

Legal Capacity to Marry, Co-Habit, Separate and Divorce

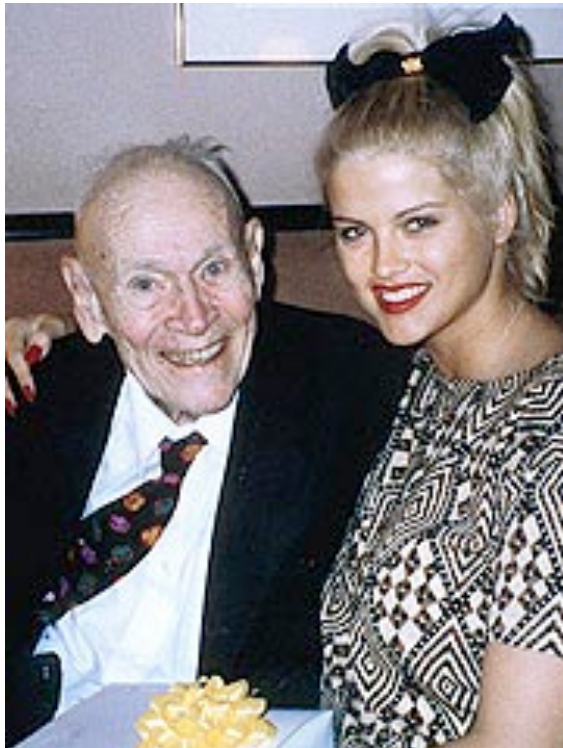
CBA Elder Law – Alberta Branch
By Heather Hogan





- Not just a difference in age
- Usually other hallmarks – exploitation, financial gain

Compare / Contrast





- Co-habiting
- Separating
- Erosion of personal autonomy



- Capacity:
 - Presumed at law
 - Legal determination based on a number of factors
 - Decision and time specific

- ***Starson v. Swayze***, 2003 SCC 32, 2003 CSC 32, 2003 CarswellOnt 2079
 - cognitive ability to process, retain and understand the relevant information
 - able to apply the relevant information to the circumstances, and be able to weigh the foreseeable risks and benefits of a decision or lack thereof
 - A person should not be deemed incapable for failing to understand if that person possesses the ability to comprehend

- ***Alberta Guardianship and Trusteeship Act***

(d) "**capacity**" means, in respect of the making of a decision about a matter, the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of

- (i) a decision, and
- (ii) a failure to make a decision;



- *Chutskoff Estate v. Bonora*, 2013 CarswellAlta 286
 - The admitted fact that the Respondent suffers from a psychiatric condition does not mean that he lacks capacity as defined in Rule 2.11(c).
 - Lack of capacity in the defined sense must be proved on a balance of probabilities.



CAPACITY TO MARRY

CASES

CAPACITY TO MARRY



- *Durham v. Durham* (1885), 10 P.D. 80
- Applied in *Chertkow v. Feinstein* (*Chertkow*), 1929 CarswellAlta 23, Alta CA
 - Bride has always been “peculiar,” history of mental health issues
 - Cried on her wedding day... “I may as well go through with it.”
 - Court overturned trial judge’s finding of nullity, but approved of *Durham v. Durham* re capacity to contract, and the contract of marriage is simple



7. Persons lacking mental capacity

No person shall issue a licence to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason.

Marriage Act, R.S.O. 1990, c. M.3, s. 7

CAPACITY TO MARRY



- Themes (perhaps conflicting?):
 - The factors and standard for determining the requisite capacity to marry is equivalent to that of the capacity to contract
 - That the contract of marriage is a simple one
 - The contract of marriage triggers statutory rights and responsibilities



PREDATORY MARRIAGES

CASES

PREDATORY



- *Barrett Estate v. Dexter*, 2000 CarswellAlta 816, 2000 ABQB 530
 - Caregiver 39 years younger than him
 - Married in secret – had to try twice because one of the witnesses has a change-of-heart at the last minute!
 - Belief in the necessity of marriage to avoid being put into a nursing home
 - Would be alone in hospital if not married
 - Applied *Chertkow v. Feinstein (Chertkow)*

NOT PREDATORY



Ross-Scott v. Potvin 2014 BCSC 435

- Younger caretaker 21 years his junior
- Evidence of compromised capacity, delusional at times
- Wanted to avoid retirement home

A court should only reject a person's autonomy in the clearest of cases where an individual lacks a "clear free and personal choice". . . The evidence does not establish that [the deceased] was terrified, coerced, threatened or did not understand what he was doing. Additionally, no evidence demonstrates that [the deceased's] decision resulted from the defendant's coercive power.

See also...



- *Hart v. Cooper*, 1994 CanLII 262 (BCSC)
- *Banton v Banton*, 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176.
- *Barrett Estate v. Dexter*, 2000 ABQB 530.
- *Feng v Sung Estate*, 2003 CanLII 2420 (ON S.C.).
- *Hamilton Estate v. Jacinto*, 2011 BCSC 52.
- *AB v. CD*, 2009 BCCA 200.
- *Juzumas v. Baron*, 2012 ONSC 7220.

See also...



- Albert Oosterhoff, “Predatory Marriages” (2013) 33 Estates, Trusts & Pensions Journal 24.



CAPACITY TO COHABIT

CASES



- *PC (by her litigation friend the Official Solicitor), NC v. City of York Council, [2013] EWCA Civ. 478*
 - mild learning difficulties, had low IQ scores, and had a troubled childhood
 - boyfriend in 2001 convicted of serious sexual offences
 - married while he was in prison in 2006
 - released in 2012
 - Court found she lacked capacity to co-habit
 - Appeal allowed



- See also *Banton v. Banton*
- *Wolfman-Stotland v. Stotland* 2011 BCCA 175
- *Calvert (Litigation Guardian of) v. Calvert* 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169., leave to appeal to S.C.C. refused



CAPACITY TO SEPARATE

CASES

SEPARATE



- *A.B. v. C.D.* (2009), BCCA 200 (CanLII), leave to appeal to S.C.C. denied
 - ...court must be satisfied that that spouse possessed the necessary mental capacity to form that intention. This is probably a similar requirement to the requisite capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.



- *Babiuk v. Babiuk* 2014 SKQB 320
 - certified incompetent to manage her estate pursuant to *The Mentally Disordered Person's Act*, RSS 1978, c M-14 (since repealed by SS 2014, c 24)
 - refused any contact from her husband
 - PGT sought division of family property
 - husband brought a motion seeking an Order prohibiting the PGT from pursuing a property claim

SEPARATE



- *Babiuk v. Babiuk* 2014 SKQB 320
 - wife testified in an affidavit that while she forgets most things, she does not forget her life with her husband
 - Applied *Calvert*
 - Dismissed husband's motion

In deciding issues of capacity, insofar as the law is able to, the appropriate approach is to respect the personal autonomy of the individual in making decisions about his or her life



CAPACITY TO DIVORCE

CASES

DIVORCE



- *Calvert (Litigation Guardian of) v. Calvert* 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), leave to appeal to S.C.C. refused
- If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins*, 136 A.3d 45 (Ill., 1985).



- *Wolfman-Stotland v. Stotland*, 2011 CarswellBC 803, 2011 BCCA 175
 - 93 year-old sought declaration of no reasonable prospect of reconciliation with 92 year-old husband
 - referred to *AB v. CD* and *Calvert*

capacity to separate is the same as the standard for the requisite capacity to marry, and that the “requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one’s affairs.”



CONCLUDING REMARKS

DO WE AGREE?



- That the contract of marriage is a simple one, despite statutory obligations and property rights?
- That cohabitation is part of the marriage contract, and therefore requires the same degree of capacity?
- That the “victim” of a predatory marriage is not a victim unless she/he is terrified?

- Like a contract...
 - Undue influence (but see *Ross-Scott*)
 - Unconscionability (*Juzumas*)
 - Lack of ILA?

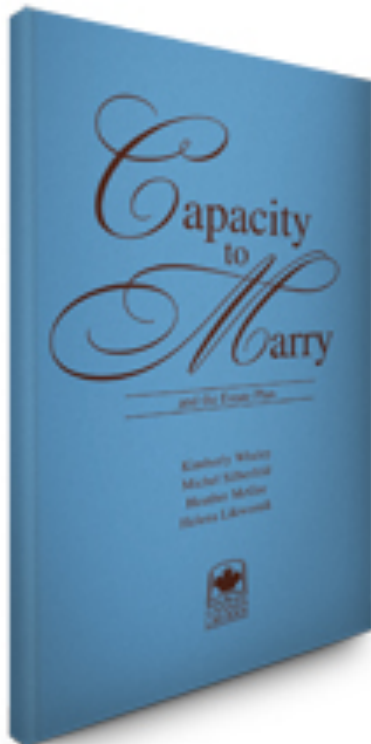
- If not contract, then equity / tort?
 - Using a statute as an instrument of fraud?
 - Profiting from wrongdoing?
 - Civil fraud / tort of deceit?

But wait, there's more...



- What about capacity to consent to sex with one's spouse / partner?
 - Hayter, Emily, *Sexual Expression in Long-Term Care Homes: Capacity & Consent*, 35 Windsor Rev. Legal & Soc Issues 54

Further reading



- www.whaleyestatelitigation.com
- Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010)
- See also Albert Oosterhoff, “Predatory Marriages” (2013) 33 *Estates, Trusts & Pensions Journal* 24