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### The 100-Year Life and the New Family Law

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# The 100 Year Life and the New Family Law

Naomi Cahn & Elizabeth Scott

Lynda Gratton and Andrew Scott invite us to contemplate a future in which life expectancy extends to 100 years; in this chapter we explore the likely impact of this trend on family law. This undertaking requires first an inquiry, based on existing demographic trends, into how increased longevity is likely to affect family formation and structure in general, and especially for an expanding cohort of older individuals. Will increased longevity affect childrearing patterns? Will octogenarians (and beyond) create new family relationships and how might these relationships differ from traditional families? Our analysis leads us to conclude that the 100-year life indeed is likely to have an impact, but that families will continue to function as the primary setting for intimacy and for caregiving and caretaking, whatever form those families take. Further, the importance to both individual and social welfare of family support throughout life points to a need for reform of current family law doctrine. The impact of longer life on doctrines regulating the relationship of parents and minor children is likely to be modest, but doctrinal and policy reforms will be needed to support individuals in following their preferences for intimacy and security in old age -- as will reforms to the minimal role of the state in promoting security for individuals in different family forms.<sup>1</sup> We suggest general goals for law reform and offer as well some specific proposals.

## 1. Family Demographic Trends

The starting point to better forecasting the impact of increased longevity on family law is an accurate account of recent trends in family formation and structure. While extrapolation from the present to the future is difficult, a large body of demographic data on families offers the best tools available to predict the challenges the law will face as life expectancy increases. The future of families is likely to build on several trends: First, families are smaller today, with more dual-earning couples and fewer children to serve as future caretakers of aging parents. Second, non-

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<sup>1</sup> E.g., Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, *Law & Contemp. Probs.*, 2014, at 25, 32; Clare Huntington, *Failure to Flourish: How Law Undermines Family Relationships* (2014).

marital cohabitation has increased. Third, the number of second and third families has also grown, but at the same time, the number of individuals, particularly seniors, living alone has increased.<sup>2</sup> Fourth, family structures increasingly are stratified by class; educated couples are more likely to marry, while cohabitation is more likely to be chosen by couples with less education.<sup>3</sup> Finally, the divorce rate has flattened or declined for some groups, but has grown among older married couples.

*a. The numbers.* With the greying of Baby Boomers and the aging of Millennials, family structures today are different from those fifty years ago. Although average household size and fertility rates have decreased, people are more likely to live in multigenerational households, which include at least two adult generations, or grandparents and grandchildren who are younger than 25;<sup>4</sup> the trend towards multigenerational households is likely to continue as lives lengthen since aging parents both provide and need care. More than one-fifth of those over the age of 65 live in such a household.

Childrearing patterns have changed in recent decades. In today's households, both partners are more likely to work as women's labor force participation has increased.<sup>5</sup> Childrearing, which increasingly is shared by parents, has been pushed back for educated couples. And, as well-paying jobs with good benefits become increasingly scarce for the non-college-educated, college attendance means that children's transition to independence occurs later., extending into adulthood,

Partnering is also changing. In 1960, 72% of all adults were married,<sup>6</sup> and 13% of those were in second or subsequent marriages.<sup>7</sup> By contrast, today, just over half of all adults are

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<sup>2</sup> <https://ourworldindata.org/grapher/percentage-of-americans-living-alone-by-age>.

<sup>3</sup> <https://www.pewsocialtrends.org/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/>; JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS (2014).

<sup>4</sup> <https://www.pewresearch.org/fact-tank/2019/10/01/the-number-of-people-in-the-average-u-s-household-is-going-up-for-the-first-time-in-over-160-years/>.

<sup>5</sup> <https://www.bls.gov/opub/mlr/2020/article/comparing-characteristics-and-selected-expenditures-of-dual-and-single-income-households-with-children.htm>

<sup>6</sup> 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>].

<sup>7</sup> 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](https://www.pewresearch.org/wp-content/uploads/sites/3/2014/11/2014-11-14_remarriage-final.pdf).

married, and almost a quarter of those are in second (or subsequent) marriages.<sup>8</sup> The percentage of people who are not married has increased for all racial groups, although it has remained relatively stable for Asians.<sup>9</sup> Correspondingly, the rate of cohabitation for all age groups and social classes is increasing. This includes individuals over the age of 50<sup>10</sup>; the cohabitation rate for those over the age of 65 tripled from 1996-2017.<sup>11</sup> Moreover, the age of first marriage has increased over the past generation as more individuals postpone marriage to complete their education.<sup>12</sup> Indeed, the education gap in rates of marriage for millennials is wider than in earlier generations; marriage increasingly is chosen by more educated couples, while less educated partners tend to live together in informal unions.<sup>13</sup> But overall, millennials have high rates of cohabitation.<sup>14</sup>

Relatively high 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, less than half do today.<sup>15</sup> However, remarriage rates overall are decreasing, suggesting that divorced individuals may be more likely to enter informal unions.<sup>16</sup>

The only group for whom the divorce rate is actually increasing today is those ages 50 and above,<sup>17</sup> with the rate doubling for those ages 55-64 and tripling for those age 65 and older

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<sup>8</sup> *Id.*

<sup>9</sup> <https://www.usnews.com/news/elections/articles/2020-02-14/the-state-of-american-households-smaller-more-diverse-and-unmarried>.

<sup>10</sup> 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>].

<sup>11</sup> 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>].

<sup>12</sup> <https://www.prb.org/usdata/indicator/marriage-age-women/snapshot/>

<sup>13</sup> <https://www.pewsocialtrends.org/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/>.

<sup>14</sup> <https://www.pewsocialtrends.org/2020/05/27/as-millennials-near-40-theyre-approaching-family-life-differently-than-previous-generations/#:~:text=A%20look%20at%20Millennials%20who,in%20their%2020s%20and%2030s>.

<sup>15</sup> *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](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).

<sup>16</sup> <https://www.bgsu.edu/content/dam/BGSU/college-of-arts-and-sciences/NCFMR/documents/FP/payne-change-remarriage-rate-fp-18-16.pdf>

<sup>17</sup> 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>].

from 1990-2017.<sup>18</sup> While three percent of women, and four percent of men, ages 65 and older were divorced in 1980, that is true for 14% of women, and 11% of men, today.<sup>19</sup>

Notwithstanding this increase, the rates are still below those of younger cohorts. Although with longer lives, divorce rates for older persons may increase, the determining factor may be class rather than age.

Increasingly, older people live in informal groups that currently are not recognized as families. Non-conjugal congregate living has increased with a growing number of options, such as intentional cohousing communities<sup>20</sup> (grown-up communes) or “villages,” voluntary kin groups,<sup>21</sup> and naturally occurring retirement communities; some of these family arrangements support aging-in-place, a goal of many seniors,<sup>22</sup> and all promote ongoing social and emotional connections.<sup>23</sup> Of course, many older people also live in nursing homes, assisted living or continuing care retirement communities.

More than a quarter of Americans over the age of 60 live alone.<sup>24</sup> Women are more likely than men to live alone, while both African-American men and women live alone at rates that are higher than those of whites.<sup>25</sup> The rates for LGBTQ seniors living alone are higher than for cisgender older adults,<sup>26</sup> a trend that is likely changing with greater societal acceptance of same-sex relationships.<sup>27</sup>

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<sup>18</sup> <https://www.bgsu.edu/ncfmr/resources/data/family-profiles/allred-age-variation-div-rate-fp-19-13.html>

<sup>19</sup> Population Reference Bureau, *Fact Sheet* (2019), <https://www.prb.org/aging-unitedstates-fact-sheet/>.

<sup>20</sup> <https://www.aarp.org/livable-communities/info-2014/creative-age-friendly-housing-options.html>

<sup>21</sup> Dawn Braithwaite et. al., *Constructing Family: A Typology of Voluntary Kin*, 27 *J. Soc. & Pers. Relationships*, 388 (2010).

<sup>22</sup> <https://www.barrons.com/articles/how-covid-19-will-shape-the-future-of-senior-living-new-models-of-care-more-aging-in-place-51590767276>

<sup>23</sup> <https://www.aarp.org/livable-communities/info-2014/creative-age-friendly-housing-options.html>.

<sup>24</sup> Jacob Asubel, *Older people are more likely to live alone in the U.S. than elsewhere in the world*, PEW RESEARCH 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/>.

<sup>25</sup> <https://www.nextavenue.org/old-black-alone-grim-forecast/>.

<sup>26</sup> <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf>. They are also less likely to have children who can care for them, and more likely to have “families of choice.” *Id.* at 0.

<sup>27</sup> <https://www.census.gov/library/stories/2019/09/where-same-sex-couples-live.html#:~:text=Married%20same%2Dsex%20couples%20made,over%20the%20past%2010%20years>

As a final demographic note, older individuals tend to have more health problems and disability than younger persons, and this is likely to continue even if advances in health care keep pace with advances in longevity. Moreover, socioeconomic status is linked to substantial disparities in health status. Presumably, these disparities and the incidence of disability generally in the aging population will increase as life expectancy increases.<sup>28</sup>

b. *Implications of Increased Longevity for Family Formation and Structure.* These trends form a context for speculating about the impact of substantial increases in longevity on family formation and structure. Several trends seem particularly salient: These include later marriage and childbearing, the education gap in family formation, increasing rates of cohabitation and formation of second and third families, and generally the increased variety in the forms families take (a trend that Gratton and Scott predict, p. 15).

First, patterns of childrearing may change. With increased life expectancy, childhood dependency may extend further into adulthood, resulting in family formation, childrearing and childrearing later in life for educated persons. Births among women over the age of 40 are rising.<sup>29</sup> As women become increasingly likely to freeze their eggs and surrogacy becomes legal in more states, the trend of later births will continue. Advances in ART may even contribute to childbearing and rearing by those in their 50s, 60s and beyond. Of course, as Gratton and Scott note (p. 293), longer lives will result in a “smaller proportion of years [] focused on raising children,” a situation likely to be true, even with increased length of dependency. The authors predict this may result in decreased role-based specialization within the family.

Second, as individuals live longer, trends in re-partnering may change. While marriage has become concentrated in wealthier and more highly educated couples, even this group may be less likely to choose marriage later in life after divorce from or the death of a first spouse. Not only will the appeal of marriage as a secure setting to raise children be less relevant as people age, but they may not want to assume the financial commitments that typically go with marriage.

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<sup>28</sup> Paula Scommegna et al., *Eight Demographic Trends Transforming America's Older Population*, Pop. Ref. Bur. (Nov. 12, 2018), <https://www.prb.org/eight-demographic-trends-transforming-americas-older-population/>.

Accordingly, cohabitation rates among older people across classes are likely to increase. Even those who prefer marriage for religious or other reasons may vary in the extent of financial sharing and commitment they desire.

In general, seniors who establish new families, either marital or non-marital, will likely have varied expectations for the levels of commitment and financial sharing desired. Some may want to undertake a broad commitment, with financial sharing and other expectations typical of first marriages. But many more may want a relationship of intimacy and companionship, without financial sharing or with sharing only for the duration of the relationship. Further, older individuals will likely be more ready to end unsatisfactory unions than in the past and may or may not have intended to assume ongoing obligations to one another.

Many older persons who create new families have close bonds with children and other family members from earlier relationships, and they may want to give priority to those bonds; standard spousal inheritance rights and medical decisionmaking authority may be inconsistent with their wishes. In other families, however, filial bonds may have become attenuated over time, resulting in reduced feelings of obligation for both generations.

As life expectancy increases, a growing number of older Americans will not be part of dyadic family units at all. Predictably more seniors will form non-conjugal families-of-choice, as they seek relationships that can provide intimacy or companionship and mutual care of dependency needs. These groups potentially can fulfill these two core functions of families, although currently they are not recognized as legal families. Further, as we live longer lives, an increasing number will live alone; these individuals will need substitutes for family if they are to fulfill their need for care and intimacy.

Finally, Gratton and Scott predict that economic patterns within marriage will change, showing how their prototypical characters – Jane, a lawyer and Jorge, who works for an ngo (p. 183) -- may be more likely to have flexible careers and to trade off working and child care (pp. 307-08), resulting in changing gender roles in the workplace and at home. That is one possible scenario for families, but it relies on three assumptions: first, the workplace itself will change to accommodate such multi-stage lives; second, that gender norms will change and third, couples will have the financial means to engage in this trade-off;

The third assumption points to a broader critically important point that Gratton and Scott virtually ignore; their predictions generally apply only to higher socioeconomic classes. In the

early 1960s, Jacobus tenBroek observed that, although family law is neutrally applied, regardless of income, there are actually two different systems, one set of regulations that applies to the wealthy, who are able to opt out of default rules and have little political oversight, and one set that applies to the use of public funds and affects the poor, who are subject to stringent monitoring by state apparatus.<sup>30</sup> With increasing inequality in family structure, this dichotomous system may continue, and, as people age, will become most visible with respect to family intimacy and caretaking as well as with government programs.<sup>31</sup> This dual system will co-exist with differing life expectancies based on race and socioeconomic status. Although this chapter focuses primarily on the first system, it also raises potential reforms needed for the second system.

## **2. The Inadequacy of Current Family Law**

Current family law doctrine is poorly suited to respond effectively to increased life expectancy against the backdrop of these trends. It is likely to defeat the preferences of many individuals forming families later in life and may undermine expectations in relation to adult children.

We begin with the law regulating marriage, cohabitation, and non-conjugal family unions. Marriage continues to be uniquely privileged as a family form, enjoying strong legal protection, financial advantages conferred by government,<sup>32</sup> and enforcement of financial obligations between spouses. In general, legal marriage is tailored to the preferences and needs of younger individuals starting families, and not of those entering marriage later in life. Thus, default rules presume long-term commitment and aim to protect dependent spouses (and children) by providing for the sharing of marital property and for spousal support on divorce, which may be short-term, but may not terminate until the death of the payor spouse. Spouses also enjoy inheritance rights that cannot be altered unilaterally. The default rules for

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<sup>30</sup> Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status Part I*, 16 Stan. L. Rev. 257, 257-58 (1964).

<sup>31</sup> SSI income support and Medicaid eligibility for long-term care are each, for example, affected by the size of jointly-owned assets.

<sup>32</sup> *United States v. Windsor*, 570 U.S. 744 (2013)(cataloging legal benefits and advantages of marriage)

surrogate decisionmaking also favor a spouse over other family members. These rights and duties can be changed but parties must affirmatively agree to opt out and most couples do not. And some override rules, such as the doctrine of necessities, are not subject to spousal agreement.<sup>33</sup> Many couples who marry later in life may not wish to undertake these legal obligations. Seniors often want their children, and not new spouses, to inherit their property and many would not expect to be saddled with spousal support. Further, the priority of spouses as surrogate medical decisionmakers may conform to the preferences of some older spouses in second marriages, but others may prefer a child, other relative, or a friend. The presumption of financial interdependence affecting eligibility for long-term care under Medicaid serves is yet another disincentive to marriage.

Current law is also problematic because it draws a sharp line between marital and nonmarital relationships; that is, parties either opt into marriage and all of its rights and responsibilities, or have nonmarital relationships with no legal recognition of emotional and social connections. Cohabiting couples can execute contracts to clarify their financial understandings and other documents to protect their emotional connection, but very few couples do. Couples with minor children also receive some default legal benefits as co-parents. But two individuals living together and fulfilling each other's intimacy and dependency needs do not count as a legally-recognized family. For example, regardless of their age, cohabitants will not qualify for family leave under federal law to care for an ill partner.<sup>34</sup> While many older individuals will choose informal non-marital unions, based on more limited understandings and expectations of commitment, sharing, and mutual obligation than marriage, they may be surprised at the dearth of support for the emotional aspects of their relationships.

Given the focus on marriage, non-dyadic and non-conjugal family relationships receive little or no recognition as families.<sup>35</sup> These groups seldom formally execute contracts and are excluded from even the benefits afforded to cohabiting couples. But these "new" family forms are likely to become ever more common for older individuals who, predictably, will choose to satisfy their needs for care and intimacy later in life in non-conjugal groups that may be multigenerational or may be age-based.

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<sup>33</sup> This doctrine benefits 3<sup>rd</sup> party creditors.

<sup>34</sup>

<sup>35</sup> An exception might be grandparents standing to seek visitation in most states, but this remain contested,.

A 100-year life may also affect laws concerning parenting, beginning with how to become a parent. There may be increased pressure to require insurance plans to cover assisted reproductive technology, mandated in a few states today, and acceptance of surrogacy may become even more widespread, with easier recognition of the intended parents and more protections for surrogates. As family forms change, states may make it easier to recognize more than two parents. State protections for children, such as laws concerning public school education, abuse, and neglect, will probably not be affected by longer lives; school health courses might change to focus not just on sex education but also on lifelong health. Child support in many states still ends when a child reaches the age of 18, even though many children continue to be dependent on their parents into their 20s. With the growing importance of post-high-school education, the time period for children's financial dependency may lengthen.

While changing family demographics will affect family law, they also have implications for numerous other areas of law addressed in this book.

### **3. Why Law Reform is Important.**

Informal family relationships can offer substantial individual and social welfare benefits and warrant legal support. Families play a critically important role in satisfying individuals' core needs for care and intimacy. Dependency needs vary in different life stages, and are most acute in infancy and childhood and again in old age, when individuals' ability to care for themselves often declines. While in many other advanced countries, the government plays a major role in providing healthcare and other support for dependency needs, a libertarian presumption of self-sufficiency is embedded in American law and policy, resulting in a substantial burden on families to provide care and assistance. Families also fulfill the human need for intimacy and social connection. Much research supports that older persons who lose intimate connection decline in both physical and psychological health.<sup>36</sup> Family relationships become ever more important as seniors are less able to actively cultivate social relationships outside the family.<sup>37</sup>

Despite the upbeat predictions of Gratton and Scott, many older individuals will experience illness and disability and need family care and support, and all will need

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<sup>36</sup> Stanford report

<sup>37</sup> *Id.*

psychological support and human relationships. If individuals lack emotional or economic support, the state will bear an increased burden to fulfill these needs, which currently it fails to do. While the 100-year life may prompt a larger governmental role in providing care and support for the aging population, strengthening legal support for families remains critical. Thus, society has an interest in facilitating family formation for older individuals and in supporting groups that fulfill family functions.

Attaining this goal will require a commitment to legal reforms that acknowledge and support the variety of family relationships that seniors are likely to choose. Many have criticized family law's privileging of marriage as a family form a stance grounded in traditional assumptions about marital roles and commitment. It has long been recognized that this approach harms individuals in non-marital families and also hurts single people. It is a particularly poor fit for the needs and preferences of older persons, both those who choose marriage and those who prefer other conjugal or non-conjugal family forms, as well as those who age alone.

#### **4. An agenda for reform**

a. *Broad goals of reform.* A major goal of legal reform in response to the 100-year life will be to adopt a more pluralist and less libertarian family law; the new family law would support a range of families, facilitating individuals' ability to create families adapted to their needs and desires, efficiently and without undue effort. Flexibility will be needed to accommodate a range of preferences for financial sharing and other aspects of interdependency. Reforms can also offer assurance to older persons forming new families that their intentions toward members of earlier families, particularly children, will be respected through legal protection. At a broader policy level, individual fulfillment in old age as well as social welfare will depend on a fundamental shift toward a more active state role supporting individuals and families, and facilitating human connection. Moreover, recognizing that equal application of the same laws to families of differing classes results in inequities may lead to further changes that affect the entire life course.

b. *Specific family law reforms.* A range of family law reforms will usefully support individuals in realizing their goals for intimacy and care. While the need for reform will be highlighted by the 100-year life, many reforms will benefit

individuals earlier in life as well. This section briefly explores some of the potential reforms.

First, a key type of reform would be the development of mechanisms that facilitate the more streamlined execution of statements of intent. Prenuptial agreements, cohabitation contracts, wills, powers of attorney, medical directives, and reciprocal beneficiary forms<sup>38</sup> are all helpful in allowing older individuals to determine the legal rights and duties that define their relationships. But, while creating documents that override default presumptions is usually not difficult, most individuals do not execute contracts or otherwise formalize their intentions, because it takes effort and expense to do so; and even when they do, the directive can become outdated as individuals move into new relationships and as their children age. Rather than rely on individual initiative, the government could take steps to facilitate formal expressions of intentions easily and cheaply. This will be a key part of a pluralist family law that recognizes the wide variety of preferences regarding family form and functioning. For example, the government could provide easy-to-use financial and medical directive forms to individuals enrolling in Social Security or Medicare, renewing their drivers' licenses, or filing income tax returns. Physicians currently are authorized to suggest that patients execute a medical directives at an initial visit under Medicare,<sup>39</sup> but could proactively encourage patients to execute surrogate decisionmaking authorization and to update these forms. Also promising is a Colorado law authorizing individuals in non-marital relationships to register for "designated beneficiary" status. That option allows each individual in a couple to decide on specific rights and duties recognize emotional connection and financial interdependence; these range from the right to inherit through intestacy to the right to serve as a surrogate medical decisionmaker.<sup>40</sup>

Second, a reexamination of marriage and divorce default rules is in order; couples marrying at 70 may have different expectations from those who marry at

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<sup>38</sup> See t.a.n 42 *infra*.

<sup>39</sup> 42 C.F.R. § 410.15.

<sup>40</sup> Colo. Rev. Stat. Ann. § 15-22-105 (2020).

thirty.<sup>41</sup> Rules about spousal support could be adapted to reflect the differing needs of people living a 100-year life. This might argue for a presumption favoring short-term alimony on divorce other than for marriages of long duration involving an older dependent spouse. Such spouses may be unlikely to acquire skills sufficient for self-support and might need lifelong support unless they receive support from another source.<sup>42</sup> States are already moving towards presumptions of termination of general alimony upon the obligor spouse's retirement; similar presumptions might also apply when a recipient ex-spouse receives Social Security benefits. While states provide for equitable distribution of property upon divorce and an elective share at death, those rules might be adapted to respond to marriages between older people who have earlier families or who are Social Security recipients when they marry.

At the federal level, marriage brings numerous benefits, but Medicaid eligibility rules for long-term care can deter couples from marriage; the rules often exclude middle and low-income individuals unable to afford the expense of long-term care. Expanded government support for long-term care could remove this disincentive.

Third, the creation of new default rules to be applied to cohabiting couples might also be beneficial. These might distinguish among various types of couples to reflect differing roles of cohabitation during the life course. For couples who begin their relationships after they are eligible for Medicare, default rules might reinforce aspects of intimacy, support, and caregiving during the relationship, rather than imposing financial obligations after the union dissolves. These default rules might include presumptions about surrogate health care decisionmaking and hospital visits, while also ensuring protection of the interests of children from earlier relationships. There might also be some type of homestead exemption

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<sup>41</sup> See Anne Alstott notes:

“*Law and the Hundred Year Life*, 26 ELDER L.J. 131, 145-46 (2018).

<sup>42</sup> The source might be proof of a new family relationship that alleviates financial need or improved government support.

(perhaps a life estate) to ensure continuity in living arrangements at the death of one partner. By contrast, for cohabitations of long duration, marital-type obligations might be imposed upon separation or death.<sup>43</sup>

Reform may also focus usefully on non-intimate families of choice, allowing these relationships to function without legal barriers and to provide support. Indeed, Gratton and Scott, in their 2020 revisiting of the long life, suggest that, with fewer family members to provide care, one solution is “alternative ‘families.’”<sup>44</sup> This might, for example, mean that zoning restrictions that limit residential use to “single-family” homes should be interpreted to support non-dyadic families of choice by defining groups functionally, rather than based on consanguinity or marriage. Finally the expanding cohort of older individuals, in families and living alone, will need more state support through programs that assist families and single persons to fulfill dependency needs as well as the need for human connection. Community centers and adult day care<sup>45</sup> can provide social links, serve as a forum for developing intimate relationship, and offer relief for caretakers. Ample evidence supports the importance of social connection to aging well.

And then there are a series of reforms to existing laws that recognize connections between older and younger family members and the impact of caregiving. Mechanisms to easily implement seniors’ intentions regarding inheritance by children and other family members from prior families are important. Visitation rights might also need reform. If multigenerational households become more common, grandparents and great-grandparents who have lived with children might receive stronger protection of their relationships with children through visitation rights, and may be subject to support obligations as well. Future laws will need to balance the constitutionally-protected interests of parents with the state’s role in protecting children from harm, and may move towards greater support of

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<sup>43</sup> Elizabeth Scott, Marriage, divorce and collective Responsibility for Dependency, 2004 U.Chi. Legal forum 219.

<sup>44</sup> SCOTT & GRATTON, THE NEW LONG LIFE 112 (2020).

<sup>45</sup> <https://www.aarp.org/caregiving/home-care/info-2017/adult-day-care.html>.

children's relationships with grandparents or other third parties who function as de facto parents.<sup>46</sup>

A number of reforms might facilitate intrafamilial caregiving, whether by one spouse or partner for another, or a child or grandchild for a member of an older generation (or vice versa). The Family and Medical Leave Act does not cover care for a grandparent or grandchild, unless there is an in loco parentis relationship. The concept of caregiving leave could be expanded to include additional relationships (cohabitants and, perhaps, members of expanded communal households), and such leave could be paid. Assuming longer work lives is also likely to result in more caregiving. Time spent out of the workforce providing care for qualifying family members could result in Social Security credits, even though that care is unpaid; this is similar to the system of many European countries. Caregivers might also receive tax benefits to reimburse out-of-pocket expenses.. These proposals to support intrafamilial care may gain traction, providing more support for a multi-stage life (although perhaps also reinforcing existing gendered care roles).

The ability to pay directly for care from family members could be enhanced, with better guidelines on when such payments are permissible without disqualifying Medicaid transfers. Family members will benefit if they are allowed to execute intrafamilial caregiving agreements, which under current law, are often unenforceable, despite the importance of the role that such care provides.<sup>47</sup> In general, stronger legal and policy support for caregiving within families will enhance both individual and social welfare as life expectancy increases.

### **Concluding thoughts**

Gratton and Scott suggest that, with proportionately less of life focused on childrearing, individuals have more options not just for career balancing but also for focusing on intimate relationships (pp. 293-98). To provide support for these relationships throughout the 100-year

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<sup>46</sup> De facto parents can attain limited parental rights in many states today. Under the new Restatement of Children and the Law, de facto parents can be awarded custody. § 1.72.

<sup>47</sup> Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-Family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211 (2019).

life, family law will need to change; moreover, our conceptions of what constitutes family law may itself be transformed. Family law is (or should be) profoundly influenced by social forces, demographic trends, and public policy. Thus, the family law response to the 100-year life will inevitably be tempered by changes in health care, government support for individuals, and new approaches to socioeconomic and racial inequality.