# GERIATRIC DIVORCE
# A HARSH ROAD TO AN ESTATE PLAN

*by Andy Ross*

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I have seen it three times in the past 20 years. As lawyers, we will be seeing it with more frequency as people live longer. Family lawyers see it in the context of divorce. Estate planners see it in the context of their practice. Probate lawyers see it in will contests. What have we seen? It is the adult child seeking representation on behalf of an elderly parent who, you are told, wants a new will, a divorce or other legal assistance. This article summarizes three very similar "geriatric divorce" cases (O, L & D) with different endings, in which I was involved as the attorney of record for one of the parties. It also identifies the common themes existing in these divorces, which will become only more prevalent as our population continues to age.

## The "O" Case

A couple who were both 75 years of age had been married for 50 years. I received a phone call from their oldest son, himself an extremely successful entrepreneur in the Silicon Valley. He was calling on behalf of his mother. He relayed that she resided in a hillside house in need of repair in a very desirable neighborhood on the Peninsula. He also indicated that his father had become romantically involved with a much younger woman (the 25-year-old former girlfriend of the caller's brother); had allotted his mother $50 a week for food and household supplies; had denied her access to any of the family fortune; and was possibly making ready to leave the country with his girlfriend and a briefcase that the son thought contained valuable negotiable securities.

The son was introduced to me by a firm of lawyers who handled his transactional and corporate work – an established San Francisco firm that vouched for his integrity and financial resources. When we met, he was anxious to assist his mother in dissolving her marriage and dividing the community assets – he did not want to be burdened with the care and responsibility for her and his other siblings, none of whom were as successful as he. He alleged that his father owned a warehouse in which he maintained an office. The office had a secret hiding place (behind bookshelves, where there was a hidden small alcove). This alcove contained valuable assets, consisting of precious metals, gemstones and foreign and domestic currency. He believed that all of these assets were legitimately acquired (from a tax point of view) but were not inventoried or known to his mother.

He wanted an ex parte order appointing a receiver to take possession of the warehouse and all of the assets in it. The file had to be sealed to protect against theft. We also requested the court to issue an order enjoining the parties' accountants and lawyers from destroying or transferring any files relating to the community or to any business of the community, including personal and corporate tax returns. The order was issued. The receiver was accompanied by armed sheriff's deputies. The entire take-over of the warehouse took less than an hour and was videotaped.

Earlier in the case, when I interviewed the saddened wife, she had authorized her son to speak on her behalf and she authorized our actions in writing. One of the dangers in dealing with the son was protecting the attorney-client privilege. Fortunately, after the issuance of the ex parte application, there was very little in the way of formal litigation. Ultimately, over a period of a year-and-a-half and after

extensive discovery, a settlement was reached. This was based, in large part, on the opinion of our forensic accountant that we had located all the marital assets. He based his opinion, in part, on hand-written "tally" sheets in the husband's handwriting we found in the secret alcove, inventorying the hidden, undocumented assets.

The most interesting things about this case occurred at the beginning and at the end of it. At the beginning, we required the son to declare under penalty of perjury all of the facts he recited to us; some of which went beyond the declaration he filed in support of the ex parte application. We also asked that he provide us with a formal hold-harmless and indemnification agreement for any damages arising by virtue of any misstatement of fact that was given, particularly in connection with the warehouse take-over. At the end of the case, based on behaviors we had observed and because the division of the community property was not equal (our client ended up taking two-thirds of the community property while one-third was awarded to the husband), we insisted that a guardian ad-litem execute the Marital Settlement Agreement in addition to counsel for the husband. The unequal division was made in recognition of the fact that the husband would leave nothing to his children. We demanded a guardian ad-litem to protect against an incompetency claim on behalf of the husband. We proposed three very well known family lawyers whose practices were located in the geographic area where the husband resided.

If the oldest son were not as motivated and sophisticated as he was, Mrs. "O" would never have recovered as much property as she did. Mr. "O" died within one year after the settlement, after having married his young girlfriend.

**The "L" Case**

A marriage of 70 years, this involved a 91-year-old husband and 90-year-old wife. The case was introduced to me by an adult child of the parties on behalf of her mother who was confined to her home, rendering her physically unable to attend a meeting at my office. I met with the wife and two of her children (one of whom was the spokesperson) at her house. After spending a few hours with everyone, I came to a number of conclusions. First, the prospective client appeared to be competent. Second, she seemed to be sincerely desirous of dissolving her marriage. She had no will but there was a substantial estate. There was a rift among the children. The two children who attended the meeting were no longer in the good graces of their father who had been particularly protective of a third sibling, who his sisters referred to as a "ne'er do well."

This seemed to be an estate planning case. I obtained advice from an estate planner concerning the manners in which the estate could be distributed and included her in our discussion. What would be the various consequences if the wife predeceased her husband? If he predeceased her? How would the property be distributed pursuant to the laws of intestacy?

What ensued? A good-faith effort on my part and on the part of the husband's attorney to strike a compromise, which would divide the property equally and guarantee that all of the heirs of the parents would inherit and none would be excluded. Our efforts, however, resulted in a breakdown – a sibling rivalry. The sisters would not accept the possibility of receiving a smaller share of the estate than their brother. I felt my client had lost control, resulting in my loss of control. Knowing that a trial at this point would not produce a better result for my client and seeing no resolution in the near future, I reluctantly withdrew from the case.

In preparing this article, I went to the court's website. I discovered that the case did settle, without a trial, some two years after I had withdrawn. At that time, the parties were closer to 95 than 90. I was relieved to see they were not put through the rigors of a trial. I assume that the divorce was the first step in their estate plan.

**The "D" Case**

The last case involved a couple who were both born on the same day of the very same year. When the case was started, both parties were 85 years old and had been married for 60 years. The husband, who had been living out of state, was sued for divorce by his wife. This was quite a shock, as he had been living separately from her for 47 years, without animosity. During the 1930s, he and his wife had built a modest home on a couple of acres in one of the most desirable areas of the county (the wife occupied). The property was fully paid off and was owned by the couple as joint tenants. While living together as man and wife during the first 10 years of their marriage, they had three children: two were aligned with the mother; and one was aligned with the father.

When the action was filed, automatic temporary restraining orders were issued, prohibiting either of the parties from entering into any extraordinary transactions. At the time, the law was not settled whether the termination of a joint tenancy violated the automatic temporary restraining orders. Our law firm's position was that it did not because it was in the nature of a testamentary disposition by which the terminating spouse would ensure the ability to dispose of his or her interest in the property upon death.

Early on in the proceeding, I learned that the lawyer for the wife was also the lawyer for one of the parties' children, who happened to be a very successful and locally well-known businessman here in the East Bay. My client was certain that his son had introduced his mother to her lawyer and instigated the dissolution proceeding.

Given the age of the parties, it appeared that this was a pre-death will-contest. As a result, I asked my client to come California so that we could meet and discuss his alternatives, particularly with respect to the joint tenancy owned property. It had substantial value. I also wanted to meet him to "size him up."

We discussed that because the property was owned in joint tenancy, it would pass by right of survivorship. We discussed that, statistically, his wife was more likely than not to survive the death of my client, but it was up to him whether to terminate the joint tenancy.

The husband decided to terminate the joint tenancy. As fate would have it, his wife died within a period of four to six weeks. Prior to her death, after receiving notice of the termination of joint tenancy, her counsel threatened to file a motion to set aside the transaction and for sanctions against our law firm for an alleged violation of the automatic temporary restraining orders. The motion was never filed.

In checking the court's online register of actions, I saw that Mr. "D" died some four years after his wife passed away. I also saw that there was a probate of his will here in California, so I assume he moved back here, 50 years after he left the state and some time after his wife had passed away.

Nothing surprises a family lawyer; not even divorce after 50, 60, or 70 years of marriage. Aging people are entitled to divorce and to enjoy their lives, even if the catalyst for divorce is the selfish motive of their less or more successful children.