

Late-in-Life Spousal Support: Strategizing to Maximize a Client's Financial Life Post Divorce

BY MARLO VAN OORSCHOT

Parents and grandparents of baby boomers likely married in their early twenties, had children a few years later, never divorced, worked until age sixty or sixty-five, and then retired. Death usually followed not too many years later. Baby boomers—they broke the rules. Same marriage until death? Nah. Minor children late in life? Sure! Retire? Maybe. Divorce after age fifty? Absolutely!

According to the National Center for Family and Demographic Research, boomers are the only segment of our society for whom divorce rates are on the rise. But breaking the rules to live differently from previous generations collides with reality for those who divorce late in life and can cause significant difficulties for the parties involved.

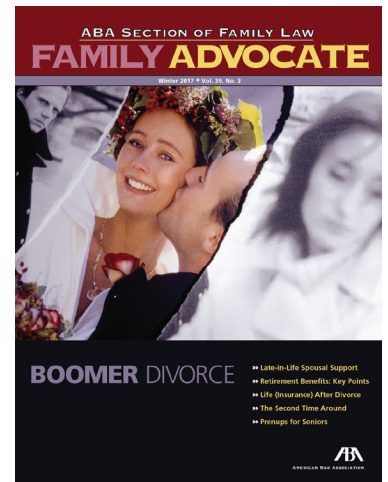
That is especially true where spousal support, also known as alimony or spousal maintenance in some jurisdictions, is concerned. Establishing the duration and amount for what is called “permanent support” is more an art than a science when the individuals involved are older. The following are some of the factors to be taken into account.

Duration and Amount of Spousal Support

Some states, such as Texas, have defined schedules for the duration and amount of spousal support, but in other states, such as in California, New York, and Arizona, rules and guidelines are subject to judicial discretion, which makes support awards extraordinarily fluid, especially in a late-in-life divorce.

Duration of Spousal Support

In California, it is presumed that a marriage that lasts more than ten years is a long-term marriage requiring long-term spousal support until the death of either spouse, the remarriage of the recipient spouse, or *further order of the court*. A marriage lasting less than ten years is considered a short-term marriage, with spousal support presumably payable for a time equal to one-half the length of the marriage. However, in Texas, the duration of support is set by statute, with a payment for ten years if the couple has been married for thirty or more years. However, support can last longer if there is a mental or physical disability or *some other reason why a spouse cannot be self-supporting*. In most jurisdictions, the statutory assumptions can be contested and support for an indefinite period of time may be required because, as the nonearning spouse ages and his or her health and earning capacity decline, it is less likely that he or she will ever be self-supporting. This can create a very difficult and complex financial situation for both spouses as they each consider their financial futures.



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Amount of Spousal Support

In California, New York, and Arizona, courts cannot use computer programs to set permanent spousal support. Rather, these courts must finesse the number based on factors that bear on each party's current and future financial circumstances, including income from all sources, expenses, financial needs measured by the marital standard of living the parties shared, health, earning capacity, and history of domestic violence, as well as other statutory factors. The court must weigh how these factors influence self-sufficiency because they directly impact how much and how long support is paid. However, in Texas, there is a defined maximum amount of support, but in setting the actual amount of support, the court must still consider relevant factors. Certain factors are highly malleable in a late-in-life divorce that could turn a short-term marriage into a long-term marriage or a marriage requiring indefinite support.

Age and Health

Advancing age and declining physical, emotional, and mental health often restrict the longevity of one's career or ability to earn. They also impact the cost of health insurance and health care. These issues can create a need for support or diminish the ability to pay it.

Earning Capacity

Even if health issues do not interfere with a person's ability to work, they can impact the opportunity to work for an aging person who must compete with today's workforce, again increasing the need or decreasing the resources for support.

Lifestyle

For many of the years leading to their "golden years," people establish a certain lifestyle based on financial resources, and they expect it to continue. Older people who face divorce have less time to recover from the financial losses caused by the division of the marital estate and payment of support. They may be unable to make their reduced wealth meet the often increasing expenses of two homes and two lifestyles.

Boomer Divorce Income Factors

The sources of income for an older person are often very different from those of younger counterparts, especially with respect to (1) social security income, (2) pension income, (3) passive income, and (4) disability income.

Social Security Income

In California, Social Security benefits are considered a spouse's separate property and therefore not divisible as an asset, but they can be used to calculate current and future support. As attorneys are aware, under current law, Social Security retirement benefits can be accessed as early as age sixty-two, with maximum retirement benefits not available until age seventy. A divorced spouse can get benefits based on the other spouse's Social Security if the marriage lasted at least ten years and the spouse seeking the benefit is sixty-two or older and unmarried. The benefit he or she gets doesn't affect the amount of the other spouse's benefit. A former spouse can also get spousal benefits even if the other is not retired so long as both former spouses are at least sixty-two and divorced at least two years. Social Security retirement benefits are taxable income.

Retirement Plans

As family law attorneys, we know that retirement benefits can include but not be limited to IRAs, defined benefit plans, defined contribution plans such as 401Ks, and deferred compensation plans, and that the distributions from these plans are typically taxable, though some IRA distributions are not. What we need to be aware of is that the age for benefit payments can vary by plan, which is important when analyzing need for support. Often these plans, unlike Social Security income, are divided between the spouses in the division of property or “bought out” by one spouse. The method of division in divorce will impact each spouse’s post-divorce income, whether as recipient or payer. Because retirement is usually imminent for baby boomers, the income from retirement benefits is critical in assessing support. However, if that income is not yet accessible due to age, knowing whether the amount can be received in the future and whether or not it will, in fact, be received (i.e., because death may or may not occur before the desired receipt date) are often some of the unknowns of retirement benefits and the considerations in planning our client’s financial futures.

Passive Income

Passive income can include but not be limited to rental income, dividends, interest income, and business interest distributions. The asset that generates the passive income may be divided in the divorce equally between the spouses or one spouse may “buy out” the other spouse, as it might be from a retirement plan. However, because there is no age requirement to access passive income, passive income options can be determined at the time of the divorce.

Disability Income

Disability income can come from the government (Social Security Disability Income), employment benefits, or a private disability policy. Some benefits are taxable; some are not; some benefits are divisible in the property division and others are not. We know that disability benefits may never be paid if a disability does not occur; however, because disability is more likely for an older person, we as attorneys should consider how this potential asset or stream of income in a late-in-life divorce could affect support.

The Double Dip

It is possible in divorce to “buy out” an income producing asset (i.e., pay a spouse for his or her share of the asset) and then be required to use the resulting stream of income from that asset to pay support. Using the same asset twice for two different purposes is often called the “double dip.” It can apply to a family business, retirement benefits, and passive income from a rental property. While not everyone owns a business, most late-in-life divorces involve retirement benefits that are currently being or will soon be paid. As a result, accessing or preventing the double dip must be considered.

Retirement

The Right to Retire

Two spouses who divorce at age fifty-five may have planned to retire at that age, but if the law of their state says that retirement age is sixty-five, is there a right to retire without any financial consequences? If imputing of income will occur, can one spouse afford to retire knowing that he or she will pay support at a level commensurate with his or her pre-retirement income? There is probably no

Because retirement may be imminent for baby boomers, assessing income from retirement benefits is critical.

right answer to these questions, but this is an area for creative lawyering in the courtroom or during settlement negotiations. For example, it could be argued that an earlier retirement age should be accepted when savings and career paths were planned in accordance with an earlier retirement. In certain professions, working into an age when motor skills diminish and one's professional competence is reduced, an early retirement might be optimal. In California, the spousal support statute allows a court to consider "all other factors the court determines are just and equitable."

The Ability to Retire

The converse of the right to retire is the ability to retire. At age sixty-five or older, with the division of the marital estate, one or both spouses may discover that they cannot afford to retire on the reduced retirement income resulting from the division of assets or from support paid or received. For many people facing late-in-life divorce, the divorce comes at a very high price: the loss of retirement. Many need to continue working in order to avoid dramatically reducing their lifestyle. The effect of age, health, or availability of employment on retirement plans should generate a very serious discussion involving the divorce lawyer, financial advisor, and estate planning lawyer to examine asset division, future streams of income, and lifestyle choices.

Ability to Be Self-Supporting

Health Issues

We all know that health issues impacting the ability to work are much greater in a late-in-life divorce due to the age of the parties. In any case, if health issues exist at the time of divorce, they are known and easier to consider. However, for many, the ability to work will be impacted by unknowns. These future unknowns do require consideration when setting monthly support amounts, agreeing to lump sum payments to terminate support obligations, or considering how assets are divided. We as lawyers and counselors at law should determine the client's comfort level on the uncertainty surrounding these issues. For example, a spouse who receives a high monthly amount of support may be uncomfortable knowing this support could end if the paying spouse falls ill and would therefore prefer the certainty of a reduced lump sum payment now to end the support obligation. Award of an asset that will produce a stream of income instead of heavy reliance on support as a source of income may also be preferable. The client must decide, but the lawyer should initiate the discussion.

Self-Support

This issue most often arises if a spouse who has been out of the workforce for a substantial period of time is asked to return to work after the divorce. California, Texas, and other states expect each person to make reasonable good faith efforts to become self-supporting, but this may not be realistic for an older person who has been out of the workforce and lacks sophisticated technological skills. Therefore, both spouses should be realistic about self-support when preparing a support analysis.

Increased Age-Related Expenses

Health Insurance and Medical Costs

A support analysis typically addresses the need for support and the ability to pay support. Health care is an essential element of this analysis. Medical costs for older persons are likely to increase, regardless of Medicare benefits. These expenses are critically important to analyze for support in a late-in-life divorce.

Caregiver Expenses

Separate from health insurance or medical costs is the issue of caregiver expenses. These expenses, whether from live-in care providers or residential facilities, are different from other medical costs. If the need is not present at the time of divorce, more likely than not, it will be needed in the future. Younger baby boomers may be able to buy a long-term care insurance policy to offset this future expense. The purchase cost affects the ability to pay support or the need for support, but it can also offset future support needs.

Modification of Spousal Support

Significant Change of Circumstances Required

Many jurisdictions require proving a significant change of circumstances (such as retirement, disability, or remarriage) to modify spousal support. Because the timing of retirement can be planned, depending upon the terms of settlement, it may not actually cause a significant change in circumstances. Passive and retirement income, for example, may nearly replace earnings. A future disability may not cause a change of circumstances if disability benefits, passive income, or long-term care benefits were designated as replacements for income.

However, it is an open issue in many jurisdictions as to whether living longer than expected is a significant enough change of circumstances by itself to modify support. In other words, what if either or both spouses outlive the Social Security Administration mortality tables used to determine future cash flow upon which spousal support was negotiated and planned? Once again, this is an area for creative lawyering; it could be argued, for example, that longevity was an unexpected circumstance and that the fact that one lives longer than anticipated in and of itself is a change of circumstances. That being said, it is probably best to consider the possibility of living longer up front to take a more conservative approach in the support analysis, as it is highly unlikely that our octogenarian clients want to spend their golden years litigating.

Is living longer than expected a significant enough change of circumstances to modify support?

Other Issues

Life insurance to Secure Support

Life insurance is only important in the spousal support analysis as it relates to one's ability to afford the policy cost. A life insurance policy for the benefit of the support recipient will replace the support obligation upon death but has no impact on presumably more immediate support issues such as disability, retirement, or ability to work.

Elder Financial Abuse

Elder financial abuse can be present in many cases, though many lawyers do not recognize the issue and do not know how easy under some state's laws it is to prove a civil claim of elder financial abuse. The difficulty, however, is the chance of recovery from the abuser. The interesting aspect of elder financial abuse is

that, while a spouse may not have needed support before the abuse occurred, the abuser may in fact have created a situation of need for the victim. For example, imagine a couple who marries late in life, with each spouse bringing a separate property estate to the marriage. During this marriage, the husband develops dementia and the wife starts managing the husband's finances, using signatory rights or a power of attorney to liquidate his separate property assets, not only for his expenses but for hers as well. This allows the wife to preserve her separate property estate entirely. Then they divorce. Had the wife not taken from the husband's separate property estate, he would not have needed support, as his estate would have been sufficient to support his needs post-divorce. However, depleting his estate has now created a need for support.

In addition, the husband may have a civil damage claim. Ironically, if this claim successfully restores the husband to his former financial position, could he now be liable for support to his abusing ex-wife as a result of her worse financial situation created by paying damages to husband? In states where there is discretion to determine spousal support, thorough analysis of all possibilities and strategizing with an elder abuse lawyer can determine the best course of action.

Conclusion

Although a late-in-life divorce can be amicable, it raises major and unique concerns. We as family law attorneys should work to analyze spousal support for persons over the age of fifty in ways that minimize potential problems and maximize quality of life following the divorce. The decisions will truly have a life-long impact—and if they are not done well, there will be little time for recovery. **FA**

Marlo Van Oorschot (mvo@mvolaw.com) is managing partner of Van Oorschot Law Group, PC, in Los Angeles and author of the book *How to Survive Grey Divorce: What You Need to Know About Divorce After 50*.