneficiaries for restricted purposes.¹⁹⁰ They can also commonly be used by individuals considering remarriage to ensure any children from a prior marriage are not disinherited. This section will overview some specific types of trusts that protect one's assets in the event of a divorce. First, domestic asset protection trusts ("DAPTs") can help older individuals both manage their estate and protect it from a future ex-spouse or creditors.¹⁹¹ DAPTs are irrevocable, which means they are protected from creditors, but they still allow the trust creator to be a discretionary beneficiary.¹⁹²

187. Blair Klayko, *4 Types of Power of Attorney: What You Should Know*, KINDRED HEALTHCARE, <https://www.kindredhealthcare.com/resources/blog-kindred-spirit/2017/06/02/4-powers-of-attorney-every-caregiver-should-know> (last visited Jan. 27, 2020).

188. *Estate Planning After Divorce*, ESTATEPLANNING.COM, (June 21, 2012), <https://www.estateplanning.com/Divorce-Planning/>.

189. *Id.*

190. Russ Thornton, *How Can I Protect My Assets in a Second Marriage?*, WEALTHCARE FOR WOMEN (July 21, 2015), <https://wealthcareforwomen.com/how-can-i-protect-my-assets-in-a-second-marriage/>.

191. *Id.*

192. Robert Pagliarini, *How To Protect Yourself in a Divorce Using a Domestic Asset Protection Trust*, FORBES (May 15, 2014, 3:40 PM), <https://www.forbes.com>.

Currently, seventeen states allow this structure, and individuals can still take advantage of the law even if they do not live in the state where the trust sits.¹⁹³ The major disadvantage of a DAPT is that it is typically best suited for individuals who have excess funds or a high net worth, as DAPTs involve irrevocable transfers to a trust.¹⁹⁴ However, as the beneficiary, a trust creator may still retain the power to direct investment decisions of the trust, veto a distribution from the trust, direct how the trust assets are distributed, and receive income or distributions from the trust.¹⁹⁵ Certain states further carve out a spouse's marital rights for assets in a DAPT.¹⁹⁶ For example, in Michigan, if the trust was created more than thirty days before a marriage or if the parties otherwise agree, the trust assets are not marital property and cannot be awarded to the beneficiary's spouse in the event of a divorce.¹⁹⁷ Spouses will want to be careful with timing and establishing DAPTs or other trusts carefully to prevent courts from invalidating the transfer as a fraudulent attempt to shield assets from their spouse.¹⁹⁸

Another type of trust to consider is a Credit Shelter Trust ("CST"). A CST can provide income to a surviving spouse while preserving underlying assets and controlling their distribution to children from a prior marriage or other designated beneficiaries.¹⁹⁹ Similar to a DAPT, a CST is also irrevocable, which helps guarantee that the assets it holds will be preserved for the decedent's descendants.²⁰⁰ This eliminates the "evil stepparent" concern that a stepparent may receive all the money

com/sites/robertpagliarini/2014/05/15/how-to-protect-yourself-in-a-divorce-using-a-domestic-asset-protection-trust/#56dc35d43cb6 [hereinafter Pagliarini].

193. *Id.*; *Domestic Asset Protection Trusts Are Now Legal in Michigan*, BARRON, ROSENBERG, MAYORAS & MAYORAS, P.C., (Aug. 30, 2017), <https://www.brmmlaw.com/blog/2017/april/date-domestic-asset-protection-trusts-are-now-legal-i/> [hereinafter Barron].

194. *Id.*

195. *Id.*

196. *Id.*; Robert Pagliarini & Neil Schoenblum, *Protecting Your Client's Assets in a Divorce Using a DAPT*, FAMILY LAWYER MAGAZINE (June 2, 2014), <https://familylawyermagazine.com/articles/using-dapt/> [hereinafter Pagliarini & Schoenblum]; Pagliarini, *supra* note 192.

197. Barron, *supra* note 193.

198. Pagliarini & Schoenblum, *supra* note 196.

199. *Estate Planning for Remarried Couples*, FIDELITY (Jan. 22, 2019), <https://www.fidelity.com/viewpoints/personal-finance/estate-planning-for-second-marriages> [hereinafter *Estate Planning for Remarried Couples*].

200. Steve Hartnett, *Basics of Estate Planning: Credit Shelter Trusts*, AM. ACAD. OF EST. PLAN. ATT'YS (June 7, 2017), <https://www.aepa.com/2017/06/basics-estate-planning-credit-shelter-trusts/>.

intended for the children.²⁰¹ A CST grantor has the option of granting the trustee discretion to use funds from the CST for the needs of the surviving spouse based on some ascertainable standard such as health, education, maintenance, and support.²⁰² Finally, CSTs are designed to minimize estate tax liabilities by passing proceeds from individual estates onto their partners' estates.²⁰³

A third type of trust to consider is a Qualified Terminable Interest Property ("QTIP") trust. A QTIP trust similarly provides income for a surviving spouse while preserving the underlying assets and controlling how they are distributed to children from a prior marriage or other beneficiaries.²⁰⁴ A QTIP trustee is specifically obligated to make all income payments generated by the QTIP trusts to the beneficiary.²⁰⁵ However, the spouse that establishes the QTIP trust can still control who will ultimately receive the assets transferred to the trust.²⁰⁶ QTIP trusts may be used to address a spouse's concern that their spousal support payments will not be timely. The payor spouse can create a lifetime QTIP trust for the benefit of the recipient spouse with a provision that provides that the trust rolls over to a trust for the payor's descendants upon the recipient's death.²⁰⁷ This helps assure a grantor that children from a prior marriage will be taken care of upon the recipient spouse's passing.²⁰⁸ These are just a few types of trusts that can be established to protect a spouse's assets in the event of a divorce. However, it is important for people to meet with other professionals such as estate planning attorneys to walk through the best types of trust to meet their goals and that fits the particular estate.

201. *Id.*

202. *Id.*

203. James Chen, *Credit Shelter Trust*, INVESTOPEDIA (last updated Apr. 12, 2019), <https://www.investopedia.com/terms/c/creditsheltrust.asp>.

204. *Estate Planning for Remarried Couples*, *supra* note 199.

205. George F. Bearup, *Divorce Settlements: Using Trusts to Deal with Distrust*, GREENLEAF TRUST, <https://greenleaftrust.com/news/divorce-settlements-using-trusts-to-deal-with-distrust/> (last visited Jan. 27, 2020).

206. *Id.*

207. John J. Scroggin, *Planning for Divorce from the Perspective of a Tax and Estate Planner* (2016), <https://www.scrogginlaw.com/Divorce-Negotiations-from-the-Perspective-of-an-Estate-Planner-feb-9-2016.pdf>.

208. Rob Clarfeld, *Beyond Your First Marriage: A QTIP Can Protect Your Current Spouse and Your Children*, FORBES (Sept. 18, 2018, 3:08 PM), <https://www.forbes.com/sites/robclarfeld/2018/09/18/beyond-your-first-marriage-a-qtip-can-protect-your-current-spouse-and-your-children/#47ed355d7647>.

C. Working with Other Professionals

As noted in this section, it can be helpful for older couples to consult with other professionals besides family law attorneys—including estate planning attorneys, financial planners, and accountants—to affirmatively discuss methods of asset protection.²⁰⁹ Estate planning attorneys can help individuals revoke and update their powers of attorney, discuss trust and estate plan options, and update a will to remove provisions related to an ex-spouse and remove an ex-spouse as executor and trustee of trust accounts.²¹⁰ If a person wants to name their ex-spouse as a beneficiary following divorce, an estate planning attorney can help draft an updated beneficiary designation and letter of intent.²¹¹

On the financial end, hiring a financial planner can help older individuals analyze their cash flow and how to best preserve and grow their assets in the event of a divorce.²¹² A financial planner or certified divorce financial analyst can also help individuals understand potential tax consequences of both spousal support and withdrawing monies from certain accounts.²¹³ The Tax Cuts and Jobs Act enacted in 2019 now eliminates alimony deductions ordered in divorce judgments entered after 2018.²¹⁴ This can significantly impact cash flow projections and amount of taxes paid by payor and recipient spouses.²¹⁵ Similarly, there are substantial tax penalties for early withdrawals from certain retirement accounts prior to age fifty-nine-and-a-half.²¹⁶ A financial planner can help individuals look at the assets they currently have or are awarded in a divorce to discuss tax-efficient options for future spending.²¹⁷ Building a network of related professionals prior to undergoing the divorce process can help individuals get a fuller picture of what

209. Bell, *supra* note 173.

210. Christine Fletcher, *9 Things You Need To Know About Estate Planning After Divorce*, FORBES (Jan. 8, 2019, 2:52 PM), <https://www.forbes.com/sites/christine-fletcher/2019/01/08/9-things-you-need-to-know-about-estate-planning-after-divorce/#3990f95b3e31>.

211. *Id.*

212. Doebler, *supra* note 137.

213. *Id.*

214. Bill Bischoff, *New Tax Law Eliminates Alimony Deductions – but Not for Everybody*, MARKETWATCH (Jan. 29, 2019, 8:33 AM), <https://www.marketwatch.com/story/new-tax-law-eliminates-alimony-deductions-but-not-for-everybody-2018-01-23>.

215. *Id.*

216. See *What if I withdraw money from my IRA?*, INTERNAL REVENUE SERV., <https://www.irs.gov/newsroom/what-if-i-withdraw-money-from-my-ira> (last modified Dec. 21, 2019).

217. Doebler, *supra* note 137.

accounts they can protect in the process and how to move forward following entry of the final judgment.

D. Prospective Drafting of Marital Settlement Agreements

Once individuals get into the thick of the divorce process, there are still steps both clients and their attorneys can take in terms of drafting final judgments and marital settlement agreements to protect the client's assets through the process. Below is a brief discussion of some commonly overlooked issues common in gray divorces that both attorneys and spouses should consider when preparing final divorce judgments.

1. ESTABLISHMENT OF FIRST PARTY SPECIAL NEEDS TRUSTS

As discussed briefly above, in divorces where one spouse is disabled, one common issue is that spousal support awarded to the disabled spouse counts as "income" that may render that spouse ineligible for government benefits including Medicaid, SSI, and in-home services.²¹⁸ One option for attorneys and parties to consider under these circumstances is whether they should establish a Payback Trust, otherwise known as a first party or self-settled special needs trust.²¹⁹ In order to qualify for this type of trust, a spouse must meet the definition of "disabled" under the Social Security Act and must be under sixty-five years of age at the time the trust is funded.²²⁰ The trust must be for the sole benefit of the individual with disabilities and the state Medicaid agency must ultimately be reimbursed any remaining principal upon the death of the person with disabilities.²²¹ Finally, the trust must be irrevocable.²²² Under certain circumstances, spousal support may be assigned to a Payback Trust and prevent the recipient spouse from being

218. Theresa M. Varnet, *Divorce and Planning for the Disabled Child or Spouse*, PROTECTED TOMORROWS (Jan. 13, 2016), <https://protectedtomorrows.com/divorce-planning-disabled-child-spouse/>.

219. Also referred to as a "Qualified Special Needs Trust." *Id.*

220. 42 U.S.C. § 1382 (2018); *Public Benefits and Matrimonial Settlements*, LITTMAN KROOKS LLP, <https://www.littmankrooks.com/PublicBenefitsMatrimonialSettlements092008.pdf> (last visited Jan. 27, 2020) [hereinafter *Public Benefits and Matrimonial Settlements*].

221. *Public Benefits and Matrimonial Settlements*, *supra* note 220.

222. *Id.*

precluded from receiving government benefits.²²³ Similarly, payback trusts can be used to section off inheritance of other lawsuit settlement payments and direct those so that they do not disqualify the disabled spouse from receiving public benefits.²²⁴

In practice, a Payback Trust must be established by a parent, grandparent, guardian, or the court.²²⁵ Therefore, an attorney can draft a final divorce judgment to provide that the non-disabled spouse must pay a lump-sum or periodic amount directly to the trustee to establish the trust.²²⁶ The attorney must be careful that the non-disabled spouse does not make payments to the attorney, as that would constitute the disabled spouse's "constructive receipt" of the funds and disqualify him from benefits.²²⁷ The judgment should grant the trustee full discretion to use the principal and income for the needs of the beneficiary to provide for things that enhance the person's quality of life and specify that the trust is irrevocable.²²⁸

2. CONTEMPLATION OF REDUCED SOCIAL SECURITY PAYMENTS

The Social Security Administration sets forth specific requirements for collecting Social Security payments based on a spouse's record.²²⁹ In the case of graying divorces, it is possible that a spouse is already collecting Social Security payments based on their spouse's record, but will become ineligible to receive them once the final judgment is entered.²³⁰ For example, if the couple has not yet been married for ten years, the divorced spouse will not be able to collect on their ex-spouse's record upon divorce.²³¹ Accordingly, both spouses should visit a Social Security office to clarify what their post-divorce benefits will be, particularly regarding spousal support and each spouse's income.

223. *What Is a "First Party" Special Needs Trust and When Is It Useful?*, SPECIAL NEEDS ANSWERS (last updated June 16, 2017), <https://specialneedsanswers.com/what-is-a-first-party-special-needs-trust-and-when-is-it-useful-13264>.

224. *Id.*

225. *Id.*

226. *Id.*

227. *Public Benefits and Matrimonial Settlements*, *supra* note 220.

228. Eugene Rosner & Margaret W. Hickey, *Participating in Divorce Negotiations When Your Client Has Special Needs* (presented on Nov. 16, 2019).

229. *If You Are Divorced*, *supra* note 87.

230. Tom Sightings, *Navigating Divorce in Retirement*, U.S. NEWS (Sept. 30, 2019, 4:13 PM), <https://money.usnews.com/money/retirement/baby-boomers/articles/navigating-divorce-in-retirement>.

231. *Id.*

3. ALLOCATION OF PENSION BENEFITS

In addition to knowing that a spouse may be entitled to receive a pension upon retirement, it is important that spouses understand what components and benefits are available to them pursuant to this pension. This includes any survivor benefits and any other credits or enhancements.²³² The Illinois cases *In re Marriage of Ramsey*²³³ and *In re Marriage of Zamudio*²³⁴ are illustrative of the analysis courts may engage in when dividing certain pension enhancements. The *Ramsey* court suggested that when analyzing whether pension enhancements are marital or separate property, a court should look at whether the enhancement is “derivative” of the right to receive a pension in the first place or “non-derivative” in that it was directly and solely attributable to the nonmarital contributions of the pension participant.²³⁵ If, based on this definition, a pension benefit is a marital asset, any enhancement on the value obtained during the marriage should also be considered a marital asset subject to division.²³⁶

In *Zamudio*, the court considered whether a wife was entitled to a portion of a husband’s “permissive military service credit,” where the credit was earned prior to the marriage from his active duty service, but he purchased the credit during the marriage with marital funds to enhance his pension annuity.²³⁷ Applying the analysis from *Ramsey*, the *Zamudio* court found that the husband’s entitlement to an enhanced annuity accrued while he participated in the plan during the marriage and thus, a portion of the credit accrued during the marriage and was subject to division.²³⁸ Because of the attorneys’ and couple’s due diligence in looking into the pension benefits, the wife was able to receive additional benefits from the husband’s pension.²³⁹ This illustrates the importance of understanding components of a pension and providing for allocation of the same in marital settlement agreements.

It is important to note that parties will likely need to prepare a separate Qualified Domestic Relations Order (“QDRO”) or other

232. *How Your Spouse Earns Social Security Survivors Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/survivors/ifyou.html> (last visited Jan. 26, 2020).

233. *In re Marriage of Ramsey*, 339 Ill. App. 3d 752, 766 (2003).

234. *In re Marriage of Zamudio*, 2019 IL App (3d) 160537, ¶ 22.

235. *Ramsey*, 339 Ill. App. 3d at 764.

236. *Zamudio*, 2019 IL App (3d) 160537, ¶ 18.

237. *Id.* ¶ 19.

238. *Id.* ¶ 20.

239. *Id.*

documents to divide the pension benefits between them.²⁴⁰ These orders allow retirement plans to pay pension benefits directly to divorced spouses pursuant to the terms of the QDRO, upon approval by the plan administrator.²⁴¹ Attorneys should be sure to follow up and enter these QDROs before or soon after entry of a final divorce judgment to ensure the division is set up as the parties intend.²⁴²

Finally, in the event a pension is already in pay status with benefits paid to previously designated beneficiaries, the parties should look at the terms of the plan to determine whether the allocation of benefits may be modified in the event of a divorce.²⁴³ If they cannot be modified, the benefit payments should be considered accordingly in dividing assets and setting spousal support following divorce.

V. CONCLUSION

With the steady rise of baby boomers entering their fifties and sixties, the number of graying divorces is going to continue to rise as well. As discussed herein, there are many considerations that are particularly prevalent when older couples divorce that both the individuals contemplating divorce and as attorneys should keep in mind prior to and during the divorce process. Addressing these considerations prior to initiating a divorce and actively during the divorce would allow older individuals to contemplate various asset protection options including pre- and post-nuptial agreements, estate plans, and trusts. Further, keeping these considerations in mind during the divorce process itself can help older individuals work with related professionals and their family law attorneys in protecting their futures as well. Overall, taking the additional time to review a person's assets and assert greater control on the front end can help the graying divorcees keep control of their estates.

240. Ena Anthony, *Understanding Divorce and QDRO: Dividing Retirement Assets*, NAT'L LIFE GROUP (Apr. 12, 2016), <https://blog.nationallife.com/understanding-divorce-qdro-dividing-retirement-assets> [hereinafter Anthony].

241. *Pension Rights After Divorce*, PENSION RTS. CTR., <https://www.pension-rights.org/publications/fact-sheet/pension-rights-after-divorce> (last visited Jan. 27, 2020).

242. Anthony, *supra* note 240.

243. See, e.g., *Beneficiaries/Report Death of a Participant*, PENSION BENEFIT GUARANTY CORP., <https://www.pbgc.gov/wr/benefits/beneficiaries> (last visited Jan. 27, 2020).

