PREDATORY MARRIAGES

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INTRODUCTION: Update on Predatory Marriages and Later in Life Partnerships[1]

Current and evolving statistics confirm that our population is aging and doing so, rapidly. With age and 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 dependent. 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.

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]

The overriding problem with such marriages today, is that they are not easily challenged. The current standard or factors to be applied for ascertaining the requisite

[1] Authored by Kimberly A. Whaley, Principal of Whaley Estate Litigation. Paper and analysis updated herein September 2016.
[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

"capacity to marry" as developed at common law are anything but rigorous. This means that capacity is likely found by a court, even in the most obvious cases of exploitation. Consequently, predatory and exploitative marriages are more likely than not, to withstand challenge. While some refer to a 'test' when speaking of the consideration of factors to be applied to determine/ascertain requisite capacity to marry, it is important to note that this is a colloquial or lay term. There is no 'test' per se, but rather a consideration of factors to be applied to ascertain decisional capacity to marry.

Relatedly, there is a growing rate of "**later in life relationships**". Our high rate of separation and divorce; increasing prevalence of unmarried, cohabiting partners, particularly amongst older adults; recognition in the equality of same-sex partnerships/unions, in addition to common law developments giving rise to what constitute spousal, and 'spousal-like' relationships, have resulted in an increase in legal disputes arising out of such relationships. As an adjunct to such unions, children, step-children, adopted children, genetically procured children, add to the complexity associated with estate and succession planning.

These societal issues are a distinctly modern development. The volume of court decisions involving blended, complex or fractured family units, where a spouse has remarried or entered into a new common-law relationship, with children from multiple relationships, has exploded over the last several decades in the changing cultural climate following the liberalization of matrimonial laws. As the population ages rapidly, it is ever more important to consider these relationships from the perspective of effective estate planning and litigation prevention.

This paper is but a snapshot of the many critical issues arising from predatory relationships and estate disputes arising from later in life partnerships. Those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*****, Canada Law Book,** co-authored by Kimberly Whaley et al., http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html[7], "**Predatory**

[7] *Ibid*.

Marriages" (2013) by Albert H. Oosterhoff and "**Predatory Marriages - Equitable Remedies**" (2015) by Kimberly Whaley and Albert H. Oosterhoff.[8]

This paper is by no means exhaustive in its approach or content. The subject matter is broad, and a mere overview of some of the many developing patterns across Canada is considered, while paying particular attention to the specific challenges arising out of later in life re-partnerships, predatory marriages and the capacity to marry.

CAPACITY TO MARRY AND PREDATORY MARRIAGES

1. What is Capacity?

In law, one is presumed capable unless and until such presumption is legally rebutted. Legal capacity is decision, time and situation/context specific.[9] The law prescribes standards of capacity in different contexts. Contexts in which decisional capacity is required include the following:

1. Giving instructions for and to execute a Will or trust. In other words, "testamentary capacity";[10]
2. Making other testamentary dispositions legislatively defined;[11]
3. Contracting;[12]
4. Managing property;[13]
5. Managing personal care;[14]
6. Granting or revoking a Continuing Power of Attorney for Property;[15]

[8] Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 E.T.P.J. 24, Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 E.T.P.J. 269
[9] *Supra* note 2 at 46
[10] 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.)
[11] 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.
[12] *Hart v O'Connor* [1985] AC1000
[13] *Substitute Decisions Act,* 1992, S.O. 1992, c.30, as amended, s. 6
[14] *Ibid.*, s. 45

7. Granting or revoking a Power of Attorney for Personal Care;[16]
8. Consenting to treatment decisions in accordance with the *Health Care Consent Act;*[17]
9. Gifting or selling property;[18]
10. Instructing a lawyer; and
11. Marrying.

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.[19] And, importantly, as the law currently stands, capacity to marry may exist despite incapacity in other legal decisions or matters.[20]

The relevant time period is the time at which the decision in issue is made.[21] Legal capacity can fluctuate over time.[22] 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.[23] For example, if a mother appoints her eldest child as an attorney, under a 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.[24]

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[15] *Ibid.*, s. 8
[16] *Ibid.*, s. 47
[17] *Health Care Consent Act*, 1996, S.O. 1996, c.2, Schedule A, Section 41
[18] *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
[19] *Supra* note 2 at 45
[20] *Ibid.* at 45
[21] *Ibid.* at 46.
[22] *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.
[23] *Supra* note 2 at 48.
[24] *Ibid.*

Assessing capacity is an imperfect science which further complicates its determination.[25] In addition to professional and expert evidence, lay evidence can also be determinative, if not more so in some situations.[26] The standard of the capacity assessment conducted varies and this too, can become an obstacle that may need to be overcome in determining capacity with some degree of compelling accuracy.[27]

On point, an English High Court of Justice, Queen's Bench Division Judgment[28] *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 check 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).*
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> *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 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*

[25] *Ibid*.
[26] *Ibid*.
[27] *Ibid*.
[28] *Thorpe v Fellowes Solicitors LLP*, [2011]EWHC 61 (QB), (21 January 2011)

> *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.*
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> *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*. [29]

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

2. Capacity to Marry

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.[30] Yet, at the time of marriage, parties regularly as a matter of course fail to consider other relevant 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.[31]

Currently, in Canada, 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.[32] 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 long standing classic English cases, such as *Durham v. Durham*,[33] which collectively espouse the following principle: "the contract of marriage is a very simple one, one which does not require a high degree of intelligence

[29] *Ibid*. at paras 75-77
[30] *Supra* note 2 at 50
[31] *Ibid.* at 50
[32] *Ibid.* at 50
[33] *Durham v. Durham* (1885), 10 P.D. 80 [hereinafter *Durham*]

to comprehend."[34] Current legal treatment is becoming more unsettled and is in immediate need of judicial clarity.

The Historical Development of Capacity to Marry

Several common themes appear to emerge from a comprehensive review of historical cases on the issue of decisional and requisite capacity to marry. These themes are summarized here:

1. That the factors for determining the requisite capacity to marry is equivalent to that of 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 factors for determining the requisite capacity to marry is the same as the factors for ascertaining capacity to manage property; or that it requires both the requisite capacity to manage the person and the property.

Marriage as a Civil Contract

From a review of the old English cases, emerges the notion that the requisite 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),*[35] 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

[34] *Durham* at 82
[35] *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?[36]

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*.[37]

In the case of *In the Estate of Park, Deceased*,[38] Justice Singleton was faced with making a determination as to whether the deceased had capacity to marry. His articulation of how to determine 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 that 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*

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[36] *Ibid*., at para.31
[37] *Durham* v. *Durham*, (1885), 10 P.D. 80 at p.82
[38] *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*]

> *relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered*.[39]

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."[40] In his view, the determination of 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*.[41]

While the Court struggled with developing the appropriate process for determining requisite 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*[42] 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*

[39] *Estate of Park,* at 1411
[40] *Estate of Park, ibid,* at 1425
[41] *Estate of Park, ibid,* at 1417
[42] *Browning* v. *Reane* (1812), 161 E. R. 1080, [1803-13] All E.R. Rep. 265 [hereinafter *Browning*]

> *legitimate, and, consequently, that his marriage was valid. A strange determination!*
>
> *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.*[43]

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

The Distinct Nature of Marriage

There is yet 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,*

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

the question raised and to be answered by the court was, "whether or not the individual had capacity to understand the 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*,[44] 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*.[45]

Notably, again, the Court went further in stating that "there must also be a capacity to take care of both his/her own person and property."

The Simplicity of the Marriage Contract

As evinced by the decisions discussed, the courts historically 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.'[46] The Court in *Hunter v. Edney*[47] held the very same view, stating: "*no high intellectual standard is required in consenting to a marriage*."[48]

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[44] *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
[45] *Ibid*. at 46
[46] *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
[47] *Hunter* v. *Edney*, (1881) 10.P.D. 93
[48] *Hunter* v. *Edney*, (1881) 10.P.D. 93 at 95-96

Capacity to Marry Considered the Same as Capacity to Manage Property

That said, an alternative view of the requisite capacity to marry also can be found from the jurisprudence as was referenced 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 their property. Similarly, in *Spier, supra*, the Court stated that one must be capable of managing their property, in order to be capable of marrying.

Concluding Summary

From a historical perspective, it is apparent that there is no single and complete definition of marriage, or, of the 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. Yet, on the other end of the spectrum, 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, or both.

3. Statutory Requirements

With a few exceptions, most provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity.[49] These statutes prevent the relevant marriage officiate from issuing a license to, or solemnizing the marriage of, someone he/she knows, or has reasonable grounds to believe, lacks mental capacity to marry,[50] is incapable of giving a valid consent,[51] or who has been certified as mentally disordered.

[49] Exceptions being Newfoundland and Labrador, Nova Scotia, Yukon, and New Brunswick
[50] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license 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."
[51] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut)

At a glance, in Manitoba, certain rigorous precautions exist, for instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that he/she is able to understand the nature of marriage and its duties and responsibilities.[52] In fact, should a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered, will be guilty of an offence and liable on summary conviction to a fine.[53]

Section 7 Ontario's *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what he/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*.[54]

In British Columbia, it is an offence to issue a license 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.[55] The act further provides that a caveat can be lodged with an issuer of marriage licenses against issuing of a license to persons named in the caveat.[56] Once lodged, the caveat prevents the issuing of a marriage license until the issuer has inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it.[57] However, there are no reported cases citing 35 of the act, which suggests that offences under this legislation, if such offences occur, are not prosecuted. The writer has been told however by B.C. counsel that this provision is successfully used for protective purposes where predatory marriages are suspected. Discussion with lawyers in British Columbia suggests further however that the caveat system, although useful in theory, is not fully implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

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[52] *The Marriage Act*, C.C.S.M. c. M50, section 20.
[53] *The Marriage Act*, C.C.S.M. c. M50, sub-section 20(3).
[54] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license 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."
[55] *Marriage Act* [RSBC 1996] chapter 282, section 35.
[56] *Ibid*, s. 23.
[57] *Ibid*, subsection 23(2).

Where provincial legislation is silent on this issue of capacity and marriage, 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 at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid marriage.

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

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

Put in context, it is important to note that in Ontario, and in many other Canadian provinces, marriage automatically revokes a Will/testamentary document 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 applicable exceptions applies 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*[58] held that extrinsic evidence supported the term "spouse" as used in the Will to mean the testator's legal 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)).[59]

This revocation of a will upon marriage can raise serious consequential issues where a vulnerable adult marries but lacks the capacity to make a Will thereafter, or dies before a new Will can be 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.[60] British Columbia followed suit and on March 31, 2014, the new

[58] *MacLean Estate v. Christiansen*, 2010 BCCA 374
[59] Section 16(a) of the *SLRA*
[60] *Wills and Succession Act,* SA 2010, c W-12.2

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 all Canadian provinces, marriage comes with certain statutorily-mandated property right as between spouses. Using Ontario legislation 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" ("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 that the spouse's debts and other liabilities and the value of property held by the spouse already 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 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' and apply 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 and apply to either take pursuant to the intestate succession legislation as set out in the *SLRA*, or to elect to receive an equalization payment pursuant to the *FLA*. While a claim for variation

(in other words, a challenge) of one-half of the difference can be made, it is rarely achieved in the absence of fraud or other unconscionable circumstances.[61]

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.[62] 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.[63]

There are legitimate and important policy reasons underlying this statutorily-imposed wealth-sharing regime which has 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).

Arguably however, this policy rationale does not appropriately 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, where there are no children of the union, and where the other party offers little in the way of financial contribution. Such a relationship is not, as the property legislation presumes, and even elicited common law principles 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

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[61] *Ibid*.
[62] *Ibid*.
[63] *SLRA*, O. Reg. 54/95, s. 1

has very significant consequences on testate and 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 decision of Belleghem J., in *Blair v. Cooke (Allair Estate)*[64] 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 inherent difficulty with a predatory marriage is in reconciling the injustice caused to the vulnerable and/or incapable spouse (and the legitimate heirs, if any), since such unions are not easily challenged in law. The reason for this is that the common law factors employed to determine the requisite capacity to marry, have historically, been set at a fairly low threshold. Common law has arguably has not kept pace at all with the development of legislation that has been designed to promote and protect property rights.

5. Predatory Marriages and Capacity to Marry: Modern Case Law

Predatory marriages are on the rise, and I would suggest, world-wide, irrespective of country or culture. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, such unions 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, or dependency, they are vulnerable, and as such exposing them as more susceptible to exploitation. These unions are frequently clandestine – alienation and sequestering from friends, family and loved ones being a tell-tale red flag that the relationship is not above board. The following fairly recent cases involving such fact scenarios include: *Hart v. Cooper*,[65] *Banton v. Banton*,[66] *Barrett Estate v. Dexter*,[67] *Feng v. Sung Estate*,[68]

[64] *Blair v. Cooke* (Allair Estate) 2011 ONSC 498 (Can LII)
[65] *Hart v. Cooper,* 1994 CanLII 262 (BCSC)
[66] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244
[67] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII)
[68] *Feng v Sung Estate,* 2003 CanLII 2420 (ON S.C.)

Hamilton Estate v Jacinto,[69] *A.B. v. C.D.,*[70] *Petch v. Kuivila,*[71] *Ross-Scott v. Potvin,*[72] *Juzumas v. Baron*,[73] and *Elder Estate v. Bradshaw*.[74]

Hart v. Cooper

The case of *Hart v. Cooper* involved a 76 year old man who married a woman 18 years his junior. The couple married by way of a civil marriage ceremony. As is generally the case, the marriage automatically revoked a will the older mad had made six years prior, which named his three children as the beneficiaries of his Estate. His children challenged the validity of his marriage on the ground that their father lacked the mental incapacity to contract a marriage. Allegations were also made of alienation by the new wife of their father.

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney* and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic determination of capacity to marry. Factors which rely 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.*[75]

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

> *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*

[69] *Hamilton v. Jacinto*, 2011 BCSC 52 (CanLII)
[70] *A.B.v. C.D.* 2009 BCCA 200
[71] *Petch v. Kuivila* 2012 ONSC 6131
[72] *Ross-Scott v. Potvin* 2014 BCSC 435
[73] *Juzumas v. Baron* 2012 ONSC 7220
[74] *Elder Estate v. Bradshaw* 2015 BCSC 1266
[75] *Hart v. Cooper,* 1994 CanLII 262 at 9 (BCSC)

> *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.).[76]

The court in this case did not accept the medical evidence of the husband's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The court commented that there was no evidence proffered to suggest that the young wife ever profited financially from current marriage or her previous marriages. Additionally, the court found that the wife's motivation in marrying was not otherwise relevant to the determination of the husband's 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 written 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.

No significant analysis was made by the Court of the allegations of alienation or whether the husband fully understood the financial consequences of marriage or the impact of marriage on his property rights. 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* again affirms the age-old principle that the contract of marriage is a simple one.

Banton v. Banton[77]

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

[76] *Hart v. Cooper,* 1994 CanLII 262 (BC S.C.) at 9
[77] *Banton v Banton,* 1998, 164 D.L.R. (4th) 176 at 244

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 Ms. 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 the 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.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors to determine requisite 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*.[78]

[78] *Ibid.* at para.33

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."[79] 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.[80] 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.[81]

The Court commenced its analysis on requisite capacity to marry 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.[82] In the Court's view, however, the factors to be met are not 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 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:*

[79] *Ibid.* at para.136
[80] *Ibid.* at para.136
[81] *Ibid.* at paras. 140-41
[82] *Ibid.* at para.142

> *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 "*capacity to marry at common law*":

> *Whether a person of unsound mind was capable of contracting a valid marriage depended, according to ecclesiastical 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*.

Justice Cullity however found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v. Reane* appeared to suggest both incapacity to manage oneself, as well as one's property was required for the requisite capacity to marry; 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 a finding of 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 respecting 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 standard 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 on its face, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and declined to find the marriage invalid or void. Even more, Justice Cullity made this determination in spite of the fact that he found at the time of Mr. Banton's marriage to Ms. Yassin, that 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*." Notably, earlier in his reasons, Cullity J., stated that *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*. That said, there was no known expert evidence either retrospective or commensurate of the capacity of Mr. Banton to marry. Justice Cullity may not have had the evidence to consider any other result particularly given the common law standard for determining capacity to marry.

Barrett Estate v. Dexter[83]

[83] 2000 ABQB 530

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. Barrett's three sons became suspicious of the increasing influence that Ms. Dexter was exerting over their father. In September of that year, only months after she had moved in, Mr. Barrett apparently signed a hand written memorandum which gave Ms. Dexter the privilege of living in his home while he lived until one year after his death. The one year term was later crossed out and initialed giving Ms. Dexter the 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 initiative.

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."[84]

In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of *Chertkow v. Feinstein (Chertkow)*[85] which employed the factors set out in *Durham v. Durham*:

> *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*

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

> *nature of the contract, and the duties and responsibilities which it creates*".[86]

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.

The Court ultimately 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.

Feng v. Sung Estate[87]

In 2003, five years post *Banton,* Justice Greer advanced the factors and application of the capacity to marry in *Re Sung Estate*. 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 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

[86] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82
[87] 2003 CanLII 2420 (ONSC)

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 sufficient degree to negative consent.

In rendering her decision, Justice Greer found 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 so declared.[88] 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 requisite mental capacity to enter into the marriage. In reaching this conclusion, 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/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

[88] *Ibid.* at para. 51

capable of writing cheques, he was forced to rely on a respirator operated by Ms. Feng. As well, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the factors for determining 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."[89] 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 moreover that it required execution by both parties to make it legally effective.

Accordingly, the marriage certificate was ordered to be set aside. 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 to be 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.[90] The Court of Appeal endorsed Justice Greer's decision, although it remarked that the case was a close one.

Hamilton Estate v Jacinto[91]

This British Columbia Supreme Court case is yet another decision bearing some of the hallmarks of these predatory relationship situations; however, in this case, there was no

[89] *Ibid.* at para.62
[90] *Feng v. Sung Estate* [2004] O.J. No. 4496 (ONCA.)
[91] *Hamilton Estate v. Jacinto*, 2011 BCSC 52 (CanLII)

marriage. The Court's analysis of the facts and issues is interesting from the perspective of the predatory aspects.

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. Within a few months of losing his wife, Mr. Hamilton embarked on a relationship with Ms. Jacinto who was approximately 30 years his junior. 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, and held jointly. At Mr. Hamilton's death in 2004, 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 analyzed 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 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 v. Pecore.*[92]

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, the issues 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 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

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

successfully rebutted. 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.

AB v CD[93]

In *A.B. v. C.D.*, the British Columbia Court of Appeal considered the question of requisite 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).[94] 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 focuses on the spouse's overall capacity to manage his/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 both the English decisions of *Perry v. Perry*[95], and *Brannan v. Brannan*[96], which concluded 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 requisite capacity because it respects the personal autonomy of the individual in making decisions about his/her life.[97]

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[93] 2009 BCCA 200 (CanLII)
[94] Robertson, Gerald B. *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at pp.253-54
[95] *Perry v. Perry*, [1963] 3 All E.R. 766 (Eng. P.D.A)
[96] *Brannan v. Brannan* (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div)
[97] *A.B. v. C.D.*, 2009 BCCA 200 (CanLII) at para.30

***Juzumas v. Baron*[98]**

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.[99] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden.[100] 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 the 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.[101] 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.[102]

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[98] *Juzumas v. Baron*, 2012 ONSC 7220
[99] *Ibid.* at para 1
[100] *Ibid.* at paras 39 and 56
[101] *Ibid.* at para 25
[102] *Ibid.* at para 28

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 reason related to his money or property.[103] 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.[104] 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, but Justice Lang found otherwise.[105] 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.[106]

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.[107]

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.[108] The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

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[103] *Ibid.* at paras 26-28
[104] *Ibid.* at para 28
[105] *Ibid.* at para 27
[106] *Ibid.* at para 24
[107] *Ibid.* at para 30
[108] *Ibid.* at para 31

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 that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff's niece, as "'abusive', 'controlling' and 'domineering'".[109]

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.[110]

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.[111] 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.[112]

[109] *Ibid.* at para 54
[110] *Ibid.* at paras 68-69
[111] *Ibid.* at paras 79-84
[112] *Ibid.* at para 84

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. The lawyer appeared to be under the impression that the defendant, and not the plaintiff, was the vulnerable party.[113]

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.[114] 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.[115]

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."[116]

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."[117] 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*"[118]

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

[113] *Ibid.* at para 88
[114] *Ibid.* at para 91
[115] *Ibid.* at paras 63 and 92
[116] *Ibid*. at para 97
[117] *Ibid.* at para 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378
[118] *Ibid.* at para 8

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 allows him or her to provide "*a fully-informed and considered consent to the proposed transaction*."[119]

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."[120] 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.[121] 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.[122] Justice Lang

[119] *Ibid.* at para 11
[120] *Ibid.* at para 13
[121] *Ibid.* at para 129
[122] *Ibid.* at para 128

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 of restitution permitting a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."[123] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behavior is such that it taints the entire relationship."[124] 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 favor of the older adult plaintiff.[125]

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 that brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult 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[126]

This decision highlights the effects of marriage on estate planning and specifically, the revocation of a Will by marriage pursuant to s. 15 of the *Succession Law Reform Act* (the "*SLRA*"). It also acts as a reminder of the correlation and consequences of

[123] *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 661
[124] *Ibid.* at para 142
[125] 2012 ONSC 7332 (CanLII)
[126] 2012 ONSC 6131

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.

Ross-Scott v. Potvin[127]

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 factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability.

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

[127] 2014 BCSC 435

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 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 the 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 provision 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.[128] The medical evidence established that Mr. Groves suffered from cognitive impairments, anxiety, depression, and moments of delusional thinking.[129] Mr. Groves's family doctor asserted that Mr. Groves was incapable of "managing himself" in November of 2009.[130] 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.[131] 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.[132]

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 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 by marrying Ms. Potvin, who promised to assist him

[128] *Ibid*., at paras 46, 184
[129] *Ibid*. at para 186
[130] *Ibid*. at paras 94 and 95
[131] *Ibid*. at para 186
[132] *Ibid*. at para 20

with asserting his autonomy and maintaining his comfort and care at home.[133] His family doctor asserted that Mr. Groves was susceptible to persuasion in 2009.[134]

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.[135] 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.[136] 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.[137]

Justice Armstrong also dismissed the claims that Mr. Grover's testamentary dispositions and *inter vivos* transfers were invalid by reason of undue influence.[138] 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.[139] The action was dismissed with costs to Ms. Potvin.[140]

Elder Estate v. Bradshaw[141]

This case reminds us that not all such older adult / younger caregiver (or romantic partner) situations are as sinister as they may first appear and each situation must be adjudicated on their own particular facts and evidence.

The older adult in this case was a Mr. Elder. He was 80 years old when he died suddenly on July 20, 2011. He was single, had never married, and never had children.

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[133] *Ibid*. at para 190
[134] *Ibid*. at para 95
[135] *Ibid*. at para 190
[136] *Ibid*., at para 190
[137] *Ibid*., at para 240
[138] *Ibid*., at para 227, 280, and 281
[139] *Ibid*., at para 300
[140] *Ibid*., at para 302
[141] 2015 BCSC 1266 (Elder Estate).

He had a sister with whom he had been close. In 2006 Mr. Elder hired a housekeeper, Ms. O'Brien, (who was twenty-five years younger than him) to assist him around his house and eventually her role changed to that of caregiver. She would assist him with a variety of chores, drive him to appointments and to the bank, fill out cheques for him to sign when he needed to pay bills, etc.

In 2008 Mr. Elder had been diagnosed as having memory loss, functional impairment, and "dementia - likely a mixed vascular Alzheimer type."[142] He was placed on medication and in 2009 he "seemed to improve immensely" and he remained stable until 2011 when his confusion increased for a short time after his sister's death in March of 2011.

On April 2, 2011 he executed a new will (the "2011 Will") in which he left everything to his caregiver, unlike his previous will in which he left everything to his sister and then his three nephews should she predecease him. He also appointed the caregiver as his attorney under a power of attorney for property.

Also in 2011, the caregiver suggested that they buy a home together. They searched for and found a house that they wanted to purchase, where Mr. Elder would live in a bedroom on the first floor and the caregiver would live in the basement. The caregiver testified that Mr. Elder was "chuffed" about it and really excited. Mr. Elder agreed to pay for 2/3 of the house and the caregiver 1/3. Mr. Elder deposited $120,000.00 into a joint account with the caregiver for this purpose. However, Mr. Elder died before the house could be bought. After his death, the caregiver used the money to purchase the house herself.

The nephews challenged the validity of the 2011 Will alleging: lack of testamentary capacity, undue influence, and coercion by the caregiver. They also sought the return of the $120,000.000. One nephew testified that his uncle told him that he and the caregiver might be getting married and moving in together, but he did not really want to marry, because he was not the marrying type. This nephew also testified that the uncle

[142] *Elder Estate v. Bradshaw*, 2015 BCSC 1266 at para. 38 ("*Elder Estate*").

was confused when he called to say his mother (Mr. Elder's sister) had died and that Mr. Elder only wanted to talk about the movie he was watching and that he was rambling and incoherent. The nephew didn't think he grasped what he was telling him.[143]

Admittedly, there were some concerning facts surrounding the execution of the 2011 Will and power of attorney:

- The caregiver referred Mr. Elder to the law firm. Mr. Elder had not met the lawyer before and it was a different lawyer than the one who drafted his previous will.
- The caregiver called and set up the appointment.
- A note made by one of Mr. Elder's outreach workers stated that Mr. Elder was confused about a phone message from a lawyer's office and was not sure why they were calling. Mr. Elder asked the worker to listen to the message, and she called the lawyer's office to confirm he had to come in and sign his new will and POA.
- The caregiver brought Mr. Elder to the law office and first met with the solicitor and Mr. Elder at the same time.

However, the solicitor also took necessary precautions:

- The solicitor met with the older adult alone and confirmed his instructions that he wanted the caregiver to receive his entire estate and not his nephews.
- He confirmed the reason why Mr. Elder did not want his nephews to inherit: he had not seen his nephews in 15-20 years.
- The solicitor "looked for signs of undue influence" and "saw none".[144]

[143] *Elder Estate* at para. 81.
[144] *Elder Estate* at para.16.

- An assistant had taken down information on the relationship between the Mr. Elder and caregiver when the caregiver called to set up the appointment. The solicitor went over this information and confirmed it with Mr. Elder when they were alone.[145]

- The solicitor's opinion was that Mr. Elder was of sound mind and capacity. The solicitor had asked Mr. Elder a series of questions[146] to test his lucidity and awareness and "if he had been even a bit suspicious of his capacity he would have contacted Mr. Elder's doctor as was his practice in such cases".[147]

- The solicitor however did not ask about the value of the estate. Justice Meiklem noted that:

  > The omission to inquire about the value of the estate is not insignificant, because learning it was in the range of $500,000.00 at the time may have triggered some additional discussion, **but the omission itself is not a suspicious circumstance sufficient to rebut the presumption of validity**.[148] [emphasis added]

The Court found there was no evidence that the caregiver played any role in conveying the wishes to the solicitor or in influencing Mr. Elder to have a new will prepared and that there were "[n]o suspicious circumstances surrounding the preparation of the 2011 Will that are sufficiently well-grounded to rebut the presumption of validity." [149]

Justice Meiklem also reached the same conclusion in respect of whether there were suspicious circumstances tending to show that Mr. Elder's free will was overborne by acts of coercion or fraud:

> While **there may be a 'miasma of suspicion' arising out of the lack of kinship** between Ms. O'Brien and Mr. Elder and the circumstance of his early

[145] *Elder Estate* at paras. 15-17
[146] Unfortunately the decision does not describe the questions.
[147] *Elder Estate* at para. 18.
[148] *Elder Estate* at para. 19.
[149] *Elder Estate* at para. 23.

> dementia combined with an ostensible relationship of dependency with her as a caregiver, **there is no evidence of any coercive act or course of conduct on the part of Ms. O'Brien** in respect of the preparation of the 2011 Will.[150][emphasis added]

However, the Court concluded that "the evidence relating to the diagnosis of early dementia and medical services interactions concerning memory loss and functional decline" and Mr. Elder's "moderate dementia" raised a "specific and focussed suspicion that [was] sufficient to rebut the presumption of validity" of the will.[151] Therefore, the burden then shifted to Ms. O'Brien to prove Mr. Elder had testamentary capacity.

While no formal capacity assessment was completed, his doctor had a great deal of geriatrics experience and he performed three psychogeriatric assessments on Mr. Elder supporting the caregiver's case. Furthermore, large portions of the responding expert report tendered by the nephews were ruled inadmissible. Based on this medical evidence and testimony, Justice Meiklem held that "the preponderance of evidence" showed that "as of April 27, 2011, when he executed the 2011 Will, Mr. Elder met the test for testamentary capacity set out in the *Banks* [*v. Goodfellow*] case".[152]

Undue Influence / Coercion

The nephews argued that by the time the 2011 Will was made Ms. O'Brien had moved from housekeeper to primary caregiver and, upon the death of his sister, became his main source of emotional and physical support. They submitted that the caregiver made a plan, driven by her need to secure new accommodation for her, to obtain the funds from their uncle. Furthermore, just losing his sister made Mr. Elder even more dependent upon the caregiver. Justice Meiklem saw things differently:

> The defendants' theory of Ms. O'Brien forming and carrying out a step-by-step plan is quite simply unsupported by the evidence. . . **It is a theory which is based solely on the defendants' original suspicions arising from the**

[150] *Elder Estate* at para. 24
[151] *Elder Estate* at para. 25 and 28.
[152] *Elder Estate* at para. 87.

> **overview of the circumstance of a younger housekeeper/caregiver benefitting from the will of an aged man**.[emphasis added][153]

Numerous witnesses, including a financial advisor, real estate agent, home care workers, and doctors provided testimony in this case that supported the caregiver's position.

A financial advisor interviewed Mr. Elder in June of 2011 as she had concerns with respect to the purchase of the house jointly between Mr. Elder and the caregiver. Her specific concerns were with his age and possible elder abuse. She testified that he appeared physically frail but was "with it" mentally and was excited about the house purchase. He was the "majority" talker and was "spunky". He was very clear that it was not a romantic relationship but he also stated that he did not know what he would do without the caregiver. The financial advisor saw no red flags. Mr. Elder also told the financial advisor that he did not want his nephews to have any part of the house.[154] It is unclear from the decision whether the financial advisor met with Mr. Elder alone or if the caregiver was present as well.

Also, the real estate agent who showed the home they eventually decided to purchase also testified that Mr. Elder was active and a leading participant in the viewing of the new property and decision to make an offer to purchase.[155]

Justice Meiklem was impressed with the caregiver and her testimony:

> Ms. O'Brien impressed me, not only as being a credible witness as to her testimony, but as a person of generous character, who genuinely liked and respected Mr. Elder. **Her evidence that she loved him like a grandfather rang true. She was deferential to him rather than dominant, which was supported by the evidence of numerous witnesses.** When her own health prevented her from attending as necessary, she compiled a detailed list of instructions for her friend Mr. Rainbow to take her place. . . .**Ms. O'Brien's relationship with Mr. Elder and the potential for undue influence was scrutinized frequently by the institutional service providers, Ms. Krantz [a case manager with the geriatric mental health team], Ms. Heron[an**

[153] *Elder Estate* at para. 95.
[154] *Elder Estate* at para. 43.
[155] *Elder Estate* at para. 44.

> **outreach worker], Ms. Hutton[a home care manager], Dr. Fawcett [his doctor], and to a lesser extent, but in a focussed way, by Mr. Thompson [the drafting lawyer], Mr. Laurie [real estate agent], and Ms. Gibb [financial advisor]. All these witnesses were specifically looking for evidence of undue influence and saw none**.[156]
>
> Certainly Ms. O'Brien had legitimate influence over Mr. Elder, which is evidenced by her proposing the joint house purchase, but there is no evidence that she coerced him into doing something he did not want to do or that was not his own choice. In respect of the will, he actually rejected her advice that he did not need to change his will.[emphasis added][157]

Justice Meiklem found that the nephews did not establish undue influence or coercion on the part of Ms. O'Brien in respect of the 2011 Will.

Inter vivos Gift of $120,000.00

The nephews argued that the caregiver was in a fiduciary relationship with Mr. Elder because she was his caregiver and power of attorney, and that this was sufficient to raise a presumption of undue influence. Justice Meiklem disagreed:

> The generic label 'caregiver' does not necessarily denote a fiduciary relationship or a potential for domination. . . **The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship**.[158]
>
> . . . It is undoubtedly true that Mr. Elder was becoming more dependent upon Ms. O'Brien as time passed and it is reasonable to infer that she became a more significant part of his life after the death of his sister Georgina . . .**but taking into account their individual natures, and the development of the relationship, I do not find that the potential for domination of his will inhered in that relationship.** . . .[159]

Justice Meiklem also concluded that had he found that the relationship was sufficient to raise a presumption of undue influence, he would have found the presumption to have been rebutted on the preponderance of evidence and that the caregiver did not exercise any undue influence over Mr. Elder.

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[156] *Elder Estate* at para.98.
[157] *Elder Estate* at para. 99.
[158] *Elder Estate* at para. 108.
[159] *Elder Estate* at para. 111.

6. International Perspective on Predatory Marriages

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.[160] 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.[161]

Below is a recent American case, while not culminating in marriage, was clearly a predatory relationship and examined from a unique perspective, through federal tax rules:

Alhadi v. Commissioner of Internal Revenue[162]

In this 2016 U.S. tax case a caregiver defrauded an older adult of over $1 million under the guise of providing "caregiving" services. The Commissioner of Internal Revenue posited that the $1 million was proceeds of undue influence and elder abuse and wanted the caregiver to pay tax on the funds and pay a fraud penalty. The caregiver alleged they were nontaxable gifts or loans. The case addressed the issue of what is "undue influence" as a matter of federal tax law and how it affected donative intent.[163]

The older adult, Dr. Arthur Marsh, was born in 1915, had never married, and lived very frugally resulting in over $3 million in his retirement fund. In 2007 his health declined dramatically and he could no longer care for himself in his second floor apartment. The much younger Ms. Angelina Alhadi met Dr. Marsh when he was in the hospital and offered to provide homecare services for him. Very quickly Ms. Alhadi took advantage of

[160] Albert Oosterhoff, "Predatory Marriages" (2013) 33 Estates, Trusts & Pensions Journal 24 at p. 54.
[161] *Ibid*. at p. 57
[162] 2016 TC Memo 74, United States Tax Court, Docket No. 17696-10, April 21, 2016 (*Alhadi*).
[163] Alhadi at para. 26.

this new relationship. Dr. Marsh agreed to pay her $6000.00 a month (even though the going rate was $3750.00) and also gave her $1000.00 a month for his groceries (even though he only needed about $400 a month in food and his tiny fridge only fit about $50 worth). She began to pressure Dr. Marsh to pay for her mortgage payments. By the end of November 2007 Dr. Marsh had written cheques totaling over $400,000.00. Ms. Alhadi spent this money on paying off her ex-husband, furniture, landscaping and $73,000.00 on a new pool "complete with a spa and therapeutic turtle mosaic". When she presented Dr. Marsh with an invoice of $22,000.00 for digging the hole for the pool, Dr. Marsh responded "Who the hell is going to pay it?" However, Dr. Marsh relented and paid it, later saying he felt he had to "because the work was already done and he had to accommodate his caregiver".

Ms. Alhadi increasingly kept him isolated from his friends and started to emotionally manipulate him, telling him four or five times a day that she "loved" him and tried to pressure him into marrying her and moving in with her. She would cry in front of him about how she was financially struggling and worried about how she was going to survive and provide for her children. A neuropsychiatrist, Dr. Mueller, who had interacted with Dr. Marsh testified that there was a "real, if sad, emotional bond between Dr. Marsh and Ms. Alhadi. . .Dr. Marsh wanted to rescue her, wanted to be a good person, and wanted to feel loved for the rest of his days on earth." Dr. Marsh told Dr. Mueller that it was "impossible to imagine how it feels being 90 years old and feeling loved for the first time".[164]

Ms. Alhadi no longer let his niece or other family members speak to him, telling them that Dr. Marsh was sleeping or unavailable whenever they called. Also, Ms. Alhadi was not keeping up her caregiving duties. The house was filthy with "trails of ants", food on the floor that was rotten, greasy pots and pans and the apartment was stained with urine as Dr. Marsh could not get to the bathroom on time.

[164] At para. 28, footnote 6.

In the summer of 2008 Ms. Alhadi told Dr. Marsh that she had “won” a cruise and wanted him to come along with her. She left him sitting alone in the sun while she went off with her children. Later, it was discovered that Dr. Marsh had paid for the whole cruise ($25,000.00) even though he did not remember writing the cheque.

By the end of 2008 Dr. Marsh had written cheques to Ms. Alhadi totaling nearly $800,000.00. Then she pressured him even more and got him to sign five more cheques each for $100,000.00. This is when her financial abuse was discovered. The mutual fund company found Dr. Marsh’s account activity to be suspicious and called to express concern. The company records all of its phone calls. In the background Ms. Alhadi could be heard yelling, cajoling, and threatening Dr. Marsh that he was going to get her in trouble if he didn’t admit that he wrote the cheques. The mutual funds company refused to honor the cheques and sent a letter to Dr. Marsh explaining why. However, Dr. Marsh was homebound and completely at the mercy of Ms. Alhadi. Ms. Alhadi intercepted the mail.

Ms. Alhadi then took Dr. Marsh to a lawyer, trying to get a power of attorney in her favour. The lawyer refused to get involved. Dr. Marsh told the lawyer that Ms. Alhadi was pressuring him to name her in his will and that he needed a separate trust for her so that his family members wouldn’t be able to interfere. The lawyer refused and the Public Guardian filed a petition to put Dr. Marsh under a temporary conservatorship.

Dr. Marsh died in February 2009 and at the funeral Ms. Alhadi tried to “crawl in the coffin” and “was screaming”.

The trustee of a trust that Dr. Marsh had created several years earlier (as a substitute for a will) settled a suit brought against Ms. Alhadi, but recovered only $310,000.00 in cash. She had lost her house to foreclosure and had spent the rest of the money or gave it away or rendered it untraceable. When the trust filed its tax returns it noted the money paid to the caregiver Ms. Alhadi, which she did not claim on her tax return. This is when the IRA got involved.

The Tax Court found that Ms. Alhadi exercised undue influence on Dr. Marsh and that all the money she received from him was taxable to her. While non-family taxpayers in "generous-elder" cases who rely on their own testimony can succeed in proving that a transfer was a gift, the issue is one of fact and the burden of proof rested on Ms. Alhadi. She did not meet this burden as all she had was uncorroborated testimony and the word "gift" written on the memo lines of some of the cheques. Furthermore, there was medical evidence that Dr. Marsh had dementia and cognitive decline, including poor short term and long term memory, inability to perform simple arithmetic and persistent deficiencies in visuospatial analysis. These problems made him vulnerable. California (where Dr. Marsh resided) has codified its definition of undue influence as:

- The use of a confidence or (real or apparent) authority for the purpose of obtaining an unfair advantage over someone;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.[165]

For the specific purpose of elder abuse, California law defines undue influence as the "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity".[166]

The Tax Court found Ms. Alhadi exerted undue influence over Dr. Marsh:

> She was in a confident relationship with Dr. Marsh as his sole caregiver. He relied on her just to get downstairs, to go to the doctor, to be fed, and even to bathe. Dr. Marsh was in extremely poor health; he suffered from heart problems, hearing and vision loss, a broken hip, and dementia, among other handicaps. Ms. Alhadi knew all of this. She used her relationship with Dr. Marsh to isolate him from his family and financial advisers and to wring money out of him . . .We also can't close our eyes to Dr. Marsh's emotional life. Ms. Alhadi preyed on his loneliness.

The Court also found Ms. Alhadi liable for self-employment tax, her tax returns were fraudulent.

[165] Cal. Civ. Code sec 1575 (West 1982)
[166] Cal. Welf. & Inst. Code sec. 15610.70 (West 2014)

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 by legislating the factors required to determine capacity to marry. However, Australia's legislation 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.[167] Some scholars have suggested that the legislation 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.[168]

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.[169] In doing so, the court reviewed the common law factors for capacity to marry as it developed in England and the subsequent enactment of the statutory factors in Australia. While the relevant legislation and common law factors 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 and 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 daughter had made arrangements for Mr. Oliver to receive in-home care from a

[167] *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.
[168] Cowley, *ibid.* at p. 170 – 171
[169] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII)

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.[170]

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."[171] The Respondent then took the phone and advised that they would be married in June of 2011.[172]

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.[173] 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.[174] 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 previously asserted to Mr. Oliver's relatives. None of Mr. Oliver's family 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

[170] *Ibid*. at paras 39 and 40
[171] *Ibid*. at para 25
[172] *Ibid*.
[173] *Ibid*.at para 73
[174] *Ibid*. at para 74

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.[175] 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 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:*
>
> > *... 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*

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

> *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.*[176]

The Court observed that the English common law factors for determining capacity to marry had been supplanted by the statutory factors 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.*[177]
>
> …

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

> *… it is in my view* ***significant that the legislation not only requires a capacity to understand "the effect" but also refers to "<u>the</u> marriage" rather than "<u>a</u> marriage". In my view taken together those matters require more than a general understanding of what marriage***

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

> ***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.*[178]

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*.[179]

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.[180]

7. Predatory Marriages: Consideration of Equitable and Other Remedies

Since contesting the validity of a marriage on the grounds of incapacity is an imperfect approach, it has become apparent to the writer that the need to explore other potentially available rights and remedies is imperative to reflect the reality of today's society. The purpose of this section is to consider other grounds, including equitable grounds, upon which a court has the jurisdiction to set aside a predatory marriage as a nullity/void *ab initio* as if it never happened or remedy the wrongs caused by a predator spouse.

Undue Influence

The equitable doctrine of undue influence is often relied on to set aside a will or *inter vivos* gifts that were procured by undue influence. Numerous recent cases have explored situations where older adults have been victimized by undue influence.[181] The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions where an individual exerts such influence on the grantor or donor that it cannot be said that his/her decisions are wholly independent.

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[178] *Ibid*., at para 202, citing para 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII).
[179] *Babich*, *supra*, at para 256
[180] *Oliver*, *supra*, at para 210
[181] See for example *Gironda v. Gironda*, 2013 ONSC 4133, additional reasons 2013 ONSC 6474.

The writer proposes that the same doctrine, if proven, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the consequence of the marriage effectively results in a gift to the predator. In *Ross-Scott v. Potvin*,[182] discussed above, the only surviving relatives of the deceased, Mr. Groves, sought to have his marriage annulled on grounds of undue influence and lack of capacity. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all of the claims, despite compelling medical evidence of diminished capacity and vulnerability. With respect to undue influence, Justice Armstrong had this to say:

> 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.[183]

While the evidence was not sufficient for the Court to find undue influence in this situation, if proven, the undue influence doctrine should be available to set aside a predatory marriage.

Unconscionability

The doctrine of unconscionability is typically used to set aside a contract that offends the conscience of a court of equity. However, unconscionability is not restricted to the law of contracts. And, while it is closely related to undue influence, they are separate and distinct. A claim of undue influence attacks the sufficiency of consent. Unconscionability arises where an unfair advantage is gained by an unconscientious use of power by a stronger party against a weaker. In order to be successful such a claim would need proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him or her in the power of the stronger party and proof of substantial unfairness of the bargain obtained by the

[182] 2014 BCSC 435
[183] *Ibid*., at para 240.

stronger. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just and reasonable.[184]

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on the grounds there is an inequality of bargaining power and accordingly it would be an improvident bargain that the predator would be entitled to all of the spousal property and financial benefits that come with marriage.[185]

Using a Statute as an Instrument of Fraud

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of predatory marriages. In the context of trusts of land the *Statute of Frauds*[186] provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. However, equity will not allow the Statute to be used as an instrument of fraud and the court will direct that the property is held in trust for the beneficiary. A marriage is also based on, and sanctioned by, legislation.[187] The predator relies on the statutes to enforce his or her claim. However a predator spouse's claim is fraudulent because the predator persuaded his or her spouse by devious means to enter into the marriage. A court of equity should not allow the statute to be used in this way, and should restore the property the predator received to the rightful heirs.

No One Shall Profit from His or Her Own Wrongdoing

[184] *Morrison v. Coast Financial Ltd*. (1965), 55 D.L.R. (2d) 710 (B.C.C.A.), at p. 713. See also the recent case of *Smith v. Croft* 2015 CanLII 3837 (ONSCSM) where the Ontario Small Claims Court set aside a transaction as unconscionable where a neighbour purchased an antique truck valued at $18,000 from an elderly neighbour with dementia for $2000.00.

[185] See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v Coast Finance Ltd*., 1965 CarswellBC 140 (S.C.J.)

[186] (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9; RSNS 1989, c 442,s5; RSO 1990, c.S.19, s.9.

[187] See, e.g.. *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, e. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

Yet another tool that could reasonably be applied in attacking the injustice of predatory marriages is challenging the predator spouse's right to inherit from the older adult's estate either under a will or under legislation, instead of the remedy of attacking the validity of the marriage itself. Seeking a declaration that the predator spouse is barred or estopped from inheriting is a remedy based in public policy, where the law will not permit same. "No one shall profit from his or her own wrongdoing" is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased's will, on the deceased's intestacy, or otherwise. Canadian courts have found that the property does not pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.[188] It is also clear that a beneficiary will not inherit where the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,[189] or where a testator was coerced by the beneficiary into a bequest.[190] The comparable common law principle is *ex turpi causa non oritur actio*, ie. a disgraceful matter cannot be the basis of an action, discussed below.

In New York, two recent decisions provided a compellable analysis of these concepts and their applicability to predatory marriages which was relied upon. The facts in *In the Matter of Berk,*[191] and *Campbell v. Thomas,*[192] are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult where capacity was an issue. After death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to 1/3 of the estate or $50,000, whichever is more). The children of the deceased argued that the marriage was "null and void" as their father lacked capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court declaration and as

[188] *Lundy v. Lundy* 1895 24 SCR 650.
[189] *Kenell v. Abbott* 31 E.R. 416]
[190] *Hall v. Hall* (1868) L.R. 1 P.& D. 48]
[191] *In the Matter of Berk,* 71 A.D. 3d 710, NY: Appellate Div., 2nd Dept., 2010.
[192] *Campbell v. Thomas,* 897 NYS2d 460 (2010)

such, not void *ab initio.* The predatory spouse maintained her statutory right to a share of the estate.

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This principle, often referred to as the "Slayer's Rule", was first applied in in New York in *Riggs v. Palmer*,[193] to stop a murderer from recovering under the Will of the person he murdered. Pursuant to this doctrine, the wrongdoer is deemed to have forfeited the benefit that might otherwise flow from his wrongdoing. New York courts have also used this rule to deny a murderer the right to succeed in any survivorship interest in his victim's estate.

The court recognized that while the actions of the predatory spouses were not as "extreme" as those of a murderer, the required causal link between the wrongdoing and the benefits sought was, however, even more direct. A murdering beneficiary is already in a position to benefit from his victim's estate when he commits the wrongdoing, but it was the wrongdoing itself (the predatory marriage) that put the spouse in a position to obtain benefits. The court held that the predator spouse should not be permitted to benefit from this wrongful conduct any more than should a person who coerces their way into becoming a beneficiary in a Will.[194]

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements and this principle should also be used to invalidate a predatory marriage.

Unjust Enrichment

[193] *Riggs v. Palmer*, 115 N.Y. 505,511 [1889]

[194] Note that the dispute in *Matter of Berk* is still ongoing with the most recent decision determining the standard and burden when relying on the equitable doctrine that one should not profit from her wrongdoing: the children of the deceased bear the burden of proving wrongdoing by a preponderance of evidence: See *Matter of Berk*, 133 AD 3d 850 (2015) and 2016 NY Slip Op 76663(U).

The principle of unjust enrichment is well developed in Canadian law and largely developed in the context of co-habitational property disputes. To be successful in unjust enrichment, one must satisfy a three-part test:

1. that the defendant was enriched;
2. that the plaintiff suffered a corresponding deprivation; and
3. that the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.[195]

In the New York case of *Campbell,* discussed above, the Appellate Division noted also that because the predatory spouse altered the older adult's testamentary plan in her favour, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.[196] The principle of unjust enrichment should also be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be considered to be a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the older adult's property.

Civil Fraud / Tort of Deceit

An approach based in fraud, either common law fraud or equitable/constructive fraud is also worthy of consideration. In the usual predatory marriage situation, the predator spouse induces the older adult to marry by perpetrating a false representation that the marriage will be a "real" marriage (which the predator spouse knows is false, is a trick, is a misrepresentation) and the older adult relies on the representation and marries the predator spouse suffering damage as a result (either through money gifted to the predator spouse, or through the various rights that spouse takes under legislation, which deprives the older adult of significant property rights. A case could be fashioned

[195] See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 S.C>R. 834 (SCC); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).
[196] *Campbell*, supra at p.119.

such that the predator's behavior meets the required elements to qualify and succeed in an action of civil fraud as a result of the following:

1) A false representation made by the defendant;
2) Some level of knowledge of the falsehood of the representation on the part of the defendant (whether through knowledge or recklessness);
3) The false representation caused the plaintiff to act (inducement); and
4) The plaintiff's actions resulted in a loss.[197]

Canadian Courts are rich with decisions analyzing civil fraud/tort of deceit in the context of marriage in "immigration fraud" cases where one spouse falsely represents he/she is entering into a "true" marriage when in fact the marriage was entered into simply to attain Canadian residency.[198] The Courts have been reluctant to set aside this type of marriage as a fraud.

In *Ianstis v. Papatheodorou,*[199] the Ontario Court of Appeal confirmed that civil fraud will not usually vitiate consent to a marriage, *unless* it induces an operative mistake. For example, a mistake as it relates to a party's identity or that the ceremony was one of marriage.[200] This case has been cited with approval many times and continues to be considered as the leading case.[201] The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.[202] Alleging fraud where one party to the marriage has character flaws not anticipated by the other is not something the court wishes to advance as is evinced by the following select comments of the Court:

[197] *Bruno v. Hyrniak* 2014 SCC 8 at para. 21
[198] See for example *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[199] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[200] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.) at pp. 248 and 249
[201] See *Torfehnejad v. Salimi* 2006 CanLII 38882 (ONSC) upheld 2008 ONCA 583; *Grewal v. Kaur* 2011 ONSC 1812; *Raju v. Kumar* 2006 BCSC 439; and *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.).
[202] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

> [23] "First, on a principled approach it may be difficult to differentiate immigration fraud from other types of fraud. In *Grewal v. Sohal* 2004 BCSC 1549 (CanLII), (2004), 246 D.L.R. (4th) 743 (B.C.S.C.) the fraud consisted of the defendant fraudulently representing his marital intentions for immigration purposes and fraudulently representing that he did not have an alcohol or drug addiction. **One can think of many other misrepresentations such as related to education, health or assets that might induce a decision to marry and which could be made fraudulently. If a fraud as to fundamental facts that ground the decision to marry is generally a ground for annulment, this certainly raises the spectre of an increase in the volume of costly litigation**.
>
> [24] Even assuming that the law can logically extend to permit annulment on the basis of immigration fraud and not on other grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]"[203]

The Court's message, effectively, "*caveat emptor*" – the spouses ought to have conducted their due diligence before marriage.[204] Predatory marriages are easily distinguishable from immigration fraud cases if for no other reason than, a person under disability may and likely is not, for many obvious reasons, in a position to conduct any due diligence.

Although it may be difficult for an older spouse to have a marriage set aside on the grounds of civil fraud/tort of decit, he/she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar* [205], involved a wife who was awarded damages for civil fraud in an immigration fraud case where the court notably stated:

> [69] "The four elements of the tort of deceit are: a false representation, knowledge of its falsity, an intent to deceive and reliance by the plaintiff with resulting damage. [. . .]
>
> [70] I find the defendant misrepresented his true feelings towards the plaintiff and his true motive for marrying her order to induce her to marry him so he could emigrate to Canada. I find the plaintiff married the defendant relying on his misrepresentations of true affection and a desire to build a family with her in Canada.
>
> [71] The defendant's misrepresentations entitle the plaintiff to damages resulting from her reliance on them."

[203] *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24
[204] *A.A.S. v. R.S.S.,* 1986 CanLII 822 (BC CA) at para. 25.
[205] *Raju v. Kumar* 2006 BCSC 439

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting his immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre and post marriage long distance calls.[206]

In *Juzumas,* discussed above, had the older adult continued with his claim for an annulment of his marriage and the Court was open to allowing a claim of fraud in this context, the older adult would have had to prove that the predator spouse knowingly made a false representation to the older adult, with an intent to deceive him and on which he relied, causing him damage. It could be argued that the predator spouse falsely represented to Juzumas that she would look after and care for him. Juzumas relied on that representation when he chose to marry her and he suffered damages. It is unlikely that a claim in civil fraud could be made out in *Banton supra*, unless it was raised before the older adult passed away.

Ex Turpi Causa Non Oritur Actio

The legal principle, *ex turpi causa* acts as a defence to bar a plaintiff's claim where the plaintiff seeks to profit from acts that are "anti-social"[207] or "illegal, wrongful or of culpable immorality"[208] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. Arguably a Court should not assist a predatory spouse in recovering the benefits from a marriage which was obtained

[206] *Raju v. Kumar* 2006 BCSC 439 at para. 72. See also the recent case of *RKS v. RK* 2014 BCSC 1626, where the Court dismissed a claim alleging the tort of deceit. A wife alleged that she was induced into marrying her husband on false representations that he was heterosexual, while in fact he was not. The wife also sought an annulment of the marriage citing non-consummation. The Court dismissed the claim and refused to grant an annulment as there was no evidence that the groom or groom's family made any false representations to either the bride or her family with an intent to deceive the plaintiff into marrying him. Prior to the wedding the plaintiff and her family had asked many questions about the defendant's background, his education, his financial situation and the kind of woman he was looking to marry. The Court found that the wife's claim for damages for the tort of deceit had to fail as it found that the husband never made any representations, prior to the wedding, about his sexual orientation. Furthermore the wife could not prove with medical or other evidence that the marriage was not consummated. The husband testified that it had been consummated. The Court denied the wife's claim for an annulment and granted a divorce instead.

[207] *Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742.

[208] *Hall v. Hebert* 1993 2 S.C.R. 159.

through the predator's devious, unscrupulous and anti-social means. The unscrupulous, should not be entitled to financial gain arising from the "anti-social" or "immoral" act of a predatory marriage. A predatory spouse alters an older adult's life and testamentary plan by claiming entitlements in the same manner as if he/she coerced the testator to add his/her name to a Will.

Lack of Independent Legal Advice

The older adult in predatory marriages is often deprived of the opportunity to seek and obtain independent legal advice before marrying. Lack of independent legal advice is an oft considered factor in the setting aside of domestic contracts. Whether such arguments could be extended to set aside the marriage itself is a consideration worthy of a court's analysis.

Courts have consistently held that "*marriage is something more than a contract*",[209] as such, there could well be judicial reluctance to extend contract law concepts and use them as a vehicle to set aside actual marriages, as opposed to simply setting aside marriage contracts. It is largely unclear whether such arguments extend to parties other than those to the marriage. If the victim so to speak dies, arguments may be difficult to pursue. However, parties such as children of the older adult are impacted by the union. This is a different approach to that of cases where capacity is challenged on the grounds of incapacity and the marriage then declared to be void *ab initio,* since these unions can be challenged by other interested parties.[210]

LATER IN LIFE PARTNERSHIPS: DISPUTES

Related to the concepts of predatory marriages and capacity to marry, lawyers should also be aware of the potential for other types of disputes arising out of later in life

[209] See *Ciresi (Ahmad) v. Ahmad*, 1982 CanLII 1228 (ABQB); *Feiner v. Demkowicz (falsely called Feiner),* 1973 CanLII 707 (ONSC); *Grewal v. Kaur*, 2009 CanLII 66913 (ONSC); *Sahibalzubaidi v. Bahjat*, 2011 ONSC 4075; *Iantsis v. Papatheodorou*, 1970 CanLII 438 (ONCA); *J.G. v. S.S.S.*, 2004 BCSC 1549; *Torfehnejad v. Salimi*, 2006 CanLII 38882 (ONSC) at para. 92; and *Hyde v. Hyde and Woodmansee* (1866), L.R. 1 P.&D. 130 (H.L.).

[210] *Ross-Scott v. Potvin* 2014 BCSC 435 at para. 73

partnerships. This next part of the paper will look at common estate disputes between adult children from previous marriages and second (or third, fourth) spouses.

8. Spousal Support Orders and Domestic Contracts after Death

Pursuant to section 34 of the *SLRA* in Ontario, a surviving spouse, whether common-law or married, may enforce a spousal support order against the estate of a deceased spouse.[211] Subsection 34(4) is explicit on this point: "*An order for support binds the estate of the person having the support obligation unless the order provides otherwise*." Indeed, the courts have held that support payments owed by a deceased spouse constitute a debt of the estate pursuant to subsection 34(4) of the Ontario *Family Law Act*, such that estate trustees owe a fiduciary duty to the recipient of the support in the same way they owe a fiduciary duty to the beneficiaries and creditors of an estate.[212]

Another potential source of rights for a separating or surviving spouse is a domestic agreement. In Ontario, Part IV of the *Family Law Act* governs domestic contracts: cohabitation agreements, marriage contracts, and separation agreements.[213] Similar legislation exists throughout Canada.[214] The parties to such agreements have reasonably wide latitude to agree about the division of property and spousal support.

A domestic contract may be filed with the court under Section 35 of the Ontario *FLA* and the spousal support provisions can be enforced accordingly. As such, a surviving spouse can enforce a spousal support provision in a domestic contract in the same way as a support order.

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[211] RSO 1990, c S.26.
[212] *Re Welin Estate*, 2003 CarswellOnt 2869 (Ont. S.C.J.).
[213] *FLA*, ss. 52-54.
[214] See Alberta's *Family Law Act,* SA 2003, c F-4.5 and *Matrimonial Property Ac*t, R.S.A. 2000, C M-8, British Columbia's *Family Law Act*, SBC 2011, c 25 and *Family Relations Ac*t, R.S.B.C. 1996, c.128, Saskatchewan's *The Family Property Act*, SS 1997, c F-6.3 s.38, Manitoba's Family Property Act, CCSM c F-25, New Brunswick's *Marital Property Act*, SNB 2012 c 107, Nova Scotia's Maintenance Enforcement Act, SNS 1994-95, c 6 and Matrimonial Property Act, RSNA 1989, c 275, Prince Edward Island's *Family Law Act*, RSPEI 1988, c F-2.1, Newfoundland's *Family Law Act*, RSNL 1990, c F-2, Yukon's *Family Property and Support Act*, RSY 2002 c83, Northwest Territories *Family Law Ac*t, SNWT 1997, c 18.

Estates practitioners should be mindful of the extensive law governing the enforceability of domestic contracts, which may be set aside if such contain prohibited provisions;[215] if a party failed to make full and frank financial disclosure;[216] and/or if the agreement is unconscionable.[217]

9. Common Estate Disputes between Adult Children and Second (or Third) Spouses

Often arising from later in life partnerships are disputes between adult children of the deceased's first marriage and the subsequent spouse. Below we discuss some of the more common disputes:

(a) Intestate Succession Disputes

York Estates (Re)

While an older case, *Re York Estate*[218] provides an useful example of a situation in which a remarriage that takes place not long before the death of the testator works a significant disadvantage to the children of the deceased who, but for the remarriage, would have stood to inherit the entirety of their parent's estate.

The deceased's first wife died and one month later, the deceased executed a new Will leaving the residue of his estate to his children in equal shares. Just over a year later, the deceased remarried. One month after that, he died.

It is not clear whether the deceased already had marriage in mind when he made his new Will, that is, whether he intended to get married and still leave his estate to his children. In any event, this was not a Will made "in contemplation of marriage," and was therefore revoked by the marriage. The deceased's estate was of moderate size, consisting of farm property, RRSPs, and investments totalling $476,574. The evidence was clear that the substantial amount of money the deceased amassed during his

[215] *FLA*, ss. 52(2) and 56(1).
[216] *FLA*, s. 56(4). See also *LeVan v. LeVan* (2008), 90 OR (3d) 1; 51 RFL (6th) 237; 239 OAC 1, application for leave refused in 2008 CanLII 54724 (SCC).
[217] *FLA*, s. 56(4). See e.g. *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 SCR 303 and *Hartshorne v. Hartshorne*, 2004 SCC 22, [2004] 1 SCR 550 and *McCain v. McCain* 2012 ONSC 7344.
[218] 1998 CarswellOnt 3947 (Gen Div).

lifetime "was due to his extremely frugal lifestyle and the fact that he did all repairs necessary on his farm property, and that the children ran the significant operation of the farm to allow [the deceased] to continue with a full-time job."[219]

Despite the short time that the deceased and his second wife were married, the Court disagreed with the proposal that it had discretion to deviate from the distribution formula for intestacy as set out in section 45 of the *SLRA* as to the $200,000 preferential share.

The Court ordered the farm to be transferred to the surviving spouse as part of her distributive/preferential share, deducting half the costs of repairing it on the basis that the repairs would significantly benefit the wife as the ultimate owner of the property. A number of other items were deemed to be received by the wife as part of her distributive share. The Court did not comment on whether the application of section 45 resulted in any injustice, but the Court's statement at paragraph 10 exposes how a straightforward application of the provision does not always bear a fair result:

> *The evidence before me is that [the deceased] and his six children, when he was married to [his first wife], lived for almost 30 years on this farm property on Bleeks Road. The children are, needless to say, very emotionally attached to the farm and the property, because that is where they were brought up and they spent many hours working on the farm. It is clearly evident from three of the children who testified before me, […] that this whole issue of the circumstances they find themselves in now with their father's second wife is difficult for them, and every effort at trying to resolve the property issues between them and [his second wife] have failed.*[220]

Notably, in the end, the children were granted $10,000 each in *quantum meruit* for their work on the farm when growing up.[221]

This litigation resulted despite the perfectly clear effect of the rules of intestate succession under Part III of the *SLRA*. One has to wonder at the tenacity of the children's quixotic mission to bring their unlikely application to trial. Estate litigators are well aware of the strong emotional forces that drive family litigation, even against long

[219] *Ibid.* at par. 6.
[220] *Ibid.* at para. 10.
[221] *Ibid.* at paras. 37-38.

odds. This case seemingly represents a failure to plan, whether by making a new Will to benefit the children or to confirm that the deceased wished to actually benefit his new wife almost exclusively. However, the lawyer who may have advised the deceased on his Will shortly after his first wife died may have had no opportunity to assist this client in dealing with the consequences of the new marriage except to remind the client in his reporting letter that he would need a new Will if and when he remarries.

Unless there is a change to the laws of intestate succession and/or the rule that a Will is revoked by marriage, as recently seen in Alberta, British Columbia, and New Brunswick, these cases will surely continue.

Stanley Mutual Insurance Co. v. Shepherd

Even where the deceased intends for his entire estate to pass to his wife of 28 years and has no reasonable expectation of claims against his estate, an intestacy can cause serious problems. In *Stanley*,[222] the deceased died intestate. He had children from a previous relationship, but he had no contact with these children and in fact did not even know where they were located or if they were alive. The widow disclosed these facts to the court, which held that she must take extraordinary steps to locate the children and give them an opportunity to be heard.

The estate-planning lesson in this case must be a reminder that simple families on the surface may in fact be complex families on closer inspection.

(b) Dependent Support Claims

A common dispute between adult children and subsequent spouses is a claim by the spouse for dependent support from the estate, which adult children often oppose, depending on the relationship between the parties. Adult children may see it as “unfair” that “their” money (money from their deceased parent) would be given to their step-parent.

[222] 2011 NBQB 57, 2011 CarswellNB 88, 97 C.C.L.I. (4th) 64, 369 N.B.R. (2d) 181, 952 A.P.R. 181, (N.B. Q.B.).

In Ontario, Part V of the *SLRA* provides for the support of dependants in situations where a deceased person, prior to death, was providing support, or was under a legal obligation to do so, immediately before death but failed to make adequate provision for the proper support of his/her dependant on death.[223] In such circumstances, the court is empowered to make an order, interim or permanent, as it considers adequate, to be made out of the estate of the deceased.[224]

In the case of a surviving spouse, the spouse needs to prove that he/she was indeed a spouse, that the deceased had a legal obligation to provide support or was providing support immediately before death, and that the deceased failed to make adequate support. If successful in qualifying as a dependant, the court will consider a list of factors pursuant to s. 62 of the *SLRA* and common law precedent in determining the amount and duration of support.

Part V of the *SLRA* is a powerful tool. At first blush, it may seem to provide a remedy akin to spousal support, which is guided by, the payor's means and the recipient's needs. However, the Ontario Court of Appeal has clarified that in determining claims for dependant's support under the *SLRA* the court must consider not just the applicant's bare needs, or legal claims, but also the applicant's moral or ethical claims.[225] Arguably, the moral claim has become a legal claim.[226]

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[223] *SLRA*, s. 57.
[224] *Ibid.*, s. 58(1).
[225] *Cummings v. Cummings* (2004), 2004 CarswellOnt 99, 235 D.L.R. (4th) 474, (sub nom. Cummings Estate, Re) 181 O.A.C. 98, 5 E.T.R. (3d) 97, 69 O.R. (3d) 397 (Ont. C.A.).
[226] *Tataryn v. Tataryn*, [1994] 2 SCR 807; *Cummings v Cummings,* 2003 CanLII 64218 (On SC) – 2003-02-21. For an application of this particular moral claim in a situation of complex estate planning, see *Morassut v. Jaczynski Estate*, 2013 ONSC 2856; upheld on appeal 2015 ONSC 502 (Div. Ct): A successful business owner, was diagnosed with breast cancer and she decided to revise her estates plans in the last few months of her life. Two new Wills were produced. The first Will moved many of her assets to holding companies and left the residue of the estate to a family Trust created by the second Will. Her common-law spouse, was not provided for in either new Will, but the estate agreed to give him a $1,000,000 lump-sum payment. Her previous Will, nullified by her subsequent planning, had provided for her common law spouse a $1,000,000 payment. The estate argued that this single payment was adequate in itself and that he should not qualify for further dependant support under the *SLRA*. Following *Tataryn v. Tataryn*, however, the court found that the testatrix had "both a legal and moral obligation to continue to support him after her death." He was awarded sole ownership of a property that he and the testatrix had built together; a yearly sum for the rest of his life; and a smaller payment every five years so that he could buy a new automobile

This expands the court's jurisdiction to make a dependant's support order to resemble, if not mirror, the broader jurisdiction of British Columbia courts under the *WESA*.[227] Section 60 of the British Columbia *WESA* provides that:

> *Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.*

Even with fairly recent developments affecting *SLRA* claims in the Ontario court, the British Columbia provision has a potentially broader application. The applicant in British Columbia can be any spouse or child. The applicant need not prove that he or she was a dependant of the deceased.[228] The definition of spouse includes both married and common-law spouses.[229] Although there is no definition of child, the provision has been held to apply to independent adult children.[230] There is no need to show either a legal obligation to support the person or that the deceased was actually supporting the person immediately before death.

In Ontario, the dependant can reach various assets of the deceased that do not form part of the estate. Certain *inter vivos* transactions can be clawed back into the estate for the purpose of satisfying a support award, including gifts *mortis causa*; property held jointly that passed to another person by right of survivorship; the proceeds of RRSPs and like instruments that pass to designated beneficiaries; property that the deceased settled on/in trust; the proceeds of any life insurance policy owned by the deceased; and others.[231] That said, Ontario claimants may also resort to equitable claims or rely on

[227] *WESA, supra*..
[228] *Ibid*., s. 2.
[229] *Ibid*., s. 1.
[230] *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807 at 14.
[231] *SLRA*, s. 72.

the *Fraudulent Conveyance Act*[232] to bring assets back into the estate, but these kinds of claims can result in difficult trials.[233]

Poitras Estate v Poitras

This case[234] involved a dispute between an 82 year old stepmother and four of her five stepchildren in relation to the estate of her husband and their father. They had been married for over 26 years and it was the second marriage for both of them. The step-mother alleged that her step-children improperly influenced her husband to change his Will to her disadvantage, remove her as a joint owner of savings certificates, and amend the beneficiary designation of his Retirement Income Fund from the step-mother to his estate. In addition she sought support pursuant to Part V of the *SLRA* and sought an order transferring the entire estate to her to satisfy her claim for dependant's relief.

The Court found that the evidence fell short of establishing that the pressure exerted by the husband's children was so great that his Will ought to be set aside. The husband was not isolated by, and dependent upon, his children prior to the changes in question. He continued to live independently with his wife in his own home. For all but the last few weeks of his life, his wife was his primary caregiver. She accompanied him to the lawyer's office when he changed his will and to the bank when he changed the beneficiary on his investments. While the appointment with the lawyer was made by the step-children they did not sit in on the meeting or provide instructions to the lawyer.[235]

With respect to the dependant's support claim, the Court examined the factors set out in section 62(1) of the *SLRA* and noted that the step-mother had adequate current assets and means to meet her present resources, her asset base will not increase significantly in the future, is 82 and in good health, her present needs are being met but she had no capacity to earn an income. She was the husband's only dependant and he was legally

[232] RSBC 1996, c 163.
[233] See *Mawdsley v. Meshen*, 2012 BCCA 91, affirming 2010 BCSC 1099, 59 E.T.R. (3d) 51 (B.C. S.C.)
[234] *Poitras Estate v. Poitras*, 2016 ONSC 5049 (*Poitras*)
[235] *Poitras* at para. 42

required to make adequate provisions for her future care after his death. He also had a moral obligation to her to ensure she was properly cared for.[236] The Court concluded:

> While [the wife's] present needs may be said to be adequately protected, her unascertained future needs are not. Her life expectancy and future health needs are unknowable at this time. The cost of assisted living can be substantial. These substantial costs may have to be incurred for a lengthy period of time. She is entitled to a more secure financial future than that which was provided by her husband. I have also taken into account that [the wife] will be able to live cost-free in the matrimonial home at the expense of the estate for an unknown period of time.
>
> Weighing the various factors that I have referred to, I have concluded that [the wife] ought to be paid the sum of $85,000 as a lump sum pursuant to section 58 of the SLRA.[237]

Kalman v Pick

The 75-year-old applicant sought, *inter alia*, dependant's support from the estate of her common-law partner of 23 years.[238] The respondent estate trustees were the deceased's children of his first relationship, and the primary beneficiaries of his estate valued at $1.8 million. The applicant had been completely financially dependant on the deceased.

On consent, at an interim motion, the applicant received a monthly payment of "interim interim support," a non-dissipation order in respect of the Estate, and a return date in three months' time.

The only issue before Justice C. Brown on that January 2013 return date was the Applicant's request that the estate provide her with a lump-sum interim support payment to cover her legal fees and disbursements. This type of funding order had not previously been reported as granted in *SLRA* claims.

Justice Brown accepted the applicant's evidence of financial need and legal fees incurred and observed that, in the absence of adequate interim support, "…the

[236] *Poitras* at para. 50.
[237] *Poitras* at paras. 56-57.
[238] *Kalman v. Pick et al.*, 2013 ONSC 304 ("*Kalman*").

Applicant's ability to pursue her meritorious claim would be prejudiced or would depend on the generosity of her counsel."[239]

In ordering the estate to pay the applicant a lump-sum interim support of $60,000 for her legal costs and disbursements and expert's retainer, Justice Brown cited the provision of such funding orders in matrimonial, commercial, and constitutional matters and applied the Supreme Court of Canada's criteria for such exercises of equitable jurisdiction as to costs.[240] Justice Brown also relied on interim costs awards granted in the context of estates and trusts matters.[241]

Subsequently, Justice McEwen ordered a further interim support payment in the amount of $25,000 on a without prejudice basis.[242]

This case represents a much needed precedent in providing a means for dependants to fund a viable claim against an estate where having met the statutory test under the legislation – the *SLRA* – and the dependant has not been provided adequate or proper support by the deceased person. Often in such a case the dependant is prejudiced in prosecuting a meritorious claim due to unaffordability.

Recently in *Dagg v. Cameron* (below) a lump sum payment of $30,000 was ordered "to maintain the litigation" in a dependant support application.[243]

Dagg v. Cameron

The deceased had separated from his wife of 12 years. They had two children. As part of a consent temporary order on spousal and child support the deceased agreed to maintain his estranged wife as irrevocable beneficiary on any life insurance policy.

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[239] *Ibid* at para. 11
[240] *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] 3 SCR 371, 2003 SCC 71.
[241] *Kraus v. Valentini Estate*, 1993 CarswellOnt 2128, 1993 OJ No 3276 (Ont Gen Div); *Zhao v Ismail Estate (trustee of)*, 2006 CarswellOnt 8411, 29 ETR (3d) 315; *Perkovic v Marion Estate*, 2008 CarswellOnt 5931 (SCJ).
[242] 2014 ONSC 2362.
[243] 2015 ONSC 2597

Shortly after leaving his wife, the deceased commenced a new relationship. His new partner became pregnant and the two began living together. Four months later the deceased was diagnosed with pancreatic cancer. Within days of the diagnosis the deceased changed his life insurance designation. His new partner was now entitled to 56.3 per cent and his wife and children were to receive the remaining 46.3 per cent. The wife immediately obtained an urgent order requiring the life insurance company to restore the beneficiary designation. The deceased died three days later, within a month of his diagnosis, at the age of 48. His partner was 8 months pregnant with his child.

While the partner was the sole beneficiary of the deceased's will, she brought an application for dependant support under the *SLRA* upon behalf of her son and herself. She also sought to recover any dependant support from the insurance policy pursuant to section 72(1)(f) of the *SLRA* which states: "*any amount payable under a policy of insurance effect on the life of the deceased, and owned by him or her*" is available for satisfaction of dependant support claims. The wife opposed the application arguing that the partner was not a dependent under the *SLRA* as they had only co-habited for four months at the time of his death and they were not parents to a child as the child was born *after* his death. Also, she argued that the insurance money was not available under section 72 as the deceased did not "own" the policy as he had designated her as the irrevocable beneficiary.

Bale J., found that the deceased had two spouses: his wife, from whom he was separated, and his partner with whom he had conceived a child. Section 1(1) of the *SLRA* defines a "child" as including a child conceived before, and born alive after, the parent's death. The partner was also a dependant, according to Bale J.: "If, on the date the application was made, the person was a spouse, then he or she will also have been a dependant on that date, and entitled to support, if the deceased was, in fact, providing support to him or her immediately before the date of death".[244]

[244] 2015 ONSC 2597 at para 17.

Bale J. also found that the insurance money was caught by section 72 of the *SLRA* and therefore available to satisfy a dependant support claim. Bale J. noted: "If the Legislature had intended to except life insurance policies which are subject to an irrevocable designation under section 72, one would have expected the exception to have been made explicit."[245] Furthermore, the irrevocable designation was made pursuant to a temporary order, and the deceased had the right to argue on the final hearing (had there been one) that the designation was not required or need not continue. Bale J. ordered interim support, as well as a lump sum payment of $30,000.00 "maintain the litigation" and set a date for the hearing of the application to determine the amount of dependant support.[246]

(c) Challenges to Joint Title

Spouses/partners may find themselves defending challenges to property passing to them by right of survivorship through joint title ownership. In re-marriage and re-partnership scenarios, expectant heirs often have an incentive to try to prevent the deceased's portion of a jointly held asset from passing by right of survivorship to the surviving spouse.

In the 2012 case of ***Hansen v. Hansen Estate***, (discussed in more detail below) the Ontario Court of Appeal clarified the law with respect to the severance of joint tenancies.[247] In particular, the court clarified the third of the "three rules" of when a joint tenancy will be severed. The first rule provides that a joint tenancy can be severed by a unilateral act affecting title, such as selling or encumbering the interest. The second rule provides that the parties may explicitly agree to sever the joint title. Both of these rules can be used effectively for planning purposes.

The third rule provides that a joint tenancy will be severed by something less than an explicit act of severance. Specifically, joint title will be severed by "any course of dealing

[245] 2015 ONSC 2597 at para 21.
[246] 2015 ONSC 2597 at para 33-37
[247] *Hansen Estate v. Hansen*, 2012 CarswellOnt 2051, 2012 ONCA 112, [2012] W.D.F.L. 1985, [2012] O.J. No. 780, 109 O.R. (3d) 241, 16 R.P.R. (5th) 1, 212 A.C.W.S. (3d) 854, 288 O.A.C. 116, 347 D.L.R. (4th) 491, 75 E.T.R. (3d) 19, 9 R.F.L. (7th) 251.

sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common."[248] The Court held that this rule operates in equity.[249] It is meant to prevent the title passing by way of survivorship when to do so would cause an injustice. This rule does not require a specific act or any explicit agreement. What the party asserting severance must prove is that the co-owners have all acted as though their respective shares in the property were no longer an indivisible, unified whole.[250]

Cautionary Planning Tips – Jointly Held Assets

Joint tenancy has been described to be a useful estate-planning tool in avoiding the administrative hassle and estate administration taxes associated with probate, but it is difficult to suggest, in light of the difficulties, that joint tenancy is a good or effective means of planning. Indeed, an extraordinary amount of litigation arises respecting jointly held assets and survivorship rights perhaps planning for probate, as opposed to around probate is the best approach. This is an area riddled with disputes about whether joint title was severed by a mutual course of conduct. It is important to remember that severance of joint title under the third rule requires a *mutual* course of conduct. Therefore, if only one of the joint owners maintains that the property is held in joint tenancy, the property will remain so until the other owner carries out a unilateral act of severance on title. When a property is to be held in joint tenancy, particularly in complex family situations, it is worth considering whether the joint owner carrying out the estate plan should sign a written acknowledgement that the property is to be held in joint tenancy.

Hansen v. Hansen Estate

In *Hansen*,[251] the husband's daughters from a previous marriage claimed that title to the matrimonial home, which was held by the husband and wife jointly, was severed as a result of their mutual conduct following their separation. The Court agreed. The following mutual conduct supported this finding:

[248] *Ibid.* at para. 34.
[249] *Ibid.* at para. 35.
[250] *Hansen, supra.* at para. 39.
[251] 2012 ONCA 112

- the wife moved out of the home;
- the husband took over payment of the expenses and put the bills in his own name;
- the parties retained their own lawyers and agreed that they would exchange financial disclosure in order to carry out a division of their property;
- the wife proposed that the husband buy out her interest in the home or else it would need to be sold, and the husband took no issue with this proposal;
- the parties agreed that a quick resolution was in order;
- the husband made a new will naming his children rather than his wife as beneficiaries, and the home was his only significant asset; and
- the husband and wife closed joint bank accounts and opened new bank accounts in their own names.

A claim for severance of a joint tenancy is most likely to arise in complex family situations. Where spouses in a "simple" family separate, the passage of title by survivorship to the other spouse would often not work an injustice. Assuming that both parents have positive relationships with their children, the property may eventually pass to the children.

The situation in *Hansen* represents a potential missed opportunity to plan. Family lawyers in the circumstances of the separating spouses in *Hansen* in addition to advising that a Will be done, may want to consider advising their separated clients on entering into interim agreements to sever title to some or all jointly held property or register transfer of the property jointly to the parties as tenants in common.

It is also worth considering whether parties to marriage contracts and cohabitation agreements might want to include a provision automatically severing title upon breakdown of the relationship. However, despite the fact that this case could be said to have arisen out of the deceased's failure to plan, the helpful reasons may have the effect of reducing future confusion and disputes over severance of joint title when spouses separate. The facts of this case are typical of a separation, and it is possible that severance based on the "third rule," severance of joint title by a mutual course of conduct, will be the naturally expected outcome when parties initiate negotiations to divide their property after a separation, especially if they specifically address the disposition of a jointly held matrimonial home.

(d) Equity: Unjust Enrichment, Proprietary Estoppel, Joint Family Ventures etc.

Subsequent spouses in later in life partnerships may have a claim in unjust enrichment which can cause a dispute with adult children seeking to inherit under their parent's estate.

In the seminal decision of *Kerr v. Baranow; Vanasse v. Seguin,*[252] the Supreme Court of Canada reviewed the law of unjust enrichment and expanded the remedies available to unmarried cohabiting spouses.[253]

The basic elements of an unjust enrichment claim have remained more or less unchanged since *Becker v. Pettkus.*[254] For a plaintiff to be successful in such a claim, he/she must be able to establish the following three elements: (i) an enrichment of or benefit to the defendant by the plaintiff; (ii) a corresponding deprivation of the plaintiff; and (iii) the absence of a juristic reason for the enrichment. As well, it has been consistently held in the case law, and has been affirmed in *Kerr v. Baranow; Vanasse v.*

[252] *Kerr v. Baranow,* 2011 CarswellBC 240 (S.C.C.). A further judgment in this matter issued on Kerr v. Baranow, 2012, BCSC 1222 (CanLII) 2012-08-15
[253] See Martha McCarthy, "Family Law for Estates Lawyers," LSUC CPD, Blended Family Estate Planning, June 14, 2011, at 12.
[254] (1980), 2 S.C.R. 834.

Seguin, that "the courts 'should exercise flexibility and common sense when applying equitable principles to family law issues with due sensitivity to the special circumstances that can arise in such cases.'"[255]

Two of the available remedies for unjust enrichment remain unchanged by the Court: the remedial constructive trust and a monetary remedy in *quantum meruit* (sometimes referred to as "value received" or "fee-for-service").[256] The constructive trust (proprietary) remedy is available where a monetary award would be inappropriate or insufficient and there is a link or causal connection between their contributions and the acquisition, preservation, maintenance, or improvement of the disputed property. The *quantum meruit* remedy is typically available where the unjust enrichment constituted the provision of unpaid services, but it tends to be the least valuable remedy.

Joint Family Venture

The major development in *Kerr v. Baranow; Vanasse v. Seguin* was the endorsement of a third remedy: a monetary remedy for "value survived." Where the spouses were engaged in a "joint family venture" and, upon breakdown of the relationship, one of the parties is left with a disproportionate share of the jointly held assets, the Court will reapportion the wealth between the parties. The Court identified the following non-exhaustive list of factors to assist in making a determination: (i) the mutual effort of the parties and whether they worked collaboratively towards common goals; (ii) economic integration of the couples' finances; (iii) actual intent or choice of the parties to not have their economic lives intertwined, whether such is expressed or inferred; and (iv) whether the parties have given priority to the family or there is detrimental reliance on the relationship, by one or both of the parties, for the sake of the family.[257]

Once a spouse has proven the existence of a joint family venture, the Court will determine the award, which is not restricted to a fee-for-services approach. Rather,

[255] *Kerr v. Baranow, supra,* note 252 at para. 34, citing *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 997 per McLachlin J. (as she then was) and also 1023 per Cory J.
[256] *Ibid.* at para. 58.
[257] *Kerr v Baranow*, s*upra* note 63, at paras. 89-100.

where it can be shown that the joint family venture in which the mutual efforts of the parties have resulted in an accumulation of wealth, the remedy "should be calculated on the basis of the share of those assets proportionate to the claimant's contributions,"[258] taking into consideration the respective contributions of the parties. The Court was clear that this calculation should not result in a "minute examination of the give and take of daily life."[259] Rather, it should remain a broad and flexible approach.

The important point for estates litigators is that the law of unjust enrichment is equally applicable to a surviving spouse against the estate of a deceased spouse as it is to a living spouse.[260] There is a wealth of case law applying *Kerr v. Baranow; Vanasse v. Seguin*, and the cases are very much driven by the unique facts of each. The difficulty for the surviving spouse and his or her lawyer will be in proving the existence of a joint family venture without the evidence of the deceased spouse. There is the strategic and practical challenge of deciding which claim or combination of claims to bring on behalf of a surviving spouse, including dependant's support, unjust enrichment, and other equitable claims.

In 2014 the Ontario Superior Court of Justice released a family law decision, *Barrett v. Barrett*[261] dealing with the issue of who benefited from the increase in value of the matrimonial home from the date of separation to the date of trial. The Court applied the principles set out in *Kerr v. Baranow*[262] to the married spouses.

Proprietary Estoppel

Proprietary estoppel is an increasingly used tool to remedy and to protect a person who detrimentally relied on a property owner's promises, actions, or inaction that caused the person to believe that he or she was the true owner of the property and where it would be unjust to permit the owner to later turn around and assert title.

[258] *Ibid.* at para. 100.
[259] *Ibid.* at para. 102.
[260] *Hillier Estate v. McLean*, 2011 CarswellNfld 207 at para. 20.
[261] 2014 ONSC 857
[262] [2011] 1 S.C.R. 269.

Cowderoy v. Sorkos

Gus Sorkos had no children of his own.[263] However, he considered his first spouse's grandchildren to be his own and they considered him to be their grandfather. He promised them that if they worked to maintain his farm and cottage, whenever and however he asked, that he would leave these properties to them in his will. The evidence showed that the grandchildren carried out their end of the bargain: they were available whenever asked and carried out extensive work on the farm and cottage over the course of many years. They had also helped Gus with his business ventures. The Court found, for example, that one of the grandchildren had put in over 2000 hours of unpaid work to help Gus with one of his businesses.

In 2001, Gus's wife, the grandmother of the grandchildren, died. In 2002, Gus remarried a woman he had known in his youth in Greece. His will had previously left the bulk of his estate to the grandchildren. However, after he remarried, he reduced the bequests to the grandchildren to token legacies.

Gus made representations and the grandchildren relied on them in ordering their lives to their detriment. Having received the benefit of his promises, the withdrawal of the benefit was considered by the court to be unconscionable. *Quantum meruit* would not adequately compensate the grandchildren. They were entitled to the farm and cottage properties on the basis of proprietary estoppel.

On appeal,[264] the Ontario Court of Appeal received fresh evidence revealing that the transfer of the properties to the children would leave the estate without sufficient funds to fulfill a dependant support order that had been made. The Court of Appeal also agreed with the finding of proprietary estoppel by the trial judge, however, held that it was a promise to bequeath the properties upon death and not convey the properties. This meant the properties formed part of the estate and therefore could be subject to

[263] 2012 ONSC 1921
[264] 2014 ONCA 618

the dependant support claim. The Court ordered a new dependant support trial which was to take into account the value of the properties.[265]

The lessons from this case are simple to state and difficult to apply. Simply put, people will be held to their promises to make testamentary gifts, at least with respect to land (although compare gifts *mortis causa* per statute), if the promises induce detrimental reliance and the promised gifts are unconscionably withdrawn.

From a planning perspective, individuals who have made these kinds of promises may think that they still have the discretion about whether to make good on them. When making a Will, they may not think to disclose the circumstances to their lawyer. Perhaps the simple question: "have you already told anyone that they can expect to get something from you when you die?" might elicit an answer that the estate planner could probe.[266]

CONCLUSION

Older adult relationships have unique challenges. Whether those challenges are dealing with estate disputes between adult children and second spouses, or financially abusive or predatory marriages, these issues should be a concern to all who deal with older adult clients. Where should the law go from here?

While many provinces and states have legislated out of the 'revocation–upon–marriage' provisions in their succession or probate statutes, this is merely one small step towards the development of a more cohesive approach to preventing financial abuse through predatory marriages. Innovative ideas, like the caveat system in British Columbia, require consistent implementation to be effective.

In the absence of clear legislation defining the requisite capacity to marry, the common law remains unclear. In Canada, *Banton* and *Re Sung Estate* cite *Browning v. Reane* and *Re Spier*, which both suggest that capacity to manage one's person *and/or* one's

[265] 2014 ONCA 618 at para. 59.
[266] For a notable and recent BC case, see *Sabey v. Von Hopffgarten Estate*, 2013 BCSC 642.

property, or both are a component for determining the requisite capacity to marry. These cases appear to be moving in the direction of developing an appropriate consideration of factors for ascertaining the capacity to marry—one which best reflects and accords with the real-life financial implications of death or marital breakdown on a marriage in today's ageing society.

Still, it would appear that our courts continue to be 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 the reluctance on the part of our courts to "attribute inordinate weight to the proprietary aspects of marriage," has meant that the factors for determining the requisite capacity to marry are much less stringent than those used to determine testamentary capacity or to determine the capacity to manage property.

Australian case law seems to suggest that a statutory factors for determining the capacity to marry can be a useful tool in cases of elder abuse, but such legislation should specifically reference the marrying parties' understanding of the property consequences of marriage. Indeed, 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 factors 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/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 factors to determine the requisite capacity to marry are refined, such that it adequately takes into consideration the financial implications of marriage, all those with diminished decisional capacity will remain vulnerable to exploitation through marriage. This is likely to become an ever increasing and pressing problem as an unprecedented

proportion of our society becomes, with age, prone to cognitive decline. Hopefully, we will see some of the suggested equitable approaches gaining some traction in the near future.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive. Please visit our new website at http://www.whaleyestatelitigation.com

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