



**LSUC FAMILY LAW AND THE ELDERLY CLIENT  
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**LEGAL CAPACITY TO MARRY, CO-HABIT,  
SEPARATE AND DIVORCE**

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

### 1. Introduction<sup>1</sup>

Current and evolving statistics confirm that our population is aging and doing so, rapidly. With age and longevity can often come an increase in the occurrence of medical issues affecting cognitive ability, related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, and other conditions involving reduced functioning and capability.<sup>2</sup> There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable, dependent and susceptible to influence. Factors affecting capacity can inter alia, 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.<sup>3</sup> These sorts of issues unfortunately invite opportunity for financial abuse, elder abuse, and exploitation.

Exploitation, financial abuse, and undue influence can occur in the context of marriage, co-habitation, separation, and even divorce. For example, 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, of providing consent to marry and to enter into a contract of marriage—perhaps because of illness

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<sup>2</sup> Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70.  
<http://www.canadalawbook.ca>

<sup>3</sup> *Ibid* at 1.

or dependency.<sup>4</sup> Indeed, unscrupulous opportunists too often get away with preying upon in particular, older adults with diminished reasoning ability purely for financial gain. An appropriate moniker for this type of relationship is that of the ‘predatory marriage’.<sup>5</sup> Given that marriage brings with it a wide range of property and financial entitlements, the descriptive, ‘predatory’ does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.<sup>6</sup> Older adults may also be prone to abuse or pressure to co-habit for unscrupulous reasons. While co-habitation does not bring with it the same property rights and financial consequences of marriage, living with a predator can still have equally serious consequences.

Similarly, vulnerable older adults may be unduly pressured not to live with, or marry persons due to influence from children of prior unions who may disapprove of later life partnership. Adult children may see an opportunity to persuade a vulnerable parent to divorce, or cease living with a partner once becoming ill, vulnerable or decisionally incapable. What the older adult wants is often over-looked. The question of whether there is a presence of decisional capacity sufficient to make such decisions is paramount?

Determining whether an older adult has the requisite decisional capacity to marry, to co-habit, to separate and to divorce is explored in this paper as

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<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra* note 2 at 70

well as related issues such as predatory marriages, and the nature and extent of the role of the litigation guardian in such matters.

## **2. What is Capacity?**

There is no single legal definition of “capacity”. The *Substitute Decisions Act, 1992*<sup>7</sup> (the “SDA”) which addresses various types of capacity, simply defines “capable” as “mentally capable”, and provides that “capacity” has a corresponding meaning. What does this mean?

Equally puzzling is the fact that there is no general or consistent approach to apply in determining or establishing “capacity”, “mental capacity” or “competency”. Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.<sup>8</sup>

Decisional capacity is determined upon factors of mixed law, medicine and fact by applying the evidence available to the applicable capacity consideration as at the relevant time.<sup>9</sup> Often reference is made to a

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<sup>7</sup> S.O. 1992, c. 30 as am [hereinafter *SDA*]

<sup>8</sup> *Palahnuk v. Palahnuk Estate*, [2006] O.J. No. 5304 (QL), 154 A.C.W.S. (3d) 996 (S.C.J.) [hereinafter *Palahnuk Estate*]; *Brillinger v. Brillinger-Cain*, [2007] O.J. No. 2451 (QL), 158 A.C.W.S. (3d) 482 (S.C.J.) [hereinafter *Brillinger v. Brillinger-Cain*]; *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (ed) 216 (Ont. S.C.J.) [hereinafter *Knox v. Burton*]

<sup>9</sup> *Starson v. Swayze*, [2003] 1 S.C.R. 722 [hereinafter *Starson v. Swayze*]

capacity ‘test’, notably however there is no ‘test’ so to speak, rather there are different criteria to consider in determining decisional capacity.

Capacity is an area of enquiry where medicine and law collide, in that legal practitioners are often dealing with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal criteria in their clinical practices, or are asked to review evidence retrospectively to determine whether at the relevant time an individual had the requisite decisional capacity to complete a specific task.

The assessment of capacity is a less-than-perfect science, both from a legal and medical perspective. Capacity determinations are often complicated: in addition to professional and expert evidence, lay evidence is relevant to assessing decisional capacity. The standard of assessment varies and this too, can become an obstacle that is difficult to overcome in determining capacity as well as in resolving disputes over the quality and integrity of capacity findings. To add further to the complication, in contentious settings, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long since past decision of a person, alive or deceased. The evidentiary weight given to such assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

Capacity is *decision, time* and *situation*-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. A person is not globally “capable” or “incapable” and there is no specific standard to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision and at a moment in time.

### **Capacity is Decision-Specific**

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one’s property or personal care. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, to separate or to divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making personal care decisions, but not capable of managing property, or capable of granting a power of attorney document, but, not capable of making a Will. The possibilities are unlimited as each task or decision undertaken has its own specific factors to consider in its determination.

### **Capacity is Time-Specific**

Capacity is *time*-specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for “good” and “bad” days where capacity can and does fluctuate depending on the cause. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. Even in situations where an individual suffers from a non-

reversible and/or progressive disorder, that person may not be permanently incapable, and may have decisional capacity at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a Will can vary over time.<sup>10</sup>

The factor of time-specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may have less probative value than the evidence of, for instance, a drafting solicitor who applies a legal analysis in determining requisite capacity commensurate with the time that instructions are received.<sup>11</sup>

### **Capacity is Situation-Specific**

Lastly, capacity is *situation*-specific in that under different circumstances, an individual may have differing capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, for example, a person at home may have capacity not displayed in a lawyer's or doctor's office.

Although each task has its own specific capacity analysis, it is fair to say that in general, capacity to make a decision is demonstrated by a person's

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<sup>10</sup> *Palahnuk Estate, Brillinger v. Brillinger-Cain, Knox v. Burton*, all *supra* note 8.

<sup>11</sup> *Palahnuk Estate*, *supra* note 8 at para. 71



ability to understand all the information that is relevant to the decision to be made, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court decision in *Starson v. Swayze*<sup>12</sup> is helpful in understanding and determining decisional capacity. Although this decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act, 1996*,<sup>13</sup> (a statute which is not addressed in this paper) the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, per Major J: The presence of a mental disorder must not be equated with incapacity since the presumption of legal capacity can only be rebutted by clear evidence.<sup>14</sup>

Major J., emphasized that the ability to understand and process information is key to capacity. It requires the "cognitive ability to process, retain and understand the relevant information."<sup>15</sup> Then, a person must "be 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."<sup>16</sup>

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<sup>12</sup> *Supra* note 9.

<sup>13</sup> S.O. 1996, c. 2, Sched. A as am.

<sup>14</sup> *Starson v. Swayze, supra* note 9 at para. 77. This case was most recently applied in the Ontario Court of Appeal case of *Gajewski v. Wilkie* 2014 ONCA 897 which deals with statutory guide for capacity to consent to treatment under the *Health Care Consent Act, 1996*, S.O. 199, c.2. Sched.A.

<sup>15</sup> *Ibid.* at para. 78

<sup>16</sup> *Ibid.* at para. 78

A capable person requires the “ability to appreciate the consequences of a decision”, and not necessarily an “actual appreciation of those consequences”.<sup>17</sup> A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if that person possesses the ability to comprehend the information and consequences of a decision.

Major J. also made note that the subject matter of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.<sup>18</sup> A capable person is entitled to be unwise in decision-making. In the oft-cited decision of *Re. Koch*,<sup>19</sup> Quinn J. wrote as follows:

It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. ...<sup>20</sup>

For detailed information on capacity, see Whaley Estate Litigation checklists and publications:

[http://whaleystatelitigation.com/resources/WEL\\_CapacityChecklist\\_EstatePlanningContext.pdf](http://whaleystatelitigation.com/resources/WEL_CapacityChecklist_EstatePlanningContext.pdf); [http://whaleystatelitigation.com/resources/WEL\\_SummaryofCapacityCriteria.pdf](http://whaleystatelitigation.com/resources/WEL_SummaryofCapacityCriteria.pdf)

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<sup>17</sup> *Ibid.* at paras. 80-81 [emphasis in original]

<sup>18</sup> *Ibid.* at para. 79

<sup>19</sup> 1997 CanLII 12138 (ON S.C.) [hereinafter *Re. Koch*]

<sup>20</sup> *Ibid.* at para. 89

### **3. Property Law/Testamentary Considerations**

To truly appreciate the importance of capacity in the context of marriage, separation and divorce, it is necessary to understand what entitlements may be gained or lost.

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*<sup>21</sup> 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. Ontario legislation would not likely provide for such a result, it requiring “a declaration in the Will” (Section 16(a)).<sup>22</sup>

This revocation of a Will upon marriage can raise serious consequential issues where a vulnerable adult marries, yet lacks the requisite capacity to make a Will thereafter, or dies before a new Will can be executed. Some provinces have recognized this issue and have recently 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

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<sup>21</sup> 2010 BCCA 374.

<sup>22</sup> Section 16 (a) of the *SLRA*.

marriage no longer revokes a Will.<sup>23</sup> British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* (“WESA”) came into force. Under WESA, marriage no longer revokes a Will.

In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily-mandated property rights 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 property calculations, is entitled to an equalization payment of one-half the difference between them. 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 to make application 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 either to take pursuant to the intestate succession legislation under the SLRA, or to elect to receive an equalization payment under 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.

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<sup>23</sup> *Wills and Succession Act*, SA 2010, c W-12.2.

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. 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.<sup>24</sup>

As is apparent, in some provinces, like Ontario, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate 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. Notably, the decision of Bellegem J., in *Blair v. Cooke (Allair Estate)*<sup>25</sup> saw a determination that two different women simultaneously were legally spouses of the deceased and as such, were not precluded from both obtaining an award of support from the Estate.

#### **4. Capacity to Marry**

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.<sup>26</sup> Yet, at the time of marriage, parties

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<sup>24</sup> SLRA, O.Reg 54/95, s.1.

<sup>25</sup> 2011 ONSC 498.

<sup>26</sup> *Supra* note 2 at 50.

regularly as a matter of course fail to consider the significant property rights that arise out 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.<sup>27</sup>

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.<sup>28</sup> 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*,<sup>29</sup> 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 to comprehend."<sup>30</sup>

### **(a) Statutory and Common law Requirements**

With a few exceptions, most provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity.<sup>31</sup> These statutes prevent the relevant marriage officiate from issuing a license to, or solemnizing the marriage of an individual who is known to lack the requisite mental capacity to marry,<sup>32</sup> is incapable of giving valid consent,<sup>33</sup> or who has been certified as mentally disordered.

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<sup>27</sup> *Ibid.* at 50

<sup>28</sup> *Ibid.* at 50

<sup>29</sup> *Durham v. Durham* (1885), 10 P.D. 80 [hereinafter *Durham*]

<sup>30</sup> *Durham v. Durham* (1885), 10 P.D. 80 at 82.

<sup>31</sup> Exceptions being Newfoundland and Labrador, Nova Scotia, Yukon, and New Brunswick.

<sup>32</sup> 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

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.<sup>34</sup> 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 is liable on summary conviction to a fine.<sup>35</sup>

Section 7 of Ontario's *Marriage Act* prohibits persons from issuing a license to, or solemnizing the marriage of, any person where reasonable grounds exist to believe that person lacks requisite mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.<sup>36</sup>

In British Columbia, it is an offence under the *Marriage Act* R.S.B.C. 1996, c 282 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.<sup>37</sup> This Act further provides that a caveat can be lodged with an issuer of marriage licenses against issuing a license to persons named in

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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."

<sup>33</sup> *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut)

<sup>34</sup> *The Marriage Act*, C.C.S.M. c. M50, section 20.

<sup>35</sup> *The Marriage Act*, C.C.S.M. c. M50, subsection 20(3).

<sup>36</sup> 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."

<sup>37</sup> *Marriage Act* [RSBC 1996] chapter 282, section 35.

the caveat.<sup>38</sup> 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.<sup>39</sup> While at the time of writing there are no reported cases citing section 35 of the Act, I am aware from discussions with B.C. counsel that this provision does get used and is a good tool to delay or avoid questionable marriages in circumstances of incapacity. The caveat system, although useful, I am told is not fully implemented in that there is no centralized, searchable roster of caveats lodged in the province.

Where provincial legislation is silent on this issue of capacity and marriage, 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 contract of marriage.

Several common themes appear to emerge from a comprehensive review of historical cases on the issue of decisional and requisite capacity to marry.<sup>40</sup> These themes are summarized here:

1. That the so called ‘test’ for determining the requisite capacity to marry is equivalent to that of the capacity to contract;<sup>41</sup>
2. That marriage has a distinct nature of rights and responsibilities;<sup>42</sup>

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<sup>38</sup> *Ibid*, s. 23.

<sup>39</sup> *Supra* note 37 at subsection 23(2).

<sup>40</sup> For a more in-depth discussion on the history of the capacity to marry, see “Capacity to Marry and the Estate Plan”, Canada Law Book, co-authored by Kimberly Whaley.

<sup>41</sup> See *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016 (S.C.)



3. That the contract of marriage is a simple one;<sup>43</sup> and
4. That the standard for determining the requisite capacity to marry is the same as the standard for ascertaining capacity to manage property; or that it requires both the requisite capacity to manage the person and the property.<sup>44</sup>

From a historical perspective, it is apparent that there is no single and complete definition of the requisite capacity to contract marriage. Rather, on one end of the judicial spectrum, there exists a view that marriage is but a mere contract, and a simple one at that; and, 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 and/or one's property in order to enter into a valid marriage. Current legal treatment is unsettled and would benefit from judicial clarity. In the interim, we explore other legal doctrines to remedy the legal treatment until judicial precedent catches up with the development of property rights as they currently exist.

### **(b) Predatory Marriages**

Predatory marriages are on the rise, 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 of a number of

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<sup>42</sup> See *In the Estate of Park, Deceased*, [1953] All E.R. Reports [Vol. 2] at 1411

<sup>43</sup> See *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1012 (S.C.), *Durham v. Durham*, (1885), 10 P.D. 80 at p.82, *In the Estate of Park, Deceased*, [1953] All E.R. Reports [Vol. 2] at 1411, *Hunter v. Edney*, (1881) 10 P.D. 93.

<sup>44</sup> *Browning v. Reane*, (1812), 161 E.R. 1080, [1803-13] All E.R. Rep 265; *Spier v. Spier* [1947] W.N. 46 (Eng. P.D.A.);

factors (which include loneliness consequent to losing a long-term spouse, or illness, incapacity, dependency, or vulnerability) is susceptible to exploitation. These unions are more often than not, clandestine. Common characteristics of these unions are alienation, secrecy, sequestering from friends, family and loved ones being an obvious red flag that the relationship is not above board. Cases involving such fact scenarios include: *Hart v. Cooper*,<sup>45</sup> *Banton v. Banton*,<sup>46</sup> *Barrett Estate v. Dexter*,<sup>47</sup> *Feng v. Sung Estate*,<sup>48</sup> *Hamilton Estate v Jacinto*,<sup>49</sup> and *A.B. v. C.D.*<sup>50</sup>

Two recent cases, *Juzumas v. Baron*<sup>51</sup> and *Ross-Scott v. Potvin*<sup>52</sup>, address issues of predatory marriage, yet with different outcomes.

While not necessarily a case where capacity is a primary issue, *Juzumas v. Baron*<sup>53</sup> highlights an increasingly common fact scenario. In this case an elderly widower was duped into marrying his much younger, house keeper and would be caregiver under the pretense that if he married her, she would move in with him, look after him, and he would not be put in a home (which he feared), and so that the caregiver would be eligible for a widow's pension after his death. She stated the marriage was for no other reason related to his money or property. However, the real motive of the marriage for the caregiver was financial gain.

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<sup>45</sup> *Hart v. Cooper*, 1994 CanLII 262 (BCSC)

<sup>46</sup> *Banton v Banton*, 1998 CarswellOnt 4688, 164 D.L.R. (4<sup>th</sup>) 176 at 244

<sup>47</sup> *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII)

<sup>48</sup> *Feng v Sung Estate*, 2003 CanLII 2420 (ON S.C.).

<sup>49</sup> *Hamilton Estate v. Jacinto*, 2011 BCSC 52.

<sup>50</sup> *AB v. CD* 2009 BCCA 200.

<sup>51</sup> 2012 ONSC 7220.

<sup>52</sup> 2014 BCSC 435.

<sup>53</sup> *Juzumas v. Baron*, 2012 ONSC 7220.

The day before the wedding, the caregiver took the older adult to a lawyer he had never met before to execute a new Will. The older adult's English was limited and the lawyer did not speak his language. The caregiver did most of the talking and the lawyer never met with the older adult alone. After they were married, they returned to the same lawyer and executed an agreement whereby the older adult's home was transferred into the name of the caregiver's son. The older adult was not truly aware as to the consequences of the agreement until his neighbour explained it to him. When the older adult returned to the lawyer to stop the transfer the lawyer told him it was too late and that it was "in the computer". Fortunately, with the help of a neighbour, the older adult was able to bring the perpetrator caregiver to court and successfully received a divorce order. The court also set aside the transfer of the house. Lang J., found that a presumption of undue influence existed between the parties as there was a relationship of an older person and his caregiver.<sup>54</sup> Lang J. also found that the transaction was unconscionable under the doctrine of unconscionability.<sup>55</sup> Substantial costs were awarded in favour of the older adult plaintiff.<sup>56</sup>

In *Ross-Scott v. Potvin*,<sup>57</sup> the Court examined the issue of predatory marriages but also cautioned that it may not be appropriate to interfere in the love lives of older adults as personal autonomy to make decisions must be respected.<sup>58</sup> In this case, the only surviving relatives of the deceased

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<sup>54</sup> At para.11

<sup>55</sup> At para.13.

<sup>56</sup> 2012 ONSC 7332.

<sup>57</sup> *Ross-Scott v. Potvin* 2014 BCSC 435.

<sup>58</sup> *Ibid* at para. 184 & 187.

(his niece and nephew) sought an order annulling their uncle's marriage to a much younger woman on the grounds of undue influence or, in the alternative, lack of requisite 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, in spite of compelling medical evidence of diminished capacity and vulnerability. Justice Armstrong noted that:

The heavy burden on the plaintiffs exists to ensure that [the deceased's] autonomy is respected. A court should only reject a person's autonomy in the clearest of cases where an individual lacks a "clear free and personal choice"<sup>59</sup>. . . In this case, the plaintiffs' evidence was not strong or compelling. 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. The witnesses to the marriage ceremony observed nothing about [the deceased] to suggest he lacked an awareness of what he was doing or did not understand the event taking place or that he was coerced or influenced by [the defendant].<sup>60</sup>

### ***An International Perspective on Predatory Marriage: U.S.A and Australia***

Professor Albert Oosterhoff's article, "Predatory Marriages", provides an excellent review and analysis of international initiatives attempting 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

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<sup>59</sup> *Ibid* at para. 188.

<sup>60</sup> *Ibid* at para.237.

provisions in their probate legislation.<sup>61</sup> 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.<sup>62</sup>

Like Canada, Australia has also struggled to balance the autonomy of vulnerable adults with the necessity of protecting them from predatory marriages. Unlike Canada, Australia has met this challenge with legislation that sets out a statutory test for establishing the requisite capacity to marry. However, Australia's statutory test is somewhat limited in that it requires the marrying parties to have the mental capacity to understand the effect of the *ceremony*, not an understanding of the nature of marriage as an institution with all its consequences.<sup>63</sup> Some scholars have suggested that the test would be more effective if it required the understanding of the property consequences of marriage, yet judicial comment in Australia suggests that few people, if any, truly understand all the consequences of marriage.<sup>64</sup>

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<sup>61</sup> Albert Oosterhoff, "Predatory Marriages" (2013) 33 Estates, Trusts & Pensions Journal 24 at p. 54.

<sup>62</sup> *Supra* note 61. at p. 57. See also the recent case from Florida, *Blinn v. Carlman*, No. 4D13-1156 (Fla. 4th DCA 2015), affirming Circuit Court Decision, 15th District, Palm Beach County, Case No. 502012CP003699XXXMB, where an unscrupulous wife (shortly after their later in life marriage) had her vulnerable and incapacitated husband change his will for her benefit. The Court noted: "[b]efore and during the marriage, the appellant preyed on [the deceased's] paranoia and mental infirmity to alienate the decedent from his two children and their families." While the marriage itself was not challenged the will was set aside on the basis of undue influence.

<sup>63</sup> *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.

<sup>64</sup> *Ibid.* at p. 170 – 171

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.<sup>65</sup> In doing so, the court reviewed the common law test (so to speak) for determining the requisite capacity to marry as it developed in England and the subsequent enactment of the statutory test in Australia. While the relevant legal factors differ from those applied in Canada, the facts, are instantly recognizable as those of a predatory marriage.

Mr. Oliver suffered from alcoholism and alcohol related dementia at the time of his first wife's death. The predator spouse in this case took advantage of that and started exerting control over Mr. Oliver. She cancelled his in home care, started looking after his financial affairs, poisoned his opinion of his son, and refused to let him speak with his son or granddaughter, among other things. When the son eventually got through to his father on the phone he was advised that his father was married and that the wedding had already taken place. Earlier that year, the predatory spouse took Mr. Oliver to a doctor who certified Mr. Oliver was of sound mind and capable of making rational decisions and a few days later they attended a lawyer's office and executed a Will (in contemplation of marriage) which left everything to the predator spouse.

When Mr. Oliver fell and broke his hip shortly after the wedding, the public guardian and trustee was appointed as his guardian. Mr. Oliver's granddaughter brought an application under section 113 of the *Family Law*

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<sup>65</sup> *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII)

Act, just prior to his death, for a declaration that the marriage was invalid since Mr. Oliver was mentally incapable of understanding the nature and effect of the marriage ceremony. The Act provided standing to the granddaughter – such standing is not available under Canadian legislation.<sup>66</sup> When Mr. Oliver died, his new spouse did not advise his family.

The Court reviewed judicial commentary on Australia’s capacity to marry, 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 “the marriage” rather than “a marriage”. In my view taken together those matters require more than a general understanding of what marriage involves [emphasis added]. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.<sup>67</sup>

In *Oliver*, Justice Foster found that Mr. Oliver may have been aware that he was participating in a marriage ceremony, or at least some sort of ceremony, but no further.<sup>68</sup> The Court was satisfied that, as at the date of the impugned ceremony, the deceased did not have the requisite capacity

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<sup>66</sup> *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII) at paras. 5 & 6; see also Albert Oosterhoff, “Predatory Marriages” (2013) 33 Estates, Trusts & Pensions Journal 24.

<sup>67</sup> *Oliver*, at para. 202, citing para. 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII).

<sup>68</sup> *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII) at para. 210.

to understand the nature and effect of the marriage and accordingly, a declaration was made that the marriage was invalid.<sup>69</sup>

### **(c) Equitable Remedies to Set Aside a Marriage as Void**

Since contesting the validity of a marriage on the grounds of incapacity is imperfect in approach and result, it has become apparent to the writer that the need to explore other potentially available rights and remedies is imperative to move the legal remedy along so it reflects the reality of today's society, to consider other 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.

#### *Principles for Setting Aside a Contract*

Possible considerations include application of the various principles or rules that are commonly used in contract law to set aside contracts. Such principles include the doctrine of unconscionability, lack of independent legal advice, and inequality in bargaining power.

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party, on grounds which include inequality of bargaining power and accordingly, it would be an improvident bargain that the predator should be entitled to all of the spousal property

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<sup>69</sup> *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII) at para. 213.



and financial benefits that come with marriage.<sup>70</sup> The older adult in such circumstances 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*”,<sup>71</sup> 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.<sup>72</sup>

### *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

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<sup>70</sup> See *Juzumas v. Baron* 2012 ONSC 7220, *Morrison v Coast Finance Ltd.*, 1965 CarswellBC 140 (S.C.J.)

<sup>71</sup> 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.).

<sup>72</sup> *Ross-Scott v. Potvin* 2014 BCSC 435 at para. 73

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 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.<sup>73</sup>

Canadian Courts are rich with decisions analyzing civil fraud 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.<sup>74</sup> The Courts have been reluctant to set aside this type of marriage as a fraud.

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<sup>73</sup> *Bruno v. Hryniak* 2014 SCC 8 at para. 21

<sup>74</sup> 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.)

In *Ianstis v. Papatheodorou*,<sup>75</sup> 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.<sup>76</sup> This case has been cited with approval many times and continues to be considered as the leading case.<sup>77</sup> The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.<sup>78</sup> 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:

[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

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<sup>75</sup> *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

<sup>76</sup> *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.) at pp. 248 and 249

<sup>77</sup> 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.).

<sup>78</sup> *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)

grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]”<sup>79</sup>

The Court’s message, effectively, “*caveat emptor*” – the spouses ought to have conducted their due diligence before marriage.<sup>80</sup> 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 (also known as the tort of deceit), he/she may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar*<sup>81</sup>, 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.”

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<sup>79</sup> *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24

<sup>80</sup> *A.A.S. v. R.S.S.*, 1986 CanLII 822 (BC CA) at para. 25.

<sup>81</sup> *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.<sup>82</sup>

### *Not Benefiting From Wrongdoing*

Yet another tool that could reasonably be applied in attacking the injustice of predatory marriages involves 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. A "wrongdoer cannot benefit from his/ her own wrongdoing" or from the legal maxim *ex turpi causa non oritur actio* (no right of action arises from a base cause). Canadian courts have frequently engaged similar doctrines in the estates context and it is well founded that no murderer can take under the Will or life insurance policy of his victim [*Lundy v. Lundy* 1895 24 SCR 650]. 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,<sup>83</sup> or where a testator was coerced by the beneficiary into a bequest.<sup>84</sup>

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<sup>82</sup> *Raju v. Kumar* 2006 BCSC 439 at para. 72.

<sup>83</sup> *Kenell v. Abbott* 31 E.R. 416]

<sup>84</sup> *Hall v. Hall* (1868) L.R. 1 P.& D. 48]

The legal maxim, *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"<sup>85</sup> or "illegal, wrongful or of culpable immorality"<sup>86</sup> in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing.

In New York, two recent decisions provide a compelling analysis of these concepts and their applicability to predatory marriages. The facts in *In the Matter of Berk*,<sup>87</sup> and *Campbell v. Thomas*,<sup>88</sup> are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult where capacity was at 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" since 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 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

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<sup>85</sup> [*Hardy v. Motor Insurer's Bureau* (1964) 2 All E.R. 742];

<sup>86</sup> [*Hall v. Hebert* 1993 2 S.C.R. 159]

<sup>87</sup> *In the Matter of Berk*, 71 A.D. 3d 710 (2010)

<sup>88</sup> *Campbell v. Thomas*, 897 NYS2d 460 (2010)

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 New York in *Riggs v. Palmer*,<sup>89</sup> 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 through coercion becomes a beneficiary under a Will.

Arguably, such an approach ought to be available in Canada to defend/attack against these predatory entitlements. 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.

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<sup>89</sup> *Riggs v. Palmer*, 115 N.Y. 505,511 [1889]

## **5. Capacity to Co-Habit or Live Together**

Is there a difference in determining capacity to marry and capacity to co-habit or to live with someone? In Canada, there has been no reported decision that examines this issue directly. However, the recent English case of ***PC (by her litigation friend the Official Solicitor), NC v. City of York Council*, [2013] EWCA Civ. 478**, is a good starting point. It asked specifically, “Is the test for capacity to cohabit the same as the test for the capacity to marry?”<sup>90</sup>

In this case, the central issue was whether or not a woman (referred to as PC) had capacity to decide whether or not she could co-habit with her husband. The 48 year old woman was diagnosed with mild learning difficulties, had low IQ scores, and had a troubled childhood and was in and out of the child welfare system. In adulthood she had several negative relationships with men. In 2001 she moved in with her then-boyfriend. However, he was later arrested and convicted of serious sexual offences. The man denied his involvement and the woman believed him and stood by him. They married in 2006 while the man was in prison. He was set to be released in 2012 and the husband and wife wanted to start living together.

The relevant local authority asserted that while the woman had had the capacity to marry her husband, she lacked the capacity to decide to co-habit with him. They argued that the husband was a serious threat to the

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<sup>90</sup> [2013] EWCA Civ. 478 at para.2.



woman because of his violent sexual past. The Court at first instance agreed that she lacked capacity to decide to co-habit. This decision triggered the Court of Protection's jurisdiction under the *Mental Capacity Act 2005*, s.4 [MCA 2005] to determine whether or not it was in the woman's best interest to live with her husband or otherwise have contact with him. The wife and husband appealed the judge's determination on capacity.

The trial judge had concluded that it must be taken that the woman had capacity to marry in 2006 and that she understood the obligations of marriage. However, the trial judge also concluded that the "presumption of capacity" must prevail on all issues in the current case other than her capacity to decide to live with her husband. The trial judge concluded that the woman did "not have the capacity to make the identified decision" and that she was "undoubtedly within section 2(1) requirements" for impairment based on the medical evidence provided: she lacked capacity as she was unable to make a decision for herself "in relation to the matter because of an impairment of, or a disturbance of the mind or brain".<sup>91</sup>

Applying the section 3(1) test (a person is unable to make a decision for herself if she is unable to a) understand the information relevant to the decision, b) retain that information, c) use or weigh that information; or d) communicate her decision) the trial judge was "not satisfied that she is able to understand the potential risk that [her husband] presents to her and that she is unable to weigh the information underpinning the potential risk so as

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<sup>91</sup> MCA 2005 section 2(1).

to determine whether or not such a risk either exists or should be run, and should, therefore, be part of her decision to resume cohabitation.”<sup>92</sup>

On appeal, the main ground of appeal was that the trial judge erred by wrongly applying a *person-specific*, rather than an *act-specific*, test in determining capacity to co-habit.<sup>93</sup> In other words the argument advanced was that the proper test should be act-specific and should consider whether the woman lacks the capacity to decide to co-habit with any person (not whether she has capacity to cohabit with her husband specifically). The Appellate Court concluded that the specific provisions under *MCA 2005* Part 1 provide that the determination of capacity under those provisions is *decision-specific*. Some decisions, such as agreeing to marry or consent to divorce are status or act specific. Other decisions, such as whether someone should have contact with a particular individual, may be person specific:

But all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of *MCA 2005*, ss. 1 to 3 which requires the court to have regard to ‘a matter’ requiring ‘a decision’. There is neither need nor justification for the plain words of the statute to be embellished.<sup>94</sup>

One, capacity to marry, involves understanding matters of status, obligation and rights, the other, contact and residence, may well be grounded in a specific factual context. **The process of evaluation of the capacity to make the decision must be the same, but the factors to be taken into account will differ.**<sup>95</sup>

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<sup>92</sup> [2013] EWCA Civ. 478 at para. 13

<sup>93</sup> [2013] EWCA Civ.478 at para.15.

<sup>94</sup> [2013] EWCA Civ. 478 at para. 35.

<sup>95</sup> [2013] EWCA Civ. 478 at para. 38.

. . . I readily accept that **the evaluation of the capacity to marry and the capacity to cohabit**, and in particular the evaluation of whether any apparent inability to make the relevant decision is 'because of an impairment of, or a disturbance in the functioning of, the mind or brain', **will involve consideration of factors that are very closely related**. On the facts of any particular case, and indeed on the facts of this case, it may be impossible for the court to come to contrary conclusions on these two issues.<sup>96</sup>

The Court concluded that:

. . .this appeal must be allowed. Hedley J found that PC had (or must be taken to have had) capacity to marry in 2006. What does that finding entail? In *Sheffield City Council v E* [2005] Fam 326 Munby J explained: "To have the capacity to marry one must be mentally capable of understanding the duties and responsibilities that normally attach to marriage. What then are the duties and responsibilities that in 2004 should be treated as normally attaching to marriage? In my judgment the matter can be summarized as follows: Marriage, whether civil or religious, is a contract, formally entered into. It confers on the parties the status of husband and wife, **the essence of the contract being an agreement 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 creates a relationship of mutual and reciprocal obligations, typically involving the sharing of a common home and a common domestic life and the right to enjoy each other's society, comfort and assistance.

**Thus, in 2006 PC had the capacity to enter into a contract the essence of which was an agreement to live together with her husband. If she had the capacity to make that promise, she must then have had the capacity to decide to keep her promise. There is no finding of any deterioration in her mental capacity since then.** Nor has there been any relevant change of circumstances, because at the date of the marriage NC had already been convicted and imprisoned.

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<sup>96</sup> [2013] EWCA Civ. 478 at para. 42

I well understand that all the responsible professionals take the view that it would be extremely unwise for PC to cohabit with her husband. But adult autonomy is such that people are free to make unwise decisions, provided that they have the capacity to decide. Like McFarlane LJ I do not consider that there was a solid evidential foundation on which the judge's decision can rest. We must leave PC free to make her own decision, and hope that everything turns out well in the end.<sup>97</sup>

So ultimately according to this case if you have capacity to marry then you likely have capacity to co-habit since cohabitation is one of the duties/requirements of marriage. This is, one would argue, the same in Canada, as Canadian courts have held that cohabitation is part of the decision to marry. See for example in *Banton v. Banton*, where the Court observed: “*the duty to cohabit is inherent in the marriage relationship.*”<sup>98</sup> Or in the case of *Wolfman-Stotland v. Stotland*,<sup>99</sup> where the Court, concerning marriage, observed:

Thus, if the parties are capable of understanding that the relationship is legally monogamous, indeterminate except by death or divorce, **and involved mutual support and cohabitation**, capacity is present.<sup>100</sup>

Nevertheless, one must ask, is it possible to not have the requisite capacity to marry, but still have the capacity to co-habit? There are no reported decisions tackling this issue. However, arguably, capacity to co-habit could well be an even simpler decision than the decision to enter into a marriage.

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<sup>97</sup> [2013] EWCA Civ. 478 at paras. 62-64.

<sup>98</sup> [2013] EWCA Civ. 478 at 225.

<sup>99</sup> *Wolfman-Stotland v. Stotland* 2011 BCCA 175.

<sup>100</sup> *Wolfman-Stotland v. Stotland*, *ibid*, citing Robertson's, *Mental Disability and the Law in Canada* pages 253-254.

As discussed in greater detail below, Justice Benotto in ***Calvert (Litigation Guardian of) v. Calvert***<sup>101</sup> compared the different standards of capacity – to marry, separate and divorce and concluded that “separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live.”<sup>102</sup> In deciding to separate, the individual is forming an intention to live separate and apart. In deciding to co-habit, the individual is forming the intention to live with each other and together. Arguably, the same level of understanding would be required. Unfortunately, there is no reported decision to assist with clarifying this capacity standard.

## **6. Capacity to Separate**

The question of the requisite capacity to separate was addressed in the British Columbia Court of Appeal case of ***A.B. v. C.D.***<sup>103</sup> In that decision, the Court agreed with the characterization of the different standards of capacity and the standard of capacity to form the intention to leave a marriage, set out by Professor Robertson in his text, *Mental Disability and the Law in Canada*.<sup>104</sup> Professor Robertson focuses on the spouse's overall capacity to manage his/her own affairs. This standard, which had also been relied upon by the lower court, is found at paragraph 21 of the Court of Appeal's decision as follows:

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<sup>101</sup> 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 May 7, 1998.

<sup>102</sup> *Calvert*, at para.57

<sup>103</sup> *A.B. v. C.D.* (2009), BCCA 200 (CanLII), leave to appeal to S.C.C. denied October 22, 2009, [2009] 9 W.W.R. 82 [hereinafter *A.B. v. C.D.*]

<sup>104</sup> At page 272.

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 a similar requirement to the requisite capacity to marry, and involves an ability to appreciate the nature and consequences of abandoning the marital relationship.

The Court noted that this standard differs and is less onerous than that adopted in the English decisions of *Perry v. Perry*<sup>105</sup> and *Brannan v. Brannan*<sup>106</sup> which conclude that when a spouse suffers from delusions that lead to a decision to leave the marriage, that spouse lacks the requisite intent to leave the marriage. The Court of Appeal notably preferred Professor Robertson's characterization of capacity to that found in the older English cases, as it prioritized the personal autonomy of the individual in making decisions about his/her life.<sup>107</sup>

In cases where capacity fluctuates or disappears altogether, courts have held that as long as a person had requisite capacity at the time of separation from his/her spouse, and maintained the intention to remain separate and apart from his/her spouse while capable, then the entirety of the separation period could be counted for the purposes of a divorce, even if the person lost capacity during the period of separation.<sup>108</sup>

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<sup>105</sup> [1963] 3 All E.R. 766 (Eng. P.D.A.)

<sup>106</sup> (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.)

<sup>107</sup> *A.B. v. C.D.*, at para.30.

<sup>108</sup> *O. (M.K.) (Litigation Guardian of) v. C. (M.E.)* 2005 CarswellBC 1690 (B.C.S.C.) at para. 40

Recently, the Saskatchewan Court of Queen's Bench reviewed the requisite capacity to separate, among other issues, in the case of ***Babiuk v. Babiuk* 2014 SKQB 320**. In this case, an older adult (after being admitted to the hospital for injuries to her body) was 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). The PGT became her statutory guardian for property. After being discharged from the hospital the older adult resided in a care home and refused any contact from her husband. During a review hearing for her Certificate of Incompetence the wife stated that she had been physically assaulted and intimidated by her husband during her life and that she was afraid of him. She wanted to remain in her care home, separate and apart from her husband. She said she was happy and safe, although she could not name the care home or its address, could not file a tax return on her own and, while she had some knowledge of her financial situation, it was limited.

The PGT brought a petition seeking a division of family property pursuant to *The Family Property Act* and maintenance pursuant to *The Family Maintenance Act*. The husband brought a motion seeking an Order prohibiting the PGT from pursuing a property claim on behalf of his wife. The husband argued that his wife would not want the family property to be divided. The wife however testified in an affidavit that while she forgets most things, she does not forget her life with her husband. She also stated that she would like to have half of her family property and have it managed by the PGT.

The Court noted that the wife may not be capable to manage her financial affairs but that does not mean she was not capable of making personal decisions. The Court cited ***Calvert (Litigation Guardian of) v. Calvert (1997)***, 32 O.R. (3d) 281 (Div. Ct), at 294, *aff'd* (1998), 37 O.R. (3d) 221 (CA), leave to appeal *ref'd* [1998] SCCA No. 161:

Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he/she does not want to live.

The Court in *Babiuk* concluded that:

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. . . There is evidence that [the wife] wants to live in the care home and not with [her husband], and that she wants her half of the family property. . .<sup>109</sup>

The Court dismissed the husband's motion.

## **7. Capacity to Divorce**

It appears that ***Calvert***, cited above, arguably places the threshold for capacity to divorce as somewhat higher than the threshold for capacity to separate. It equates the threshold for capacity to divorce with the threshold for capacity to marry.

[57] Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. **Divorce, while still simple, requires a bit more understanding. It requires the desire to *remain separate***

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<sup>109</sup> *Babiuk v. Babiuk* 2014 SKQB 320 at para.48.



**and to be no longer married to one's spouse. It is the undoing of the contract of marriage.**

Justice Benotto continues, and points to a “simple” test for capacity to marry:

[58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra*, at p. 1427. **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).**

As for the specifics of the factors to be applied in assessing capacity, Justice Benotto favourably refers to the evidence of an expert physician, Dr. Molloy who outlined a case for the requisite factors for determining capacity:

[73] I found the evidence of Dr. Molloy very helpful. Although he, like Drs. Silberfeld and Freedman, did not see Mrs. Calvert, he provided a useful analysis of the evidence and methodology for determining capacity. To be competent to make a decision, a person must:

1. understand the context of the decision;
2. know his/her specific choices; and
3. appreciate the consequences of the choices.

In English case law, the issue of capacity to consent to a decree of divorce is treated in the same manner as all other legally binding decisions. In the England and Wales Court of Appeal decision of *Masterman-Lister v Brutton & Co.*,<sup>110</sup> the Court wrote that “a person must have the necessary mental capacity if he is to do a legally effective act or make a legally effective decision for himself” and citing the decision of *Mason v. Mason*<sup>111</sup> pointed out that this includes consenting to a decree of divorce.

The Missouri Court of Appeal upheld<sup>112</sup> a lower court finding that the wife was capable to commence proceedings for the dissolution of her marriage as she was able to explain the reasons why she wanted the divorce (in spite of having difficulties with dates and events), and because her testimony was consistent with evidence in other legal proceedings. As a result, over the objections of her husband, the Court granted the wife’s request for a divorce.

In *Wolfman-Stotland v. Stotland*<sup>113</sup> the British Columbia Court of Appeal was asked to consider the requisite capacity necessary to form the intention to live separate and apart and divorce. The appellant, Lillian Wolfman-Stotland at 93 years of age had sought a declaration from the British Columbia Supreme Court that there was no reasonable prospect of reconciliation with her 92-year old husband. Mr. Stotland had applied for a medical examination of Mrs. Stotland and Justice Smith of the Supreme

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<sup>110</sup> [2002] EWCA Civ 1889 (19 December 2002) at para. 57.

<sup>111</sup> [1972] Fam 302.

<sup>112</sup> *Szramkowski v. Szramkowski*, S.W.3d, 2010 WL 2284222 Mo.App. E.D.,2010. (June 08, 2010)

<sup>113</sup> 2011 CarswellBC 803, 2011 BCCA 175, [2011] B.C.W.L.D. 3528, [2011] W.D.F.L. 2593, 16 B.C.L.R. (5<sup>th</sup>) 290, 333 D.L.R. (4<sup>th</sup>) 106, 97 R.F.L. (6<sup>th</sup>) 124, 303 B.C.A.C. 201, 512 W.A.C. 201 [hereinafter *Stotland*]

Court had ordered that Mrs. Stotland be examined by a physician with respect to her capacity to instruct counsel, to manage her affairs, her capacity to form the intention to live separate and apart from her husband, and her capacity to “appreciate the nature and consequences of abandoning the marital relationship.”<sup>114</sup>

Somewhat confusingly, the assessing physician found that Mrs. Stotland “likely” had the capacity to instruct counsel in respect of the divorce; but did not have the capacity to manage her property; nor did she have the capacity “to form the intention to live separate and apart from her husband;” however, he did find that she had the capacity “to appreciate the financial nature and consequences of abandoning her marital relationship.”<sup>115</sup>

The Chambers judge found, even more confusingly, in spite of the conclusion that Mrs. Stotland had capacity to instruct counsel, that she lacked the necessary capacity required to obtain the declaration she sought.

The Court of Appeal overturned the Chambers judge’s finding, and concluded that the judge “erred in law in the formulation and application of the proper test of the capacity necessary to form the intention to live separate and apart.”<sup>116</sup>

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<sup>114</sup> *Ibid.* at para. 12

<sup>115</sup> *Ibid.* at para. 14

<sup>116</sup> *Supra* note 113 at para. 21

The Court of Appeal referred to the decisions in *AB v. CD*, and *Calvert*, above, and referred favourably to Professor Robertson's *Mental Disability and the Law in Canada* and in particular cited the following passage from pages 253 to 254 of the book, which points to a low threshold for capacity to marry:

In order to enter into a valid marriage, each party must be capable, at the date of the marriage, of understanding the nature of the contract of marriage and the duties and responsibilities which it creates...The test does not, of course, require the parties to be capable of understanding all the consequences of marriage; as one English judge aptly noted, few (if any) could satisfy such a test...the common law test is probably only concerned with the legal consequences and responsibilities which form an essential part of the concept of marriage. Thus, if the parties are capable of understanding that the relationship is legally monogamous, indeterminate except by death or divorce, and involved mutual support and cohabitation, capacity is present. The reported cases indicate that the test is not a particularly demanding one...

The Court of Appeal concluded, based on the authorities that 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."<sup>117</sup>

It is notable in this case, however, that there was a finding that the appellant was capable of instructing counsel, and of appreciating the financial consequences of a divorce. In fact, therefore there was evidence

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<sup>117</sup> *Ibid.* at para. 27

that she understood and appreciated the ramifications of a separation and divorce, such that her capacity was *not* so low.

In the brief decision of ***Anderson v. Anderson* 2012 BCSC 11** a husband applied for a declaration pursuant to s.57 of the (then in force) *Family Relations Act*, R.S.B.C. 1996, c. 128 (the “*FRA*”) that he and his wife have no reasonable prospect of reconciliation.

The wife opposed the application stating that she believes her husband’s children were behind this application and that they were unduly influencing an elderly, ill man with the goal of preserving as much of his estate for them as they could should he die.<sup>118</sup> The wife was 55 and the husband was 85 years old. The husband says he moved to another residence because he no longer wanted to continue in a marriage relationship with his wife. He denies influence from his children. The wife had previously brought a claim asking for reapportionment of family assets in her favour, notably that she have beneficial ownership of the family home. The husband had severed the joint tenancy prior to the commencement of the action. The wife argued she would be prejudiced in her claim if a s.57 *FRA* declaration is made and that she would be prejudiced by no longer being a spouse with respect to rights she may have to some of his pensions.

The Court found that:

there is insufficient evidence with respect to any possible prejudice to deny to the respondent the declaration to which he is otherwise entitled in law (see *Wolfman-Stotland v. Stotland*, 2011 BCCA 175) on the facts of this case. By that I mean that I am satisfied that the parties have been

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<sup>118</sup> 2012 BCSC 11 at para. 2.

living separate and apart since May 2010 and that it was the independent intention of the respondent to do so and to not continue in his marriage to the claimant. He made this even more plain when he subsequently took action to sever their joint tenancy of the matrimonial home.<sup>119</sup>

The Court also noted that as the husband was “elderly and in poor health” should he die before the claim by the wife was dealt with by the Court, an administrator ad litem would be permitted to carry on the action for the determination and division of family assets pursuant to the declaration of irreconcilability.<sup>120</sup>

### **(a) Setting Aside a Divorce Judgment**

If a person lacked the requisite capacity to divorce, but a divorce judgment was granted, arguably the judgment can be set aside for lack of capacity.

In *Piwniuk v. Piwniuk*<sup>121</sup> a divorce judgement was set aside as the action should have been brought by the wife’s guardian and not the wife herself as she was incapable of seeking a divorce. The wife had suffered from a brain aneurysm and had difficulties communicating, processing and learning new information, understanding or formulating abstract concepts and had troubles with her memory.<sup>122</sup> A guardianship order was sought and granted for the wife and the order named her mother as guardian. Pursuant to s. 10 of the *Dependent Adults Act*, the mother had the power and authority to “commence, compromise or settle any legal proceeding that does not relate to the estate of the dependant adult. . .”<sup>123</sup> However, despite

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<sup>119</sup> 2012 BCSC 11 at para.6.

<sup>120</sup> 2012 BCSC 11 at para.5.

<sup>121</sup> 1992 CanLII 6213 (ABQB).

<sup>122</sup> 1992 CanLII 6213 (ABQB) at para.3.

<sup>123</sup> *Dependant Act*, s.10

this, the wife filed and pursued the petition for divorce. The Court set aside the divorce judgement finding that the divorce action should have been brought by the wife's guardian on behalf of the wife. The court found that this was "more than a minor irregularity" and the appeal was allowed and the divorce was set aside.<sup>124</sup>

Other than on the ground of incapacity, a party could potentially attempt to seek the setting aside of divorce judgement on the equitable remedies set out above under "Capacity to Marry". For example, one could argue that the divorce judgement was obtained by fraud, mistake, or *non est factum*, etc.. Each of these remedies and the so called tests to be met are set herein. While in Ontario, Rule 15(14) of the *Family Law Rules* only allows a court to "change" a divorce order, rather than set one aside, there may be a possibility of setting aside an order by analogy to the *Rules of Civil Procedure* according to the Divisional Court in *Diciaula v. Mastrogiacono*, 2006 CanLII 11928 (ON SCDC). Under Rule 59.6 of the *Rules of Civil Procedure* an order can be set aside for fraud.

## **8. Role of the Litigation Guardian**

If someone is incapable, can someone else file for divorce on the incapable person's behalf?

In civil or family law proceedings, when a party is considered to be a "party under disability" it will be necessary to have a litigation guardian appointed

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<sup>124</sup> 1992 CanLII 6213 (ABQB) at para. 17

(formerly referred to as “next friend” or “guardian *ad litem*”) to act on behalf of the party under disability. The purpose of a litigation guardian is to ensure that the party under disability has a representative to act on their behalf.

In the case of ***M.K.O. (by his Litigation Guardian T.O) v. M.E.C. 2005 BCSC 1051*** the plaintiff, through his litigation guardian – his son from a first marriage - sought a divorce based on a one-year separation and sought a division of family assets. The wife opposed the divorce stating that while they had been physically separated for over one year, neither of them had expressed a genuine intention to end their relationship. She argued that her husband was incapable of forming such an intention because he suffered from Alzheimer’s disease. The couple’s physical separation began when the wife placed her husband in a long-term care facility, and his son arranged for him to be released into his care. The husband had been living with the son ever since.

There were issues of alcoholism, Alzheimer’s, and alleged physical abuse and altercations between the husband and wife. When the husband was admitted to a hospital, the wife applied to be appointed Committee of her husband. The son counter-petitioned and was appointed Committee of the person and affairs of his father. Shortly thereafter the son filed the original writ of summons on behalf of his father as litigation guardian. Section 6(6) of the BC Rules of Court provide that: “*Where a person is appointed committee, that person shall be the litigation guardian of the patient in any proceeding unless the court otherwise orders*”



The Court noted that there are no common law principles and no provisions in the *Rules of Court*, the *Patients Property Act* or the *Divorce Act* prohibiting a litigation guardian from initiating a divorce proceeding. Nevertheless, the court noted that an action for divorce raises issues of status and posed the question: may a Committee initiate such an action involving status?

The Court concluded that:

I conclude that T.O., as Committee of the person and affairs of M.O., has the necessary status to commence and conduct these divorce proceedings. As emphasized in *Beadle*, however, **he must demonstrate that the proceedings are in his father's best interests. As well, he has the onus of proving the requirements of the *Divorce Act*.**

**In the case of a patient who lacks capacity, however, it is not necessary to show a current intention.** If M.O. had the intention to live separate and apart from M.C. and maintained that intention while he was still competent, then the finding of a one-year separation would still be possible even if he later became incompetent: see *Calvert (Litigation Guardian of) v. Calvert (1997)*, 27 R.F.L. (4th) 394 (Ont Gen. Div), aff'd 36 R.F.L. (4th) 169 (Ont C.A.).[emphasis added]<sup>125</sup>

There was a great deal of conflicting evidence of whether the husband ever expressed a clear intention to divorce or to live separate and apart from his wife. The Court concluded that the son did not establish on a balance of probabilities that his father had capacity to form or formed the intent to live

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<sup>125</sup> 2005 BCSC 1051 at para. 40.

separate and apart from his wife, or similarly, to divorce her. No divorce was therefore granted.

In **Calvert**, the Ontario Superior Court of Justice also examined the role of a litigation guardian in a divorce proceeding. The husband in this case contended that his wife did not have the requisite mental capacity to form the intention to separate from him and thus was not entitled to an equalization payment. He also argued that her appointed litigation guardian could not pursue a divorce on her behalf and that the litigation guardian was being derelict in his duties. The Court however confirmed that a divorce can be pursued by a litigation guardian pursuant to Rule 7.01 of the *Rules of Civil Procedure* and the cases of *Mordaunt v. Moncreiffe* (1874), L.R. 2 Sc & Div. 374 and *Boswell v. Boswell*, [1951] 2 D.L.R. 847 (Alta S.C.). The Court opined that the litigation guardian fulfilled his duties properly as: he “gave instructions” “which not only clarified the issues but resulted in an early trial date”; he “diligently pursued the best interests of Mrs. Calvert in the litigation, namely her entitlements to a substantial equalization payment”.<sup>126</sup>

In **Babiuk**,<sup>127</sup> (referenced above) the husband argued that the PGT could not pursue a property claim on behalf of his wife. The PGT had become statutorily obliged to act as the wife’s property guardian after she was certified incompetent to manage her assets/estate. There was an appeal of this decision and on appeal the review panel agreed that the issuance of

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<sup>126</sup> 1997 CanLII 12096 (ONSC).

<sup>127</sup> *Babiuk v. Babiuk* 2014 SKQB 320.

the Certificate of Incompetence was warranted. No application for personal guardianship was raised by the family. The PGT sought a division of family property pursuant to *The Family Property Act*, ss 1997, c F-6.3 and maintenance pursuant to the *Family Maintenance Act*, 1997, ss 1997, c F-6.2.

The husband argued that the PGT could not pursue a property claim on his wife's behalf. He relied on *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, [2002] 2 S.C.R. 417, 2002 SCC 38 and certain sections of the *Public Guardian and Trustee Act*, SS 1983, c P-36.3. In *Gronnerud*, the Supreme Court of Canada had concluded that the two children who had been appointed as litigation guardians for their incapacitated mother and who had commenced matrimonial property proceedings on her behalf were in a conflict of interest and did not have the necessary indifference to act as litigation guardians. The Supreme Court of Canada replaced the litigation guardians with the PGT pursuant to *The Adult Guardianship and Co-Decision-Makers Act*.

However, in *Babiuk*, unlike in *Gronnerud*, the property division application was brought by the authority given to the PGT by the *Public Guardian and Trustee Act* exclusively:

This application does not present a situation with the factors necessary to prohibit the PGT from proceeding with the action for family property division on [the wife's] behalf. The Legislature has chosen to provide the court with jurisdiction to impose limitations and restrictions on property guardians and property decision makers when the matter is brought before the court for its determination pursuant to *The Adult Guardianship and Co-decision-makers Act*.

However, when the matter is not placed before the court for that determination, and the **PGT is appointed as property guardian purely by operation of *The Public Guardian and Trustee Act*, ss. 29(6) and 30 of that Act do not provide the court with the authority to place a limitation prohibiting the PGT from pursuing a property claim in its role as property guardian so appointed. Nor has it been shown in this case that any other basis, founded on the best interests of [the wife], exists such that interference with the exercise of the mandate of the PGT as property guardian in the way requested is warranted.**<sup>128</sup>

Furthermore, the Court noted that the facts in *Babiuk* could be distinguished from those in *Gronnerud*. In *Gronnerud* there was evidence that the Supreme Court of Canada found compelling in that the clear desire of the dependent adult was *not* to break up the family farm which had been intended to go to one son who was particularly close to the dependent adult. In *Babiuk*, the wife had testified that she wanted to pursue the property claim.<sup>129</sup>

The following can be gleaned from the cases above:

- A litigation guardian can seek a divorce on behalf of an incapacitated person;
- The litigation guardian must show that the proceedings are in the best interests of the incapable person; and
- The litigation guardian has the onus of proving the requirements for divorce pursuant to the *Divorce Act*.

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<sup>128</sup> *Babiuk v. Babiuk* 2014 SKQB 320 at para.60.

<sup>129</sup> *Babiuk v. Babiuk* 2014 SKQB 320 at para. 42.

In Australia, the leading case discussing the role of a litigation guardian or ‘case guardian’ in a divorce proceeding is ***Underwood v. Price* [2009] FamCAFC 127**. In this case, a terminally ill man sought a divorce from his wife. It was a matter of “common fact” that it was his wish that he wanted a divorce and he communicated this fact to his daughter.<sup>130</sup> The husband lapsed into a coma and his daughter sought, and was appointed, case guardian for her father pursuant to an enduring financial power of attorney.

The daughter was appointed as case guardian and the divorce was granted on an expedited basis. The man died the next day. The wife appealed the divorce on multiple grounds including that the appointment of the case guardian should be set aside as there was a conflict of interest between the husband and daughter since the daughter had something to gain from the divorce. She also argued that the divorce should not have been granted on an expedited basis and if the appointment of the case guardian was set aside, then the divorce order would be *void ab initio*.

The wife argued that an attorney cannot make an application for divorce as what is required is a matter of intention and a decision that only a party to a marriage can make. The Court found that:

No authority was provided for the proposition that a case guardian may not bring an application for divorce. There is no reason why the role of the case guardian should be so limited. In addition, in this case it is quite clear that during the period prior to the husband being unable to manage his affairs an application for divorce was made by him. There is no doubt that the husband communicated to the wife on

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<sup>130</sup> [2009] FamCAFC 127 at para.42.

3 April 2007 that the marriage was at an end and that he wished a divorce.<sup>131</sup>

In concurring reasons, Justice Boland and Justice Ryan referred to a number of decisions where English Courts had dealt with applications by a guardian *ad litem*, generally on behalf of persons suffering a mental disability, for the disabled person's marriage to be dissolved.<sup>132</sup> The Justices observed:

Not surprisingly, given the aging demographics of the Australian population, and increasing incidence of dementia necessitating nursing home care (see *Australian Institute of Health and Welfare 2008*, Australia's health 2008, Cat. No. AUS 99, Canberra: AIHW at [216] – [218]), the Family Court and the Federal Magistrates Court have, in recent years, dealt with applications brought by case guardians seeking either divorce orders or a decree of nullity where one party to the marriage is suffering mental incapacity.

These cases throw into sharp focus what we perceive to be the crucial element in considering whether a case guardian can bring an application for divorce for the disabled party. **That is, can the case guardian establish that a party to the marriage had the requisite intention to bring the marriage to an end?** [emphasis added]<sup>133</sup>

In the *Underwood*, the Justices concluded that:

We are satisfied it was an uncontroverted fact that the husband had formed an intention to bring the marriage to an end which he conveyed to the wife on 3 April 2007.<sup>134</sup>

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<sup>131</sup> [2009] FamCAFC 127 at para. 96

<sup>132</sup> [2009] FamCAFC 127 at para. 129.

<sup>133</sup> [2009] FamCAFC 127 at para. 135-136

<sup>134</sup> [2009] FamCAFC 127 at para. 141.

. . .therefore. . .the rules permit a case guardian to bring an application for divorce. But such an application will be nugatory unless the case guardian can satisfy the Court that the marriage has irretrievably broken down by demonstrating that the applicant, whom the case guardian represents, had the requisite intention to bring the marriage to an end and had lived separately and apart for 12 months prior to the filing of the application. **Further, if the case guardian can lead evidence which proves the respondent has demonstrated the requisite intent, and lived separately and apart for the requisite period, that evidence can be relied on by the case guardian acting on behalf of the applicant disabled person for a divorce order.** (see *Pavey & Pavey* (1976) FLC 90-051, *Todd & Todd* (No 2) (1976) FLC 90-008 and *Falk & Falk* (1977) FLC 90-247)<sup>135</sup>

However, the Justices also noted that the circumstances in which a court will be satisfied on evidence presented by a case guardian that a marriage has irretrievably broken down are likely to be rare. This was one of the rare cases.<sup>136</sup>

In another Australian case, that of ***McKenzie v. McKenzie* [2013] FCCA 1013**, the parties were married and commenced living separate and apart on May 1, 2001. There were no periods of reconciliation and the parties had no contact. In October 2001, the wife approached her mother to assist with getting a divorce. She needed her mother's assistance as she suffered from a mild disability at that time. The wife underwent surgery in March 2012 and sustained a brain injury. The mother, sister and brother were the wife's Guardians and Administrators. The mother was appointed as the wife's litigation guardian and filed an application for divorce.

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<sup>135</sup> [2009] Fam CAFC 127 at para 145.

<sup>136</sup> [2013] FCCA 1013 at para. 163.

The medical evidence from the wife’s doctor included:

Overall while Ms. McKenzie consistently communicated a desire to seek a divorce, even with specific coaching where Ms. McKenzie was told the correct answers several times, she could not demonstrate adequate understanding of the nature and effect of the divorce processes or proceedings.<sup>137</sup>

The Court found that the wife “was no longer able to manifest, through her cognitive ability, a desire to separate”. However, she had over the preceding nine month period, clearly demonstrated a desire to separate from her husband. While the applicable act required the parties to be living separate and apart for 12 months, the Court found that the “nine months that the wife lived separately and apart when she had the cognitive capacity to understand her actions, satisfied the requirement that the marriage has broken down irretrievably”.<sup>138</sup>

## **9. Rules of Professional Conduct and Capacity**

The Rules of Professional Conduct<sup>139</sup> provide some guidance to the lawyer facing clients with potential capacity challenges. Rule 3.2-9 provides that a lawyer in dealing with a client who may have compromised capacity, is required to maintain as much of a regular solicitor-client relationship as is possible. This presumes that the client in question has the requisite capacity to retain and instruct counsel such that the lawyer may be retained

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<sup>137</sup> [2013] FCCA 1013 at para.22.

<sup>138</sup> [2013] FCCA 1013 at para. 24.

<sup>139</sup> The LSUC Rules of Professional Conduct, Amendments current to October 2014.



to act on his/her behalf. The Rules also contemplate a scenario where subsequent to the retainer, a client is no longer able to give capable instructions at which point, the lawyer ought to seek alternate representation for the incapable person by for example a litigation guardian or the Public Guardian and Trustee.

Rule 3.2-9 and the accompanying commentary provide as follows (with emphasis added):

### **3.2 QUALITY OF SERVICE**

...

#### **3.2-9 Client with Diminished Capacity**

When a client's ability to make decisions is impaired because of minority, mental disability, or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal lawyer and client relationship.

#### **Commentary**

[1] A lawyer and client relationship presupposes that the client has the requisite mental ability to make decisions about his or her legal affairs and to give the lawyer instructions. A client's ability to make decisions, however, depends on such factors as his or her age, intelligence, experience, and mental and physical health, and on the advice, guidance, and support of others. Further, a client's ability to make decisions may change, for better or worse, over time.

[1.1] When a client is or comes to be under a disability that impairs his or her ability to make decisions, the impairment may be minor or it might prevent the client from having the legal capacity to give instructions or to enter into binding legal relationships. Recognizing these factors, the purpose of this rule is to direct a lawyer with a client

under a disability to maintain, as far as reasonably possible, a normal lawyer and client relationship.

[2] [FLSC – not in use]

[3] A lawyer with a client under a disability should appreciate that if the disability of the client is such that the client no longer has the legal capacity to manage his or her legal affairs, the lawyer may need to take 21 steps to have a lawfully authorized representative appointed, for example, a litigation guardian, or to obtain the assistance of the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer to protect the interests of the client. In any event, the lawyer has an ethical obligation to ensure that the client’s interests are not abandoned.

The Rule requiring maintaining a normal solicitor-client relationship with a client who may have some capacity challenges would also require that a lawyer be bound by the Rule respecting confidentiality. The Commentary in respect of Rule 3.3 (Confidentiality) provides that the duty of confidentiality is owed “to every client without exception.”

Rule 3.3-1 provides as follows:

### **3.3 CONFIDENTIALITY**

#### **Confidential Information**

3.3-1 A lawyer at all times shall hold in strict confidence all information concerning the business and affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless,

a) expressly or impliedly authorized by the client;

- b) required by law or by order of a tribunal of competent jurisdiction to do so;
- c) required to provide the information to the Law Society; or
- d) otherwise permitted by rules 3.3-2 to 3.3-6.

### **Commentary**

[1] A lawyer cannot render effective professional service to the client unless there is full and unreserved communication between them. At the same time, the client must feel completely secure and entitled to proceed on the basis that, without any express request or stipulation on the client's part, matters disclosed to or discussed with the lawyer will be held in strict confidence.

[2] This rule must be distinguished from the evidentiary rule of lawyer and client privilege concerning oral or documentary communications passing between the client and the lawyer. The ethical rule is wider and applies without regard to the nature or source of the information or the fact that others may share the knowledge.

[3] A lawyer owes the duty of confidentiality to every client without exception and whether or not the client is a continuing or casual client. The duty survives the professional relationship and continues indefinitely after the lawyer has ceased to act for the client, whether or not differences have arisen between them. ...

The issue of confidentiality and older adults can be challenging. Often older adults have family members who are highly involved with and assist them. To the extent that a practitioner represents a client, whether an older adult or otherwise, he/she is required to adhere to the duty of confidentiality, except in cases where the client instructs the lawyer to divulge information to particular individuals. It is essential, when dealing with a client to ensure that their rights are not compromised because of their age, despite the otherwise possibly well-meaning intentions of family members or other individuals.

Rule 3.7 requires a lawyer to only withdraw from representing a client “for good cause.” If a lawyer has ascertained that a client is capable of instructing the lawyer, and undertaking the particular transactions, then the lawyer should continue to act. As for situations where capacity later becomes an issue, there are options short of withdrawal, including seeking a litigation guardian (as set out in Rule 2.02 (6)). Rule 3.7-1 provides as follows:

### **3.7 - WITHDRAWAL FROM REPRESENTATION**

#### Withdrawal from Representation

3.7-1 A lawyer shall not withdraw from representation of a client except for good cause and on reasonable notice to the client.

#### Commentary

[1] Although the client has the right to terminate the lawyer-client relationship at will, the lawyer does not enjoy the same freedom of action. Having undertaken the representation of a client, the lawyer should complete the task as ably as possible unless there is justifiable cause for terminating the relationship.

[2] An essential element of reasonable notice is notification to the client, unless the client cannot be located after reasonable efforts. No hard and fast rules can be laid down about what will constitute reasonable notice before withdrawal and how quickly a lawyer may cease acting after notification will depend on all relevant circumstances. Where the matter is covered by statutory provisions or rules of court, these will govern. In other situations, the governing principle is that the lawyer should protect the client's interests to the best of the lawyer's ability and should not desert the client at a critical stage of a matter or at a time when withdrawal would put the client in a position of disadvantage or peril.

[3] Every effort should be made to ensure that withdrawal occurs at an appropriate time in the proceedings in keeping with the lawyer's obligations. The court, opposing parties and others directly affected should also be notified of the withdrawal.

### Optional Withdrawal

3.7-2 Subject to the rules about criminal proceedings and the direction of the tribunal, where there has been a serious loss of confidence between the lawyer and the client, the lawyer may withdraw.

### Commentary

[1] A lawyer may have a justifiable cause for withdrawal in circumstances indicating a loss of confidence, for example, if a lawyer is deceived by their client, the client refuses to accept and act upon the lawyer's advice on a significant point, a client is persistently unreasonable or uncooperative in a material respect, there is a material breakdown in communications, or the lawyer is facing difficulty in obtaining adequate instructions from the client. However, the lawyer should not use the threat of withdrawal as a device to force a hasty decision by the client on a difficult question.

...

### Mandatory Withdrawal

3.7-7 Subject to the rules about criminal proceedings and the direction of the tribunal, a lawyer shall withdraw if

- (a) discharged by the client;
- (b) the client's instructions require the lawyer to act contrary to these rules or by-laws under the *Law Society Act*; or
- (c) the lawyer is not competent to continue to handle the matter.

Rule 5.1 requires that a lawyer act honestly and ensure fairness in representing clients. This holds for clients who have potential capacity challenges as well:

## **SECTION 5.1 – THE LAWYER AS ADVOCATE**

5.1-1 When acting as an advocate, a lawyer shall represent the client resolutely and honourably within the limits of the law while treating the tribunal with candour, fairness, courtesy, and respect.

### Commentary

[1] Role in Adversarial Proceedings – In adversarial proceedings, the lawyer has a duty to the client to raise fearlessly every issue, advance every argument, and ask every question, however distasteful, which the lawyer thinks will help the client's case and to endeavour to obtain for the client the benefit of every remedy and defence authorized by law. The lawyer must discharge this duty by fair and honourable means, without illegality and in a manner that is consistent with the lawyer's duty to treat the tribunal with candour, fairness, courtesy and respect and in a way that promotes the parties' right to a fair hearing where justice can be done. Maintaining dignity, decorum and courtesy in the courtroom is not an empty formality because, unless order is maintained, rights cannot be protected. . .

While clients with potentially compromised capacity pose challenges for their lawyers, a lawyer who acts for a client is still required to abide by all the duties as set out in the *Rules of Professional Conduct*.

## **10. Concluding Comments**

Put simply, the requisite factors for establishing the capacity to divorce, like the requisite criteria for the capacity to marry, and the requisite criteria for

the capacity to separate at common law and rightly, or wrongly, appears to be based on whether the person in question has an ability to appreciate the nature and consequences of the act, and in particular the fact that the act taken is legally binding.

However, as the law on the requisite capacity to marry is evolving, so must the law on the requisite capacity to divorce, and perhaps the requisite capacity to separate or even co-habit. This is an area worthy of tracking as the law continues to develop in light of the financial considerations raised in both marriage and divorce, the development of property rights and attendant legislative changes.

*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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