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5 Tips About Late-Life Divorce and Your Money

Ending a marriage after 50 comes with unique financial challenges

by Janice Green, AARP, December 20, 2010

En español | Getting a divorce at any age has emotional implications, but getting a divorce after 50 comes with the added burden of unique financial challenges. Odds are your accumulated assets, from real estate to investment accounts, are substantial and intertwined. Perhaps your debts are, too. Add to this looming retirement, and it becomes clear why it's trickier to end a marriage after the age of 50. Family attorney Janice Green, author of *Divorce After 50: Your Guide to the Unique Legal & Financial Challenges*, offers answers to common questions confronting couples going through a late-life divorce.

1. What makes a late-life divorce different from one in an earlier decade?

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Less time to recover financially. That fact alone influences many aspects of the divorce. The property division now focuses on analyzing assets for postdivorce income potential and knowing the age-related attributes of assets that can add intrinsic value.

Take the marital home as an example. Over and above the fair market value of a home, it may have intrinsic value later in life: exemptions from property tax increases at specific ages; a potential source of income through reverse mortgages at 62; rental income potential (from a room or the entire property); exemptions when qualifying for public benefits, such as Medicaid.

2. What is the most common mistake people make in their divorce, financially speaking?

They fail to think about the value of a mixed, balanced portfolio. Often, a spouse will focus on receiving one particular asset and not pay attention to what else may be on the table. Aiming for a balanced, or mixed, portfolio can be as relevant in the divorce context as it is for non-divorce retirement planning.

For example, Wife wants to keep the house no matter what, and this may be an emotional decision. She puts all her eggs in one basket. She agrees to let Husband have his retirement in exchange for the house. She may also agree to pay Husband, in the future, a sum of money for a portion of his interest in the house equity. Then the real estate market takes a serious downturn. She can find herself upside down — owing more to the primary mortgage and to her ex-Husband than the house is currently worth. Her ex-Husband's note comes due, and she has no option but to sell the house. She's able to use the sale proceeds to pay off the mortgage, but she still owes money to her ex-Husband — and has no other property to cushion the market downturn and her retirement years.

Depending on the type of assets in a marital estate, it may be wise to consider sharing the risk and take a percentage of multiple assets. Over time, through upturns and downturns in the various markets, a more conservative joint ownership of assets may make sense when the spouses' personalities are conducive to doing so.

What Social Security benefits may there be for an ex-spouse? >>

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3. Are there Social Security benefits based on a former spouse's employment credits?

Yes. There are two types of Social Security benefits linked to a former spouse: retirement and survivor benefits. The threshold requirement for each is that the marriage lasts at least 10 years.

Retirement benefit eligibility: The claimant must be 62 or older; and if the claimant has remarried, he or she may not be able to collect these benefits unless the later marriage ends.

The claimed benefits must be higher than those earned by the claimant. The amount of the benefit is 50 percent of the former spouse's retirement. By the way, the former spouse's check is not reduced by 50 percent, which is the amount the claimant receives. If the claimant has been divorced for two years from the former spouse, then the claimant is entitled to benefits, even though the former spouse is eligible but not yet receiving benefits.

It is possible to begin receiving retirement benefits either on the claimant's or the former spouse's Social Security income record at age 62, then switch to the other benefit upon reaching full retirement age if the other benefit is higher.

Benefits end when either the claimant or former spouse dies, when the claimant is entitled to retirement benefits based on income credits in an amount equal to or greater than the former spouse's, or if the claimant before age 60 remarries someone other than the former spouse.

Survivor benefit eligibility: Survivor benefits are 100 percent of the former spouse's retirement benefit. The claimant must be at least 60 years old (or 50, if disabled); not entitled to retirement benefits in an amount that is equal to or greater than that of the former spouse's benefit; and not remarried unless the claimant married again after age 60 or is currently 60-plus and remarried between the ages of 50 and 60 (or is at least 50 years of age, remarried after turning 50 and is disabled).

If other survivors are eligible for benefits, such as a subsequent spouse of another 10-plus year marriage to the deceased, benefits are not affected. Multiple marriages could produce multiple former spouses receiving an amount equal to more than 100 percent of the deceased's benefits.

"Piggy-backing" benefits may be an option. If the claimant is collecting survivor benefits, then he or she can switch to their own retirement benefits as early as age 62 if the claimant's retirement benefit is higher than the survivor benefit.

Every divorcing spouse should have a copy of their most recent Social Security benefit statement (available online from the Social Security Administration) and that of his or her spouse as a point of comparison.

4. How are retirement assets divided?

It depends on the type of retirement asset.

One form of retirement is a pension plan, called a defined benefit plan, that pays out monthly payments at a specific age, with the amount determined by salary and length of employment. The monthly payment can be divided between the spouses when the benefits are distributed. An important document to review is the Summary Plan Description. A separate court order, called a QDRO (Qualified Domestic Relations Order) spells out:

• How the pension payments are divided.
• Whether direct payments will be made to the nonemployee former spouse.
• What type of survivor benefits are in place.
• Who will receive cost-of-living adjustments.

Pension plans are like an annuity and may need to be valued by an actuary, especially if they are awarded entirely to one spouse.

The other type of retirement is a defined contribution plan such as a 401(k). [An IRA retirement account is divided similarly.] They are much easier to value and divide. The value is the current market value of the assets held in the account. Depending on when the funds will be tapped, the value may be reduced for estimated taxes. Spouses may agree to split the account, or let one spouse take the entire account after offsetting its value with other assets.

After the divorce, there is a trustee-to-trustee transfer of funds/assets into a new individual retirement account for the spouse who was not the original holder of the account. Sometimes these accounts are divided by percentages, sometimes by dollar value. If you do the latter, problems can arise if there are extreme market shifts in value between the time the agreement is reached and the account is actually divided. Dividing by percentages also spreads the risk and tax implications when account assets have different tax bases.

What role does debt play in later-life divorces? >>

5. What role does debt play in a late-life divorce?

A major role. Divorcing spouses should always obtain a credit report on both themselves and their spouses. It is amazing how eye-opening credit reports can be; e.g., they can reveal undisclosed debt or unknown credit card accounts.

Divorcing later in life provides less time to retire debt. This is important: A divorce decree does not control creditors because the IRS, the home mortgage company and credit card issuers are not parties to the divorce, and they are not bound by the spouses' divorce agreement about who must pay which joint debt. If both spouses are on the liability ropes, a divorce decree that places responsibility for payment of a joint debt on one spouse will not provide 100 percent protection for the other spouse. How often has a wife been awarded the car, with the husband ordered to pay the secured note? When she goes to her driveway one morning and discovers her vehicle has been repossessed for nonpayment, what are her options? Unfortunately, few. Even if she has a claim against her former spouse for breach of contract, what makes her think he will pay her and not the creditor?

There are ways to reduce the risk of this happening. Put the car and car note with the same person, with an adjustment in other asset allocation. Put money into an escrow account to be released to the liable spouse upon full payment of the obligation. Award alimony to the car-owning spouse, in an amount to cover the debt payments. None of these methods provide 100 percent protection, but they may deter avoidance of debt obligations.

Janice Green, a fellow in the American Academy of Matrimonial Lawyers, has been a practicing family law attorney in Texas for more than 30 years. She's the author of Divorce After 50: Your Guide to the Unique Legal & Financial Challenges. This article is reprinted by permission of the author.