

## Grey Divorce: Tips for the Matrimonial Practitioner

by  
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When I get older losing my hair  
Many years from now  
Will you still be sending me a valentine  
Birthday greetings, bottle of wine?  
If I'd been out till quarter to three  
Would you lock the door?  
Will you still need me, will you still feed me  
When I'm sixty-four?<sup>1</sup>

Nearly fifty years ago, when the Beatles wrote *When I'm 64*, Paul McCartney wondered to his future wife whether she would still love him in his old age. Today, with life expectancies on the rise, as the elder divorce rate continues to increase, the now 74 year-old Paul might well be asking his song-bride whether she will waive his pension.

### I. The Grey Divorce Revolution

Here is a statistic that may make many divorce lawyers smile – if only privately. The United States has the highest divorce rate in the world; 45% percent of all U.S. marriages end in divorce. The divorce rate for people under fifty is higher than the divorce rate of those over fifty.<sup>2</sup> But a revolution is afoot.

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<sup>1</sup> THE BEATLES, *When I'm 64*, SGT. PEPPER'S LONELY HEARTS CLUB BAND (Capitol Records 1967).

<sup>2</sup> Susan L. Brown & I-Fen Lin, *The Gray Divorce Revolution: Rising Divorce Among Middle-aged and Older Adults, 1990-2010*, NAT'L CTR. FOR FAMILY & MARRIAGE RES. 2, 3 (2013).

Much has been written in the popular press about the Grey Divorce Revolution.<sup>3</sup> Indeed, in the United States, the rate of divorce among people fifty and over has doubled since 1990. Still, the rate is not as high as that among the younger cohort. But, since the overall U.S. divorce rate since 1990 has been flat,<sup>4</sup> the “revolution” moniker is not hyperbolic. This means that matrimonial lawyers need to start to pay serious attention to the legal issues that relate to divorce and the elder client.

To that end, this article is intended as a primer for matrimonial attorneys on elder divorce. Naturally, because of this demographic, several of the issues involve the consequences of a spouse dying, either before or after divorce. As a general matter, the theme of unintended consequences permeates the first half of the article (Parts II through VIII), where many of the issues turn on the elder’s failure to take a particular action—to change a beneficiary designation, will, or trust, to revoke durable powers of attorney and medical directives. The second half of the article (Parts IX through XII) discusses the so-called “Medicaid divorce,” alimony recapture, guardian-initiated divorce and, finally, predatory marriages.

Specifically, the discussion begins in Part II with the effect of the untimely post-divorce death on a joint bank or security account where a party failed to change the title of such account. Essentially, in most states, there is no statute that revokes joint accounts upon divorce.

Similarly, Part III treats the situation in which a spouse with an obligation to provide a specified amount of private (non-ERISA) life insurance dies without having fulfilled such obligation. In most states, divorce, *per se*, does not affect a beneficiary designation in a life insurance policy. However, a spouse may have rights under the divorce agreement or judgment to recover in equity. Part III also explains the impact of an after-acquired policy.

With ERISA retirement plans and life insurance, even a state statute meant to protect the forgetful spouse from unintended consequences cannot save him or her. ERISA, as ex-

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<sup>3</sup> See, e.g., Sam Roberts, *Divorce After 50 Grows More Common*, N.Y. TIMES, Sept. 20, 2013, at ST26; Susan Gregory Thomas, *The Gray Divorcés*, WALL ST. J., (Mar. 3, 2012, 1:53 PM), <http://www.wsj.com/articles/SB10001424052970203753704577255230471480276>

<sup>4</sup> Brown & Lin, *supra* note 2.

plained in Part IV, preempts any state revocation-upon-divorce statutes. Part IV also explains that, with respect to ERISA retirement plans, only a QDRO can divide such an asset.

In elder divorce, the practitioner must understand the relationship between intestacy and divorce. Part V explains that until the divorce is final, where a spouse dies intestate, the surviving spouse can claim a statutory share unless there is an explicit waiver in a divorce, or other, agreement.

Part VI explains that, in the majority of states, wills and revocable trusts are revoked upon divorce. The Part also discusses the issue of the pretermitted spouse, wills and trusts made notwithstanding a subsequent marriage, and wills and trusts made in contemplation of marriage.

Part VII explains why the practitioner should be sensitive to the dangers of an unrevoked durable power of attorney – particularly, the possibility that a spouse exercises it on behalf of the other spouse following the separation of the parties. Part VII also points out that the majority of states do not have statutes revoking durable powers of attorneys upon divorce.

The unintended consequences of an unrevoked medical directive can be, literally, life or death. As Part VIII points out, in most states, a medical directive is revoked upon divorce. However, while a divorce is pending, it is still in effect.

The article's second half, beginning in Part IX, explains why matrimonial attorneys must be well-versed in the interplay between divorce and Medicaid and, in particular, the use of divorce as a Medicaid planning tool. Part IX also articulates the difficulties in presenting a Medicaid divorce to the court, particularly in light of the public policy in most states that no spouse should become a public charge as a result of a divorce. Further, this Part explains the ethical and moral issues with divorce and Medicaid planning.

Alimony recapture, as explained in Part X, can be a special concern with the elderly, considering the likelihood that they might injure themselves within the recapture period of three years. Part X revisits the basics of recapture and describes how attorneys may wish to frame alimony obligations as a percentage of income in order to avoid the problem.

Because many elders may be incompetent, the practitioner may have to navigate a divorce involving guardians. Part XI

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deals with the guardian-initiated divorce, detailing the general common law prohibition against a guardian-initiated divorce and indicating a trend toward permitting guardians to initiate divorce.

Finally, adult children often worry about their elderly parents being victimized by younger, predatory spouses. Part XII considers the legal options available to attack the marriage.

In the service of creating here a user-friendly primer, I have imagined a hypothetical couple and fact pattern that the reader can follow throughout the article:

*Cindy and Richard Kaye, in their late sixties, have been married for forty years. They have two children, Tommy and Wendy, both in their thirties and married.*

*Richard is an M.D. in internal medicine employed by a hospital and earns \$400,000 per year. Cindy has never worked during the marriage and has stayed at home to raise the children.*

*Richard has moved out of the house and is living with Nancy, who is in her forties, divorced, and has two children of her own. She is the office phlebotomist, which helped earn her the nickname from the Kaye children: “bloodsucker.”*

*The marital estate is substantial. The five bedroom marital home is mortgage-free. There are significant retirement assets – a defined benefit plan, excess benefit plans, 401-ks, and IRAs. There are joint checking and savings accounts. The parties have an estate plan consisting of wills, trusts, durable powers of attorney, and health care proxies. Each of them has term life insurance with death benefits payable to the other in trust.*

*Richard filed a Complaint for Divorce.<sup>5</sup>*

## **II. Joint Bank and Securities Accounts**

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. The agreement provides that several joint checking and savings accounts are to be divided equally as of a certain date. The divorce is final on April 15. Richard dies on April 25. The accounts were never divided. On the day of the funeral, Cindy goes to the bank and cleans out all the accounts.*

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<sup>5</sup> A style note: I will call the pleading that initiates a divorce a “Complaint for Divorce,” because that is what it is called in Massachusetts where I practice. I appreciate that in many other states, the pleading might be called a “petition for dissolution” or by another name depending on the jurisdiction.

In 49 states and the District of Columbia,<sup>6</sup> there is no statute that revokes joint or multiple party bank accounts upon divorce. Cindy, then, has the *legal* right to all the funds under the law in almost all states. Depending on the state and the particular language of the agreement, Richard's estate could have an *equitable* claim for the funds. The same holds with securities accounts. In 49 states and the District of Columbia, there is no statute that revokes securities accounts upon divorce.<sup>7</sup>

Practitioners may wish to consider drafting a closing letter to the client, articulating for them what must be accomplished – and to follow up by phone and in writing until each of the assets has been handled according to the agreement or judgment. This is true with all clients – with older ones, it is imperative.

The letter should identify each asset and the client's associated post-divorce task. For example, the letter would list "Bank of America joint checking account ending in 7789." Next to this, the letter could state in bold caps "ACTION REQUIRED:" followed by "Client is instructed to close joint account immediately." The letter should be handed to the client on the day of court, accompanied by an in-person review of its contents and the obligations of the client.

### III. Private (Non-ERISA) Life Insurance

#### A. After-Acquired Policies

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. The agreement provides that, in the event of death, Richard is to maintain Cindy as the primary beneficiary of a \$1,000,000 private (non-ERISA) life insurance policy. The policy was in place at the time that the agreement is signed. Richard dies a year later, having reduced the coverage to \$700,000 and changed the beneficiary to Nancy, to whom he is now married. In addition, there is another policy in the amount of \$300,000, also naming Nancy as the primary beneficiary. The agreement made no reference to after-acquired life insurance policies.*

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<sup>6</sup> LESLIE ANN SHANER, *DIVORCE IN THE GOLDEN YEARS: ESTATE PLANNING, SPOUSAL SUPPORT, AND RETIREMENT ISSUES FOR CLIENTS IN MIDLIFE AND BEYOND* 5 (2010). This book has been an invaluable resource to me in my practice and in preparing this article. It should be mandatory reading for the matrimonial practitioner who has a practice involving elderly clients.

<sup>7</sup> *Id.* at 8.

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At the outset, it is worth remembering that a beneficiary has no interest in life insurance proceeds until the death of the insured. Prior to the death of the insured, the beneficiary has merely a revocable expectancy interest.

In most states, Nancy has the legal right to the proceeds to both policies. Whether Cindy can make an equitable claim depends on a variety of factors. In *Foster v. Hurley*,<sup>8</sup> the Massachusetts Supreme Judicial Court, on facts similar to the above hypothetical, found that the ex-spouse (Cindy) had an equitable claim to the proceeds of the policy that was in place at the time of the agreement.

As to the after-acquired policy, the *Foster* court found that Cindy could not make an equitable claim to the proceeds of the second policy.<sup>9</sup> If there was specific language regarding the intentions of the parties with respect to after-acquired policies, Cindy may have had the right to the proceeds, depending on the language. Absent specific language, the *Foster* court would have found for Cindy had there been evidence that Richard “intended to use the . . . policy to meet [his] obligations under the separation agreement but was dissuaded from doing so by [Nancy].”<sup>10</sup>

B. *Practical Considerations*

Of course, outcomes will differ widely depending on the state and the facts of the case. Therefore, for purposes of this primer, the practitioner should consider including the following language for agreements or proposed judgments.

The policy should be identified clearly:

The Husband currently has in effect a term life insurance policy taken out on April 30, 2016 on his life with John Hancock [No. XXXXX3074] with a death benefit of One Million Dollars (\$1,000,000.00) which he shall maintain, at his own expense, for the benefit of the children with the Wife as the named beneficiary until . . .

The agreement should speak to after-acquired policies.

If either party dies while in breach of the provisions of this Exhibit, any new policy or policies of life insurance acquired after the execution of this Agreement insuring that party's life shall be deemed to have been intended by the insured party to secure the obligations set

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<sup>8</sup> 826 N.E.2d 719, 724 (Mass. 2005).

<sup>9</sup> *Id.* at 728.

<sup>10</sup> *Id.*

forth in this Exhibit, regardless of any other beneficiary designation. In that event, the after-acquired insurance policy or policies shall be payable to the other party, in an amount no less or no greater than that required for coverage under this Exhibit, as if the insured party or Insurance Trust had duly maintained the specifically identified life insurance policies referenced in this Exhibit with the beneficiary designations required under this Exhibit.

### C. *Effect of Non-Specific Waiver*

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. At the time of the agreement, Richard had a \$1,000,000 individual (non-ERISA) life insurance policy designating Cindy as the primary beneficiary. Richard had retired by the time of the divorce and there were no support provisions — which is why the agreement did not require Richard to provide life insurance.*

*While the agreement did not contain a specific waiver of beneficial interests in the life insurance policy, it did contain general mutual waiver language in which the parties released “all claims to the marital estate of the other.”*

*Richard married Nancy shortly after the divorce and died nine years later, having never changed the beneficiary designation.*

Apart from any equitable right to proceeds she may have, the issue is whether Cindy has any legal right to the proceeds. That she and Richard divorced is not dispositive. The majority rule is that divorce, *per se*, does not affect a beneficiary designation in a life insurance policy.<sup>11</sup> The analysis, then, requires an examination of the agreement or judgment. Here, poor Richard loses again. In the majority of states, Cindy’s non-specific waiver of all claims to Richard’s marital estate does not operate as her waiver to the proceeds of a life insurance policy of which she is the beneficiary.<sup>12</sup>

### D. *Practical Considerations*

For Richard’s attorney, the best practice would have been to include in an agreement (or proposed judgment) a specific waiver to the proceeds of an existing policy, to identify the policy clearly by company and number and to provide the death benefit. Richard’s attorney should have also followed up in writing

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<sup>11</sup> See, e.g., *Ping v. Denton*, 562 S.W.2d 314 (Ky. 1978).

<sup>12</sup> SHANER, *supra* note 6, at 12.

with him immediately to ensure that he has changed beneficiaries. As further last-resort protection, Richard's attorney might also have insisted on language providing that Cindy's waiver is effective even if Richard fails to change the beneficiary designation.

## **IV. ERISA Retirement Plans and ERISA Life Insurance**

### *A. ERISA Preemption of State Revocation Laws*

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. Richard died intestate two months after the divorce was final, survived by Cindy and their two children, Tommy and Wendy.*

*At the time of the agreement, Richard, still working, had a \$1,000,000 ERISA group life insurance policy from the hospital designating Cindy as the primary beneficiary. In the agreement, Cindy explicitly "waived any and all right title and interest to the policy and all proceeds in the event of his death." Richard neglected to change the beneficiary designation, leaving Cindy as his beneficiary under the plan documents on file with the plan administrators.*

*Through the hospital, Richard also had an ERISA pension plan in which he had designated Cindy as the beneficiary. As with the employer-sponsored ERISA life insurance, Cindy explicitly "waived any and all right, title, and interest to the pension including any death benefit." Again, Richard neglected to change the beneficiary designation, leaving Cindy as his beneficiary under the plan documents on file with the plan administrators.*

*Under the applicable state intestacy statute, divorce revokes all probate and non-probate transfers to the former spouse if the designation was made prior to the divorce. As a result, Richard's and Cindy's two adult children, Tommy and Wendy, are the heirs under the statute. Tommy and Wendy seek to claim under the statute.*

*Cindy, ever greedy, tells her children that she deserves the proceeds. She brings suit, arguing that the state statute is preempted by ERISA.*

The U.S. Supreme Court, in *Egelhoff v. Egelhoff ex rel. Breiner*,<sup>13</sup> agreed with the ex-spouse, Cindy in our example, that ERISA preempted the state revocation-upon-death statute. So, despite Cindy's clear and unequivocal waivers, under *Egelhoff*,

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<sup>13</sup> 532 U.S. 141, 143 (2001).

she is entitled to the ERISA life insurance proceeds as well as the pension.

### B. *Practical Considerations*

For practitioners, the lessons here are familiar. Ask for any policies and beneficiary designations. Advise clients about the issues relating to changing beneficiaries and, if they want to change them, follow up with them in writing and make sure they change them. To go even further, one commentator advises that practitioners include the following provision in their agreements. The capital letters are in the original.

THIS WAIVER DOES NOT CONSTITUTE A WAIVER OF ANY BENEFICIARY DESIGNATION, OR ANY TYPE OF SURVIVOR BENEFIT, ESTABLISHED PURSUANT TO THE TERMS AND PROVISIONS OF THE [insert name of plan] BY THE HUSBAND/WIFE IN FAVOR OF THE HUSBAND/WIFE. IT IS THE RESPONSIBILITY OF THE HUSBAND/WIFE TO STRICTLY COMPLY WITH ALL APPLICABLE TERMS AND PROVISIONS ESTABLISHED BY THE PLAN ADMINISTRATOR OF THE [insert name of plan] TO CHANGE ANY SUCH DESIGNATION UPON THE ENTRY OF A FINAL DECREE OF DIVORCE.<sup>14</sup>

### C. *Plan Document Rule*

*On January 15, Richard and Cindy enter into a divorce agreement that is approved by a court and incorporated in a judgment. Richard died two months after the divorce was final, survived by Cindy and their two children, Tommy and Wendy. The agreement provided that Richard's ERISA retirement plans were to be divided on a 50-50 basis between Richard and Cindy*

*At the time of the divorce, Cindy was listed as the beneficiary of all the ERISA retirement plans. Richard neglected to change the beneficiary designation, leaving Cindy as his beneficiary under the plan documents on file with the plan administrators. The agreement called for a QDRO to be drafted but, at the time of Richard's death, no QDRO had been presented to or entered by the court.*

*The plan administrator distributed proceeds according to the plan documents. Richard's estate filed suit, claiming that Cindy waived her rights to 50% of the retirement benefits.*

Because the purported waiver in the agreement was not a QDRO, it was ineffective to waive Cindy's interest in the retirement assets. Although the agreement provides that she receive

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<sup>14</sup> SHANER, *supra* note 6, at 28.

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50%, the plan administrator must disburse proceeds according to the plan documents on file.<sup>15</sup>

A lesson for practitioners is to make sure the QDRO is presented to the judge at the time of the divorce or as soon thereafter as possible.

### **V. Intestacy**

*On January 15, Richard and Cindy enter into a divorce agreement that is approved by a court and incorporated in a judgment. Before the divorce became final but after the agreement was effective, Richard died. The agreement contained waivers of any rights the other might have as a surviving spouse to claim a share in the estate of the other. Cindy, the day after the funeral, filed a petition to claim her statutory share.*

Under the Uniform Probate Code and the law of most states, a waiver of the statutory rights of a surviving spouse in a property settlement agreement is effective.<sup>16</sup> In other words, Cindy's waiver in the agreement bars her from receiving an intestate share.

### **VI. Wills and Trusts**

#### **A. The Pretermitted Spouse**

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. Richard did not execute any wills during the marriage. He did, however, execute a will a few years before the marriage when he was unmarried, leaving his estate to a favorite cousin, Andrea.*

*The agreement contained waivers of any rights the other might have as a surviving spouse to claim a share in the estate of the other. Before the divorce became final but after the agreement was effective, Richard died, never having executed a new will, and comforted in the belief that Andrea would reap the riches of his estate should he pass. Cindy, however, a day after Richard's funeral, filed a claim against the estate.*

As a so-called "pretermitted spouse," Cindy, in most states, is entitled to a statutory share.<sup>17</sup>

*The facts are the same as the above, except that the will provides that it is effective notwithstanding a subsequent marriage.*

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<sup>15</sup> See *Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan*, 555 U.S. 285, 304 (2009), upon which the hypothetical is based.

<sup>16</sup> SHANER, *supra* note 6, at 49.

<sup>17</sup> *Id.* at 61.

In this situation, Cindy, in most states, is not entitled to a statutory share.<sup>18</sup>

### B. Revocation Upon Divorce

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. Richard had executed a will and revocable trust during the marriage leaving everything to Cindy.*

*A few years later, after the divorce became final, Richard died, never having executed a new will. Cindy, a day after Richard's funeral, filed a claim against the estate.*

In a majority of states, both the will and the revocable trust are revoked upon divorce.<sup>19</sup> Note that the revocation applies both to wills and to will substitutes, including but not limited to, revocable trusts.

### C. Wills and Trusts Made in Contemplation of Marriage

*On January 15, Richard and Cindy enter into an agreement that is approved by a court and incorporated in a judgment. Richard did not execute any wills during or before the marriage. The agreement, nevertheless, contained waivers of any rights the other might have as a surviving spouse to claim a share in the estate of the other.*

*Before the divorce became final but after the agreement was effective, Richard executed a will and revocable trust leaving everything to Nancy whom he intended to marry once his divorce from Cindy was final. The will and trust each expressly stated that they were made "in contemplation of marriage" to Nancy. Cindy, however, a day after Richard's funeral, filed a claim against the estate.*

Where the will or revocable trust was made in contemplation of marriage to Nancy while he was married to Cindy, in most states, the divorce would not revoke the will and Cindy would not be entitled to a statutory share.<sup>20</sup>

## VII. Powers of Attorney

A power of attorney is a document in which a principal gives to an agent, or attorney-in-fact, the right to manage certain specified affairs of the principal, financial and otherwise. "A durable

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<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 78.

<sup>20</sup> *Id.* at 61.

power of attorney is effective regardless of the principal's subsequent disability or incompetency."<sup>21</sup>

Durable powers of attorney (DPOA) are a part of many of the estate plans of divorcing clients. They can be useful and effective in avoiding the costs and burdens of a guardianship in the event that a spouse loses the ability to manage his or her own affairs. If and when a spouse does lose such ability, the agent (very often the other spouse) can step in, rather seamlessly, and manage affairs as appropriate.

Without a DPOA, a guardianship and/or conservatorship may be required and a guardian/conservator may have to be appointed to handle the affairs of the principal-spouse. Without a doubt, the ability to avoid a costly and time-consuming guardianship/conservatorship can be a convenient tool. The trade-off, however, is that the agent is vested with significant authority over the affairs of the principal. With that authority, of course, is the potential for abuse.

Further, a critical factor sometimes lost on the holder of a DPOA is that he or she has a fiduciary responsibility to the principal. The agent consents, as a matter of law, "to have courts of equity measure his conduct toward the principal by a standard of finer loyalties."<sup>22</sup>

*On January 15, Richard filed for divorce and Cindy was served on February 15. During the marriage, Richard had executed a DPOA naming Cindy as his agent – which he had neglected to revoke. The DPOA delineated vast and numerous powers, one of which was the authority to make a gift to a third party.*

*On March 1, during the pending divorce, Cindy withdrew \$1,000,000 from an account in Richard's name on the authority of the power of attorney naming her as agent. She gave the money to Wendy, the eldest child of Richard and Cindy, who is furious at her father for his extra-marital betrayal with Nancy, the bloodsucker.*

*When Cindy's withdrawal and transfer was discovered, she asserted that the power of attorney authorized the gift and that those monies are now outside the marital estate and not subject to division.*

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<sup>21</sup> Mark R. Caldwell et al., *Winning the Battle and the War: A Remedies-Centered Approach to Litigation Involving Durable Powers of Attorney*, 64 BAYLOR L. REV. 435, 441-42 (2012).

<sup>22</sup> *Id.* at 443.

An exploration of the remedies that Richard would have in this situation is outside the scope of this article.<sup>23</sup> Briefly, the divorce court may have the ability to treat the transfer as improper and offset it by granting Richard a larger share of the marital estate. There may be a basis for a fraudulent conveyance action against Cindy and/or Wendy – a very costly option. A suit against Cindy for a breach of her fiduciary duty is, of course, also a costly option, and its outcome uncertain.

The lesson here for matrimonial practitioners is a simpler one. At the first meeting with the client, make sure to ask whether the client has durable powers of attorney and, if so, to produce them. If the other spouse is the agent, explain to the client the risks and dangers and, if she or he still wants to keep it in place, make sure to put in writing that you had advised the client of the dangers. If the client wants to revoke the power, follow the procedure for doing so in the document.

Clients of any age and perhaps elders particularly, may not recall whether they have a durable power of attorney. In that case, consider asking for permission to contact their personal attorney, if they have one, or adult children, if they have any. Also, in the event no power of attorney is discovered, you might consider sending a letter to the opposing counsel stating that, in the event there exists any powers of attorney in which the other spouse is an agent, they are considered revoked.

Finally, in our example above, Cindy withdrew and transferred monies during the pendency of the divorce. Let us now change the timing of Cindy's withdrawal – she does it post-divorce.

*Richard and Cindy settled their divorce by an agreement that was incorporated in a divorce judgment which is now final. In that agreement, Cindy waived right, title, and interest to a Merrill Lynch money market account with a balance of \$1,000,000.*

*During the marriage, Richard had executed a DPOA naming Cindy as his agent – which he had neglected to revoke. The DPOA delineated vast and numerous powers, one of which was the authority to make a gift to a third party.*

*Some years later, Cindy withdrew \$1,000,000 from the Merrill Lynch account in which she waived interest. She gave the money to Wendy, the*

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<sup>23</sup> For those interested in exploring this issue further, Mark Caldwell's article, *supra* note 21, is excellent.

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*eldest child of Richard and Cindy, who remained furious (even after all this time) at her father for his extramarital betrayal with Nancy. Richard discovers the transfer. Cindy claims that the DPOA authorizes her to give gifts to third parties.*

The equities here are plain. Instinctively, we know that Cindy is exploiting Richard's oversight in not revoking the DPOA and he would not have wanted her to do this. So, one would think that divorce automatically terminates the DPOA. To the contrary, in most states, there is no statute that automatically revokes a DPOA upon divorce.<sup>24</sup> So, in the event this occurs, the outcome in subsequent litigation may not be certain and, in any event, will be expensive.

Again, what is the lesson for practitioners? Follow up in writing with clients and make sure that they have revoked all powers of attorney or at least make them aware of the consequences if they do not do so.

### **VIII. Medical Directives**

In addition to DPOAs, many of our divorcing clients also have health care proxies, or living wills, in which their spouse has certain authority for medical decision-making. While the stakes are higher in this realm – life or death in some cases – the issues are similar to those involving DPOAs in the divorce context.

Once parties are divorced, any medical directives in which a spouse named the other spouse as the agent are revoked upon divorce by statute in a majority of states.<sup>25</sup>

During the pendency of the divorce, however, any such directives are still effective until revoked. Therefore, as matrimonial attorneys, it is our responsibility to determine whether our clients have medical directives, obtain copies of them if they do, and determine with them if they need to be revoked.

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<sup>24</sup> SHANER, *supra* note 6, at 93.

<sup>25</sup> *Id.* at 98.

## IX. The Medicaid Divorce

### A. *The Medicaid Basics*

The costs of long-term health care<sup>26</sup> can eviscerate the average estate and, therefore, for elder Americans, can be a frightening prospect – one of the “biggest financial risks of old age.”<sup>27</sup> Medicaid, a needs-based federal-state program, is the largest source of funding for such care in the United States.<sup>28</sup>

#### 1. *Exempt and Non-Exempt Assets*

Matrimonial attorneys, particularly those representing elder clients, must know the basics of the interplay between divorce and Medicaid. The general rule is that non-exempt assets of a married couple cannot exceed \$2,000 in most states in order for the spouse going into care (the “institutionalized” spouse) to qualify for Medicaid.<sup>29</sup> However, to mitigate the economic impact on the spouse at home (the “community” spouse), most states allow the community spouse to keep “exempt” assets.<sup>30</sup>

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<sup>26</sup> The median cost in the United States for a private room in a nursing home is \$7,500 per month. Those costs can be much higher depending on location. For example, in the Boston area, the median cost is approximately \$12,000 per month. Genworth Financial, Inc., *Genworth 2015 Cost of Care Survey Massachusetts*, [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928MA\\_040115\\_gnw.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928MA_040115_gnw.pdf) (last visited on May 5, 2016). In Manhattan, the median cost for a private room in a nursing home is \$15,000 per month. Genworth Financial Inc., *Genworth 2015 Cost of Care Survey New York*, [https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928NY\\_040115\\_gnw.pdf](https://www.genworth.com/dam/Americas/US/PDFs/Consumer/corporate/cost-of-care/118928NY_040115_gnw.pdf) (last visited on May 5, 2016).

<sup>27</sup> John A. Miller, *Medicaid Spend-Down, Estate Recovery and Divorce: Doctrine, Planning and Policy*, 23 ELDER L.J. 41, n.1 (2015).

<sup>28</sup> In fiscal year 2010, for example, Medicaid paid for 62.2% of long-term care in the United States. *Who Pays for Long-Term Care in the U.S.?(Updated)*, THE SCAN FOUNDATION, [http://www.thescanfoundation.org/sites/default/files/who\\_pays\\_for\\_ltc\\_us\\_jan\\_2013\\_fs.pdf](http://www.thescanfoundation.org/sites/default/files/who_pays_for_ltc_us_jan_2013_fs.pdf) (last visited on May 5, 2016).

<sup>29</sup> *Financial Requirements—Assets*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://longtermcare.gov/medicare-medicaid-more/medicaid/medicaid-eligibility/financial-requirements-assets/> (last visited on May 5, 2016).

<sup>30</sup> *Considerations for Married People*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, <http://longtermcare.gov/medicare-medicaid-more/medicaid-eligibility/considerations-for-married-people/> (last visited on May 5, 2016).

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Exempt assets include a home (with equity between \$552,000 and \$828,000 depending on the state),<sup>31</sup> a car, personal belongings, and a prepaid burial plus 50% of all remaining assets (up to between \$23,844 and \$119,220 depending on the state.)<sup>32</sup> In the Medicaid nomenclature, these are called the “spousal impoverishment standards.”<sup>33</sup>

Once the institutionalized spouse qualifies for Medicaid, the assets and income of the community spouse are no longer required to pay for the nursing home. Therefore, those assets are sheltered from Medicaid – temporarily. That is where “estate recovery” comes into play.

## 2. *Estate Recovery*

The government, through the Centers for Medicaid & Medicare Services (CMS), has been counting what it spent on the institutionalized spouse and, with certain exceptions, wants its money back. It does so, or attempts to, through estate recovery – a process which begins upon the death of the community spouse. At this point, the government may, depending on how aggressive the state is with enforcing estate recovery, try to collect from the estate of the community spouse.

### B. *Divorce as Medicaid Planning Tool*

With a system whose eligibility turns on the resources of both parties, it is unsurprising that divorce can be an effective Medicaid planning tool for some couples. If the couple divorces, the non-institutionalized spouse has no duty to contribute to nursing home costs and can keep the property awarded in the divorce judgment. The institutionalized spouse can qualify for Medicaid without consideration of the assets of the other spouse.

Let us alter the Richard and Cindy story a bit to illustrate some of the issues divorce attorneys might confront in the Medicaid area.

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<sup>31</sup> *2016 SSI and Spousal Impoverishment Standards*, CENTERS FOR MEDICARE & MEDICAID SERVICES, <https://www.medicaid.gov/medicaid-chip-program-information/by-topics/eligibility/downloads/2016-ssi-and-spousal-impoverishment-standards.pdf> (last visited on May 5, 2016).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

*Richard and Cindy are married. There is no “other woman.” Richard is retired and, in Cindy’s view, deteriorating. He’s forgetting more than usual and his mental acuity is slipping. Cindy takes him to the doctor who, after testing, determines that Richard has early Alzheimer’s disease. Within the next year or two, the doctor tells them, it is likely that Richard will need expensive nursing home care.*

*Cindy and Richard are both concerned about the extraordinary expenses forthcoming and are also concerned about Medicaid estate recovery which may compromise their ability to leave an estate to their two adult children, Tommy and Wendy.*

*Cindy has been advised by an elder care attorney to seek a divorce as a Medicaid planning tool. There is no capacity issue with Richard and he shares with Cindy the goal of a divorce agreement in which Cindy receives a larger proportion of the assets in order to accelerate Richard’s Medicaid eligibility and to help preserve the estate for the children. That agreement will be incorporated into a judgment.*

Assuming both matrimonial attorneys are working in conjunction with experienced elder counsel, the parties should be able to arrive at a division of assets that accomplishes the Medicaid planning goals each party desires. Further, where the agreement presented may be ostensibly imbalanced, the matrimonial attorneys need to frame it in a manner palatable to the court. That will vary widely, of course, from state to state.

### C. Drafting Considerations

A concern with an agreement that seeks to accomplish Medicaid planning goals is the public policy of many states that, to the extent possible, neither spouse should become a public charge as a result of the divorce.<sup>34</sup> So, although there is scant case law on the subject, an agreement that divests a spouse of

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<sup>34</sup> *E.g.*, *Knox v. Remick*, 358 N.E.2d 432, 437 (Mass. 1976) (“Where, however, the Probate Court judge determines that one spouse is or will become a public charge, the judge may order support pursuant to his statutory authority, not specifically enforcing the separation agreement to the point where the separation agreement would be used to impose support obligations on the taxpayers of the Commonwealth.”); *O’Daniel v. O’Daniel*, 419 S.W.3d 280 (Tenn. App. Ct. 2013) (deciding that enforcement of a waiver of alimony provision in parties’ prenuptial agreement would probably result in the wife becoming public charge, and thus, this provision was not enforceable). *See also* *Long v. Long*, No. 1987-7755, slip. op. (N.Y. Sept. 1, 2011) (The trial court refused to modify an ex-husband’s support obligations where his ex-wife was already on Medicaid and the support was being paid to the state holding that to do otherwise, would violate New York policy against permitting a spouse to become a public charge

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assets in order to assist in Medicaid eligibility might not be well-received in some courts.

A New Jersey appellate case, *W.T. v. Division of Medical Assistance and Health Services*,<sup>35</sup> is instructive for drafters. The husband had been rendered a quadriplegic with limited life expectancy (as a possible result of medical malpractice) and was living in a nursing home. The wife was relatively healthy. Each spouse hired attorneys to work cooperatively toward a divorce agreement,<sup>36</sup> which contained a waiver of alimony and a 60/40 property division in the wife's favor, except that the husband would keep any and all monies that might result from his medical malpractice claim. The agreement was approved by the New Jersey court.

Following the divorce, the husband filed for Medicaid and the New Jersey Medicaid agency determined that the property division was an impermissible transfer since it was other than equal. This determination, peculiarly, was based on an unwritten agency rule. Litigation continued until it reached the Appellate Division of the Superior Court which found that the agency's rule could not be enforced and, in any event, was inconsistent with New Jersey's equitable distribution law which does not impose a requirement that property division be on a 50/50 basis.<sup>37</sup>

Drafters should review closely the court's analysis of the agreement which contained the following language:

The said plan is to provide the Wife with sufficient income, which together with Social Security benefits when she attains the age necessary to qualify for same, will permit her to support herself and compensate for the loss of the Husband's income and not jeopardize the Husband's eligibility for Medicaid benefits.<sup>38</sup>

At the administrative hearing, both counsel testified that the unequal distribution was not intended to strip the husband of as-

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as well as the public policy of Medicaid as a "well-structured system of 'last resort' public financing.").

<sup>35</sup> *W.T. v. Div. of Med. Assistance & Health Serv.*, 916 A.2d 1066 (N.J. Super. Ct. App. Div. 2007).

<sup>36</sup> Actually, the parties sought a "divorce from bed and board," a creature of New Jersey statute which "decrees a judicial separation without severing the marital bond and affords each party the same property rights as an absolute divorce." *Id.* at 1069.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 1069-70.

sets so that he could qualify for Medicaid.<sup>39</sup> Rather, the agreement considered the relative needs of the parties and the judgment was based on factors appropriate under New Jersey's equitable distribution law. The husband's needs were met largely by his nursing home care and his needs were affected – and constrained – by his limited life expectancy. The husband would spend whatever remained of his life at the nursing home and his standard of living would remain consistent.<sup>40</sup> The wife, for her part, had needs based partly on the husband's sudden and unexpected loss of income. Further, there were tax consequences taken into account that were reflected in the division.

Under the facts of this case, the distribution that was approved by the local family court was not intended to “circumvent Medicaid law . . . but to serve the independent purpose of a fair and equitable distribution of marital assets” in accordance with the equitable distribution laws of New Jersey.<sup>41</sup> This equitable distribution, the court found, would not be an abuse of discretion if it were rendered, after a trial, in a judgment of divorce.<sup>42</sup>

The practitioner confronted with a Medicaid divorce would do well to frame the agreement in terms of the state's domestic relations law. In particular, at least in equitable distribution states, these factors would include the needs of the parties, the standards of living of the parties and, if relevant, the life expectancy of the parties. Further, the court is less likely to gainsay an agreement that is mildly imbalanced as opposed to one that is wildly imbalanced.

Finally, practitioners might be circumspect about including in an agreement language about Medicaid eligibility — as counsel did in this case. The language explaining the rationale of the agreement partly in terms of a desire not to jeopardize the husband's Medicaid benefits might have helped trigger the ire of New Jersey Medicaid — and a family court may well view such language in the same way.

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<sup>39</sup> *Id.* at 1069

<sup>40</sup> The wife's attorney testified that the agreement was based partly on the fact that the husband would remain in the nursing home. *Id.* at 1071. Practitioners should note that this may be a critical distinction from a case in which neither spouse is currently in a nursing home or assisted living facility.

<sup>41</sup> *Id.* at 1078.

<sup>42</sup> *Id.*

#### D. *Ethical and Moral Considerations*

There are ethical and moral issues that the matrimonial attorney may also wish to consider.

##### 1. *Ethical Considerations*

With a Medicaid divorce, the practitioner is reminded that an attorney cannot offer evidence to the court he/she knows to be false.<sup>43</sup> Where the parties contemplate a no-fault divorce in a state where they have to assert that their marriage is “irretrievably broken,” for example, and that there is no hope for reconciliation,<sup>44</sup> the issue is whether the parties can truthfully assert that their marriage is “irretrievably broken,” or whether it satisfies the analogous no-fault standard in the particular state.

If the sole purpose of the divorce is Medicaid planning, that would suggest fraud. If this were a couple that would stay married *but for* Medicaid planning, that would suggest fraud.

There may be another way of analyzing the issue. Assuming that the couple is divorcing only for Medicaid, one might argue, if the facts warrant, that the financial consequences of looming long-term care expenses have made the marriage untenable — and, therefore, the marriage is “irretrievably broken” or satisfies the analogous no-fault standard in the particular state.

##### 2. *Moral Considerations*

While the voluntary impoverishment that is central to Medicaid planning is legal, is it moral? The most compelling moral argument against voluntary impoverishment is that Medicaid is intended for the poor — and that those who can afford to pay for their long-term care should pay so that the program’s resources are available for those who need it most.<sup>45</sup>

On the other hand, one might argue that, while attorneys have a right to decline representation in a repellant case, if a client wants help to accomplish for him or her something that is

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<sup>43</sup> See, e.g. MODEL RULES OF PROF’L CONDUCT R. 3.3 (2015); MASS. RULES OF PROF’L CONDUCT 3.3 (2016).

<sup>44</sup> E.g. CONN. GEN. STAT. § 46b-40 (2016) MASS. GEN. LAWS ch. 208 § 1A (2016).

<sup>45</sup> The moral component of voluntary impoverishment is treated fully in John A Miller, *Voluntary Impoverishment to Obtain Government Benefits*, 13 CORNELL J.L. & PUB. POL’Y 81, 98 (2003).

legal (and prevalent), an attorney should be inclined to assist. A case in which the economic wherewithal of the parties is marginal, or would be after long-term health care costs are borne, may resonate better morally than one in which the parties are relatively affluent and are aggressively sheltering assets. Finding the moral compass can be problematic. Perhaps the proper standard is that of the criminal defense attorney who represents the person accused of murder out of a constitutional duty and a belief that everyone is entitled to representation.

## X. Alimony Recapture

At the outset, the practitioner might wonder about the relevance of alimony recapture in an article about elder divorce. Simply put, the concern here is the possibility that, within the first three years of alimony payments, there is a reasonable likelihood that an elder person may injure himself or herself and suffer a reduction or elimination of income.<sup>46</sup> This could trigger recapture concerns.

That said, a refresher on recapture is worthwhile. The alimony recapture rules are concerned with excess front-loading of alimony in the first three years after the divorce. Any excess front loading will be recaptured and included in the payor's income and deducted from the payee's income beginning in the third post-separation year.<sup>47</sup>

Recapture occurs only in year three. To determine whether recapture applies and, if so, what the amount is, one needs to perform two calculations. Melvyn Frumkes articulates the process well:

The first calculation compares the second post-separation year payments to the third post-separation year payments. If the amount paid in the third post-separation year plus \$15,000 is less than the amount paid in the second post-separation year, the excess amount will be recaptured.

The second calculation compares the first post-separation year to the adjusted average of the second and third post-separation years. Pay-

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<sup>46</sup> Indeed, the elderly become injured through a fall with great frequency. *Important Facts About Falls*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/homeandrecreationalafety/falls/adultfalls.html> (last visited May 4, 2016).

<sup>47</sup> 26 U.S.C.A. § 71(f).

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ments in the second and third post-separation years will be reduced by any recapture from the first calculation. The second and third post-separation years payments will be averaged. If this average plus \$15,000 is less than the payments in the first post-separation years, the excess amount will be recaptured.<sup>48</sup>

Back to Richard and Cindy — how does recapture affect their post-divorce story?

*Richard and Cindy are divorced. Richard is still practicing medicine at the time the divorce agreement is signed. The agreement calls for alimony payments in the amount of \$100,000 per year, in monthly installments. After the first year of payments, he slips and falls on the ice outside his home and injures himself to the point where he can never work again.*

*Cindy, feeling charitable for a change, agrees with Richard that he will have no more alimony obligations and they file a modification to that effect with the court. The court approves the agreement, incorporating it into a modification judgment.*

*The IRS subsequently audits Richard's return and determines that there is \$85,000 of recapture – meaning that Richard should have reported \$85,000 of income in his third post-separation year. Cindy, correspondingly, will have a taxable deduction of \$85,000 in the third post-separation year. Richard challenges the IRS in Tax Court, arguing, to no avail, that the state court modification judgment releases him from recapture.*

*Richard starts to second-guess Cindy's charity and wonders if Cindy knew this all along.*

Practitioners should take note here that the state court modification judgment does not affect Richard's recapture problems.<sup>49</sup>

Note too, that there are three exceptions to recapture. First, if the payments stop because either party dies or the payee remarries. Second, payments pursuant to temporary orders do not count. And the third exception is “where payments fluctuate outside of the payor's control because they are a percentage or a fixed portion or portions of income or compensation received by the payor.”<sup>50</sup>

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<sup>48</sup> Melvyn B. Frumkes, *Tax Implications for the Elder Divorcee*, 16 J. AM. ACAD. MATRIM. LAW. 427, 429 (2000).

<sup>49</sup> *Id.* at 430.

<sup>50</sup> *Id.*

If Richard's attorney, then, had structured the alimony payments as a percentage of income rather than a fixed dollar amount, this would have avoided the alimony recapture issue.

## XI. The Guardian-Initiated Divorce

Attorneys representing elders in divorce are likely to encounter a client who needs or has in place a guardian.<sup>51</sup> As such, it is helpful for the practitioner to understand the role of a guardian in a divorce. One question of particular concern in this area is whether a guardian can initiate a divorce on behalf of the elder ward.

The majority rule is that, absent the statutory authority to do so, a guardian does not have authority to initiate a divorce on behalf of the ward. The rationale is explained in a decision from the Supreme Court of South Carolina:

Although there are statutes in practically every jurisdiction which give a guardian the general authority to maintain actions on behalf of an incompetent, it is generally held that these statutes do not apply to divorce actions unless the statute expressly so states. The theory underlying the majority view is that a divorce is so strictly personal and volitional that it cannot be maintained at the pleasure of a guardian, even if the result is to render the marriage indissoluble on behalf of the incompetent.<sup>52</sup>

Let us get back to Cindy and Richard, reworking some of the facts.

*Richard and Cindy are married. There is no "other woman," no Nancy. Richard, suffering from Alzheimer's disease, is under a guardianship – his son Tommy is the guardian. A few months following the guardianship, and after much handwringing, including disputes with his sister Wendy about it, he filed a complaint for divorce on his father's behalf alleging an irretrievable breakdown of the marriage.*

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<sup>51</sup> For ease of reference, I will use the term "guardian" to encompass a person who also has authority over the financial domain of an elder. In Massachusetts, where I practice, and other states, there is a distinction between a "guardian," who has authority over the non-financial domain of the ward, and a "conservator" who has authority over the financial domain of the ward. MASS. GEN. LAWS ch. 190B §§ 5-101(2), 5-101(6) (2016). For ease of reference, I will also use the antiquated "ward" rather than some of its more modern successors, such as "protected person," which is used in Massachusetts. MASS. GEN. LAWS ch. 190B § 5-101(22) (2016).

<sup>52</sup> Murray *ex rel.* Murray v. Murray, 426 S.E.2d 781, 783 (S.C. 1993).

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*The complaint alleged that, prior to the onset of Alzheimer's, Richard told family members that the marriage was a mistake and that he was very unhappy in it. Further, the complaint alleged that, for a period of many years, Cindy had abused Richard by throwing plates and glasses at him during her frequent rages.*

*Cindy filed a motion to dismiss the complaint on the grounds that there is no state statute that authorizes a guardian to initiate a divorce.*

*Richard, through his guardian Tommy, opposed the motion to dismiss, acknowledging that there is no state statute authorizing a guardian to initiate a divorce. Tommy conceded too, that, as guardian, he has the burden of proving the necessary factual basis in support of the divorce. However, Tommy argued, there should not be a conclusive bar against guardians filing a divorce action on behalf of the ward.*

The New Mexico Court of Appeals, in *Nelson v. Nelson*,<sup>53</sup> upon which this fact pattern is based, agreed with Richard's position and allowed the divorce to proceed.

The Court of Appeals of Arizona reached a similar result, in *Ruvalcaba v. Ruvalcaba*.<sup>54</sup> There, the court held that a guardian-initiated divorce could proceed if there was clear and convincing evidence that the ward, while competent, wanted to end the marriage.<sup>55</sup> The guardian, who was the mother of the ward, was allowed to testify about statements her daughter made to her while the daughter was competent.

In 2014, the Illinois legislature addressed by statute the issue of guardian-initiated divorces.<sup>56</sup> Essentially, under Illinois law, a guardian has the authority to seek permission from the court to file a complaint for divorce. The court will conduct a "best interests" hearing to determine whether the complaint for divorce can be filed. The court must find, by clear and convincing evidence, that it would be in the best interests of the ward for the divorce action to be initiated.<sup>57</sup> The statute attempts to balance the best interests of the ward while ensuring that the guardian is not pursuing the divorce for his or her own financial benefit or because of the guardian's personal dislike of the ward's spouse.

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<sup>53</sup> 878 P.2d 335 (N.M. Ct. App. 1994).

<sup>54</sup> 850 P.2d 674 (Ariz. Ct. App. 1993).

<sup>55</sup> *Id.* at 683-84.

<sup>56</sup> 755 ILL. COMP. STAT. § 5/11a-17(e) (2016).

<sup>57</sup> A recent appellate decision clarified that, at the "best interests" hearing, the other spouse is not permitted to testify. *Warga v. Warga*, 46 N.E.3d 268 (Ill. App. 2015).

Florida,<sup>58</sup> Colorado,<sup>59</sup> and Missouri<sup>60</sup> also have statutes authorizing guardians to initiate divorce actions on behalf of their wards. Again, these states, along with others, including but not limited to, New Mexico,<sup>61</sup> Arizona,<sup>62</sup> Illinois, Connecticut,<sup>63</sup> Maine,<sup>64</sup> and Ohio,<sup>65</sup> are in the minority.

Under the majority rule, as stated above, Tommy, as the guardian, would be precluded from filing a divorce on behalf of his father, Richard. One commentator has called this the “marriage trap” and argues that the majority rule abets spousal abuse.<sup>66</sup>

Practitioners, of course, need to check their state laws, statutes, and judicial opinions, since they will vary considerably from state to state. But, as one commentator notes, the judicial and statutory trend is toward greater liberalization of a guardian’s authority in this area.<sup>67</sup> So, practitioners with the right case, client, and jurisdiction may consider taking an appeal because it would seem that the area is ripe for change.

## XII. The Predatory Marriage

Nothing can unsettle adult children more than when one of their elderly parents gets remarried – especially when it is to a much younger person who, the adult children are convinced, only wants their parent’s money.

With that in mind, let us return to Richard and Cindy, with a kind of fast-forward, to illustrate the issue of the predatory marriage.

*Richard and Cindy are divorced. Just after the divorce became final, Nancy and he started fighting and they broke up. Shortly thereafter,*

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<sup>58</sup> FLA. STAT. ANN. § 744.3215(4)(c) (2016). Florida’s law, unfortunately, requires spousal consent.

<sup>59</sup> COLO. REV. STAT. ANN. § 15-14-102 (2016).

<sup>60</sup> MO. REV. STAT. § 452.314 (2016).

<sup>61</sup> *Nelson*, 878 P.2d 335 (N.M Ct. App. 1994).

<sup>62</sup> *Ruvalcaba*, 850 P.2d 674 (N.M Ct. App. 1994).

<sup>63</sup> *Luster v. Luster*, 17 A.3d 1068 (Conn. App. Ct. 2011)

<sup>64</sup> *Knight v. Radomski*, 414 A.2d 1211 (Me. 1980).

<sup>65</sup> *Broach v. Broach*, 895 N.E.2d 640 (Ohio Ct. App. 2008).

<sup>66</sup> Mark Schwarz, *The Marriage Trap: How Guardianship Divorce Bans Abet Spousal Abuse*, 13 J.L. & FAM. STUD. 187 (2011).

<sup>67</sup> Bella Feinstein, *A New Solution to an Age-Old Problem: Statutory Authorization for Guardian-Initiated Divorces*, 10 NAELA J. 203, 205 (2014).

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*Richard suffered a debilitating stroke. He was given weeks to live and sent home for hospice care. Bored one night, he asked his round-the-clock nurse to set up an account on a dating website.*

*Enter twenty-two year old Destiny, a woman who Richard, in his day, might have called a “strumpet.” Destiny spent the next week with him and, at some point, the two of them decided to get married. While the first rabbi they contacted refused to marry them, they found one who did. And they were married while Richard lay in bed, prone, catheterized, an IV line in his arm. None of Richard’s family attended the wedding.*

*“The wedding ceremony lasted about 15 minutes. There was no cake. Then the groom stayed behind as his bride headed out to dinner with friends. They threw flowers as she sat down in the restaurant.”<sup>68</sup>*

*Richard died three days later.*

Richard’s adult children, Tommy and Wendy, are furious that, as a result of the marriage, Destiny is now entitled to a statutory share that will decrease what they receive from his estate. Their birthright in danger, they seek legal recourse. Unfortunately, for these adult children, the legal landscape here is unforgiving.

First, the U.S. Supreme Court has made explicit that the Due Process Clause includes a fundamental right to marry.<sup>69</sup> Second, in most states, the only one with standing to challenge the validity of this marriage would be Destiny – who, of course, has no incentive to do so.<sup>70</sup> Third, in most states, the marriage cannot be challenged in any event after the death of either of the parties. The law, then, has little good news for these adult children.<sup>71</sup>

The deathbed marriage is a provocative example of a more common scenario where two older people, who are not dying, enter into a late-in-life second marriage. This, of course, like the deathbed marriage, also threatens adult children who may be

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<sup>68</sup> Michael E. Ruane, *et al. Family Feud Reaches Beyond Grave: As Haft Lay Dying, Questions about Companion, Competency Swirled*, WASH. POST, Oct. 10, 2004, at C01 available at <http://www.washingtonpost.com/wp-dyn/articles/A20822-2004Oct9.html>. The hypothetical is loosely based on the deathbed marriage of Herbert Haft to Myrna Ruben. See also Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 KY. L.J. 275 (2007/2008) which explores this issue in a thoughtful and thorough manner.

<sup>69</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>70</sup> Turnipseed, *supra* note 68, at 276.

<sup>71</sup> See generally *id.*

protective of their legacies. In those cases, prenuptial agreements<sup>72</sup> can be useful to protect the interests of adult children and improve their relationship with the new spouse.<sup>73</sup>

### XIII. Conclusion

In the coming years, the demographics point to elderly clients increasingly divorcing. So, while divorce involving this population today does not yet fill up attorneys' conference rooms, this is changing – and attorneys need to be prepared for it. To that end, I hope this primer will be a useful beginning for practitioners. Of course, the experienced matrimonial practitioner would do well to continue following legal trends that affect seniors so that he or she is well-versed not only in this practice area, but with the needs of a demographic that will be keeping matrimonial attorneys busier and busier every year.

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<sup>72</sup> While prenuptial agreements are beyond the scope of this article, the interested reader is directed to ALEXANDER LINDEY & LOUIS I. PARLEY, *LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS* (2d ed. 2015). See also Jonathan E. Fields, *Cutting Edge Issues in Family Law: Article: Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW 413 (2008).

<sup>73</sup> See, e.g., Alison A. Marston, Note, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 895 (1997) (noting that “[p]renuptials often aid family harmony in second marriages, especially for children from the first marriage worried about their inheritance”), citing Albert B. Crenshaw, *To Love, Honor and Protect Your Assets: Older Couples Embrace Prenuptial Agreements*, WASH. POST, Apr. 27, 1993, (Health), at 12-13. See also *Simeone v. Simeone*, 581 A.2d 162, 170 (Pa. 1990) (McDermott, J., dissenting) (noting the particular wisdom of prenuptial agreements in advance of a second marriage where the parties can protect certain assets for their children from a prior marriage).

