



Gray marriage: Late-in-life unions can spur legal issues

By: Matt Chaney October 25, 2018

If a second marriage is, as is said, the triumph of hope over experience, it would seem that the growing cohort of older Americans is feeling increasingly hopeful these days.

In 2013, two-thirds of previously married adults between the ages of 55 and 64 had remarried, and 50 percent of adults over the age of 65 had remarried, according to a study conducted by the Pew Institute. This number is expected to continue to increase in coming years as life expectancy increases.

While finding love and meaningful relationships is important at any age, family and elder law attorneys from around North Carolina agree that marriages later in life can often lead to legal complications. These complications can be further exacerbated by the existence of adult children. But elder law attorneys agree that with proper planning, they don't have to be.

Carolyn Woodruff, a family law attorney from Greensboro, said that proper legal planning, and communicating those plans to new spouses and family members, are the keys to avoiding messy conflicts stemming from late-life remarriages.

"Unless this is talked about before the marriage, including with the children, it can be a big mess," she said. "Each person has got to decide who can make final decisions if they cannot ... Each adult has to have a decision-maker. If the spouse got left out of that, that might be hurtful, unless that was talked about up front."

Robin Lalley of Sodoma Law in Charlotte said it's important that clients consider prenuptial agreements prior to any remarriage.

"For those getting married later in life, this may be especially important as they may be carrying more assets [and debts] into the marriage," she said. "They may want to protect those assets as they have worked hard and over a number years to earn and preserve those assets—whether it is for their own bucket lists, their children, grandchildren, or even a charitable organization."

Lalley said prenuptial agreements can help a client retain their hard-earned property should the marriage dissolve.

"A prenuptial agreement can help you address any property, debt, and spousal support considerations before entering the marriage," Lalley said. "If properly drafted, such an agreement may control what happens with that property, debt, and potential spousal support obligation should the marriage unfortunately end."

Not so young, and in love

Other considerations for clients getting remarried later in life have to do with Social Security, retirement benefits, and the doctrine of necessities, the legal concept that each spouse can be made financially liable for any necessary expenses the other incurs, such as medical bills.

Woodruff said attorneys should advise clients to consider how remarriage will impact their eligibility for Social Security, especially if it means forgoing a claim to a former spouse's social security.

"A former spouse is entitled to half of the other spouse's Social Security, or his/hers, whichever is more," she said. "If a person remarries, that person loses the election for half of the former spouse's Social Security."

Lalley said remarriage may impact income from spousal support from a previous marriage.

"Those factors may lessen your ability to pay a dependent spouse if you are on a fixed income or create less of a need for support from the other spouse," she said. "Overall, this demographic creates interesting factors for

consideration in spousal support and property division simply based on where they are in life.”

Because of the doctrine of necessities, Woodruff said, if one spouse’s health diminishes and they are forced to go on Medicaid, it may impact the finances of the other spouse. She said it’s not currently clear whether the doctrine can be waived by a premarital agreement, but there is case law shielding separated spouses from their partner’s liability.

“In cases of separated spouses, there is a case that says estranged spouses cannot be sued if the notice of the separation is given to the health care provider,” she said.

Yours, mine, and ours

But what happens when one spouse dies?

“The question becomes whether the new spouse will receive a share of the estate should a spouse pass away,” Lalley said, “and how does that affect what is currently expected to be inherited by adult children?”

In 2013, North Carolina lawmakers made significant changes to the state’s inheritance laws. Under the amended law, widows and widowers are entitled to at least a certain minimum amount of their spouse’s estate based on how long the couple was married.

But Lisa Hostetler, an elder law attorney in Columbia, South Carolina, said it’s not at all uncommon for the spouse from a second marriage to inherit all of his or her spouse’s assets, before passing away themselves and leaving the combined assets to their own children, thereby cutting out the children of the spouse who predeceased them. To prevent this from happening, Hostetler said it’s worth considering setting up a living trust in lieu of a simple will.

“They need to make sure a will and trust is set up so that the way they want their assets to go actually happens,” she said.

Lalley said that in general, baby boomers are statistically bad about estate planning. She said that even when plans do get made, it’s important to follow up every few years with the client to see if they’re happy with the plan and see if anything needs to change.

While communication between the client and their spouse and family members is important, it’s also important for attorneys to maintain lines of communication with their client, according to Franchelle Millender, another elder law attorney based in South Carolina.

“The most important thing is to assure that your client understands the risks of the marriage and how it can impact the client’s family and finances,” Millender said. “After lengthy discussions, many clients in later life decide that a marriage may not be the right solution for them.”

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