

So, This Is Fifty: The Gray Divorcees

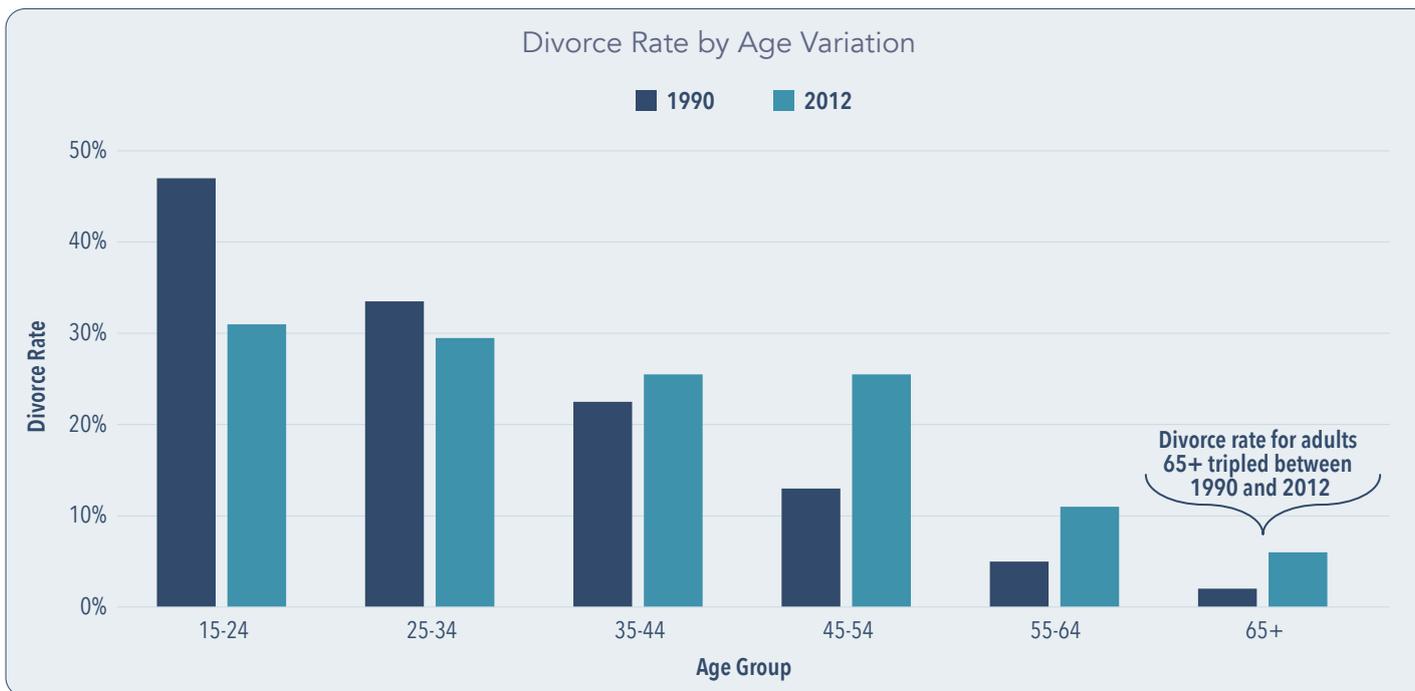
Natalie A. Williams

*Court Executive 2B-Family Division Manager, Middlesex County,
Superior Court of New Jersey*

The judicial system will be further tested by the increasing divorce rate of the elderly population. Are the courts equipped to handle this surge, and what are the most critical factors they must consider?

One group has experienced a significant rise in divorce rates since the 1990s. This group, referred to as “Gray Divorcees” or “Silver Splitters,” consists of couples who are over the age of 50. The U.S. Census Bureau Project predicts there will be more adults aged 65 or older than children in 2035 (U.S. Census Bureau, 2010).

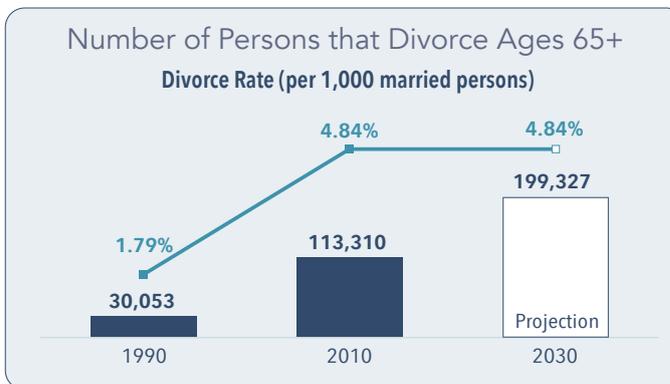
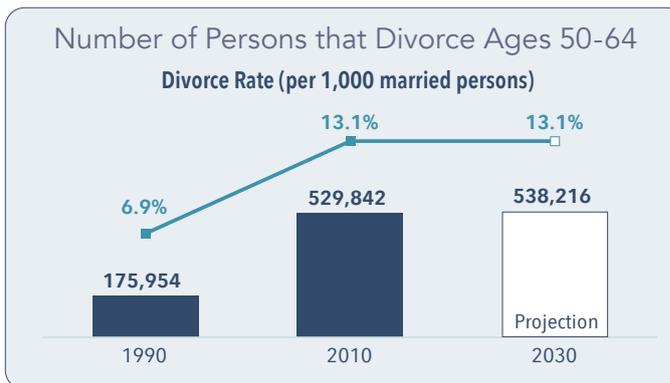
The stigma and the laws of divorce have dramatically changed over the years. In the 1850s, the Matrimonial Act allowed married couples to get divorced, but only under certain conditions that typically favored the husband. In the 1920s and 1930s, in addition to cruelty, rape, incest, and adultery, the law included drunkenness, insanity, and abandonment. By the late 1960s, the Divorce Reform Act relaxed the restrictions for couples to divorce and allowed a two-to-five-year separation period before granting a final divorce. What was once a subject of shame or failure, or considered illegal, has now elicited celebrations known as “divorce parties” to honor what once existed and the newfound freedom of the individual (see https://en.wikipedia.org/wiki/Divorce_party). In a time where life expectancy has increased, education has become necessary to achieve success, and homes need dual incomes to survive, unhappy couples refuse to remain in unfulfilling marriages for another 20, 30, or even 40 years.



Source: Centers for Disease Control and Prevention, National Center for Health Statistics, VitalStats and U.S. Census Bureau, American Community Survey, 2012

During late adulthood, spouses experience several reasons that lead to a “gray divorce.” Couples experience empty nests and retirement, where both remain in the home and learn how to live together again. Declining health adds a different type of stress to the marriage as one grows older. Other common reasons for an increase in gray divorces include infidelity, abandonment, and sexual dissatisfaction.

Societal reasons have played a significant part in this increase. There has been added pressure on many places of worship to take another look at how they view divorces. The Catholic Church has begun to express more leniency in accepting divorces due to this push. This is a significant change from 40 to 60 years ago, when feelings of failure and shame accompanied a divorce, and religion played a more significant role in decision making. Our society has become more secular. Based on several generational studies, society has changed views on religion and identification with specific groups in general. Younger generations identify less with set political parties or religious groups, and they carry strong feelings about the role of the military, marriage, and education in their lives. One example: Two-thirds of members of the Silent Generation (67 percent) say religion is very important in their lives, but only 38 percent of the youngest members of the Millennial Generation, those born between 1990 and 1996, say the same (Lipka, 2015).



Source: Brown and Lin, 2012.

Online dating, sometimes specifically geared toward adults 55 or older (for example, [OurTime.com](https://www.ourtime.com)), has also provided a new forum for divorced parties to reconnect with others after leaving a marriage of 20 or more years. Knowing there are still “options” can help soothe the fear of being “alone for the rest of their life.” Women entering the workforce, waiting to have children until later in life, not taking on all the home-caretaking responsibilities, gaining more education, and obtaining higher positions of employment have also reduced the fear of leaving marriage later in life.

Gray divorce presents unique challenges for the court system. It is necessary to determine if the courts are equipped to handle the complexities these divorces present. Critical areas in which courts need expertise include spousal support, Social Security benefits, division of personal and business assets, pensions, estate and trust planning, long-term care, insurance, retirements, veterans benefits, guardianship issues, inheritance disputes, and elder abuse. (According to the National Council on Aging, in almost 60 percent of incidents of elder abuse and neglect, the perpetrator is a family member, and two thirds of perpetrators are adult children or spouses.) Access to the courts and self-represented parties are two other major factors that affect how courts handle divorces. Additional outside groups that also need to work on gray divorces include attorneys, mediators, medical professionals, and financial analysts/accountants.

The consequences of a gray divorce are likely to be different than those of a divorce in earlier years. For a younger couple, dividing assets may be simple because the couple has not had enough time together to accumulate much property or wealth. They may just be starting out in their careers, so pensions and retirement are not worth as much as they would be after 30 years of service with a company. One party may not have acquired a pension through an employer or could have spent many years unemployed. They may also have young children, where child support and custody and visitation must be addressed. Although many might think this issue does not exist with adult children, states such as New Jersey allow child support to go until 23 years old if children are continuing their education or are disabled. In New York that age caps at 21 years. When a child’s parents divorce later in life, adult children can become more entwined in the divorce, because they may need to assist their parents with finances, provide an alternative location for a parent to reside, or take on power of attorney for medical decisions.



Preparing the Courts

When addressing gray divorces, the courts must not have a “one-size-fits-all” approach. All professionals must work together to remove the barriers and limitations for this specialized divorce group.

In gray divorce cases, the courts must be willing to investigate various concerns, such as intimate partner violence (i.e., elder abuse). In domestic violence cases that have one party self-represented, an imbalance of power and control can appear, changing the outcome of the event. There may be an increased need for geriatric and forensic psychiatrists to conduct full evaluations for abuse, trauma, or competency issues even before appearing for the first time in court.

This leads to a significant need for attorneys and judges to expand their training in elder law, which is the specialized field of law that addresses the diverse legal needs of aging adults and their elderly parents and includes the following legal areas:

- disability planning, including special-needs planning
- long-term care planning, including Medicaid planning and veterans benefits
- estate planning
- guardianship and conservatorship
- estate settlement, including probate and trust administration
- elder abuse, both personal and financial (Garber, 2020)

In 2009 the ABA Commission on Law and Aging compiled a list of schools that had begun incorporating elder-law courses or clinics in their certification programs. There were 90 schools nationwide. However, since that time, due to the increase in the older generation and gray divorces, many more schools are offering these types of programs or continuing education courses. Something else to consider could be the use of law students for self-represented litigants, which would provide internship credits for the student, as well as legal services to parties at no cost.

Gray divorces bring another complex issue for courts: competency. For instance, competency issues in Florida differ from competency issues in Kentucky. In Florida, once a party is legally declared incompetent, three years must pass before the courts will grant the divorce. This is done to afford enough time to the other party to become stabilized with their resources. In Kentucky, the mentally incompetent are unable to reach the court system when they have a guardian and are seeking divorce. The guardian must act on the incompetent party's behalf. It becomes problematic when the guardian is the other spouse and does not want the divorce. In those cases, the courts will not grant the divorce. This puts an added strain on the appellate court system when the party seeking the divorce appeals the decision—e.g., *In re Dandridge*, 120 A.D.3d 1411 (2d Dept. 2014) and *Campbell v. Thomas*, 73 A.D.3d 103 (2d Dept. 2010).

There are also those instances when other family acquaintances or scammers try to take advantage of those who may be mentally incompetent and act on their behalf negligently, which would require the courts to take extra time to conduct a thorough investigation. Asking family court management nationwide to examine the roles and tasks of their staff in the courts, such as using a “family court investigator” to aid in this type of investigation, could be beneficial.

Limitations in court technology delay court proceedings when a party is bedridden or in an assisted nursing facility and they do not have access to technological equipment or do not remember how to use the equipment. Virtual courtrooms, conference bridge calls, chat/video groups, and regular phone calls could provide additional options to handle these cases remotely.

The need to hire more judges or associate judges, mediators, attorneys, and other professionals who specialize in the complications of this group of divorces is also needed but requires additional funding for the courts. These cases must be reviewed in depth before receiving a court hearing date to ensure that attorneys who represent these matters are well educated and prepared to present the matters they are faced with. They then need to be placed on a specialized track, which allows longer processing time without causing backlog for the courts and while ensuring parties are not being delayed from court access unnecessarily.

Attorneys may also need to approach these cases differently than they have been accustomed to, which can be difficult for many because it requires a thought-process shift, especially if they have not received the proper training for this divorce group. Court staff also need to be properly trained with the language on court orders. For example, if there are multiple conditions set on an order, it is necessary to use plain language to indicate if all or some of those conditions must be met at the same time before the divorce can proceed or is granted/denied.

Legal verbiage and court forms can also present problems for self-represented litigants trying to understand what is needed and must be considered. Legal information centers, where more simplistic court forms and on-the-spot translators could be available all day, could help. Staff in those centers would need the ability to provide more specific guidance, with minimal limitations, on the navigation of documents and should be hired as an outside entity from the courts, yet be a collaborative stakeholder to the courts to provide proper guidance.

Dividing assets in these matters, when parties are established or wealthy, can become extremely complex. An inventory needs to be taken of all assets; however, judges must consider limitations on retention time spans when retrieving records. Some records may not be retrievable over seven years. A couple indicates their account had \$500,000 in it and that it should be equally distributed; however, \$400,000 of that was contributed by only one of the unmarried parties over 35 years ago, before the marriage. Yet there are no paper records available from either party due to the limited record-retention span and the lack of electronic access dating that far back. Due to splitting assets, there may be a need to locate and secure other forms of income for the parties and to consider age differences, life expectancy, and medical conditions, before granting the divorce.

Health insurance becomes a concern as well, especially if one of the parties is not 65 and able to receive Medicare. A decline in economic well-being following divorce would suggest a greater reliance on public rather than private forms of support, possibly meaning a rise in Medicaid and Supplemental Security Income use by older adults (Brown and Lin, 2012). That party must find a way to pay for COBRA or obtain some other form of health insurance to cover the large cost. Providing litigants with additional mental-health support or “court hotlines” could assist with reducing stress and health issues developing through the divorce process. In older generations it was not uncommon to have one individual, typically the husband, be the sole breadwinner for the family. This would leave the female spouse at a disadvantage, because she stayed home, did not continue her education, had limited work experience, and could now be facing health conditions that need to be addressed.

However, there is still much more that needs to be contemplated for the seamless handling of these specialized cases in the court system. Streamlining more simplistic cases should be considered first. Making court paperwork easier to read, removing language barriers, providing more cost reductions or payment plans, setting up more nontraditional court hours, or providing funding for staff that can specifically offer advice and guidance solely on navigating paperwork would be a start. Using outside options from the traditional courtroom could help reduce backlog and settle more divorce cases. Using “mobile divorce” vans to meet parties at their home; reducing the need for child care, transportation, or taking time off from work; adding “one-stop shop” divorce centers or “drive-thru” locations; or developing a divorce-procedure app for the phone and computer for individuals who are more comfortable with technology are some other options.

A more recent unconventional approach came out of Hotel Karel the Fifth in the Netherlands and Gideon Putnam Resort and Spa in Saratoga Springs, New York: divorce hotels (for more information, go to <https://tinyurl.com/y8kvvqd7>). These are mini resorts for the couples seeking to check in as a married or separated couple, obtain a divorce through mediation techniques, and check out legally as singles upon departure. Mediators are on-site, and the divorce can be conducted in a relaxing and remote area, removing children from the tense environment. In these situations, the cost of the vacation can be much less than that of the hiring of lawyers for both sides, court expenses, and loss of time.



Bringing to light the various factors of litigation areas in gray divorce cases, properly implementing new trainings, and hiring educated judges, attorneys, judicial staff, and involved professionals is an immense start. Additionally, it could be helpful to conduct in-depth surveys with involved parties going through the process, similar to the *Study of Divorce at Midlife and Beyond* conducted by AARP (Montenegro, 2004). Data from these surveys could help courts with areas that need improvement.

Looking at the physical court environment can change the experience for parties. Making the courthouse more inviting by adding couches, food, drink, comfortable lighting, light music, or entertaining reading material can put parties more at ease. Judges and staff could adopt a more person-centered approach to interact with parties. For example, a judge can sit with the parties side by side, instead of looking down from the bench. Maybe family staff can conduct field visits to parties’ homes or neutral restaurants to discuss options.

In the end, are “gray divorces” truly a new trend, or have they always been present but never examined this way until recently due to all the societal changes that have occurred? Despite the rapidly increasing trend with late-life divorces, the court system has made significant strides in understanding the complexities of gray divorces by adding continuing education courses on elder law, hiring specialized and experienced professionals, and discussing more openly the concern and need for adjustment on how these divorces are handled within the courts.



Source: Gideon Putnam Resort and Spa in Saratoga Springs in New York. *NY Post* (February 10, 2015).

Source: "Judge's Changes Make Divorce Court Less Stressful." <https://local12.com/news/local/courtroom-geared-toward-collaboration-in-divorces>



References

Brown, S. L., and I-F Lin (2012). "The Gray Divorce Revolution: Rising Divorce Among Middle-Aged and Older Adults, 1990-2010." *67 Journals of Gerontology Series B: Psychological Sciences and Social Sciences* 731.

Garber, J. (2020). "What Is Elder Law?" *The Balance, Budgeting/Estate Planning*, updated April 10. Online at <https://tinyurl.com/ycold67a>.

Lipka, M (2015). "5 Key findings About Religiosity in the U.S.—and How It's Changing." *Fact Tank: News in the Numbers*, Pew Research Center, Washington, D.C., November 3. Online at <https://tinyurl.com/yagc8d4u>.

Montenegro, X. (2004). *The Divorce Experience: A Study of Divorce at Midlife and Beyond*. Washington, DC: AARP, Public Policy Institute.

U.S. Census Bureau (2010). *American Community Survey*. Washington, DC: U.S. Census Bureau.

