



Marriage Later in Life Tricky for Estate Planning

By Lisa Scherzer
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AFTER HER HUSBAND of 57 years passed away, Cathleen Bachmann's 80-year-old mother, Ruth, never thought she would remarry. It didn't take long, though, before an old friend she had known since kindergarten began courting her from another state. They started dating and soon her new beau decided to move to Michigan to be with her. About a year after her father died, Cathleen got a call from her mother saying she was going shopping for a wedding dress. (Names have been changed due to privacy concerns.)

Before the big day, Cathleen insisted that the couple sign a prenuptial agreement¹. "My father would have never forgiven me," she says, if she let her mother marry without one. Her parents had considerable assets and Cathleen worried that whoever was after her mother was after her money. "I knew it had to be done. If she predeceased him, because of our state law, I did not want him to inherit," she says.

Welcome to the new singles scene. Today, more and more seniors are finding love whether via a glance across the nursing home activity room or at the local senior citizens mixer. With the average life expectancy in the U.S. today at about 78 years, up from 70 in 1960, according to the National Center for Health Statistics, people are living longer and healthier lives than ever before. And that means more folks are rediscovering love later on in life.

But what can be exciting and romantic for an older couple can be nerve-racking for families, who have hopes pinned to an inheritance or simply expectations about how money will be handled by a surviving parent. The issue here? Once married, a spouse will automatically inherit a deceased partner's estate — unless steps are taken to prevent that.

Marriage at any age means a marriage of finances. But the fact that older folks are likely coming into a second or third marriage with adult children, assets, a house, a 401(k) and perhaps failing health makes a trip to the altar significantly more complicated. In fact, the legal implications can get so thorny that many older couples opt not to get married and instead just live together. (Some worry about Social Security benefits being threatened if they remarry, but if you remarry after age 60², you can still collect benefits on your former spouse's record.)

"A remarriage can create a lot of family discord and distrust," says Sally Hurme, an attorney at AARP. "You've got to take legal steps to determine how it is you want your money to be distributed."

How best to do that? Through the use of a will, a prenup and oftentimes, a trust. [Click here³](#) for more on how to create a will. Here's what you need to know about the other tools:

Prenups

Typically, when two people marry, their first obligation is to take care of their spouse. But that's not necessarily the first priority for folks getting married later in life. Most seniors with disposable income want to leave at least some of their assets to their kids.

A prenup allows a couple to identify which assets belong to whom during their marriage as well as in the event of a divorce. It works to keep spouses' assets separate, something estate-planning attorneys and financial planners advocate older couples do. "The prenup is a wonderful tool while the couple is living," says Craig Berman, an estate-planning attorney and CPA in Maryland. "It dictates who owns what and it clarifies the separation of assets." But it should be used in conjunction with a will and other estate-planning tools, like a trust, he says.

What happens without a prenup? While the laws are particular to each state, most states rule your spouse is entitled to about one-third of the estate, called the elective share. (The precise amount varies by state.) So if you leave your spouse less than one-third of your estate in a will or otherwise, he or she can get it anyway. Let's say an older couple marries. Both spouses have children from previous marriages. The husband has \$3 million in assets and the wife has almost nothing. If he dies first, she is entitled to a big piece of his estate — roughly \$1 million. Whether she needs that money to live or not, she's entitled to it — and it can ultimately end up with her children — a scenario ripe

for family friction, especially if the husband's children were expecting to inherit his entire estate. In that case the couple can waive their right to the elective share in a prenup.

It's important to note that a prenup is not an estate-planning tool in itself, and does not necessarily take precedence over a will or trust. But it is an enforceable contract that can be crucial when it comes to the distribution of assets once a spouse dies.

Say our senior couple are writing their wills and the husband assures his wife that upon his death he'll leave all his assets to her in a trust. What if he changes his mind and leaves her only a third? The prenup is a way to enforce what the parties agree to, says Lawrence Davidow, an elder-law attorney at Davidow Davidow Siegel & Stern, in Islandia, N.Y. "No one should be so naive to think a spouse will not change their mind later. If they want to enforce the agreement they negotiated with each other, they need a prenuptial," he says.

Prenups aren't foolproof, though, particularly when it comes to qualified plans like 401(k)s. When one spouse dies, his 401(k) plan will automatically go to his spouse regardless of what the couple's prenup says. That means if his will and prenup stipulate that all his assets go to his children when he dies, his wife will still inherit his 401(k). The only way around that is for his new wife to sign a waiver to disclaim the 401(k).

Trusts

Often there's a question of how a surviving spouse will be supported when his or her partner passes away. Trusts can be used to make sure that there's a steady flow of income but that the estate will eventually pass along to the decedent's children.

The idea behind trusts, says Davidow, is to protect children from the previous marriage but use the assets to maintain the lifestyle and health-care needs of the surviving spouse.

A couple can stipulate in a trust agreement that at the husband's death his wife will use a certain amount of his assets to live. And at her death, the trust will be terminated and the assets go to the husband's children.

The trust, created through a prenup or will, is often important when one spouse gets sick and needs expensive medical care. "The law says you have a legal obligation to support your spouse for 'necessaries'," Davidow says. That includes health care, something you can't contract out with a prenuptial. So if one spouse gets sick and can't afford treatment, the other spouse is obligated to pay. (Paying \$100,000 a year for a spouse's nursing home stay is a drain on anyone's assets.) Davidow recommends his clients also purchase a long-term-care⁴ insurance policy so there won't be a threat to either's estate.

The Family Home

When Judith Ludwig's 64-year-old father got married to his second wife, he moved into his new wife's home in Florida. She was concerned, however, that there was no provision for what would happen to her father if his new wife died first. Ludwig, a CPA and certified financial planner in Newton, Mass., feared that if her stepmother died first, her children would be tempted to sell the house. And where would that leave her father?

"When I brought it up she was really mad at me," Ludwig says of her stepmother. "But the reality is that when a parent dies, you want your money. It sounds cold-hearted, but it's true."

A family home is a sensitive issue that can cause problems for both spouses as well as their children. Often when an older couple gets married, one spouse moves into the other's home. Typically, says AARP's Hurme, it's going to be the family home. The question they have to answer is: What will happen to the house when one spouse dies? If Dad's new wife moves in, is the children's expectation that as soon as Dad dies, she moves out? Or will she get to live in the house until she dies, upon which the children inherit the house?

"The greater concern is probably not so much that she gets it," she says. "It's 'we don't want her kids to get it. If she dies, it should come back to our side of the family.'"

If you're worried about the fate of your house — say a spouse wants the home to revert to his children from the previous marriage for the sake of keeping it in the family line — don't assume the will is going to take care of it. If a husband retitles his home by putting his and his new wife's names on the deed, it doesn't matter what the will says about who gets the house: "She's going to get the family home and that's probably going to upset the kids," Hurme

says.

Creating a life estate is a straightforward option, estate planners say. A life estate is essentially a trust with a special provision for the house itself. In it the couple can spell out exactly who gets to live in the house, for how long and who gets it after both spouses die. The "receiver" of the life estate would be responsible for maintenance of the house; he or she is a beneficial owner and has the right to live there but doesn't actually own it.

For more on estate planning, click here⁵.

Links in this article:

¹<http://www.smartmoney.com/divorce/marriage/index.cfm?story=prenups>

²<http://www.ssa.gov/ww&os2.htm>


³<http://www.smartmoney.com/estate/index.cfm?story=19980319>

⁴<http://www.smartmoney.com/insurance/longtermcare/index.cfm?story=essentialguide2005>

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