

# Divorce Considerations

## Are there different considerations for divorcing later in life?

While the divorce law is the same, there are challenges unique to senior citizens that don't apply to the general population. The biggest difference is that there is less time to recover financially. Issues to consider when older adults get divorced include:

- **Financial Issues:** While divorces almost always involve financial issues, such as division of marital assets (including pension and/or other retirement funds), divorced seniors often struggle financially because they do not have as many years of working and saving left as younger divorcing couples. Sometimes, the only retirement benefit available to either spouse is Social Security. You need to be aware of the "10 year rule" - that is, if you've been married to your spouse for at least 10 years, you will be eligible to draw Social Security benefits off his/her record if you meet the following criteria:

If your former spouse is living, you can receive benefits based on the former spouse's work if:

- Your marriage lasted 10 years or longer;
- You are currently unmarried;
- You are age 62 or older;
- The benefit you are entitled to receive based on your own work is less than the benefit you would receive on your spouse's work; and
- Your former spouse is entitled to receive Social Security retirement or disability benefits.

Even if your former spouse has not applied for benefits, you may still be able to receive benefits based on the former spouse's earnings record, so long as the former spouse: (1) can qualify for benefits; (2) is age 62 or older, and (3) you have been divorced for at least two years.

If your former spouse is deceased, you can receive benefits if:

- You are age 60 (or age 50 and disabled);
- You are unmarried (or were remarried on or after age 60);
- Your marriage lasted at least 10 years;
- You are not entitled to a higher benefit on your own record.

- *Spousal Support (Alimony)*: One of the factors for spousal support, also known as alimony, is how long you have been married. The longer you've been married, the more likely that alimony could be awarded. However, the most important factors for a judge to consider in awarding alimony are need and ability to pay. If one spouse has a need for spousal support to maintain a comparable level of living after the divorce, the other spouse has to have to ability to pay. There are other factors, including fault of one party, but if there is no ability to pay then spousal support not be awarded.
- *Housing/Property Issues*: Divorce involves an equitable division of property. While this doesn't necessarily mean equal, 50/50 is often a starting point. You need to be aware that you may not be able to afford keeping the house which, even if it is paid for, will involve property taxes, maintenance, and other costs that could put you in a financial bind. If you are awarded the house in the divorce, you will give up something else, which could result in a lesser share of a retirement funds, a smaller cash payment, or less alimony.

Many older adults over age 62 take advantage of a reverse mortgage where, instead of paying money, the homeowner receives money that increases the amount owed on the home. The reverse mortgage loan is then paid off when the house is sold after the homeowner is no longer living in the house. A post-divorce reverse mortgage may allow a divorced spouse to keep the home; however, if you have a reverse mortgage before you get a divorce and the borrowing spouse moves out of the house, the spouse remaining in the home could end up having to pay off the reverse mortgage loan to stay in the home. WTLS has housing counselors who can help individuals make good decisions about whether they can afford to keep the marital residence after divorce.

- *Medical Insurance Issues*: For older Americans struggling financially and facing health issues, loss of insurance coverage can be devastating. If your health

insurance was provided by your spouse's employer or former employer, a federal law called COBRA allows you to continue your health insurance for up to 36 months from the date your divorce is final. However, COBRA is very expensive. Before deciding to divorce, you should review your options for potential insurance coverage under COBRA, Medicare, and Medicaid.

- *Veterans Benefits:* What benefits a divorced spouse of a military veteran receives is a complicated issue governed by both state and federal law. The Uniformed Services Former Spouse Protection Act (USFSPA) allows state courts to divide military retirement pay as part of marital assets. The military spouse qualifies for military retirement benefits under USFSPA if the parties were married for at least 10 years and the veteran spent at least 10 years in the military (the "10/10" requirement). While state law can divide retirement pay, the non-military spouse can receive pay from the Defense Finance and Accounting Service only once the "10/10" requirement is proved. Tricare, the federal program that provides health insurance for the military, is only available to a divorced non-military spouse if the parties were married 20 years during which time the other spouses was in the military for at least 15 years. If you have been married at least 20 years and your spouse was in the military for at least 20 years during the marriage you may qualify for Tricare. If you were married at least 20 years and your spouse served in the military for at least 15 but less than 20 of those years, you may qualify for only 1 year of Tricare. Base privileges (commissary and exchange benefits) for the non-military spouse are available only the military spouse spent at least 20 years during the marriage in the military.

Some veterans' benefits are never available to the non-military spouse once a divorce occurs. If the pension was not divided as part of the divorce, a divorced spouse cannot receive the pension upon the death of the veteran because he/she is not a "surviving spouse" at the time of the veteran's death. Veterans who served in wartime and their spouses over age 65 who are under asset and income limits can receive Aid and Attendance pension benefits to help pay the cost of in-home assistance, assisted living, or nursing home care. Divorced spouses are not eligible for this benefit.

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## **What is a "Medicaid divorce"?**

A Medicaid divorce may help preserve assets where one spouse needs long-term care. It is complicated, and you need a lawyer who has a good understanding of family law, estate planning, and state Medicaid laws. Couples have to “spend down” assets owned by both spouses before the incapacitated spouse can qualify for Medicaid, leaving the well spouse impoverished. A prenuptial agreement will not protect you because Medicaid disregards prenuptial agreements. State agencies “look back” and will disallow asset transfers of property within a certain time period in determining an individual’s eligibility for Long-Term Services & Supports (CHOICES). An asset transfer that occurs prior to the look-back period is not counted as a resource; however, an asset transfer within the look-back period is counted. If an asset transfer is disallowed, you will be penalized by becoming ineligible for Medicaid for a number of months. The “look-back” period in Tennessee is currently 5 years or 60 months from the date of the Medicaid application. However, division of assets due to a divorce are not disqualifying transfers. In a Medicaid divorce, the goal is transfer a larger share of the assets to the well spouse to minimize the spend-down and preserve the quality of life for the well spouse as much as possible while qualifying the spouse in need of medical care for Medicaid as soon as possible.

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## **Do I need a lawyer?**

The issues involved in a senior divorce can be complex. If at all possible, you should consult with a lawyer. If you cannot afford a lawyer, contact your local legal aid office for help. In some situations, you may want to postpone the divorce to make sure you do not lose important rights to benefits.

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## **What information do I need to gather in preparation for meeting with a lawyer?**

You need to know your monthly living expenses, family income, all assets and how assets are titled, the terms of any pre-nuptial agreement between you and your spouse, existing medical insurance, whether either you or your spouse currently have or will have in the future Social Security or other retirement benefits, and the names of all credit accounts, including credit cards, lines of credit, utilities and phone or cable bills. If you do not have all this information, your lawyer will help you

get it. However, the more information you can provide, the less your divorce is likely to cost.

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