

Some Issues Supersede Premarital Agreements

By Wesley E. Wright and Molly Dear Abshire, as published in the Houston Chronicle Senior Living Section on August 18, 2010.

For many elderly couples with seemingly long-term marriages, the notion of separating or divorcing after so many years together remains almost unthinkable. Yet, as recently reported, the divorce rate among seniors is increasing.

Due to a growing divorce rate in the United States, premarital agreements now are widely accepted, even among the elderly. Seniors should approach the idea of a premarital agreement with an open mind. Signing a premarital agreement does not automatically mean that you are planning a divorce. Instead, it is recognizing the seriousness of the establishment of the new relationship.

Additionally, it communicates the couples' concerns for the future financial security of their other loved ones, such as adult children from prior marriages, and it expresses their respect for each others' hard-earned assets.

One complication that arises with the use of premarital agreements later in life is the issue of competency. With elderly clients, proving competency to enter into such an agreement can be contested, usually by adult children from prior marriages.

Many divorce attorneys advise their altar-bound senior clients to put premarital agreements in place before tying the knot. A premarital agreement creates a plan for how the couple will merge their economic and emotional lives. Such premarital agreements can address maintaining separate property, division of assets upon divorce, dealing with income and bill paying during the marriage. These agreements can help manage the issues and expectations particular to a later-in-life marriage.

However, there are some significant drawbacks that a senior may encounter if he or she remarries. Many fear the loss of a former spouse's pension payments, Social Security benefits and medical insurance benefits. Many seniors live on fixed incomes; they simply cannot give up these valuable benefits that were obtained in a prior marriage.

Many seniors also shy away from remarriage because they do not want to put their children's inheritances at risk. By not getting married, they are protecting their assets.

It is important for the senior contemplating remarriage to discuss these issues with their future spouse openly.

It is likely that both spouses have strong feelings about protecting their adult children. Without a frank discussion, it may end up causing their loved ones a great deal of heartache and confusion when one spouse requires long-term care or passes away, requiring a division of hopelessly mixed separate and community property.

A premarital agreement and frank discussions that go with it can help ensure the financial well-being of the marriage. A plan can be made for dealing with future health care issues, death and disability.

However, there are some things premarital agreements cannot help. Many remarried seniors worry about what will happen to their assets if their new spouse enters a nursing home. They are concerned that the hard-earned assets they have saved could be lost.

Although a premarital agreement will help ensure the elderly person's assets go to their loved ones at death and protect their assets from claims of the surviving spouse when he or she dies, the premarital agreement will not protect his assets from his spouse's nursing home expenses. It is surprising to many to learn the premarital agreement does not prevent Medicaid from considering the assets of the spouse at home when determining Medicaid eligibility for the spouse in the nursing facility.

Medicaid is the governmental benefit program that pays nursing home costs. It has income and asset eligibility requirements. Despite the premarital agreement, Medicaid looks at the assets of both spouses in determining eligibility for the spouse in the nursing facility. The rules for determining eligibility are exactly the same for couples with a premarital agreement as for those without one.

Thus, all of the couples' assets are at risk when one spouse needs long-term care.

One way to remedy this dilemma is to put long-term care insurance in place for both prospective spouses.

However, many elderly people are not insurable at this stage in their lives due to advanced age or health related issues.

Marriage at any age is serious business and should not be taken lightly.

Harsh consequences can occur if a senior does not carefully address the economic ramifications of getting remarried. Specifically, each prospective spouse should ask themselves: "What will happen if I get sick?" "How will my long-term care costs be met?" "Does the spouse I am contemplating marrying have long-term care insurance?" If not, then "Are there sufficient assets in both of our estates to privately pay for long-term care?"