# Divorce, Elder Law Style

In my first 15 years of practice, I represented clients in Probate Court litigation and clients in Domestic Court litigation. My colleagues in Domestic Court were always interested in how I could practice in Probate Court, while my colleagues in Probate Court were always wondering how I could practice in Domestic Court. Although they respected each other, they considered the other area of law a mine field.

I typically responded by pointing out the similarities that each area of law entailed: you value assets, identify tax issues and debts, and determine offsets to arrive at a net that you divide amongst people who don't like each other. With both areas of practice forming to the same mold, the idea of using divorce as an elder law tool was not too much a stretch of the imagination.

Currently, elder law divorces play an important role in effective estate planning, and considering recent political and societal trends, this role will likely amplify. With the baby-boomers reaching an age where around the clock care transitions from a contingency to a necessity and recent legislative extension of Medicaid spend down periods, clients and practitioners will develop and implement novel methods of obtaining needed care and asset preservation. Elder law divorce provides one such method.

Effective execution of an elder law divorce presents an attorney with three manifold considerations. These three considerations are (1) the nature of the client's property, (2) whether competency is an issue with either spouse, and (3) whether to pursue dissolution or divorce. This presentation summarily touches upon these considerations with a view to both practicality and common law possibility.

Before applying these considerations, however, the first and perhaps the most difficult step in using divorce as an elder law tool, is presenting the option and its advantages to the client. When interviewing the client, proceed with care when suggesting divorce as a planning possibility. All too often, and rightfully so, the contemplation of divorce is against the client's moral or ethical fiber and, therefore, disposed of at first mention. Even so, divorce should be discussed as it is the ultimate spousal resource assessment as briefly demonstrated by the following.

When a couple applies for Medicaid, a case worker at the Department of Jobs and Family Services (DJFS) will require the couple to provide documentation regarding all assets owned and/or transferred in the last five (5) years. Assuming no improper transfers (e.g., gifts to children or grandchildren) during this five year period, the case worker will list all the couple's assets and then deduct any exempt resources (i.e., car, house, determined amount of cash). The resulting figure of this calculation constitutes the couple's available assets to pay for nursing home care. In other words, the amount the couple must spend before qualifying for public assistance.

As an example, assume a couple's available assets amount to $500,000 with one spouse residing in the marital home (the community spouse) and the other spouse residing in an assisted living facility (the institutionalized spouse). Pursuant to a DJFS community spouse resource assessment (CSRA), the community spouse will be able to keep $90,000 and the remainder, $410,000, will have to be spent on the institutionalized spouse's care before the couple becomes eligible for governmental assistance. There are some income issues and other considerations that may result in a larger asset award to the community spouse, but they are rare.

Now, compare the foregoing CSRA to a divorce ending with an equal split of the couple's marital property (each spouse receiving $250,000). Without even discussing deviation within the domestic laws regarding marital property or the award of spousal support, both spouses are in a better position under a domestic allocation of assets as opposed to the DJFS's Medicaid spousal resource assessment allocation of assets. The community spouse is better off economically while the institutionalized spouse has a decreased amount of available Medicaid assets, meaning earlier qualification for assistance.

If, after explaining these benefits and details, the client decides to pursue a divorce, the previously mentioned three considerations come into play. Since each consideration warrants its own in-depth review, this presentation will only address the basic elements of each.

## Consideration One: The Nature of the Client's Property

The nature of the client's property refers to whether certain property has a status as either marital or separate. Barring a few particulars, marital property consists of personal and real property interests owned and acquired by either spouse during the marriage. Separate property, on the other hand, generally consists of property interests acquired either prior to the marriage, by inheritance, by certain gifts, or from passive income. The appropriate subsequent steps in proceeding with the divorce depend upon the label which client's property warrants.

If the client is in a first long-term marriage, most likely all the assets involved are marital. Such a situation normally calls for an equal division of the couple's assets, unless you can provide the Court with a basis to deviate from the statutory protocol.

One possible method to obtain a deviation is through the use of an economist. Suppose the wife (community spouse) has low income and the husband (institutionalized spouse) has high income. In this instance the husband's income will follow him to the nursing home. Also, the Department of Jobs and Family services will not credit payments for child or spousal support. Therefore, use the economist to establish the amount of money the wife should retain to sustain herself in the community, thereby giving the court the necessary evidence upon which to order a larger amount of the martial assets to the community spouse. Will you get 100%? No, but in most circumstances you will exceed a CSRA and put the institutionalized spouse a few dollars and a few days closer to obtaining medical assistance.

If the client is in a second marriage, separate property may be present regardless of whether a prenuptial agreement exists. A court disburses separate property to each respective spouse prior to a division of marital property. However, income produced from the awarded separate property could become the basis of a spousal support order from the community spouse to the institutionalized spouse. Also, passive and non-passive income may enter the courts consideration of spousal support amounts. Due to the constraints of this presentation, I will not attempt to expand this topic, yet all practitioners should fully research the use of these arguments in calculating spousal support.

In the event that income derived from separate property does become a basis for spousal support, the Court may require a calculation of the term of the support order based upon stipulated years of marriage and the life expectancy of the spouse receiving support. Obviously, the lengths of marriage are easily determined, but remember to use the date of separation as the ending point rather than the date of final hearing. Also, life expectancy tables allow for more argument as to the term. You may wish to employ an actuary who can testify as to how determined diseases of the institutionalized spouse will shorten the standard life expectancy tables.

Income equalization, meaning that the income of the parties should be of equal proportion, is based upon the weight given to unearned and earned income, tax exempt and taxable income, and other types of income. Again, the argument of passive versus non-passive income is important in determining the amount of the monthly payment. Basically, the community spouse is ahead if the spousal support term is shorter than the institutionalized spouse's life expectancy and the amount of spousal support is less than the cost of private skilled nursing care minus the institutionalized spouses' monthly income.

If the institutionalized spouse owns the separate property, you may make an award of a lump sum in lieu of alimony. Again, it is acceptable to do so while avoiding the Department's refusal to recognize spousal support on a monthly basis.

## Consideration Two: Whether Competency is a Factor

A client's competency impacts the use of divorce as an elder law tool in two scenarios. The first is when the client has previously been determined incompetent. The second is when the client exhibits signs of an inability to comprehend and understand the nature and impact of a divorce proceeding despite the absence of a prior determination that the client is incompetent.

A previous determination that a client is incompetent, though adding an extra layer in the divorce proceedings, is not fatal. Despite a client's determined incompetence, the client still maintains certain rights, including the ability to consummate or terminate a valid marriage. The ability of a person previously determined incompetent to terminate a marriage hinges upon that person's ability to correctly testify with respect to the nature of the divorce proceedings and clearly express a desire to dissolve the marriage.

Boyd v. Edwardsserves as an example of the role an incompetent may play in a divorce action. In Edwards, a guardian filed for divorce on behalf of her ward who was previously judged incompetent. The ward's spouse, on the ground that the ward did not want the divorce, opposed the suit. In addition, there was testimony that the ward could communicate and express his feelings. When presented with these circumstances, the Ohio Eighth District Court of Appeals declined to grant the divorce requested by the guardian without first determining whether the ward was competent to testify, and to express his intentions as to the divorce despite his status as legally incompetent.

Thus, when faced with a previously determined incompetent client, evaluate the clients ability to comprehend and articulate the impact of the divorce proceeding. If the client portrays an appreciation and understanding of the divorce, then the proceeding may validly continue despite some unsoundness of mind. However, this is not always the case, which leads to the second scenario.

If the client does not appear to comprehend the nature or impact of the divorce proceeding and has not been previously determined incompetent, then the best available path is to pursue the divorce with the potentially incompetent spouse participating through a representative. Two possible paths exist for obtaining a representative for the incompetent spouse: one domestic, one probate.

In the domestic forum, use the Civil rules to appoint a guardian ad litem. Ohio Rule of Civil Procedure 17(B) authorizes a court, other than a probate court, to appoint a guardian ad litem for the protection of an individual. Rule 17(B) reads as follows:

"Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative, he may sue by his next friend or defend by a guardian ad litem. When a minor or incompetent is not otherwise represented in an action, the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of the minor or incompetent person."

Prior to court appointment of a guardian ad litem pursuant to Civ. R. 17(B), however, a court must determine whether the spouse is truly incompetent. Wozniak v. Wozniakset out the standard of competency when determining whether the appointment of a guardian ad litem is proper. Drawing directly from criminal law, the Wozniak court found that if a person, while subject to an adjudication of incompetency, can testify with respect to the nature of the divorce proceedings, such person does not require appointment of a guardian ad litem. Once again, competency balances upon the client's current mental understanding of the divorce, which, based on your evaluation of the client and decision to obtain a guardian, should not serve as an obstacle.

Another possible route when dealing with an incompetent spouse is to use a Probate Guardian. Following this route adds a layer of review (Probate Lawyer/Guardian/Judge) along with a delay due to the Probate appointment process.

If you use the Probate forum, you must comply with the Probate Code to appoint a Guardian over the person and estate. The process may take 60 to 90 days depending upon the circumstances and the County in which you practice. In addition to the delay due to the appointment process, you will have a probate practitioner appointed Guardian with Probate Court (Superior Guardian) oversight. Additionally, the Guardian may hire a domestic litigator. Thus, you have added a layer of review that will result in more scrutiny of a settlement entry. A Probate Court Judge normally protects the interest of the ward, and consequently, a significant deviation from the normal division of assets will require, at a minimum, more persuasion.

Consideration Three: Divorce or Dissolution?

In many cases, the clients will be competent. Thus, the question arises whether to pursue dissolution using the no-fault divorce provisions, or to use the divorce route which requires proof of grounds.

In Ohio, dissolution (agreed divorce) is available, but it requires both parties to agree to a separation agreement and to attend the dissolution hearing. Using a private judge may allow you to have the hearing in the nursing home or at your office. This allows you to have both parties attend the hearing without the normal hustle and bustle of domestic court. Dissolution, if available, serves as an efficient and fairly quick method of ending the client's marriage and moving towards qualification for care.

A unique hybrid of dissolution/separation also exists, but is only an effective option in New Jersey. Known as a divorce from bed and board, this hybrid does not dissolve the marital bond, but does treat all property rights of the parties as though a judgment of absolute divorce had been entered. In the elder law context, bed and board divorce serves as a desirable option as it allows for property distribution between the spouses while maintaining the marital bond, thus catering to a client's planning goals and ethical concerns. Despite the effectiveness of this New Jersey option, most jurisdictions treat a divorce from bed and board as a legal separation and unfortunately void its allure.

If dissolution proves a difficult or unavailable option, however, you must review grounds to plead in filing for divorce. The Ohio Revised Code, which groups fault and no-fault grounds together, sets forth the possible grounds for a divorce in § 3105.01 which include the following:

Fault Grounds

(a) either party had a husband or a wife living at the time of marriage from which divorce is sought;

(b) willful absence of an adverse party for a year;

(c) adultery;

(d) extreme cruelty;

(e) fraudulent contract;

(f) any gross neglect of duty;

(g) habitual drunkenness;

(h) imprisonment of an adverse party in a state or federal correctional institution at the time of the filing of the complaint;

No-fault Grounds

(i) procurement of a divorce outside of this state, by a husband or a wife, by virtue of which the party who procured it is released from the obligations of marriage, while those obligations remain binding upon the parties;

(j) on application of either party, when husband and wife have without interruption for a year lived separate and apart without the cohabitation;

(k) incompatibility, unless denied by either party

To arrive at the proper grounds for the divorce proceeding, assess the client's current and past marital situation for particularized facts capable of sustaining the divorce action when presented to the

court. Search for salient details or circumstances that allow the client's situation to "fit" any one particular ground. In addition, always maintain a view to your jurisdictions interpretation of the divorce grounds and how such interpretation may factor into an elder law situation.

In Ohio, certain jurisdictions developed interpretations of the available divorce grounds that impact use of such grounds for elder law purposes. One example is the willful absence ground found in Ohio Revised Code § 3105.01(b). Willful absence has come to mean, rather clearly, an intentional and voluntary absence purposefully and designedly carried out. Thus, one spouse's confinement to a nursing home is not a willful absence but an absence by necessity of medical condition.

Other § 3105.01 grounds have obtained a similar judicial gloss. The ground of extreme cruelty as used in Ohio Revised Code § 3105.01(d) is not limited in scope to acts of physical violence or the reasonable apprehension thereof, but is sufficiently broad to encompass acts and conduct the effect of which is calculated to permanently destroy the peace of mind and happiness of one of the parties to the marriage and thereby render the marital relationship intolerable. The ground of gross neglect of duty found in subsection (f) can also take a variety of forms. Neglect of housekeeping or child care duties have served sufficient in some cases where the neglect was flagrant, heinous, odious, atrocious, shameful, or despicable.

Failure to plead and prove particularized facts in-line with judicial interpretation may cause a court to dismiss the case or possibly order a legal separation. This "artful pleading" requirement serves as a possible obstacle to procurement of an elder law divorce, however, more solace can be found in the no-fault provisions of Ohio law.

Procurement of a divorce outside this state may release an individual from the marital bonds, however, the financial obligations may remain. This is known as "the Nevada option." At the time of writing this article, I have not conferred with my good friend, Jim O'Reilly, Esq. a Nevada Elder Law Specialist, but after consideration of the global grounds for a divorce in the State of Ohio, I may be referring more domestic work to Jim than either of us anticipated.

Applying section 3105.01(I), the "Nevada Option", a number of Ohio courts have taken a substance over form stance prior to granting the divorce. The courts tend to look to the actions of the spouse who obtained the divorce "outside this state" to ensure an effort towards establishing domicile in such "outside" state.

One such example is Linck v. Linckwhere the Common Pleas Court of Scioto County upheld a decree of divorce from Nevada based on the fact that the husband had made bona fide efforts (pursuit of employment and opening of a bank account) to establish domicile in the state of Nevada. The Linck court set forth the generally espoused judicial opinion regarding 3105.01(I) in stating:

[T]he mere fact that one leaves his domiciliary state and goes to another for the express purpose of procuring a divorce is not, in and of itself, grounds for another court to refuse to recognize the foreign divorce decree, so long as the person intended to make the foreign state his residence or domicile. On the other hand, if all the circumstances indicate that the applicant for divorce went to another state for the express purpose of securing a decree and not with the intention of remaining permanently, the jurisdiction of the court may be questioned.

A court following such sentiment makes the "Nevada Option" appear slightly limited in its use as an effective elder law tool, discounting a client willing to make efforts to establish domicile in a sister state. When dealing with a client who wishes to remain in the state, any facts to fit the 3105.01(I) grounds will be sparse.

The "living apart" provision of Section 3105.01 also provides a point of interest in the context of elder law. The provision has been the focus of a number of cases where divorce was sought under circumstances often encountered in elder law.

Perhaps the most cogent of the § 3105.01(j) elder law cases is Daily v. Daily. In Daily, the wife suffered a major stroke, was hospitalized, and subsequently placed in a nursing home. Following a four year period of the husband living at home and the wife in the nursing home, the husband filed for divorce citing section 3105.01 the "living apart" no-fault provision as grounds.

Applying the "living apart" section, the court denied the husband a divorce noting that "the only reason the parties were unable to live together was because of [the wife's] physical disabilities." The court also found support for its decision in the fact that the husband continued to assume his marital duties during his wife's confinement, that he continued to live in the marital residence, and that the wife's clothing and furniture remained in the martial residence. All in all, the court viewed the husband and wife as "living apart in a limited sense, [but] not living separately in a marital sense."

Daily appears, to some extent, to take the "no fault" out of the no fault provision. The Daily Court however, is not alone in this view. A number of subsequent opinions have also adopted a voluntary separation requirement when adjudging a divorce claiming 3105.01(J) as the applicable ground.

For example, in Launsbach v. Launsbachthe Eighth District Court of Appeals of Ohio, when reviewing a divorce granted on 3105.01(J), stated that "[i]t is generally accepted that before separation can be used as a ground for divorce, the separation must be voluntary." Also, the Second Appellate District of Ohio has also re-evaluated 3105.01(J) in light of its own Daily decision. In Heskett v. Heskett, the court commented on the Daily decision setting forth that "[i]n Daily, we noted that the 'living apart' was the result of the defendant's illness rather than an indication the marriage had broken apart."

These decisions set forth the contention that prior to granting a divorce on the living separate and apart grounds of 3105.01(J), courts will review the circumstances giving rise to the separation to ensure that it was voluntary in nature. Such a view to this no fault provision comports with the oft cited public policy behind the no fault provision that living apart for a long period of time is the best evidence that a marriage has broken down.

This level of scrutiny for a no fault divorce places certain constraints on the use of divorce as a tool for elder law. Strict adherence to the Daily decision would effectively disallow a couple consisting of an institutionalized spouse and a community spouse from obtaining a divorce based on § 3105.01(J) if such living situation was medically motivated and not per se voluntary in nature. As stated in Daily and its progeny, separation due to medical necessity is not a sign that the marriage has broken down, hence allowing a divorce based on 3105.01(J) in a community/institutionalized situation would be contrary to public policy.

Another possible hurdle to the use of 3105.01(J) as a ground for divorce in elder law is the discretion that a number of courts have found in the statute. Section 3105.01 reads, "the court of common pleas may grant divorces." Placing emphasis on use of the word "may" instead of "shall", a number of courts uphold denial of divorces on 3105.01(J) grounds and instead grant a legal separation when insurance and medical benefits are of concern.

Despite these hurdles, the no-fault provisions still serve as the more effective route for an elder law divorce. The last available no-fault ground, incompatibility, stands as the most useful ground for elder law divorces. Incompatibility serves as a ground not to be litigated.Thus, if both spouses agree to the divorce, then providing the court with mutually agreed stipulations as to grounds (i.e. incompatibility), will most likely result in the divorce being granted. As such, when performing an elder law divorce, the incompatibility ground serves as the default.

In closing, a divorce for purposes of separating the assets of a retired couple, especially a couple facing a long term debilitating disease, creates an advantageous situation to all parties involved. Ailments such as Lou Gehrig's disease, early onset of Alzheimer's, or Multiple Sclerosis, which are slowly degenerative over the years and eventually fatal, warrant consideration of divorce in order to preserve the couple's assets.

In the near future, the failure of our Federal and State governments to tackle the health care issues facing our clients will result in more elder law divorces were both parties are older, but well. Remember, the middle class are the clients subject to Medicaid spend down. Persons with less than $1,500 will automatically qualify for assistance and persons with over $1,000,000 will be able to afford private care at a rate of $6,500 per month. But couples with less than $1,000,000 face financial devastation by the new laws and rules. Will they chose to ignore the loss of all their assets to long term care or will they chose to separate their assets and cohabitate? Only time will tell.

Ohio Rev. Code Ann. § 3105.171(A)(3)(a) (2006).

Ohio Rev. Code Ann. § 3105.171 (A)(6)(a) (2006).

Ohio Rev. Code Ann. § 3105.171(C)(1) (2006).

Ohio Rev. Code. Ann. § 3105.171(D) (2006).

Ohio Rev. Code. Ann. § 3105.171(A)(6)(iii) (2006).

For basic examples of such arguments see, Middendorf v. Middendorf, 82 Ohio St. 3d 397 (Ohio 1998); Salmon v. Salmon, 2006 Ohio 1557 (March 31, 2006).

See Hicks v. Hicks, No. 3230, 1985 Ohio App. LEXIS 5661 (February 1, 1985) (Holding that evidence of poor health, disease, or addiction to dissipating habits may be offered for their effect on the evidentiary weight of standard life expectancy tables).

See Seabold v. Seabold, 84 Ohio App. 83, 88 (Ohio Ct. App. 1948); Wozniak v. Wozniak, C.A. No. L-85-147, 1986 Ohio App. LEXIS 5437 (Ohio Ct. App. January 31, 1986).

See Wozniak, 1986 Ohio App. LEXIS at *6.

4 Ohio App. 3d 142 (June 3, 1982).

Id.

See Wozniak 1986 Ohio App. LEXIS 5437 at *6 - *7.

Id.

L.M. v. N.J., Division of Medical Assistance and Health Services, 659 A.2d 450 at 481 (1994).

Mason v. Mason, 30 Ohio Op. 27 (CP 1945).

Verpltse v. Verplatse, 17 Ohio App. 3d 99 (1984).

Gilmcher v. Gilmcher, 29 Ohio App. 2d 55 (1971).

31 Ohio Misc. 224 (1972).

Id. at 227.

11 Ohio App. 3d 121 (1983).

Id. at 122.

Id.

1988 Ohio App. LEXIS 4707 (Dec. 1, 1988).

Id. at 10.

1991 Ohio App. LEXIS 5816 (Nov. 25, 1991).

Id. at *6.

See Dailey, 11 Ohio App. 3d at 122.

See Mahon v. Mahon, No. 98-T-0050, 1999 Ohio App. LEXIS 938 at *7-*8 (Mar. 12, 1999); Harcourt v. Harcourt, No. 97-A-0066, 1998 Ohio App. LEXIS 4624, *9-*11 (Sept. 30. 1998).

Rodgers v. Henninger-Rodgers, Case No. 02CA079, 2003 Ohio 2642 (May 14, 2003).