The Intersection of Estate Planning, Family Law, and Elder Law

There are many commonalities between elder law, estate planning, and family law. All focus on the individual, and practitioners must balance legal advice with sensitivity and compassion, recognizing the life-altering events clients may be facing. Moreover, as late-in-life marriages become more common and spouses develop serious health issues, special considerations may be relevant to all these practice areas. Consider the following.

Case study

Joe and Sally, in their mid-seventies, have been married for 15 years—a second marriage for both. They each had two children from their first marriages who had no contact with one another. Sally's children are close to the couple. Joe's son and daughter-in-law predeceased Joe, but his remaining child is not in regular contact. Before their marriage, Joe and Sally executed a prenuptial agreement and individual estate plans that provided for their own respective children and grandchildren.

However, unique family dynamics affect the situation. One of Sally's children, Lynn, is in the midst of a contentious divorce involving minor children. Lynn and her soon-to-be-ex-husband are currently named as co-successor trustees on Sally's trust. Since Joe's son and daughter-in-law were killed in a car accident 10 years ago, Joe has been the guardian for his 15-year-old grandson, Michael. Michael lives with Joe and Sally.

Joe and Sally were both retired when they married. Joe has a much higher fixed monthly income than Sally, but Sally has more in investments and savings. Their home is held jointly. Historically, the couple have contributed equally to living expenses, but Joe has developed fast-progressing dementia, requiring Sally to provide care and hire additional caregivers. At the onset of the marriage, all assets were held separately, but over time they have been commingled without regard to Joe's and Sally's respective estate plans. Sally worries about her long-term financial security. The following is a review of issues to consider when counseling this couple.

By Rosemary Howley Buhl and Katie Lynwood

Remarriage and prenuptial agreements

Joe and Sally's situation illustrates many common dilemmas when marrying later in life. Problems such as unforeseen and challenging family dynamics are mixed with the competing priorities of preserving assets for children of previous marriages while balancing the needs of a spouse and the costs of care. Joe and Sally were proactive, intentionally planning for the division of their assets upon their divorce or deaths. Even so, as suitable as their plans were at the inception of their marriage, new considerations take priority when revising their planning needs and objectives. Although their existing plans may no longer be a perfect fit, they are helpful because they reflect the couple's overall wishes and intentions. Absent this, Joe's dementia would make it virtually impossible to determine his intent.

People marrying later in life often have children from previous relationships and have accumulated wealth that they want to protect for those children. However, as the couple ages, unanticipated healthcare expenses often create a strain between the spouse and children as to how expenses will be paid and out of whose funds, and who will make the decisions. This is an especially challenging dynamic when remarriage occurs later in life and the children never establish significant relationships with each other or the stepparent. In addition, determining who will care for the parent and make medical decisions can become contentious.

In this situation, Joe's family may have concerns with Sally being the decision maker and having unfettered access to Joe's funds. In addition, since Sally is Joe's medical patient advocate, she determines whether she will provide care for Joe in their home or place him in a facility. Sally's children may worry that Joe may not have enough resources to pay for his care and that their mother's financial security may be in jeopardy. Since both Joe and Sally are retired, they have no ability to replenish their estates as they face these overwhelming costs.

What happens when a couple has been married for so many years that they no longer follow their prenuptial agreement? By commingling assets, Joe and Sally have muddied the waters in terms of estate planning objectives and created doubt as to their current intentions and the ongoing appropriateness of the prenuptial agreement.

Unexpected estate planning

Sometimes clients have done everything right and have written plans in place, but unforeseen circumstances of named beneficiaries may require changes. In the scenario above, Lynn's impending divorce should prompt Sally to strongly consider taking immediate steps to remove Lynn's husband from any decision-making role.

Another possible scenario in which clients may want to revise their plans is when they are leaving money to a child who has special needs or is in a rocky relationship. The inheritance

FAST FACTS

Divorce for those over age 50 is on the rise, and this growing demographic leads to unique planning options and pitfalls; therefore, it's important to understand the interplay between family law and elder law to help a family navigate the process more smoothly.

For aging couples who are in a second marriage, unanticipated healthcare expenses often create a strain between the spouse and children of a prior marriage as to how expenses will be paid and out of whose funds, and who will make the decisions.

As aging couples face overwhelming nursing home expenses, they sometimes believe their only option to qualify for Medicaid benefits is divorce; however, in many circumstances, Medicaid planning techniques allow the couple to remain married and qualify for benefits.

shouldn't be subject to the divorce division; however, it depends on the state, and in some jurisdictions the judge has discretion to invade inherited property.[1] In the scenario above, until Lynn's divorce is finalized, the division of Lynn's and her husband's assets will be uncertain. Sally should take steps to ensure that if she were to die, funds do not go to Lynn outright before the divorce is final.

Grandparents as guardians

Grandparents acting as guardians for minors may encounter capacity issues as they age. When Joe became Michael's guardian, he was the most appropriate person to serve in that role, but his health is interfering with his ability to continue. Michael has lived with the couple for 10 years and they are the only parental figures he knows, so a substantial change will create additional stress. Sally may be the appropriate guardian, but she may be unable to handle the responsibility. This situation should be addressed thoughtfully before it turns into a crisis.

Divorce after 65

Older individuals who want to divorce may choose to stay married temporarily to qualify for Social Security benefits, pensions, or health insurance because if they divorce, they may lose some or all of these benefits. Consider financial consequences when thinking about ending a late-in-life marriage. For an ex-spouse to make a claim on a former spouse's Social Security record, the marriage must have lasted at least 10 years and the applicant must be unmarried and over age 62.[2] The rules regarding survivor benefits or the division of a pension vary from plan to plan. Couples who have not saved appropriately may encounter financial circumstances, including their income and resources, which limit their ability to support two separate households, and they may therefore choose to remain married. If Joe and Sally were to consider divorce, their resources might be sufficient to support two households, albeit with an income disparity. It would be prudent to consider whether Medicaid may be necessary in the future when determining the division of resources to put both Joe and Sally in the best possible financial situation.

As aging couples face overwhelming nursing home expenses, they sometimes believe their only option to qualify for Medicaid benefits is divorce. In many circumstances, Medicaid planning techniques allow the couple to remain married and qualify for benefits. However, in rare circumstances, the best financial option is divorce. In the above situation, Joe and Sally would have Medicaid planning options available to them short of ending the marriage.

As for Medicaid, what is the effect of a separation? Medicaid is black and white—either you are married or you are divorced. A separation agreement or pre- (or post-) marital agreements do not provide protection. Also, Medicaid does not allow for alimony by a Medicaid recipient in a nursing home.[3]

In some circumstances, one spouse may have dementia or other medical conditions that result in capacity issues. In that case, it may be necessary to have a guardian or conservator appointed on behalf of the incapacitated spouse to ensure adequate protection for both parties. Given Joe's diagnosis, if either spouse were to pursue a divorce, it may be necessary to have a guardian and conservator appointed on his behalf.

Conclusion

The interplay of family law, estate planning, and elder law needs to be handled not only with an understanding of the technical side of the law, but also with a sensitivity to the challenges related to the aging process. Lack of physical ability, mental capacity, and ability to change financial circumstances make this type of representation unique. Adequate representation by an estate planning or family law attorney of an elder with health issues includes consulting with an elder law attorney to achieve the best results under the circumstances. ■

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ENDNOTES

1. MCL 552.23.
2. Social Security Administration, *Retirement Planner: Benefits For Your Divorced Spouse* <https://www.ssa.gov/planners/retire/yourdivspouse.html> (accessed November 29, 2017).
3. Mich Dept of Health and Human Services, *Bridges Eligibility Manual 503, Income Unearned*, p 34 (July 1, 2017), available at <https://dhhs.michigan.gov/OLMWEB/EX/BP/Public/BEM/503.pdf> (accessed November 29, 2017).