



NEW SPOUSE/OLD MONEY: PREDATORY MARRIAGES

OSGOODE ELDER LAW WEBINAR SERIES

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Introduction

- Predatory Marriages
 - Where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit
 - Not easily challenged
 - Problematic due to property entitlements

Consequences of Predatory Marriages

- Earlier Will revoked
- Survivor inherits on intestacy or under new Will
- Survivor has right to have estates equalized under FLA

Who May Contest Predatory Marriage?

- For lack of capacity: Anyone with a financial interest
- For fraud, undue influence, etc.: only spouses and only while both are living

According to Statistics Canada:

- 2013 - 15.3% of the population was 65 and older by 2030 - will increase to 22.2-23.6%
- 2013 - Canada had 5.4 million persons 65 and older – more than triple the number recorded in 1963
- 2015 is the first time the number of seniors will exceed the number of children
- 2013 there were 6,900 centenarians in Canada, in 2063 this is expected to increase to 62,200 people who are 100 or older

- Statistics cont.
 - Dementia affects 20% of seniors by the age of 80 and over 40% by 90
 - 1 in 11 Canadians over the age of 65 currently has Alzheimer's or related dementia
 - In the United States Alzheimer's is the 6th leading cause of death

Capacity in General

- No single legal definition for “capacity”
- No single “test” for capacity, not really a test
- Certain factors are to be considered in an assessment of requisite mental capacity to make *a certain decision/undertake a certain task at a particular time*

Capacity in General

- Capacity is:
 - decision,
 - time and
 - situation-specific
- Capacity may fluctuate

Capacity to Marry / Predatory Marriages

- Not easily challenged
- Centuries old understanding for “capacity to marry” as developed at common law is that the contract to marry is a “simple one”
- “does not require a high degree of intelligence to comprehend”

Four General Historical Themes

1. Equivalent to capacity to contract
2. Marriage has distinct nature of rights, responsibilities, obligations that must be appreciated
3. Contract of marriage is a simple one
4. Factors for determining capacity to marry is the same as capacity to manage property, or it requires one having capacity to manage the person and property

- No single complete definition of capacity to marry
- Spectrum:
 - One end - marriage is but a mere simple contract
 - Other end – the requirement to marry is not so simple, must be capable of managing property or one's person or both

Capacity to Marry / Separate / Divorce

- *Calvert (Litigation Guardian of) v. Calvert*
- Separation: simplest act, requiring lowest level of understanding
- Divorce: requires desire to remain separate and to be no longer married
- Marriage: essence of simplicity, if marriage is simple, divorce must equally be simple

Case Law

- *Banton v. Banton*
- 84 years old and 31 year old waitress
- Terminally ill, married at her apartment
- New power of attorney and wills
- Court: lacked testamentary capacity but had capacity to marry
- See also *Feng v. Sung*, *Juzumas v. Baron*

United States

- Very few states have retained revocation-upon-marriage provisions in probate legislation
- Some states permit a relative to contest validity of a marriage by an incapacitated elderly family member before the death of that family member

Australia

- Legislation that sets out the factors or standards for capacity to marry
- Somewhat limited – requires mental capacity to understand the effect of the ceremony, not an understanding of the nature of marriage as an institution with consequences
- See *Oliver v. Oliver*

Equitable and other Remedies

- Need to explore other grounds upon which a court has the jurisdiction to set aside a predatory marriage as a nullity / void *ab initio* or remedy wrongs caused by predator spouse

Undue Influence

- Often relied on to set aside a will or *inter vivos* gift
- Arguably, may be used to set aside predatory marriage – the consequences of marriage effectively results in a gift to the predator
- See *Ross-Scott v. Potvin*

Unconscionability

- Need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him or her in the power of the stronger party and proof of substantial unfairness
- Results in presumption of fraud
- Stronger party must rebut presumption - proof bargain was fair, just and reasonable

Statute as an Instrument of Fraud

- Marriage is based on, sanction by, legislation
- Predator relies on statute to enforce a claim
- Claim is fraudulent – persuaded spouse by devious means to enter into marriage
- Court of equity should not allow the statute to be used in this way and should restore property to the rightful heirs

No One Shall Profit from His or Her Own Wrongdoing

- Challenge predator spouse's right to inherit
- Based in public policy
- Beneficiary won't inherit where he or she intentionally kills, perpetrated fraud, or coerced testator
- Property does not pass to beneficiary – equity imposes constructive trust

- New York: ***In the Matter of Berk and Campbell v. Thomas***
- Similar facts – caretaker used position of power to secretly marry an older adult where capacity in issue
- Relied on ‘fundamental equitable principle’ to deny predator’s claim
- ‘Slayer’s Rule’ from *Riggs v. Palmer*
- Predator spouse should not benefit from wrongful conduct

Unjust Enrichment

- Factors:
 - enrichment
 - Corresponding deprivation
 - Lack of juristic reason
- Should be available to invalidate a predatory marriage in Canada and restore property to rightful heirs
- Existence of marriage should not be considered juristic reason to deny relief

Civil Fraud / Tort of Deceit

- Predator spouse induces older adult to marry by perpetrating a false representation that the marriage will be a “real” marriage (which the predator knows is false, a trick a misrepresentation)
- While in immigration cases, courts are reluctant to set aside on basis of fraud, predatory marriages are distinguishable

Ex Turpi Causa Non Oritur Actio

- A defence to bar plaintiff's claim where seeking profit from acts that are anti-social, illegal, wrongful or of culpable immorality in both contract and tort
- Predatory spouse should not be entitled to financial gain arising from the anti-social act of a predatory marriage

Lack of Independent Advice

- Often used in setting aside domestic contracts
- While marriage has been held to be “something more than a contract”, lack of independent advice is still worthy of consideration as an argument to set aside a predatory marriage

Summary / Conclusion

- Capacity is complicated
- No clear hierarchy
- Simply “different”
- Absence of clear legislation defining requisite capacity to marry, common law remains unclear

- Until factors to determine requisite capacity to marry are refined (such that it takes into consideration financial implications) those with diminished capacity will remain vulnerable to exploitation through marriage

THANK YOU