Premarital Agreements for Seniors

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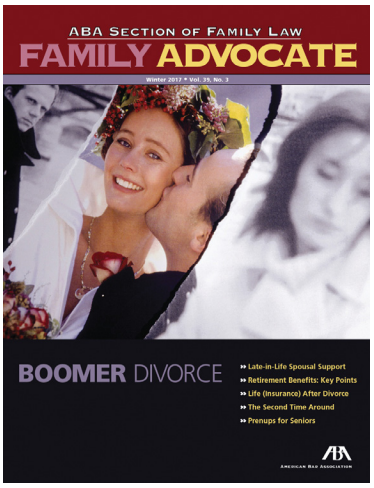

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There may be fifty ways to leave your lover, but there are only two ways to leave your spouse: you either die or get a divorce. Without a premarital agreement, you are at the mercy of state probate laws—or your spouse's estate plan. You will also be subject to state divorce laws if your marriage ends in divorce. With a prenup, you can plan your destiny, whether you die or divorce.

Unfortunately, the older one gets, the more likely it is that death will dissolve the marriage. That begs the question, who should draft the agreement—a divorce lawyer or an estate planning lawyer. In fact, attorneys from both disciplines try their hand at the craft. In most cases, the client would get a better product if estate planners and family lawyers worked together.

The senior prenup client is likely to have amassed significant wealth or to be marrying a person with wealth. Such clients may be contemplating retirement. They may not have many years left in the workforce. This is particularly significant in community property states, where property acquired as a result of effort during the marriage is the only divisible marital property. *See, e.g.,* Cal. Fam. Code § 760 (West 2017). Because there may be no accrual of community property, the nonworking dependent spouse may need the premarital agreement more than the spouse who has accumulated wealth and does not need to work.

The thoughtful lawyer views prenups as a financial planning tool. If the plan is flawed such that either spouse does not have the ability to live comfortably after divorce or death, then the agreement is flawed. For younger couples, the future is ahead of them and there are a lot of possibilities. For seniors, there are fewer possibilities, but there may be more to share. It would be prudent for attorneys to refer both young and old clients to financial planners so that there is an objective basis for negotiation. For seniors, many issues need to be considered, such as the impact of getting married on Social Security benefits; Medicare eligibility; planning and liability for medical expenses; joint liability for debts (including large medical bills); responsibility for obligations to former spouses; tax filing and liability issues; and a fiancé's credit history.

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It is not uncommon for wealthy parents to want their twenty-something children to have a prenup. The attorney knows that terms of the prenup will be dictated by the parents. For seniors, it is often their children who want the prenup. Why? Because they want to protect their inheritance from their new mother- or father-in-law.

Age, Health, and Capacity Considerations

To enter into a valid premarital agreement, each party must have the capacity to enter into the contract, per the comment to section 2 of the Uniform Premarital Agreement Act (UPAA). A person who enters into a premarital agreement with someone of diminished capacity or someone who is dependent on his or her fiancé may be held to a higher standard if the agreement is challenged on the basis of

whether the agreement was entered into voluntarily. In *Marriage of Bonds*, 24 Cal. 4th 1, 28 (2000), the California Supreme Court stated, "A confidential relationship may arise, for example, between family members and between friends." In such cases,

> mere lack of independent advice is not sufficient to raise a presumption of undue influence or of constructive fraud, even when the consideration appears inadequate. But when to these factors is added some other such as great age, weakness of mind, sickness or other incapacity, the presumption arises, and the burden is on the other party to show that no oppression took place.

See also Tyler v. Children's Home Society 29 Cal. App. 4th 511, 550 (1994).

Though capacity is not solely associated with age, these issues arise more frequently when negotiating premarital agreements with elderly clients. Lack of capacity may be used as a defense to enforcement of the agreement. Premarital agreements should, therefore, include factual recitals confirming the capacity or competency of each party so that their capacity to enter into the agreement cannot be easily contested.

Attorneys may want to take precautions to ensure that the parties understand the terms of the agreement. Some attorneys will videotape the execution of the agreement and then voir dire the parties as to their understanding of the agreement. Some counsel will also retain a retired judicial officer to attend the execution and voir dire the parties as to their understanding of the agreement. Other attorneys have a court reporter present to record the questioning of the parties relating to their capacity.

Unfortunately, there is not one clear way to determine capacity. Like many other legal concepts, capacity is not black and white—it exists on a spectrum. Capacity may change weekly, or even daily, depending on the party's health or medication or the nature of an illness. If there is a concern about capacity, it may be prudent to have a doctor or mental health professional examine the party and advise whether, in his or her opinion, the client has the capability to understand the premarital agreement.

When drafting premarital agreements for seniors, one must take into account the fact that the client and the client's spouse are likely to have health problems now or in the near future. One or both of them may suffer a disabling disease that could require many years of expensive professional care. At the very least, the attorney must recommend that the client consult with a professional for advice on long-term care insurance, disability insurance, medical insurance, and Medicare, as well as supplemental insurance. Without insurance, both parties' wealth is at risk, regardless of what the premarital agreement says. Precautions should be taken to make sure the policies do not lapse.

Estate Planning

Most form agreements have a section that describes the rights on the death of either party. These provisions take on an added importance for seniors. The UPAA provides in section 3(a)(5): "Parties to a premarital agreement may contract with respect to all of the following: … (4) The making of a will, trust, or other arrangement to carry out the provisions of the agreement." See also the Uniform Premarital and Marital Agreements Act, which, as of January 30, 2016, was adopted by two states, North Dakota and Colorado. *See* Comment*, The Uniform Premarital Agreement Act and Its Variations throughout the States*, 23 J. Acad. Matrim. Law. 355 (2010), http://www.aaml.org/sites/default/files/MAT206_3.pdf; *see also* Unif. Law Comm'n, Legislative Fact Sheet— Premarital and Marital Agreements Act, http://www.uniformlaws.org/shared/docs/premarital%20agreement/upaa_final_83.pdf.

It would be wise to determine whether the client wants this clause in the first draft of the agreement. It is more than likely that, if this section is included in the first draft, the party without the money will want to negotiate whether he or she can live in the family residence (the probate homestead) or whether he or she will receive payments from the estate (a probate allowance) when the spouse dies. In most cases, these disputes are theoretical because the decedent will have an estate plan that will control, and these provisions will not be applied. One reason to include these waivers would be to prevent the impecunious spouse from destroying a valid will or trust and claim that his or her spouse died intestate and thereby secure statutory benefits, i.e. the intestate share, the probate homestead, and allowance.

Specific Provisions on Death

Marrying seniors often have children from prior marriages, and they typically want to make sure that these heirs, as well as spouses, are taken care of. A party to a prenup, therefore, will usually want the agreement to specify what the spouse will provide in the event of death. The promise "Don't worry, I will take care of you" will not be enough.

There are many ways to allocate the property between the new spouse and children. The agreement may provide that all property acquired prior to the marriage goes to the children and all jointly acquired property to the surviving spouse. Or it might provide that the spouse receives all the marital property and the children are beneficiaries of a life insurance policy. A party may want to change the survivorship beneficiaries on retirement accounts to fairly allocate his or her estate. Gary D. Skoloff, Richard H. Singer Jr., Ronald L. Brown, Drafting Prenuptial Agreements, pt. [VI] D[2][b], Option 11, VI-41 (2016-2 Supp. & 2013-2 Supp.)

Note that a party will not be able to give away the spouse's community property share of any asset unless community property is waived in the agreement. Parties generally want to avoid probate and they want to avoid estate taxes. Any language in a premarital agreement should be consistent with a carefully drafted estate plan. The plan should take into account who will have use of the family residence and who will receive the personal property, photographs, and mementos. In addition to addressing the major assets, the parties should address who will get the computers and the digital property, including access to social media, data in the cloud, and passwords.

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Medical Directives

Though an unpleasant topic to discuss, end of life planning is important for people of all ages and becomes increasingly important for the elderly. When a family member is seriously ill or injured, it can add immeasurable stress to have to argue over who holds the rights to make important medical decisions.

A medical directive appoints an agent to act on the behalf of a party in the event that party is incapable of making informed medical decisions. Typically, people who are married choose their spouses to take on this responsibility, but the children of a senior may be a better choice in some circumstances. In the negotiation of a premarital agreement, the parties will be single and they therefore may have older, out of date, directives from prior marriages. They may also have directives directed to children from previous marriages or other family or friends. It is important, therefore, to update these directives.

Limiting Spousal Support

Twenty-seven states have enacted the UPAA. *See* Comment, *The Uniform Premarital*

Agreement Act and Its Variations throughout the States, and Unif. Law Comm'n, Legislative Fact Sheet, *supra*. In twenty-four of the twenty-seven UPAA states, the parties may limit spousal support, but such limitations are subject to a court's authority to make an award to avoid hardship to a dependent spouse. Linda J. Ravdin, Premarital Agreements Drafting and Negotiation (A.B.A. Section of Family Law 2011). But other states have elected to enforce a limitation provision only if it is not unconscionable. In the majority of non-UPAA states, a court may determine that a limitation is void under certain circumstances. In some states, the court has jurisdiction to determine the validity of a limitation. *Id.* at 81.

The issue of whether to limit spousal support is addressed in the negotiation of most premarital agreements, whether clients are young or old. The decision is especially critical for seniors negotiating premarital agreements, since their working years are limited or they are on fixed incomes. Attorneys should advise their clients that the spousal support limitation clause will not always be enforced; enforcement will depend on the standard applied in the state in which they are divorced. The propertied spouse will be concerned that a spousal support award will deplete his or her limited resources. Low-earning or nonearning parties will be concerned that, if there is a divorce and they agree to limit spousal support, they will not be able to secure employment sufficient to support themselves. Further, they should be advised that, if they remarry, they will lose spousal support from a former spouse. They will want to secure an agreement with the new spouse to the effect that that support is being replaced by the new spouse's promise to make up the loss by getting married.

As the parties grow older and more dependent, there is typically a greater need for spousal support, and courts will be likely to carefully scrutinize whether these clauses are unconscionable. Depending on state law as to unconscionability, a limitation clause, rather than an outright waiver, may be desirable as a bilateral cap on the amount of the support paid. For example, the clause could provide that neither party would pay more than a certain amount, no matter the situation. The cap would be lower than the state "guideline," if any exists, but would be sufficient to provide the party with enough support to not be deemed unconscionable. The cap could be expressed in terms of a percentage of income or by a specific amount of money per month. However this is handled, "income" should be defined for the purposes of calculating spousal support, and if a percentage is used, support should be capped with a specific dollar amount so that the recipient does not receive a windfall in the event the payor receives a large payment in one year.

For the party whose income fluctuates, the drafting attorneys will have to be particularly careful to come up with a fair arrangement so that neither party gets an unfair advantage. Some of the factors a lawyer might consider in drafting or evaluating this clause are whether the payee's basic needs, such as food, housing, medical care, and medical insurance, are covered. A cost of living clause will also help protect against claims that the award is unconscionable, especially when the marriage has been long. In states where the unconscionability test is triggered if the support provides a standard of living far below the marital standard, it may be difficult to select an amount of support that would be "safe" against an attack.

When drafting limitation clauses, an attorney should consider both the amount and duration of the spousal support. A typical limitation clause might provide that the duration of the support would not be longer than one-half the length of the marriage. For longer marriages, the clause may provide one year of spousal support for every year of marriage after one year of marriage. There is no assurance that a court would deem these limitations "conscionable." Age, health, and financial resources would be the factors a court would take into account in limiting spousal support.

Conclusion

When drafting premarital agreements for seniors, lawyers must consider that marriage can end in death, as well as divorce. Through careful planning, attorneys can ensure that a client will have adequate funds if the other spouse dies during the marriage or if the marriage ends in divorce. They can recommend that their clients consider ways to save estate taxes by using the marital deduction and the lifetime exclusion. They must make sure that a client gets advice on revocable and irrevocable trusts to avoid probate. They should advise their clients to take a creative approach by considering how disability, life, and long-term care and health insurance will ameliorate some of the risks of marrying a senior. Attorneys must also balance the needs of other family members, including children from prior relationships, needy parents of the parties, and even ex-spouses, and they should strive to minimize future disputes between family members.

To draft a premarital agreement that will be enforceable on the death of a party, the family lawyer needs the assistance of an estate planning lawyer, and for the agreement to be enforceable in a divorce, the estate planner needs the family lawyer. Both types of attorneys need the assistance of experts on Social Security, Medicare, financial planning, and tax law to effectively draft workable and enforceable premarital agreements for seniors. **FA**

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