

9-1-2020

Changing Demographics, Elder Law, and Trusts and Estates

Naomi Cahn

Follow this and additional works at: <https://scholarlycommons.law.hofstra.edu/actecj>



Part of the [Estates and Trusts Commons](#), [Taxation-Federal Estate and Gift Commons](#), and the [Tax Law Commons](#)

Recommended Citation

Cahn, Naomi (2020) "Changing Demographics, Elder Law, and Trusts and Estates," *ACTEC Law Journal*: Vol. 46: No. 1, Article 5.

Available at: <https://scholarlycommons.law.hofstra.edu/actecj/vol46/iss1/5>

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in ACTEC Law Journal by an authorized editor of Scholarly Commons at Hofstra Law. For more information, please contact lawlas@hofstra.edu.

Changing Demographics, Elder Law, and Trusts and Estates

*Naomi Cahn**

With the aging of Baby Boomers, family structures today are different from those fifty years ago, and increased life expectancy brings a number of additional challenges. The only group for whom the divorce rate is increasing is those ages 50 and above;¹ the rate of cohabitation for all age groups, including those over the age of 50, is increasing.² The article outlines a variety of topics relevant to the changing demographics of seniors: 1) the need for prenuptial agreements and cohabitation agreements; 2) the need to protect earlier families; and 3) the importance of planning for longer lifespans, ranging from advance medical directives to funding long-term care.

These are issues that show the interrelationship between elder law and the trusts and estates field. If elder law practice is “focused on counseling older adults on later-in-life planning and related concerns,”³ then a significant part of that counseling will involve core trusts and estates issues: it will also, of course, include topics that go beyond financial security and have become part of the elder law canon, such as planning for incapacity, for health care needs, and for housing eventualities, while also involving attentiveness to horizontal and vertical intrafamilial relationships. At a jurisprudential level, elder law is “the study of how the law affects and responds to old age and the experience of getting

* Justice Anthony M. Kennedy Distinguished Professor of Law, Nancy L. Buc '69 Research Professor in Democracy and Equity, Director, Family Law Center, University of Virginia School of Law. Thanks to Mary Kate Hunter, GW research librarian extraordinaire, and Meredith Condren for research assistance. And much gratitude to Alyssa DiRusso for organizing this symposium and to Ashleigh Gough for her stewardship.

¹ See Renee Stepler, *Led by Baby Boomers, divorce rates climb for America's 50+ population*, PEW RSCH. CTR. (Mar. 9, 2017), <https://www.pewresearch.org/fact-tank/2017/03/09/led-by-baby-boomers-divorce-rates-climb-for-americas-50-population/> [https://perma.cc/U6EL-T4AQ].

² See Renee Stepler, *Number of U.S. adults cohabiting with a partner continues to rise, especially among those 50 and older*, PEW RSCH. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/> [https://perma.cc/FNM3-FAMK].

³ Nina A. Kohn, *A Framework for Theoretical Inquiry into Law and Aging*, 21 THEORETICAL INQUIRIES L. 187, 199 (2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3634924.

older,”⁴ and the law’s handling of the changing demographics of older people is again at the intersection of the two fields. While either family law or trusts and estates law already includes many of the issues addressed in this article, elder law practice and jurisprudence provide additional insights for practitioners and scholars that unify the somewhat, and sometimes, disparate elements.

I. CHANGING DEMOGRAPHICS

In 1960, 72% of all adults were married,⁵ and 13% of those were in second or subsequent marriages.⁶ By contrast, today, just over half of all adults are married, and almost a quarter of them are in second (or subsequent) marriages.⁷ Increasing divorce and remarriage rates mean a rising number of stepparents and stepchildren; while almost three-quarter of all children in 1960 lived with two married parents in their first marriage, under half do so today.⁸

Most of those subsequent marriages involve people over the age of 55.⁹ But people over the age of 55 also have an increasing divorce rate – and the cohabitation rate for those over the age of 65 tripled from 1996-2017.¹⁰ While 3% percent of women, and 4% of men, ages 65 and older were divorced in 1980, that is true for 14% of women, and 11% of men, today.¹¹ An unknown number of older couples are LATs, or living-apart-together couples, another manifestation of an increasingly mobile

⁴ *Id.*

⁵ D’vera Cohn et al., *Barely Half of U.S. Adults Are Married – A Record Low*, PEW RSCH. CTR. (Dec. 14, 2011), <https://www.pewsocialtrends.org/2011/12/14/barely-half-of-u-s-adults-are-married-a-record-low/> [<https://perma.cc/R7VJ-MA8L>].

⁶ Gretchen Livingston, *Four-in-Ten Couples are Saying “I Do,” Again*, PEW RSCH. CTR. 1, 8 (Nov. 14, 2014), https://www.pewresearch.org/wp-content/uploads/sites/3/2014/11/2014-11-14_remarriage-final.pdf.

⁷ *Id.*

⁸ *Parenting in America: Outlook, worries, aspirations are strongly linked to financial situation*, PEW RSCH. CTR. 15 (Dec. 17, 2015), https://www.pewresearch.org/wp-content/uploads/sites/3/2015/12/2015-12-17_parenting-in-america_FINAL.pdf; see Naomi Cahn, *The Golden Years, Gray Divorce, Pink Caretaking, and Green Money*, 52 FAM. L. Q. 57, 65 (2018) (discussing baby boomers and remarriages).

⁹ Livingston, *supra* note 6, at 10.

¹⁰ Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html> [<https://perma.cc/RT5F-58J9>].

¹¹ *Fact Sheet: Aging in the United States*, POPULATION REFERENCE BUREAU (Jul. 15, 2019), <https://www.prb.org/aging-unitedstates-fact-sheet/> [<https://perma.cc/KX6K-7X44>].

society.¹² Moreover, more than a quarter of Americans over the age of 60 live alone.¹³

As a final demographic note, these subsequent marriages and cohabitations for older people may last a long time because Americans are living longer lives than in the past. In 1900, approximately 4% of the population was aged 65 or older; that number is projected to be closer to 20% by 2050.¹⁴ And the number of people living with a disability is expected to increase, with health disparities by socioeconomic status also affecting the aging population.¹⁵ As a result, planning for older age, including long-term care and its attendant costs, assumes increasing significance, as does the role of the state in providing care.

So changing numbers of stepfamilies, cohabitants, and longer life pose challenges for how the law should respond.

II. PROTECTING FIRST FAMILIES

When they marry, couples change their status and are covered by a series of both override and default rules at the state and federal level that channel the couple into an emotional and economic partnership.¹⁶ These laws become most visible at times of stress or dissolution, such as serious illness, divorce, or death, and range from assumptions that a spouse will serve as a default decision maker for medical decisions to intestacy provisions, gift and estate tax protections, and the elective share. Yet marriage is not always economically positive and, of particular relevance to older people, can preclude, or even terminate, significant benefits.

The presumption behind most of the default laws is that the spouses would choose to benefit one another, and, in first marriages, such pre-

¹² See Cynthia Grant Bowman, *Living Apart Together as a “Family Form” Among Persons of Retirement Age: The Appropriate Family Law Response*, 52 FAM. L. Q. 1, 22 (2018).

¹³ Jacob Asubel, *Older people are more likely to live alone in the U.S. than elsewhere in the world*, PEW RSCH. CTR. (March 10, 2020), <https://www.pewresearch.org/fact-tank/2020/03/10/older-people-are-more-likely-to-live-alone-in-the-u-s-than-elsewhere-in-the-world/> [<https://perma.cc/U4PC-9XS7>].

¹⁴ See *The Growing Cost of Aging in America Part 1: An Aging Population and Rising Healthcare Costs*, GEO. WASH. U. (Apr. 6, 2018), <https://publichealthonline.gwu.edu/cost-of-aging-healthcare/> [<https://perma.cc/ZMV5-WCLK>]; see also ANDREW SCOTT & LYNDY GRATTON, *THE NEW LONG LIFE: A FRAMEWORK FOR FLOURISHING IN A CHANGING WORLD* (2020) (addressing the challenges of longer lifespans).

¹⁵ Paola Scommegna et al., *Eight Demographic Trends Transforming America’s Older Population*, POPULATION REFERENCE BUREAU (Nov. 12, 2018), <https://www.prb.org/eight-demographic-trends-transforming-americas-older-population/> [<https://perma.cc/3FH6-7CK5>].

¹⁶ Naomi Cahn, *What’s Right About the Elective Share?*, 53 U.C. DAVIS L. REV. 2087, 2091-92, (2020).

sumptions are most likely to be accurate. It is in subsequent marriages that these assumptions become questionable, particularly when either spouse has separate children.¹⁷ Indeed, in their empirical study of wills, Danaya Wright and Beth Sterner found that patterns of distribution differed when testators were in a first or subsequent marriage.¹⁸ For example, while 58% of the one-time married spouses left their entire estates to the surviving spouse, that was true for only 40% of testators in a subsequent marriage; moreover, those in a subsequent marriage were twice as likely as those in a first marriage not to leave anything to a surviving spouse.¹⁹ Or the decedent may even have wanted to benefit a divorced spouse or that spouse's relatives, contrary to the presumption in revocation-upon-divorce statutes.²⁰

Elder law theory and practice thus counsel attention to the reasons for these longstanding presumptions and the processes for opting out of them. While a spouse does not have control over whether a spouse or ex-spouse has access to Social Security benefits (an example of override rules), they can opt out of many default rules involving, for example, the management of the disposition of their property at divorce or death and the choice of a surrogate decision-maker. That control starts before marriage, with prenuptial agreements or, after marriage, with postmarital agreements that can waive – or not – joint acquisition of property, alimony, the elective share, and other rights during marriage.²¹ Similarly, trust documents, at the time of initial drafting and afterwards, with respect to changes in family structure, need careful drafting to plan for the impact of demographic developments. Advance medical directives can designate children, or even a first spouse, as the health care decisionmaker.

Elder law theory may prompt reforms to the default laws by, for example, changing the presumed healthcare decisionmaker to a grown child where a parent is in a subsequent marriage. Intestacy laws already reflect the potential existence of nonjoint children of either spouse,²²

¹⁷ *Id.*; e.g., Randolph Morgan, *Love in Your Later Years*, 30 EXPERIENCE, Jan./Feb. 2020, at 16, 18, https://www.americanbar.org/groups/senior_lawyers/publications/experience/2020/january-february/love-your-later-years/ [<https://perma.cc/3EFX-4M59>] (discussing estate planning before marriage).

¹⁸ See Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341, 364-66 (2017).

¹⁹ See *id.* at 365.

²⁰ See Naomi Cahn, *Revisiting Revocation Upon Divorce?*, 103 IOWA L. REV. 1879, 1885 (2018); AMY ZIETLOW & NAOMI CAHN, *HOMEWARD BOUND* 147-48 (2017).

²¹ See UNIF. PREMARITAL & MARITAL AGREEMENTS ACT § 9(c) (UNIF. L. COMM'N 2012).

²² See UNIF. PROBATE CODE § 2-102 (UNIF. L. COMM'N amended 2019).

and the existence of other families may lead to revision of other doctrines.

Just as the presumption of most default laws is an intent to benefit, the presumption behind most override laws is that marriage is an economic partnership. Elder law theory might even prompt reform to some override laws, such as changing the standard elective share laws in subsequent marriages.²³ The omitted spouse doctrine, another override rule, protects bequests to the testator's prior, non-joint children through the abatement principles.²⁴

Finally, both override and default laws have costs for marriage. The Medicaid long-term care eligibility rules, even with the community spouse protections,²⁵ while enshrining a partnership theory of marriage, are neither marriage-neutral nor couples-neutral.²⁶ The default alimony rules in many states provide that remarriage or cohabitation, or a similar relationship with a new partner, can terminate alimony;²⁷ a separation agreement can ensure ongoing alimony awards, even if the recipient is living with another partner.

²³ See Anne L. Alstott, *Updating the Welfare State: Marriage, The Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 736 (2013).

²⁴ UNIF. PROBATE CODE § 2-301(b). States differ on this issue, with some, as well as the UPC, including explicit protection for an omitted spouse. See *id.* § 2-301(a); Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 263 (2018) (identifying 33 states). Some do not. See, e.g., N.C. GEN. STAT. § 31-5.3 (2020) (specifying that the omitted spouse can elect against the will). Unlike the elective share, omitted spouse statutes have been adopted in community property states. See, e.g., CAL. PROB. CODE § 21610 (West 2020).

²⁵ Medicaid is available to qualifying low-income individuals. *Eligibility*, MEDICAID, <https://www.medicaid.gov/medicaid/eligibility/index.html> [<https://perma.cc/LC8P-F7HA>]. Married couples, where one spouse is in a nursing home, are subject to a “spousal impoverishment” rule, under which a limited amount of the couple’s assets are preserved for the noninstitutionalized (“community”) spouse. *Spousal Impoverishment*, MEDICAID, <https://www.medicaid.gov/medicaid/eligibility/spousal-impoverishment/index.html> [<https://perma.cc/9QA6-SMS2>]. On the other hand, the income of the community spouse is not counted to determine the eligibility of the institutionalized spouse. LAWRENCE FROLIK & MELISSA BROWN, *ADVISING THE ELDERLY OR DISABLED CLIENT* ¶ 14.03[2][c][i] (2d ed. 2020).

²⁶ Joanna Zhang, *Marriage in the Golden Years: Revisiting Benefits and Obligations in Light of the New Individualism*, 38 N.Y.U. REV. L. & SOC. CHANGE 361, 376 (2014). On the issue of “neutrality,” see Daniel Hemel, *Beyond the Marriage Tax Trilemma*, 54 WAKE FOREST L. REV. 661, 661 (2019) (couples neutrality means the same tax liability across all married couples who have the same income, while marriage neutrality ensures that a married couple pays the same taxes as if the spouses were not married).

²⁷ E.g., Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1940 (2018).

III. PROTECTING COHABITANTS

The increasing number of cohabitants has resulted in changes in law, practice, and theory. At one time, cohabitation was a crime in many states. But as cohabitation (including living apart together couples) has become more prevalent and more socially acceptable, laws concerning cohabitation have changed markedly. A spur to such change was the pursuit by cohabitants of various theories to establish legal claims against each other. There is, however, no uniformity among the states on the legal treatment of cohabitation, and, as a general matter in most states, the cohabitation itself does not create legal obligations.

Instead, state common law has evolved in three distinct directions. The first, and most common, allows cohabitants to assert legal and equitable claims against one another based, for example, on contract or unjust enrichment.²⁸ A second approach, available most prominently in Washington state,²⁹ allows the assertion of status-based claims. A third group of states accords no relief at all, even if there are contract or equitable claims that arise from the relationship.³⁰ Some jurisdictions also have enacted statutes that allow cohabitants to register for a civil union or domestic partnership or a similar status.³¹

The law applicable to cohabitants thus varies by state and, unlike married couples, cohabitants are subject to few override rules. While the Uniform Law Commission has tasked a Drafting Committee with developing model legislation to unify the differing state approaches to economic rights between cohabitants,³² the resulting proposed legislation may not be adopted by all of the states.

To ensure that cohabitants are aware of their rights, practitioners are increasingly drafting cohabitation agreements to set out the parties' legal expectations.³³ Such agreements can reflect the parties' intent to impose marital-type obligations, or can keep income, real and personal property, and gifts separate and can determine how expenses incurred

²⁸ See Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1329 (2019); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 63 (2016).

²⁹ See, e.g., *In re Walsh*, 335 P.3d 984, 984, 988 (Wash. Ct. App. 2014).

³⁰ See *Blumenthal v. Brewer*, 69 N.E.3d 834, 851 (Ill. 2016); Antognini, *supra* note 27, at 1919.

³¹ See, e.g., John G. Culhane, *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples' Real Relationships*, 58 FAM. CT. REV. 145, 149 (2020).

³² *Economic Rights of Unmarried Cohabitants Committee*, UNIF. L. COMM'N (2018), <https://www.uniformlaws.org/committees/community-home?CommunityKey=5f044999-b4b3-458a-b6d4-d984885d913b> [<https://perma.cc/FY42-5ZCW>]. Full disclosure that I am the Reporter for the Drafting Committee.

³³ See Morgan, *supra* note 17, at 17.

during the relationship, such as mortgage or rental payments, should be treated. If each partner wants to change beneficiary designations on retirement accounts or insurance plans, then those could also be covered, with the obligation to make those changes in compliance with the appropriate documents.³⁴ This is an especially important project when there are preexisting families. Indeed, given the range of expectations and income independencies and dependencies, cohabitants may well be specifically trying to avoid obligations.³⁵

IV. CONCLUSION

Although elder law and trusts and estates overlap substantially with respect to family counselling issues, elder law contributes a series of additional issues to be considered on the practical, legislative, and jurisprudential levels. The demographic changes to family structure provide a case study of those contributions, suggesting new considerations for trusts and estates practice and providing support for a re-examination, and possible revision, of existing doctrines.

³⁴ Naomi Cahn & Kim Kamin, *Adapt Old Strategies to Fit New Family Arrangements*, 47 *EST. PLAN.* 30, 35 (2020).

³⁵ *E.g.*, Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 *ARIZ. ST. L.J.* 1247 (2019) (detailing the different types of cohabiting relationships).

