SENIOR SOLICITORS' PRACTITIONERS FORUM
MAY 12-14, 2014

PREDATORY MARRIAGES:
LEGAL CAPACITY TO MARRY AND THE ESTATE PLAN

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Predatory Marriages: Legal Capacity to Marry and the Estate Plan

1. Introduction[1]

The statistics confirm that our population is aging rapidly. With longevity comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability.[2] There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. Other factors affecting capacity include, normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.[3] These sorts of issues unfortunately invite opportunity for abuse, elder abuse, and exploitation. Predatory marriages are a form of exploitation and abuse.

Civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry—perhaps because they are afflicted with one of the ailments described above.[4] Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the 'predatory marriage'.[5] This is not a term that is in common use. However, given that marriage brings with it a wide range of property and financial entitlements, it does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.[6]

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[1] Authored by Kimberly A. Whaley, Principal of Whaley Estate Litigation
[2] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. http://www.canadalawbook.ca
[3] *Ibid* at 1
[4] *Ibid* at 1
[5] *Ibid*. at 1.
[6] *Ibid*. at 70.

The problem with such marriages is that they are not easily challenged. The current test for "capacity to marry" as developed in the case law is anything but a rigorous one. This means that capacity is likely found, even in the most obvious cases of exploitation, and, consequently, that predatory and exploitative marriages are more likely to withstand challenge.

While litigation arising from marriages involving older adults is still relatively uncommon, we are seeing an increase in such cases as the number of older adults reaches record highs. As this paper is but a snapshot of the many critical issues arising from predatory relationships, those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*****, a Canada Law Book, A Division of the Cartwright Group Ltd**. publication, co-authored by Kimberly Whaley, Dr. Michel Silberfeld, Heather McGee and Helena Likwornik.
http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html [7]

2. Marriage and Property Law: Consequences of a Predatory Marriage

To truly understand why predatory marriages can be so problematic, it is necessary to understand what entitlements are gained through marriage.

At the outset, it is important to note that in Ontario law, and in many other provinces, marriage automatically revokes a will pursuant to section 15 of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. (the "*SLRA*"), and the exceptions thereto as set out at section 16 of the *SLRA*. One of the exceptions that apply is where there is a declaration in the will that it is made in contemplation of marriage. The 2010 Court of Appeal decision in British Columbia, *MacLean Estate v. Christiansen*[8] held that extrinsic evidence supported the term "spouse" as used in the will to mean the testator's legal

[7] *Ibid*.
[8] *MacLean Estate v. Christiansen*, 2010 BCCA 374

spouse, with whom he was contemplating marriage. The legislation in Ontario likely would not provide for such a result, it requiring "a declaration in the Will" (Section 16(a)).[9]

This revocation of a will upon marriage can raise serious issues where a vulnerable adult marries but lacks the capacity to make a will thereafter, or dies before a new will can is executed. Some provinces have recognized this issue and have enacted legislation to prevent revocation of wills upon marriage. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage no longer revokes a will.[10] British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("WESA") came into force. Under WESA, marriage no longer revokes a will.

In addition to the testamentary consequences of marriage, in many Canadian provinces, with marriage come certain statutorily-mandated property rights. Using Ontario law as an example, section 5 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), provides that, on marriage breakdown or death, the spouse whose "net family property" is the lesser of the two net family properties is entitled to an equalization payment of one-half the difference between them.

A spouse's "net family property" or NFP is the value of all of their property (except for certain excluded properties set out in subsection 4(2) of the *FLA*) that a spouse owns on the valuation date (which could be the date of divorce, or date of death of a spouse), after certain deductions are made, such as the spouse's debts and other liabilities and the value of property that the spouse already owned on the date of marriage after deducting the debts and other liabilities related to that property. Importantly, even if the matrimonial home was owned before/as at the date of marriage, its value is not deducted from a spouse's NFP, nor are any debts or liabilities related directly to the acquisition or significant improvement of the matrimonial home (calculated as of the

[9] Section 16(a) of the *SLRA.*
[10] *Wills and Succession Act,* SA 2010, c W-12.2.

date of the marriage). The definition of property in the *FLA* is fairly vast: "any interest, present or future, vested or contingent, in real or personal property."

Such entitlements do not terminate on death. Rather, where one spouse dies leaving a will, marital status bestows upon the surviving spouse the right to 'elect' to either take under the will, or to receive an equalization payment, if applicable. Even if a spouse dies intestate, the surviving married spouse is entitled to elect to either take pursuant to the intestacy laws set out in the *SLRA*, or chose to elect to receive an equalization payment pursuant to the *FLA*. While a claim for variation of one-half of the difference can be made, it is rarely achieved in the absence of fraud or other unconscionable circumstances.[11]

Section 44 of Part II of the *SLRA* provides that where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.[12] Where a spouse dies intestate in respect of property having a net value of more than the "preferential share" and is survived by a spouse and issue, the spouse is entitled to the preferential share, absolutely. The preferential share is currently prescribed by regulation as $200,000.00.[13]

There are legitimate policy reasons underlying this statutorily-imposed wealth-sharing regime which have developed over time. Using the marital property provisions of the *FLA* as an example, section 5(7) of that Act sets out its underlying policy rationale as follows:

> The purpose of this section is to recognize that child care, household management and financial provision are the joint responsibilities of the spouses and that inherent in the marital relationship there is equal contribution, whether financial or otherwise, by the spouses to the assumption of these responsibilities, entitling each spouse to the equalization of the net family properties, subject only to the equitable considerations set out in subsection (6).

[11] *Ibid*.
[12] *Ibid*.
[13] *SLRA*, O. Reg. 54/95, s. 1.

Arguably, this policy rationale does not apply to the predatory marriage scenario, where one party is significantly older, holds the bulk if not all of the property and finances in the relationship, there are no children, and the other party offers little in the way of contribution. Such a relationship is not, as the legislation presumes, founded on an equal contribution, whether financial or otherwise.

As is apparent, in some provinces, like Ontario, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate or intestate succession, to such an extent that spouses are given primacy over the heirs of a deceased person's estate. Ontario's SLRA also permits under Section 58, a spouse to claim proper and adequate support as a dependant of a deceased, whether married, or living common law. Interestingly, the recent decision of Belleghem J., in *Blair v. Cooke* (Allair Estate)[14] the Court determined that two different women simultaneously spouses of the deceased were not precluded from both obtaining a support award from the Estate.

The difficulty with predatory marriages is that despite the injustice they cause to the incapable spouse (and his legitimate heirs, if any), such unions are not easily challenged. The reason for this is that the test for capacity to marry has, historically, been a fairly low threshold to cross and continues to be so and, unfortunately, the case law arguably has not kept pace with the development of legislation that has been designed to promote and protect property rights.

3. Capacity to Marry: Statutory and Common Law Requirements

With a few exceptions, most provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity.[15] These statutes prevent the relevant officials from issuing a license to, or solemnizing the marriage of, someone he

[14] *Blair v. Cooke* (Allair Estate) 2011 ONSC 498 (Can LII)
[15] Exceptions being Newfoundland and Labrador, Nova Scotia, Yukon, and New Brunswick.

or she knows, or has reasonable grounds to believe, lacks mental capacity to marry,[16] is incapable of giving a valid consent,[17] or who has been certified as mentally disordered.

In Manitoba, certain rigorous precautions exist, for instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that they are able to understand the nature of marriage and its duties and responsibilities.[18] In fact, should a person who issues a marriage licence or solemnizes the marriage of someone is known to be certified as mentally disordered, they will be guilty of an offence and liable on summary conviction to a fine.[19]

Section 7 Ontario's *Marriage Act* prohibits persons from issuing a licence to or solemnizing the marriage of any person who, based on what he or she knows, or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.[20]

In British Columbia, it is an offence to issue a licence for a marriage, or to solemnize a marriage, where the authority in question knows or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.[21] The Act further provides that a caveat can be lodged with an issuer of marriage licences against issuing of a license to persons named in the caveat.[22] Once lodged, the caveat prevents the issuing of a marriage licence until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by

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[16] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[17] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).
[18] *The Marriage Act*, C.C.S.M. c. M50, section 20.
[19] *The Marriage Act*, C.C.S.M. c. M50, subsection 20(3).
[20] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[21] *Marriage Act* [RSBC 1996] chapter 282, section 35.
[22] *Ibid*, s. 23.

the person who lodged it.[23] However, there are no reported cases citing 35 of the Act, which suggests that offences under this Act, if such offences occur, are not prosecuted. Our discussions with lawyers in British Columbia suggest that the caveat system, although useful in theory, is not yet implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

Where provincial legislation is silent on this issue of capacity and marriage, the common law dictates that a marriage may be found to be void *ab initio* if one or both of the spouses did not have the requisite mental capacity to marry.

Thus, whether by statute or the common law, all of the provinces require that persons have legal capacity in order to consent to, and therefore enter into a valid marriage.

4. What is Capacity?

In law, one is presumed capable unless and until this presumption is legally rebutted. Legal capacity is decision, time and situation/context specific.[24] The law prescribes standards of capacity in different contexts. Contexts in which capacity is required include the following:

1. Giving instructions for and to execute a will or trust. In other words, "testamentary capacity";[25]
2. Making other testamentary dispositions legislatively defined;[26]
3. Contracting;[27]
4. Managing property;[28]

[23] *Ibid*, subsection 23(2).
[24] *Supra* note 2 at 46.
[25] The test for testamentary capacity is set out in *Banks v. Goodfellow* (1870), L.R. 5 Q.B.D. 549 (Eng.Q.B.); *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; and *Schwartz v. Schwartz*, 10 D.L.R. (3d) 15, 1970, CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. affirmed (1971), 20 D.L.R. (3d) 313, [1972] S.C.R. 150, 1971 CarswellOnt 163 (S.C.C.)
[26] The *Succession Law Reform Act*, R.S.O. 1990 c. s 26, as amended, defines a will as follows: "*will*" includes(a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in exercise of a power, and (d) any other testamentary disposition.
[27] *Hart v O'Connor* [1985] AC1000.

5. Managing personal care;[29]

6. Granting or revoking a Continuing Power of Attorney for Property;[30]

7. Granting or revoking a Power of Attorney for Personal Care;[31]

8. Consenting to treatment decisions in accordance with the *Health Care Consent Act;*[32]

9. Gifting or selling property;[33]

10. Instructing a lawyer; and

11. **<u>Marrying.</u>**

The capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which differs from the capacity to manage one's property or personal care.[34] And, importantly, as the law currently stands, capacity to marry may exist despite incapacity in other legal matters.[35]

The relevant time period is the time at which the decision in issue is made.[36] Legal capacity can fluctuate over time.[37] Capacity is situation-specific in that the choices that a person makes in granting a power of attorney or making a will affect a court's determination of capacity.[38] For example, if a mother appoints her eldest child as a

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[28] *Substitute Decisions Act,* 1992, S.O. 1992, c.30, as amended, s. 6.
[29] *Ibid.*, s. 45.
[30] *Ibid.*, s. 8.
[31] *Ibid.*, s. 47.
[32] *Health Care Consent Act*, 1996, S.O. 1996, c.2, Schedule A, Section 41.
[33] *Archer v. St. John,* 2008 A.B.Q.B. 9; *Pecore v. Pecore* [2007] 1 S.C.R. 795; *Re Beaney (Deceased)* [1978] 1 WLR 770 at 774; *Re Morris (Deceased), Special trustees for Great Ormond Street Hospital for Children v Pauline Rushin* [2000] All ER(D) 598.
[34] *Supra* note 2 at 45.
[35] *Ibid.* at 45.
[36] *Supra* note 2 at 46.
[37] *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.). The Ontario Court of Appeal held that a cognitively impaired person can fluctuate between being capable and incapable of granting a power of attorney.
[38] *Supra* note 2 at 48.

power of attorney, this choice will be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.[39]

Assessing capacity is an imperfect science which further complicates its determination.[40] In addition to professional and expert evidence, lay evidence can also be determinative in some situations.[41] The standard of assessment varies and this too can become an obstacle that may need to be overcome in determining capacity accurately.[42]

On point, a recent English High Court of Justice, Queen's Bench Division Judgment[43] *Thorpe v. Fellowes Solicitors LLP* [2011], concerning the capacity of a 77 year old Mrs. Hill to enter into a transaction to sell her home and pay the proceeds to her daughter resulted in the eventual claim brought by her son against Mrs. Hill's solicitor for negligence in failing to test mental capacity, appreciate Mrs. Hill's vulnerability, susceptibility to influence and inter alia, properly investigate the sale transaction.

The Honourable Mrs. Justice Sharp found that there was no evidence of lack of capacity, nor that the solicitor knew or ought to have known that Mrs. Hill had dementia. Her Honour further stated:

> *A solicitor is generally only required to make enquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to his in the mind of a reasonably competent practitioner, see Jackson & Powell at 11-221 and by analogy Hall v Estate of Bruce Bennett [2003] WTLR 827. This position is reflected in the guidance given to solicitors in The Guide to the Professional Conduct of Solicitors (8th edition, 1999), which was in force at the relevant time, where it is said that there is a presumption of capacity, and that only if this is called into question should a solicitor seek a doctor's report (with client's consent) "However, you should also make your own assessment and not rely solely upon the doctor's assessment" (at 24.04).*
>
> *In opening, the Claimant's case was put on the basis that Fellowes* [the solicitors] *ought to have been "more careful" with regard to the sale of the Property*

[39] *Supra* note 2 at 48.
[40] *Ibid*.
[41] *Ibid*.
[42] *Ibid*.
[43] *Thorpe v Fellowes Solicitors LLP*, [2011]EWHC 61 (QB), (21 January 2011)

because Mrs. Hill was suffering from dementia and did not really know what she was doing. The relevant test where professional negligence is alleged however is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession: see Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979] ch 384 at 403 per Oliver J at 403.

I should add (since at least part of the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary. [44]

For more detailed information on capacity, see Whaley Estate Litigation checklists links: http://whaleyestatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf;
and http://whaleyestatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf

5. Capacity to Marry

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.[45] Yet, at the time of marriage, parties often fail to consider the other facets of the marital union; namely, the obligation to provide financial support, the enforced sharing of equity acquired during the marriage, and the impact it has on the disposition of one's estate.[46]

Currently, in Canadian law, in order to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.[47] No party is required to understand all of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite classic English cases, such as *Durham v. Durham*,[48] which espouse the following principle: "the

[44] *Ibid*., at paras 75-77
[45] *Supra* note 2 at 50.
[46] *Ibid.* at 50.
[47] *Ibid.* at 50.
[48] *Durham v. Durham* (1885), 10 P.D. 80 [hereinafter *Durham*].

contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."[49] Current legal treatment is unsettled and is in need of judicial clarity.

6. The Historical Development of Capacity to Marry

Several themes emerge from a review of the historical cases on the issue of capacity to marry. These themes are:

1. That the test for capacity to marry is equivalent to the test for the capacity to contract;
2. That marriage has a distinct nature of rights and responsibilities;
3. That the contract of marriage is a simple one; and
4. That the test for capacity to marry is the test for capacity to manage property; or that it requires both capacity to manage the person and property.

(i) Marriage as a (civil) contract

From a review of the old English cases, emerges the notion that the capacity to marry is akin to the capacity to enter into a civil contract. Thus, for instance, in the case of *Lacey v. Lacey (Public Trustee of)*[50] the marriage contract is described in the following manner:

> Thus at law, the essence of a marriage contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It is a simple contract which does not require high intelligence to comprehend. It does not involve consideration of a large variety of circumstances required in other acts involving others, such as in the making of a Will. In addition, the character of consent for this particular marriage did not involve consideration of other circumstances normally required by other persons contemplating marriage - such as establishing a source of

[49] *Durham v. Durham* (1885), 10 P.D. 80 at 82.
[50] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016.

> income, maintaining a home, or contemplation of children. Were the parties then capable of understanding the nature of the contract they were entering into?[51]

As is evident from *Lacey v. Lacey*, historically, the contract of marriage was considered to be "simple" one. This is consistent with the case of *Durham v. Durham*, where Sir J. Hannen stated:

> I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.[52]

In the case of *In the Estate of Park, Deceased*,[53] Justice Singleton was faced with making a determination as to whether the deceased had capacity to marry. His articulation of the test for the validity of marriage was as follows:

> *In considering whether or not a marriage is invalid on the ground that one of the parties was of unsound mind at the time it was celebrated the test to be applied is whether he or she was capable of understanding the nature of the contract into which he or she was entering, free from the influence of morbid delusions on the subject. To ascertain the nature of the contract of marriage a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage.*

Again commencing from the proposition the contract of marriage is a simple one, Birkett, L.J. contributed as follows:

> *The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person*

[51] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016, at para.31.
[52] *Durham* v. *Durham*, (1885), 10 P.D. 80 at p.82.
[53] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [hereinafter *Estate of Park*].

> *was not mentally capable of understanding the contract into which he or she had entered*.[54]

Karminski J. took the position that there is "a lesser degree of capacity ... required to consent to a marriage than in the making of a will."[55] In his view, the test for a valid marriage is as follows:

> i. *the parties must understand the nature of the marriage contract;*
> ii. *the parties must understand the rights and responsibilities which marriage entails;*
> iii. *each party must be able to take care of his or her person and property;*
> iv. *it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and*
> v. *if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid...The question for consideration is whether he sanely comprehended the nature of the marriage contract*.[56]

While the Court then struggled with developing the appropriate test for capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract.

The case of *Browning v. Reane*[57] concerned a marriage between a woman, Mary Reane, who, at the time of her marriage was 70 years old; her husband 40. The case was heard after the wife had passed away. The court concluded that the marriage was legally invalid by virtue of the fact that the deceased had been incapable of entering into the marriage. In reaching this conclusion, the court observed the following:

> *A fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination!*

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[54] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [hereinafter *Estate of Park*].
[55] *Estate of Park, ibid,* at 1425.
[56] *Estate of Park,ibid,* at 1417.
[57] *Browning* v. *Reane* (1812), 161 E. R. 1080, [1803-13] All E.R. Rep. 265 [hereinafter *Browning*].

> *Since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not be in a lucid interval, was absolutely void." [Mr. Justice Blackstone]*
>
> *Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined, nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy. Complete idiocy, total fatuity from the birth, rarely occurs; a much more common cause is mental weakness and imbecility, increased as a person grows up and advances in age from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes,* ***that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract,*** *any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances, and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.*[58]

The holding in this case [as bolded] would later be reviewed and adopted by the Ontario courts.

(ii) The Distinct Nature of Marriage

There is another line of cases which suggest that marriage, as an institution, is distinct and that capacity to marry requires an appreciation of the duties and responsibilities that attach to this particular union. Hence, in the case of *Durham, supra,* the question to be answered by the court was "whether or not the individual had capacity to understand the

[58] *Browning, ibid* at 1081 (E.R.).

nature of the contract, *and* the duties and responsibilities which it creates?" [emphasis added].

The principle that it is necessary to understand and appreciate the responsibilities which marriage creates, above and beyond an understanding of the nature of marriage as a contract, was echoed in the case of *Spier v. Spier*,[59] where Willmer J. stated:

> *…it was not sufficient merely to be able to understand the words of the ceremony or even to know that the party was going through a ceremony. There must be capacity to understand the nature of the contract and the duties and responsibilities which it created, and from Browning v. Reane…**there must also be a capacity to take care of his or her own person and property**…But as pointed out in Durham, supra, marriage was a very simple contract which did not require a high degree of intelligence to contract; certainly it did not call for so high a degree of mental capacity as the making of a will.*[60]

As you may note again, the Court went further stating that "there must also be a capacity to take care of his or her own person and property."

(iii) The Simplicity of the Marital Contract

As may be evident above, historically, the courts viewed marriage not only as a mere contract, but a simple one at that. Paraphrasing the Court in *In the Estate of Park, supra,* 'marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend.'[61] The Court in *Hunter v. Edney*[62] held the same view, stating that "*no high intellectual standard is required in consenting to a marriage*."[63]

[59] *Spier v. Benyen (*sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier* v. *Spier* [1947] The Weekly Notes, at para. 46 per Willmer J.
[60] *Ibid*. at 46.
[61] *Estate of Park, Park v. Park,* [1954] p. 112, C.A. affirming; *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411., at 1411.
[62] *Hunter* v. *Edney*, (1881) 10.P.D. 93.
[63] *Hunter* v. *Edney*, (1881) 10.P.D. 93 at 95-96.

(iv) That the test for capacity to marry is the test for capacity to manage property

That said, an alternate view of the capacity to marry that also arises from the jurisprudence is one that was alluded to above in the cases of *Browning v. Reane* and *Spier, supra*. The Court in *Browning v. Reane* stated that for a person to be capable of marriage, they must be capable of managing their person and property. Similarly, in *Spier, supra*, the Court stated that one must be capable of managing their property, in order to be capable of marrying.

Conclusion

As is evident, historically, there has been an absence of a single and complete definition of marriage and of capacity to marry. Rather, on one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that. On the other end of the spectrum, however, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property in order to enter into a valid marriage.

7. A Cross-Provincial/Canadian Look at the More Modern Case Law

Predatory marriages are on the rise. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, they are usually characterized by one spouse who is significantly advanced in age and, because a number of factors which range from the loneliness consequent to losing a long-term spouse, or illness or incapacity, they are in a vulnerable position, thus making them more susceptible to exploitation by another. These unions are frequently clandestine – alienation from friends and loved ones being a tell-tale sign that the relationship is not above board. The following recent cases involving such fact scenarios are *Hart v. Cooper*,[64] *Banton v.*

[64] *Hart v. Cooper,* 1994 CanLII 262 (BC S.C.).

Banton,[65] *Barrett Estate v. Dexter*,[66] *Feng v. Sung Estate*,[67] *Hamilton Estate v Jacinto, A.B. v. C.D., Ross-Scott v. Potvin, Juzumas v. Baron*, and *Petch v. Kuivila.*

Hart v. Cooper

The case of *Hart v. Cooper* involved a 76 year old man, Mr. Smiglicki, who married a woman 18 years his junior: Ms. Hart. The couple married by way of a civil marriage ceremony. As is generally the case, Mr. Smiglicki's marriage to Ms. Hart automatically revoked a will he had made six years prior, which named his three children as the beneficiaries of his Estate. Mr. Smiglicki had made this will after learning that he had a terminal illness and little more than a month to live. Mr. Smiglicki's children challenged the validity of his marriage to Ms. Hart on the ground that Mr. Smiglicki lacked the mental incapacity to contract a marriage. Allegations were also made of alienation by Ms. Hart of Mr. Smiglicki.

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney* and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic test for capacity to marry, a test which relies on the concept of marriage as a '*simple contract'*:

> *A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates. The recognition that a ceremony of marriage is being performed or the mere comprehension of the words employed and the promises exchanged is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into; Durham v. Durham; Hunter v. Edney (otherwise Hunter); Cannon v. Smalley (otherwise Cannon) (1885), L.R. 10 P.D. 80 at 82 and 95. But the contract is a very simple one - - not at all difficult to understand*.[68]

The court then proceeded to describe the appropriate burden of proof as follows:

[65] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244.
[66] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).
[67] *Feng v Sung Estate,* 2003 CanLII 2420 (ON S.C.).
[68] *Hart v. Cooper,* 1994 CanLII 262 at 9 (BC S.C.).

> *Where, as here, a marriage has, in form, been properly celebrated, the burden of proving a lack of mental capacity is bore by the party who challenges the validity. What is required is proof of a preponderance of evidence. The evidence must be of a sufficiently clear and definite character as to constitute more than a "mere" preponderance as is required in ordinary civil cases: Reynolds v. Reynolds (1966), 58 W.W.R. 87 at 90-91 (B.C.S.C.) quoting from Kerr v. Kerr* (1952), 5 W.W.R. (N.S.) 385 (Man. C.A.).[69]

The court in this case did not accept the medical evidence of Mr. Smiglicki's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The court added that there was no evidence given to suggest that Ms. Hart ever profited financially from either her marriage to Mr. Smiglicki or to her previous husbands. Additionally, the court found that Ms. Hart's motivation in marrying Mr. Smiglicki was not otherwise relevant to the determination of his mental state at the time of the marriage ceremony. Accordingly, the marriage was upheld as valid, and the will previously executed remained revoked.

It is difficult to determine from the reasons in this case whether and to what extent the court considered the allegations of alienation and potentially predatory circumstances that the family asserted preceded the marriage.

Although the Court found that the burden of proof had not been satisfied, no significant analysis was made by the Court of the allegations of alienation by Ms. Hart and its impact on Mr. Smiglicki's decision to marry. Moreover, whether Mr. Smiglicki fully understood the financial consequences of marriage or the impact of marriage on his property rights were not matters considered by the court in reaching its conclusion. Consequently, the case makes no advancements in defining the '*duties and responsibilities'* that attach to the marriage contract or what must be understood by those entering into the contract of marriage.

Thus, in a consistent application of the historical case law, *Hart v. Cooper* confirms the age-old principle that the contract of marriage is a simple one.

[69] *Hart v. Cooper,* 1994 CanLII 262 (BC S.C.) at 9.

Banton v. Banton[70]

The facts of *Banton v. Banton* are as follows. When Mr. Banton was 84 years old, he made a will leaving his property equally amongst his five children. Shortly thereafter, Mr. Banton moved into a retirement home. Within a year of moving into a retirement home, he met Muna Yassin, a 31-year old waitress who worked in the retirement home's restaurant. At this time, Mr. Banton was terminally ill with prostate cancer. He was also, by all accounts, depressed. Additionally, he was in a weakened physical state as he required a walker and was incontinent.

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Muna Yassin, and a will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, and shortly after the new identical documents were prepared, a further capacity assessment was preformed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Banton's children raised a number of issues before the Court, including the following: whether Mr. Banton had capacity to make wills in 1994, and 1995; whether the wills were procured by undue influence; and, whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton lacked testamentary capacity to make the Wills in 1994 and 1995, and that the Wills were obtained through the exertion of undue influence. In spite of these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

[70] *Banton v Banton,* 1998, 164 D.L.R. (4th) 176 at 244.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the tests for testamentary capacity, capacity to manage property, capacity to give a power of attorney for property, capacity to give a power of attorney for personal care and capacity to marry according to the provisions of the *Substitute Decisions Act*.[71]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[72] Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions of whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[73] In reaching this conclusion, Cullity J. drew a significant distinction between the concepts of 'consent' and of 'capacity,' finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[74]

Having clarified the distinction between 'consent' and 'capacity', Justice Cullity then embarked upon an analysis of the test for capacity to marry and whether Mr. Banton passed this test. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[75] In the Court's view, however, the test is not one which is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to

[71] *Ibid.* at para.33.
[72] *Ibid.* at para.136.
[73] *Ibid.* at para.136.
[74] *Ibid.* at paras. 140-41.
[75] *Ibid.* at para.142.

appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Justice Cullity then turned his attention to whether or not, in Ontario law, there was an "additional requirement" for requisite mental capacity to marry:

> *An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in Browning v. Reane (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:*
>
> > *If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by the matrimonial contract, any more than by any other contract. at pp. 70-1*
>
> *The principle that a lack of ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in Spier v. Bengen, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:*
>
> > *There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46*

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "*the test for capacity to marry at common law*":

> *Whether a person of unsound mind was capable of contracting a valid marriage depended, according to eccle-siastical law to which the court had to have regard, upon his capacity at the time of the marriage to understand the nature of the contract and the duties and responsibilities created, his freedom or otherwise from the influence of insane delusions on the subject, and his ability to take care of his own person and property.*

After review of these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in

Browning v. Reane appeared to require both incapacity to manage oneself as well as one's property, whereas Willmer J.'s statement in *Re Spier* could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to incapacity to marry. Notably, Halsbury's statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It is only with the enactment of the *Substitute Decisions Act* that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."

Despite articulating what would, at the very least, be a dual test for capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, somewhat surprisingly, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid. Even more, Justice Cullity made this determination in spite of the fact that he found that, at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "*judgment was severely impaired and his contact with reality tenuous*." Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v. Reane*." However, you will note that, earlier in his reasons, he stated that the case of *Browning v. Reane* is the source to which the "*additional requirement"* is attributed, which requirement goes beyond a capacity to understand "*the nature of the relationship and the obligations and responsibilities it involves*" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's own person *and property*.

Barrett Estate v. Dexter

In sharp contrast to the holding in *Banton*, in *Barrett v. Dexter* ("*Barrett*") the Alberta Court of Queen's Bench declared the marriage performed between Arlene Dexter-Barrett and Dwight Wesley Barrett to be a nullity based upon a finding that Mr. Barrett lacked the legal capacity to enter into any form of marriage contract.

The case of *Barrett v. Dexter* involved a 93 year old widower, Mr. Dwight Barrett, who made the acquaintance of a woman almost 40 years his junior, Arlene Dexter Barrett. They met in a seniors club where Mr. Barrett was a regular attendee. In less than a year or so, Ms. Barrett began renting a room in Mr. Barrett's house. As part of the rental agreement entered into, Ms. Dexter was to pay $100.00/month and do some cooking and cleaning of the common areas of the home.

Not long after she moved in, however, Mr. Barett's three sons became suspicious of the increasing influence that Ms. Dexter was exerting over their father and, in September of that year, only months after she had moved in, Mr. Barrett apparently signed a hand written memorandum which gave Ms. Dexter a privilege of living in his home while he lived until one year after his death. The one year term was later crossed out and initialled thus giving Ms. Dexter a privilege of living in the home for the duration of her lifetime and at the expense of the Estate.

Mr. Barrett's withdrawals from the bank began to increase in both frequency and amount. Ms. Dexter then made an appointment with the marriage commissioner, and her daughter and son-in-law were to attend as witnesses. The marriage was not performed as apparently the son-in-law had a change of heart about acting as a witness. Ms. Dexter then made another appointment with a different marriage commissioner. On this occasion, the limousine driver and additional taxi cab driver acted as witnesses. Mr. Barrett advised his grand-daughter of the marriage when she came to visit him on the day after the wedding. Mr. Barrett proceeded to draft a new

Will, appointing his new wife as executor, and gifting to her the house and furniture as well as the residue of his estate. A capacity assessment was conducted shortly thereafter and Mr. Barrett's son brought an application to declare the marriage a nullity on the basis of lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own will and accord.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed that the marriage was necessary in order for him to avoid placement in a nursing home. There was evidence of alienation by Ms. Dexter, including removal by her of family pictures from Mr. Barrett's home and interference by her with planned family gatherings. Ms. Dexter was also accused of speaking for Mr. Barrett and advising him against answering his son's questions and that she had written documents on Mr. Barrett's behalf.

Not only were all of the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on his family and estate. On the issue of capacity to marry, one of the doctors, Dr. Malloy, significantly opined that a person must understand the nature of the marriage contract, the state of previous marriages, one's children, and how they may be affected. Dr. Malloy testified that it is possible for an assessor or the court to set a high or low threshold for this measurement, but that in his opinion, "no matter where you set the threshold, Dwight [Mr. Barrett] failed."[76]

In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of *Chertkow v. Feinstein (Chertkow)*[77] which employed the test set out in *Durham v. Durham*:

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[76] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII) at pp.71-2.
[77] *Chertkow v. Feinstein (Chertkow)*, [1929] 2 W.W.R. 257, 24 Alta. L.R. 188, [1929] 3 D.L.R. 339 (Alta. C.A.).

> *What must be established is set out in Durham v. Durham (1885 10 P.D. 80) at p. 82 where it is stated that the capacity to enter into a valid contract of marriage is "A capacity to understand the nature of the contract, and the duties and responsibilities which it creates*".[78]

According to the Court, the onus rests with the Plaintiff who attacks the marriage to prove on a preponderance of evidence that a spouse lacked the capacity to enter into the marriage contract. Applying the law to the facts, the Court noted that while the opinions of medical experts were not determinative in and of themselves, and had to be weighed in light of all of the evidence, in this case the medical evidence adduced by the Plaintiff established on an overwhelming preponderance of probability that Mr. Barrett lacked the mental capacity to enter into a marriage contract or any form of marriage on the date he married Ms. Dexter.

Although the Court did consider the evidence of the lay witnesses, relative to the medical evidence, the evidence given by the lay witnesses was weak. In fact, Ms. Dexter was the best lay witness. However, because she had a personal interest in the outcome of the case her evidence could not be accepted.

In conclusion, the Court held that the plaintiff had proven, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null and void and the court found it unnecessary to decide the issue of undue influence. As the Plaintiff son had been entirely successful in the action, he was entitled to costs.

Feng v. Sung Estate

In 2003, five years after *Banton,* Justice Greer refined the test and application of the capacity to marry in *Re Sung Estate*. The facts in *Re Sung* are as follows. Mr. Sung, recently widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were

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[78] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82.

quickly married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share. Mr. Sung's children sought a declaration that the marriage was void *ab initio,* on the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, on the basis of duress, coercion and undue influence of a degree sufficient to negative any consent that there may have been.

In making her determination, Justice Greer found that there was no question that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party prior to Mr. Sung's death took steps to have it declared such.[79] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

In the Court's view, the evidence showed that Ms. Feng used both duress and undue influence to force Mr. Sung, who was in a vulnerable position, to marry her. Although Mr. Sung was only 70 years of age, he was both infirm and vulnerable and, the Court noted, Ms. Feng would have been very aware of his frail mental and physical health as a result of her nursing background. The Court also found that Ms. Feng was aware of Mr. Sung's vulnerability on the basis that Mr. Sung had agreed to help financially support Ms. Feng's son. It was suspicious that Mr. Sung, who had always been very close to his family, never told his children and his family about his marriage to Ms. Feng. Moreover, that Mr. Sung was under duress was evident from the fact that his health was frail and he feared that Ms. Feng would leave him if he did not marry her.

Justice Greer also states that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the mental capacity to enter into the marriage. In reaching this conclusion,

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[79] *Feng v. Sung Estate, supra* note 67 at para. 51.

Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen* where "the court noted that the person must also have the capacity to take care of his or her own person and property." Applying those principles, Greer J. found that the evidence is clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was capable of writing cheques, he was forced to rely on a respirator and Ms. Feng's operation of it. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the test for capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate*: "…a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[80] On the basis that Mr. Sung married Ms. Feng because he had erroneously believed that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.

Accordingly, the marriage certificate was ordered set aside and a declaration was to issue that the marriage was not valid and that Ms. Feng was not Mr. Sung's legal wife on the date of his death. In the result, the Will that Mr. Sung made in 1999 remained valid and was ordered probated.

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the capacity to enter into the marriage with Ms. Feng.[81] The Court of Appeal endorsed Justice Greer's decision, although it remarked that the case was a close one.

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[80] *Ibid.* at para. 62.
[81] *Feng v. Sung Estate* [2004] O.J. No. 4496 (Ont. C.A.).

Hamilton Estate v Jacinto[82]

In January, in the British Columbia Supreme Court yet another related decision has come out bearing some of the hallmarks of these predatory relationship situations; however, in this case, there was no marriage. The Court's analysis of the facts and issues is interesting from the perspective of these predatory situations.

In this case, Mr. Hamilton was married for 59 years before his wife died in March 2001, at which time he was 81 years old. Mr. Hamilton survived another 3 ½ years and died in 2004 at age 84. Within a few months of losing his wife, Mr. Hamilton embarked on a relationship with Ms. Jacinto. The evidence before the Court was, that at some point Ms. Jacinto and Mr. Hamilton contemplated marriage, though the marriage never took place.

In 2003, transactions took place that formed the subject matter of the action. Namely, Mr. Hamilton was the sole trustee and primary beneficiary of a trust that he set up. In that capacity, he arranged a line of credit, secured by property titled in the name of the trust and paid into the trust's bank account, money to fund the purchase of a house, the title to which was registered in Mr. Hamilton and Ms. Jacinto's names as joint tenants with rights of survivorship. Moreover, to facilitate the purchase, Mr. Hamilton opened two bank accounts with Ms. Jacinto, which were held jointly. At Mr. Hamilton's death, legal ownership of the monies in the joint account entitled to the property vested in Ms. Jacinto by survivorship, and not his estate.

Not surprisingly, Mr. Hamilton's children brought an action alleging *inter alia* that as the trustee of the trust, he was without authority to purchase the property using trust assets, undue influence was alleged against Ms. Jacinto, a claim of resulting trust alleged over the joint assets, as well as allegations of incapacity.

The Court engaged in considerable analysis as to whether or not Mr. Hamilton had authority to convert trust assets into non-trust assets. The Court, in this regard, had to determine Washington State law with respect to authority of the trustee in Mr. Hamilton

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[82] *Hamilton Estate v. Jacinto*, 2011 BCSC 52 (CanLII), 2011-01-19

under the trust; the position of Ms. Jacinto; and the interpretation of the trust powers itself. The Court analyzed the position of the children that Mr. Hamilton was a man in rapid physical and mental decline and their allegations that he was increasingly confused and forgetful in the last years of his life. There was a great deal of evidence of intent. The Court provided an in-depth analysis of the gratuitous transfer of property including the application of the doctrine of resulting trust to gratuitous transfers in *Pecore and Pecore*[83].

Mr. Hamilton's children alleged that he was confused about his business affairs and had increasing difficulty in understanding them.

There was, however, a great deal of other evidence of independent witnesses. The evidence spoke to defeating the allegations that Ms. Jacinto was a "*gold digger*". Mr. Hamilton's solicitor was a witness. A number of independent witnesses testified that Mr. Hamilton had shared love and affection for Ms. Jacinto and spoke of their loving and intimate relationship. Relatives of Ms. Jacinto gave evidence. The Deceased's solicitor prepared a form of pre-nuptial agreement which had never been entered into but spoke to defeat the allegations of the children that they had not contemplated marriage. The Court looked at the conjugal nature of the relationship.

On undue influence, the Court found that Ms. Jacinto was not exploiting Mr. Hamilton or taking advantage of him in any way. Moreover, there was no evidence to draw an inference from the nature of their relationship that Ms. Jacinto exercised undue influence over Mr. Hamilton with respect to the property transactions conducted.

The Court was satisfied that the intent of the gift to Ms. Jacinto had been proven and accepted her evidence with respect to the jointly held property. Although the Court noted there were issues of credibility, that they had been considered and had no bearing on the evidence given by Ms. Jacinto about the decision that the property be held in joint tenancy, nor as to the nature of their relationship. The Court also took into consideration the fact that the children knew about the real property that had been

[83] *Pecore v. Pecore,* 2007 SCC 17 (CanLII), 2007 SCC 17

bought during the Deceased's lifetime and the possibility of the marriage. In its thorough analysis, the Court concluded that Mr. Hamilton intended to give a gift to Ms. Jacinto of an interest in joint tenancy in the real property and the joint accounts. The Court determined that the Deceased had given the gift freely; that it was an independent act, and one which he fully understood. Moreover, the Court determined that the presumption of resulting trust had been successfully rebutted. The Court also found that Ms. Jacinto did not exercise undue influence over Mr. Hamilton when he decided to make the gift. The Court was satisfied that the gift was an act of love and an expression of affection and the action was dismissed and Ms. Jacinto entitled to her costs. It should be noted that Ms. Jacinto was in or about 30 years younger than Mr. Hamilton.

The judgment does not speak to issues of alienation from family. Too, there is no mention as to the value of the Deceased's estate in relation to the value of the joint property that passed by rights of survivorship. In conclusion, there were some of the usual hallmarks, but in this case there appear to be a rather thorough analysis of evidence in respect of the allegations which did not prove the plaintiffs case on a balance of probabilities. The law with respect to capacity was not analyzed, rather, decisions respecting resulting trust and legislation concerning the *Trustee Act* were analyzed.

A.B. v. C.D.

In *A.B. v. C.D.*,[84] the British Columbia Court of Appeal considered the question of capacity to form the intention to live separate and apart. Like the Court below it, the Court of Appeal agreed with the comments made by Professor Robertson in his text, *Mental Disability and the Law in Canada,* 2nd ed., (Toronto: Carswell, 1994).[85] More specifically, the Court of Appeal agreed with Professor Robertson's characterization of the different standards of capacity and his articulation of the standard of capacity necessary to form the intention to leave a marriage. Professor Robertson's standard

[84] *A.B. v. C.D.* (2009), BCCA 200 (CanLII).
[85] Robertson, Gerald B. *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at pp.253-54.

focuses on the spouse's overall capacity to manage his or her own affairs and is found at paragraph 21 of the Court of Appeal's decision:

> *Where it is the mentally ill spouse who is alleged to have formed the intention to live separate and apart, the court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably similar to capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship*.

The Court noted that this characterization differs from the standard adopted in the English decisions of *Perry v. Perry*, [1963] 3 All E.R. 766 (Eng. P.D.A.) and *Brannan v. Brannan* (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.), which conclude that when a spouse suffers from delusions that govern a decision to leave the marriage, the delusional spouse does not have the requisite intent to leave the marriage. The Court in *A.B. v. C.D*, preferred Professor Robertson's characterization of the requisite capacity is because it respects the personal autonomy of the individual in making decisions about his or her life.[86]

Ross-Scott v. Potvin[87]

In *Ross-Scott v. Potvin*, the British Columbia Supreme Court applied *A.B v. C.D.* but arrived at a very different holding, which illustrates the difficulties of attacking the validity of a marriage after the death of the vulnerable adult. The only surviving relatives of the deceased, Mr. Groves, sought an order annulling Mr. Groves's marriage on grounds of undue influence or, in the alternative, lack of capacity. They also argued that various *inter vivos* transfers and testamentary instruments were invalid on the same grounds. Justice Armstrong applied the common law test of capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability.

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[86] *A.B. v. C.D.*, (2009), BCCA 200 (CanLII) at para.30.
[87] 2014 BCSC 435

Mr. Groves was a 77 year-old retired civil engineer when he married the Respondent, Ms. Potvin, who was then 56 years old. They were neighbors. Mr. Groves was reclusive and did not socialize; he met Ms. Potvin in 2006 when he delivered a piece of her mail that he had received by mistake. They married in November of 2009. Mr. Groves died a year later, in November of 2010.

The applicants are his niece and nephew, and his only living relatives. They lived abroad and had not seen the deceased for 25 years.

In 2007, shortly after he had met the Ms. Potvin, Mr. Groves instructed a solicitor to prepare a will which named one of the applicants, Nigel Scott-Ross, as the executor and trustee of his estate. The proposed will split the estate equally between Nigel and his sister and co-applicant. Mr. Groves contacted that solicitor 4 months later and said that he wanted to leave the will for about six months.

In June of 2008, Mr. Groves contacted a new solicitor, instructed the new solicitor to prepare a new will and executed the will in the same month. The will included provisions that granted his car, space heater, and rugs to Ms. Potvin, and divided the rest of his estate between the applicants and two charities.

Four months later, in October of 2008, Mr. Groves retained his third solicitor, Mr. Holland, and executed another will which named Ms. Potvin as his executor and trustee, and divided the estate between the applicants, Ms. Potvin, and one charity. In July of 2009, Mr. Groves executed yet another will that divided his estate in two equal shares; one share for Ms. Potvin and one for the applicants.

By September of 2009, Mr. Groves's health problems, which had first presented themselves to his doctor in 2007, had grown more serious.

In November of 2009, Mr. Groves and Ms. Potvin were married. They made no announcements or public notice, and they took no pictures. Mr. Groves then put his car in Ms. Potvin's name, converted his bank accounts to joint accounts with her, and gave her $6,000 to assist her with her mortgage.

When Mr. Holland learned of the marriage a few months later, he called Mr. Groves and informed him of the impact of the marriage on Mr. Groves's will. Mr. Groves executed a new will that gave the applicants $10,000 each and left the rest of his estate to Ms. Potvin.

Mr. Groves died in November of 2010.

Justice Armstrong's analysis of the capacity to marry relies primarily on *A.B. v C.D*, and in particular, the importance of autonomy therein.[88] The medical evidence established that Mr. Groves suffered from cognitive impairments, anxiety, depression, and moments of delusional thinking.[89] Mr. Groves's family doctor asserted that Mr. Groves was incapable of "managing himself" in November of 2009.[90] Nevertheless, Justice Armstrong found that these conditions, diagnoses, and limitations did not evidence an inability on Mr. Groves's part to make an informed decision to marry Ms. Potvin.[91] His Honour provides the following observation:

> A person may be incapable of writing a cheque or making a deposit to a bank account and thus be described as being incapable of managing their financial affairs. Similarly, temporal delusions, depression, or anxiety may impact a person's ability to make other life decisions. But these factors do not necessarily impact a person's ability to consciously consider the importance of a marriage contract. Nor do they necessarily impact formation of an intention to marry, a decision to marry, or the ability to proceed through a marriage ceremony.[92]

Mr. Holland, as well as Mr. Groves's accountant, financial advisor and marriage commissioner all gave evidence affirming that Mr. Groves was aware of the nature of

[88] *Ibid*., at paras 46, 184.
[89] *Ibid*., at para 186.
[90] *Ibid*., at paras 94 and 95.
[91] *Ibid*., at para 186.
[92] *Ibid*., at para 200.

the marriage. Of particular assistance was Mr. Holland's evidence; Mr. Holland was concerned about the appearance of elder abuse and he questioned Mr. Groves in detail about his relationship with Ms. Potvin a few weeks prior to the marriage. Mr. Groves was consistent in his assertions that he wanted to marry.

With respect to undue influence, the applicants relied on *Feng v. Sung Estate*. The evidence established that Mr. Groves was afraid of being admitted into care and believed that he could avoid that end by marrying Ms. Potvin, who would assist him with asserting his autonomy and maintaining his comfort and care at home.[93] His family doctor asserted that Mr. Groves was susceptible to persuasion in 2009.[94]

Regardless, Justice Armstrong found that there was no direct evidence that Ms. Potvin's influence over Mr. Groves supplanted his decision making power on the issue of his decision to marry.[95] His Honour found that Ms. Potvin may have encouraged Mr. Groves in this regard, but there was no evidence that she exerted influence or force to compel him to do so.[96] His Honour explains his holding as follows:

> I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must provide the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.[97]

Justice Armstrong also dismissed the claims that Mr. Grover's testamentary dispositions and *inter vivos* transfers were invalid by reason of undue influence.[98] His Honour applied *Hyrniak v. Maudlin*, 2014 SCC 7 and concluded that a summary trial, with a record of affidavit evidence and cross-examination transcripts, was a suitable forum for the disposition of the claim.[99] The action was dismissed with costs to Ms. Potvin.[100]

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[93] *Ibid*., at para 190.
[94] *Ibid*., at para 95.
[95] *Ibid*., at para 190.
[96] *Ibid*., at para 190.
[97] *Ibid*., at para 240.
[98] *Ibid*., at para 227, 280, and 281.
[99] *Ibid*., at para 300.
[100] *Ibid*., at para 302.

Juzumas v. Baron[101]

In *Juzumas v. Baron,* the plaintiff initially sought a declaration that his marriage to the defendant was a nullity and void *ab initio*, but he did not pursue this claim at trial; instead, he was granted a divorce/dissolution of the marriage. The resulting decision is therefore not a capacity to marry case per se, but the facts have all the hallmarks of a predatory marriage. Mr. Juzumas is an older adult who comes into contact with an individual who, under the guise of "*caretaking*", takes steps to fulfill more of the latter part of that verb. The result: an older person is left in a more vulnerable position than that in which they were found.

Mr. Juzumas, the plaintiff in this case, was 89 years old at the time the reported events took place, and of Lithuanian descent, with limited English skills. His neighbor described him as having been a mostly independent widow prior to meeting the defendant, a woman of 65 years.[102] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden.[103] The defendant's infiltration in the plaintiff's life was credited for bringing about this transformation. The financial exploitation, breach of trust, precipitation of fear, are all hallmarks of a predator.

The defendant "*befriended*" the respondent in 2006. She visited him at his home, suggested that she provide assistance with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance.[104] The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.[105]

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other

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[101] *Juzumas v. Baron*, 2012 ONSC 7220.
[102] *Ibid.* at para 1.
[103] *Ibid.* at paras 39 and 56.
[104] *Ibid.* at para 25.
[105] *Supra* note 59 at para 28.

reason related to his money or property.[106] She promised to live in the home after they were married and to take better care of him. Most importantly, she undertook not to send him to a nursing home as he so feared.[107] The plaintiff agreed.

The defendant testified that the plaintiff had suggested that they marry on the basis of their mutual feelings of affection, romance, and sexual interest, Justice Lang found otherwise.[108] The defendant, who had been married approximately 6-8 times (she could not remember the exact number), had previous "caretaking" experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not. Justice Lang considered this evidence as an indicator that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone's Will on the basis that she provided that person with care is unenforceable.[109]

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. In spite of the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff's house ($600,000) or the possibility of a marriage contract. Interestingly, the lawyer did not meet with the plaintiff without the defendant being present.[110]

After the wedding ceremony, which took place at the defendant's apartment, she dropped him off at a subway stop so that he would take public transit home alone.[111] The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant's promise that she would provide better care to the plaintiff if they married, the plaintiff's tenant and neighbor, who were both found to be credible, attested

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[106] *Ibid.* at paras 26-28.
[107] *Ibid.* at para 28.
[108] *Ibid.* at para 27.
[109] *Ibid.* at para 24.
[110] *Ibid.* at para 30.
[111] *Ibid.* at para 31.

that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "'abusive', 'controlling' and 'domineering'".[112]

With the help of a plan devised over the course of the defendant's consultation with the lawyer who had drafted the plaintiff's Will made in contemplation of marriage, the defendant's son drafted an agreement which transferred the plaintiff's home to himself, no this mother to financially protect her. The "agreement" acknowledged that the plaintiff did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.[113]

The plaintiff, the defendant and her son attended the lawyer's office in order to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that overall his evidence indicated that it had not been explained to the client with sufficient discussion, or understanding the consequences of the transfer of property and moreover, that he was in the court's words "*virtually eviscerating the Will he had executed only one month earlier…*"; that he did not meet with the plaintiff alone; and only met with the parties for a brief time.[114] Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[115]

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. In fact, it seems the lawyer was under the impression that the defendant, and not the plaintiff, was the vulnerable party.[116]

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[112] *Supra* note 59 at para 54.
[113] *Ibid.* at paras 68-69.
[114] *Ibid.* at paras 79-84.
[115] *Ibid.* at para 84.
[116] *Ibid.* at para 88.

The lawyer's notes indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.**[117]** In addition, Justice Lang found that the plaintiff had been under the influence of emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on testimonial evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.**[118]**

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect in respect of his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."**[119]**

In considering the transfer of property, Justice Lang applied and cited McCamus' Law of Contracts, which outlines a "*cluster of remedies*" that may be used "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[120] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "*if any of these doctrines applies, the weaker party has the option of rescinding the agreement*."[121]

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice or some other opportunity given to the vulnerable party which

[117] *Supra* note 59 at para 91.
[118] *Ibid.* at paras 63 and 92.
[119] *Ibid*. at para 97.
[120] *Ibid.* at para. 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[121] *Ibid.* at para 8.

allows him or her to provide "*a fully-informed and considered consent to the proposed transaction*."[122]

As for the doctrine of unconscionability, Justice Lang stated that the doctrine "gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power."[123] The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

In addressing the defendant's claim of quantum meruit for services rendered, Justice Lang found that the period during which services were rendered could be distinguished as two categories: pre-marriage and post-marriage.

During the pre-marriage period, the defendant undertook to care for the plaintiff without an expectation or promise of remuneration, and persuaded the plaintiff to compensate her with a monthly income. Justice Lang found that no additional remuneration could be claimed for that period.

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had agreed to do so.[124] For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.[125] Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary, and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle that restitutionary relief allows a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from

[122] *Supra* note 59 at para 11.
[123] *Ibid.* at para 13.
[124] *Ibid.* at para 129.
[125] *Ibid.* at para 128.

doing so would, in all the circumstances, be inequitable."[126] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behaviour is such that it taints the entire relationship."[127] As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her quantum meruit claim.

Substantial costs were awarded in favour of the older adult plaintiff.[128]

This case provides helpful guidance in the area of elder abuse, as it demonstrates the use of contract law and equity to remedy a wrong in the context of financial abuse. This case provides what is, in cases of financial abuse, a rarity: an uplifting ending. In this case, it is not a family member or acquaintance who brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult himself who, with the help of his neighbor, was able to seek justice and reverse some of the defendant's wrongdoing.

It is not every case of elder abuse that involves an older adult who is able to, or capable of, being present during court proceedings to testify. In addition to its review of the legal concepts that are available to counsel seeking to remedy the wrongs associated with predatory marriages, this case demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

Petch v. Kuivila[129]

Petch v. Kuivila highlights the effects of marriage on estate planning; specifically, the revocation of a will by marriage pursuant to s. 15 of the *Succession Law Reform Act*

[126] *Supra* note 59 at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 661.
[127] *Ibid.* at para 142.
[128] 2012 ONSC 7332 (CanLII).
[129] 2012 ONSC 6131.

(*SLRA*). It also acts as a reminder of the correlation and consequences of predatory marriages and revocations of previous wills not made in contemplation of marriage.

In 2003, the Deceased designated the Applicant as the revocable sole beneficiary of his life insurance policy. In 2004, the Deceased made a will in which he named the Respondent and her brother as beneficiaries of that same insurance policy; that will was not made in contemplation of marriage. In 2008, the Deceased married the Respondent. After the date of death, the Applicant sought the insurance proceeds on the grounds that his marriage to the respondent revoked the designation in his will.

Justice Macdonald made the following findings: the will revoked the 2003 designation pursuant to the *Insurance Act,* the 2008 marriage revoked the 2004 will pursuant to s. 15 of the *SLRA,* and the revocation by marriage did nothing to undo the previous revocation by will therefore the insurance proceeds were payable to the Deceased's estate.

8. An International Perspective

Statutory Reform in the United States of America

Professor Albert Oosterhoff's article, "Predatory Marriages", provides an excellent review of international efforts to address the harms done by predatory marriages. He found that in the U.S.A., very few states have retained the revocation-upon-marriage provisions in their probate legislation.[130] Professor Oosterhoff also found that some states permit a relative to contest the validity of a marriage by an incapacitated elderly family member before the death of that family member, and in Texas, their legislation permits post-death consequences.[131]

[130] Albert Oosterhoff, "Predatory Marriages" (2013) 33 Estates & Trusts Pensions 24 at p. 54.
[131] *Ibid*., at p. 57.

Australia's Approach: the Marriage Act, and Oliver (Deceased) & Oliver

Like Canada, Australia has also struggled to balance the autonomy of vulnerable adults with the necessity of protecting them from predatory marriages. Unlike Canada, Australia has met this challenge with legislation that sets out the test for capacity to marry. However, Australia's statutory test is somewhat limited in that it requires the marrying parties to have the mental capacity to understand the effect of the *ceremony*, not an understanding of the nature of marriage as an institution with all its consequences.[132] Some scholars have suggested that the test would be more effective if it required the understanding of the property consequences of marriage, yet judicial comment in Australia suggests that few people, if any, truly understand all the consequences of marriage.[133]

In a recent decision out of New South Wales, *Oliver v. Oliver*, Australia's Family Court declared that the April 2011 marriage between the 78 year-old Mr. Oliver (deceased), and the 49 year-old Mrs. Oliver was invalid.[134] In doing so, the court reviewed the common law test for capacity to marry as it developed in England and the subsequent enactment of a statutory test in Australia. While the relevant legal tests differ from those applied in Canada, the facts, described below, are instantly recognizable as those of a predatory marriage.

Mr. Oliver had suffered alcohol-related capacity issues dating back to 2001. His first wife, Mrs. E, had also suffered under alcohol-related dementia, and in 2004, when the New South Wales Guardianship Tribunal considered the issue of Mrs. E's guardianship, it held that Mr. Oliver lacked the capacity to manage Mrs. E's affairs.

Mrs. E died in August of 2010. The Respondent attended the funeral as the daughter of a friend of Mr. Oliver, and she referred to Mr. Oliver as "Uncle." Although Mr. Oliver's

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[132] *Marriage Act 1961* (Cth) subsection 23B(1)(d); see also Jill Cowley, "Does Anyone Understand the Effect of 'The Marriage Ceremony'? The Nature and Consequences of Marriage in Australia" [2007] SCULawRw 6; (2007) 11 Southern Cross University Law Review 125.

[133] Cowley, *supra* note 132 at p. 170 – 171.

[134] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AstLII).

daughter had made arrangements for Mr. Oliver to receive in-home care from a community organization, the Respondent later cancelled that service. Mr. Oliver had previously granted power of attorney to his son-in-law, but the Respondent made arrangements to assist the Mr. Oliver with his financial affairs. Mr. H had not begun to exercise his authority as an attorney for property, but in January and February of 2011, Mr. Oliver became increasingly suspicious of Mr. H and accused Mr. H of wanting to take all his money and control his life.[135]

From February 2011 to April 2011, the Applicant (Mr. H's daughter and Mr. Oliver's granddaughter), tried on numerous occasions to speak with Mr. Oliver, but the Respondent always answered the phone. The Applicant was rarely able to speak with him. However, in late February or early March of 2011, Mr. Oliver did come to the phone and told the Applicant he was getting married. The Applicant said, "How are you getting married? I didn't even realize you had a girlfriend." Mr. Oliver said, "Neither did I."[136] The Respondent then took the phone and advised that they would be married in June of 2011.[137]

In February of 2011, the Respondent took Mr. Oliver to see his general practitioner, Dr. G, who certified that the deceased was of sound mind and capable of making rational decisions about his affairs.[138] A few days later, the respondent and Mr. Oliver attended the office of a solicitor and executed a will in contemplation of marriage (but not conditional on the marriage taking place) that named the solicitor his Executor and left his entire estate to the Respondent.[139] The Respondent moved in with Mr. Oliver the next day.

The Respondent and Mr. Oliver were married in April of 2011, not June, as the Respondent has previously asserted to Mr. Oliver's relatives. None of Mr. Oliver's family

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[135] *Ibid*., at paras 39 and 40.
[136] *Ibid*., at para 25.
[137] *Ibid*.
[138] *Ibid*., at para 73.
[139] *Ibid*., at para 74.

were invited or notified; only the Respondent's sister and parents attended. In her testimony, the Respondent had no explanation as to why Mr. Oliver's relatives were not invited. The ceremony celebrant, Mrs. Q, gave evidence that Mr. Oliver stated he was pleased to be getting married.

In May of 2011, three weeks after the wedding, Mr. Oliver fell in his home, fractured his hip, and was hospitalized. The social worker, Mrs. U assessed Mr. Oliver and noted his dementia and vulnerability. Mrs. U spoke with the Respondent twice. The Respondent initially informed Ms. U that Mr. Oliver had no relatives other than a niece living out of state, and had no attorney for property. Mrs. U recommended that the New South Wales Public Trustee and Guardian be appointed as Mr. Oliver's guardian of property. The New South Wales Trustee and Guardian as so appointed in August of 2011.

The Applicant commenced her application under section 113 of the Family Law Act 175 just prior to Mr. Oliver's death for a declaration as to the validity of the marriage. She argued that Mr. Oliver was mentally incapable of understanding the nature and effect of the marriage ceremony as provided for in section 23B(1)(d)(iii) of the Act. The Act further provides standing to the Applicant to make the within Application - such standing is unavailable under Canadian legislation.[140] Mr. Oliver died in September of 2011. The Respondent did not inform Mr. Oliver's family.

The court had the benefit of an expert's report who reviewed Mr. Oliver's voluminous health records and provided an opinion, summarized by the court, as follows:

> *As to whether the deceased was capable of understanding the nature of the contract (marriage) that he was entering into, free from the influence of morbid delusions, upon the subject Dr Z says that is a difficult question to answer. There was clear evidence of long-standing cognitive impairment prior to April 2011, which may have influenced the deceased's capacity in this regard. Dr Z notes:*

[140] *Ibid*., at paras 5 and 6; see also Albert Oosterhoff, "Predatory Marriages" (2013) 33 Estates & Trusts Pensions 24.

> *... in relation to the specific issue of "morbid delusions", information provided by his family suggests he was experienced delusions and paranoia through December 2010 into the New Year, including his belief sometimes that his first wife, [Ms E], was still alive and also his belief that Mr [H] was being too controlling of his money. Moreover, there is a long history documented in hospital notes of paranoid delusions and treatment for these, dating back to 2001, especially during times of delirium. As such, it is possible (but I cannot be certain) that [the deceased] was experiencing some degree of delusions around this time and that this might have influenced his thinking, especially if he had certain inaccurate beliefs about some family members and if he was being unduly influenced by them.*[141]

The Court observed that the English common law test for capacity to marry had been supplanted by the statutory test in the *Marriage Act 1961* (Cth), as amended, and noted the following:

> *On the face of it the English common law test and the Australian statutory test are different, particularly because of the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony. …*
>
> *In the 32 years since the legislative test has applied, there has not been a plethora of decisions of the Australian courts as to its interpretation. There are only 2 reported decisions that I was referred to and I located no others. … The current test of "mentally incapable of understanding the nature and effect of the marriage ceremony" was applied in both cases.*
> *…*
>
> *It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.*[142]
> …

The Court reviewed judicial commentary on Australia's capacity to marry tests, and in particular, Justice Mullane's application of authorities in *Babich & Sokur and Anor*, as follows:

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[141] *Oliver*, *supra* note 132, at para 185.
[142] *Ibid*., at paras 244, 245, 246.

> *… it is in my view* ***significant that the legislation not only requires a capacity to understand "the effect" but also refers to "the marriage" rather than "a marriage". In my view taken together those matters require more than a general understanding of what marriage involves*** *[emphasis added]. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.*[143]

In *Babich*, Justice Mullane held that the vulnerable adult in question had a general understanding of "a" marriage, but she was incapable of understanding the effect her marriage would have on *her*.[144]

In *Oliver*, Justice Foster found that Mr. Oliver may have been aware that he was participating in a marriage ceremony to the Respondent, or at least some sort of ceremony with the respondent, but no further.[145]

9. Conclusion

While many provinces and states have done away with the revocation–upon–marriage provisions in their succession or probate legislation, these new statutes are a small first step towards the development of a more cohesive prevention of financial abuse through predatory marriages. Innovative ideas, like the caveat system in British Columbia, require consistent implementation if they are to be effective.

In the absence of clear legislation as to the capacity to marry, the common law is anything but crystal clear. In Canada, *Banton* and *Re Sung Estate* cite *Browning v. Reane* and *Re Spier*, cases which appear to suggest that capacity to manage one's person *and* one's property are a component of the test for capacity to marry. These cases appear to be moving in the direction of developing an adequate test for capacity

[143] *Ibid*., at para 202, citing para 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII).
[144] *Babich*, *supra* note 141, at para 256.
[145] *Oliver*, *supra* note 132, at para 210.

to marry—one which best reflects and accords with the real-life financial implications of death or marital breakdown on a marriage.

Yet, it would appear that our courts are still haunted by the old judicial adage that "the contract to marry is a very simple one." We see this approach in *Ross-Scott v. Potvin*. This, combined with reluctance on the part of our courts to "attribute inordinate weight to the proprietary aspects of marriage," has meant that the test for the capacity to marry is much less stringent than the one used to determine testamentary capacity or capacity to manage property.

Australian case law seems to suggest that a statutory test for the capacity to marry can be a useful tool in cases of elder abuse, but such statutory tests should specifically reference the marrying parties' understanding of the property consequences of marriage. Nevertheless, the *Oliver* case illustrates the value of the capacity provisions in Australia's *Marriage Act*.

The consequences of Canada's ongoing deference to the common law test are as puzzling as they are problematic from a social perspective as well as a public policy perspective.

Essentially, this means that a person found incapable of making a will may revoke his or her will through the act of marriage. As well, in refusing to require that a finding of capacity to manage property forms a prerequisite to a finding of capacity to marry gives free reign to would-be (predatory) spouses to marry purely in the pursuit of a share in their incapable spouse's wealth, however vast or small it may be. After all, as stated, a multitude of proprietary rights flow from marriage.

Until our test for capacity to marry is refined, such that it adequately takes into consideration the financial implications of marriage, all those with diminished mental capacity will remain vulnerable to exploitation through marriage. This is likely to become

an increasingly pressing problem as an unprecedented proportion of our society becomes, with age, prone to cognitive decline.

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Kimberly A. Whaley *May 2014*