

CONTENTS

The Older, Affluent Female Divorcee
The Role of a Financial Advisor

By Terry Donahe 1

The Military Family Law Feature

SBP — By the Numbers

by Mark E. Sullivan 5

CASENOTES

Oregon Court of Appeals 7

WEBSITE

Check out the Family Law Section
website at: www.osbfamilylaw.org

To access back issues of this newsletter
you will need to sign into the member
area of the Orego

The Older, Affluent Female Divorcee The Role of a Financial Advisor

By Terry Donahe

Over the past two decades, the percentage of our practice focused on serving affluent divorced women has grown significantly. We have served women contemplating divorce, in the midst of divorce, newly emerging from divorce and carrying on long after divorce.

This was not intentional. We never sought to make divorce-related financial planning a focus of our practice. In fact, we are still trying to understand why these women have chosen to work with us, as the advisors in our firm are all (rather unfortunately) male. When we have surveyed these women though, they have told us that it was not important to them that they work with another woman. They have also told us that they trust us and that we help them navigate complex financial issues. They like that we are fee only advisors who will never attempt to sell them a financial product. Whatever the case, we have enjoyed serving these women and we are grateful for the opportunity.

In recent years, increasingly the women who have come to us for planning services have been age 50 or older. They are part of the gray divorce movement that has drawn media attention. They have often been married for 20, 30 or more years. They have typically raised their children. They are often retired or close to retirement. They are usually well-off with significant financial resources.

There are a variety of areas in which a financial advisor can assist older, affluent women in the context of divorce. We will use a hypothetical client who is a composite of our actual clients to identify these opportunities.

Background

Angela is 60. She has been married to Bob, who is 65, for 33 years. They moved to Portland last year after they retired and they sold their home in Los Gatos, CA.

Angela met Bob at Rolling Stones concert at the Cow Palace in San Francisco in 1987. She was 26 and Bob was 32. They fell in love and were married the following year.

Bob has undergraduate and graduate degrees in electrical engineering. Angela has an undergraduate degree in sociology. After they married, Bob took a job with Johnson Aerospace (JA) where he worked for the next 32 years. Angela worked briefly before they started a family, and she became a

stay-at-home mother. After their kids were grown and through high school, Angela went back to work as an office manager in a small law firm.

Bob and Angela have two children. Their son Scott is 31, married (to Lynn) and has two young kids. Son, Braden is 4. Daughter, Jessica is 2. They live in the Chicago suburbs. Scott is a very successful securities attorney.

Their daughter, Margo, is 27, single, lives with a same sex partner (Jane) and has no plans to have kids. She and Jane live in San Francisco. Margo works in advertising and struggles financially.

Bob took a single life pension when he retired from JA. Angela agreed to this (as required by law), because they have \$2 million of cash value life insurance that is paid up. A life insurance agent convinced them many years ago that that this strategy would increase their retirement income and protect Angela if Bob died prematurely. The pension pays \$150,000 a year.

Bob contributed to the JA 401(k) plan throughout his career. When he retired, he rolled his account into IRA. The IRA is worth \$1.5 million and is allocated 70% to stocks and 30% bonds. Bob has a Roth IRA with \$125,000 which is invested entirely in tech stocks.

Bob and Angela lived on his income. So, when Angela went back to work, she was able to save much of her income in the firm's 401(k). When she retired, she rolled the account into her IRA. That account is worth \$350,000.

They have a joint brokerage account with \$1.5 million and a cost basis of \$400,000. It is invested mostly small technology startups that Bob has researched.

Bob and Angela started 529 college savings plans for their grandkids. There is \$10,000 for Braden and \$5,000 for Jessica.

Their home in Southwest Portland, Oregon is valued at \$2 million. They also own a home in Cannon Beach, Oregon that was recently appraised at \$1.2 million. They inherited it from Bob's parents 20 years ago, and it has been a vacation home for their family for decades. There is no mortgage on either property.

They have \$100,000 in checking, savings, and money market accounts. They have a small art collection that features artist from California and the Pacific Northwest. They think it's worth \$150,000, but it has not been appraised. Angela owns jewelry, most of which she inherited from her mother, worth \$80,000.

Bob started his Social Security benefit at 65. It pays \$3,100 each month. They planned to defer Angela's modest Social Security benefit until she reaches age 70.

Throughout their marriage, Angela relied on Bob to manage their financial affairs. He used Mint to track their finances. He also made their investing decisions. Angela does not know how much they spend each month. Bob told her that his pension and Social Security provided enough income to meet their needs and, as a result, they were not taking distributions from their other accounts.

Housing

Angela was referred to us by a family law attorney. She had been advised would likely receive one-half of the marital estate's net value. This served as our starting assumption as we began to explore her financial situation.

The first thing Angela asked us was where was she going to live. While she liked the house she and Bob bought in Portland, they both realized that it was going to be bigger than either of them wanted or needed. Neither of them was emotionally attached to it and they were both comfortable selling it. Because Bob and Angela had just purchased the property, there would be little, if any, gain associated with the sale of the property.

Initially, Angela told us she wanted to buy a condo on the south waterfront in Portland. Later in our conversations she said she might want to move to the Chicago area to be closer to Scott's family. We encouraged her to plan on renting wherever she decided to move. Given their resources, she would be able to buy another home again. But she should give herself time to consider where she wanted to be, and renting would give her flexibility.

Housing is a major concern for just about everyone going through a divorce. Most affluent divorcees do not need to be concerned about being able to afford their housing preference. A financial advisor can provide important assurances.

We discussed the Cannon Beach House. Bob made it clear that he wanted to keep it and Angela indicated she was willing to accept other assets to compensate her for relinquishing her interest in it. We told her that, given how long they had owned the house and that it was the gathering place for their family for many years, the court would likely consider it marital property. But we cautioned her that she may not be awarded property equivalent to half of the value of the house.

Cash Flow and Budgeting

The next thing Angela asked us was how she was going to support herself, given that the pension and Social Security were payable to Bob. We assured her that her attorney would negotiate for resources that would be sufficient to meet her needs.

It is not uncommon for women over 50 to rely on their spouses to handle the household budget, pay their bills, and balance their checkbook(s). Angela was not aware of what they were spending each month.

In addition to current statements for all their investment accounts, we asked her to provide us with 3 years of bank statements and credit card statements. This would help us establish their core living expenses as a couple.

We then asked Angela to let us know what she expected to spend each month once she got settled after the divorce. We had her break her spending into fixed and variable expenses. We also had her identify major expenses that she anticipated. Examples included travel, new vehicles and gifts to family and charity. Our initial estimate for Angela's core living expenses (including rent) was \$7,000 a month.

There is longevity in Angela's family. So, we did our modeling work assuming she would live to age 95. We wanted to be certain that she would not outlive her resources.

Income

Angela asked how she would receive income, given that she and Bob had been living on his pension and his Social Security. She knew that she was too young to take her own Social Security benefits and, even if she could, they were going to be rather small.

Angela had been advised by her attorney that presumptively she would receive one-half the value of all retirement benefits accumulated during their marriage. We were hopeful that she would be awarded half of the pension. However, her attorney would have to negotiate this and work with a Qualified Domestic Relations Order (QDRO) specialist on the specific terms of that part of the settlement. We knew that Bob's pension was in distribution mode and could not be altered. This meant that Angela could only receive income indirectly through assignment as an "alternate payee" via a QDRO.

We also informed Angela that Bob would continue to receive his Social Security benefits and that his benefits were, by federal law, non-divisible. Her attorney could attempt to negotiate a nonmodifiable spousal support award in lieu of a share of property. But that was not at all certain in her situation.

Angela asked when she should start her own Social Security benefit. We explained that while she was eligible for a modest Social Security benefit based on her own earning history, she was also entitled to a larger spousal benefit based on Bob's work history. Her divorced spouse

FAMILY LAW NEWSLETTER

*Published Six Times a Year by the
Family Law Section of the Oregon State Bar.*

Editor: Daniel R. Murphy
P.O. Box 3151, Albany, OR 97321
(541) 974-0567, danmurphyoffice@gmail.com

2021 Executive Committee Officers

Annelisa D. Smith, Chairperson
Murray S. Pettitt, Chair-Elect
Amanda C. Thorpe, Past Chair
Zachary Fruchtengarten, Treasurer
Erin Fennerty, Secretary

Members-At-Large

Jennifer J. Brown, Jennifer E. Currin,
Daniel W. Miller, Kimberly A. Quach,
Keri J. Smith, Shannon D. Snow,
Stephanie F. Wilson, Katherine H. Denning/BOG
Contact, Susan E. Grabe/Bar Liaison

The purpose of this Newsletter is to provide information on current developments in the law. Attorneys using information in this publication for dealing with legal matters should also research original sources and other authorities. The opinions and recommendations expressed are the author's own and do not necessarily reflect the views of the Family Law Section or the Oregon State Bar.

Layout and technical assistance provided by Creative Services at the Oregon State Bar.

Publication Deadlines

The following deadlines apply if a member wants an announcement or letter included in the newsletter.

<i>Deadline</i>	<i>Issue</i>
1-15-2022	February 2022
3-15-2022	April 2022
5-15-2022	June 2022
7-15-2022	August 2022
9-15-2022	October 2022
11-15-2022	December 2022

benefit would be effectively one half of Bob's benefit at his full retirement age.

We encouraged Angela to plan to wait until she reached her own full retirement age (67) before claiming Social Security benefits. We anticipated that her benefit would be one half of \$3,100 or \$1,550 per month.

We realized that that Angela would need to rely on distributions from her portion of the investment accounts to create income. We had one conversation with her which was entirely focused on how this is done. We also advised her to work with an investment advisor.

Taxes

Bob and Angela used a CPA firm in the Bay Area for tax services. Angela did not understand their tax situation. She relied on Bob to get tax documents to their CPA and make sure their tax return was submitted to the IRS.

We explained that her settlement with Bob would incorporate the unique tax characteristics of their assets. We noted, as an example, that their IRAs had not been taxed and that they would be when they began taking distributions. We also told her that they were significant untaxed long term capital gains embedded in their joint brokerage account.

We also pointed out that her tax status was about to change from married filing jointly to single filer. We encouraged her to develop a relationship with a tax professional who could help her navigate the many tax issues she would encounter in the divorce and in her life afterwards.

Life insurance

We discussed the life insurance on Bob's life. The policy had a cash value of \$1 million and was a significant asset in their settlement. Bob was the owner. Angela was the beneficiary. The original purpose of the life insurance was to provide her with resources if Bob died in retirement having taken a single life pension. That need would not change even though Bob and Angela would soon be divorced. But the amount of insurance needed would be less, because Angela would likely be receiving no more than half of Bob's pension payments.

We offered to contact the insurance company to determine options for the policy. We knew that surrendering the policy would be taxable event. Could ownership of the policy be transferred from Bob to Angela? If so, would this be reportable to the IRS? Could Bob take a reduced paid-up policy and do a conversion under IRC 1035 of the remaining cash value into an annuity? Could an annuity be assigned to Angela?

We offered other ideas. Should Angela instead take out a new policy on Bob to protect her interest in the pension? Could her attorney negotiate to have Angela remain as the beneficiary of Bob's life insurance (or some portion of it)? How much consideration would she need to provide to acquire the necessary coverage on Bob.

Angela's attorney would need to negotiate an agreement that would protect her and that would be acceptable to Bob and his attorney and, ultimately, acceptable to the court.

Investments

We advised Angela that she would likely retain ownership of her IRA. She would probably be awarded a significant portion of the joint brokerage account. She might even be assigned a portion of Bob's IRA.

We advised Angela that the value of many of their assets would need to be adjusted for taxes. The IRAs would be subject to ordinary income taxes. The positions in their brokerage account with unrealized gains would be subject to federal and state capital gain taxation if/when they were sold.

We put together an analysis depicting the current market value of their assets and an estimate of the after-tax value of the assets. Her attorney was able use this analysis in the settlement discussions.

We had a separate conversation with Angela about the composition of the retirement accounts and the brokerage account. Angela told us that she knew very little about investing. We encouraged her to work with an investment advisor who would be able to rebuild her portfolio after the divorce was complete in a manner that would be consistent with her needs and objectives.

Art and Jewelry

Bob and Angela were willing to split up the art and attempt equalize the value that each received. Angela would keep the jewelry and that would end up on her side of the settlement.

Health Insurance

Bob started Medicare when he retired. Angel, at age 60, was not eligible for Medicare. She had private insurance and would need to maintain it until she qualified for Medicare at age 65. Private insurance is very expensive, and it is not likely that Angela would qualify for a health insurance subsidy (i.e., premium tax credit) under the Affordable Care Act.

Angela told us she was concerned about one day needing long term care. We told her that Medicare does not cover such care and that we would help her explore long term care insurance options.

Estate Planning, Giving and Charitable Giving

We encouraged Angela to update her estate plan once her divorce was settled. She would need to revise her will, durable power of attorney, health care directive and trust. She would also need to change the beneficiary on her IRA.

Angela told us she was concerned about Margo and wanted to know if she could afford to help her financially. We discussed the wisdom of doing this and included such support as a goal in the financial model we built for her.

Bob and Angela had begun college saving accounts for their grandkids. Angela wanted to continue to make contributions to these accounts and we added that goal to her plan.

Bob and Angela had a long history of making annual gifts to various charities. She told us that she wanted to continue to make such gifts and we added a goal for these gifts.

Comprehensive, Integrated Planning

During our first conversation with Angela, we explained that she would need a team to assist her. The team would include a family law attorney, a financial planner, an investment advisor, a tax professional, an estate planning attorney and insurance agents. She might also want to work with a therapist as she negotiates her divorce and plans for her future.

Peace of Mind

Divorce for affluent couples is inherently complex. We have briefly touched on a few of the many issues that frequently surface. Our overarching goal as we serve clients like Angela is to give them peace of mind about money and help them use their resources to achieve their objectives.

Finding an Advisor

If your clients need divorce-related financial advice, please encourage them to consider working with a Certified Divorce Financial Analyst (CDFA®), Certified Financial Planner™ (CFP®), or Certified Public Accountant (CPA) with the Personal Financial Specialist (PFS™) credential. Advisors who hold these designations had to meet rigorous educational, experience and ethics requirements.

About the Author

Terry Donahe, CFP® is a principal with Springwater Wealth Management, LLC, a fee only registered investment advisor with offices in Oregon and California.

The Military Family Law Feature

SBP — By the Numbers

by Mark E. Sullivan

In a military pension case, the Survivor Benefit Plan (SBP) is a very important asset for a spouse or former spouse. If the military retiree dies first, SBP enrollment means that the survivor receives 55% of the retiree's selected base amount (usually full retired pay) for life. Overlooking this asset can be a fast ticket to a grievance or a malpractice claim for the lawyer who represents the non-military spouse. The rules for election and allocation, the deadlines and the choices are complex and confusing. Here is a quick summary of the most important information about SBP.

①	Exactly ZERO subsequent orders for SBP coverage can “restart the clock” on the one-year deadline explained below. In other words, you cannot retrieve <i>the missed year</i> by convincing the court to enter yet another order awarding SBP to a former spouse (FS) if it's already been awarded in the first place. You only get one shot – so it must be done right and on time.
①	<ul style="list-style-type: none">> There is only ONE year in which to send to DFAS* the election form for former-spouse SBP coverage. See #2 below for an explanation of the two deadlines.> There is ONE DFAS location which accepts SBP application forms, and it's located in London, KY. Transmit the forms and court papers there by registered or certified mail, return receipt requested (or by fax) to ensure that you have proof of receipt. The address is on any of the SBP forms mentioned in this SILENT PARTNER.> Only ONE adult beneficiary is allowed for SBP. It cannot be subdivided between a current spouse and a former spouse. Tell the client to make a choice: “Your EX or your NEXT.”> DD Form 2656-1 is the form to use when the servicemember (SM) or retiree applies for former-spouse SBP coverage.
②	<ul style="list-style-type: none">> The TWO deadlines for SBP applications are: When divorce follows retirement, the election by retiree must be done within one year of the divorce. A “deemed election” by the FS must be submitted within one year of the order granting SBP coverage. <p style="text-align: right;"><i>continued...</i></p>

②	<p>cont'd > TWO to three years after retired pay begins is the period in which the parties may agree to terminate SBP coverage (between the 25th and the 36th months after "pay status" for the retiree). This election cannot be reversed, and there is no refund of premiums already paid.</p>
③	<p>Guard and Reserve retirees have THREE options for SBP coverage when they attain 20 "good years" toward retirement and receive their NOE (notice of eligibility) or "20-year letter." Option A is to wait till pay status (usually age 60) to decide; this means no coverage in the interim period. No interim coverage also applies to Option B, which involves election of coverage but age 60 as the effective date (or when the SM would have turned 60 if death occurs before then). Option C, the only one which doesn't require written spousal consent, is called "RCSBP," or Reserve Component SBP" and it means immediate coverage for the Guard/ Reserve member. If the member fails to return the form to DFAS, the default choice will be applied, which is Option C.</p>
④	<p>FOUR percent is the approximate reduction needed to the former spouse's pension share to shift payment of the entire premium to her or him in a retirement from active duty. An Excel spreadsheet is found in <i>The Military Divorce Handbook</i> (Am. Bar Assn., 3rd Ed 2019) which allow more precision in the calculation. Without an adjustment or a decree requiring one party to reimburse the other directly, DFAS will take the premiums "off the top" before retired pay is divided between the parties, since that's required by federal law. Thus the premium is divided in the same ratio as the pension itself (e.g., if John gets 70% of the pension, he pays 70% of the SBP premium).</p>
⑤	<p>> FIVE-five percent (55%) of the selected base amount is the benefit paid out to the beneficiary. The base amount is the full retired pay (as the "default option") or any amount down to \$300 a month.</p> <p>> FIVE-five (55) years old is the age limit for remarriage. If a former spouse remarries before then, SBP coverage is suspended. It will be reinstated if that marriage ends in death, divorce or annulment.</p> <p>> DD 2656-5 is the form which is used by a Guard or Reserve member to make one of the three choices set out above (DD Form 2656-5).</p> <p>> There are FIVE options for beneficiaries with SBP: spouse, former spouse spouse (or former spouse) and child, child (or children) and individual with an "insurable interest."</p>

⑤	<p>> SIX point five percent (6.5%) is the premium for those electing spouse/former spouse coverage in a retirement from active duty.</p> <p>> DD 2656-6 is the form to use for a permitted change of beneficiary, such as when a retiree remarries and there is no requirement for former-spouse coverage (DD Form 2656-6).</p>
⑦	<p>SEVEN words describe the single unchangeable rule for SBP when the base has been selected initially: "You can not change the base amount."</p>
⑧	<p>EIGHT words will do it for an SBP election clause: "John will elect former spouse SBP for Mary."</p>
⑨	<p>One four NINE (149) is the number of the Dept. of Defense form (DD Form 149) used to apply to the appropriate Board for the Correction of Military Records (BCMR) when a deadline has been missed and the former spouse wants to get the military to change the records to allow coverage. There are BCMR's for the Army, Navy, Air Force, Marine Corps and Coast Guard. The time to apply is within three years of the discovery of the error.</p>
⑩	<p>> TEN percent is the approximate percent of base amount paid by Guard/Reserve retirees for RCSBP coverage.</p> <p>> DD 2656-10 is the form used to make a "deemed election" by the FS (DD Form 2656-10). This is done when the SM/retiree fails or refuses to make the election required by court order. The deemed election must be submitted to DFAS within one year of the order granting former-spouse SBP coverage.</p>

*DFAS, the Defense Finance and Accounting Service, processes SBP applications for all of the uniformed services except the Coast Guard, and the commissioned corps of the Public Health Service and the National Oceanographic and Atmospheric Administration, which are administered by the Coast Guard.

*Mr. Sullivan is a retired Army Reserve JAG colonel. He practices family law in Raleigh, North Carolina, and is the author of *THE MILITARY DIVORCE HANDBOOK* (Am. Bar Assn., 3rd Ed. 2019) and many internet resources on military family law issues. A Board-Certified Specialist in Family Law for over 30 years, Mr. Sullivan works with attorneys nationwide as a consultant on military divorce issues and in drafting military pension division orders. He can be reached at 919-832-8507 and mark.sullivan@ncfamilylaw.com.

CASENOTES

OREGON APPELLATE DECISIONS

December 2021 Edition, OSB Family Law Newsletter
Family Law Opinions: October 2021 and November 2021

Editor's Note: these are brief summaries only. Readers should read the full opinion. Each case has a hyperlink to the case on-line when available.

SUPREME COURT

No Family Law Cases in Supreme Court for this period.

OREGON COURT OF APPEALS

Domestic Relations

Spousal Support

Brianne Marie Williams and Derek Alexander Williams (Aoyagi, J.) Father moved to terminate spousal support and modify child support based on a substantial change in economic circumstances related to the failure of his business. The modification court denied the motion. Framing the issue as whether the business's demise "could have been anticipated at the time of judgment," the modification court concluded that father should have had a better understanding of the business's finances at the time of dissolution, when the dissolution court awarded him mother's one-third share of the business in addition to his own existing one-third share. Father appeals the resulting supplemental judgment. He argues that the modification court misapplied the "change in economic circumstances" standard and thus erred in denying his motion.

Held: The modification court erred in denying the motion on the grounds that it did. The proper point in time against which to assess whether a change in economic circumstances had occurred was the date of the dissolution trial, not the date of entry of the dissolution judgment. Further, the dissolution court plainly did not anticipate the demise of the business in setting support, the parties did not actually anticipate the demise of the business at the time of the dissolution trial, and there is no evidence that the business's situation at the time of the dissolution trial was so dire that its demise was inevitable. Reversed and remanded as to denial of father's motion to terminate spousal support and modify child support; otherwise affirmed. COA 11.24.21.

FAPA

N. F. M. v. Sadeq Al Khalidi (Kamins, J.) Respondent appeals the trial court's continuation of a restraining order issued against him under the Family Abuse Prevention Act (FAPA), ORS 107.700 to 107.735. Respondent assigns error to the trial court's findings that petitioner reasonably feared for her physical safety and that respondent posed a credible threat as required by ORS 107.716(3). Additionally, respondent assigns error to the court's award of petitioner's attorney fees.

Held: There was legally sufficient evidence to support the trial court's conclusion to continue the FAPA order. Respondent's recent physical abuse of petitioner, combined with threats of violence and a subsequent violation of the ex parte order, together supported a finding that petitioner's fear of respondent was reasonable under ORS 107.716(3) (a)(B) and that respondent was a credible threat under ORS 107.716(3)(a) (C). Additionally, the trial court did not err when it awarded petitioner's attorney fees. Affirmed. COA 11.17.21.

Full Case Opinions may be found here:

Supreme Court: <https://www.courts.oregon.gov/publications/sc/Pages/default.aspx>

Court of Appeals: <https://www.courts.oregon.gov/publications/coa/Pages/default.aspx>

Note on Opinions Reviewed

The Editor tries to include all the Family Law related decisions of the Oregon Appellate Courts in these Notes. Some cases do not have holdings that have precedent significance however they are included to insure none are missed.