

Mediation Matters
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"The over 80s are the fastest growing group in the population worldwide."

— Imperial College, London
News Release, 3/31/08

**Gray, Silver or Mature Divorce:
You Really Need Mediation**

No longer the domain of the young and reproducing, divorce increasingly involves the older client whose 40, or even 50, year marriage is not working out¹. Issues of property, spousal support, taxes, gifts, inheritances, estate planning and providing for those golden years become critical.

What is different about these divorces is that, unlike younger divorcing couples, there is less anger. No explosions, no simmering caldron of discontent. Usually one of the parties claims that enough is enough. Perhaps it is retirement that triggers the desire for a divorce. A woman who feels controlled could take it when her spouse was out of the home most of the day, but not when he's home all the time seeking to control her routine and also expects her to find activities for him. Perhaps it is the presence of stepchildren that the husband doesn't like who have always been around during his work day but now he's home during the day and he can't take it. Add to all of this the mobility factor, that is the children are grown and the parties have the finances and health to travel. Finally infidelity (the Viagra, Cialis, Levitra effect) is ending more long-term marriages.

For the older couple seeking to end their marriage it is very important to do so in a

manner that preserves both the best parts of a long term relationship and accomplishes the dissolution with the least cost possible. At every stage of life, it is difficult to earn and save money, but for older people it is even more of an issue since there are fewer prime earning years left before retirement. What is worse, the idea of invading capital to pay for the expense of divorce is anathema to savvy financial planners.² That is why mediation is so important to the older divorcing couple. While many older clients are often more organized than some of their younger counterparts, it is important for the mediator to start at the initial meeting to assess whether the client understands the process and if there are any auditory, visual or physical handicaps to accommodate. Mental handicaps pose much more serious problems, such as, who can file or defend a mentally handicapped person's divorce³.

In an excellent article by Jennifer J. Rose⁴, she discusses some of the key issues that mediators need to know to help them with the divorce involving older clients. Topics she provides include:

- Legislation: mediators should learn about the Medicare Catastrophic Coverage Act of 1988 and its legislative progeny. This helps in the formation of solutions in the event of crippling long-term health care expenses.
- Time: allow the older client time to consider options. Divorce may not be the sole remedy. After 40 or 50 years, perhaps a legal separation is a better alternative. In some short marriages, due to social security benefits being eliminated in the event of remarriages, an annulment might be considered.
- The Family Dynamics: It is particularly important to consider the family dynamics in the case of an older client. Even though grown children may have flown the coop, all too often the mediator will have to face an irate son or daughter whose motivations may be less driven by filial devotion than by self-interest. The adult child's interest in family business enterprises may be at risk. Parental largess extended to grown children may come to a screeching halt when each parent

faces life with only half of the marital estate. Furthermore, the children may perceive that additional caretaking chores for a dependent parent may fall upon them if the able-bodied spouse has departed from the family home.

- Spousal Support: Spousal support may assume greater importance among older clients. In some cases, the notion of rehabilitative alimony simply doesn't work; age may have dimmed reasonable expectations for retooling and development of marketable job skills. The duration of one spouse's earning power and the other's need for support may come into conflict. Age and infirmity may influence support needs for both spouses.
- Retirement Benefits: What kind of retirement benefits do the parties have? Most obvious is social security. The Social Security Administration's "Request for Earnings and Benefits Estimate Statement" will show the number of credits earned, the earnings record and an estimate of benefits.
- Social Security: If the parties currently receive social security benefits, assess the impact of divorce upon the benefits payable. Railroad retirement, state and federal governments, the U.S. Postal Service, the foreign and the military all operate under unique sets of rules. Recent Michigan case law suggests ways for couples to share the benefits of social security more equally after divorces.
- Health Insurance: Health insurance may loom with greater urgency among the elderly. COBRA may not be the safety net many assume. Specifically excluded from COBRA's reach are government employees and employers with less than twenty employees, although state plans may provide more or less generous treatment. Former spouses of military personnel confront even more variants. Furthermore, the 36-month COBRA umbrella snaps shut when the beneficiary becomes eligible for Medicare. Who's going to pay for supplemental insurance? And what about long-term health care and disability insurance?
- Taxes: The issue of taxes present additional problems for the older client's divorce. Desire for exclusion of the gain from the sale of a principal residence, how alimony/spousal support will shade each party's tax picture and the tax consequences lurking behind retirement plans and distributions are issues

which must be reviewed.

- Estate Planning: Serious estate planning often works at cross-purposes with effective divorce planning. Those clever steps intended to shield property from the tax collector and creditors may have positioned the same property in the other spouse's hands. The irrevocable trust may have already set the stage for property distribution.

A divorce for the older client is very different than a divorce for younger clients. As a mediator, not knowing information which assists the clients may do harm. It is all right to admit that and ask that the parties seek assistance from an elder law expert. It is not all right to ignore the older divorcing couple's needs.

1. Pulliam Webster, Liz, *Should Grandma Divorce Grandpa?*. Elder law attorneys suspect that the proportion of people over 65 who list their marital status as “divorced” has risen nearly 60% since 1990, compared with an 8% rise in the proportion of divorced adults overall, <<http://articles.moneycentral.msn/CollegeAndFamily/CaringForParents/ShouldGrandmaDivorceGrandpa.aspx?page=1>> (accessed May 5, 2011).

However, for a different view, that is, that the number of elder divorces is still a rarity, though slightly increased, see *Encyclopedia of Aging & the Elderly*, <<http://www.medrounds.org/encyclopedia-of-aging/2006/01/divorce.html>> (accessed May 5, 2011).

2. Stein, David D., *Grey Divorce: Make Sure Its Not a “Grave Mistake”*, <<http://www.mediate.com/articles/steinD4.cfm>> (accessed May 5, 2011).

3. *Redding v Redding*, 214 Mich App 639, 543 NW2d 75 (1996).

4. Rose, Jennifer J., *When Silver and Golden Years Tarnish* (GP Solo Law Trends & News, 2006, Vol 2 No 2), <americanbar.org/content/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/silverandgold.html> (accessed May 5, 2011).

5. *Biondo v Biondo*, ___ Mich App ___ (2011).