NYSBA Journal – Gray Divorce and Remarriage

FEATURED ATTORNEY

Steven J. Eisman
Executive Partner

By Willard H. DaSilva and Steven J. Eisman

Willard H. DaSilva, senior partner of DaSilva, Hilowitz & McEvily LLP, Garden City and New City, New York, is one of 100 attorneys in the U.S. invited to be a Diplomat of the American College of Family Trial Lawyers. He is past President of the American Academy of Matrimonial Lawyers, New York Chapter, and of the New York Family Law American Inn of Court. The New York Law Journal has referred to him and the "Dean of Matrimonial Lawyers."

Steven J. Eisman, a partner at Abrams, Fensterman, Fensterman, Eisman, Formato, Ferrara and Einiger, LLP is the law firm's senior litigator. He oversees both the Divorce and Family Law and Civil Litigation and Appeals "Practices" within the firm. He currently serves as the Treasurer of the Nassau County Bar Association and as a member of the Grievance Committee for the Tenth Judicial District. He is a frequent lecturer in matters relating to Matrimonial and Family Law.

We thank Christopher A. Renke, an associate at Abrams, Fensterman, for his assistance in the writing of this article. Mr. Renke is a member of the litigation practice group and concentrates his practice in family law and divorce, as well as commercial litigation. We also thank Hilary F. Casper, a law clerk at Abrams, Fensterman, for her assistance in the writing of this article. Ms. Casper, a second-year law student at Hofstra University School of Law, is a Notes & Comments Editor of the Hofstra Law Review, Volume 40.

As the first wave of baby boomers approaches age 65, their divorce rate is rising. Boomers, born between 1946 and 1964, already have a divorce rate triple that of their parents. Now they are pioneering a new trend in matrimonial law – the "gray divorce," the phenomenon of couples divorcing after the age of 50. While divorce rates overall have declined slightly nationwide, from a peak of 5.3 per 1,000 people in 1981 to 3.5 today, the rate of "gray divorce" has doubled in the last 20 years. This growth in the divorce rate among older adults translates into a larger share of all divorces being experienced by middle-aged and older adults. In 1990, only 8% of all persons who divorced were more than 50 years of age; [1] over the last several years that number has increased to over 25%. [2]

According to recent U.S. Census data, there was a 20% drop in married couples (those wed between 1955 and 1984) who reached their 20th anniversary. [3] Coinciding with an increased divorce rate among adults above the age of 50 is an increased rate of remarriage later in life. And, as remarriages become a larger share of marriages for the baby boomer generation, the portion of marriages at a higher risk for divorce likewise increases.

Several cultural changes have contributed to the baby boomers generating high rates of late-life divorce. In the past 20 years, gender roles have shifted significantly, and women have become increasingly less financially dependent on men. According to a recent survey by the American Association for Retired Persons (AARP), women over 50 now initiate two-thirds of divorce proceedings. There has also been a growing acceptance of divorce in society, and more states have moved to make divorce easier, as evidenced by the passage of no-fault divorce laws in all states. [4] Furthermore, boomers entering their retirement years are healthier than any previous generation and are projected to have longer life expectancies. As such, experts have observed a growing desire for fulfillment in the later years, as well as an inclination to leave a dispassionate marriage. Additionally, as the children of boomers enter adulthood, parents are less concerned about the impact of divorce on their offspring and are more likely to exit the marriage without worries about custody, child support and the effects of divorce on young children.

People who divorce later in life have had more time to accumulate assets and debts, which can be significant in a remarriage and subsequent divorce. Access to pensions, retirement account balances and Social Security benefits must be considered. Moreover, it is crucial during the separation process to revise existing wills. Issues such as estate planning, survivor annuities and the protection of bequests to children must be contemplated and addressed. Additionally, as couples grow older and face increasing health issues, health care decision making and the execution and/or revocation of advanced life directives become increasingly important in the context of a remarriage and/or a divorce.

When a marriage occurs later in life, each partner has his or her own life-long experience which raises distinct issues. Each party has assets and liabilities, developed separately from the new marital partner. In many cases, each partner has a family (children, grandchildren and others) separate from the new marital partner. When contemplating remarriage, the partners inevitably consider what impact the new marriage will have on their separately developed economic and personal lives. Questions may arise concerning the protection of separately developed assets and to ensure that they pass to children rather than to the new spouse and/or the new spouse's children or other heirs. These questions can be resolved by a well-drafted, written agreement made in contemplation of marriage and signed by both parties. [5] This prenuptial agreement permits a party to protect separate assets through provisions that allow a party to have an exclusive right to manage, re-invest and otherwise completely control all separate assets and ensure that separate real estate, accounts or retirement assets of the party are to remain the separate property of its owner. [6] In the absence of fraud, coercion and/or misrepresentations, prenuptial agreements are generally deemed valid by courts. The party alleging defects has the burden of proof to establish their invalidity. [7]

Financial Considerations and Implications

Marriages and divorces later in life come with their fair share of financial ramifications. Later-in-life divorces can be problematic because individuals' future earning potentials are typically limited. When combined with the possibility of costly health problems, individuals may be unable to maintain the status

quo of the lifestyle they enjoyed as married couples, and older couples may have a harder time adjusting their personal habits and money management styles. Furthermore, in cases where adult children are financially dependent on their parents, this can create a particularly precarious situation. This is especially true when one spouse refuses to contribute anything toward the continued support of the adult children, knowing that the other spouse will ultimately bear this burden out of separate resources.

New York is an equitable distribution state; accordingly, the marital assets and liabilities ("marital property") are divided in an equitable fashion, meaning that the marital property will be divided in such a way that fairly represents the parties' respective contributions to the marriage. In the context of negotiating a settlement agreement, it is important to consider all the assets that are subject to distribution. Parties may decide to trade off passive assets or negotiate percentages of various active assets, such as a business or professional practice, and courts typically look to indirect contributions – for example, from a homemaker spouse – in order to determine the proper percentages. [8] Later in life divorces provide parties with less time to pay off debt, another critical aspect in the negotiation of a settlement agreement between spouses. In addition to being fully aware of all debts involved (even previously undisclosed debt or credit cards), parties can take certain security measures to better protect themselves, including, but not limited to, adjustments in the asset allocation process or the placement of money into an escrow account to be released to the indebted party upon full satisfaction of a certain obligation. As for credit cards post-divorce, each party should remember to remove the former spouse from any credit card account held in his or her name to prevent the former spouse from incurring additional debt.

Financial transparency allows couples to be honest and realistic about their finances, including assets and liabilities, as well as their long-term financial goals for the preservation of their estates. Open lines of communication about financial desires, before marrying or remarrying later in life, will help avoid problems down the road. Reconciling and finalizing all tax-related issues from a previous marriage are key components to an easy transition to a second or third marriage.

As with any potentially life-altering decision, one should factor in the current economic, stock and real estate market conditions. It is strongly recommended that individuals contemplating a marriage, separation or divorce later in life consult with an attorney and an accountant.

Spousal Support

An important consideration in the contemplation of a divorce is spousal support or maintenance. [9] The amount of maintenance, if any, is generally determined by balancing the payor spouse's ability to pay with the payee spouse's reasonable needs. Additionally, it is imperative to secure any financial obligation. While life insurance may be cost prohibitive depending upon age and health, it is possible to secure payments through mortgages, confessions of judgment and other security devices. Some considerations include obtaining a significant down payment on any financial obligation or securing a life insurance policy on a former spouse's life.

There is a growing concern as to how courts address maintenance awards as one party approaches retirement. Generally, long-term marriages go hand in hand with long-term support. If, however, a court provides a party with a long-term maintenance award, this could effectively force one spouse to continue working well past his or her planned retirement age, posing a potential problem for later-in-life divorces as

well as those already divorced who are seeking to modify support payments later in life. In the 2008 decision *J.S. v. J.S.*, [10] Justice Anthony J. Falanga of the Nassau County Supreme Court held that as a matter of first impression, in considering a non-durational award of spousal maintenance, courts should consider prospective financial circumstances and work-life expectancy of the payor spouse. [11]

Marital Residence

For many older couples in their retirement years, income is limited, so asset division can be problematic. In today's troubled real estate market, the marital residence may not have retained its prior value and may remain unsold for a long period of time. Dividing the remaining equity (net proceeds) may not provide the husband or wife with enough financial wherewithal to obtain adequate separate housing. Since the marital residence is frequently a married couple's largest asset, decisions and negotiations regarding the disposition of the home are often protracted and emotional. While the equity in the marital residence is typically divided equally between spouses, other issues can arise including the timing of the sale and the payment of carrying charges pending the sale. In the case of minor children, courts may defer the sale of the house until some defined event – such as the emancipation of the youngest child (e.g., high school or college graduation).

When deciding whether to retain the marital residence, it is important to analyze the costs associated with maintaining the home – taking into account taxes and inflation. [12] Will there be sufficient cash flow to pay the carrying charges of the home (e.g., real estate taxes and mortgage costs) together with other necessary expenses? The pros and cons of keeping the home must be compared to the cost/benefit of trading off other assets (e.g., liquid assets and retirement plans). There are other aspects relating to the value of a residence that cannot be overlooked, such as exemptions from property tax increases at specific ages, the potential income through reverse mortgages, special treatment for people qualifying for public benefits if the house is a primary residence, rental income, tax deductions for mortgage interest, and taxes and exclusions from gains upon sale.

Pension, Retirement Accounts and Stock

Pensions and retirement plans are considered marital assets; typically, the amount that was earned during the marriage will be subject to equitable distribution pursuant to New York's Domestic Relations Law (DRL). [13] Monies that were set aside for retirement prior to marriage must be separately valued to determine the contributing spouse's separate property interest. A married person may change the beneficiary of his or her retirement plans to someone other than a spouse – in limited circumstances. For example, if the retirement plan is an ERISA qualified plan, such as a 401(k), 403(b) or other employer-sponsored plan, the law requires the non-participating spouse to be the primary beneficiary, unless otherwise waived in writing. Waivers make sense, particularly in second and third marriages when a spouse is financially independent.

Additionally, if the plan is an individual retirement account (IRA) and the IRA was funded using marital funds, the non-participating spouse commonly has the right to one-half of its value, unless consent is given for distribution to a non-spousal beneficiary; otherwise anyone can be named the beneficiary of an IRA. A 2009 U.S. Supreme Court decision illustrates the importance of keeping up-to-date beneficiary designations. In *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, [14] the Supreme Court of the United States ruled that a plan administrator properly distributed benefits under an ERISA

pension plan to a deceased participant's former spouse because she was the only designated beneficiary in the records of the plan administrator – even though she had waived her interest in plan benefits in the parties' divorce settlement agreement and in the divorce decree.

It is important to obtain an accurate determination of the value of pension plans, IRAs and stock holdings, together with their concomitant tax ramifications. Taxes on retirement funds must be considered when determining the true value of those accounts. [15] In many circumstances, one party will trade away rights to a spouse's pension to keep the house for sentimental reasons, even if he or she cannot afford to maintain said residence. If the parties involved own equities jointly, sometimes it is beneficial to negotiate for some of the "poor performers" to gain a benefit from a taxable loss when sold. Pension payouts, a more streamlined process to receive payments directly from the spouse's pension plan, can be achieved with the use of a qualified domestic relations order (QDRO), which identifies (1) how the pension payments are divided; (2) whether direct payments will be made to the non-employee former spouse; (3) what type of survivor benefits are in place; and (4) who will receive cost-of-living adjustments, among other things. IRAs and 401(k)s are easier to value and divide since they are based on the current market value. Dividing these types of defined contribution retirement plans by percentages (and not by dollar value) provides an additional security measure by spreading the risk and tax implications. Other plans, such as defined benefit plans, will require the assistance of an actuary to determine their value.

Social Security

For a couple getting divorced later in life, monthly income from Social Security can play an important part in divorce negotiations, particularly in the consideration of division of property and maintenance payments. After at least 10 years of marriage, a former spouse is entitled to one-half of the benefits of the other (without affecting the benefits of the other) after he or she has attained 62 years of age. Once an individual is over the age of 62 and has been divorced for at least two years, there will be an entitlement to benefits through the former spouse as long as the former spouse is eligible, even if the former spouse has not yet filed for benefits.

For couples who marry after full retirement age, the less-monied spouse generally cannot collect benefits on the former spouse's record unless the later marriage ends either by death or divorce. Widows' or widowers' benefits, which are 100% of the former spouse's Social Security benefit, will be waived by a widowed spouse who remarries before age 60. If marriage occurs after full retirement age and one spouse's Social Security benefit is less than half that of the new spouse, that spouse can receive his or her own Social Security benefit plus an additional amount to bring the distribution up to half of the new spouse's Social Security benefit. This will generally occur one year into the marriage.

Separation, Annulments and Common Law Marriage

There are alternatives to obtaining a divorce, such as a legal separation or annulment. In certain circumstances, choosing to live apart may be less costly than an actual divorce. Crafting a binding agreement addressing the division of financial assets is a crucial element of a successful separation. Maintaining the marriage, while living apart and settling financial matters, may allow an uninsured spouse to receive continued medical coverage under the other spouse's plan, keep the marital status intact until a spouse becomes eligible for Medicare, meet the 10-year eligibility requirement for Social Security benefits or otherwise maintain the marriage for personal or religious beliefs. Separation has the same legal effect

of a divorce in the sense that it may by agreement provide for distribution of assets as well as support. The main distinction between a separation and a divorce is that a separation does not provide either party with the right to remarry.

Obtaining an annulment or having a marriage declared void is an additional option, even for the aging population, as length of the union is not a determining factor in whether an annulment will be granted. Annulments can be obtained where the marriage never existed because it was not a legally valid union. It is usually considered invalid from the date of the "marriage," as if it had never taken place, although in some states the union is void from the date of the annulment. People may choose an annulment over a divorce for various reasons, including religious and financial. Generally speaking, an annulment may provide for a division of property and/or support payments. Annulments can be obtained on various grounds, including lack of consent, fraud, and inability to consummate the marriage.

Although many people believe that living with someone for a specified period of time constitutes a common law marriage, this is not the case. In fact, the few states in the United States that do recognize common law marriage impose a requirement that the couple hold themselves out to the community as married (with affirmative conduct and declarations). [16] If a party plans to reside in a state where common law marriages are recognized without the intention of entering into a common law marriage, it is recommended that the parties execute a written agreement stating their intentions to cohabitate as unmarried persons. Nevertheless, states, including those that have abolished common law marriage, recognize common law marriages lawfully contracted in those jurisdictions that permit them. As such, it is important to keep in mind that a common law marriage provides each spouse with the same rights and privileges as those provided to spouses in non-common law marriage jurisdictions. [17]

Wills, Trusts and Estates

One of the most important areas to consider in later-in-life divorces and remarriages is estate planning. During the divorce process, it is critical to evaluate the beneficiaries that parties have selected in wills and retirement plans, as well as agent designations in medical directives or powers of attorney, to ensure that the documents reflect their current circumstances and desires. Under § 5-1.1-A of New York's Estates, Powers and Trusts Law (EPTL), surviving spouses have a personal right of election to a minimum basic inheritance of the deceased spouse's estate. The elective share is the greater of $50,000 or one-third of the net estate regardless of what the will provides for the spouse. The net estate consists of the net probate assets as well as testamentary substitutes, such as joint bank accounts, jointly owned property and pension plans. This entitlement can be circumvented by a signed contract between spouses.

In most states, such as New York, the entry of a final judgment of divorce automatically revokes all prior provisions or bequests in a will to a former spouse. [18] However, the period of time between the execution of a final divorce settlement and the receipt of a signed judgment of divorce may be lengthy. Therefore, parties should be protected by a provision in the divorce settlement agreement stating that each party has waived his or her right of election and other rights under the EPTL.

During the pendency of the divorce, individuals should also consider changing beneficiary designations on certain types of property which can pass outside of the probate estate by operation of law, such as most retirement accounts, life insurance policies, annuities, property owned as joint tenants with rights of survivorship, and property owned in a trust. If beneficiary designations are not changed, this property may pass directly to the former designated beneficiary upon death. Keep in mind, however, that a spouse may

not be unilaterally removed as a beneficiary from an ERISA-protected retirement account. Furthermore, if an action has been commenced, the automatic restraining orders that accompany the filing of the summons will protect against any change in insurance policies. [19] In a separation or divorce agreement, ownership of life insurance policies, including cash value, if any, and beneficiary designations should be addressed. If one spouse dies without having removed the other spouse as a beneficiary on a life insurance policy, the insurance proceeds will pass to the named beneficiary.

In the estate-planning process, couples contemplating remarriage later in life should consider prenuptial agreements in order to address legal issues such as waiver of rights to retirement benefits, obligations to children of prior marriages, tax considerations, and rights to assets brought to the marriage – including the appreciation thereof. These issues can be addressed by a carefully drafted prenuptial agreement which can help determine what assets will retain their separate nature. A well-drafted and properly executed prenuptial agreement may also prevent a current spouse from challenging a will or any existing trusts. Whether a trust will be affected by remarriage may depend on the nature of the trust (i.e., revocable or irrevocable), as well as the designated beneficiaries.

Some trusts, such as a qualified terminable interest property trust (QTIP), can offer protections to children from a former marriage. Upon death, a QTIP trust gives the surviving spouse limited access to a party's assets during his or her lifetime while ensuring that the remaining assets in the trust are distributed to children from a prior marriage upon the spouse's death. Property passing to a QTIP trust is eligible for the marital deduction, so the property is not taxed at the death of the deceased spouse, leaving the entire amount available for the surviving spouse's support. Such a trust can generate income for the benefit of the surviving spouse during his or her lifetime. At the death of the surviving spouse, those assets would then be distributed among the parties' mutual and/or prior children pursuant to the wishes of the settlor of the trust.

Health Care Decision Making

As baby boomers reach retirement age and face growing health care problems and risks, they must carefully consider medical decision making in the event of legal incapacity. This becomes increasingly important in the framework of a later-in-life divorce or remarriage. A frequent source of conflict in the law is the dilemma posed by adults without current decision making ability who have either not expressed their intent in the past or have provided conflicting or unclear directions.

This difficulty can be obviated in many circumstances by adherence to statutes that permit competent individuals to execute advance life directives, such as a living will or a health care proxy. A living will is a document that expresses the type of life-sustaining treatment a patient does or does not want performed in the event the patient loses capacity to make decisions regarding his or her own health. A health care proxy is an instrument in which a patient appoints an agent to make health care decisions in circumstances when the patient is incapable of making such decisions. Advance life directives bestow upon a chosen individual the right to make a medically related decision regarding the health of the patient in the event the patient is unable to do so.

Chronic illnesses, such as Alzheimer's or dementia, can have a profound impact on the health and quality of life of elder adults and their spouses. The divorce rate among the chronically ill is high. The creation of no-fault divorce laws of the 1970s and 1980s, and the recent passage of no-fault divorce in New York, opened the door to the concept of divorce without the need to prove a cognizable offense. [20] With the

passage of no-fault, it is conceivable that spouses of chronically ill or mentally incapacitated individuals could more easily initiate divorce proceedings.

Spouses of chronically ill individuals often feel unable to handle the enhanced care-giving role and deal with the financial burdens that are associated with long-term illnesses. In such situations, individuals may try to initiate guardianship proceedings against a chronically ill spouse in order to gain an advantage in divorce proceedings. Planning and the execution of advance life directives may make it less likely that an individual will be declared by a court to be unable to manage his or her personal and/or financial affairs, and therefore obviate the necessity of the appointment of a guardian.

For aging couples getting divorced, considerations regarding medical decisions and the execution of advanced life directives will be significant, to ensure that the person or persons of their choosing are able to carry out their treatment wishes. Unmarried seniors living with significant others should consider a cohabitation agreement supplemented with durable power of attorney and health care proxy documents, allowing partners to make medical decisions for one another when and if needed.

New York's Family Health Care Decision Making Act (FHCDA), signed into law in March 2010, has the potential to improve the legal situation for patients residing in hospitals and nursing homes. The act not only simplifies and facilitates the execution of advance directives but also provides for default procedures if advance directives have not been completed where there is no "clear and convincing" evidence of prior expressed wishes. Prior to the enactment of the FHCDA, there was a protracted process which included filing petitions to a court, even in circumstances where the family was in fact available to make decisions.

The FHCDA establishes a clear hierarchy for health care decision making, authorizing decision makers beginning with a spouse and proceeding to additional family members (adult children, parents, siblings) or other persons close to the patient. These can include the withholding or withdrawal of life-sustaining treatment on behalf of patients who lose their ability to make such decisions (i.e., incapacitated persons). If, however, the patient has executed an advance life directive, then the previously designated agent will be authorized to make decisions.

Spousal Obligation to Pay Health Care Costs

Generally, a married person is obligated to support his or her spouse. If possessed of sufficient means or the ability to earn such means, a party may be required to pay a fair and reasonable sum for the support of his or her spouse, as the court may determine, having due regard to the circumstances of the respective parties. The court may include in an order for support a provision for necessary shelter, food, clothing, care, medical attention, expenses of confinement, the expense of education, payment of funeral expenses, and other proper and reasonable expenses. [21] Except as otherwise provided in DRL § 236, a husband and wife cannot contract to alter or dissolve the marriage or to relieve either of his or her liability to support the other in such a manner that he or she will become incapable of self-support and, therefore, likely to become a public charge. [22] This spousal support obligation may create tension between adult children and a parent who decides to remarry later in life, especially in circumstances where the parent's new spouse becomes ill or incapacitated and requires spousal support at the parent's expense, having the net effect of reducing the value of the parent's estate.

Another growing trend in the practice of elder law – relating to both matrimonial law and health care planning – is the use of so-called "Medicaid divorces." In fact, the use of Medicaid gifting and Medicaid

planning received judicial sanction from New York's highest court in 2000 in In re Shah. [23] In this type of divorce, the "spouse in the community" (the spouse who is not institutionalized or the healthy spouse), stands to lose a lifetime's worth of savings unless a health care plan is devised that provides care for the ill or incapacitated spouse and simultaneously protects the assets of the spouse in the community so that both spouses do not end up impoverished wards of the state. A prenuptial agreement alone will not defeat a claim by Medicaid.

In circumstances where there is an incapacitated spouse, the spouse in the community will petition the court under Article 81 of the Mental Hygiene Law to ensure that the best interests of the incapacitated party can be addressed. The healthy spouse has two options: first, do no planning and privately pay for the ill or incapacitated spouse's health care, be it at home or in an inpatient health care facility, such as a nursing home, until the community spouse depletes virtually all personal liquid assets, which would then render the ill or incapacitated spouse Medicaid eligible; or second, what is referred to as a "spousal refusal." [24] This is the process wherein excess assets are shifted into the name of the community spouse who then executes a document, later filed with the Department of Social Services, indicating that he or she refuses to contribute income and assets to the care of the ill or incapacitated spouse. This was a right granted to New Yorkers in 1998. Spousal refusal may result in a Medicaid divorce, which immediately renders the ill or incapacitated spouse Medicaid eligible – a plan that the Court of Appeals declared sound policy in the aforementioned case of Shah. This type of plan allows the community spouse to retain the marital residence and enough money to maintain a decent quality of life. [25]

Conclusion

As this article illustrates, a variety of considerations related to matrimonial and elder law decisions affect members of the ever-growing aging population. Many of the problems and pitfalls that may be associated with later-in-life marriages can be addressed with a well crafted prenuptial agreement. The decision to marry, separate or obtain a divorce, especially later in life, involves critical decisions with potentially far-reaching ramifications for the individuals and families involved, their financial circumstances and even their health. Decisions of this nature require considerable thought and analysis. Most important, individuals contemplating marriage, separation or divorce, especially in their later years, should consult an experienced attorney who can address their particular circumstances, needs and goals.

---

1. National Center for Health Statistics 2009 (data on marriage and divorce), *available at* http://www.cdc.gov/nchs/nvss.htm.

2. *Id.*

3. U.S. Census, 2010.

4. New York was the last state to enact no-fault divorce, effective in October of 2010.

5. *See* DRL § 236B(3).

6. Couples should be sure to consult a knowledgeable attorney in the drafting of their prenuptial agreement in order to ensure that their interests are fully protected and the individual circumstances of both parties are covered in the final agreement.

7. *See In re Phillips' Estate*, 293 N.Y. 483 (1944).

8. *See McSparron v. McSparron*, 87 N.Y.2d 275 (1995) (“In attempting to select a suitable valuation date, some courts have drawn a distinction between ‘active’ assets [i.e., those whose value depends on the labor of a spouse] and ‘passive assets’ [i.e., those whose value depends only on market conditions]. These courts have concluded that ‘active’ assets should be valued only as of the date of the commencement of the action, while the valuation date for ‘passive’ assets may be determined more flexibly. *See also Smerling v. Smerling*, 177 A.D.2d 429; *Heine v. Heine*, 176 A.D.2d 77; *Zelnik v Zelnik*, 169 A.D.2d 317; *Kallins v. Kallins*, 170 A.D.2d 436; *Greenwald v. Greenwald*, 164 A.D.2d 706]. Such formulations, however, may prove too rigid to be useful in particular cases. Thus, they should be regarded only as helpful guideposts and not as immutable rules of law [citation omitted].”).

9. As part of New York’s No-Fault Divorce legislation package, DRL § 236B(6-a) directs the New York State Law Revision Commission to study and assess the economic consequences of divorce and to carefully review the spousal maintenance laws of the state in order to effectuate the state’s policy goals of ensuring that the economic consequences of divorce are “fairly and equitably shared by the divorcing couple.”

10. 19 Misc. 3d 634 (Sup. Ct., Nassau Co. 2008).

11. Justice Falanga’s decision in J.S., 19 Misc. 3d 634, was cited by P.D. v. L.D., 28 Misc. 3d 1232(A) (Sup. Ct., Westchester Co. 2010), and B.M. v. D.M., 31 Misc. 3d 1211(A) (Sup. Ct., Richmond Co. 2011). These later cases held that courts should determine awards of non-durational maintenance by considering the payor’s ability to provide support through factors such as health and long-term work expectancy, rather than based solely on existing financial circumstances.

12. If the marital home is transferred to a spouse or former spouse incident to a divorce, there is no gain or loss. Furthermore, if the residence is sold incident to a divorce, there is a $250,000 exclusion of capital gain per spouse ($500,000 per couple) on a principal residence, subject to certain provisions (e.g., satisfaction of the ownership and use test).

13. *See Majauskas v. Majauskas*, 61 N.Y.2d 481 (1984).

14. 555 U.S. 285 (2009).

15. Where a pension or retirement plan is subject to the protections under ERISA, special exceptions exist providing that retirement funds are exempt from certain taxes and penalties when transferred directly to a non-employee spouse’s retirement account incident to a divorce.

16. New York does not recognize common law marriage, unless they were contracted in a state that does permit them.

17. The Social Security Administration (SSA) will only recognize common law marriage if the state in which the couple resides recognizes common law marriage. In order to be eligible for survivor benefits, couples must go to the SSA office to provide supporting evidence of a common law marriage, such as joint tax returns and a statement from two blood relatives.

18. N.Y. Estates, Powers & Trusts Law 5-1.4.

19. *See* DRL § 236B(2).

20. There is some debate in New York over whether a defense is permitted to the new no-fault provision under DRL § 170(7). However, since the statute was signed in October of 2010, most courts have held

that there is no defense to no-fault. *See A.C. v. D.R.*, 31 Misc. 3d 517 (Sup. Ct., Nassau Co. 2011). DRL § 170(7) permits a party to obtain a divorce by swearing under oath that the marital relationship has been irretrievably broken for a period of at least six months.

21. *See* N.Y. Family Court Act §§ 412, 416.

22. *See* N.Y. General Obligations Law § 5-311.

23. 95 N.Y.2d 148 (2000).

24. It should be noted that the community spouse is entitled to a Community Spouse Resource Allowance (CSRA) of no more than $109,560. Furthermore, the community spouse is allowed to retain a community spouse monthly income allowance of $2,739.

25. The state may seek recovery of the cost of Medical Assistance benefits from the community spouse. The local Medicaid agency must commence a proceeding against a financially qualified spouse for the Medical Assistance benefits granted after Medicaid benefits are paid, instead of at the initial calculation stage which might limit the amount of Medicaid benefits to be provided.

Reprinted with permission from: New York State Bar Association *Journal*, July/August 2011, Vol. 83, No. 6, published by the New York State Bar Association, One Elk Street, Albany, NY 12207.