

THE “NEW” NEWLYWEDS: MARRIAGE AMONG THE ELDERLY, SUGGESTIONS TO THE ELDER LAW PRACTITIONER

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Amid reports of a growing senior population and a lengthening average lifespan, Joanna Grama explores the peculiar problems and pitfalls of romantic relationships while advancing in years. Various deterrents to marriage are of particular concern to seniors, including problems of wealth preservation from the significant other, avoidance of the other's financial obligations related to health care and other debts, protection of pension benefits from previous marriages, protection against intestate succession, and interactions with adult children. Ms. Grama notes that alternatives to marriage, such as cohabitation, are gaining cultural acceptance and possess certain advantages that make them appear to be preferable at first glance. Yet such alternatives, she argues, pose problems of their own, though not necessarily insurmountable. Within the bonds of marriage, Ms. Grama maintains, effective means already exist that are sufficient to adapt a relationship to the special challenges and constraints imposed by advanced age. These include prenuptial agreements, powers of attorney, wills, and advance directives. Even if such legal devices may seem unnecessary to most people contemplating “tying the knot,” Ms. Grama advises the elder law practitioner to give such options special attention in counseling elderly couples.

Whenever they're together, their hands unconsciously reach for each other. Their eyes flash when they talk about the spark at their first meeting, 19 months ago. And they've been inseparable

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ever since. Imagine what this giddy couple will be like in another year or so—say, when he's 90 and she's 87.¹

I. Introduction

There seems to be a trend of remarriage among the elderly.² In fact, marriage among the elderly is already a popular Internet topic,³ as well as a popular media subject.⁴ This trend promises to increase with the growth of the elderly population. As a whole, between 1990 and 1994, the elderly population has increased by a factor of eleven,⁵ while the total population has only tripled in that same amount of time.⁶ Under population predictions by the United States Census Bureau, the number of elderly will increase to eighty million in the next century.⁷ This increasing elderly population will face a growing number of legal questions,⁸ and issues such as marital planning may assume more importance.⁹

Late-in-life marriages carry with them their own set of problems, such as how to protect the lifetime accumulations of wealth of both partners,¹⁰ concerns about medical care and other long-term medical obligations,¹¹ the possible loss of a widow's pension upon remarriage,¹² and the input and concerns of adult children of prior

1. Steve Carney, *Never Too Late for Love: Two Show There's No Age Limit on Romance*, L.A. DAILY NEWS, Jan. 24, 1999, at N1.

2. See Barbara Quirk, *Stepkids May Reject Caring for the Elderly*, CAPITAL TIMES, Nov. 10, 1998, at 1D. See generally Elizabeth Seay, "I Do," *But First. . . Prenuptial Agreements Are Rarely Easy to Discuss. That's What Makes Them So Crucial*, WALL ST. J., June 1, 1998, at R7; Katherine Spitz, *It's No Waltz But Don't Dance Around the Subject of Family Finances When Remarrying*, CHICAGO TRIB., Jan. 25, 1999, at 1; Liza M. Burby, *Why Couples Who Have Lived Together a Long Time Decide to Get Married*, NEWSDAY, Nov. 3, 1998, at B13.

3. See Seay, *supra* note 2; see also *Medical Obligations May Be a Reason Not to Marry* (visited Aug. 23, 1998) <<http://www.flyingsolo.com/files/elddis/geneld/General26.html>>; *What Can Happen When Elderly People Marry Without a Plan*, (visited Sept. 23, 1998) <<http://www.flyingsolo.com/files/di..ep/12-02-97-Elderly-Remarriage.html>>.

4. See *supra* note 2.

5. See FRANK B. HOBBS & BONNIE L. DAMON, U.S. DEP'T OF COMMERCE, 65+ IN THE UNITED STATES 2-2 (1996).

6. See *id.*

7. See *id.* This rise will be primarily due to the aging of the Baby-Boom generation. See *id.*

8. See LAWRENCE A. FROLIK & RICHARD L. KAPLAN, *ELDER LAW IN A NUTSHELL* 3 (2d ed. 1999).

9. See HOBBS & DAMON, *supra* note 5, at vii.

10. See Seay, *supra* note 2, at R7.

11. See *Medical Obligations May Be a Reason Not to Marry*, *supra* note 3.

12. See *Effect of Divorce, Remarriage or Annulment on Widow's Pension or Bonus*

relationships.¹³ As a result, elderly couples considering marriage may turn to attorneys to help them protect their interests in these areas, both individually and with respect to their own families.¹⁴ To respond to these needs, attorneys must be aware of the options available to their elderly clients concerning their new relationship and which option will best serve their clients.

This note describes some of the significant deterrents to remarriage among the elderly, as well as options available to the elderly to help combat these problems and enjoy marital bliss. While a suggestion to practitioners concerning marital planning for the elderly may at first seem a trivial topic for a law journal, the simple truth is that the increasing elderly population¹⁵ is facing more legal issues,¹⁶ including what to do upon remarriage.

Part II of this note sets forth some background information regarding elderly remarriage, including some of the factors that both the elderly and their attorney should think about when discussing remarriage. These include the relative wealth of the two parties, medical and financial obligations, pension benefits, living arrangements, inheritance issues, and the wishes of adult children. This list is not exhaustive, but instead provides a logical starting point for the elder law practitioner to consider when advising older clients who wish to marry.

Part III looks at the options available to the elderly couple considering marriage and assesses the viability of each option. Part IV proposes a checklist for the elder law practitioner to utilize when conducting estate planning for elderly clients considering a long-term relationship. Through careful pre-marital planning with their attorney, elderly newlyweds can enjoy their marriage with a minimum of hassle and confusion.

II. Background

More elderly men than women are married.¹⁷ Factors contributing to this statistic are higher remarriage rates among elderly

Rights or Social Security Benefits, 85 A.L.R.2D 242, 246 (1997).

13. See Seay, *supra* note 2, at R7.

14. See *id.*

15. See HOBBS & DAMON, *supra* note 5, at v.

16. See FROLIK & KAPLAN, *supra* note 8, at 3.

17. See HOBBS & DAMON, *supra* note 5, at vi.

men and the life expectancy gender gap. In 1993, elderly men were almost twice as likely to be married as were elderly women.¹⁸ Statistical evidence shows that this is in part due to the fact that men are more likely to remarry following a divorce¹⁹ or the deaths of their wives.²⁰

The possibility of remarriage is also on the rise because of the increasing longevity of Americans.²¹ In 1991, the average life expectancy in the United States reached 75.5 years.²² Generally, women can expect to live seven years longer than men.²³ Consequently, widows are more common than widowers.²⁴

The gender gap in life expectancy, the fact that more elderly men than women remarry after divorce or death of a spouse, and the fact that there are more elderly women than elderly men²⁵ put elderly women at a (re)marital disadvantage. Social commentators note this disadvantage and state that women will need to be more assertive if they wish to find a male companion in their golden years.²⁶

While it is always nice to share one's life with a special person, companionship assumes more importance for women in the "golden years," when health and age take their toll. Since women are more

18. *See id.* at 6-1.

19. *See id.* The overall divorce rate among the elderly is low, with only about 5% of the elderly population in 1993 divorced. When compared to the rest of the population, remarriage after divorce is low for both elderly men and women; however, the disparity between elderly men and women is striking. In 1990, only four out of one thousand divorced elderly women remarried compared with nineteen out of one thousand elderly men. Remarriage rates among the middle-aged (age forty-five to sixty-four) for this same time show that thirty per one thousand middle-aged divorced women and sixty-seven per one thousand middle-aged divorced men remarried. *See id.*

20. *See id.*

21. *See id.* at 3-1.

22. *See id.*

23. *See id.* For example, in 1993, 47% of elderly women were widowed, compared to only 14% of elderly men. *See id.* at 6-3 tbl.6-2. This trend of female widowhood does not look like it will end any time soon. It is estimated that women of the Baby-Boom Generation will experience more years of being widowed (or divorced). *See id.* at 6-5.

24. Women are far more likely than men to be widowed, regardless of their age, race, or ethnicity. *See id.* at 6-4.

25. *See id.* at 2-10. For example, elderly men were outnumbered by elderly women two to three in 1994. *See id.*

26. *See* Carney, *supra* note 1. Anecdotes about the "casserole brigade" (the mass of older women who bring casseroles to comfort recently widowed men), as well as stories of older men in retirement homes who are "hounded" to death by members of the opposite sex are not uncommon. *See id.*

likely to be widowed than men,²⁷ and less likely to remarry,²⁸ they are also more likely to live alone²⁹ and less likely to have a spouse to lean upon for care-giving assistance in old age.³⁰ If necessary, care-giving duties may fall to older adult children in the absence of an able spouse.³¹ Living alone also has other drawbacks, including increased depression and isolation.³²

Despite the playing of the numbers game, which works exclusively to the detriment of elderly women, other deterrents to marriage affect both elderly men and elderly women.

A. Protecting and Preserving Relative Economic Wealth

Perhaps the most important factor for both the attorney and his or her elderly client to consider before remarriage is how to protect the client's premarital wealth.³³ Protection of this wealth has assumed new importance since the economic position of the elderly as a group has improved since 1970.³⁴ For example, the median income of the elderly more than doubled between 1957 and 1992.³⁵ According to a survey done in 1995, households headed by people aged fifty-five to sixty-four had the highest median net worth of any other age group in the study.³⁶ Typically accumulated over a lifetime, the net worth of the elderly includes property (homes, land, autos, and other collectibles, such as the family butterfly collection), investments, and

27. See *supra* text accompanying note 24.

28. See *supra* note 18.

29. See HOBBS & DAMON, *supra* note 5, at 6-5.

30. See *id.* at 6-1. Recent studies show that spouses in general represent 36% of total caregivers. Wives in particular account for 23% of all caregivers to the elderly who are not institutionalized. See *id.*

31. Adult daughters constitute 29% of the caregivers for the elderly. See *id.* at 6-1.

32. See *id.* at 6-8. It is comforting to note, however, that the U.S. Department of Census reports that those seniors living alone, and women in particular, are developing new interests and social networks for support in old age, and lean more heavily on community services than those seniors who have spousal companionship. See *id.* at 6-8.

33. It is perfectly reasonable that the elderly would seek to protect their assets upon remarriage; to avoid statutory chains of inheritance, the effect of a late-in-life divorce, or to ensure that the assets will be available to pass on to children of previous marriages.

34. See ECONOMICS & STATISTICS ADMIN., U.S. DEP'T OF COMMERCE, WE THE AMERICAN ELDERLY 9 (1993).

35. See HOBBS & DAMON, *supra* note 5, at vi.

36. See Seay, *supra* note 2, at R7. The median net worth of these elderly householders is more than fifteen times that of a householder under the age of thirty-five. See HOBBS & DAMON, *supra* note 5, at vi.

pensions.³⁷ Home ownership constitutes a significant portion of this wealth, as Americans put sixty percent of their assets into their homes.³⁸ Often this net worth is static,³⁹ because the elderly are less likely to be earning income from employment.⁴⁰ Thus, a client's worries about protecting assets, particularly the home, are not entirely unfounded.

Unfortunately, there are situations in which a new spouse takes advantage of the wealth brought into the new marriage by the other spouse. Flying Solo, an Internet service for the divorced, elderly, and disabled, finds that more elderly Americans have entered into later-in-life marriages, only to find that their new relationship is less than perfect where finances are concerned.⁴¹ In one case of remarriage, a new husband coerced his wife into putting his name on the deed to her home, the one which she had previously owned with her first husband.⁴² The husband later used his newfound asset as the basis of a new will benefiting his own children from a prior marriage.⁴³ While stories abound in which a new spouse falls victim to an unscrupulous and financially savvy spouse,⁴⁴ there are other ways in which the assets from a previous marriage can be drained.

37. See Seay, *supra* note 2, at R7; see also HOBBS & DAMON, *supra* note 5, at 4-24. "The elderly have had longer to accumulate assets." *Id.* at 4-23.

38. See ELIZABETH WARREN & JAY LAWRENCE WESTBROOK, *THE LAW OF DEBTORS AND CREDITORS* 155 (1996). This wealth from home ownership correlation is particularly poignant for the elderly, for almost 90% of persons over age fifty own the homes that they live in. See *id.*

39. Income is static, rather than decreasing, because money that was formerly attributable to employment income is primarily replaced by social security and other retirement-related benefits. See HOBBS & DAMON, *supra* note 5, at 4-8, 4-14.

40. See HOBBS & DAMON, *supra* note 5, at 4-1. The elderly comprise only a small proportion of the labor force, in part due to early retirement incentives and rising life expectancies. See *id.* at 4-2.

41. See *What Can Happen When Elderly People Marry Without a Plan*, *supra* note 3.

42. See *id.*

43. During a subsequent hospital stay, the wife was informed that her husband had changed his will: If the husband died first, the wife could live in (her own) home until her death, at which point the house would be sold and 50% of the proceeds from the sale would go to the husband's children from his first marriage. This is after the husband sold his own home, earmarking those funds for his own children. See *What Can Happen When Elderly People Marry Without a Plan*, *supra* note 3.

44. See *id.*

B. Avoiding Medical and Financial Obligations

For elderly couples thinking about marriage, the possibility of being held responsible for a spouse's medical expenses may be cause to put the nuptials on hold.⁴⁵ The elderly are the primary consumers of health care products and services.⁴⁶ In addition, because the probability of chronic illness increases with age,⁴⁷ the elderly are more likely to have chronic conditions which require prolonged hospital stays.⁴⁸ Uncertainty over medical expenditures takes on new meaning during old age, as health, life expectancy, and a possible need for long-term health care become additional factors to consider upon remarriage.⁴⁹

Hospitalization accounts for most personal health care expenditures for the elderly, followed by physician's services and nursing home expenditures.⁵⁰ While public funds like Medicare and Medicaid pay about three-fifths of elderly medical bills,⁵¹ elderly individuals or their families still need to pay a significant portion of the bill. Possible responsibility for a new spouse's medical obligations may be a disincentive to marriage for elderly couples with limited incomes, especially if the couple lives in a state with statutorily imposed financial responsibility. One such state is Illinois, where spouses are held jointly and severally liable for the expenses of the family,⁵² which includes medical expenses.⁵³

While medical obligations and their financial repercussions may weigh against the decision to marry, so might the fear of being held liable for a spouse's nonmedical debt.⁵⁴ Such a fear is to some extent unfounded because generally one is not liable for debt which one's spouse acquired *before* the marriage.⁵⁵ However, in some states and

45. *See id.*

46. *See* Lawrence A. Frolick & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 713 (1991).

47. *See* HOBBS & DAMON, *supra* note 5, at 3-17.

48. *See* Frolick & Barnes, *supra* note 46, at 713.

49. *See* HOBBS & DAMON, *supra* note 5, at 4-23.

50. *See id.* at 3-23, 3-25.

51. *See id.*

52. *See* 750 ILL. COMP. STAT. ANN. 65/15(a)(1) (West 1998).

53. *See* Fleming v. Wabash R. Co., 8 F.R.D. 419 (E.D. Ill. 1948); Fortner v. Norris, 153 N.E.2d 433 (Ill. 1958).

54. *See* AMERICAN BAR ASS'N, GUIDE TO FAMILY LAW 29 (1996) [hereinafter GUIDE TO FAMILY LAW].

55. *See id.* Of course, both spouses will be liable for debt incurred during the marriage that both have cosigned, as well as for debt that may be considered a family expense under statute or a necessary expense under the common-law

circumstances, a debt incurred by a spouse before marriage may be collected against the marital property of the new marriage.⁵⁶

The best way to avoid joint responsibility for debt is to keep property under each partner's separate name and to avoid the comingling of assets which are purchased during the marriage.⁵⁷ Premarital bankruptcy for the debtor spouse may be appropriate if the nondebtor spouse wishes to avoid being held liable for the premarriage debt of the debtor spouse.⁵⁸

C. Protecting Pension Income

Pensions are an important source of income for the elderly⁵⁹ and become critically important in determining retirement income.⁶⁰ For some individuals, pensions constitute the largest monetary asset after the home.⁶¹ In 1992, the average income received from pensions was \$8,278.⁶² Private pension plans are governed by the Employee Retirement Income Security Act (ERISA).⁶³ ERISA creates uniform national standards for pension plans⁶⁴ and governs such issues as the determination of retirement age, spousal benefits, and employee benefit membership requirements.⁶⁵

ERISA requires all vested pension plans to offer spousal benefits for couples married for at least one full year before retirement or death unless the couple gives a written waiver.⁶⁶ State law governs

doctrine of necessities. *See id.*

56. *See id.* The results may be especially odd if the couple resides in a community property state. For example, in Texas, a creditor may attach not only a debtor spouse's separate property, but may also attach all property over which the spouse has sole or joint management power. This includes marital property. *See* TEX. FAM. CODE §§ 3.201, 3.202 (West 1997).

57. *See* GUIDE TO FAMILY LAW, *supra* note 54, at 30.

58. *See* AMERICAN BAR ASS'N, YOUR LEGAL GUIDE TO MARRIAGE AND OTHER RELATIONSHIPS 23 (1989) [hereinafter YOUR LEGAL GUIDE TO MARRIAGE AND OTHER RELATIONSHIPS].

59. *See* HOBBS & DAMON, *supra* note 5, at 4-14.

60. *See* PETER J. STRAUSS & NANCY M. LEDERMAN, THE ELDER LAW HANDBOOK 220 (1996).

61. *See* GUIDE TO FAMILY LAW, *supra* note 54, at 84.

62. *See* HOBBS & DAMON, *supra* note 5, at 4-14.

63. *See* the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1242 (1988).

64. *See* ALISON BARNES ET AL., COUNSELING OLDER CLIENTS 6-1, 6-2 (1997).

65. *See id.* at 6-2.

66. *See* 29 U.S.C. § 1055. If the employee spouses were to die without vested pension rights, the spouse will probably receive nothing. *See id.*

spousal rights in divorce cases.⁶⁷ Typically, a decree of divorce results in no survivor's benefits for the pensioner's spouse because the divorce terminates the marital relationship, never allowing the one-time spouse to become a beneficiary.⁶⁸

While pension benefits are important to both elderly men and women for income purposes, they may be even more important to elderly widows and may be a factor in determining whether to remarry. Typically the remarriage of a widow entitled to her deceased husband's pension benefits has had the effect of terminating the widow's pension rights.⁶⁹ For elderly women, pension income is extremely important. In 1992, the median yearly income from pension for nonmarried (including widows and divorcees) elderly women was \$2,620,⁷⁰ while the total income earned from all sources was only \$8,189.⁷¹ Men earn almost twice as much as women in pension⁷² and average a total income of \$14,548 per year.⁷³ Despite the fact that the fractional percentage of pension to income is similar for both elderly men and women, in absolute terms the marginal value of the pension dollar is higher for elderly women, who already have a proportionately smaller income than do elderly men. Fear of losing this source of income may weigh heavily against a prospective marriage. On the other hand, it is worth noting that a widow may be entitled to an ERISA-required survivor option under her new husband's pension plan.⁷⁴

D. Confronting Inheritance Issues

Elderly couples may also be concerned about inheritance issues when contemplating remarriage.⁷⁵ For example, if an elderly person

67. See STRAUSS & LEDERMAN, *supra* note 60, at 225-26.

68. See *Effect of Divorce, Remarriage or Annulment on Widow's Pension*, *supra* note 12, at 243.

69. See *id.* at 246. Although this section primarily concerned the pension value and the possible effect of loss of pension on women, it is equally important to point out that loss of the survivor benefit from a wife's pension plan could also adversely effect a widower.

70. See HOBBS & DAMON, *supra* note 5, at 4-15.

71. See *id.* at 4-8.

72. See *id.* at 4-15.

73. See *id.* at 4-8.

74. See LAWRENCE A. FROLICK & MELISSA C. BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT 7-6* (1992). However, this benefit may not be as large as the benefit afforded to the widow under her late husband's plan.

75. See generally Seay, *supra* note 2, at R7.

with children remarries and does not have a valid will upon death, intestate succession can cause as much as half of that person's lifetime assets to go to the surviving spouse.⁷⁶ The results of intestate succession may be particularly undesirable for remarried elderly couples, as they may have children from previous marriages whom they wish to provide for and protect.⁷⁷

Unfortunately, the alternative to intestate succession is an emotionally charged issue in blended families.⁷⁸ Disputes often arise when parents change their wills to reduce or remove the amount left to children from a first marriage, often in order to include stepchildren.⁷⁹ Other arguments may revolve around the unequal treatment of siblings and stepsiblings in the will⁸⁰ or the preferential treatment of a new spouse.⁸¹

Drafting a will is sometimes made even more complicated by the operation of state statute. Some states have provisions preventing a person from disinheriting their spouse.⁸² For example, in some states a spouse may renounce a will that disinherits her and take a statutorily predetermined share of the estate.⁸³ Conversely, some states have provisions allowing spouses to waive their right to a share of the other spouse's property upon death. Although this waiver is usually done through a prenuptial agreement,⁸⁴ other mechanisms

76. See *id.*; see also UNIF. PROBATE CODE 2-102 (1990); 755 ILL. COMP. STAT. ANN. 5/2-1(a)-(c) (West 1998).

77. See Seay, *supra* note 2, at R7.

78. See Spitz, *supra* note 2, at 1.

79. See Jill Insley, *Money Matters: Look Happy Don't They? But If They Hadn't Made New Wills After Their Wedding, the Children of Their First Marriages Could Have Been Left High and Dry; Jill Insley on Inheritance*, THE OBSERVER, Aug. 23, 1998, at 12.

80. See Waltrina Stovall, *Left Out: Disinheriting Someone Can Leave Deep Scars on a Family*, DALLAS MORNING NEWS, Nov. 23, 1998, at 1C. Treating natural children and stepchildren differently (and sometimes similarly) in a will does cause discord, with relationships between the children deteriorating after the parents have died. See *id.*

81. See *id.*

82. See STRAUSS & LEDERMAN, *supra* note 60, at 180.

83. See 755 ILL. COMP. STAT. ANN. 5/2-8 (West 1992) (stating that a surviving spouse may renounce a testator's will and claim her statutory share whether or not the will contained any provision for the benefit of the surviving spouse).

84. See STRAUSS & LEDERMAN, *supra* note 60, at 181. Incidentally, a spouse may also waive his or her rights to the other spouse's pension plan. ERISA requires that the spouse execute a signed and notarized document that designates another beneficiary, who cannot be changed without the consent of the waiving spouse. See 29 U.S.C. § 1055(c)(2)(A)(ii) (1988). Note however, that this type of waiver cannot be accomplished through a general waiver in a prenuptial agreement. See *Hurwitz v. Sher*, 982 F.2d 778 (2d Cir. 1992).

exist which accomplish the same result. For example, in Illinois, any person with an interest in the property of another by virtue of will or statute may disclaim that interest in whole or in part.⁸⁵ The disclaimer must be written, and if the person through whom the interest exists has already died, it must be filed with the court.⁸⁶

An elderly couple may address potential inheritance issues, such as how much a late-in-life spouse should inherit, provisions for support of the spouse, and provisions for adult children, through a valid will. Unfortunately, studies show that a majority of people die intestate.⁸⁷ However, these same studies also show that older, wealthier people are more likely to have a will.⁸⁸

E. Addressing the Concerns of Adult Children

The wishes of adult children also might weigh heavily on an elderly parent's decision to remarry, especially because the elderly often rely on their adult children. The elder's family often assists and advises the elderly family member.⁸⁹ Most adult children stay actively involved in the lives of their elder parents: they see their parents regularly, provide financial support when needed, and live close to their parents.⁹⁰ Due to this close interaction, the blessings of their adult children may be important to an elderly parent considering remarriage.

When seniors remarry, their adult children often worry.⁹¹ An older parent's remarriage does not always bring out the best in adult children, who, upon "threat" of marriage may "exhibit an attitude" toward the prospective spouse.⁹² Adult children may be particularly concerned and vocal about a remarriage⁹³ if they think that the new spouse is marrying their parent solely for that parent's wealth, is taking advantage of their parent, or that their own interests as

85. See 755 ILL. COMP. STAT. ANN. 5/2-7(a).

86. See 755 ILL. COMP. STAT. ANN. 5/2-7(a), (b), (c).

87. See JESSE DUKEMINIER & STANLEY M. JOHNSON, WILLS, TRUSTS, AND ESTATES 67 (5th ed. 1995).

88. See *id.*

89. See BARNES, FROLIK & WHITMAN, *supra* note 64, at 3-1.

90. See Usha Narayanan, Note, *The Government's Role in Fostering the Relationship Between Adult Children and Their Elder Parents: From Filial Responsibility Laws to...What?, A Cross-Cultural Perspective*, 4 ELDER L.J. 369 (1996).

91. See Seay, *supra* note 2, at R7.

92. See Burby, *supra* note 2, at B13.

93. See Seay, *supra* note 2, at R7.

children from a prior marriage are being neglected.⁹⁴ Unfortunately, these concerns of adult children may add to a parent's feelings of disloyalty to a previous spouse, particularly in cases where remarriage follows death,⁹⁵ and may negatively influence a parent's decision to marry.⁹⁶

Other issues about a late-in-life marriage that may concern an adult child include who will care for ailing parents and stepparents.⁹⁷ Children and stepsiblings may not agree on who should give care to ailing parents and how that care should be handled.⁹⁸ At times, adult children may try to convince a stepsibling to remove their ailing parent from the marital home in order to relieve their own parent of caregiving duties.⁹⁹ Adult children may also begrudge a stepparent for their own parent's finances that are spent for that stepparent's care.¹⁰⁰

Lest adult children be considered greedy would-be heirs who only care about their inheritance, it is important to remember that most adult children do care about their parents and want what is in their parents' best interests. Remarrying parents who sit down to discuss wills, the financial ramifications of the marriage, and future caregiving issues may allay the fears of adult children, soothe hurt feelings, and help the adult children adjust to the idea of a parent's remarriage.¹⁰¹

III. Analysis

An attorney does have options to present to the elderly client considering marriage, although some options better address the potential deterrents to elder marriage than do others. Solutions range from merely living together (perhaps least desirable) to getting married with a multitude of attached legal documents (perhaps the

94. *See id.*

95. *See Carney, supra note 1, at N1.*

96. *See Medical Obligations May Be a Reason Not to Marry, supra note 3.*

97. *See Quirk, supra note 2, at 1D.*

98. *See id.*

99. *See id.*

100. *See id.*

101. *See id.; see also Burby, supra note 2.* "It would be unfair to suddenly get married without giving the offspring a chance to process things out. It brings up issues for the child, no matter how they intellectualize that this is a good thing. The better you communicate, the better the adjustment." *Id.*

most advantageous, but least convenient). This section addresses some of the options available to marriage-minded elder couples.

A. Living Together

At times the elderly may think that the many deterrents to marriage are significant enough to thwart possible marriage plans.¹⁰² These elderly couples may find living together (cohabitation) a satisfactory substitute for marriage.¹⁰³ Due to changes brought on in society by the women's movement, urbanization, the disappearance of the stigma of cohabitation, and technological developments, cohabitation has become generally accepted,¹⁰⁴ and is becoming increasingly popular as a precursor to marriage.¹⁰⁵ Cohabitation is not usually sanctioned by the state,¹⁰⁶ meaning that the participants are not permitted the rights and benefits of marriage.¹⁰⁷ For example, couples who are merely living together have no succession rights should one partner die intestate,¹⁰⁸ and they have no legal right to make medical decisions for one another.¹⁰⁹

In some sense, denial of the rights and obligations of married couples is perfect for the elderly couple seeking to avoid the complications of marriage. For example, in a cohabitation situation, partners typically take no responsibility for one another's debts.¹¹⁰

102. See *Medical Obligations May Be a Reason Not to Marry*, *supra* note 3. (Couple chose to cohabitate due to potential medical bills and issues with children.) See also *Carney*, *supra* note 1. (Elderly couple chose not to marry in light of belief that marriage could provide them with nothing that they did not already have.)

103. See generally *Medical Obligations May Be a Reason Not to Marry*, *supra* note 3. See also JOHNETTE DUFF & GEORGE G. TRUITT, *THE SPOUSAL EQUIVALENT HANDBOOK* 29 (1991).

104. See SAMUEL GREEN & JOHN V. LONG, *MARRIAGE AND FAMILY LAW AGREEMENTS* 159 (1984). However, societal acceptance of cohabitation further points out that there is a lack of permanence in relationships today.

105. See TONI IHARA & RALPH WARNER, *THE LIVING TOGETHER KIT: A DETAILED GUIDE TO HELP UNMARRIED COUPLES DEAL WITH LEGAL REALITIES* 1/4 (1997).

106. See GREEN & LONG, *supra* note 104, at 186. Criminal laws were also enacted to discourage living together. For example, Illinois has laws against both fornication and adultery. See 720 ILL. COMP. STAT. ANN. 5/11-7, 5/11-8 (West 1992). However, laws such as these are very rarely enforced. See GREEN & LONG, *supra* note 104, at 179.

107. See YOUR LEGAL GUIDE TO MARRIAGE AND OTHER RELATIONSHIPS, *supra* note 58, at 18.

108. See IHARA & WARNER, *supra* note 105, at 11/2.

109. See *id.* at 3/16.

110. See *id.* at 3/3. However, if the couple mingles their finances, the chances that one cohabitant could be liable for the debts of another increases. See *id.*

This is particularly true if both partners take pains to keep their finances and property separate.¹¹¹ Nonliability for debt also carries over into the medical arena. One partner will not be held responsible for the medical debts of the other.¹¹² Further, living together helps each partner maintain their own economic wealth, provided that the couple does not make any decision to the contrary.

In addition to solving inheritance concerns for the elderly, cohabitation may also quiet concerns from adult children. Cohabitation allows partners to avoid statutory chains of inheritance, meaning that each partner need not worry about their property passing intestate to someone other than their children or blood relatives.¹¹³ Without a will providing for a different outcome, a surviving partner will inherit nothing from the estate of the deceased partner.¹¹⁴ Although this might relieve partners who wish to maintain totally independent estates, it does not apply to situations in which one partner does wish to care for the welfare of the other after the first partner's death. In these types of situations, both parties most certainly need valid wills.

Another problem with cohabitation is that domestic partners may be unable to make medical decisions on behalf of one another in case of illness.¹¹⁵ This may be of particular concern for the elderly, who have an increased risk of chronic illness.¹¹⁶ If one cohabiting partner is seriously ill and unable to make medical decisions on his or her own behalf, doctors usually turn to the next-of-kin (blood relative) for a decision regarding treatment.¹¹⁷ For an elderly person in this situation, despite the presence of a domestic partner, doctors will typically turn to an adult child.¹¹⁸ Without some sort of health care power of attorney,¹¹⁹ a domestic partner, who may be more aware of the medical wishes of his or her ailing partner, is unable to make any health care decisions for the ailing partner.

111. *See id.*

112. *See id.* at 3/14.

113. *See id.* at 11/2.

114. *See id.*

115. *See id.* at 3/16.

116. *See* HOBBS & DAMON, *supra* note 5, at 3-17.

117. *See* IHARA & WARNER, *supra* note 105, at 3/16.

118. *See* GUIDE TO FAMILY LAW, *supra* note 54, at 9.

119. *See* discussion *infra* notes 192-97 and accompanying text.

One way to avoid the pitfalls of living together is for an elderly couple to enter into a cohabitation agreement.¹²⁰ Cohabitation agreements can help protect domestic partners that do not have the same rights and protections as married people.¹²¹ Such an agreement constitutes proof that there is an agreement to live together between the two parties.¹²² Typical cohabitation agreements encompass many different living arrangements.¹²³ Some items may include decisions to keep property separate,¹²⁴ or to combine property acquired after the partners begin living together. Such agreements also may provide for daily living issues, like the division of household expenses, the division of housework, plans for children,¹²⁵ and who will take care of pets.¹²⁶ Some couples may also choose to include in the agreement provisions for what happens upon the death of a partner.¹²⁷

Like any contract, a cohabitation agreement should be in writing for maximum legal protection.¹²⁸ In addition, cohabitation agreements for elderly couples should be supported with springing durable power of attorney and health care power of attorney documents, which would allow cohabiting partners to make medical decisions for one another when and if needed.¹²⁹

B. Common-law Marriages

Common-law marriages differ from cohabitation in that under the former the couple had intended to live together as husband and wife, but for some reason failed to satisfy the statutory requirements for contracting a valid “traditional” marriage, such as not obtaining a marriage license.¹³⁰ In jurisdictions that recognize common-law

120. See GREEN & LONG, *supra* note 104, at 208. A cohabitation agreement is very similar to a prenuptial agreement, which will be discussed in a later section.

121. See *id.*

122. See *id.*

123. See IHARA & WARNER, *supra* note 105, at 5/2.

124. If a cohabitation agreement includes real property, it is probably in the best interests of both partners if the agreement is filed at the county recorder's office. See *id.* at 5/5.

125. Although probably not an issue facing the elderly, this is included for illustrative purposes.

126. See IHARA & WARNER, *supra* note 105, at 5/3.

127. See *id.* at 5/5. Such a provision will help clear ambiguities in wills and provide guidance if a will is contested. See *id.*

128. See GUIDE TO FAMILY LAW, *supra* note 54, at 6.

129. See discussion *infra* notes 187-190 and accompanying text.

130. See GREEN & LONG, *supra* note 104, at 80. Statutory requirements in most states include the couple obtaining a marriage license, and some sort of

marriages, common-law marriage is as valid in the eyes of the law as is a traditional (ceremonial) marriage.¹³¹ Once validly established, a common-law marriage has the same rights of inheritance, distribution, and property rights as does a traditional marriage.¹³²

Perhaps the main difficulty with common-law marriages is that not all states allow couples to enter into them.¹³³ The states that currently recognize common-law marriages include Alabama, Colorado, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina and Utah.¹³⁴ There are generally three requirements for a common-law marriage:¹³⁵ an agreement to marry, consummation of the agreement through constant and exclusive cohabitation, and publicly holding out as husband and wife.¹³⁶ Evidence of a common-law marriage includes “joint tax returns, joint cemetery lots, joint bank accounts and savings accounts, joint buying and selling of property, co-executing deeds of trust, sharing care, work, home and having children.”¹³⁷

Like cohabitation, a common-law marriage may be a less than optimal solution for an elderly client. Perhaps the largest criticism of the common-law marriage is its lack of recognition in all states. If an elderly couple seeks to create a common-law marriage, they need to be in a jurisdiction that allows them to do so. Another defect of the common-law marriage, particularly applicable to the elderly, is the considerable amount of time that it takes to establish a common-law marriage.¹³⁸ Because the life expectancy of an elderly person is obviously shortened, it may be difficult for the couple to establish the requisite intent to enter into a common-law marriage, which is typically determined by the length of time that the couple spent together. Although there is not a specific length of time that the

solemnization of the marriage. *See id.*

131. *See* Faith Mullen, *Common Problems with Common Law Marriages*, ELDER LAW FORUM (AARP), Jan./Feb. 1995, at 5.

132. *See id.*

133. *See id.* However, under the conflict of laws principle, a common-law marriage validly contracted in a state that recognizes common-law marriage will be enforced in all states unless there is a strong public policy reason to the contrary.

134. *See* IHARA & WARNER, *supra* note 105, at 2/5; *see also* GREEN & LONG, *supra* note 104, at 163. Utah has actually codified the elements of a “common-law” marriage. *See* 30 UTAH CODE ANN. § 1-4.5 (1996).

135. *See* Mullen, *supra* note 131, at 5.

136. *See* GREEN & LONG, *supra* note 104, at 80.

137. Mullen, *supra* note 131, at 5.

138. *See* discussion *infra* notes 139-40 and accompanying text.

couple needs to be together to establish a common-law marriage,¹³⁹ length of time together does go toward showing intent to enter into a common-law marriage, should the marriage ever be questioned in court.¹⁴⁰ If a will or intestate succession is challenged by the heirs, then this intent element may play a key role in inheritance disputes.

There are other drawbacks to the common-law marriage as it applies to the elderly. Because common-law marriage confers all the rights and responsibilities of a traditional marriage, participants in a valid common-law marriage are held financially responsible for one another. A common-law marriage also triggers statutory chains of inheritance in case one spouse dies without a will, possibly leaving children from previous marriages unprotected.

Although a common-law marriage may involve some difficulties, once validly established, it provides the elderly couple with all of the rights and obligations incident to marriage.¹⁴¹ For example, common-law spouses are required to support one another,¹⁴² and can also carry out tort actions on behalf of the other spouse.¹⁴³ In addition, there is no such thing as a “common-law divorce,” so participants in a valid common-law marriage also have the “right” to a formal divorce.¹⁴⁴ Unlike cohabitation arrangements, which do not have supporting documents outlining medical decisionmaking, a common-law marriage does allow each spouse to make medical decisions for one another in time of illness.

C. “Traditional Marriages”

In isolation, the traditional marriage, unsupported by any other legal documents, seems to be filled with every possible disadvantage to the elderly, even while avoiding some of the drawbacks of living together and the common-law marriage.

Traditional marriage requirements typically include capacity to contract, age requirements, a license, and solemnization of the

139. See IHARA & WARNER, *supra* note 105, at 2/4. The Utah code does not specify a minimum duration in which a common-law marriage is established. See 30 UTAH CODE ANN. § 1-4.5.

140. See IHARA & WARNER, *supra* note 105, at 2/4.

141. See HARRY D. KRAUSE, *FAMILY LAW IN A NUTSHELL* 81 (1995).

142. See *id.* at 110.

143. See *id.* at 138.

144. See ROBIN D. LEONARD & STEPHEN ELIAS, *FAMILY LAW DICTIONARY* 34 (1990).

marriage.¹⁴⁵ States may impose a host of additional regulations on marriage if they so choose, provided that it does not subordinate the rights of the individual.¹⁴⁶ Once validly entered into, the traditional marriage functions identically to a validly contracted common-law marriage.

For example, like a valid common-law marriage, each spouse in a traditional marriage is responsible for the financial obligations of the other.¹⁴⁷ Couples usually combine their assets, which means that the premarital wealth of each spouse usually becomes intertwined. Should a spouse die intestate, statutory chains of inheritance come into play, perhaps dividing the decedent's estate in an unintended way. A traditional marriage will also probably heighten the concerns of adult children, who will worry about a parent as they embark on a new marital relationship.¹⁴⁸

Unlike cohabiting partners, who may not have made prior arrangements for health care, spouses in a traditional marriage are automatically able to make decisions on one another's behalf in the event of a serious medical illness. In addition, unlike a common-law marriage, where intent is a large factor in determining the existence of a marriage, the intent behind a traditional elderly marriage cannot be challenged in court simply because the couple went through the formalities of getting a marriage license and solemnizing the marriage.

D. Marriage Supported by Other Legal Documents

Although a traditional marriage is not necessarily a cure to the elders' concerns about remarriage, a well-thought-out marriage supported by legal documentation can allow elders the happiness of a worry-free marriage. When legal documents such as prenuptial agreements, current wills, powers of attorney, and advance directives are employed by the elderly in conjunction with a traditional marriage, they take care of most of the elders' concerns. For example, a prenuptial agreement can deal with property and financial issues, as well as preplan inheritance concerns.¹⁴⁹ A current will also helps to

145. See KRAUSE, *supra* note 141, at 110.

146. See *id.* at 42.

147. See *supra* text accompanying notes 139-40.

148. See Seay, *supra* note 2, at R7.

149. See KRAUSE, *supra* note 141, at 94.

make the desires of the testator with regard to inheritance perfectly clear. Powers of attorney and advance directives help make known what the drafting party wants done in cases of incapacitation and medical illness.¹⁵⁰

1. PRENUPTIAL AGREEMENTS

Historically, the prenuptial agreement was used between prospective spouses to waive interests in the property of the other spouse.¹⁵¹ Lawyers usually tailor a prenuptial agreement to the individual circumstances of each client.¹⁵² Today, these agreements are used to deal with a myriad of concerns, including financial issues, living arrangements, and any other circumstance that might be relevant to the couple.¹⁵³ Due to this flexibility, an elderly couple can tailor their prenuptial agreement to their own particularized concerns about their upcoming marriage. For some this may include waiving claims to the other spouse's premarital property, while for others this might mean determining who will pay for health care and setting up a trust to handle such a contingency.¹⁵⁴ Prenuptial agreements can also be used to ensure that certain items of personal property, especially those items with sentimental significance, are passed on to children from prior marriages, rather than reverting to a new spouse.¹⁵⁵ If a couple enters into a valid prenuptial agreement, upon death that agreement will supersede both the decedent's will and statutory provisions for property distribution.¹⁵⁶

Like any other contract, a prenuptial agreement must be in writing to be valid.¹⁵⁷ Most states require the contracting parties to disclose their assets to one another,¹⁵⁸ particularly if one party is wealthier than the other.¹⁵⁹ In addition, the prenuptial agreement

150. See FROLIK & KAPLAN, *supra* note 8, at 26.

151. See GREEN & LONG, *supra* note 104, at 112.

152. See Leah Guggenheimer, *A Modest Proposal: The Feminomics of Drafting Premarital Agreements*, 17 WOMEN'S RTS L. REP. 147, 154 (1996).

153. See GREEN & LONG, *supra* note 104, at 114.

154. See Seay, *supra* note 2, at R7.

155. See GUIDE TO FAMILY LAW, *supra* note 54, at 13.

156. See *id.*

157. See *id.* at 14.

158. See *id.*

159. See *id.* The level of disclosure varies between states. For example, in New Jersey the contracting parties are considered fiduciaries to one another, triggering a heightened level of disclosure; while in California the parties are not fiduciaries until they are married. See *DeLorean v. DeLorean*, 511 A.2d 1257, 1262 (N.J. 1986). In Illinois, parties are fiduciaries once they become engaged. See *id.*

cannot be the product of fraud or duress,¹⁶⁰ and must be completely voluntary.¹⁶¹ Generally this means that a prenuptial agreement is not valid if a prospective spouse was induced into signing the agreement a day before the wedding.¹⁶²

When drafted by an attorney, the price of a prenuptial agreement can vary depending upon the complexity of the agreement.¹⁶³ The price of the agreement may increase when both parties to the agreement have an attorney to represent their interests. Typically, one spouse's attorney will draft the agreement, while the other spouse's attorney will review the subsequent agreement.¹⁶⁴ Individual representation for both parties enhances the enforceability of the document should its validity ever be challenged.¹⁶⁵

While elderly couples are beginning to demand prenuptial agreements when remarrying,¹⁶⁶ some elders feel that prenuptials are "incompatible with the notion of marriage."¹⁶⁷ Although prenuptial agreements have been around since the Middle Ages,¹⁶⁸ this long history may be of little consequence to a senior who feels that a prenuptial agreement is no way to start a marriage.¹⁶⁹ However, the legal security that prenuptial agreements afford seniors and their families probably outweighs an elder's concern about the appropriateness of the agreement.

2. WILLS

Closely related to the importance of an enforceable prenuptial agreement is a current and valid will. In 1991, it was estimated that almost two-thirds of all adults did not have adequate wills, while almost ninety-five percent of all adults had no other estate-planning

160. See GUIDE TO FAMILY LAW, *supra* note 54, at 14.

161. See *id.*

162. See *id.* at 15. An agreement signed a day in advance of the wedding is not automatically void, but timing may be significant in determining other aspects of unconscionability. See *id.*

163. See Seay, *supra* note 2, at R7.

164. See *id.*

165. See BARNES ET AL., *supra* note 64, at 10-7.

166. See Seay, *supra* note 2, at R7.

167. *Id.* "I've always felt that if you can't trust the one you want to marry, what's the sense?" *Id.* (Quote from 78-year-old man).

168. See Guggenheimer, *supra* note 152, at 147.

169. Some seniors start a new marriage with a prenuptial agreement that expires automatically after a certain duration of marriage. Says a remarried elder, "I wanted her to feel like she was my wife and not a second-class wife." The agreement dissolved after a year of marriage. See Seay, *supra* note 2, at R7.

instruments.¹⁷⁰ Wills are perhaps the single most important instrument of estate planning in that they control what happens to the assets owned by the decedent upon death.¹⁷¹ Wills are an invaluable tool for the elderly client who may wish to disinherit his or her spouse in favor of children from prior marriages, or who wishes for a certain distribution of assets upon death.

The general requirements for wills vary from state to state, but states usually require that they are written, made by a person who is of legal age and sound mind, and that the signing was witnessed by at least two people.¹⁷² A testator can change the will at any time.¹⁷³ A will that is valid in one state will usually be valid in another, but it is a good idea for a client to have the will reviewed by an attorney if the client relocates to another state.¹⁷⁴ Wills should always be drafted by an attorney and executed in an attorney's presence. Otherwise, a will may be deemed void due to mistakes in preparation.¹⁷⁵

A will should include the nomination of a personal representative, provisions for property, gifts of personal property, dispositions of real estate, gifts of cash, the creation of trusts, and provisions for minor or incompetent children.¹⁷⁶ For the remarried elderly client, addressing these issues in a will helps to prevent confusion later. Many attorneys who routinely work with the elderly advise seniors to review their wills occasionally to make sure that the will continues to reflect the intent of the individual.¹⁷⁷

3. POWERS OF ATTORNEY

Powers of attorney are written documents that appoint someone to manage an individual's financial affairs in case that person is no longer able to act for himself or herself.¹⁷⁸ A power of attorney generally delineates the type of power that a person wishes his or her

170. See DUFF & TRUITT, *supra* note 103, at 115.

171. See FROLICK & BROWN, *supra* note 74, at 21-27.

172. See LEGAL COUNSEL FOR THE ELDERLY, INC., ORGANIZING YOUR FUTURE: A GUIDE TO DECISIONMAKING IN YOUR LATER YEARS 22 (1990) [hereinafter ORGANIZING YOUR FUTURE].

173. See *id.* at 24.

174. See LINDA JOSEPHSON MILLMAN, LEGAL ISSUES AND OLDER ADULTS 133-35 (1992).

175. See FROLICK & BROWN, *supra* note 74, at 21-27.

176. See MILLMAN, *supra* note 174, at 131.

177. See *id.*

178. See ORGANIZING YOUR FUTURE, *supra* note 172, at 9.

agent to have.¹⁷⁹ Such powers may include the right to deal with property, handle banking transactions, make gifts, collect or forgive debts, assist with retirement plans, or make charitable contributions.¹⁸⁰ The list of powers available to an agent depends on state law, and in some states a principal will need to specifically enumerate the powers that the agent is authorized to have.¹⁸¹

There are two types of powers of attorney: the ordinary power of attorney and the durable power of attorney.¹⁸² The ordinary power of attorney remains effective only so long as the principal is competent.¹⁸³ As such, the ordinary power of attorney is virtually useless as an estate-planning tool for the elderly because it does not survive the death or mental disability of the principal.¹⁸⁴ The durable power of attorney was created in response to the shortcomings of the ordinary power of attorney. The durable power of attorney remains effective even if the principal becomes incompetent.¹⁸⁵ There are two forms of durable power of attorney: one which takes effect immediately upon execution (the common method in which a power of attorney works); the other called a springing durable power of attorney.¹⁸⁶

The springing durable power of attorney becomes effective only at some future point in time, such as when the principal becomes incompetent.¹⁸⁷ The conditions under which the power “springs” into effect must be clearly specified by the client.¹⁸⁸ In general, specific conditions are easier to meet than those that merely ask for a general determination of incompetence.¹⁸⁹ A springing power of attorney can be a valuable planning tool for a married elderly couple, especially because it delineates who will make financial decisions on a principal’s behalf in case of incapacity. Naturally, an elderly person

179. See STRAUSS & LEDERMAN, *supra* note 60, at 143.

180. See *id.* at 145.

181. See *id.*

182. See ORGANIZING YOUR FUTURE, *supra* note 172, at 9.

183. See *id.*

184. See STRAUSS & LEDERMAN, *supra* note 60, at 143. Essentially the ordinary power of attorney was only good for allowing some the authority to travel and do business on the principal’s behalf. See *id.*

185. See ORGANIZING YOUR FUTURE, *supra* note 172, at 9.

186. See STRAUSS & LEDERMAN, *supra* note 60, at 143.

187. See *id.* at 144.

188. See ORGANIZING YOUR FUTURE, *supra* note 172, at 11. When dealing with incompetence, most springing powers of attorney require that doctors testify to the principal’s incapacity. See FROLIK & KAPLAN, *supra* note 8, at 258.

189. See ORGANIZING YOUR FUTURE, *supra* note 172, at 11.

will need to appoint an agent whom he or she trusts, such as the individual's spouse, child, relative, or another trusted individual.¹⁹⁰ The beauty of a springing power of attorney is that it allows the principal to be assured that his financial interests will be looked after in the event of his incapacity. One drawback to this option is that not all states recognize a springing power of attorney.¹⁹¹

4. ADVANCE DIRECTIVES

Advance directives deal with situations in which an individual can no longer make a health care decision on his or her own or does not wish to artificially prolong his life.¹⁹² These documents allow competent individuals to direct the course of their future medical care should they become incompetent.¹⁹³ Advance directives are particularly useful tools for the newly married elderly in that they let the elder individual's wishes about health care and medical decisions be known to both the new spouse and the elder individual's family. Advance directives may also help to eliminate confusion between family members should a need arise in which someone must make medical decisions for an incapacitated loved one. Most states have two types of advance directives, the springing health care power of attorney and the living will.

Similar to the springing durable power of attorney, the springing health care power of attorney appoints a person to make health care decisions for the principal when that individual becomes incapacitated and is no longer able to make health care decisions on his or her own.¹⁹⁴ A person should appoint someone that he or she trusts as his or her agent.¹⁹⁵ Typically a spouse is named as the agent, with children and close friends named as alternates in the event that the spouse is unwilling or unable to carry out the principal's medical desires.¹⁹⁶ Some state laws prohibit an individual from naming his or her physician as the health care agent.¹⁹⁷

190. See STRAUSS & LEDERMAN, *supra* note 60, at 144.

191. See *id.*

192. See ORGANIZING YOUR FUTURE, *supra* note 172, at 27.

193. See BARNES ET AL., *supra* note 64, at 28-2.

194. See *id.*

195. See STRAUSS & LEDERMAN, *supra* note 60, at 144.

196. See BARNES ET AL., *supra* note 64, at 28-2 to 28-3.

197. See *id.* at 28-2.

A living will is another advance directive document that identifies future medical desires in the event of incapacity. Unlike springing health care powers of attorney, living wills primarily concern medical decisions affecting a person who is suffering from a terminal condition or is in a persistent vegetative state.¹⁹⁸ These documents typically dictate the type of medical care desired by the individual if he or she reaches a condition described by the living will and also describe the conditions under which life-sustaining treatment should be initiated or discontinued.¹⁹⁹ Living wills most frequently are used to identify situations in which medical treatment is to be discontinued.²⁰⁰ Preparing a living will is similar to preparing a regular will. The document must be in writing, the “testator” must be of legal age, must declare that he or she is of sound mind, and the document must be witnessed.²⁰¹ Some states impose other laws, such as a requirement that the living will be left with the individual’s physician or filed with the state.²⁰²

State law defines the situations under which both living wills and springing health care powers of attorney become operative.²⁰³ Typically, such laws provide that a physician (sometimes two) must certify that a person who is the subject of the document is no longer able to make a health care decision on his or her own behalf.²⁰⁴ With respect to living wills, the physician(s) must also certify that the patient, who is no longer able to make a health care decision on his or her own behalf, has a terminal condition or is in a persistent vegetative state.²⁰⁵

Advance directives are important tools for an elderly couple considering marriage. These documents allow new spouses to know each other’s medical desires and make it clear to family members and physicians what types of medical decisions are to be made in cases of incapacity. In addition, advance directives clarify who is to make medical decisions for the patient in the event of incapacity.

198. *See id.*

199. *See* FROLIK & KAPLAN, *supra* note 8, at 29.

200. *See id.* at 30.

201. *See* FROLICK & BROWN, *supra* note 74, at 18-35.

202. *See id.*

203. *See* ORGANIZING YOUR FUTURE, *supra* note 172, at 29.

204. *See* BARNES ET AL., *supra* note 64, at 28-2.

205. *See* ORGANIZING YOUR FUTURE, *supra* note 172, at 29.

IV. Recommendation

More often, the elderly are turning to attorneys for advice as they contemplate remarriage.²⁰⁶ These clients are seeking advice about the type of relationship that they should enter into and may also need more holistic advice about other late-in-life planning issues.²⁰⁷ It is no longer enough for an attorney simply to advise an elderly client on his or her immediate concerns because many of the legal problems of the elderly involve wide-ranging and interconnected issues.²⁰⁸ When approached by an elderly client seeking advice about marriage, an elder law attorney must be sure to explain to the client the ramifications of the marriage, and the documents needed by the couple to protect their individual interests. Such documents necessarily include prenuptial agreements, wills, powers of attorney, and health care directives.

A. Prenuptial Agreements

When advising elderly couples on prenuptial agreements, the elder law practitioner must take into account many potential factors. These include: who is instigating the discussion about a prenuptial agreement, the property which each spouse seeks to protect, living and spending arrangements for the couple, and whether the other party to the agreement will be represented by separate counsel.

Typically the wealthier spouse pushes for a prenuptial agreement in order to protect accumulated wealth.²⁰⁹ In general, the less wealthy spouse is probably giving something up by signing the prenuptial agreement, usually property rights upon divorce.²¹⁰ However, with the elderly this may not necessarily be true, especially if each party demands a prenuptial agreement in order to preserve and protect part of his or her property for children from prior marriages. Thus, because a prenuptial agreement for an elderly couple may not fit the prototypical prenuptial agreement, an attorney

206. See Seay, *supra* note 2, at R7. "More older couples are getting divorced and remarrying, and more of them are demanding security and predictability in the law." *Id.*

207. See FROLICK & BROWN, *supra* note 74, at 1-2.

208. See *id.*

209. See Seay, *supra* note 2, at R7.

210. See GUIDE TO FAMILY LAW, *supra* note 54, at 13.

needs to be especially careful to discern the intent of the couple with respect to the agreement.

A drafting attorney will need to be sure that he or she understands what the elderly couple wishes to accomplish with a prenuptial agreement, particularly with respect to financial planning. Some couples want financial matters to be clear at the outset of the marriage.²¹¹ Others include in their agreement lifestyle choices, as well as divisions of labor.²¹² Some couples incorporate financial provisions in their prenuptial agreements to keep track of property purchased during the marriage, and how much each spouse has contributed to that property.²¹³ In general, lawyers should advise their clients to catalogue their assets²¹⁴ in conjunction with the prenuptial agreement in order to prevent ownership disputes later, as well as to fulfill the requirement of asset disclosure.²¹⁵

To avoid challenges to the prenuptial agreement, an elder law attorney should insist on separate attorneys for each party.²¹⁶ As previously discussed, one attorney can draft the agreement, which the attorney for the other party can then review.²¹⁷ If an attorney should agree to represent both parties to the agreement, he will need to make sure that the agreement accurately reflects the intentions of both parties. Even if the attorney adequately assures himself that the document reflects the intentions of the parties, the validity of the document may be seriously compromised, and concerns about adequate consideration may arise if the attorney has represented both parties to the agreement.²¹⁸ Given the dire consequences for the client, it is usually best for an attorney to strongly encourage separate representation for both parties to the prenuptial agreement.

B. Wills

Drafting wills for the newlyweds may also present some difficulties for the elder law practitioner. Issues to consider include: whether the client has the requisite mental capacity to engage in will-

211. See Seay, *supra* note 2, at R7.

212. See *id.*

213. See generally *id.*

214. See *id.*

215. See *supra* notes 157-59 and accompanying text.

216. See Seay, *supra* note 2, at R7; see also BARNES ET AL., *supra* note 64, at 10-7.

217. See *supra* note 164 and accompanying text.

218. See BARNES ET AL., *supra* note 64, at 10-7.

making, whether the individual desires of both the husband and wife are accurately reflected in each will and the dynamics of the relationship between the husband and wife.

A particular concern for an elder law attorney may be client competency.²¹⁹ The elderly are more susceptible to debilitating age-related illnesses that may hinder their ability to engage in legal business.²²⁰ These age-related illnesses may affect the client's mental capacity, a necessary requirement for will making.²²¹

Legal capacity to make a will lies somewhere between capacity to contract (on the high end) and capacity to enter into a valid marriage (on the low end).²²² In order to have sufficient mental capacity for making a will, a testator needs to know what property he owns, the persons who are "the natural objects of [his] bounty,"²²³ the fact that he is making a legal instrument to dispose of his property after death, and that the instrument he is making is part of an estate plan.²²⁴

Unfortunately for elder law practitioners, there is no universally accepted method for determining a client's capacity,²²⁵ especially when the level of client capacity needed varies with the legal tasks that the client is seeking to accomplish through his attorney.²²⁶ Making the determination of capacity even more troublesome is the fact that incapacity must be distinguished from mere eccentricity.²²⁷ In a very real sense the line between capacity and incapacity is blurry, allowing a bold attorney to make his or her own assessment of client competency, either through observation, talking to relatives, or through simple tests.²²⁸ More conservative attorneys may wish to have mental health professionals determine the competency of the client.²²⁹

219. See FROLIK & KAPLAN, *supra* note 8, at 8.

220. See *id.* at 9.

221. See DUKEMINIER & JOHNSON, *supra* note 87, at 147.

222. See *id.* at 150. This means presumably that an elderly client could competently enter into a valid marriage but, because of capacity issues, possibly could not alter his will to protect his marriage or spouse.

223. DUKEMINIER & JOHNSON, *supra* note 87, at 149.

224. See *id.*

225. See FROLIK & KAPLAN, *supra* note 8, at 14.

226. See *id.* at 15.

227. See *id.* at 14. How many of us have eccentricities that family members say rob us of capacity in some way, shape, or form?

228. See *id.* Mental tests are used to assess factors such as memory, language comprehension, and length of attention span. See *id.*

229. See *id.* at 14, 15.

An attorney who doubts the competency of a client has several options by which to make an assessment.²³⁰ However, usually questions about mental capacity to make a will arise after the testator has died and if the will is being contested.²³¹ In these situations, sometimes the lawyer will need to answer questions about how he or she ascertained the client's competency. Because such will contests tend to arise more often in situations where the elderly have remarried,²³² it is probably best for an elder law practitioner to document those factors that contributed to a determination of competency or incompetence.

Another problem facing the elder law practitioner with respect to will making is the interpersonal dynamics between the elderly couple and whether the wills reflect the actual intent of both the husband and the wife. Although most attorneys interview husband and wife together when approached about estate planning,²³³ the attorney must remember that both the husband and wife are separate clients.²³⁴ In this respect, the drafting attorney will need to observe the behavior of the couple, making sure that one spouse does not dominate the planning discussion.²³⁵ Good communication between the elderly couple and their attorney is also important. The attorney can help smooth over rough areas and offer advice on points upon which the clients do not agree.

C. Powers of Attorney and Health Care Advance Directives

Drafting powers of attorney and health care advance directives involve essentially the same issues for the elder law practitioner as drafting wills. The attorney must assure himself of his client's competency and must make sure that the documents he or she drafts represent the true intent of the client. Again, the attorney must keep in mind that he or she represents each party to the marriage and that they may have different ideas about their care in the event of incompetence or serious illness. In addition, the attorney will also need to inform the client's physician about the documents

230. *See id.* at 15.

231. *See generally* DUKEMINIER & JOHNSON, *supra* note 87, at 149.

232. Will contests are probably most likely in situations in which both elderly spouses have adult children from prior marriages.

233. *See* FROLICK & BROWN, *supra* note 74, at 1-6.

234. *See id.*

235. *See id.*

(particularly advance directives) and will need to be sure that the physician understands the client's wishes with respect to a determination of incompetence and other end-of-life issues. In addition, the attorney may wish to remind the client to discuss these decisions with his or her family members, so as to preempt any family squabbles.

V. Conclusion

The road to marital bliss can be a tough one, especially when the happy participants are elderly and have considerable obstacles placed in their path by their life experiences and concerned family members. However, with the help of an attorney, and extensive premarital planning, the elderly couple should be able to enjoy their preplanned marriage while keeping problems to a minimum.