

The Law and You Marriage for Older Adults & Financial Risks

It's a fact that we are living longer. And that means we are facing a host of new issues. Our health is of course one of them. But more older adults are also facing marriage in their 60's, 70's, and 80's or older.

Marriage at any age should be taken seriously. At a young age, financial risks are generally minimal. But for older adults, entering into marriage can be financially far more risky.

Over time, most adults acquire property and build an estate for themselves. They may also enjoy substantial income from their career or investments.

When marriage is contemplated, divorce or death is seldom considered. But those events trigger serious financial consequences.

In a divorce, marital property is generally divided equally between husband and wife. While there is no bright line, assets jointly owned or acquired during the marriage are most often divided equally between the parties.

In addition to dividing marital assets, alimony may also be awarded. The duration of alimony is limited to the duration of the marriage. The amount of alimony is determined by the relative incomes of the divorcing parties and the standard of living during the marriage. The courts will attempt to equalize the standard of living for each divorcing party.

Upon death, the surviving spouse is entitled to an "elective share" of the marital

estate. A person cannot use a Will or a Trust to disinherit a spouse. Generally, a surviving spouse receives a minimum of one-third of the deceased's estate.

The only exception to the financial implications of divorce or death is a premarital agreement.

In 1994, Utah enacted the Uniform Premarital Agreement Act. The full text of the Act can be found at § 30-8-1, Utah Code Annotated.

The Act expressly provides an exception to the general laws that protect spouses in a divorce or death situation. A premarital agreement, if in writing and signed by both parties, can alter the division of property following a divorce or death. It can also waive or set the amount of alimony in case of divorce.

In a premarital agreement, the parties may contract with respect to:

- a. the rights and obligations of each of the parties in any of their property regardless of where or when the property was acquired.
- b. the disposition of property upon separation, divorce, death or the occurrence or nonoccurrence of any other event.
- c. the modification or elimination of spousal support.

The premarital agreement may also contain other provisions, so long as they are not in violation of public policy. In particular, a premarital agreement cannot limit child support nor can it limit spousal support to the

extent that a divorced spouse becomes eligible for public assistance.

A premarital agreement may be amended or revoked during the marriage, provided such changes are in writing and signed by the parties.

Subsequent to the passage of the Act, the Legislature also enacted § 75-2-213 as part of the Probate Code. This section reinforces the right to contract between spouses. Specifically, it expressly permits a premarital contract to waive wholly or partially any rights a surviving spouse might have to an elective share, homestead allowance, exempt property or family allowance.

A premarital agreement is not enforceable if a spouse does not execute the agreement voluntarily. It is also not enforceable if there is fraud. It is important for the parties to fully disclose the extent and nature of their property and financial obligations. If they do not, the agreement may not be enforceable in a divorce or after death.

One final point about a premarital agreement: it will not affect the way Medicaid values the assets of a married applicant. Regardless of any waivers in a premarital agreement, Medicaid will consider all assets of both spouses in determining eligibility for long term care assistance.

Deciding whether a premarital agreement is right for you is necessarily a very personal decision. Each situation is unique. Some fear that a premarital agreement conveys distrust or a lack of confidence in the marriage.

But some marriages never take place,

especially with seniors, simply out of concern about what might happen to their estates. Candidly discussing the issues may dispel the fear of a premarital agreement.

Consulting with an Elder Law Attorney may help. To locate an Elder Law Attorney, check with the National Academy of Elder Law Attorneys at (520) 881-4005, or your local Yellow Pages.

YOUR QUESTIONS: Do you have a particular question that you would like answered? To better serve the regular readers of this Elder Law Column, please direct your questions in writing to Michael A. Jensen, Elder Law Attorney, PO Box 571708, Salt Lake City, Utah 84157. From time to time, I will attempt to answer some of those questions. Also, you may send your questions to:

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