The Fertile Octogenarian Revisited: Financial and Estate Planning Implications of Late in Life Romance

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More and more frequently, as we all live longer than our ability to live independently, romance is in the air in retirement communities and nursing homes. The issue has received significant recent attention from those who are facing it daily – health care workers, gerentological social workers and long term care administrators. A study published in August 2007 in the New England Journal of Medicine found that while sexual activity declined with age, there are "a substantial number of men and women" who are sexually active "even in the eighth and ninth decades of life." Stacy Tessler Lindau, M.D., M.A.P.P., L. Philip Schumm, M.A., Edward O. Laumann, Ph.D., Wendy Levinson, M.D., Colm A. O'Muircheartaigh, Ph.D., and Linda J. Waite, Ph.D. A Study of Sexuality and Health among Older Adults in the United States, _____ (2007). As noted in a Slate Magazine article, this should come as no surprise because, "[a]fter all, we're talking about a mixed-sex population living in close quarters with almost endless amounts of free time." Daniel Engber, "Naughty Nursing Homes," Slate Magazine, Sept. 27, 2007, http://www.slate.com/id/2174855. As these couples meet and become close, it is likely that there are family members (such as adult children), who resist and fear the relationship. This paper addresses the peculiar financial, property ownership and estate planning complications that arise with these late in life romances, due in part to family resistance, the elderly partner's reluctance to plan effectively and also due to the undesirable effects that marriage can have on eligibility for government benefits and other sources of financial support in retirement.

I. CONSEQUENCES OF A LATE IN LIFE MARRIAGE

One concern of the family members is likely to be that their elderly family member may get married without fully considering the consequences. In fact, if there is a concern about undue influence, marriage is a much bigger problem than a Will or other financial arrangement made in the manipulator's favor. Proof of undue influence can invalidate a Will, gift or nonprobate transfer even after the death of the donor/testator, but invalidating a marriage is not as easy. For example, in *Estate of Lint,* 135 Wn.2d 518 (1998), the court had little difficulty invalidating a Will executed by Estelle Murphy in favor of her new companion, Christian Lint, on grounds of undue influence and fraud. However, Christian had, in addition to arranging for the new Will, taken Estelle to a Las Vegas wedding chapel. If the marriage was valid, even though the Will was ineffective, Christian would inherit as a pretermitted spouse because the marriage occurred after Estelle's last valid Will. The first obstacle was whether the marriage was voidable because of Estelle's incapacity at the time of the wedding. Fortunately for her family other than Christian, Estelle was very ill at the time and suffering from a misdosage of medication and was clearly incapacitated, according to witnesses. It should be noted, however, that the standard for capacity for marriage is very low and except in extreme cases like the Lint case a marriage is

likely to be upheld. There was another obstacle in the Lint case, however. The issue was being litigated after Estelle's death, and the Washington statute, RCW 26.09.040, required that an action to declare a marriage invalid had to be brought while both parties were alive. Again fortunately for Estelle's family, there were irregularities with the solemnization of the marriage, as well as a court finding of "fraud of the grossest kind" on Christian's part, allowing the court to declare the marriage invalid.

The message of *Lint* is that family members may have good reason to be concerned if the older parent or relative is getting involved with someone that the family suspects of manipulation. In addition, the elderly client entering into a relationship at a point where a lifetime of assets and family relationships has already been established must tread carefully when considering a legal relationship geared more towards a longterm partnership when such assets and relationships are in the future. Marriage without advance planning carries with it the following consequences:

A. Intestacy rights. If the first spouse to die has no Will, then the surviving spouse will receive a substantial portion of the estate under the applicable state's intestacy rules. While those statutes vary from state to state, in general the length of the marriage and the existence of children from a prior marriage will not have much effect on the spouse's share. It should be noted, however, that the Uniform Probate Code does take into account children from a prior marriage, and cuts the surviving spouse's intestate share from the entire estate to the first $100,000 and one-half of the estate if the decedent left descendants who are not also descendants of the survivor. UPC § 2-102.

B. Elective share. Unless the decedent was a resident of a community property state, or a resident of Georgia, the surviving spouse will have an elective share of the decedent's estate even if there is a Will disinheriting the spouse. The amount of the elective share varies greatly from state to state, and can even be zero in UPC states if the surviving spouse is wealthier than the decedent was.

C. Pretermitted spouse rights. If the decedent died with a will executed prior to the marriage, the surviving spouse can claim an interest in the estate that varies from state to state, and is traditionally whatever the intestate share would have been. These rights can be particularly troublesome in situations like the Lint case described above.

D. Homestead and Family Support. Most states provide some sort of protection to surviving spouses in the form of homestead allowances and family support. While such provisions are generally not a large factor in significant estates, they can be an additional claim made by a

surviving spouse who is competing for the estate with children from another marriage or other family members.

E. Priority over Contractual Wills. Another unexpected consequence of second marriages may be the defeat of prior contracts to make a Will. The case of *Via v. Putnam*, 656 So.2d 460 (Fla. 1994) is a classic example of this situation. Edgar and Joann executed mutual wills leaving everything to each other, with the agreement that the survivor would leave his or her entire estate to the couple's mutual children. Joann died, and Edgar remarried. Edgar died without changing his will, and his surviving spouse, Rachel, claimed her share of the estate as a pretermitted spouse. The children argued that Rachel's pretermitted spouse claim was subordinate to their claim as third party beneficiaries of the contract and therefore creditors of the estate. Courts in different states are split on this issue; some states hold that the pre-existing contractual will claimants have priority, often on the basis that the pretermitted spouse's share is net of any preexisting claims. *See, e.g., Gregory v. Estate of Gregory,* 866 S.W.2d 379 (Ark. 1993); *Rubenstein v. Mueller,* 225 N.E. 2d 540 (NY 1967). However, the *Via* court held that public policy favored the surviving spouse, and gave Rachel her omitted spouse share, which was one-half of the estate. Generally, this scenario illustrates that late in life marriages must be entered into thoughtfully in order to avoid controversy, litigation and potential thwarting of intentions.

F. Potential Disruption of Social Security and other Sources of Retirement Income and Benefits . A frequent concern about marriage of retired persons is whether a marriage will affect Social Security or other benefits being received on the basis of a previous spouse's employment. With respect to Social Security, a divorced or widowed spouse is eligible to receive a Social Security payment equal to one-half of the former spouse's payment, if the divorced or widowed spouse does not otherwise qualify for a higher payment because of their own employment. 42 U.S.C. 402(b). With respect to divorced spouses, that payment is terminated if the divorced spouse remarries and the new spouse is entitled to benefits on the basis of their own employment. *Id.* If a widowed spouse remarries, however, the widowed spouse's Social Security payment continues as long as the widowed spouse is over the age of 60 at the time of remarriage (or over age 50 and disabled), regardless of the eligibility of the new spouse. 42 U.S.C. 402(e). Therefore, while loss of Social Security benefits does not occur in all cases of remarriage, the potential needs to be considered before any decisions are made.

Another major concern is Medicaid eligibility. Because Medicaid eligibility tests consider the resources and income of both spouses, a

remarriage can affect both spouses' ability to obtain or maintain Medicaid eligibility. In addition, because the failure of a surviving spouse to assert an elective share can create Medicaid ineligibility, *see, e.g., Estate of Cross,* 664 N.E.2d 905(Ohio 1996), marriage can have far-reaching effects on eligibility.

In addition to to the potential loss of Social Security and Medicaid benefits, private pension rights and health insurance tied to a former or deceased spouse or rights under a dissolution decree or property settlement entered into at marriage dissolution may be adversely affected by a later marriage.

Another potential disruption caused by a later marriage is the significant set of rights given to a surviving spouse, regardless of the length of the marriage, in retirement assets governed by ERISA. These are discussed more thoroughly below in the section on prenuptial agreements.

In addition, provisions in a deceases spouse's Will for the surviving spouse may be affected by the survivor's remarriage. A trust for the surviving spouse or the right to live in the family home may expressly terminate on the survivor's remarriage. The more subtle dilemmas that can be caused by the survivor's remarriage are illustrated by the case of *Marsman v. Nasca,* 573 N.E.2d 1025 (Mass. 1991). In that case, Sara was a well-to-do widow with one daughter from the first marriage who married Cappy, not so well off, as her second husband. In Sara's Will, she gave her daughter 2/3 of her estate and with the remaining one-third she set up a trust for Cappy for life, remainder to her daughter Sally. Cappy was entitled to all the income and discretionary principal distributions. Cappy also received the family home because it was held as tenancy by the entirety. After Sara's death, Cappy married Margaret. Cappy ran into financial trouble, and was unable to meet the expenses of the house with the income from the trust. He negotiated with Sally, his stepdaughter, to sell her the remainder interest in the house in exchange for her agreement to cover the costs of maintaining the house for the rest of Cappy's life. No one, including the trustee who was also a lawyer representing Sally in the deal with Cappy, suggested to Cappy that a better solution for him would be to distribute principal from the trust to cover his expenses. However, if that would have been done, Sally would have ended up with less money in the trust remainder on Cappy's death, and would not have owned the house on Cappy's death. Also, no one suggested to Cappy that maybe he should at least negotiate for a joint life estate of himself and Margaret. When Cappy died, and Sally's surviving husband (Sally predeceased Cappy) took steps to evict Margaret from the house, Margaret sued. The result was that Sally's surviving

husband was required to pay Margaret the amounts of principal that the trust should have paid to Cappy.

G. Burial and Funeral Arrangements; Disposition of Remains. Most state statutes give the surviving spouse priority to decide issues of disposition of remains, organ donation and the like. The new spouse may make decisions that are not consistent with long-held intentions of the deceased spouse.

H. Wrongful Death. A spouse is generally allowed under state statutes to sue for wrongful death of the spouse.

This list is certainly not complete, but includes the major considerations that should be taken into account before a late in life marriage.

II. PRENUPTIAL AGREEMENTS.

Prenuptial agreements are critical when elderly couples are considering marriage. The couple may resist the notion strongly, because a prenuptial agreement may be a foreign concept to them and may be inconsistent with their existing view of relationships that was established in a different era. The attorney's (and family's) first challenge may be convincing the client of the need for such an agreement. This raises potential ethical issues also. The attorney may very well be contacted by the adult children, concerned about the parent's new relationship and potential for future marriage, and concerned that a marriage will affect their inheritances. This is a classic example of confronting the "who is the client" dilemma. Although the attorney may well agree with the children that a prenuptial agreement is in the best interests of the client, it is ultimately the client's call whether to avail himself or herself of those protections. In addition, if the children are offering to pay the attorney's fee to advise the parent with respect to an impending marriage, the attorney must comply with RPC 1.8(f).

Assuming that the client is willing, the prenuptial agreement can address some but not all of the issues raised in the previous section. Certainly, the prenuptial agreement can include provisions waiving the rights to elective share, an intestate share, a share as pretermitted spouse, homestead and other support awards. A waiver in a prenuptial agreement with respect to rights to ERISA benefits will not be enforceable unless executed after the marriage. Treas. Reg. 1.401(a)-20, Question 28; Hurwitz v. Sher, 982 F.2d 778, 781 (2d Cir. 1992). The prenuptial agreement could also presumably address funeral and burial arrangements. However, a prenuptial agreement could not alter the consequences of marriage on Social Security and Medicaid eligibility. *See, e.g., Estate of G.E. v. Division of Medical Assistance,* 638 A.2d 833 (N.J. 1994).

While the enforceability of prenuptial agreements is always an issue because of the peculiar situation and lack of arms length bargaining of the parties, there are certain minimum requirements that any prenuptial agreement must meet in order to have a chance at enforcement, and state statutes may further bolster enforcement. For example, the Uniform Probate Code contains provisions recognizing and enforcing the terms of a prenuptial agreement. Section 2-213 provides:

> (a) The right of election of and the rights of a surviving spouse to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse.
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> (b) A surviving spouse's waiver is not enforceable if the surviving spouse proves that:
>
> (1) That waiver was not executed voluntarily; or
>
> (2)The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse:
> (i) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
> (ii) Did not voluntarily and expressly waive, in writing any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
> (iii) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.
>
> (c) An issue of unconscionability of a waiver shall be decided by the court as a matter of law.
>
> (d) Unless it provides to the contrary, a waiver of "all rights," or equivalent language, in the property or estate of a present or prospective spouse, or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse in the property of the other and a renunciation by each of all benefits that would otherwise pass from the other by intestate succession or by virtue of any will executed before the waiver or property settlement.

The Uniform Premarital Agreement Act, adopted in 27 states, contains essentially the same provisions as the UPC for enforcement of a prenuptial agreement. Therefore, in order to be enforceable, the agreement must be either “not unconscionable” or the challenging party was not given reasonable disclosure of the assets and obligations of the other party and the rights he or she was waiving in the agreement.

One aspect of prenuptial agreements that should be considered in this context particularly are provisions for the surviving spouse upon the death of the richer spouse. Frequently, prenuptial agreements contain standard provisions waiving all rights to the "safety net" provisions found in state law, such as elective shares and homestead. If there is an intention on the part of the richer spouse to nevertheless provide for the poorer spouse, those provisions, or at least certain minimum provisions, should be required in the terms of the agreement for a few reasons. One is that such provisions become an enforceable contract right that the surviving spouse can assert as a creditor of the estate if corresponding provisions are not in fact made in the estate plan or if the children or other family members attempt to challenge the Will. In addition, the richer spouse may have every intention of getting around to including the poorer spouse in the estate plan but may put it off and not get it accomplished. In such a case, the provisions of the prenuptial agreement should provide adequate back-up.

III. ESTATE PLANNING FOR THE NEWLY MARRIED SENIOR

Regardless of whether the couple sign a prenuptial agreement, estate planning documents need to be updated to reflect each person's new marital status. The client must be reminded that even though the provisions of the premarital will are consistent with the testator's intentions, the new spouse may be able to claim as a pretermitted spouse unless the Will is updated to clarify that intention.

Particularly if a prenuptial agreement was not signed, an updated Will becomes critical. For example, if the richer spouse intends to make provision for the new spouse in his or her Will but leave children from a prior marriage or other beneficiaries as the primary takers of the estate, offset provisions should be spelled out so that if the surviving spouse makes claim for unwaived rights such as homestead, survivor rights in ERISA plans, or as pretermitted spouses, then any such claims would be deducted from the bequest in the Will. If no prenuptial Will was signed and elective share is a concern, then careful planning that is state-specific must be undertaken. Such planning would, for example, have to take into account whether the state uses an augmented estate approach or just considers probate assets when calculating the elective share.

Often one spouse will choose to provide for the surviving spouse with a trust providing lifetime support, with the remainder being distributed to the children from the prior marriage. If that is the chosen estate plan, the trust can contain language regarding the testator's wishes about how generous the trust should be to the spouse, in order to reduce conflict between the spouse and the children during the term of the trust. Also, the testator should consider making outright bequests to the children at the testator's death, even if the spouse is still alive. Otherwise, the children will be waiting for the stepparent to die before receiving any part of their inheritance. The testator could use his or her remaining exemption equivalent to make outright gifts to the children, with the remainder going into a

QTIP trust for the surviving spouse. This plan would be appropriate only if there were sufficient assets in addition to the exemption equivalent gifts to support the surviving spouse, particularly in light of the expanding estate credit.

Beware of estate tax allocation issues when the total estate plan deviates from all to spouse for life, remainder to children. For example, if the children are named as beneficiaries of a life insurance policy or retirement account, with the probate assets or a portion of them being distributed to the spouse or in trust for the spouse, the tax allocation clause in the Will may inadvertently direct that the probate estate pay all estate taxes, thus burdening the widow or widower's share with estate taxes on what the children are receiving (and perhaps reducing the marital deduction). Also, if a widow or widower is a beneficiary of a QTIP trust, and then remarries, be careful to readjust the formulas in the Will to accommodate the tax that will be due on the QTIP. For example, H is the beneficiary of his deceased wife's QTIP, which passes to the children on his death. H then remarries, and prepares a Will that sets up a credit shelter trust with his remaining estate tax credit for the benefit of the new wife, remainder into a QTIP for his new wife. The funding formula often used for credit shelter trusts would reduce the size of the credit trust by the amount of the QTIP from the first wife, thus allocating H's estate tax credit to cover the QTIP and putting the ultimate tax liability on the first QTIP to be paid out of the QTIP set up for Wife number two when she dies. That may be acceptable, but may not be if the beneficiaries of the first QTIP (the children from the first marriage) are different from the second QTIP (which might include new children or stepchildren).

Another potential drafting problem in the second marriage situation involves discretion granted to the fiduciaries. If either the new spouse or an adult child is appointed as fiduciary, the drafter must be concerned with conflicts of interest. Beyond the obvious concerns about how a fiduciary will evaluate discretionary distributions of principal, such as in the Marsman case above or whether an adult child trustee will continue to pay for a high-priced nursing home for the step-parent, fiduciaries may have more subtle discretionary options that can affect the beneficiaries. For example, the power to make non-prorata distributions of assets at certain points may allow the fiduciary to favor one beneficiary over another by distributing assets with different income tax bases. *See, e.g., Estate of Ehlers,* 911 P.2d 1017(Wn. App. 1996).

Another, less common, example is the choice of funding clauses that specify how an estate is to be divided between the marital deduction portion and the exemption equivalent portion. In order to avoid executors from overfunding the exemption equivalent amount (the amount that will not be subject to estate tax on the surviving spouse's estate), The IRS has limited how assets are to be valued when the time comes in estate administration to fund the marital deduction portion and the exemption equivalent function. *See* Rev. Proc. 64-19, 1964-1 C.B. 682. One approved method is the minimum worth pecuniary formula, which provides that the marital deduction share is first calculated at a specific dollar amount as of date

of death and at the time of distribution shall be satisfied with assets valued at the lesser of the estate tax value (date of death value) or the value at date of distribution. Jeffrey Pennell, Portfolio 843-2d *Estate Tax Marital Deduction* BNA Tax Management Portfolio Series, at section VIII.F. This type of funding allows the fiduciary a certain amount of discretion and, according to Professor Pennell, although it is rarely used, it should only be used in "friendly" family situations.

Allocating joint assets on the death of the surviving spouse among the children of each spouse can be complicated. If the couple have kept assets separate, and leave everything in trust to the surviving spouse, then each spouse's assets (remaining at the time of the survivor's death) can pass ultimately to that spouse's children. Some couples prefer to divide assets up equally among all the children. Although the simplest plan is to assets to each other outright (after using the unified credit), with the survivor leaving the balance to all the children and stepchildren equally, the couple must be warned that the survivor is under no obligation to carry out that plan, and is free to disinherit the first spouse's children after the first spouse's death. A contractual will presents numerous tax and other difficulties, so the best way to protect the children's inheritances is through the use of trusts.

In addition to the fiduciary selections in the Will or living trust, similar care must be taken with the power of attorney. If an adult child who is uncomfortable with the new stepparent is named as attorney-in-fact, attention must be given to the extent of the powers granted. If broad powers are given, the adult child may be able to alter beneficiary designations, move property out of accounts that are held jointly with the spouse, and otherwise disadvantage the stepparent.

IV. OPTIONS FOR REMAINING UNMARRIED

If the couple chooses not to marry, the situation may seem simpler but other complications present themselves. First, just the fact that the parties are not married does not insure that neither of them will have claims on the other's assets. Certainly, the most well known case illustrating the potential for an unmarried partner's claims against the other is *Marvin v. Marvin,* 122 Cal. App. 3d 871,176 Cal. Rptr. 555 (1981). Washington state has a more fully developed doctrine than palimony. In Washington, members of unmarried couples who have been in a longterm, marital-like relationship may acquire property interests in the other's property that would have been community property had the couple been married. *In Re Pennington,* 14 P.3d 76 (Wn. 2000); *Connell v. Francisco,* 898 P.2d 831 (Wn. 1995). Even though the couple's state of residence does not currently recognize similar equitable rights of unmarried partners, there is always a possibility that the couple may move, the state courts where they live may adopt such approach in the future or another equitable doctrine such as implied partnership may be applied to give one partner rights in the other's property. It should be noted, however, that a couple where both parties are retired is less

likely to see application of these equitable doctrines than a younger couple who are in the asset acquisition stage. Nevertheless, in light of the uncertainty, even if the couple chooses not to marry, some planning may be advisable.

A. Cohabitation Agreements. A cohabitation agreement accomplishes essentially the same goals as a prenuptial agreement: eliminating uncertainty and ambiguities as well as altering the default results from applicable law. As with prenuptial agreements, in order to be enforceable, the agreement must be procedurally fair so there needs to be full disclosure of each parties' assets and liabilities as well as full disclosure and explanation of any rights and duties that are being altered by the agreement. One aspect in which the cohabitation agreement differs from a prenuptial is that it is filling in gaps rather than changing existing rules applicable to the couple. For example, responsibility of living expenses of a married couple is affected by the legal duty to support each other. With an unmarried couple, there is no such duty, so the agreement must basically start from scratch and define the couple's respective responsibilities with respect to day to day expenses, expenses relating to maintenance of the parties' property, and whether to treat certain expenditures by one party for another as loans, gifts, or purchases of equity. Because of this clean slate, provisions with respect to expenses during the relationship can prevent serious controversy at the end of the relationship regarding expenditures made by one party that benefited the other. Because gifts from one unmarried person to another is not exempt from gift tax like transfers between legal spouses, adequate consideration and the potential for gift tax liability must be considered.

The agreement, like a prenuptial agreement, should also address property distribution and other rights when the relationship ends either through death of one of the parties or if the couple splits. As with a prenuptial agreement, the cohabitation agreement can serve both to protect a richer partner from claims of the poorer partner at the end of the relationship and can also protect the intentions of both partners from objections of the other family members and challenges to a Will executed in favor of the partner on the grounds of undue influence or similar challenges.

B. Registered Domestic Partnerships. Although the requirements vary slightly, both California and Washington now allow couples who are at least 62 years of age to register as domestic partners and thus acquire significant rights similar to rights granted to spouses under state law. RCW ch. 26.60 (2008); Ca. Fam. Code 297. Most other states that have adopted civil union or domestic partnership statutes are aimed exclusively at same sex couples and do not include older couples.

The purpose of including older heterosexual couples in Washington and California was to allow significant rights to couples who do not wish to marry because of detrimental effects on social security or other benefits. Under these states' statutes, couples who register as domestic partners acquire significant rights with respect to each other, including the following:

-Making health care decisions for each other
-Right to hospital visitation
-Right to spousal insurance policies
-Sick care and family leave
-Suing for wrongful death of a domestic partner
- Intestacy rights equivalent to a spouse
-Community property rights
-Property tax provisions available to married persons
-Disposition of remains of partner

Each state has many very specific rights that come with registration; for example, California includes the right to live with a partner in certain senior citizen housing developments. Cal. Bus. & Prof. Code 11010.05.

There are open questions, however. For example, it is unclear whether registration would cause each partner's resources and income to be considered if the other applies for Medicaid. While at least one website speculated that registration is "likely" to cause the registered domestic partner to be treated as a spouse for some public benefits purposes, http://www.caregiver.org/caregiver/jsp/content_node.jsp?nodeid=436, the federal Medicaid statutes refer only to "spouses" and in light of the federal Defense of Marriage Act, this may be one area where the refusal of the federal government to recognize any relationship other than a marriage between a man and a woman may work to the advantage of the couple.

Income tax aspects are also still very murky. Washington does not have an income tax so there are no state income tax issues. California now allows registered domestic partners to file joint state tax returns and to count earned income as community property and therefore owned by and taxed equally to the partners. Federal income tax is another matter. While the IRS has not ruled formally on the issue, on February 27, 2006, it issued a legal memorandum opining that even though California law treats income earned by one registered domestic partner as owned equally by both partners, for federal income tax purposes the income will be treated as earned solely by the earning partner. CCA 200608038; 2006 TNT 39-13. The reason given in the memorandum was that the case of Poe v. Seaborn, 282 U.S. 101, which held that community income earned by one spouse in Washington state was taxable equally to both spouses, did not apply because that case was based on the marriage between a man and a woman.

This reason makes little sense, however. The *Poe* decision, and other federal rulings on taxation of community property, was in fact based on the fact that state law declared that the income as earned was owned equally by the parties. Under the California statute, state law also dictates that the income earned by one domestic partner is owned equally by the two partners, as earned. It is understandable why the IRS would decline to allow registered partners the right to file a joint return, since that right is based solely on marital status, but taxation of community property is instead focused on the state law definition of ownership. However, until the IRS looks more closely at the issue or a court challenge to its present position is brought, earned income of registered domestic partners cannot be split on the federal income tax return.

C. Other Estate Planning issues for the Unmarried Couple. Like other unmarried couples, the elderly couple are likely to have concerns beyond just the financial. A review of the rights available to registered domestic partners in California and Washington, listed above, illustrates other issues that the couple may not be able to cover with a Will, Cohabitation Agreement or trust. Hospital visitation rights and rights to cohabit in a supervised living situation may be a concern, as well as the right to have a voice in health care decisions for the partner. The scope of rights that the partners will want to grant to the other is likely to vary greatly in the context of elderly couples, particularly where there are adult children from prior marriages involved.

V. CONCLUSION

This paper is only a partial discussion of the many issues that can come up when new romance enters the life of an older person. The usual concerns of any couple are complicated and increased when either or both of them have past marriages, children and a lifetime of asset accumulation. The role of the lawyer is to be alert and creative in informing clients about all the unexpected implications and to be sensitive to any reluctance to viewing the potential downsides to what appears to the client as a happy development.

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