

The Elderlaw Forum: Loving couples divorce to protect assets

by Professor Michael Myers

Getting old is expensive. Getting sick is expensive. Getting both old and sick is extremely expensive. It can drive an otherwise loving couple into divorce.

Two calls to the senior legal helpline this week came from older women seeking advice regarding the desirability and legal implications of obtaining a divorce; not because they no longer love their spouses, but for asset protection purposes. In both instances, their husbands agree. They don't want the cost of their care to impoverish their wives.

The first caller is 80 and twice widowed. Her present husband is also 80. Last month he was admitted to a nursing home suffering from amyotrophic lateral sclerosis (ALS), a progressive, usually fatal, neurodegenerative disease. She has moved to live with a daughter.

"I am not a wealthy woman," she said, "but I did inherit some money from my first husband, who certainly would not want his life's savings spent on somebody else, rather than on me. And, besides, my present husband agrees. That's what I want and that's what he wants."

“Is there any legal reason why we can’t?” she asked.

The second call came from a woman, age 79. Her husband, 82, is suffering from the effects of two severe strokes. She cared for him over the past six years as his health declined. He has been admitted to a care center, with a daily cost of \$150. He has excellent long-term care insurance, with a daily inflation-adjusted payment up to \$175 and “lifetime” benefits.

He bought the policy in 1992 when long-term care insurance rates were low, and as the industry later learned, underpriced. This is the second marriage for both. Married for 15 years, they have maintained financial independence from each other. Each has about \$225,000 in assets. She, too, has long-term care insurance; however, it has a four-year benefit period.

I referred the first caller to an attorney who specializes in elderlaw and understands the estate planning aspects of late-life divorce. Her circumstances favor divorce.

The second caller's circumstances are less acute. She and her husband planned well. I suggested she prepare a rolling five-year estate plan compatible with Medicaid's five-year lookback rule. Financial risk does not appear to justify a divorce in her case.

Medicaid's spousal anti-impoverishment provisions are too meager to protect middle-class seniors. More loving couples will be divorcing for asset-protection purposes.

(Pro bono legal information and advice is available to persons 55 and older through the USD Senior Legal Helpline at 1-800-747-1895; mmyers@usd.edu. Opinions are solely those of the author and not the University of South Dakota.)

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