“PREDATORY MARRIAGES AND THE CAPACITY TO MARRY”

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INTRODUCTION:[1]

Current and evolving statistics confirm that our population is aging and doing so, rapidly. With age and longevity can come an increase in the occurrence of medical issues affecting cognitive executive functioning. Certain diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, related cognitive disorders and other conditions involving reduced functioning and capability also become more prevalent with age.[2] There are a wide variety of disorders that affect decisional capacity and in turn, increase an individual's susceptibility to becoming vulnerable and dependent. Factors affecting decisional capacity can include, normal aging, disorders such as depression, which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.[3] These sorts of issues unfortunately invite the opportunity for abuse, elder abuse, and exploitation.

Civil marriages are solemnized with increasing frequency when one party to the marriage is decisionally incapable of understanding, appreciating, and formulating a choice to marry.[4] Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the "predatory marriage".[5] This has not been a term that is in common use, though it has certainly been gaining popularity through media references now, even in other countries. Given that marriage brings with it a wide range of property and financial entitlements, it does effectively capture the classic situation when one person marries another of limited capacity solely in the pursuit of these financial advantages that come with the union of marriage.[6]

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[1] Authored by Kimberly A. Whaley, Principal of WEL Partners. Paper and analysis updated herein March 2022 and again in February 2023 for Professor Nimali Gamage's course on Elder Law at the Osgoode Hall School of Law.
[2] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70. http://www.canadalawbook.ca.
[3] *Ibid* at 1.
[4] *Ibid*.
[5] *Ibid*.
[6] *Ibid*. at 70.

The overriding problem with such marriages today, is that they are still not easily challenged. The current standard or factors to be applied for ascertaining the requisite "capacity to marry" as developed at common law are anything but rigorous. Consequently, requisite capacity is often found by a court, even in the most obvious cases of exploitation. Predatory and exploitive marriages are more likely than not to withstand challenge because the common law has not kept pace with the reality of the current property rights legislative regime. While some refer to a "test" when speaking of the consideration of factors to be applied to determine requisite decisional capacity to marry, it is important to note that this is a colloquial or lay term only. There is no "test" per se, but rather there are often factors or a standard referenced in case precedent to be applied to determine requisite decisional capacity to marry.

This paper, despite its length, is but a snapshot of the many critical issues, both legal and public policy related, arising from predatory relationships. Those interested in learning more about this topic may wish to refer to ***Capacity to Marry and the Estate Plan*****, Canada Law Book,** co-authored by Kimberly Whaley et al., http://www.canadalawbook.ca/Capacity-to-Marry-and-the-Estate-Plan.html[7], "**Predatory Marriages**" (2013) by Albert H. Oosterhoff and "**Predatory Marriages - Equitable Remedies**" (2015) by Kimberly Whaley and Albert H. Oosterhoff.[8]

This paper is by no means exhaustive in its approach or content. The subject matter is broad, and a mere overview of some of the many developing patterns across Canada and beyond are considered, while focusing primarily on the specific challenges arising out of predatory relationships and the requisite decisional capacity to marry.

[7] *Supra* note 2.
[8] Albert H. Oosterhoff, "Predatory Marriages" (2013), 33 ETPJ 24, Kimberly Whaley and Albert H. Oosterhoff, "Predatory Marriages – Equitable Remedies" (2014), 34 ETPJ 269.

CAPACITY TO MARRY AND PREDATORY MARRIAGES

1. What is Capacity?

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

1. Giving instructions for and execution of a Will or trust. In other words, "testamentary capacity";[10]
2. Making other testamentary beneficiary dispositions legislatively defined;[11]
3. Contracting;[12]
4. Managing property;[13]
5. Managing personal care;[14]
6. Granting or revoking an enduring/continuing power of attorney for property;[15]
7. Granting or revoking a power of attorney for personal care;[16]
8. Consenting to treatment decisions in accordance with the *Health Care Consent Act;*[17]

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[9] *Supra* note 2 at 46

[10] Testamentary capacity is set out in *Banks v. Goodfellow* (1870), L.R. 5 Q.B.D. 549 (Eng.Q.B.); *Murphy v. Lamphier* (1914) 31 OLR 287 at 318; and *Schwartz v. Schwartz*, 10 D.L.R. (3d) 15, 1970, CarswellOnt 243 [1970] 2 O.R. 61 (Ont.) C.A. affirmed (1971), 20 D.L.R. (3d) 313, [1972] S.C.R. 150, 1971 CarswellOnt 163 (S.C.C.)

[11] See for example in Ontario under the *Succession Law Reform Act*, RSO 1990, c S 26, "will" includes,
(a) a testament,
(b) a codicil,
(c) an appointment by will or by writing in the nature of a will in exercise of a power, and
(d) any other testamentary disposition. ("testament")

[12] *Hart v O'Connor* [1985] AC1000.

[13] *Substitute Decisions Act,* 1992, S.O. 1992, c.30, as amended, s. 6.

[14] *Ibid.* s.45.

[15] *Ibid*. s. 8.

[16] *Ibid*. s.47.

[17] *Health Care Consent Act*, 1996, SO 1996, c 2, Schedule A, section 41.

9. Gifting or selling property;[18]
10. Instructing/Retaining a lawyer; and,
11. Marrying.

The capacity required to grant a power of attorney for property differs from the capacity required to grant a personal care power of attorney, which differs still from the capacity required to manage or direct the management of one's property or personal care.[19] And, importantly, as the law currently stands, the decisional capacity to marry may exist despite incapacity in other legal decisions or matters.[20]

The relevant time period to assess capacity is the time at which the decision in issue is made.[21] Legal capacity can fluctuate over time.[22] Capacity is situation-specific in that the choices that a person makes in granting a power of attorney or making a Last Will & Testament are considered by a court in its determination of capacity.[23] For example, if a mother appoints her eldest child as an attorney, under a power of attorney, this choice may be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.[24]

Assessing capacity is an imperfect science which further complicates its determination.[25] In addition to professional and expert evidence, lay evidence can also be determinative, if not more so in some situations.[26] The standard and reliability of the capacity

[18] *Archer v. St. John,* 2008 A.B.Q.B. 9; *Pecore v. Pecore* [2007] 1 S.C.R. 795; *Re Beaney (Deceased)* [1978] 1 WLR 770 at 774; *Re Morris (Deceased), Special trustees for Great Ormond Street Hospital for Children v Pauline Rushin* [2000] All ER(D) 598.
[19] *Supra* note 2 at 45
[20] *Ibid.* at 45
[21] *Ibid.* at 46.
[22] *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.) The Ontario Court of Appeal held that a cognitively impaired person can fluctuate between being capable and incapable of granting a power of attorney.
[23] *Supra* note 2 at 48.
[24] *Ibid.*
[25] *Ibid*.
[26] *Ibid*.

assessment conducted varies and this too, can become an obstacle that may need to be overcome in determining capacity with some degree of compelling accuracy.[27]

On this point, a 2011 English High Court of Justice, Queen's Bench Division Judgment[28] *Thorpe v. Fellowes Solicitors LLP*, concerning the capacity of a 77 year old Mrs. Hill to enter into a transaction to sell her home and pay the proceeds to her daughter resulted in the eventual claim brought by her son against Mrs. Hill's solicitor for negligence in failing to check mental capacity, appreciate Mrs. Hill's vulnerability, susceptibility to influence, and, *inter alia*, properly investigate the sale transaction.

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

> *A solicitor is generally only required to make enquiries as to a person's capacity to contract if there are circumstances such as to raise doubt as to his in the mind of a reasonably competent practitioner, see Jackson & Powell at 11-221 and by analogy Hall v Estate of Bruce Bennett [2003] WTLR 827. This position is reflected in the guidance given to solicitors in The Guide to the Professional Conduct of Solicitors (8th edition, 1999), which was in force at the relevant time, where it is said that there is a presumption of capacity, and that only if this is called into question should a solicitor seek a doctor's report (with client's consent) "However, you should also make your own assessment and not rely solely upon the doctor's assessment" (at 24.04).*
>
> *In opening, the Claimant's case was put on the basis that Fellowes* [the solicitors] *ought to have been "more careful" with regard to the sale of the Property because Mrs. Hill was suffering from dementia and did not really know what she was doing. The relevant test where professional negligence is alleged however is not whether someone should have been more careful. The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in his profession: see Midland Bank Trust Co Ltd v Hett Stubbs and Kemp [1979] ch 384 at 403 per Oliver J at 403.*
>
> *I should add (since at least part of the Claimant's case seemed to have suggested, at least implicitly, that this was the case) that there is plainly no duty upon solicitors in general to obtain medical evidence on every occasion upon which they are*

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

> *instructed by an elderly client just in case they lack capacity. Such a requirement would be insulting and unnecessary*. [29]

It should also be noted that despite clear academic acknowledgement within the legal and medical profession that the types of " decisional capacities" identified at law do not fall along a threshold-based hierarchy, in practice (including in cases discussed below[30]) there nonetheless appears to be a tendency to apply such a model.[31] While it is tempting to assume that requisite decisional capacity merely consists of a spectrum, with various decisions requiring higher or lower thresholds in terms of identifying the applicable criteria to ground a finding of incapacity, the reality is that the process at law is much more intricate.[32]

2. Capacity to Marry: Historical Context

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.[33] Yet, at the time of marriage, parties regularly, as a matter of course, fail to consider other relevant facets of the marital union; namely, the obligation to provide financial support, the enforced sharing of equity acquired during the marriage, and the impact it has on the disposition of one's estate.[34]

Currently, in Canada, to enter 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.[35] 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*,[36] which collectively espouse the following principle: "the contract of marriage is

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[29] *Thorpe* at paras 75-77.
[30] See *Babiuk v. Babiuk*, 2014 SKQB 320 (CanLII), *Ross-Scott v. Potvin* 2014 BCSC 435 and *Devore-Thompson v. Poulian* 2017 BCSC 1289.
[31] Kimberly A. Whaley, Kenneth I. Shulman & Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016) Advocates' Q Vol 45 No 4 at 395.
[32] *Supra* note 31 at 419
[33] *Supra* note 2 at 50.
[34] *Ibid.* at 50.
[35] *Ibid.* at 50.
[36] *Durham v. Durham* (1885), 10 P.D. 80 [*Durham*].

a very simple one, one which does not require a high degree of intelligence to comprehend."[37] Current legal treatment perplexingly remains unsettled and given the demographics of our population and those older adults affected by these predatory unions, the law is in immediate need of clarity whether that be legislatively, at common law, or, both.

The Historical Development of Capacity to Marry

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

1. That the factors for determining the requisite decisional capacity to marry are equivalent to those of the requisite capacity to contract;
2. That marriage has a distinct nature of rights and responsibilities which must be able to be appreciated;
3. That the contract of marriage is a simple one, not requiring a high degree of intelligence to negotiate; and,
4. That the factors for determining the requisite capacity to marry are the same as the factors for ascertaining requisite capacity to manage property; or even still that it requires both the requisite capacity to manage the person and property.

Marriage as a Civil Contract

From a review of the old English cases, there emerges a notion that the requisite capacity to marry is equivalent to the capacity to enter a civil contract. Thus, for instance, in the case of *Lacey v. Lacey (Public Trustee of),*[38] the marriage contract is described in the following manner:

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

[37] *Durham* at 82.
[38] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016 [*Lacey*].

> contemplation of children. Were the parties then capable of understanding the nature of the contract they were entering into?[39]

As is evident from *Lacey v. Lacey*, historically, the contract of marriage was considered to be a "simple" one, perhaps relevant at the time and more in line with social norms of that day. This case and the result, is consistent with the case of *Durham v. Durham*, where Sir James, Hannen stated:

> *I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend*.[40]

In the case of *In the Estate of Park, Deceased*,[41] Justice Singleton was faced with deciding as to whether the deceased had the requisite capacity to marry. His articulation of how to determine the validity of marriage was as follows:

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

This decision enumerated a number of other factors to consider but does not provide a definitive criterion to apply. Moreover, starting from the proposition that the contract of marriage is a simple one, Birkett L.J., contributed further as follows:

> *The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite*

[39] *Lacey* at para.3.
[40] *Durham* v. *Durham*, (1885), 10 P.D. 80 at p.82.
[41] *Estate of Park, Park v. Park* [1954] p. 112, C.A.; aff'g, *Park* v. *Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [*Estate of Park*].

> *incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered*.[42]

Karminski J., took the position that there is "a lesser degree of capacity ... required to consent to a marriage, than in the making of a Will."[43] In his view, the determination of a valid marriage is as follows:

> i. *the parties must understand the nature of the marriage contract;*
> ii. *the parties must understand the rights and responsibilities which marriage entails;*
> iii. *each party must be able to take care of his or her person and property;*
> iv. *it is not enough that the party appreciates that he is taking part in a marriage ceremony or that he should be able merely to follow the words of the ceremony; and,*
> v. *if he lacks that which is involved under heads (i), (ii) and (iii) the marriage is invalid...The question for consideration is whether he sanely comprehended the nature of the marriage contract*.[44]

While the Court clearly struggled with developing an appropriate process for determining requisite decisional capacity to marry, it concluded that the capacity to marry is essentially equivalent to the capacity to enter any binding contract.

The case of *Browning v. Reane*[45] concerned a marriage between a woman, Mary Reane, who, at the time of her marriage was 70 years old; her husband 40. The case was heard after the wife had passed away. The court concluded that the marriage was legally invalid by virtue of the fact that the deceased had been incapable of entering into the marriage. In reaching this conclusion, the court addressed the concept of consent and observed the following:

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[42] *Estate of Park* at 1411.
[43] *Estate of Park* at 1425.
[44] *Estate of Park* at 1417.
[45] *Browning* v. *Reane* (1812), 161 E. R. 1080, [1803-13] All E.R. Rep. 265 [*Browning*].

> *A fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination!*
>
> *Since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not be in a lucid interval, was absolutely void." [Mr. Justice Blackstone]*
>
> *Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined, nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy. Complete idiocy, total fatuity from the birth, rarely occurs; a much more common cause is mental weakness and imbecility, increased as a person grows up and advances in age from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either or both causes,* ***that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract,*** *any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances, and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind*.[46]

This decision [as bolded] would later be reviewed and adopted by Ontario courts.

The Distinct Nature of Marriage

There is yet another line of historical cases which suggest that marriage, as an institution, is distinct, and that decisional capacity to marry requires an appreciation of the duties and responsibilities that attach to the union. As such, in the case of *Durham, supra,* the

[46] *Browning* at 1081.

question raised and answered by the court was, "whether or not the individual had capacity to understand the nature of the contract, *and* the duties and responsibilities which it creates?" [emphasis added].

The principle that it is necessary to understand and appreciate the responsibilities which marriage creates, above and beyond an understanding of the nature of marriage as a contract, was then echoed in the case of *Spier v. Spier*,[47] where Willmer J. stated:

> *…it was not sufficient merely to be able to understand the words of the ceremony or even to know that the party was going through a ceremony. There must be capacity to understand the nature of the contract and the duties and responsibilities which it created, and from Browning v. Reane…**there must also be a capacity to take care of his or her own person and property**…But as pointed out in Durham, supra, marriage was a very simple contract which did not require a high degree of intelligence to contract; certainly it did not call for so high a degree of mental capacity as the making of a will*.[48]

Notably, again, the Court seemed to expand its consideration even further and stated that "there must also be a capacity to take care of both his/her own person and property."

The Simplicity of the Marriage Contract

As evinced by the decisions discussed, the courts historically viewed marriage not only as a mere contract, but a simple one at that. Paraphrasing the Court in *the Estate of Park, supra,* "marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend."[49] The Court in *Hunter v. Edney*[50] held the very same view, stating: "no high intellectual standard is required in consenting to a marriage."[51] Notably focusing on consent to the marriage as opposed to decisional capacity to enter into the contract of marriage.

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

Capacity to Marry Considered the Same as Capacity to Manage Property

An alternative view of the requisite decisional capacity to marry can be seen to be evolving in the jurisprudence as was referenced above in the cases of *Browning v. Reane,* and *Spier, supra*. The Court in *Browning v. Reane,* stated that for a person to be capable of marriage, they must be capable of managing their person and their property. Similarly, in *Spier, supra*, the Court stated that one must be capable of managing their property, to be capable of marrying.

Concluding Summary

From a historical perspective, it is apparent that there is no single or complete definition of marriage, or, of the requisite decisional capacity to marry, or even what the consent to marry involves. Rather, on one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that. Yet, on the other end of the spectrum, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property, or both, to enter into a valid marriage.

3. Statutory Requirements

Some, but not all, provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity in order to marry. For example, certain statutes prevent a marriage commissioner from issuing a license to, or solemnizing the marriage of someone known, or with reasonable grounds believe an individual lacks mental capacity to marry,[52] is incapable of giving a valid consent,[53] or who has been certified as mentally disordered.[54]

[52] 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."
[53] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).
[54] *The Marriage Act*, CCSM c. M50.

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 the individual is able to understand the nature of marriage and its duties and responsibilities.[55] In fact, a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered, will be guilty of an offence and liable on summary conviction to a fine.[56]

Section 7 of Ontario's *Marriage Act* prohibits persons from issuing a license to or solemnizing the marriage of any person who, based on what one 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*.[57]

In British Columbia, it is a criminal offence to issue a license for a marriage, or to solemnize a marriage, when 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.[58] The B.C. legislation Act further provides that a caveat can be lodged with an issuer of marriage licenses against the issuing a license to persons named in the caveat.[59] 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.[60] However, there are no reported cases citing section 35 of the B.C. legislation Act, which suggests that offences under this legislation, if they occur, are not prosecuted. The writers have been told, however, by B.C. counsel that this provision is successfully used for protective purposes where predatory marriages are suspected. Discussion with lawyers in British Columbia suggests further, however, that the caveat system, although useful in theory, is not fully

[55] *The Marriage Act*, CCSM c. M50, section 20.
[56] *The Marriage Act*, C.C.S.M. c. M50, sub-section 20(3).
[57] 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."
[58] *Marriage Act*, RSBC 1996 chapter 282, section 35.
[59] *Ibid*, s. 23.
[60] *Ibid*, subsection 23(2).

implemented; we understand that there is no centralized, searchable roster of caveats lodged in the province.

New Brunswick's *Marriage Act* also features a similarly worded *caveat* provision. In Quebec, the Civil Code also allows interested parties to oppose the solemnization or issuing of a marriage to individuals that may lack the mental capacity to do so. Quebec's Civil Code holds that a marriage may be declared null upon the application of an interested person who applies within three years of the solemnization, except where public order is concerned, if the consent of one of the spouses was not "free or enlightened". A complete list of the cross-provincial marriage legislation in Canada accompanies this paper at **Appendix 'A.'**

Where provincial or territorial legislation is silent on this issue of capacity and marriage (Nova Scotia, Prince Edward Island, New Brunswick, and Yukon) 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.

As such, whether by statute or at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid marriage.

Despite the various legislation on commissioning a marriage, it appears there is no diligence in heeding the provisions since marriages continue to be convened where there is no apparent attention paid to capacity and consent.

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

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

Put in context, it is also important to note that in several Canadian jurisdictions, marriage automatically revokes a Will or other testamentary document. An exception applies where there is a declaration in the Will that it is made specifically in contemplation of marriage.[61]

This revocation of a Will upon marriage can raise serious consequential issues when a vulnerable adult marries but lacks the requisite capacity to make a new Will thereafter or even dies before a new Will can be executed.

For example, the vulnerable adult unaware or unable to make a new Will, will die intestate and the predator will likely inherit under provincial intestacy legislation. In Ontario, under the intestacy provisions of Part II of the *Succession Law Reform Act*,[62] when a person dies intestate in respect of property and is survived by a married 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 $350,000.00 and is survived by a spouse and one child, the spouse is entitled to the $350,000.00 absolutely (the "preferential share") and the remaining assets are split ½ to the spouse and ½ to the child. If the deceased had more than one child, the spouse will get the preferential share of $350,000.00, along with one third of the remaining estate funds.

Some provinces have now recognized this inequity as an issue and have enacted legislation to prevent revocation of Wills upon marriage. Marriage does not revoke a Will in Quebec. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage now no longer revokes a Will.[63] British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("WESA") came into force.[64] Under WESA, marriage now no longer revokes a Will. In 2019, Saskatchewan introduced Bill 175, *An Act to amend The Marriage Act, 1995 and to make consequential*

[61] Marriage revokes a will in most provinces except, British Columbia, Alberta, Quebec, Ontario, Saskatchewan, and Yukon. See the *Wills Act*, RSNB 1973, c W-9 (New Brunswick), *Probates Act*, RSPEI 1988, c P-21 (PEI), *Wills Act*, RSNL 1990, c W-10 (Newfoundland), Succession Law Reform Act, RSO c S 26 (Ontario), *The Wills Act*, CCSM c W 150 (Manitoba), *The Wills Act*, 1996, c W-14.1 (Saskatchewan), *Wills Act* RSNWT (Nu), 1988 c W-5 (Nunavut, Northwest Territories), and *Wills Act*, RSY 2002 c 230 (Yukon).
[62] *Succession Law Reform Act*, RSO 1990, c. S. 26, ss.44-49.
[63] *Wills and Succession Act,* SA 2010, c W-12.2.
[64] *Wills, Estates and Succession Act*, SBC 2009 c 13.

amendments to The Wills Act, 1996. Under this act, which received Royal Assent on March 16, 2020, marriage no longer revokes a Will in Saskatchewan. Marriage no longer revokes a Will in Yukon as Bill 12, *Amend the Wills Act, 2020*, came into force on May 1, 2021. Finally, Ontario's Bill 245, *Accelerating Access to Justice Act, 2021*, was tabled in February 2021 and included amendments which repealed the revocation of a Will by marriage. Changes to the *SLRA* came into effect on January 1, 2022. A complete list of cross-provincial revocation of will legislation accompanies this paper at **Appendix 'B.'**

In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily mandated property rights as between spouses. In Ontario, the surviving spouse is entitled to elect and apply to either take pursuant to the intestate succession provisions as set out in the *Succession Law Reform Act (the "SLRA")*, or to elect to receive an equalization payment pursuant to the Ontario *Family Law Act* ("*FLA")*.[65]

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

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

Arguably however, this policy rationale does not really apply to a predatory marriage scenario, with the usual hallmarks including, situations, in which one party is significantly older than the other, holds the bulk, if not all of the property, wealth and finances in the relationship; where there are no children of the union; and where the other party offers

[65] *Family Law Act,* RSO 1990, c F.3

little by way of financial contribution. Such a relationship is not, as the property legislation presumes, an equal contribution partnership, whether financial or otherwise.

As is apparent, in Canada, 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 in spite of any testamentary freedom. For example, Ontario's *SLRA* permits, under Section 58, a spouse to claim proper and adequate support as a dependant of a deceased, whether married, or living common law. Interestingly, in decision of *Blair v. Cooke (Allair Estate),*[66] Belleghem J. determined that two different women, simultaneously spouses of the deceased, were not precluded from both obtaining a support order payable from the Estate.

The inherent difficulty with a predatory marriage is in reconciling the injustice caused to the vulnerable and/or incapable person (and the legitimate heirs, if any), since such unions are not easily challenged. These common law factors employed to determine the requisite capacity to marry have historically been set at a minimal threshold. Common law precedent has simply not kept pace at all with the development of legislation that has been designed to promote and protect property rights.

5. Predatory Marriages/Capacity to Marry: Cross-Canada Look at More Modern Case Law

Predatory marriages are on the rise world-wide, irrespective of country, ethnicity, or culture. There is a pattern that has emerged that makes these types of unions easier to spot. Such unions are usually characterized by one spouse who is significantly advanced in age, and, because of several potentially complicating factors, which range from the loneliness consequent upon losing a long-term spouse, illness, mental incapacity, or dependency, the person is vulnerable, and thus more susceptible to exploitation. These unions are frequently clandestine – with sudden or gradual isolation, alienation and sequestering from friends, family, and loved ones, thus being a tell-tale red flag that the relationship is not as it appears. The following cases address these issues of decisional

[66] *Blair v. Cooke* (Allair Estate) 2011 ONSC 498 (Can LII).

capacity and the "capacity to marry" and involve similar fact situations: *Cadieux v. Collin-Evanoff*,[67] *Hart v. Cooper*,[68] *Banton v. Banton*,[69] *Barrett Estate v. Dexter*,[70] *Feng v. Sung Estate*,[71] *Hamilton Estate v Jacinto,*[72] *A.B. v. C.D.,*[73] *Petch v. Kuivila,*[74] *Ross-Scott v. Potvin,*[75] *Juzumas v. Baron*,[76] *Elder Estate v. Bradshaw*,[77] and most recently, *Asad v. Canada (Citizenship and Immigration*)[78] *Devore-Thompson v. Poulain*,[79] *Hunt v. Worrod*,[80] *Chuvalo v. Chuvalo,*[81]and *Tanti v. Tanti*.[82]

1988 - Cadieux v Collin-Evanoff (Quebec)[83]

In *Cadieux v Collin-Evanoff*, a caregiver secretly married a 75-year-old man dying of colon cancer. She had known him for several years, he had dinner at her house regularly and when he became ill, she looked after him on a remunerated basis. Shortly before the marriage, the older adult executed a new Will leaving everything to his new caregiver wife (marriage does not revoke a Will in Quebec). His previous Will had left his estate to his brothers and sisters. He also executed a marriage contract containing a gift of a building in which the caregiver was a tenant and sold the family home for a price well below market value to someone the caregiver knew.

The older adult's family was not told of his marriage and the only witnesses to the marriage were the two people who had witnessed his new Will, one of whom who was the purchaser of the family home. While the Quebec Superior Court was not asked to

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[67] *Cadieux v Collin-Evanoff*, 1988 CanLII 524 (QCCA)
[68] *Hart v. Cooper,* 1994 CanLII 262 (BCSC).
[69] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244.
[70] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).
[71] *Feng v Sung Estate,* 2003 CanLII 2420 (ONSC)
[72] *Hamilton v. Jacinto*, 2011 BCSC 52 (CanLII).
[73] *A.B.v. C.D.* 2009 BCCA 200.
[74] *Petch v. Kuivila* 2012 ONSC 6131.
[75] *Ross-Scott v. Potvin* 2014 BCSC 435.
[76] *Juzumas v. Baron* 2012 ONSC 7220.
[77] *Elder Estate v. Bradshaw* 2015 BCSC 1266.
[78] *Asad v Canada (Citizenship and Immigration)* 2017 CanLII 37077 (CA IRB).
[79] *Devore-Thompson v. Poulain*, 2017 BCSC 1289.
[80] *Hunt v. Worrod,* 2017 ONSC 7397.
[81] *Chuvalo v. Chuvalo*, 2018 ONSC 311.
[82] *Tanti v. Tanti*, 2020 ONSC 8063.
[83] 1988 CanLII 524 (QC CA)

address whether the older adult had the requisite capacity to marry, the court did however set aside the new Will as well as the marriage contract gift on the grounds of lack of capacity and undue influence. This decision was upheld on appeal.

1994 - Hart v. Cooper (BC)[84]

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

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney*, and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic historical determination of the requisite decisional capacity to marry. Factors which included and rely on the concept of marriage as a "*simple contract"*:

> *A person is mentally capable of entering into a marriage contract only if he/she has the capacity to understand the nature of the contract and the duties and responsibilities it creates. The recognition that a ceremony of marriage is being performed or the mere comprehension of the words employed and the promises exchanged is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into; Durham v. Durham; Hunter v. Edney (otherwise Hunter); Cannon v. Smalley (otherwise Cannon) (1885), L.R. 10 P.D. 80 at 82 and 95. But the contract is a very simple one - - not at all difficult to understand*.[85]

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

> *Where, as here, a marriage has, in form, been properly celebrated, the burden of proving a lack of mental capacity is borne by the party who challenges the validity. What is required is proof of a preponderance of evidence. The evidence must be of a sufficiently clear and definite character as to constitute more than a "mere" preponderance as is required in ordinary civil cases: Reynolds v.*

[84] 1994 CanLII 262 (BCSC).
[85] *Hart v. Cooper,* 1994 CanLII 262 (BCSC) at 9.

Reynolds (1966), 58 W.W.R. 87 at 90-91 (B.C.S.C.) quoting from Kerr v. Kerr (1952), 5 W.W.R. (N.S.) 385 (Man. C.A.).[86]

The Court in this case, did not accept the medical evidence of the husband's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The Court commented that there was no evidence proffered to suggest that the young wife ever profited financially from the current marriage or her previous marriages. Additionally, the Court found that the wife's motivation in marrying was not otherwise relevant to the determination of the husband's mental state at the time of the marriage ceremony. Accordingly, the marriage was upheld as valid, and the Will previously executed remained revoked.

It is difficult to determine from the written reasons in this case whether and to what extent the court considered the allegations of alienation and potentially predatory circumstances that the family asserted. No significant analysis was made by the Court of the allegations of alienation or whether the husband fully understood the financial consequences of marriage or the impact of marriage on his property rights. Consequently, the case makes no advancements in defining the "*duties and responsibilities"* that attach to a marriage contract, nor, what must ultimately be understood by those entering into the contract of marriage. In a consistent application of the historical case law, *Hart v. Cooper* therefore, again, affirms the age-old principle that the contract of marriage is but a simple one.

1998 - Banton v. Banton (Ontario)[87]

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

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[86] *Ibid.*
[87] *Banton v Banton,* 1998, 164 DLR (4th) 176 at 244 [*Banton*].

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

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

Justice Cullity found that Mr. Banton did not have testamentary capacity to make the Wills in 1994 and 1995 and that the Wills were obtained through undue influence. Despite these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the standards or factors to determine requisite testamentary capacity, capacity to manage property, capacity to grant a power of attorney for property, capacity to grant a power of attorney for personal care according to the provisions of Ontario's *Substitute Decisions Act, 1992,* SO 1992, c 30.[88]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[89] Having found that Mr. Banton consented to the marriage,

[88] *Banton.* at para.33.
[89] *Ibid.* at para.136.

the Court found it unnecessary to deal with the questions of whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[90] In reaching this conclusion, Cullity J. importantly, drew a significant distinction between the concepts of "consent" and of "capacity," finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[91]

The Court commenced its analysis of requisite decisional capacity to marry with the "well-established" presumption that an individual will not have capacity to marry unless capable of understanding the nature of the relationship and the obligations and responsibilities it involves.[92] In the Court's view, however, the factors to be met are not particularly rigorous. Consequently, because Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Justice Cullity then turned his attention to whether, in Ontario law, there existed an "additional requirement" for requisite mental capacity to marry:

> *An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in Browning v. Reane (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:*
>
> > *If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person and property by*

[90] *Ibid.* In Canadian law, a marriage may be either void or voidable. It is void if either party lacks capacity to marry, in which case anyone with an interest, such as a child of a previous marriage, or the personal representative has standing to attack the marriage on that ground. In contrast, undue influence and duress render a marriage voidable only. In this case, only the parties have standing to contest the validity of the marriage and only while both parties are living. Other interested persons lack standing, although not all courts seem to be aware of the distinction. See Oosterhoff, Predatory Marriages, *supra*, footnote 2, §3.2.
[91] *Ibid.* at paras. 140-41.
[92] *Banton* at para.142.

> *the matrimonial contract, any more than by any other contract. at pp. 70-1*

> *The principle that a lack of ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in Spier v. Bengen, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:*

> > *There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46*

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

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

Justice Cullity notably found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v. Reane,* appeared to suggest both capacity to manage oneself, as well as one's property was required for the requisite capacity to marry; whereas Willmer J.'s statement in *Re Spier,* could be interpreted as treating incapacity to manage property, by itself, as sufficient to give rise to a finding of incapacity to marry. Notably, Halsbury's statement was not precise on this question either.

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

would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."

Despite articulating what would, at the very least, be a dual standard to be applied for determining decisional capacity to marry (one which requires a capacity to manage one's person *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity held somewhat surprisingly, that Mr. Banton had the capacity to marry Ms. Yassin and declined to find the marriage invalid or void. Justice Cullity made this determination although he found that at the time of Mr. Banton's marriage to Ms. Yassin, Mr. Banton's "*judgment was severely impaired and his contact with reality tenuous*." Moreover, Justice Cullity made his decision expressly "on the basis of *Browning v. Reane*." Notably, earlier in his reasons, Cullity J., stated that *Browning v. Reane* is the source to which the "*additional requirement"* is attributed, which requirement goes beyond a capacity to understand "*the nature of the relationship and the obligations and responsibilities it involves*" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's person *and property*. That said, arguably, in part, the finding can be attributed to evidentiary deficiency. There was no similar expert evidence put forward to the court either in the form of retrospective or commensurate evidence on Mr. Banton's capacity to marry. Justice Cullity may not have had available to him the evidence to be able to consider any other result. This particularly so, given the restricting and limiting common law standard for determining capacity to marry. Perhaps with the appropriate evidence including, if available, medical evidence there could have been a different outcome.

2000 - Barrett Estate v. Dexter (Alberta)[93]

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

[93] 2000 ABQB 530.

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

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

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

A capacity assessment was conducted shortly thereafter, and Mr. Barrett's son brought an application to declare the marriage a nullity based on lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own initiative.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed the marriage was necessary for him to avoid placement in a nursing home (evidence of undue influence). There was evidence

of alienation by Ms. Dexter, including removal by her of family pictures from Mr. Barrett's home and interference by her with planned family gatherings. Ms. Dexter was also accused of speaking for Mr. Barrett and advising him against answering his son's questions and of writing documents on Mr. Barrett's behalf.

Not only were all the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, but they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on his family and estate. On the issue of the capacity to marry, one of the doctors, Dr. Malloy, opined that a person must understand the nature of the marriage contract, the state of previous marriages, and one's children and how they may be affected. Dr. Malloy testified that it is possible for an assessor or the court to set a high or low threshold for this measurement, but that in his opinion, "no matter where you set the threshold, Dwight [Mr. Barrett] failed".[94] In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of *Chertkow v. Feinstein (Chertkow)*[95] which applied the factors set out in *Durham v. Durham*:

> *What must be established is set out in Durham v. Durham (1885 10 P.D. 80) at p. 82 where it is stated that the capacity to enter into a valid contract of marriage is "A capacity to understand the nature of the contract, and the duties and responsibilities which it creates*".[96]

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

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[94] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII) at 71-2
[95] *Chertkow v. Feinstein (Chertkow)*,[1929] 2 W.W.R. 257, 24 Alta. L.R. 188, [1929] 3 D.L.R. 339 (Alta. C.A.)
[96] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82.

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

The Court ultimately held that the plaintiff had proved, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null, and void and the court found it unnecessary to decide the issue of undue influence. More recent decisions seemingly are more focused on the evidence and in particular, medical evidence in the assessment of requisite decisional capacity. Unfortunately. in circumstances where there is often, isolation, alienation, sequestering, there is no medical evidence since the victim is purposely shielded from medical treatment as part of a careful plan to exploit.

2003 - Feng v. Sung Estate (Ontario)[97]

In 2003, five years post *Banton,* Justice Greer advanced the considering factors and application of the law in determining the requisite decisional capacity to marry in *Re Sung Estate*. Mr. Sung, then recently widowed, was depressed and lonely and had been diagnosed with cancer. Less than two months after the death of his first wife, Mr. Sung and Ms. Feng were quickly married without the knowledge of their children or friends. Ms. Feng had been Mr. Sung's caregiver and housekeeper when Mr. Sung was dying of lung cancer. Mr. Sung died approximately six weeks after the marriage. Ms. Feng brought an application for support from Mr. Sung's estate and for a preferential share of his intestate estate. Mr. Sung's children sought a declaration that the marriage was void *ab initio* on the ground that Mr. Sung lacked the capacity to appreciate and understand the consequences of marriage; or, in the alternative, based on duress, coercion and undue influence of a sufficient degree to negative consent.

In rendering her decision, Justice Greer found that the formalities of the marriage were compliant with the provisions of Ontario's *Marriage Act*. In addition, the Court found that

[97] 2003 CanLII 2420 (ONSC)[*Feng*].

the marriage was not voidable, as neither party took steps to have it so declared prior to Mr. Sung's death.[98] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

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

Justice Greer moreover stated, that had she not found that Mr. Sung was unduly influenced and coerced into his marriage, she would have been satisfied on the evidence that Mr. Sung lacked the requisite mental capacity to enter the marriage. In reaching this conclusion, Justice Greer referred to *Banton* and the fact that Justice Cullity had referred to the principle set out in *Spier v. Bengen,* where "the court noted that the person must also have the capacity to take care of one's own person and property." Applying those principles, Greer J., found that the evidence was clear that, at the time of the marriage, Mr. Sung really could not take care of his person. Although Mr. Sung was capable of writing cheques, he was forced to rely on a respirator operated by Ms. Feng. Also, Ms. Feng was, around the time of the marriage, or shortly thereafter, changing Mr. Sung's diapers.

The Court also adopted the factors for determining capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate, supra*: "…a person must

[98] *Feng* at para. 51. See further footnote 93, *supra*, on this point.

understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[99] Since Mr. Sung married Ms. Feng because he had erroneously believed that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and moreover that it required execution by both parties to make it legally effective.

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

The decision of Justice Greer was appealed to the Court of Appeal primarily on the issue of whether the trial judge erred in holding that the deceased did not have the requisite capacity to enter the marriage with Ms. Feng.[100] The Court of Appeal endorsed Justice Greer's decision, although it interestingly, remarked that the case was a close one.

2009 - AB v CD (BC)[101]

In *A.B. v. C.D.*, the British Columbia Court of Appeal considered the question of the requisite decisional capacity to form the intention to live separate and apart. Like the Court below it, the Court of Appeal agreed with the academic comments made by Professor Robertson in his text, *Mental Disability and the Law in Canada,* 2nd ed., (Toronto: Carswell 1994).[102] More specifically, the Court of Appeal agreed with Professor Robertson's characterization of the different standards of capacity and his articulation of the standard of capacity necessary to form the intention to leave a marriage. Professor Robertson's standard focuses on the spouse's overall capacity to manage one's own affairs and is found at paragraph 21 of the Court of Appeal's decision:

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[99] *Feng* at para.62.
[100] *Feng v. Sung Estate* [2004] O.J. No. 4496 (ONCA.).
[101] 2009 BCCA 200 (CanLII).
[102] Robertson, Gerald B. *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at pp.253-54.

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

The Court noted that this characterization differs from the standard adopted in both the English decisions of *Perry v. Perry,*[103] and *Brannan v. Brannan,*[104] which concluded that when a spouse suffers from delusions that govern a decision to leave the marriage, the delusional spouse does not have the requisite intent to leave the marriage. The Court in *A.B. v. C.D*, preferred Professor Robertson's characterization of requisite capacity because it respects the personal autonomy of the individual in making decisions about life.[105]

2011 - Hamilton Estate v Jacinto (BC)[106]

This British Columbia Supreme Court case is yet another decision involving some of the hallmarks of these predatory relationship situations; however, notably in this case, there was no marriage. The Court's analysis of the facts and issues is interesting from the perspective of the predatory aspects of a relationship, short of marriage. Predatory relationships can also result in profit from exploitation.

In this case, Mr. Hamilton was married for 59 years before his wife died in March 2001, at which time he was 81 years old. Within a few months of losing his wife, Mr. Hamilton embarked on a relationship with Ms. Jacinto who was approximately 30 years his junior. The evidence before the Court was that at some point Ms. Jacinto and Mr. Hamilton contemplated marriage, though the marriage never took place.

In 2003, transactions took place that formed the subject matter of the action. Mr. Hamilton was the sole trustee and primary beneficiary of a trust that he set up. He arranged a line of credit, secured by property held in the name of the trust, and paid into the trust's bank

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[103] *Perry v. Perry*, [1963] 3 All E.R. 766 (Eng. P.D.A).
[104] *Brannan v. Brannan* (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div).
[105] *A.B. v. C.D.*, 2009 BCCA 200 (CanLII) at para.30.
[106] *Hamilton Estate v. Jacinto*, 2011 BCSC 52 (CanLII).

account, money to fund the purchase of a house, title to which was registered in Mr. Hamilton and Ms. Jacinto's names as joint tenants with rights of survivorship. Moreover, to facilitate the purchase, Mr. Hamilton opened two joint bank accounts with Ms. Jacinto. At Mr. Hamilton's death in 2004, legal ownership of the monies in the joint account passed to Ms. Jacinto by survivorship, and not to his estate.

Not surprisingly, Mr. Hamilton's children brought an action alleging, *inter alia*, that as the trustee of the trust, he lacked authority to purchase the property using trust assets. They alleged undue influence against Ms. Jacinto and a claim of resulting trust over the joint assets. They also made allegations of incapacity.

The Court considered whether Mr. Hamilton had authority to convert trust assets into non-trust assets. In this regard, the court had to determine Mr. Hamilton's authority as trustee under Washington State Law, the position of Ms. Jacinto, and the interpretation of the trust powers itself. The Court considered the argument of the children that Mr. Hamilton was a man in rapid physical and mental decline and their allegations that he was increasingly confused and forgetful in the last years of his life. There was a great deal of evidence of intent. The Court provided an in-depth analysis of the gratuitous transfer of property including the application of the doctrine of resulting trust to gratuitous transfers in *Pecore v. Pecore.*[107]

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

There was a great deal of evidence of independent witnesses. This evidence tended to refute the allegations that Ms. Jacinto was a "*gold digger*". Mr. Hamilton's solicitor was a witness. Several independent witnesses testified that Mr. Hamilton had shared love and affection for Ms. Jacinto and spoke of their loving and intimate relationship. Relatives of Ms. Jacinto gave evidence. The deceased's solicitor prepared a form of pre-nuptial agreement which had never been entered into, but also tended to refute the allegations

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

of the children that the parties had not contemplated marriage. The Court also considered the conjugal nature of the relationship.

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

The Court was satisfied that the intent of the gift to Ms. Jacinto had been proved and accepted her evidence with respect to the jointly held property. Although the Court noted there were issues of credibility, the issues had no bearing on the evidence given by Ms. Jacinto about the decision that the property be held in joint tenancy, nor as to the nature of their relationship. The Court also took into consideration the fact that the children knew about the real property that had been bought during the Deceased's lifetime and the possibility of marriage. In its thorough analysis, the Court concluded that Mr. Hamilton intended to give a gift to Ms. Jacinto of an interest in joint tenancy in the real property and the joint accounts. The Court determined that the deceased had given the gift freely; that it was an independent act, and one which he fully understood. Moreover, the Court determined that the presumption of resulting trust had been rebutted. The Court was satisfied that the gift was an act of love and an expression of affection. It dismissed and awarded costs to Ms. Jacinto.

2012- Juzumas v. Baron (Ontario)[108]

In *Juzumas v. Baron,* the plaintiff, a vulnerable adult, initially sought a declaration that his marriage to the defendant was nullity and void ab initio, but he did not pursue this claim at trial; instead, he was granted a divorce/dissolution of the marriage. The resulting decision is therefore not a capacity to marry case *per se*, but the facts have all the hallmarks of a predatory marriage. Mr. Juzumas, an older adult, met an individual who, under the guise of "*caretaking*", took steps to fulfill more of the latter part of that noun.

[108] *Juzumas v. Baron*, 2012 ONSC 7220 [*Juzumas*].

The result: an older person was left in a more vulnerable position than that in which he was found.

Mr. Juzumas, the plaintiff in this case, was 89 years old at the time the reported events took place, and of Lithuanian descent with limited English skills. His neighbor described him as having been a mostly independent widower prior to meeting the defendant, a woman of 65 years.[109] Once a "*lovely and cheerful*" gentleman, the plaintiff was later described as being downcast and "downtrodden".[110] The defendant's infiltration in the plaintiff's life was said to have brought about this transformation. The financial exploitation, breach of trust, and precipitation of fear caused by the defendant, are the hallmarks of a predator.

The defendant "*befriended*" the respondent in 2006. She visited him at his home, suggested that she aid with housekeeping, and eventually increased her visits to 2-3 times a week. She did this despite the plaintiff's initial reluctance.[111] The defendant was aware that the plaintiff lived in fear that he would be forced to move away from his home into a facility. She offered to provide him with services to ensure that he would not need to move to a nursing home. He provided her with a monthly salary in exchange.[112]

The defendant ultimately convinced the plaintiff to marry her under the guise that she would thereby be eligible for a widow's pension following his death, and for no other reason related to his money or property.[113] She promised to live in the home after they were married and to take better care of him. Most important, she undertook not to send him to a nursing home, which he was so afraid of.[114] The plaintiff agreed.

The defendant testified that the plaintiff had suggested that they marry because of their mutual feelings of affection, romance, and sexual interest, but Justice Lang found otherwise.[115] The defendant, who had been married approximately 6-8 times (she could

[109] *Juzumas* at para 1.
[110] *Ibid.* at paras 39 and 56.
[111] *Ibid.* at para 25.
[112] *Ibid.* at para 28.
[113] *Ibid.* at paras 26-28.
[114] *Ibid.* at para 28.
[115] *Ibid.* at para 27.

not remember the exact number), had previous “caretaking” experience: prior and concurrent to meeting the plaintiff, the defendant had been caring for an older man who lived in her building. She had expected to inherit something from this man in addition to the pay she received for her services and was left feeling sour as she had not received anything. Justice Lang considered that this evidence indicated that the defendant was sophisticated in her knowledge of testamentary dispositions, and that she knew that an expectation of being named as a beneficiary to someone’s Will on the basis that she provided that person with care is unenforceable.[116]

The day before their wedding, the soon-to-be newlyweds visited a lawyer who executed a Will in contemplation of their marriage. Despite the obvious age gap and impending marriage, the lawyer did not discuss the value of the plaintiff’s house ($600,000) or the possibility of a marriage contract. And the lawyer did not meet with the plaintiff without the defendant being present.[117]

After the wedding ceremony, which took place at the defendant’s apartment, she dropped him off at a subway stop so that he would take public transit home alone.[118] The defendant continued to care for the plaintiff several hours a week and to receive a monthly sum of money from him.

Despite the defendant’s promise that she would provide better care to the plaintiff if they married, the plaintiff’s tenant and a neighbor, who were both found to be credible, attested that the relationship degenerated progressively. The tenant described the defendant, who had introduced herself as the plaintiff’s niece, as “‘abusive’, ‘controlling’ and ‘domineering.’”[119]

With the help of a plan devised over the course of the defendant’s consultation with the lawyer who had drafted the plaintiff’s Will made in contemplation of marriage, the defendant’s son drafted an agreement which transferred the plaintiff’s home to himself, not this mother, to financially protect her. The “agreement” acknowledged that the plaintiff

[116] *Juzumas* at para 24.
[117] *Ibid.* at para 30.
[118] *Ibid.* at para 31.
[119] *Ibid.* at para 54.

did not want to be admitted to a nursing home. Justice Lang found that even if it had been shown to him, the plaintiff's English skills would not have sufficed to enable him to understand the terms of the agreement, and that the agreement did not make it clear that it entailed a transfer of the plaintiff's home.[120]

The plaintiff, the defendant and her son attended the lawyer's office to sign an agreement respecting the transfer of the plaintiff's property. Justice Lang found that the lawyer was aware of the plaintiff's limited English skills; that his evidence indicated that the agreement had not been explained adequately to the client; that the plaintiff did not understand the consequences of the transfer of property; and moreover, that he was, in the court's words, "*virtually eviscerating the Will he had executed only one month earlier…"*. Further, the lawyer did not meet with the plaintiff alone; and only met with the parties for a brief time.[121] Additionally, Justice Lang found that the agreement signed by the plaintiff was fundamentally different from the agreement he had been shown by the defendant and her son at the plaintiff's home.[122]

Perhaps most importantly, Justice Lang found that the lawyer did not appreciate the power imbalance between the parties. The lawyer appeared to be under the impression that the defendant, and not the plaintiff, was the vulnerable party.[123]

The lawyer's notes indicated that the plaintiff was "cooperative" during the meeting. Justice Lang interpreted the lawyer's use of this word as indicating that the plaintiff was "acceding to someone else's direction," and not a willful and active participant to the transaction.[124] In addition, Justice Lang found that the plaintiff had been influenced by emotional exhaustion or over-medication at the time the meeting took place. The judge found, based on evidence that this may have been because the defendant may have been drugging his food as suspected by the plaintiff.[125]

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[120] *Juzumas* at paras 68-69.
[121] *Ibid.* at paras 79-84.
[122] *Ibid.* at para 84.
[123] *Ibid.* at para 88.
[124] *Ibid.* at para 91.
[125] *Ibid.* at paras 63 and 92.

Sometime after the meeting, the plaintiff's neighbor explained the lawyer's reporting letter to him, and its effect on his property. With his neighbor's assistance, the plaintiff attempted to reverse the transfer by visiting the lawyer at his office on three separate occasions. Interestingly, when he would visit, a few minutes after his arrival, his "wife" would appear. The lawyer explained to the plaintiff that the transfer could not be reversed because it was "in the computer."[126]

In considering the transfer of property, Justice Lang applied and cited McCamus on Law of Contracts, which outlines a "*cluster of remedies*" that may be used "where a stronger party takes advantage of a weaker party in the course of inducing the weaker party's consent to an agreement."[127] Justice Lang outlined the applicable legal doctrines of undue influence and unconscionability, stating: "*if any of these doctrines applies, the weaker party has the option of rescinding the agreement*."[128]

Justice Lang found that a presumption of undue influence existed between the parties in this case as the relationship in question involved an older person and his caretaker. The relationship was clearly not one of equals. In such a case, the court noted that the defendant must rebut that evidence by showing that the transaction in question was an exercise of independent free-will, which can be demonstrated by evidence of independent legal advice, or some other opportunity given to the vulnerable party which would provide "*a fully-informed and considered consent to the proposed transaction*."[129]

As for the doctrine of unconscionability, Justice Lang stated that the doctrine "gives a court the jurisdiction to set aside an agreement resulting from an inequality of bargaining power."[130] The onus is on the defendant to establish the fairness of the transaction. These presumptions were not rebutted by the defendant in this case.

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[126] *Juzumas* at para 97.
[127] *Ibid.* at para 8 citing John McCamus, *The Law of Contracts* (2d) (Toronto: Irwin Law, 2012) at 378.
[128] *Ibid.* at para 8.
[129] *Ibid.* at para 11.
[130] *Ibid.* at para 13.

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

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

During the post-marriage period, Justice Lang found that the defendant had an expectation that she would be remunerated by the plaintiff, and that the plaintiff had agreed to do so.[131] For this period, Justice Lang calculated the value of the services rendered by the defendant by multiplying the number of hours she worked each week by an approximation of the minimum wage at that time. She adjusted her calculation to account for occasional decreases in hours worked, as well as the period of two months during which she found the defendant had been solely concerned with her own objectives, such that she could not have been caring for the plaintiff.[132] Justice Lang then subtracted the amount of money that had been paid to the defendant already by way of a monthly salary and found that only a minimal sum remained.

Justice Lang then reviewed the equitable principle of restitution, which permits a court to "refuse full restitution or to relieve [a party] from full liability where to refrain from doing so would, in all the circumstances, be inequitable."[133] In considering this principle, Justice Lang found that the defendant had "unclean hands" and that "the magnitude of her reprehensible behavior is such that it taints the entire relationship."[134] As a result, Justice Lang found that the defendant was not entitled to any amount pursuant to her *quantum meruit* claim.

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[131] *Juzumas* at para 129.
[132] *Ibid.* at para 128.
[133] *Ibid.* at para 141 citing *International Corona Resources Ltd. v. Lac Minerals Ltd.*(1987), 44 DLR (4th) 592 (CA) at 66.
[134] *Ibid.* at para 142.

Substantial costs were awarded to the older adult plaintiff.[135]

This case provides what is, in cases of financial abuse, a rarity: an uplifting ending. In this case, it is not a family member or acquaintance that brought the case before a court after the vulnerable adult's assets had already been depleted, but rather, the older adult who, with the help of his neighbor, was able to seek justice and reverse some of the defendant's wrongdoing. It is not every case of elder abuse that involves an older adult who is able to, or capable of, being present during court proceedings to testify. In addition to its review of the legal concepts including equity that are available to remedy the wrongs associated with predatory marriages, this case demonstrates the usefulness of presenting the testimony of an older adult when it is possible and appropriate.

2012- Petch v. Kuivila (Ontario)[136]

This decision highlights the effects of marriage on estate planning and specifically, the revocation of a Will by marriage. It also serves as a reminder of the correlation and consequences of predatory marriages and revocations of previous Wills not made in contemplation of marriage.

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

Justice Macdonald made the following findings: the Will revoked the 2003 designation pursuant to the *Insurance Act,* the 2008 marriage revoked the 2004 Will pursuant to s. 15 of Ontario's *Succession Law Reform Act*, and the revocation by marriage did nothing to undo the previous revocation by Will. Therefore, the insurance proceeds were payable to the deceased's estate.

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[135] *Juzumas v Baron*, 2012 ONSC 7332 (CanLII).
[136] 2012 ONSC 6131.

2013 - The "Internet Black Widow" Case (Nova Scotia)[137]

While unreported, this case known as the "Black Widow" or "Internet Black Widow", involves Melissa Ann Shepard who has had a long history with the law and with unsuspecting widowers. In 1991 she was convicted of manslaughter and served 2.5 years after killing her husband on a deserted road near Halifax. Her husband was heavily drugged when she ran him over twice with a car.[138]

After being released from jail, she met a man at a Christian retreat in Florida. They were married in Nova Scotia in 2000. A year later her husband's family noticed that his health was faltering, he had mysterious fainting spells, slurred speech, and was in and out of hospitals. Also, his money was starting to disappear. The second husband died in 2002 of a cardiac arrest. No one was charged with any criminal offence, although his family remains suspicious about his death.

In 2005, Shepard was sentenced to five years in prison for several charges stemming from a relationship she had with another man in Florida she met online, including grand theft from a person over 65, forgery and using a forged document.

In 2012, Shepard married another man, who had been her neighbour in a quiet retirement community. She had knocked on his door and told him she was lonely, and she had heard he was lonely too. A civil union ceremony was performed in the husband's living room, but the marriage was never certified by the province and was ruled invalid by Nova Scotia's Vital Statistics division as false information was provided on the marriage certificate. During a trip to Newfoundland after the wedding ceremony Shepard dissolved

[137] The Canadian Press, "Internet Black Widow Melissa Ann Shepard signs a Peace Bond" CBC News (November 23, 2016) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-signs-peace-bond-1.3863909
[138] CBC News "Internet Black Widow sentenced to 3 ½ years in jail" CBC News (June 11, 2013) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-sentenced-to-3-years-in-jail-1.1324946

a cocktail of sedatives into her husband's coffee. Later, upon return to Nova Scotia, the husband tumbled out of bed and was hospitalized. Tests found tranquilizers in his blood.

Shepard was sentenced to three and a half (3.5) years in jail after pleading guilty to charges for administering a noxious substance and failing to provide the necessaries of life for her then husband. She had originally been charged with attempted murder.[139]

This is an extreme case of a predatory marriage, where the predator's intentions may have been more than just defrauding her victims or gaining financially from a marriage, but also of resorting to murder or attempted murder.

Shepard has since been released from prison and the Court noted that there is a high risk that she will reoffend. In 2016 she was rearrested for failing to abide by her parole conditions including accessing the internet, which she was prohibited from doing. Later those charges were dropped.[140]

2014 - Babiuk v. Babiuk (Saskatchewan)[141]

The Saskatchewan Court of Queen's Bench reviewed the requisite decisional capacity to separate, among other issues, in this court decision, 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 Public Guardian and Trustee 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,

[139] CBC News "Internet Black Widow sentenced to 3 ½ years in jail" CBC News (June 11, 2013) online: http://www.cbc.ca/news/canada/nova-scotia/internet-black-widow-sentenced-to-3-years-in-jail-1.1324946
[140] Michael Tutton, "Nova Scotia prosecutors drop charges against 'Internet Black Widow' Melissa Shepard" The Globe and Mail (December 22, 2016) online: https://beta.theglobeandmail.com/news/national/nova-scotia-prosecutors-drop-charges-against-internet-black-widow-melissa-shepard/article33416979/?ref=http://www.theglobeandmail.com&
[141] *Babiuk v Babiuk* 2014 SKQB 320.

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 of managing 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 refused [1998] SCCA No. 161:

> Separation is the simplest act, requiring the lowest level of understanding. A person must 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. . .[142]

The Court dismissed the husband's motion.

As noted above, while this case refers to a "hierarchy of capacities," yet, it is important to appreciate that capacity to marry does not fall lower on a fabricated hierarchy of decisional capacities. The fact that the capacity to marry has been viewed alternately by the courts as both incredibly simple and particularly complex, and the fact that significant property

[142] *Babiuk v. Babiuk* 2014 SKQB 320 at para.48.

rights in modern society attach to the marriage union, aptly illustrates that it is incorrect to conceptualize decisional capacity in hierarchical terms.[143]

2014 - Ross-Scott v. Potvin (BC)[144]

The British Columbia case of *Ross-Scott v. Potvin* illustrates the difficulties in attacking the validity of a marriage after the death of the vulnerable adult. The only surviving relatives of the deceased, Mr. Groves, sought an order annulling Mr. Groves's marriage on grounds of undue influence or, in the alternative, lack of capacity. They also argued that various *inter vivos* transfers and testamentary instruments were invalid on the same grounds. Justice Armstrong applied the common law factors for determining requisite capacity to marry and ultimately dismissed all the claims, despite compelling medical evidence of diminished capacity and vulnerability.

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

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

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

In June of 2008, Mr. Groves contacted a new solicitor, instructed the new solicitor to prepare a new Will and executed the Will in the same month. The Will included a provision

[143] Kimberly A. Whaley, Kenneth I. Shulman & Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective" (2016) Advocates' Q Vol 45 No 4 395 at 418.
[144] 2014 BCSC 435 [*Ross-Scott*].

that granted his car, space heater, and rugs to Ms. Potvin, and divided the rest of his estate between the applicants and two charities.

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

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

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

When Mr. Holland learned of the marriage a few months later, he called Mr. Groves and informed him of the impact of the marriage on Mr. Groves' Will. Mr. Groves executed a new Will that gave the applicants $10,000 each and left the rest of his estate to Ms. Potvin. Mr. Groves died in November of 2010.

Justice Armstrong's analysis of the capacity to marry relies primarily on *A.B. v C.D, supra*, and in particular, the importance of autonomy discussed in it.[145] The medical evidence established that Mr. Groves suffered from cognitive impairments, anxiety, depression, and moments of delusional thinking.[146] Mr. Groves' family doctor asserted that Mr. Groves was incapable of "managing himself" in November of 2009.[147] Nevertheless, Justice Armstrong found that these conditions, diagnoses, and limitations did not evidence an

[145] *Ross-Scott* at paras 46, 184.
[146] *Ibid*. at para 186.
[147] *Ibid*. at paras 94 and 95.

inability on Mr. Groves' part to make an informed decision to marry Ms. Potvin.[148] His Honour provided the following observation:

> A person may be incapable of writing a cheque or making a deposit to a bank account and thus be described as being incapable of managing their financial affairs. Similarly, temporal delusions, depression, or anxiety may impact a person's ability to make other life decisions. But these factors do not necessarily impact a person's ability to consciously consider the importance of a marriage contract. Nor do they necessarily impact formation of an intention to marry, a decision to marry, or the ability to proceed through a marriage ceremony.[149]

Mr. Holland, as well as Mr. Groves' accountant, financial advisor and marriage commissioner all gave evidence affirming that Mr. Groves was aware of the nature of the marriage. Of particular assistance was Mr. Holland's evidence; Mr. Holland was concerned about the appearance of elder abuse, and he questioned Mr. Groves in detail about his relationship with Ms. Potvin a few weeks prior to the marriage. Mr. Groves was consistent in his assertions that he wanted to marry.

With respect to undue influence, the applicants relied on *Feng v. Sung Estate*. The evidence established that Mr. Groves was afraid of being admitted into care and believed that he could avoid that by marrying Ms. Potvin, who promised to assist him with asserting his autonomy and maintaining his comfort and care at home.[150] His family doctor asserted that Mr. Groves was susceptible to persuasion in 2009.[151]

Regardless, Justice Armstrong found that there was no direct evidence that Ms. Potvin's influence over Mr. Groves supplanted his decision-making power on the issue of his decision to marry.[152] The court found that Ms. Potvin may have encouraged Mr. Groves in this regard, but there was no evidence that she exerted influence or force to compel him to do so.[153] His Honour explains his holding as follows:

> I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The

[148] *Ibid*. at para 186.
[149] *Ross-Scott* at para 20.
[150] *Ibid*. at para 190.
[151] *Ibid*. at para 95.
[152] *Ibid*. at para 190.
[153] *Ibid*., at para 190.

> plaintiffs must provide the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.[154]

Justice Armstrong also dismissed the claims that Mr. Grover's testamentary dispositions and *inter vivos* transfers were invalid by reason of undue influence.[155] His Honour applied *Hyrniak v. Maudlin*, 2014 SCC 7 and concluded that a summary trial, with a record of affidavit evidence and cross-examination transcripts, was a suitable forum for the disposition of the claim.[156] The action was dismissed with costs to Ms. Potvin.[157]

2015 - Elder Estate v. Bradshaw (BC)[158]

This case grounds us in the reminder that a rise in the injustices faced by challenging predatory incidents does not always result in sinister consequences and each situation must be adjudicated on its own facts and evidence.

The older adult in this case was a Mr. Elder. He was 80 years old when he died suddenly on July 20, 2011. He was single, had never married, and never had children. He had a sister with whom he had been close. In 2006, Mr. Elder hired a housekeeper, Ms. O'Brien, (twenty-five years his younger) to assist him around his house and eventually her role changed to that of caregiver. She would assist him with a variety of chores, drive him to appointments and to the bank, fill out cheques for him to sign when he needed to pay bills, and more.

In 2008, Mr. Elder had been diagnosed as having memory loss, functional impairment, and "dementia - likely a mixed vascular Alzheimer type."[159] He was placed on medication and in 2009, "seemed to improve immensely" and he remained stable until 2011 when his confusion increased for a short time after his sister's death in March of 2011.

On April 2, 2011, he executed a new Will (the "2011 Will") in which he left everything to his caregiver, unlike his previous will in which he left everything to his sister and then his

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[154] *Ibid*., at para 240.
[155] *Ross-Scott*, at para 227, 280, and 281.
[156] *Ibid*. at para 300.
[157] *Ibid*. at para 302.
[158] 2015 BCSC 1266 [*Elder Estate*]
[159] *Elder Estate* at para.38.

three nephews should she predecease him. He also appointed the caregiver as his attorney under a power of attorney for property.

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

The nephews challenged the validity of the 2011 Will alleging: lack of testamentary capacity, undue influence, and coercion by the caregiver. They also sought the return of the $120,000.000. One nephew testified that his uncle told him that he and the caregiver might be getting married and moving in together, but he did not really want to marry, because he was not the marrying type. This nephew also testified that the uncle was confused when he called to say his mother (Mr. Elder's sister) had died and that Mr. Elder only wanted to talk about the movie he was watching and that he was rambling and incoherent. The nephew didn't think he grasped what he was telling him.[160]

Admittedly, there were some facts surrounding the execution of the 2011 Will and power of attorney that were a cause of concern:

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

[160] *Elder Estate* at para. 81.

- The caregiver brought Mr. Elder to the law office and first met with the solicitor and Mr. Elder together.

However, the solicitor also took necessary precautions:

- The solicitor met with the older adult alone and confirmed his instructions that he wanted the caregiver to receive his entire estate and not his nephews.
- He confirmed the reason why Mr. Elder did not want his nephews to inherit: he had not seen his nephews in 15-20 years.
- The solicitor "looked for signs of undue influence" and "saw none".[161]
- An assistant had taken down information on the relationship between Mr. Elder and the caregiver when the caregiver called to set up the appointment. The solicitor went over this information and confirmed it with Mr. Elder when they were alone.[162]
- The solicitor's opinion was that Mr. Elder was of sound mind and capacity. The solicitor had asked Mr. Elder a series of questions[163] to test his lucidity and awareness and "if he had been even a bit suspicious of his capacity, he would have contacted Mr. Elder's doctor as was his practice in such cases".[164]
- The solicitor however did not ask about the value of the estate. Justice Meiklem noted that:

> The omission to inquire about the value of the estate is not insignificant, because learning it was in the range of $500,000.00 at the time may have triggered some additional discussion, **but the omission itself is not a suspicious circumstance sufficient to rebut the presumption of validity**.[165] [emphasis added]

The Court found there was no evidence that the caregiver played any role in conveying the wishes to the solicitor or in influencing Mr. Elder to have a new will prepared and that there were "[n]o suspicious circumstances surrounding the preparation of the 2011 Will that are sufficiently well-grounded to rebut the presumption of validity." [166]

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[161] *Elder Estate* at para.16.
[162] *Elder Estate* at paras. 15-17.
[163] Unfortunately the decision does not describe the questions.
[164] *Elder Estate* at para. 18.
[165] *Elder Estate* at para. 19.
[166] *Elder Estate* at para. 23.

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

> While **there may be a "miasma of suspicion" arising out of the lack of kinship** between Ms. O'Brien and Mr. Elder and the circumstance of his early dementia combined with an ostensible relationship of dependency with her as a caregiver, **there is no evidence of any coercive act or course of conduct on the part of Ms. O'Brien** in respect of the preparation of the 2011 Will.[167][emphasis added]

However, the Court concluded that "the evidence relating to the diagnosis of early dementia and medical services interactions concerning memory loss and functional decline" and Mr. Elder's "moderate dementia" raised a "specific and focussed suspicion that [was] sufficient to rebut the presumption of validity" of the will.[168] Therefore, the burden then shifted to Ms. O'Brien to prove Mr. Elder had testamentary capacity.

While no formal capacity assessment was completed, his doctor had a great deal of geriatrics experience, and he performed three psychogeriatric assessments on Mr. Elder that supported the caregiver's case. Furthermore, large portions of the responding expert report tendered by the nephews were ruled inadmissible. Based on this medical evidence and testimony, Justice Meiklem held that "the preponderance of evidence" showed that "as of April 27, 2011, when he executed the 2011 Will, Mr. Elder met the test for testamentary capacity set out in the *Banks* [*v. Goodfellow*] case".[169]

Undue Influence / Coercion

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

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[167] *Elder Estate* at para. 24
[168] *Elder Estate* at para. 25 and 28.
[169] *Elder Estate* at para. 87.

> The defendants' theory of Ms. O'Brien forming and carrying out a step-by-step plan is quite simply unsupported by the evidence. . . **It is a theory which is based solely on the defendants' original suspicions arising from the overview of the circumstance of a younger housekeeper/caregiver benefitting from the will of an aged man**. [emphasis added][170]

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

A financial advisor interviewed Mr. Elder in June of 2011, since she had concerns about Mr. Elder and the caregiver planning to take joint title to the house. Her specific concerns were with his age and possible elder abuse. She testified that he appeared physically frail but was "with it" mentally and was excited about the house purchase. He was the "majority" talker and was "spunky". He was very clear that it was not a romantic relationship, but he also stated that he did not know what he would do without the caregiver. The financial advisor saw no red flags. Mr. Elder also told the financial advisor that he did not want his nephews to have any part of the house.[171] It is unclear from the decision whether the financial advisor met with Mr. Elder alone or if the caregiver was present as well.

The real estate agent who showed the home they eventually decided to purchase also testified that Mr. Elder was active and a leading participant in viewing of the new property and in the decision to make an offer to purchase.[172]

Justice Meiklem was impressed with the caregiver and her testimony:

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

[170] *Elder Estate* at para. 95.
[171] *Elder Estate* at para. 43.
[172] *Elder Estate* at para. 44.

> **manager], Dr. Fawcett [his doctor], and to a lesser extent, but in a focussed way, by Mr. Thompson [the drafting lawyer], Mr. Laurie [real estate agent], and Ms. Gibb [financial advisor]. All these witnesses were specifically looking for evidence of undue influence and saw none**.[173]
>
> Certainly Ms. O'Brien had legitimate influence over Mr. Elder, which is evidenced by her proposing the joint house purchase, but there is no evidence that she coerced him into doing something he did not want to do or that was not his own choice. In respect of the will, he actually rejected her advice that he did not need to change his will. [emphasis added][174]

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

Inter vivos Gift of $120,000.00

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

> The generic label "caregiver" does not necessarily denote a fiduciary relationship or a potential for domination. . . **The nature of the specific relationship must be examined in each case to determine if the potential for domination is inherent in the relationship**.[175]
>
> . . . It is undoubtedly true that Mr. Elder was becoming more dependent upon Ms. O'Brien as time passed and it is reasonable to infer that she became a more significant part of his life after the death of his sister Georgina . . .**but taking into account their individual natures, and the development of the relationship, I do not find that the potential for domination of his will inhered in that relationship.** . . .[176]

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

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[173] *Elder Estate* at para. 98.
[174] *Elder Estate* at para. 99.
[175] *Elder Estate* at para. 108.
[176] *Elder Estate* at para. 111.

2017 – Asad v Canada (Federal)[177]

While this case is not a classic predatory marriage case, it is another example of a vulnerable individual forced into a marriage so that the spouse could gain an advantage. The advantage in this case was the obtaining of permanent resident status in Canada.

A 32-year-old man, who was born in Pakistan but came to Canada when he was 14, had "obvious mental developmental deficits" and was in receipt of Ontario Disability Support Program benefits. He could take care of his personal needs such as dressing and washing himself, but he could not purchase his own clothes or food. His parents handled all of his money and when he would use the telephone, he had a pre-programmed phone with one button to push.

He married a woman in Pakistan in an arranged marriage in 2008. The wife applied for a permanent resident visa in 2011. The visa officer was not satisfied that the marriage was genuine and not entered into primarily for the purpose of immigration. The officer also had concerns about the husband's capacity to marry. The husband appealed to the Immigration Appeal Division.

On appeal, the Panel Member Andrachuk adopted Member Dolin's words in two previous immigration cases (*Khela v Canada (Citizenship and Immigration)*, 2008 CanLII 74722 (CA IRB) and *Karthigesu v Canada (Citizenship and Immigration),* 2010 CanLII 96515 (CA IRB) dealing with the requisite capacity to marry:

> In Canada a lack of mental capacity will render the marriage void *ab initio*. The requirement that one understand the nature of marriage is a manifestation of the basic requirement in contract law that a person should have the appropriate degree of mental functioning in order to be held accountable. However, the case law with respect to capacity to marry suggests that the standard is quite low. The courts have suggested that it does not require a high degree of intelligence to comprehend the significance of marriage. Mr. Justice Lowry of the Supreme Court of British Columbia [in *Hart v. Cooper, supra*] has summarized the standard as follows:
>
> > A person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the

[177] 2017 CanLII 37077 (CA IRB)[*Asad*].

> duties and responsibilities it creates. The recognition that a ceremony of marriage is performed or the mere comprehension of the words employed in the promises exchanges is not enough if, because of the state of mind, there is no real appreciation of the engagement entered into: Durham v Durham; Hunter v Edney (otherwise Hunter); Cannon v Smalley (otherwise (Cannon)(1885), LR 10 PD 80 at 82 and 95. **But the contract is a very simple one – not at all difficult to understand** (emphasis added).[178]

Andrachuk in Asad, noted that "while the case law may suggest that the standard to be met in considering capacity to consent to marriage is low, **it is not insignificant** as the appellant has to understand the nature of the marriage contract and responsibilities it creates."[179][emphasis added].

Member Andrachuk found that the appellant had no sense of what responsibility in marriage entailed. He testified that he does not know what the word "responsibility" means. Member Andrachuk described him as a "pleasant, well-cared for young man who is totally dependent on his family . . . He cannot ever imagine that he could cope without his immediate family. He appeared to have no concept that marriage should be the primary relationship in his life." Further Member Andrachuk found that the appellant did not understand family planning or the prospect of having children: "I find that the appellant does not understand the basics of what marriage entails. He stated that he slept with his wife but he may have meant it literally . . . Family planning is an essential aspect of marriage, and yet the appellant does not understand what is happening."[180]

Member Andrachuk found two basic faults with the evidence of the psychologist expert hired by the appellant's family: 1) she derived most of her information from the father; and 2) her conclusions dealt mainly with how the appellant would be able to adapt or behave in a marriage rather than the appellant's capacity at the time of his marriage and whether he entered into the marriage with his full and informed consent.

Member Andrachuk concluded that the appellant did not have the mental capacity to give valid consent to his marriage based on the following findings: he believed that his marriage was primarily for his wife to take care of him; he gave very limited responses to

[178] *Asad* at para.20.
[179] *Asad* at para.21.
[180] *Asad* at para. 38.

what marriage means other than that as he is alone he is to marry; his reasons for marrying was that all of his siblings were married; he did not understand the concept of responsibility; when asked what would he do if he had children, he just managed to say that he would play with them and nothing else. Further he did not consider what the implications were in marrying a foreign national.

Since under Canada's laws, the marriage was not valid, the applicant "wife" was not a member of the appellant's family and could not be sponsored to Canada. In the alternative, Member Andrachuk found that the marriage was entered into primarily for the purpose of acquiring status and was not genuine.

2017 - Devore-Thompson v. Poulain (BC)[181]

The British Columbia Supreme Court set aside a marriage based on a lack of requisite decisional capacity to marry and declared the marriage void *ab initio in this decision*. The claim was brought by a family member after the death of the incapacitated party. The Court also set aside two Wills based on the testator's lack of testamentary capacity. This lengthy decision had been the first case since the 2014 case of *Ross-Scott v. Potvin*[182] to provide further ammunition on remedying the now out of date common law treatment of decisional capacity to marry. A few cases have followed suit and are reviewed below.

Ms. Walker was an older adult, who had been previously married and divorced, and had no children. She thought of her sister's children as her own. She was a strong independent woman until she was diagnosed with Alzheimer's disease in 2005. According to those close to her, Ms. Walker's condition progressively deteriorated in the years following her diagnosis, to the point where she forgot how to use utensils and a phone, could no longer cook, forgot who people were, and could not clean or care for herself. Ms. Walker, however, refused to acknowledge her declining health and insisted on remaining independent. Her niece, the Plaintiff in this case, loved her aunt dearly and increasingly assisted her aunt to live independently as long as possible.

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[181] *Devore-Thompson v. Poulain*, 2017 BCSC 1289 [*Devore*].
[182] 2014 BCSC 435.

In early 2007, Ms. Walker saw Dr. Maria Chung who prepared a consultation report. The report recommended that Ms. Walker's driver's license be revoked before she injured herself or others. Dr. Chung continued to care for Ms. Walker after the initial consultation and provided evidence at the trial.

Following Dr. Chung's advice, Ms. Walker made a new Will as of February 16, 2007, and appointed her niece as her attorney under a power of attorney for property. As of May 17, 2007, Ms. Walker also signed a representation agreement appointing her sister and her niece as her representatives under the *Representation Agreement Act*, R.S.B.C. 1996, c. 405, giving them each independent authority to make health and personal care decisions on her behalf.

Her affairs were in order, and everything was settled. Or so the niece thought. It was discovered later (discussed below) that Ms. Walker had executed a new Will in 2009 and granted new powers of attorney.

On September 14, 2010, A Certificate of Incapability was issued pursuant to s. 1(a) of the *Patients Property Act,* R.S.B.C. 1996 c. 349, declaring Ms. Walker incapable of managing her legal and financial affairs. The Public Guardian and Trustee (PGT) was appointed committee of the estate. Ms. Walker died on December 26, 2013.

The "Predatory" Relationship

Unknown to Ms. Walker's caring niece, while Ms. Walker's health was deteriorating significantly, she was being "preyed on"[183] by a younger man for financial gain.

Ms. Walker met this man, Mr. Floyd Poulain in 2006 at the local mall when he asked her for five dollars and her address and phone number. Ms. Walker and Mr. Poulain went on to have dinner together and this began Mr. Poulain's "campaign."[184]

Unbeknownst to her family and friends, Mr. Poulain took Ms. Walker to a lawyer in 2009 for Ms. Walker to execute a new Will. The lawyer testified at the trial but had to rely on

[183] *Devore* at para.4.
[184] *Devore* at paras. 255 & 329.

his “sparse notes” as he could not recall the meeting. His notes indicated that Mr. Poulain remained with Ms. Walker while she was meeting with the lawyer. The evidence demonstrated that the 2009 Will was prepared from handwritten notations to the 2007 Will. The notations were in Mr. Poulain’s handwriting. The notes struck out the appointment of Ms. Walker’s friend as executor and inserted “Floyd S. Poulain”. Mr. Poulain also struck out the gift of Ms. Walker’s car to her nephew with the instruction “omit” (as Mr. Poulain had already taken over Ms. Walker’s car). There was also a note “to make power of attorney Floyd S. Poulain.”

Madame Justice Griffin, in her decision, noted “*I find there to be a high probability that Ms. Walker sat in front of [the lawyer] and pretended to know what was going on by nodding and smiling a lot and saying very little. Others noted her smiling a lot and Ms. Walker was quite determined not to let on that she was having cognitive difficulties*.”[185] Justice Griffin found difficulty placing any weight on the evidence provided by the lawyer; noting that nothing in his evidence suggested that based on his standard practices he was able to detect Ms. Walker’s testamentary capacity.

Shortly thereafter, the niece became aware that Ms. Walker had placed her condominium up for sale, even though she had previously asserted that she enjoyed living in her condo. The family intervened, and the listing was cancelled. Ms. Walker’s actions were likely prompted by Mr. Poulain. Around this time Ms. Walker also became highly suspicious of family members, including her niece who had been assisting her the most. Mr. Poulain was reportedly fueling her suspicions.

Ms. Walker and Mr. Poulain were married in June of 2010. Ms. Walker did not inform any of her family members that she intended to marry Mr. Poulain. In fact, she had said that she did not intend to remarry. The marriage caught her close family members and her treating physician completely off guard. Mr. Poulain testified that it was her idea.

Mr. Poulain was unable to recall any material details of the wedding under cross-examination; including who the witnesses were (they were supplied by the marriage

[185] *Devore* at para. 294.

commissioner). There was one photograph produced at trial where Ms. Walker and Mr. Poulain were together, and her facial expression was vacant. The marriage commissioner's evidence was unhelpful on the issue of whether Ms. Walker had capacity to marry as he could not remember the marriage ceremony and does hundreds of ceremonies. He had "no practice of testing for capacity" (the Court noted that "it is not suggested he should have") and simply asks the parties to say, "I do not" and "I do" to the standard questions.[186]

Justice Griffin noted it was likely that Ms. Walker was prompted on what to say at the ceremony and went along with it and the fact that the marriage ceremony took place is of little help in determining capacity.

When Dr. Chung learned about the marriage from the niece, she made an urgent referral to the PGT stating her opinion that Ms. Walker was incapable of entering into a marriage relationship. Dr. Chung continued to be of the opinion, at the trial of this matter, that Ms. Walker was not capable of consenting to marriage and not capable of signing the 2009 Will.

After the marriage, Mr. Poulain and Ms. Walker consulted another lawyer at the same office where her 2009 Will was executed. This second lawyer's file was produced at trial, but the lawyer was not called as a witness. The file suggests that the lawyer was told Ms. Walker had had a stroke but was not advised of her Alzheimer's diagnosis. The file also indicated that the consultation was about obtaining greater access to Ms. Walker's bank account. The lawyer wrote a letter to her bank seeking information about Ms. Walker's account balance and why she was not permitted to access her account. Ms. Walker's niece (her attorney under the power of attorney for property) had put a $500 withdrawal limit on her account as all of Ms. Walker's bills were automatically deducted from her bank account. There was no need for Ms. Walker to obtain large sums of cash. Justice Griffin observed that this evidence pointed to "concerted efforts by Mr. Poulain to try to get

[186] *Devore* at para. 303.

access to Ms. Walker's funds at Scotiabank post-Marriage: repeated contact with [the lawyer]; approaching the Scotiabank; and approaching another bank".[187]

When the niece learned of the involvement of the second lawyer, she informed the lawyer of her power of attorney and her suspicions of Mr. Poulain. Nevertheless, the lawyer "pressed on for a while" including preparing a new power of attorney appointing Mr. Poulain as Ms. Walker's attorney. The authenticity of this document was at issue since the niece claimed that she was with Ms. Walker until 4:00 p.m. on the date it was purportedly signed, and Ms. Walker never mentioned an appointment with a lawyer. It wasn't until the PGT office communicated with the lawyer that he wrote a letter to Mr. Poulain concluding that he ought not to represent Mr. Poulain.

The day after the new power of attorney was purportedly signed, Ms. Walker had a fall in her condominium and was taken to the hospital. A note was found after Ms. Walker was in hospital in which Mr. Poulain had written "will you please go over to the bank and withdraw $40,000. . . it is really really important".[188]

Mr. Poulain claimed that he had no knowledge of Ms. Walker's health condition and that he never observed anything out of the ordinary in her behaviour. He testified that even in September of 2010 when Ms. Walker was admitted to the hospital, she was fine, there was no change in her memory or other cognitive functions from the time that he knew her.

The Court nevertheless found that the evidence showed a consistent campaign by Mr. Poulain to try to get access to Ms. Walker's funds post-marriage:

> I find it likely on the evidence that Mr. Poulain had long been fanning the fire of Ms. Walker's anxiety and paranoia by suggesting that the plaintiff was unfairly restricting her access to her own money, and that the intensity of these efforts increased after the Marriage.[189]

Justice Griffin provided a thorough review of the evidence before her and ultimately concluded that Ms. Walker did not have the requisite decisional capacity to marry and as

[187] *Devore* at para. 252.
[188] *Devore* at para. 253.
[189] *Devore* at para. 262.

such the marriage to Mr. Poulain was *void ab initio*. Her Honour also found that, based on the evidence, Ms. Walker did not have the capacity to execute a Will in 2009 or even in 2007, leaving the question of Ms. Walker's estate open for further inquiry.

Justice Griffin began her analysis by noting that the starting point is "the notion that a marriage is a contract. Similar to entering into any other type of contract, the contracting parties must possess the requisite legal capacity to enter the contract."[190] Referring to *Hart v. Cooper*, [1994] B.C.J. No. 159 (B.C.S.C.) at paragraph 30, Justice Griffin confirmed that "a person is mentally capable of entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and the duties and responsibilities it creates."

Relying on *Wolfman-Stotland*, which in turn referred to *Calvert (Litigation Guardian of) v. Calvert* (1997), 32 O.R. (3d) 281 (Ont. Gen. Div.), aff'd (1998), 37 O.R. (3d) 221 (Ont. C.A.), leave to appeal refused [1998] S.C.C.A. No. 161 (S.C.C.), Justice Griffin observed:

> the common law has developed a low threshold of capacity necessary for the formation of a marriage contract. The capacity to marry is a lower threshold than the capacity to manage one's own affairs, make a will, or instruct counsel. . .the capacity to marry requires the "lowest level of understanding" in the hierarchy of legal capacities. . . The authorities suggest that the capacity to marry must involve some understanding of with whom a person wants to live and some understanding that it will have an effect on one's future in that it will be an exclusive mutually supportive relationship until death or divorce.[191]

Relying on the evidence presented at trial, Justice Griffin concluded:

> [343] As of the date of the marriage ceremony, Ms. Walker was at a stage of her illness where she was highly vulnerable to others. She had no insight or understanding that she was impaired, did not recognize her reliance on Ms. Devore-Thompson [the niece] and Ms. Devore-Thompson's assistance, and was not capable of weighing the implications of marriage to Mr. Poulain even at the emotional level.
>
> [344] The fact that Ms. Walker told some people that she had married Floyd Poulain does not overcome all of the evidence as to her disordered thinking. This does not mean she had any understanding of what it means to be married.

[190] *Devore* at para. 43.
[191] *Devore* at para. 46-48.

> [345] It is also clear that Ms. Walker's mental capacity had diminished to such an extent that by 2010 she could not have formed an intention to live with Mr. Poulain, or to form a lifetime bond. She did not understand, at that stage, what it meant to live together with another person, nor could she understand the concept of a lifetime bond.
>
> [346] Ms. Walker did not have a grip on the reality of her own existence and so could not grip the reality of a future lifetime with another person through marriage.
>
> [347] I find on the whole of the evidence, given her state of dementia, Ms. Walker could not know even the most basic meaning of marriage or understand any of its implications at the time of the Marriage including: who she was marrying in the sense of what kind of person he was; what their emotional attachment was; where they would be living and whether he would be living with her; and fundamentally, how marriage would affect her life on a day to day basis and in future.
>
> [348] I conclude that Ms. Walker did not have the capacity to enter the Marriage.
>
> [349] Since I have concluded that Ms. Walker did not have the capacity to enter the Marriage, the Marriage is void *ab initio*. Because the Marriage is void *ab initio*, s. 15 of the *Wills Act* does not apply and, therefore, the Marriage does not revoke the prior wills.

With respect to the 2009 Will, the Court concluded that the circumstances surrounding the document were suspicious and held, based on the evidence presented, that Ms. Walker did not have testamentary capacity at the time the 2009 Will was purportedly signed.

The niece sought an order propounding the 2007 Will should she succeed on other issues. The original copy of the 2007 Will was unavailable. Forgoing the technical Probate Rules, Madam Justice Griffin found that here too the practical and first issue to be decided was whether the deceased had capacity to make a Will. Relying on preceding evidence, her Honor concluded that on a balance of probabilities Ms. Walker lacked capacity to execute the 2007 Will. The Court declined to determine the future of Ms. Walker's estate as it had not been asked to do so.

The question of capacity with respect to marriage will, no doubt, often be more complicated than it was in this case as the niece's evidence was strong, with several credible witnesses. Nevertheless, this is a strong precedent for future claims to set aside predatory marriages for lack of capacity.

This case is also a reminder of the important role that lawyers play in protecting vulnerable older adults with diminished capacity, and in this instance, the evidence indicated that the lawyers failed to follow best practices. The testimony regarding the preparation of the 2009 Will and 2010 power of attorney suggested that no inquiries were made of the deceased's capacity. Instead, notations made by a party, with a vested interest in the changes to the Will, were accepted as instructions.

2017 - Hunt v. Worrod (Ontario)[192]

Hunt v Worrod examines the requisite decisional capacity to enter into a marriage contract.

In this decision, Kevin Hunt, father of two adult sons, was severely injured in an ATV accident and sustained a catastrophic brain injury. Before his accident, Mr. Hunt was involved with Ms. Worrod in an on-again and off-again relationship. Three days after Mr. Hunt returned home from the hospital he disappeared. He did not have his medications with him. When his sons tracked him down at a hotel (by obtaining particulars from his credit card) they learned that Ms. Worrod had made arrangements to marry Mr. Hunt and that the wedding had already taken place. The police were called, and they released Mr. Hunt into the care of his sons. The sons brought an application, and one of the issues that the Court was required to consider was whether Mr. Hunt had the capacity to marry Ms. Worrod and if not, whether the marriage was *void ab initio*?

Justice Koke started the court's analysis by citing *Ross-Scott v. Potvin* 2014 BCSC 435:

> A person is capable off entering into a marriage contract only if he or she has the capacity to understand the nature of the contract and duties and responsibilities it creates. The assessment of a person's capacity to understand the nature of the marriage commitment is informed, in part, by an ability to manage themselves and their affairs. Delusional thinking or reduced cognitive abilities alone may not destroy an individual's capacity to form an intention to marry as long as the person is capable of managing their own affairs.[193]

[192] *Hunt v. Worrod* 2017 ONSC 7397.
[193] *Ross-Scott v. Potvin*, 2014 BCSC 435 at para.177.

Justice Koke recognized the need to balance Mr. Hunt's autonomy and the possibility that he did not fully appreciate how marriage affected his legal status or contractual obligations.[194] Justice Koke went on to conclude that a finding by a Court that an individual has capacity to marry, as set out in *Ross-Scott v. Potvin*, requires that that person "entering into a marriage contract understand the duties and responsibilities which a marriage creates *and* have the ability to manage themselves and their affairs" [emphasis in the original].[195]

Justice Koke thoroughly examined the significant amount of evidence dealing with the issue of capacity presented at trial. This evidence came both in the form of expert medical testimony and medical reports as well as the oral testimony of lay witnesses. A number of medical professionals had found that prior to the marriage and shortly after, Mr. Hunt demonstrated the following severe cognitive and physical impairments, among others:

- Significant impairments to his executive functioning, such as his ability to make decisions, organize and execute tasks;
- A neurologically based lack of awareness of his deficits and impairments, making it difficult for him to experience fully what is happening around him as well as to infer consequences of events which might jeopardize his personal safety;
- He demonstrated little emotional reactivity as well as apathy, demonstrated by a lack of initiation and motivation;
- He should not be left alone and continued to need supervision for safety reasons as well as to remind him to take his medications;
- His driver's license was revoked;
- He had difficulty initiating conversation and needed cuing to provide additional information; and,
- He had limited range of motion in his left shoulder, difficulties with balance, some residual left neglect, and his ability to walk was impaired when he performed more than one task at a time.

[194] *Hunt v. Worrod* 2017 ONSC 7397 at paras. 10-11.
[195] *Hunt v. Worrod* 2017 ONSC 7397 at para. 83.

Justice Koke found that the evidence of the lay witnesses called by the sons supported the opinion of the medical experts as to Mr. Hunt's cognitive and physical impairments.

Before his release from the hospital, Mr. Hunt was assessed by Bill Sanowar, a capacity assessor on two separate occasions. On August 5, 2011, Mr. Sanowar found Mr. Hunt to be incapable of managing his property. On October 19, 2011, five days before the marriage, Mr. Sanowar found Mr. Hunt to be incapable of making personal care decisions with respect to the areas of health care, nutrition, shelter, and safety.

After reviewing this extensive medical evidence, and evidence from the sons, Mr. Hunt, Ms. Worrod, and others, Justice Koke concluded that Mr. Hunt did not have the requisite capacity to marry and declared the marriage to be *void ab initio*.

Unlike most predatory marriage cases which make it to trial, this case is markedly different since Mr. Hunt is not an older person and he is still living. This meant that, while clearly vulnerable, a consideration of his personal autonomy and his safety and wellbeing in the future was necessary.

Due to the nature and extent of Mr. Hunt's injuries from his accident, extensive medical evidence for the period surrounding the marriage was available to the Court. Of particular importance were the contemporaneous capacity assessments with respect to property and personal care that had been conducted and were available to the Court. This is unusual, as predatory marriage cases often involve an older adult who may not require regular medical attention. As a result, there is often limited medical evidence from the period surrounding the marriage available.

Alienation is another common element of predatory marriages, where the unscrupulous opportunist chooses to wedge him or herself in between the older adult and their friends and family. While Ms. Worrod did attempt to alienate Mr. Hunt from his sons and influence his actions, since the sons are his guardians, they were able to do what they could to protect him and continue to make decisions in his best interest.

2018 – Chuvalo v. Chuvalo (Ontario)[196]

Capacity to Reconcile

In the recent decision, *Chuvalo v. Chuvalo*[197] Justice Kiteley examined the issue of the requisite decisional "capacity to reconcile". This analysis will review the reported reasons for decision and provide commentary on the "capacity to reconcile" within the context of current Canadian decisional capacity jurisprudence. Notably, this decision continues to highlight the complexity of the underlying principles of decisional capacities.

The Decision: *Chuvalo v. Chuvalo* 2018 ONSC 311

George Chuvalo, now retired, was a legendary boxer who fought over 93 fights throughout his 22-year career. He was a five-time Canadian Heavy-Weight Champion, a two-time world heavy weight challenger, and his accolades include two matches against the Great Muhammad Ali. His famed status as a boxer was achieved despite his losses to Ali. In their last fight George went the distance, all 14 rounds, rallying at the end and withstanding knockout. Now, at 80 years old, George Chuvalo is still making news headlines, but unfortunately respecting his would-be private affairs in a nasty public familial dispute over custody and control. His tough beginnings determined career and personal heartache appear not to be out of public scrutiny just yet.

Recent media articles[198] have reported on George Chuvalo's significant cognitive decline and his children's fight to have their father's expressed wishes recognized by a court. Specifically, over the last two years, Chuvalo's children have been in a fierce legal battle with Joanne Chuvalo, their father's spouse. His children, in their capacity as his attorneys under powers of attorney, brought divorce proceedings on behalf of Chuvalo. Joanne, however, sought to reconcile and not divorce Chuvalo despite separation.

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[196] *Chuvalo v. Chuvalo* 2018 ONSC 311.
[197] *Chuvalo v. Chuvalo* 2018 ONSC 311 (CanLII)
[198] Mary Ormsby, "The Fight Over Boxing Legend George Chuvalo", The Toronto Star, November 3, 2017, online: https://www.thestar.com/news/canada/2017/11/03/the-fight-over-boxing-legend-george-chuvalo.html ; Mary Ormsby, "George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules", The Toronto Star, January 13, 2018, online: https://www.thestar.com/news/gta/2018/01/13/george-chuvalo-lacks-capacity-to-decide-on-his-marriage-judge-rules.html

In their application, the children, on behalf of their father, reportedly raised allegations of kidnapping, brainwashing, and extortion, reckless spending and alleged that Joanne preyed on George Chuvalo's vulnerable mental state to "extort cash money".[199]

The Hearing of the Application

In January 2018, a three-day hearing of an application was heard in part, focusing at that time on the sole issue of whether Chuvalo had the requisite capacity to decide to reconcile with Joanne.[200] The application as a whole also centers on the greater issue of divorce, but that issue was put over to a trial. At the outset of the hearing, the parties agreed that the evidence demonstrated that George Chuvalo lacked the requisite decisional capacity to instruct his counsel. As such, the Public Guardian and Trustee was appointed as his representative pursuant to rule 4(3) of the *Family Law Rules* (akin to a Litigation Guardian in estate proceedings).[201]

In her decision dated January 12, 2018, Justice Kiteley decided that Chuvalo "does not have capacity to decide whether to reconcile" with Joanne and further noted that she need not decide whether he has the capacity to divorce.[202]

Justice Kiteley relied on the expert opinion of Dr. Richard Shulman, a geriatric psychiatrist, and referenced the opinion of Dr. Heather Gilley, a geriatrician. Dr. Shulman set out the legal criteria applicable to assessing whether an individual possesses the requisite decisional capacity to make a particular decision as follows:

1. The ability to understand information relevant to making the decision (for example relevant facts); and
2. The ability to appreciate the consequences of making or not making the decision (relevant to the context of the situation-specific nature of decisional capacities).

Dr. Shulman had assessed George and testified that earlier in the spring of 2017, he was able to understand and appreciate what he was doing, why he was doing it, and whether

[199] *Ibid*., "The Fight Over Boxing Legend George Chuvalo".
[200] *Chuvalo v. Chuvalo*, 2018 ONSC 311, para. 16 ["*Chuvalo*"]
[201] *Chuvalo*, paras. 4-5.
[202] *Chuvalo*, paras. 16-17.

he wanted to do it as far as the divorce proceedings were concerned. He explained that George had an adequate understanding of the fact that he was then separated and was pursuing a divorce, and he had consistently indicated that divorce, rather than reconciliation, was his preferred option.[203]

Some months later, in November of 2017, Dr. Shulman again assessed George and noted that his cognitive ability had declined sharply and that he was at that time no longer able to "appreciate the consequences of his choices regarding the matrimonial proceedings" which involve a "realistic appraisal of outcome and justification of choice."[204] Justice Kiteley accepted the evidence and expert opinion of Dr. Shulman.[205]

In addition to the expert evidence, "[a]fter laying the evidentiary groundwork" Justice Kiteley "ruled that, based on Ms. O'Hara's[206] special skill and based on Ms. Chuvalo's knowledge and experience, each of them could form an opinion as to whether Mr. Chuvalo had the *ability to decide where he wants to live*. Each witness said he had that ability and that he expressed his desire to live with Ms. Chuvalo" [emphasis in original].[207]

Justice Kiteley began her analysis with a review of the decision in *Calvert v. Calvert*,[208] which dealt primarily with the issue of whether the applicant wife had the capacity to form the requisite intention to separate from her husband. In that case, the Court relied on the expert evidence of Dr. Molloy in finding that the applicant had the requisite capacity to separate from her husband. Dr. Molloy opined that to be competent to make a decision, a person must: understand the context of the decision; know his or her specific choices; and appreciate the consequences of the choices.[209]

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[203] *Chuvalo*, para. 34.
[204] "George Chuvalo Lacks Capacity to Decide on His Marriage, Judge Rules"; *Chuvalo*, paras. 33, 35, supra note 1.
[205] *Chuvalo*, paras.44-48.
[206] Ms. Chuvalo's sister.
[207] *Chuvalo*, para. 29.
[208] *Calvert (Litigation Guardian of) v. Calvert*, 1997 CanLII 12096 (ON SC), aff'd 1998 CarswellOnt 494; 37 OR (3d) 221 (CA), leave to appeal to SCC refused May 7, 1998.
[209] *Chuvalo*, para.52.

In addition, her Honour considered and cited, *Banton v. Banton*[210] and *Feng v. Sung Estate*,[211] relying on the following principles: "an individual will not have the capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves";[212] and "a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[213]

Justice Kiteley also relied on that espoused in the recent decision of *Hunt v. Worrod*:[214]

> The consensus of opinion from the medical experts and witnesses, evidence which I note was un-contradicted by other medical experts, is that Mr. Hunt lacked the ability to understand the responsibilities or consequences arising from a marriage, and that he lacked the ability to manage his own property and personal affairs as a result of the injuries he sustained on June 18, 2011.

The Court concluded that the requirement for an individual to understand and appreciate the consequences of making or not making a decision to reconcile were consistent with the medical parameters outlined in Dr. Shulman's report as well as the jurisprudence (referenced).[215]

Justice Kiteley found that George Chuvalo expressed a wish to live with his wife but explained that "there is no evidence that he understood whether there would be consequences to a decision to 'live with' his wife. Indeed, there are consequences such as changing the financial status quo between them . . . There are other consequences such as the emotional impact if the attempted reconciliation fails."[216]

Counsel for Joanna submitted that there was no evidence that George ever intended to separate. The Court acknowledged that by finding that George Chuvalo lacked the capacity to decide whether to reconcile, it appeared to be implicit that there was a

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[210] 1998 CarswellOnt 3423, 1998 CanLII 14926, 164 DLR (4th) 176 (Ont Gen Div).
[211] (2003) 1 ETR (3d) 296, 37 RFL (5th) 441 (Ont SCJ), affd 11 ETR (3d) 169, 2004 CarswellOnt 4512 (ONCA).
[212] *Chuvalo*, para. 55.
[213] *Chuvalo*, para. 56.
[214] *Hunt v. Worrod*, 2017 ONSC 7397, para 91, para 58 of Chuvalo
[215] *Chuvalo*, para. 59.
[216] *Chuvalo*, paras. 60-61.

separation. Her Honour did not decide whether Chuvalo did separate from Joanna, and held that if it was at issue, it would be addressed in the future trial.

In early March, the parties were ordered to attend a case conference to discuss the next steps in the proceedings. At the close of the hearing, Justice Kiteley encouraged the parties to focus on George Chuvalo's 'best interests' and to "bury the hatchet and co-operate to develop a plan that will work in the best interests of George in his remaining years while he continues to experience inevitable decline."[217] Her Honour found that Joanne was not successful and was not entitled to her costs.

In a separate proceeding, the court addressed Joanne's attempt to seek guardianship of her husband and in which she disputes the validity of the power of attorney granted to George's two children.[218]

This decision is now under appeal. In the appeal Joanne asserts that Justice Kiteley erred in not applying *Calvert*, by applying an incorrect test and creating a more onerous test than the established tests or factors to be applied in determining the requisite decisional capacity to separate or to divorce, among other issues.[219]

Commentary & Analysis

George Chuvalo's circumstances are not unfamiliar, particularly in our rapidly aging population. With age and longevity often comes an increase in the occurrence of medical issues affecting cognitive ability, and impairment of the executive functioning part of the brain. Diseases such as Dementia, Alzheimer's, Stroke, Parkinson's, and other conditions involving reduced executive functioning are examples of the sorts of illnesses that can give rise to decisional capacity concerns. The Chuvalo proceedings illustrate how issues concerning for example, the capacity to marry or divorce are increasingly prevalent in our aging demographic.

[217] Chuvalo, para. 69.
[218] *Supra* note 1, "George Chuvalo Lack Capacity to Decide on his Marriage, Judge Rules"
[219] See "Appeal Sought in Chuvalo Divorce Case", The Lawyers Daily online: https://www.thelawyersdaily.ca/family/articles/5896/appeal-sought-in-chuvalo-divorce-case

Decisions concerning the capacity to marry, and divorce are evolving in the law. Historically, courts have viewed the contract of marriage as a 'simple' contract, not requiring a high degree of intelligence to comprehend. This same threshold for determining the requisite decisional capacity to marry has been equated to the requisite decisional capacity to divorce.[220] Issues related to the capacity to marry, and divorce are of increasing importance in our society, particularly since marriage and divorce carry with them significant financial and property rights and consequences. In some provinces marriage revokes a testamentary document as does divorce revoke bequests to a prior spouse.

A more recent stream of cases[221] appear to be moving the law along in the direction of developing more detailed factors that should be considered when determining the requisite decisional capacity to marry that both reflect and accord with the real-life financial implications of marriage or divorce.

Importantly, each of these cases has its own unique facts, defining characteristics and evidence to be weighed and considered. These recent decisions would seem to have had the benefit of extensive probative medical evidence in their success, which is not often the case. The hallmarks of a predatory relationship often include alienation, sequestering, isolation and a deliberate and purposeful lack of medical evidence of cognitive impairment.

The consideration of determining the requisite capacity to reconcile is not an often-deliberated issue before the court. A few cases have addressed the requisite decisional capacity to *separate*[222] but none, until *Chuvalo*, have expressly addressed reconciliation purely from a cognitive assessment perspective.

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[220] *Calvert*, *supra*, at paras. 57-58; *AB v. CD*, 2009 BCCA 200, leave to appeal to SCC refused in 2009 CarswellBC 2851; *Wolfman-Stotland v. Stotland*, 2011 BCCA 175.
[221] *Banton v. Banton*, *supra*; *Barret Estate v. Dexter* (2000), 34 ETR (2d) 1, 268 AR 101 (Alta QB); *Feng v. Sung Estate*, *supra*; *Devore-Thompson v. Poulain*, 2017 BCSC 1289; *Hunt v. Worrod*, 2017 ONSC 7397.
[222] *Calvert*, *supra* and *Babiuk v. Babiuk* 2014 SKQB 320.

Justice Kiteley in *Chuvalo* considered[223] the oft-cited quotation from Justice Bennoto in *Calvert* dealing with the various "levels" of capacity":

> There are **three levels of capacity** that are relevant to this action: capacity to separate, capacity to divorce and capacity to instruct counsel in connection with the divorce.
>
> **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 and to be no longer married to one's spouse. It is the undoing of the contract of marriage.**
>
> The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend *Park*,[224]…… 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* [citation omitted].
>
> **There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding.** The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will: *Park, supra*, at p. 1426. . . . [Emphasis added]

While *Calvert* may be the current state of the law, the question of whether it is correct is arguably at issue. It may be that the Courts have not quite got it right for various reasons, which can be problematic in future application.

First, referenced are the various "levels" for the capacity to separate, divorce, and marry within a hierarchical analysis. While it may be easier or instinctive to apply hierarchies to such analysis, a hierarchy delineating differing levels of decisional capacity does not exist. Rather different types of decisional capacity simply call for different standards to be applied.[225]The court in Chuvalo simply did not get caught up in an analysis of hierarchical paradigms.

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[223] At para. 50.

[224] *Re Park*, [1953] 2 All E.R. 1411

[225] See Kimberly A. Whaley, Kenneth l. Shulman, and Kerri L. Crawford, "The Myth of a Hierarchy of Decisional Capacity: A Medico-Legal Perspective", Adv. Q., Volume 45, No.4, July 2016.

Second, at first glance, it appears that in *Calvert*, Justice Bennoto finds capacity to separate is simply determining with whom one wants to, or does not want to, live. Finding that separation only requires the decisional capacity to decide with whom one wants to live is not in keeping with the *Molodovich*[226] factors – since reconciliation or separation does not necessarily involve living together – it is but one factor in a sea of other factors all of which have far reaching consequences. Separation, specifically determining the date of separation, has legal and financial consequences in the family law and statutory context, since it is used to determine the equalization of property, separation agreements that may be entered into and other domestic contractual arrangements or divorce decrees.

The court went on to find in *Calvert* that that there is a distinction between deciding with whom one wants to live and decisions with financial consequences; and concluding that financial matters require a "higher level of understanding". The decision to separate inherently involves financial considerations and consequences as does marriage and divorce. The question of a higher or lower level or threshold is really dispelled by the decision itself that is being undertaken. Each decision has different factors to be applied in ascertaining requisite decisional capacity.

This must equally be true of the decision to reconcile. Neither separation, nor reconciliation, is simply about with whom one wants to or does not want to live. If it was then perhaps the factors to be applied in its determination would be the same. For George, perhaps the question was more about where he wanted to live than with whom he wanted to live. There was notably, no discussion about personal care decisional capacity. Justice Kiteley clearly notes the distinction in her decision, and she concludes that Ms. Chuvalo and Ms. O'Hara could "form an opinion as to whether Mr. Chuvalo had the *ability to decide where he wants to live*" but it was only the experts who could express an opinion on Mr. Chuvalo's executive functioning and his cognitive ability to decide to reconcile.

[226] *Molodowich v. Penttinen*, 1980 CanLII 1537 (ON SC).

Determining the requisite capacity to reconcile may be situation specific depending on the intentions and terms of the contemplated reconciliation. For example, it may involve living together, or living separate and apart for the purposes of the *Divorce Act*. In this case, Ms. Chuvalo removed Mr. Chuvalo from the long-term care facility in which he was residing and took him to her house. Few people willingly want to live in a long-term care facility. Living with Ms. Chuvalo was likely a happy alternative for him, but that is not the only consideration in determining the question of requisite decisional capacity (or desire) to reconcile with his wife.

Two key paragraphs to examine in this decision are paragraphs 61 & 62:

> ….However, expressing a desire to live with his wife is just that. There is no evidence that he understood whether there would be consequences to a decision to "live with" his wife. Indeed, there are consequences such as changing the financial status quo between them, such as changing the date of separation for purposes of s. 8(2) of the *Divorce Act*. There are other consequences such as the emotional impact if the attempted reconciliation fails.
>
> This court cannot rely on Mr. Chuvalo's assertions that he wants to live with his wife as a basis on which to find that he is capable of making the decision to reconcile.

Justice Kiteley decided that Mr. Chuvalo did not have the requisite decisional capacity to reconcile. For if he reconciles, he needs to be able to foresee and understand the consequences of a reconciliation which involves not only emotional but financial consequences as well.

Justice Kiteley looked at several cases and appropriately (in my view) applied the standard which is arguably developing in more recent case law. Perhaps the standard or factors to consider when determining the requisite decisional capacity to reconcile should be the same as applied in determining the capacity to marry (or marry again), which ought to include both factors of property and personal care management, as found in obiter by both the Honorable Justice Cullity in *Banton,* and again by the Honorable Justice Greer in *Sung*.

In our opinion, Justice Kiteley, made the correct decision on the evidence before her. Dr. Shulman was the only expert called to give evidence (and be cross-examined on this evidence), and he was in the fortunate position of having seen and having assessed Mr.

Chuvalo both while he was decisionally capable of certain tasks and at a later point of significant decline in cognitive and executive functioning when he was no longer capable of certain other tasks. This made Dr. Shulman a very compelling and appropriate medical expert witness and he addressed the correct legal questions (i.e., the ability to understand information relevant to making the decision; and the ability to appreciate the consequences of making the decision or not). So, in my respectful opinion, Justice Kiteley properly declined to apply the hierarchical and "levels" of decisional capacity approaches. Moreover, in my opinion, based on the evidence that Mr. Chuvalo could not understand the consequences of reconciliation (including both financial and emotional considerations) and was not capable of instructing his counsel, the court correctly determined that Mr. Chuvalo lacked the requisite decisional capacity to reconcile on the evidence before it.

To complicate matters a little in the reading of this decision, there were two concepts of reconciliation at play relative to the presumed separation: 1) in the statutory context, under the *Divorce Act*, section 10[227] which deals with inter alia, dates of separation and the divorce proceedings proper (which will be dealt with at a future hearing/trial – where evidence will be marshalled surrounding their separation in accordance with that statute);

[227] Sec 10 (1) In a divorce proceeding, it is the duty of the court, before considering the evidence, to satisfy itself that there is no possibility of the reconciliation of the spouses, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so.
Adjournment
(2) Where at any stage in a divorce proceeding it appears to the court from the nature of the case, the evidence or the attitude of either or both spouses that there is a possibility of the reconciliation of the spouses, the court shall
(a) adjourn the proceeding to afford the spouses an opportunity to achieve a reconciliation; and
(b) with the consent of the spouses or in the discretion of the court, nominate
(i) a person with experience or training in marriage counselling or guidance, or
(ii) in special circumstances, some other suitable person, to assist the spouses to achieve a reconciliation.
Resumption
(3) Where fourteen days have elapsed from the date of any adjournment under subsection (2), the court shall resume the proceeding on the application of either or both spouses.
Nominee not competent or compellable
(4) No person nominated by a court under this section to assist spouses to achieve a reconciliation is competent or compellable in any legal proceedings to disclose any admission or communication made to that person in his or her capacity as a nominee of the court for that purpose.
Evidence not admissible
(5) Evidence of anything said or of any admission or communication made in the course of assisting spouses to achieve a reconciliation is not admissible in any legal proceedings

and, 2) what Justice Kiteley was asked to do in this hearing, which was to determine whether George Chuvalo had the requisite decisional capacity to reconcile at the time the application on this issue was heard.

It will be interesting to learn the outcome of the appeal. Ms. Chuvalo's position seems to involve the proposition that an understanding of the legal effect of reconciliation ought not to be part of the assessment of the requisite decisional capacity to reconcile and that Justice Kiteley failed to apply *Calvert*. However, I do not see how it can be concluded that Her Honour failed to apply *Calvert* – indeed the reasons for decision reference a selection of relevant and notable cases which were considered, evaluated, and examined in tandem with the medical and expert evidence and the fact specific nature of the issues for determination before her.

In my respectful view, the suggestion that Justice Kiteley created a more onerous test (an argument Her Honor addresses head on and provides reasons for) simply does not carry any weight.[228] The consequences are all part of the *'test'* or factors to be applied in the determination of capacity for any decision made, even for simple contractual capacity. In the end, she preferred the probative evidence of the expert that Mr. Chuvalo did not have the requisite capacity to instruct counsel and did not have the requisite capacity to reconcile.

The only part of the decision that may perhaps raise some questions for further examination or consideration are the comments made on the reverse onus. There is a legal presumption of capacity, so therefore the onus is usually on the person who challenges capacity to prove a lack of capacity on a balance of probabilities. Here, Justice Kiteley directed Mr. Chuvalo to prove that he had capacity. Nevertheless, Her Honour still concludes[229] that she is satisfied with the evidence and does not have to worry about the burden in this instance with no further comment on point provided.

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[228] Her Honour says in para. 46: "I do not accept the submission that he [Dr. Shulman] created his own 'new and elevated test for capacity' or a 'higher and impossible test' by introducing the element of understanding of consequences. As indicated above, Dr. Shulman and Dr. Gilley similarly describe the elements of capacity and an understanding of the consequences is key. As Dr. Shulman said, capacity involves the decision-making process, not the decision itself."

[229] At para. 24.

Ultimately, Justice Kiteley reviews and acknowledges the standards or factors to be applied in determining requisite decisional capacity, but does not apply any particular factors, standard or "test" per se. Instead, Her Honour relied on the evidence before the court and concluded that Mr. Chuvalo was decisionally incapable of reconciliation at the time of the application and perhaps on a preliminary basis since it appears that the divorce proceedings are still the subject matter of a further hearing/trial before the Court.

2020 – Tanti v. Tanti (Ontario)[230]

The Ontario case of *Tanti* involves an elderly man, Paul Tanti, who married his younger live-in companion, Sharon Joseph. The case, while not a predatory marriage, raises questions about the low threshold for the capacity to marry.

Paul and Sharon met in 2014 through a community organization where Paul was looking for help painting the exterior of his home. After this initial project, Paul and Sharon began traveling and socialising together. By 2017, the two referred to themselves as "companions" when speaking with family, friends, and professionals. By early 2018, Sharon moved into Paul's house. Eventually, Paul proposed, and the two were married in July 2019.

Witnesses who attended the ceremony testified that Paul was able to answer the minister's questions clearly and that Paul let them know that he loved Sharon and was happy to be married to her. A photo confirmed the couple's happiness.[231]

Paul's son, Raymond Tanti, disliked Sharon and on July 31, 2019, became verbally abusive upon learning about the marriage. On the same day of Raymond's tirade, Paul and Sharon attended the law office of Desmond Brizan where Paul met with the lawyer alone and provided instructions to draft a Power of Attorney in favour of Sharon. Mr. Brizan testified that Paul had sufficient capacity in providing these instructions.[232]

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[230] *Tanti v. Tanti*, 2020 ONSC 8063 [*Tanti* 2020]
[231] "Yet Another May-December Marriage," https://welpartners.com/blog/2021/01/yet-another-may-december-marriage/. Posted 22 January 2021.
[232] *Tanti* 2020, *supra*, at paras. 25-26.

After meeting with the solicitor, Sharon departed for a two-week trip to visit family members in Grenada. Within days of her departure, Raymond met with Paul's banker who informed him that Sharon was now listed as Paul's Power of Attorney. Raymond then took Paul for an urgent assessment with a gerontologist, Dr. Varga.

Dr. Varga found, "Paul's cognitive reasoning was impaired and that he lacked the capacity to handle his financial and medical affairs."[233] Dr. Varga did not, however, provide an opinion on Paul's capacity to marry.

Dr. Varga referred Paul for a second opinion. The second doctor reported that Paul lacked the capacity to grant a Power of Attorney but did not opine on his capacity to marry. Raymond then obtained a third opinion from another gerontologist "who opined that Paul lacked the capacity to marry, since he did not seem to recollect the marriage."[234]

On August 29, 2019, Raymond moved Paul to his home in Toronto. A week later, while Sharon was still out of the country, Raymond brought an application for support, alleging Paul had "become subject to manipulation and perhaps loss and misappropriation of funds at the hands of a hired caregiver, Sharon Joseph." On September 2019, Justice Harris granted Raymond's application. Upon her return, Sharon submitted a motion to set aside the order. Section 3 Counsel was also designated to Paul. While Paul's counsel took no position on the validity of the marriage, "everyone agreed that by this time Paul lacked capacity to instruct counsel or otherwise to participate in the application."

Raymond brought an application seeking:

- A declaration that Paul is incapable of managing property and personal care;
- Guardianship of Paul's property and personal care;
- Custody of Paul;
- An order permitting him to lease and eventually sell Paul's home;
- An order freezing all bank accounts jointly held by Paul and Sharon; and,
- An order suspending the Power of Attorney granted by Paul to Sharon.

[233] *Ibid*, at paras. 29
[234] *Ibid.*

Between November and December of 2020, Justice Mandhane presided over a video conference hearing and found no evidence to substantiate Raymond's claims. Mandhane J. referred to recent cases in discussing the law on capacity to marry while referring to well known principles and re-iterated that the test is simple, and capacity is fluid. Mandhane. J. held that pursuant to *Lacey v. Lacey (Public Trustee of)*, [1983] B.C.J. No. 1016 (S.C.), "understanding the content of the marriage contract does not require a high degree of intelligence; the parties must agree to live together and love one another to the exclusion of all others."[235] Additionally, Mandhane J. held that pursuant to *Hunt v. Worrod*, in the face of a legal marriage, Raymond has the burden of satisfying that Paul lacked capacity to marry Sharon.[236]

Mandhane J. admitted opinions of three gerontologists, however, did not give this evidence much weight as the reports were retrospective (prior to Paul's decision to marry), and the doctors opinions were not contemporaneous with the marriage. Most of the weight in the Court's decision was placed on direct evidence about Paul's capacity leading up to the marriage, considering the following factors:

a) The couple's relationship prior to the marriage;
b) Paul's cognitive capacity leading up [to] and immediately after the marriage;
c) Paul's understanding of the marriage ceremony and vows, and the obligations it created; and
d) Paul's interactions with professionals <u>contemporaneous</u> to the marriage.[237]

The parties were in a long-term relationship that developed and deepened over a five-year period. Raymond's allegations of predation on the part of Sharon were not proved. Noting that, Paul's decision was ultimately rational and the fact that Sharon stood to benefit financially from the relationship was irrelevant in the absence of duress.

[235] *Ibid*. at para. 43.
[236] *Ibid*. at para. 38.
[237] *Ibid*. at para. 58.

Sharon's cost claims were discounted because her "approach to the litigation unreasonably increased her costs," however, she was awarded full-indemnity costs against Raymond because of his egregious conduct.

2021 – Tanti v. Tanti (Ontario)[238]

In the appeal of Mandhane J.'s 2020 decision, the Ontario Court of Appeal was tasked with examining the determination of capacity of a person to enter into a marriage.

On September 12, 2019, Paul's son Raymond sought a guardianship order of Paul's property and person. Justice Harris of the Superior Court of Justice granted this order.[239] The Office of the Public Guardian and Trustee then appointed counsel for Paul in November 2019. Ms. Joseph brough a motion to set aside the order granted to Raymond and Ms. Joseph was added as a party to the proceedings. On December 22, 2020, Justice Mandhane determined the marriage was valid.

On May 27, 2021, Justice Trimble of the Ontario Superior Court of Justice granted a stay of the guardianship proceedings pending the disposition of the appeal. The Ontario Court of Appeal ruled this was a procedural issue, holding that the only issue before the Court was Mandhane J.'s decision on the validity of marriage. The appeal was dismissed.

The Appellant, Raymond Tanti, raised five grounds of appeal:

1. The Trial Judge applied the wrong test to determine Paul's capacity to marry;
2. The Trial Judge relied on her own research without allowing parties to make submissions on the point;
3. The Trial Judge failed to accept certain evidence;
4. The Trial Judge accepted evidence of a lay witness without meaningful cross-examination; and,
5. The Trial Judge demonstrated a reasonable apprehension of bias necessitating a new trial.

[238] *Tanti v. Tanti*, 2021 ONCA 717 [*Tanti* 2021].
[239] *Ibid*. at paras. 3-6.

The Court of Appeal found that the trial judge instructed herself on the relevant law regarding a person's capacity to marry. In reviewing the trial decision at paragraphs 40 to 46, the Court agreed with Mandhane J.'s determination of capacity as a fluid concept (decision, time, situation specific) and that requirements vary significantly and must be applied to a specific decision, act or transaction at issue. The Court held that Mandhane J.'s decision that Paul possessed the requisite capacity to marry was based on four days of testimony from eight witnesses and that these facts were correctly applied to the capacity test outlined at paragraphs 40 to 46.[240]

While the Court agreed there was some indication of Paul's decline prior to the marriage, it found no persuasive evidence that at the time of marriage "his cognitive status had diminished to the point that he was unable to make decisions regarding his day-to-day affairs or living arrangements."[241] In reaching a conclusion, the Court found that Mandhane J. rejected or discounted evidence of several experts while relying on direct evidence of a lawyer Paul consulted and gave instructions to regarding a Power of Attorney over property at the time of the marriage.

The Court was satisfied Mandhane J. instructed herself properly on the test for validity of a marriage, holding that "She correctly stated that, for a marriage to be valid, the parties must understand the nature of the marriage contract and the duties and responsibilities that flow from it. She properly emphasized that the inquiry into the validity of a marriage is situation specific."[242] The Court also found that the trial judge did not err by rejecting expert evidence, holding that instead, there was a cogent explanation for not being persuaded: the expert evidence was not contemporaneous with the marriage.

6. International Perspective on Predatory Marriages

In the U.S.A., very few states have retained the revocation-upon-marriage provisions in their probate legislation.[243] Some states permit a relative to contest the validity of a

[240] *Ibid*. at paras. 11-12.
[241] *Ibid*. at para. 13.
[242] *Ibid*. at para. 21.
[243] Albert Oosterhoff, "Predatory Marriages" (2013) 33 ETPJ 24 at p. 54.

marriage by an incapacitated elderly family member before the death of that family member, and in Texas, their legislation permits post-death contests.[244]

United States of America

In the United States of America, both Federal and State laws hold the view that marriage is not only a private civil contract with corresponding obligations but also a relationship that should be encouraged as a matter of social and public policy. According to Stephen L. Elkins, who writes on the perspective of Michigan's marriage laws, "the legal formalities to obtain a marriage license and a certificate of marriage in Michigan are minimal, and are arguably as liberal as in any other state."[245] Because of the relative ease in getting married, including the low threshold for capacity, Elkins argues that "Michigan is not the only state that makes an exploitative marriage an attractive scam since the majority of states have standing rules that prevent a voidable marriage from being attacked after the death of either spouse."[246] Terry L. Turnipseed, an associate professor of law at Syracuse University has explored the topic of predatory marriages in America. Professor Turnipseed has suggested the following potential solutions to the issue:

1. Require more safeguards in the marriage process to deter undue influence and ensure sufficient capacity, such as requiring more witnesses, videotaping of the ceremony, the attendance of medical professionals, the assignment of mandatory guardians ad litem;
2. Shift to a presumption of incapacity if one party dies within a certain amount of time after the wedding;
3. Give a surviving spouse minimal property rights if the marriage lasts less than a certain amount of time;
4. Prohibit weddings in hospitals and similar facilities; and,
5. Increase the level of capacity needed to enter into a marriage contract, say to testamentary capacity, and allow family members to demonstrate that the alleged

[244] *Ibid*. at p. 57.
[245] Stephen L. Elkins, "Exploitative Marriages in Michigan: To Love and Honor until Death Does Its Part" (2014) 34:1 Michigan Prob & Est Plan J 29 at 29 [Elkins].
[246] Elkins, *supra* note 245 at 31.

> victim did not have the higher capacity at the time of the marriage, thus invalidating all property consequences associated with the marriage.[247]

By 2014, five US states had passed laws granting heirs standing to challenge an alleged exploitative marriage after the death of the victim: New York[248], Vermont[249], Louisiana[250], New Jersey,[251] and most recently, Florida[252].

Where it concerns the types of appropriate legislation needed to address the scourge of predatory marriages, Shelly Jackson and Thomas Hafemeister, argue that "a financial exploitation of an older adult statute should address when someone establishes a relationship with an older adult for the purpose of interjecting themselves into the older adult's life to obtain access to and misappropriate the older adult's funds or other assets for personal gain."[253]

The authors noted that by 2020, thirty-nine states and the District of Columbia had a criminal statute in place that specifically addressed financial exploitation. However, the authors carefully noted that statutory approaches have remained relatively unchanged from 2000 to 2020. According to the authors,

> nineteen states had a criminal statute explicitly addressing the financial exploitation of older adults in place in 2000 that remains in effect relatively unchanged today … these jurisdictions include Arizona, Arkansas, California, Colorado, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Minnesota, Mississippi, Nebraska, Nevada, North Dakota, South Carolina, South Dakota, and Utah.[254]

Many states do not provide a statute to allow a challenge to a voidable marriage after death. One of these states, Maryland, has heard and rendered a decision which held that

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[247] *Ibid*., citing Terry L. Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America," (2008) 96 Ky L J 288.
[248] See NY Domestic Relations Law §140 (McKinney 2005).
[249] See Vt. Stat. Ann. Tit. 15 §516 (2005).
[250] See La. Civ. Code. Art. 95 (2006).
[251] See NJ Stat. 2A:34-1 (2007).
[252] See FSA §732.805.
[253] Shelly L. Jackson & Thomas L. Hafemeister, "Using the Criminal Law to Respond to the Financial Exploitation of Older Adults: The Statutory Evolution in the United States from 2000 to 2020" (2022) 29:2 Elder LJ 315 at 341 [Jackson].
[254] Jackson, *supra* note 253 at 333.

a surviving spouse could be denied spousal rights based on the surviving spouse's inequitable conduct.

In the case of *In Re Robert Watkins*[255] the equitable doctrine of unclean hands was successfully argued before the Orphans' Court. The doctrine itself "refuses recognition and relief from the court to those guilty of unlawful or inequitable conduct pertaining to the matter in which relief is sought."[256] A cursory search reveals that this is likely the only Maryland case to use this doctrine to challenge a voidable marriage after death, however, it should be noted that New York courts have also exercised discretion in applying equitable relief in a similar situation.[257] In the *Watkins* decision, the Orphans' Court determined that undue influence was exercised over the Deceased, establishing a clear connection between the improper conduct and a claim before the Orphans' Court to a statutory share of the Estate.[258] Courts are empowered to exercise theirs powers of equity. This will be explored in greater detail below.

2021 – Recent Statutory Solutions (United States)

In a recent article published in the National Academy of Elder Law Attorneys (NAELA) Journal, Mark Esposito Esq.[259], at some recent development in the United States, highlighting statutory solutions in a small minority of states with statutes that explicitly allow post-death challenges to a marriage's validity on undue influence.

Esposito begins by reiterating that "[t]he crucial inquiry, therefore, is whether the marriage of a mentally incompetent person is considered to be void *ab initio*, making the marriage a legal nullity or, instead, voidable, meaning that it is effective unless directly challenged."[260]

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[255] 241 Md. App. 56 (2019).
[256] *Hicks v. Gilbert*, 135 Md. App. 394, 400 (2000) (quoting *Manown v. Adams*, 89 Md. App. 503, 511 (1991)).
[257] See *Campbell v. Thomas*, 897 N.Y.S. 2d 460, 471 (N.Y. App. Div. 2010).
[258] Zachary Worshtil & Ralph Powers, "How to Challenge a Marriage After Death in Maryland" (2019) Online: http://probatestars.com/how-to-challenge-a-marriage-after-death-in-maryland/.
[259] Mark J. Esposito, "Predatory Marriage," (2021) 17 NAELA J 1.
[260] *Ibid*.

In Florida, Texas, and California, state governments have amended their legislation to address some of the loopholes that allow predatory marriages to occur.

Florida

On October 1, 2010, Florida closed a statutory loophole for predatory marriages, introducing amendments to the state's Probate Code. Florida's Probate Code is found at Chapters 731 to 732 of the Florida Statutes. Chapter 732 explains intestate succession wills, the rights of spouses and children, exempt property, and the contractual arrangements and production of wills.

The Florida Probate Code at, Chapter 732.805 (1), states that:

> A surviving spouse who is found to have procured a marriage to the decedent by fraud, duress, or undue influence is not entitled to any of the … rights or benefits that inure solely by virtue of the marriage or the person's status as surviving spouse of the decedent unless the decedent and the surviving spouse voluntarily cohabited as husband and wife with full knowledge of the facts constituting the fraud, duress, or undue influence or both spouses subsequently ratified the marriage.[261]

Section 805 (4) holds, "the contestant has the burden of establishing, by a preponderance of the evidence, that the marriage was procured by fraud, duress, or undue influence;" while section 805 (8) holds that, "any interested person may initiate a challenge to a marriage within 4 years of the decedent's death, and the challenger bears the burden of proof by a preponderance of the evidence."[262]

The Florida Probate Code defines an "interested person" at 731.201 (23) as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved."

[261] See Esposito, *supra* note 259 at p. 9 where the author cites Florida 2010 – Fla.Stat. § 732.805 (1)
[262] Fla. Stat. § 732.805 (4) & (8).

According to Esposito, a challenged marriage in Florida will not be invalidated *per se* if successful; rather, it will be treated as if it had no legal effect regarding the disposition of the decedent's estate.[263]

A recent case in Florida demonstrates how an interested party can apply to the court after the death of the decedent. *In re Watkins,*[264] the Orphans' Court for Prince George's County found the Appellant wife of the decedent (at time of decedent's death) procured the marriage by undue influence.

The decedent and the predator spouse both resided in Florida; however, the decedent was domiciled in the state of Maryland. After a three-day evidentiary hearing in December 2015, the Court held that the Florida statute was inapplicable, however, the judgment was still affirmed on the ground that the appellant was barred from receiving a benefit from the estate by the doctrine of clean hands.

Texas

On January 1, 2014, the most recent changes to the Texas Estate Code took effect.[265]

Section 123.102, *Application to Void Marriage After Death* of the Texas Estate Code allows an interested person, within one year of decedent's death to challenge the validity of a marriage that began no more than three years before the decedent's death.[266]

The Texas Estate Code defines an "interested person" as:

1) An heir, devisee, spouse, creditor, or any other having a property right in or claim against an estate being administered; and
2) Anyone interested in the welfare of an incapacitated person, including a minor.

In pursuing a claim in Texas, "the court shall declare the decedent's marriage void if the court finds that, on the date the marriage occurred, the decedent did not have the mental

[263] *Ibid.*
[264] No. 2171 (Md. Ct. Spec. App. May. 29, 2019)
[265] Tex. Est. Code § 22.018
[266] Esposito, *supra,* at p. 10, where the author cites Tex. Est. Code § 123.102.

capacity to: (1) consent to the marriage; and (2) understand the nature of the marriage ceremony, if a ceremony occurred."[267]

A recent case in Texas demonstrates the successful use of the amended statute. *In re Estate of Durill,*[268] Appellant Georgeanne Costell Gassaway Durill ("Gassaway") appealed (unsuccessfully) from a judgment that voided her alleged marriage to William R. "Dusty" Durill, a prominent Texas businessman. After Durill's death, his adult children sued to void the marriage pursuant to Chapter 123 of the Texas Estate Code.

In a 2016 decision, the Texas Court of Appeals in the case of *Est. of Matthews III,*[269] held that, "If a party seeks to annul a decedent's marriage for lack of mental capacity, the burden is on the applicant to prove the decedent lacked the required mental capacity."[270] The case was an appeal of the trial court's judgment voiding a marriage between a former in-home health aide and a patient. The patient, William Henry Matthews III (Billy) was a disabled Army Veteran of Operation Iraqi Freedom. Billy was medically discharged from the Army after developing Multiple Sclerosis (MS). He was also treated for depression, ADHD, PTSD, and substance abuse. Billy committed suicide ten weeks into the marriage.

California

California is already known for its adherence to preventing and responding to forms of elder abuse. On June 26, 2019, the state approved Chapter 10 of the Acts of 2019 which amended the California Probate Code at Part 7, *Effect of Homicide or Abuse of an Elder or Dependent Adult*. The amendments are the result of Assembly Bill No. 328 and were effective as of January 1, 2020, expanding the presumption of fraud to include coverage for: 1) omitted spouse claims by caregivers, and 2) donative gifts to caregivers.

The statute presumes fraud or undue influence when a donative instrument makes a gift to a caregiver who began a marriage with the grantor while providing services to the grantor or within 90 days of the cessation of such services and the relevant document was executed less than six months into the marriage.[271] To overcome this presumption

[267] Tex. Est. Code § 123.103.
[268] 570 S.W.3d 945 (Tex. App. 2019)
[269] 510 S.W.3d 106, 118 (Tex. App. 2016) [*Matthews*].
[270] Esposito, *supra*, at p.10.
[271] Esposito, *supra*, at p. 11, where the author cites Cal. Prob. Code § 21380 (a) (4).

and obtain the benefit, a care custodian must prove the absence of fraud or undue influence.

Per Probate Code Section 21362, a care custodian "means a person who provides health or social services to a dependent adult, except that "care custodian" does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult:

> (1) at least 90 days before providing those services,
> (2) at least six months before the dependent adult's death, and
> (3) before the dependant adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, "remuneration" does not include the donative transfer at issue under this chapter or the reimbursement of expenses.
>
> (b) For the purposes of this section, "health and social services" means services provided to a dependent adult because of the person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.

Bill 328 also narrows the "omitted spouse" eligibility under the new Probate Code 21611 (d). Pursuant to this statute, if a care custodian marries a dependent adult and the latter dies within six months of the marriage, the care custodian is not omitted spouse unless they can prove by clear and convincing evidence the marriage was *not* the product of fraud or undue influence.[272]

California's Probate Code precludes such a caregiver spouse from receiving a pretermitted spouse's share of the decedent's estate if the decedent died within six months from the marriage date, unless the caregiver can prove by clear and convincing evidence the marriage was not the product of fraud or undue influence. Esposito argues "the California statute goes further than the Texas statute by placing the burden of proving the marriage's legitimacy on its proponent."

[272] JD Supra, "New California Statutes Change Spousal Undue Influence Presumptions" April 7, 2020, Online: http://www.jdsupra.com/legalnews/new-california-statutes-change-spousal-71870/

This legislative amendment is a complement to California's existing Probate Code, especially at Section 259 which holds that a court can declare a person unworthy to inherit if all the following circumstances are met:

1) It has been proven by clear and convincing evidence that the person is liable for physical abuse, neglect, or financial abuse of the decedent, who was an elder or dependent adult.
2) The person is found to have acted in bad faith.
3) The person has been found to have been reckless, oppressive, fraudulent, or malicious in the commission of any of these acts upon the decedent.
4) The decedent, at the time those acts occurred and thereafter until the time of his or her death, has been found to have been substantially unable to manage his or her financial resources or to resist fraud or undue influence.[273]

These statutory amendments are much welcomed in California, a state that experienced an epidemic of elder abuse and predatory marriages. In 2010, Ashley Rathbun wrote about once powerful and prominent former California judge and lawmaker, Ralph Dills and his predatory experience.[274] According to Rathbun, on September 13, 2001, Dills married his stepdaughter, Wendi Lewellen, who was 34 years younger. Ralph was suffering from Alzheimer's. Wendi manipulated Ralph by impersonating her mother, Ralph's wife of nearly thirty years. Wendi would dress up in her mother's clothing and wear her perfume. Wendi had previously declared bankruptcy with her husband, which led to their divorce. Wendi was living with Mr. Dills was this divorce was being finalized. It was reported that Wendi isolated Ralph who was prevented from regularly bathing because her pet rottweilers had taken over and littered his bathroom. Wendi and Ralph were married only five weeks after her divorce. Four months later, Ralph's stepsons, Wendi's brothers, learned about the marriage and commenced legal action, attempting

[273] See Dorota Miler, "Elder Exploitation Through Predatory Marriage" (2012) 28:1 *Cdn J Fam L* 11 at 45 where the author cites Cal. Prob. Code § § 259 (a 1-a4).
[274] Ralph C. Dills is the longest serving legislator in the history of California.

to annul the marriage. Altered to the potential elder abuse, the Placer Country district attorney launched a two-year investigation into Wendi's alleged misuse of Ralph's money and property. She was arraigned on two felony counts: "theft by caretaker from older adult" and "grand theft of personal property."[275]

Esposito argues that, "Jurisdictions that enact statutes such as those that now exist in Florida, Texas, and California, which enable interested parties to successfully attack truly predatory marriages, provide protection to vulnerable elders without unduly interfering with their inherent rights to live their lives as they see fit."[276]

2021 – Malousek v. Meyer (United States)[277]

In Nebraska, a recent case was decided in which a marriage was considered void due to the mental incompetence of one of the spouses to the marriage. In the case of *Malousek*, Molly Stacey and Steven Greg Meyer began living together in 2009. By 2015, Ms. Stacey had been diagnosed with cancer.

As reported in the decision, "Molly was diagnosed with mouth cancer in December 2015 and underwent surgeries and other treatment. Molly did not have a will, but Molly's friends and family testified that Molly had always maintained, as late as September 2017, the month before she died, that she wanted her assets divided equally amongst her children."[278]

Throughout the relationship, Ms. Stacey declared she never planned to marry Mr. Meyer, however, a few weeks before she passed, she did exactly that. What's more, Ms. Stacey named Mr. Meyer a joint owner on two bank accounts, changed the beneficiary designations on her other accounts to name Mr. Meyer and his son, and executed quitclaim deeds on her houses to leave them to Mr. Meyer upon her passing. It was reported that at the time of her death, Ms. Stacey was isolated from her children and

[275] Christine Beckner, "The Dills misfortune" April 14, 2005, accessed online: http://www.newsreview.com/sacramento/content/the-dills-misfortune/34829/
[276] *Ibid*.
[277] Neb., No. S-20-470, July 30, 2021.
[278] *Ibid*.

incoherent. There was even evidence from the bank employees indicating Ms. Stacey's incapacity:

> On October 12, 2017, Molly signed documents to convert her two bank accounts from her sole ownership to joint owner-ship with Greg. Bank manager Marcell Kalonga assisted with the transaction. He observed Greg and Molly enter the bank and testified that Molly appeared tired and sick and "couldn't even walk" and that Greg was "holding her [up]."[279]

The Nebraska Supreme Court held that "upon our de novo review that there was clear and convincing evidence that Molly was subject to undue influence when she executed the October 2017 financial transactions."[280]

Ms. Stacey's children brought a claim in Nebraska court, seeking to have the marriage annulled and the transactions declared void. They argued that Mr. Meyer exercised undue influence and that Ms. Stacey lacked the mental capacity to make impugned transactions. The Nebraska Supreme Court ruled that the marriage was in fact, void because Ms. Stacey was clearly not mentally competent to enter into such a contract. The Nebraska Supreme Court set aside both the marriage and the financial transactions concluding that:

> Given the district court's credibility assessment, the evidence of Molly's mental incapacity at the time of the marriage and disputed transactions, and the evidence that the marriage and disputed transactions ran contrary to the plans Molly consistently expressed to her friends and family through the years, we find that there was clear and convincing evidence that Molly lacked the capacity to marry Greg or complete the disputed financial transactions.[281]

Below is another example of a recent American case. While it did not culminate in marriage, it clearly involved a predatory relationship, and the court examines it from the unique perspective of federal tax rules:

2016 - Alhadi v. Commissioner of Internal Revenue (United States)[282]

This case did not culminate in marriage, yet it clearly involved a predatory relationship examined from a tax perspective. A caregiver defrauded an older adult of over $1 million under the guise of providing "caregiving" services. The Commissioner of Internal Revenue

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[279] *Ibid.*
[280] *Ibid.*
[281] *Ibid*.
[282] 2016 TC Memo 74, United States Tax Court, Docket No. 17696-10, April 21, 2016 [*Alhadi*].

posited that the $1 million were proceeds of undue influence and elder abuse and wanted the caregiver to pay tax on the funds and pay a fraud penalty. The caregiver alleged they were nontaxable gifts or loans. The case addressed the issue of what is “undue influence” as a matter of federal tax law and how it affected donative intent.[283]

The older adult, Dr. Arthur Marsh, was born in 1915, had never married, and lived very frugally resulting in over $3 million in his retirement fund. In 2007 his health declined dramatically, and he could no longer care for himself in his second-floor apartment. The much younger Ms. Angelina Alhadi met Dr. Marsh when he was in the hospital and offered to provide homecare services for him. Very quickly Ms. Alhadi took advantage of this new relationship. Dr. Marsh agreed to pay her $6000.00 a month (even though the going rate was $3750.00) and also gave her $1000.00 a month for his groceries (even though he only needed about $400 a month in food and his tiny fridge only fit about $50 worth). She began to pressure Dr. Marsh to pay for her mortgage payments. By the end of November 2007 Dr. Marsh had written cheques totaling over $400,000.00. Ms. Alhadi spent this money on paying off her ex-husband, and paying for furniture, landscaping and $73,000.00 on a new pool “complete with a spa and therapeutic turtle mosaic”. When she presented Dr. Marsh with an invoice of $22,000.00 for digging the hole for the pool, Dr. Marsh responded, “Who the hell is going to pay it?” However, Dr. Marsh relented and paid it, later saying he felt he had to “because the work was already done, and he had to accommodate his caregiver”.

Ms. Alhadi increasingly kept him isolated from his friends and started to manipulate him emotionally, telling him four or five times a day that she “loved” him and tried to pressure him into marrying her and moving in with her. She would cry in front of him about how she was struggling financially and worried about how she was going to survive and provide for her children. A neuropsychiatrist, Dr. Mueller, who had interacted with Dr. Marsh testified that there was a “real, if sad, emotional bond between Dr. Marsh and Ms. Alhadi. . . Dr. Marsh wanted to rescue her, wanted to be a good person, and wanted to feel loved

[283] *Alhadi* at para. 26.

for the rest of his days on earth." Dr. Marsh told Dr. Mueller that it was "impossible to imagine how it feels being 90 years old and feeling loved for the first time".[284]

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

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

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

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

[284] *Alahadi* at para. 28, footnote 6.

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

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

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

- The use of a confidence or (real or apparent) authority for the purpose of obtaining an unfair advantage over someone;
- Taking an unfair advantage of another’s weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another’s necessities or distress.[285]

For the specific purpose of elder abuse, California law defines undue influence as the “excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity”.[286]

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

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

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

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

United Kingdom

In the UK, a valid marriage revokes any previous Wills made by that individual pursuant to the Wills Act 1837, s. 18 (1). In cases of intestacy, the first £322,000 of the estate will go to the spouse. It is not possible to annul a marriage once a spouse has died in the UK, unless the marriage is bigamous or incestuous.

In the UK, *The Marriage Act*, 1949 provides statutory guidance in issuing and solemnizing marriages. At section 29, the *Act* contains a caveat provision which states that:

> (1) Any person may enter a caveat with any superintendent registrar against the issue of a marriage schedule in respect of any person named in the caveat and that superintendent registrar must ensure that the fact that it has been entered and the information in it are recorded in the marriage register as soon as reasonably practicable.
>
> (2) If any caveat is entered as aforesaid, the caveat having been signed by or on behalf of the person by whom it was entered and stating his place of residence and the ground of objection on which the caveat is founded, no marriage schedule . . . shall be issued until the relevant superintendent registrar has examined into the matter of the caveat and is satisfied that it ought not to obstruct the issue of the marriage schedule . . ., or until the caveat has been withdrawn by the person who entered it; and if the superintendent registrar is doubtful whether to issue a marriage schedule . . . he may refer the matter of the caveat to the Registrar General.

When couples provide per the *Marriage Act,* a notification of marriage in the UK, they are required to have separate 45-minute interviews. There may, however, be issues in the training provided to Registrars[287] to help identify predatory marriages. According to the Predatory Marriage UK campaign, "Registrars are trained to look for forced marriage in its more common definition of one person being forced into it by the other, and sham marriage, for example for immigration purposes. They are not trained to assess mental capacity." Register Offices[288] are under no obligation to verify medical records prior to a marriage to ensure no diagnoses, or a Registered POA. It has been argued that "it's almost impossible to prove that a marriage was fraudulent as no evidence is kept by the Register Office of what happened during the notification or during the ceremony."[289]

The *Matrimonial Causes Act*, 1973, governs UK divorces, and marriages and provides some guidance on the nullity of marriages. At s 12 the *Matrimonial Causes Act* holds that a marriage will be voidable on the following grounds:

> (a) that the marriage has not been consummated owing to the incapacity of either party to consummate it;
> (b)that the marriage has not been consummated owing to the willful refusal of the respondent to consummate it;
> (c)that either party to the marriage did not validly consent to it, whether in consequence of duress, mistake, unsoundness of mind or otherwise;
> (d)that at the time of the marriage either party, though capable of giving a valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health Act 1983 of such a kind or to such an extent as to be unfitted for marriage;
> (e)that at the time of the marriage the respondent was suffering from venereal disease in a communicable form;
> (f)that at the time of the marriage the respondent was pregnant by some person other than the petitioner;

[287] Registrar of births, deaths, marriages and civil partnership.
[288] United Kingdom, "Find a Register Office." Online: https://www.gov.uk/register-offices.
[289] Predatory Marriage UK, "Did You Know?" Online at: http://www.predatorymarriage.uk/?page_id=37

(g)that an interim gender recognition certificate under the Gender Recognition Act 2004 has, after the time of the marriage, been issued to either party to the marriage; and,
(h)that the respondent is a person whose gender at the time of the marriage had become the acquired gender under the Gender Recognition Act 2004.

In the UK, a valid marriage revokes any previous Wills made by that individual pursuant to the *Wills Act 1837*, s. 18 (1). This was upheld by the Court of Appeal in 1978 in the decision in the case of *Re Roberts deceased* [1978] 1 WLR 653, [1978] 3 All ER 225. In this case, a widow was seeking a grant of administration of an estate on grounds of intestacy. The Court concluded that the deceased was subnormal intellectually and suffered from senile dementia. The Court held that the deceased's Will was revoked by marriage, even if there had been grounds to nullify as the marriage is voidable, rather than void.

In 2004, the decision in the case of *Sheffield CC v. E*, set out further the legal criteria for capacity to marry in the UK. The further criteria ask two essential questions:

1. Does the person understand the nature of the marriage contract (which is, in essence, a simple question which does not require a high degree of intelligence)? And,
2. Does the person understand the duties and responsibilities that normally attach to marriage?

The decision in *Sheffield* predates the introduction of the UK's Mental Capacity Act 2005 ("MCA"). Under the MCA, a person is unable to make a decision for themselves if unable to:

a) Understand the information relevant to the decision;
b) Retain that information;
c) Use or weigh that information as part of a process of making the decision; and,
d) Communicate his or her decision.

The information relevant to the decision includes information about the reasonably foreseeable consequences of: (a) deciding one way or another, or, (b) failing to make a decision.

Pursuant to the *Anti-Social Behaviour, Crime and Policing Act 2014*, it is a criminal offence in England, Wales, and Scotland to force someone to marry. This legislation makes it an offence to take someone overseas to force them to marry, to marry someone who lacks the mental capacity to consent to the marriage (whether they are pressured or not). Forcing someone to marry can lead to a seven-year prison sentence.

Victims or those at risk in the UK can apply for a Forced Marriage Protection Order (FMPO) made in family court. Failure to comply with FMPO requirements can lead to a five-year prison sentence. To support this legislation, the UK has created the Forced Marriage Unit ("FMU"). The recent case of *Re BU*, 2021, demonstrates the use of a forced marriage protection order in a predatory marriage.

The FMU defines a forced marriage as one, "where one or both people do not (or in cases of people with learning disabilities or reduced capacity, cannot) consent to the marriage as they are pressurized or abuse is used, to force them to do so."

The FMU is a joint Foreign, Commonwealth and Development Office (FCDO) and Home Unit and operates inside the UK and overseas (where consular assistance is provided to British nationals, including dual nationals). The FMU operates a public helpline to provide advice and support to victims and potential victims of forced marriages and professionals dealing with cases. In 2020, the FMU dealt with 759 cases. Of these cases, 66 (9 percent) involved victims with mental capacity concerns.[290]

[290] United Kingdom Foreign, Commonwealth & Development Office, "Forced Marriage Unit statistics 2020" (July 1, 2021) Online: http://www.gov.uk/government/statistics/forced-marriage-unit-statistics-2020/forced-marriage-unit-statistics-2020/

Forced marriages are not the same as predatory marriages. Predatory marriages, however, are increasingly more common in the United Kingdom and as the caselaw below demonstrates, arguably also warrants a specific and tailored legislative response.

2017 – Re DMM – (United Kingdom)[291]

In the decision of *Re DMM*, HHJ Marston QC answered this question: what information is relevant to the capacity to marry (that had not been previously answered)?

DMM, a retired insurance broker from Southwest England in his mid 80's, living with a diagnosis of Alzheimer's was married once and divorced once and had three adult children. For the past 20 years, DMM cohabited with a companion, "SD".

In 2007, DMM executed an enduring power of attorney ("EPA") appointing the Applicant, DMM's daughter, EJ, as sole attorney for property and financial affairs. In 2013, DMM executed a lasting power of attorney ("POA") for health and personal welfare in favour of EJ.[292] On December 11, 2013, DMM executed a Will giving two thirds of his pension, a legacy of £300,000 and the right to reside at his property for two years after his death to SD, with the remainder of the estate divided between his three daughters.

The issue faced by the Court was to examine whether the legal test for determining whether a person has capacity to marry includes a requirement that the person should be able to understand, retain, use, and weigh information so as to the reasonably foresee financial consequences of a marriage, including that the marriage would automatically revoke the person's Will.

DMM's Alzheimer's diagnosis was accepted by the parties. It was submitted that in November of 2016, DMM was taken by SD to have a capacity assessment to revoke his POA, and to make a new POA, and to marry. A report commissioned by SD from Dr. Bailey, consultant psychiatrist, concluded that DMM did not have capacity on the POA issue but did have the capacity to marry.[293]

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[291] [2017] EWCOP 32 ["*DMM*"].
[292] *DMM*, *supra*, at para. 1.
[293] *DMM*, *supra*, at para. 2.

Before a ceremony could take place, EJ entered a caveat at a Registry Office in the Southwest of England under s29 (1) of the *Marriage Act*, 1949 to prevent any marriage between DMM and SD. EJ commissioned a report from Mr. Farmer, an independent mental capacity assessor who met with DMM. Mr. Farmer reported on June 16, 2017, that DMM lacked capacity in both respects.[294]

The parties agreed that the marriage of DMM to SD will automatically revoke the Will that he previously made on December 11, 2013, by reason of the provisions of s18 (1) of the *Wills Act*, 1837. DMM held assets worth about £125,000 in cash, pictures worth about £40,000 and his property in the Southwest of England valued at in or about £1,500,000 - £1,600,000. Under the rules of intestacy, SD would have a statutory legacy of £250,000, his chattels and half the balance of estate, about £950-990,000 out of the assets with the rest divided between DMM's three adult daughters. The Court noted that this is a significant financial consequence.[295]

In *DMM*, the Court had to consider whether DMM understood the effect of his proposed marriage on the Will. In evidence were the reports of three witnesses who examined DMM on his capacity to marry. The first, Dr. Bailey, reported that DMM does have the capacity to enter marriage. The second, DMM's General Practitioner, Dr. Thomas, reported that he was satisfied that DMM has the capacity to get married. It was noted in the judgement that neither of these doctors raised the issue of the effect on the Will and the financial arrangements currently in place. The third witness, however, did. In reporting that DMM lacked capacity in both respects, Mr. Farmer stated that, "I then asked DMM how he thought that [marriage] would affect his current provision in his Will but DMM was unable to recall what provision had been made in his Will, nor could he recall the value of his estate. DMM was then unable to quantify or recall information that had been provided for him."[296] According to Mr. Farmer, despite being told of the actual financial implications of marriage, DMM was unable to retain information for any amount of time and certainly not for the duration of the discussion taking place.

[294] *Ibid.* at para. 2.
[295] *Ibid*. at para. 4.
[296] *DMM*, *supra*, at para. 5.

The Court looked at the legal criteria for capacity to marry, noting that the issue of capacity is set out clearly in Part 1 of the Mental Capacity Act 2005 ("MCA"). For the purposes of this case, the Court focused on the inability to make decisions at section 3 which states that:

> (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable:
>
> (a) To understand the information relevant to the decision;
>
> (b) To retain that information;
>
> (c) To use or weigh that information as part of the process of making the decision; or,
>
> (d) To communicate his decision"

The next two sections deal with appropriate explanation of the information given to the person and his ability to retain information:

> (4) The information relevant to the decision includes information about the reasonably foreseeable consequences of:
>
> (a) Deciding one way or another, or
>
> (b) Failing to make a decision.

The Court held that these matters are set out again in the MCA Code of Practice at section 4.16; constituting the structure within which the Court should consider a lack of capacity. The Court then went on to look at a number of cases that deal with the capacity to marry.

In canvassing these cases, the Court held that in *Sheffield CC v. E and another,*[297] Munby J. as he then was, held that:

> capacity to marry was about the ability to understand the nature of the marriage contract and the duties and responsibilities

[297] [2004] EWHC 2808 (Fam).

> attached to marriage namely that marriage was a contractual agreement between a man and a woman to live together to love one another to the exclusion of all others in a relationship of mutual and reciprocal obligations involving the sharing of a common home and a common domestic life and the right to enjoy each other's society comfort and assistance.[298]

Munby J. added, "the contract of marriage was a simple one which did not require a high degree of intelligence to understand."

In *DMM*, the Court noted that *Sheffield* was a pre-MCA decision and one in which "His Lordship did not specifically refer to understanding the foreseeable consequences of marriage." However, the Court noted that in the decision of *X v MM*,[299] Munby J. cited *Re MB* (Medical Treatment) [1997] 2 FLR 426, a pre-MCA decision on the capacity to consent to medical treatment which clarified that the likely consequences of having or not having treatment were relevant to a decision on medical treatment and held that there was no distinction between that test and the test in the MCA. On that basis, the Court in *DMM* decided to apply the statute in DMM's case and held that per McFarlane LJ., in *PC v City of York,*[300] "all decisions, whatever their nature, fall to be evaluated within the straightforward and clear structure of the MCA ss 1 to 3."

HHJ Marston QC in *DMM* held that,

> "It is clear to me that DMM has to be able to understand the information relevant to a decision (to marry) and that information includes information about the reasonably foreseeable consequences of deciding one way or the other. The effect of the marriage making the will invalid is not just a reasonably foreseeable consequence of

[298] *DMM*, *supra*, at para. 6.
[299] [2009] 1 FLR 443.
[300] [2014] 2 WLR 1.

> marriage, it's a certain consequence of marriage which will have financial consequences to the parties."[301]

The Court, therefore, asked the question: Is a financial effect on the parties relevant to capacity to marry? In answering in the affirmative, HHJ Marston QC relied on the decision in *London Borough of Southwark v. KA*[302] where Parker J. held that, "P must understand the duties and responsibilities that normally attached to marriage, including that there may be financial consequences and that spouses have a particular status and connection with each other."

HHJ Marston QC ruled that, **"the fact a second marriage revokes the will is information that a person should be able to understand, retain, use and weigh to have capacity to marry."**[303]

In a subsequent hearing to rule on DMM's capacity to marry,[304] DMM was joined as a party and represented by the Official Solicitor. Dr. Hugh Series was instructed to report upon DMM's capacity considering the determination made by HHJ Marston QC regarding information relevant to the test.

HHJ Marston QC in the end, made a declaration to the effect that DMM had the capacity to marry.

2021 – Re BU – (United Kingdom)[305]

This case involves BU, an elderly woman in her 70's, suffering from vascular dementia for several years. BU got involved in a relationship with a man in his 40s, NC, an individual with previous criminal convictions for dishonesty and blackmail. BU's daughter, WU, became concerned and intervened.

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[301] *Ibid*. at para. 7.
[302] [2016] EWCOP 20.
[303] *Ibid.* at para 10.
[304] *Re DMM* [2017] EWCOP 33.
[305] [2021] EWCOP 54.

The Court in BU learned that BU had liquidated an investment portfolio worth approximately £200,000 for the purpose of a property investment that NC was organizing. By May 2020, BU was seeking to liquidate her entire portfolio, worth just under £700,000. This raised alarms with the bank who immediately contacted police. The evidence showed that, "the police were told that during the call which BU had made to give those instructions they could hear a man in the background giving her instructions."[306] The transaction was stopped before any funds could be released.

On May 14, 2020, NC was arrested. When the police searched his home, they discovered "that at least five property transactions were then in progress although BU only appears to have been aware of one of these transactions."[307]

The Court found that "because of the corrosive and coercive nature of the control which I find NC to have exercised over her, BU has been deprived of autonomous decision-making in this context."[308]

As a result of the findings, the Court made a 12-month forced marriage protection order and ordered the appointment of a financial deputy, holding that, "those orders will represent an interim holding position for a period of twelve months whilst further work is undertaken to assist BU in whatever therapy can be arranged."[309]

Predatory Marriage UK campaign

The Predatory Marriage UK campaign is run by Daphne Franks, daughter of Joan Blass whose story the campaign champions.

Joan was born on April 20, 1924, and died on March 26, 2016. She was widowed in 2008, diagnosed with vascular dementia in 2011, and was suffering from terminal cancer. One

[306] *Ibid*. at para 30.
[307] *Ibid*. at para. 32.
[308] *Ibid.*
[309] *Ibid*. at para. 104.

day while gardening outside, she met a 68-year-old man named Ranlyn Lucas (“RL”). He moved in one month later.

After Joan died, RL produced a marriage certificate on March 29. He had secretly married Joan on October 26, 2015. It was later discovered that he took Joan on a trip to see her brother and his wife. Despite visiting with her children regularly, Joan never remembered that she had gotten married.

The marriage superseded a Will made in 2004 leaving everything to Joan’s children, including the house she lived in. Daphne Franks, “this means that Ranlyn has inherited her entire estate and is still living next door to us in my mother’s house.” In 2018, RL married another elderly lady who lived 10 minutes away.

Joan’s children brought RL to court and lost, having to pay £200,000 in costs. As a result of the financial burden plus the thought of living next door to RL, Joan’s children sold their family home in January 2021.

The Predatory Marriage campaign in honour of Joan Blass recommends:

- Changing the law: marriage should no longer revoke a Will;
- create an offence of predatory marriage;
- Introduce a publication of notices/bans on the internet;
- Train registrars to look for signs of incapacity to marry;
- Add robust questions for registrars to ask at marriage with clear procedures to follow if correct answers are not given;
- Ensure that registrars will stop the ceremony if there are any doubts; and,
- Add “The Marriage was fraudulent” to permitted reasons to annul a marriage after a party has died.

MP Fabian Hamilton raised Joan’s case in his Private Member’s Bill in November 2018, “Marriage and Civil Partnership (Consent) Bill.” The Private Members Bill originated in the House of Commons in Session 2017-19 and was debated on Wednesday, November 21, 2018. Fabian Hamilton, MP from Leeds Northeast presented the Bill in an attempt to close some of the loopholes in the statutes governing marriage. The Bill would have established several improvements and protections including:

- Establishing that marriage no longer revokes a previous Will;
- Establishing better training for registrars to ensure robust procedures for safeguarding vulnerable individuals are put in place;

- Proposes that capacity to marry should be established via a simple questionnaire to alert registrars that an assessment of capacity may be needed before the ceremony is carried out; and,
- Proposes that notices of intention of a marriage should be published on the internet so families can discover much sooner that a marriage has taken place or is to take place.

Unfortunately, the Private Members Bill ran out of time and did not assent.

Australia

2014 - Oliver (Deceased) & Oliver (Australia)[310]

Like Canada, Australia has also struggled to balance the autonomy of vulnerable adults with protections from predatory marriages. Unlike Canada, Australia has met this challenge by legislating the factors required to determine capacity to marry. However, Australia's legislation is somewhat limited in that it requires the marrying parties to have the mental capacity to understand the effect of the *ceremony alone*, and not an understanding of the nature of marriage as an institution with all its consequences.[311] Some scholars have suggested that the legislation would be more effective if it required the understanding of the property consequences of marriage, yet judicial comment in Australia suggests that few people, if any, truly understand all the consequences of marriage.[312]

In a recent decision in 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.[313] In doing so, the court reviewed the common law factors for capacity to marry as it developed in England and the subsequent enactment of the statutory factors in Australia. While the relevant legislation and common

[310] *Oliver (Deceased) & Oliver* [2014] FamCA 57 (AustLII).
[311] *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.
[312] Cowley, *ibid.* at p. 170 – 171
[313] *Oliver (Deceased) & Oliver* [2014] FamCA 57, para 213 (cited to AustLII)

law factors differ from those applied in Canada, the facts, described below, are instantly recognizable as those of a predatory marriage.

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

Mrs. E died in August of 2010. The Respondent attended the funeral as the daughter of a friend of Mr. Oliver, and she referred to Mr. Oliver as "Uncle." Although Mr. Oliver's daughter had arranged for Mr. Oliver to receive in-home care from a community organization, the Respondent later cancelled that service. Mr. Oliver had previously granted a power of attorney to his son-in-law, Mr. H., but the Respondent made other arrangements to assist Mr. Oliver with his financial affairs. Mr. H had not begun to exercise his authority as an attorney for property, but in January and February of 2011, Mr. Oliver became increasingly suspicious of Mr. H and accused him of wanting to take all his money and control his life.[314]

From February 2011 to April 2011, the Applicant (Mr. H's daughter and Mr. Oliver's granddaughter), tried on numerous occasions to speak with Mr. Oliver, but the Respondent always answered the phone. The Applicant was rarely able to speak with him. However, in late February or early March of 2011, Mr. Oliver did come to the phone and told the Applicant he was getting married. The Applicant said, "How are you getting married? I didn't even realize you had a girlfriend." Mr. Oliver said, "Neither did I."[315] The Respondent then took the phone and advised that they would be married in June of 2011.[316]

In February of 2011, the Respondent took Mr. Oliver to see his general practitioner, Dr. G, who certified that the deceased was of sound mind and capable of making rational decisions about his affairs.[317] A few days later, the respondent and Mr. Oliver attended

[314] *Ibid*. at paras 39 and 40
[315] *Oliver* at para 25.
[316] *Ibid*.
[317] *Ibid*.at para 73.

the office of a solicitor and executed a Will in contemplation of marriage (but not conditional on the marriage taking place) that named the solicitor his Executor and left his entire estate to the Respondent.[318] The Respondent moved in with Mr. Oliver the next day.

The Respondent and Mr. Oliver were married in April of 2011, not June, as the Respondent previously told Mr. Oliver's relatives. None of Mr. Oliver's family were invited or notified; only the Respondent's sister and parents attended. In her testimony the Respondent had no explanation as to why Mr. Oliver's relatives were not invited. The ceremony celebrant, Mrs. Q, gave evidence that Mr. Oliver stated he was pleased to be getting married.

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

The Applicant commenced her application under section 113 of the Family Law Act 175 just prior to Mr. Oliver's death for a declaration about the validity of the marriage. She argued that Mr. Oliver was mentally incapable of understanding the nature and effect of the marriage ceremony as provided for in section 23B(1)(d)(iii) of the Act. The Act further provides standing to the Applicant to make the Application.[319] Mr. Oliver died in September of 2011. The Respondent did not inform Mr. Oliver's family.

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

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[318] *Ibid*. at para 74.

[319] *Oliver* at paras 5 and 6; There is no similar legislation that confers standing on anyone to contest the validity of a marriage. However, the common law allows persons with an interest to contest the validity of a marriage for lack of capacity, but not for undue influence or duress. See further footnote 9380, *supra*.

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

> *... in relation to the specific issue of "morbid delusions", information provided by his family suggests he was experienced delusions and paranoia through December 2010 into the New Year, including his belief sometimes that his first wife, [Ms E], was still alive and also his belief that Mr [H] was being too controlling of his money. Moreover, there is a long history documented in hospital notes of paranoid delusions and treatment for these, dating back to 2001, especially during times of delirium. As such, it is possible (but I cannot be certain) that [the deceased] was experiencing some degree of delusions around this time and that this might have influenced his thinking, especially if he had certain inaccurate beliefs about some family members and if he was being unduly influenced by them.*[320]

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

On the face of it the English common law test and the Australian statutory test are different, particularly because of the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony. …

In the 32 years since the legislative test has applied, there has not been a plethora of decisions of the Australian courts as to its interpretation. There are only 2 reported decisions that I was referred to and I located no others. … The current test of "mentally incapable of understanding the nature and effect of the marriage ceremony" was applied in both cases.

…

It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences. Of course if there were such a requirement, few if any marriages would be valid.[321]

…

[320] *Oliver* at para 185.
[321] *Oliver* at paras 244, 245, 246

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

> *… it is in my view* ***significant that the legislation not only requires a capacity to understand "the effect" but also refers to "<u>the</u> marriage" rather than "<u>a</u> marriage". In my view taken together those matters require more than a general understanding of what marriage 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.*[322]

In *Babich*, Justice Mullane held that the vulnerable adult in question had a general understanding of "a" marriage, but she was incapable of understanding the effect her marriage would have on *her*.[323]

In *Oliver*, Justice Foster found that Mr. Oliver may have been aware that he was participating in a marriage ceremony to the Respondent, or at least some sort of ceremony with the respondent, but nothing more.[324]

7. Predatory Marriages: Consideration of Equitable and Other Remedies

Two Forms of Nullity (void vs voidable) and Divorce

Before we move to examining potential equitable remedies, we will briefly overview the difference between a marriage that had been declared void *ab initio*, a voidable marriage, and a divorce.

2019 – Gill v. Kaur (Manitoba) [325]

While not a predatory marriage decision, this case canvasses the law on the distinction between a nullity of a marriage, and divorce as well as the two forms of nullity which are relevant when seeking a remedy in a predatory marriage case.

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[322] *Ibid*., at para 202, citing para 255 of *Babich & Sokur and Anor* [2007] FamCA 236 (cited to AustLII) [*Babich*].
[323] *Babich* at para 256.
[324] *Oliver*, *supra*, at para 210
[325] 2019 MBQB 68.

In *Gill v Kaur*, a husband brought a petition for annulment a few months after his marriage. The petitioner was a Canadian citizen, while his wife was a citizen of India, visiting her sister on a form of visa. The marriage was arranged and after the civil ceremony, they were to have the marriage solemnized at a Sikh temple in the presence of family. This did not take place. The husband was seeking an annulment on the grounds that his wife did not tell him of a prior engagement, and that she and her family were deceitful, arranging the marriage solely for immigration purposes. The husband also argued for an annulment on the ground that there was no consummation of the marriage.

For clarity, a decree of "nullity is not a divorce by another name." Citing the case of ***Lowe v A.A.* 2018 ONSC 3509**, the Court confirmed that a divorce is based on a cause arising after a valid marriage has come into existence. A decree of nullity is based on a cause existing at the time of the marriage (prior existing marriage, incapacity to marry, etc.).

While a decree of divorce dissolves the marriage as from the date when the decree becomes absolute (*ex nunc*), a decree of nullity, depending on the ground of annulment, either declares that there never was a valid marriage, or it dissolves it with retroactive effect (*ex tunc*).

Citing from *Lowe*, the Court noted that a nullity will be granted in two situations:

1) **Where there is no valid existing marriage form the very outset**, the marriage is considered void *ab initio*, meaning "from the beginning." A marriage that is void *ab initio* is considered never to have taken place. A decree of nullity is purely declaratory and is not legally required to end the marriage because the marriage is void already. Even though a void marriage requires no formal declaration by the court, it is likely wiser to get a judicial decree to avoid future problems.[326] Examples of such marriages are where:
    a. One or both parties is married to another person at the time of marriage;
    b. One or both parties did not consent to the marriage, or, lacked the mental capacity to consent;
    c. The parties are related within prohibited degrees;

[326] *Lowe v A.A.* 2018 ONSC 3509 at para 44.

d. One or both of the parties is under the age of majority at the time of marriage; and,
e. The marriage ceremony was incomplete.

2) **Where the marriage was validly entered into but the cause for ending the marriage existed from the very outset,** the marriage is considered voidable. A voidable marriage is considered to be a valid marriage, with all its rights and consequences, unless and until a decree of nullity is made. On a decree of nullity, the marriage is erased "as if it had never existed." Examples of such marriages are where:
    a. The marriage was entered into for fraudulent purposes;
    b. Consummation of the marriage is impossible because of a lack of capacity; or, there is a wilful refusal of a party to consummate the marriage, for instance, due to repugnance;[327]

The Court rejected the husband's petition for an annulment. On the evidence, the parties had the capacity and consented to the marriage. The Ontario Court of Appeal in *Iantsis (falsely called Paptheodorou) v*, *Papatheodorou* 1970 CanLII 438 ONCA confirmed that the validity of marriage is unaffected by one or both parties entering into a marriage for the sole purpose of affecting the immigration status of one party.

With respect to the lack of consummation the Court concluded that "in the absence of evidence of impotence" non-consummation "provides no basis for the declaration he seeks." Citing the text Canadian Family Law: "Impotence, which is the inability to consummate the marriage, renders the marriage voidable. Canadian law draws a distinction between the inability to consummate a marriage and willful refusal to do so. It is impotence, not willful refusal that constitutes a ground for annulment of marriage in Canada."

[327] Citing *Sahibalzubaidi v Bahjat* 2011 ONSC 4075.

Therefore, in the context of a predatory marriage, if the victim lacked capacity to enter into the marriage, then the marriage itself was void *ab initio* and is considered never to have existed in law and therefore no legal consequences can arise from it.

Since contesting the validity of a marriage on the ground of incapacity is an imperfect approach, it has become apparent to the authors as advocates, that there is a need to explore other potentially available rights and remedies to react to what is happening in today's society. The purpose of this next section is to consider other grounds, including equitable grounds, upon which a court has the jurisdiction to set aside a predatory marriage as a nullity, that is, to declare it void *ab initio*, as if it never happened, and also to remedy the wrongs caused by a predator spouse.

Recent cases have used both equitable and common law remedies in cases of financial elder abuse, [328] but so far such remedies have not yet been applied in Canada in cases of predatory marriages.

The Doctrine of Undue Influence

The equitable doctrine of undue influence is often relied on to set aside a Will or *inter vivos* gifts that were procured by undue influence. The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions when an individual exerts such influence on the grantor/donor that it cannot be said that the decision made, was wholly independent.

We propose that the same doctrine, if proved, may be used to set aside a predatory marriage. While the older adult may not be giving actual gifts to the predatory spouse, the

[328] See for example: *Gironda v. Gironda*, 2013 ONSC 4133, additional reasons 2013 ONSC 6474 – undue influence; *Fowler Estate v. Barnes*, 1996 CarswellNfld 196 (SC TD) – undue influence and rescission; *Granger v. Granger*, 2016 ONCA 945, reversing 2015 ONSC 1711, 9 E.T.R. (4th) 281, and 2015 ONSC 6238 – unjust enrichment, undue influence, and equitable compensation; *Servello v. Servello*, 2015 ONCA 434, 9 E.T.R. (4th) 169, affirming 2014 ONSC 5035 – undue influence, failure to provide independent legal advice, *non est factum*, and mistake, as well as the maxim that he who comes into equity must come with clean hands, and denial of a claim for contribution; *Danilova v. Nitiyuk*, 2017 ONSC 4016 – damages for breach of fiduciary duty; *Stewart v. Stewart*, 2014 BCSC 766 – unjust enrichment with equitable set-off; *Waruk v. Waruk*, 1996 CarwellBC 2463 (C.A.) – injunctive relief.

consequence of the marriage effectively results in a gift to the predator. In *Ross-Scott v. Potvin*,[329] recall, the only surviving relatives of the deceased, Mr. Groves, sought to have his marriage annulled on grounds of undue influence and lack of capacity. Justice Armstrong applied common law factors for determining requisite capacity to marry and ultimately dismissed all the claims, despite the existence of compelling medical evidence of diminished capacity and vulnerability. With respect to undue influence, Justice Armstrong had this to say:

> I have concluded that the burden of proof regarding a challenge to a marriage based on a claim of undue influence is the same as the burden of proving a lack of capacity. The plaintiffs must prove the defendant's actual influence deprived Mr. Groves of the free will to marry or refuse to marry Ms. Potvin. The plaintiffs have failed to meet the burden of proving that Mr. Groves was not able to assert his own will.[330]

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

The Doctrine of Unconscionability

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

[329] 2014 BCSC 435
[330] *Ross-Scott* at para 240.

unfairness of the bargain. This creates a presumption of fraud which the stronger party must rebut by proving that the bargain was fair, just and reasonable.[331]

A predatory marriage can be characterized as unconscionable where one party takes advantage of a vulnerable party on the ground that there is an inequality of bargaining power and accordingly it would be an improvident bargain if the predator would be entitled to all of the spousal property and financial benefits that come with marriage.[332]

2015 - Smith v. Croft – (Ontario)[333]

The case of Smith is a small claims court decision out of St. Catharines, Ontario, involving allegations of undue influence and unconscionability. While not a predatory marriage, the decision in *Smith* demonstrates a successful claim advancing equitable principles of unconscionability involving a vulnerable older adult.

In the case of Smith, a neighbor purchased a 1931 Model A Pickup Truck from his elderly neighbour. The elderly woman's daughter brought an application, arguing that because of her mother's age and inexperience, plus the fact that she suffers from Alzheimer's, the transaction was subject to undue influence and unconscionability. The Court in *Smith*, did not find undue influence but did find an improvident bargain, supporting a finding of unconscionability.

In *Smith*, the Court held that pursuant to *Trotter Estate*, 2014 ONCA 841 (CanLII) at paras. 62-63, a finding of undue influence requires a "high burden" proof. Undue influence must amount to coercion or fraud and most cases involve a closer relationship than neighbors. In *Smith*, there was insufficient evidence to find undue influence.

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

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

[333] 2015 CanLII 3837 (ON SCSM) [*Smith*].

Where it concerned unconscionability, the Court in *Smith*, focused on the reasonableness of the agreement and applied this to both a two-part, and a four-part test to determine unconscionability. In *Norberg v. Wynrib*, [1992] 2 S.C.R. at para. 30, LaForest J. held that "an unconscionable transaction arises in contract law where there is an overwhelming imbalance in the power relationship between the parties."[334] The test, outlined by the Supreme Court of Canada for unconscionability requires:

1) Proof of inequality in the position of the parties; and,
2) An improvident bargain.

The Court also applied the four-part test adopted by the Ontario Court of Appeal in *Titus v. William F. Coke Enterprises Inc. (2007)*, 2007 ONCA 573 (CanLII), 284 D.L.R. (4th) 734 ("*Titus*"), which first holds that "a transaction may, in the eyes of one party, turn out to be foolhardy, burdensome, undesirable or improvident; however, this is not enough to cast the mantle of unconscionability over the shoulders of the other party."[335] The decision in *Titus*, outlined four elements which appear to be necessary for a finding of unconscionability, including:

1) A grossly unfair and improvident transaction; and
2) Victim's lack of independent legal advice or other suitable advice; and
3) Overwhelming imbalance in bargaining power caused by victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4) Other party's knowingly taking advantage of this vulnerability.

The decision in *Smith* clarified that whether the claim is for undue influence or unconscionability, if the basic underlying transaction is found to be questionable, the onus

[334] *Smith*, *supra*, at para. 228.
[335] *Ibid*, at para. 231 which cites *Titus* at para. 36.

shifts to the party seeking to uphold the transaction to prove it was in fact, a voluntary and deliberate act.[336]

Using a Statute as an Instrument of Fraud

The principle that one may not use a statute as an instrument of fraud should also be available as a tool to combat the unfair consequences of predatory marriages. In the context of trusts of land, the *Statute of Frauds*[337] provides that a declaration or trust of land is void unless it is proved by writing, signed by the maker. If it is not in writing and the beneficiary seeks to have it enforced, the transferee may claim to hold title absolutely and defend the proceedings by relying on the Statute. However, equity will not allow the Statute to be used as an instrument of fraud and the court will direct that the property is held on a constructive trust for the beneficiary if the oral express trust is proved. A marriage is comparatively based on, and sanctioned by, legislation.[338] The predator relies on the statutes to enforce a claim. However, a predator spouse's claim is fraudulent because the predator persuaded the spouse by devious means to enter the marriage. A court of equity should not permit the statute to be used in this way and should restore the property the predator received to the rightful heirs.

No One Shall Profit from His or Her Own Wrongdoing

Instead of the remedy of attacking the validity of the marriage itself, another tool that could reasonably be applied in attacking the injustice of predatory marriages is challenging the predator spouse's right to inherit from the older adult's estate either under a Will or under legislation. Seeking a declaration that the predator spouse is barred or estopped from inheriting is a remedy based in public policy. "No one shall profit from his or her own wrongdoing" is a principle that is applied in cases in which a beneficiary, who is otherwise sane, intentionally kills the person from whom the beneficiary stands to inherit under the deceased's will, on the deceased's intestacy, or otherwise. Canadian courts have found

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[336] *Ibid*, at para. 240.
[337] (1677), 29 Car.2.c.3, s.7. and see RSNB 1973, c.S-14, s.9; RSNS 1989, c 442,s5; RSO 1990, c.S.19, s.9.
[338] See, *Marriage Act*, R.S.A. 2000, c. M-5; R.S.B.C 1996, c. 282; C.C.S.M., c. M50; S.N.L. 2009, c, M-1.02; R.S.N.B. 2011, c. 188; R.S.N.W.T. 1988, e. M-4; R.S.N.W.T. (Nu.) 1988, c. M-4; R.S.O. 1990, c. M.3; R.S.P.E.I., 1988, c. M-3; R.S.Y. 2002, c. 146; *Solemnization of Marriage Act*, R.S.N.S. 1989, c. 436.

that the property does pass to the beneficiary, but equity imposes a constructive trust on the property in favour of the other persons who would have received the property.[339] It is also clear that a beneficiary will not inherit if the beneficiary perpetrated a fraud on the testator and as such obtained a legacy by virtue of that fraud,[340] or where a testator was coerced by the beneficiary into making a bequest.[341] The comparable common law principle is *ex turpi causa non oritur actio*, i.e., a disgraceful matter cannot be the basis of an action. It is discussed below.

Two New York decisions provide a compellable analysis of these concepts and their applicability to predatory marriages and relied upon them. The facts in *In the Matter of Berk,*[342] and *Campbell v. Thomas,*[343] are quite similar. In both cases a caretaker used her position of power and trust to secretly marry an older adult when capacity was an issue. After the older person's death, the predator spouse sought to collect her statutory share of the estate (under New York legislation surviving spouses are entitled to the greater of 1/3 of the estate or $50,000). The children of the deceased argued that the marriage was "null and void" as their father lacked capacity to marry. The court at first instance held that even if the deceased was incapable, under New York estate legislation the marriage was only void from the date of the court declaration and as such, not void *ab initio.* The predatory spouse maintained her statutory right to a share of the estate.

In both appeal decisions (released concurrently) the court relied on a "fundamental equitable principle" in denying the predator's claims: "no one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime." This principle, often referred to as the "Slayer's Rule", was first applied in in New York in *Riggs v. Palmer*,[344] 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

[339] *Lundy v. Lundy* 1895 24 SCR 650.
[340] *Kenell v. Abbott* 31 E.R. 416].
[341] *Hall v. Hall* (1868) L.R. 1 P.& D. 48].
[342] *In the Matter of Berk,* 71 A.D. 3d 710, NY: Appellate Div., 2nd Dept., 2010.
[343] *Campbell v. Thomas,* 897 NYS2d 460 (2010).
[344] *Riggs v. Palmer*, 115 N.Y. 505,511 [1889].

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 able 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 a person who coerces his way into becoming a beneficiary in a Will.[345]

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

Unjust Enrichment

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

1. that the defendant was enriched;
2. that the plaintiff suffered a corresponding deprivation; and

[345] On October 26, 2022, the Appellate Division, Second Department of the Supreme Court of the State of New York upheld a decision of the Surrogate's Court which determined that, at the time of the marriage, the decedent was mentally incapacitated and incapable of understanding the nature, effect, and consequences of the marriage to the petitioner or consenting to the marriage; that the petitioner knew that the decedent was mentally incapacitated at the time of the marriage and entered into the marriage to obtain the pecuniary benefits of said marriage at the expense of the decedent's beneficiaries; that, even if the decedent were competent, the petitioner exercised undue influence over the decedent to induce him to marry her for the pecuniary benefits that became available by virtue of being the decedent's spouse, at the expense of the decedent's beneficiaries; and that **through her wrongdoing**, the petitioner forfeited her right to take an elective share of the decedent's estate as the decedent's surviving spouse.

3. that the enrichment was not attributable to established categories of juristic reason, such as contract, donative intent, disposition of law, or other legal, equitable or statutory obligation.[346]

In the New York case of *Campbell*, the Appellate Division noted that because the predatory spouse altered the older adult's testamentary plan in her favor, equity will intervene to prevent the unjust enrichment of the wrongdoer predator spouse.[347] The principle of unjust enrichment should also be available to be used to invalidate a predatory marriage in Canada and restore the property to the rightful heirs. The existence of the marriage should not be considered to be a juristic reason to deny relief, since the marriage was motivated by the wrongful desire to obtain control of the older adult's property.

Civil Fraud / Tort of Deceit

An approach based in fraud, either common law fraud or equitable/constructive fraud is also worthy of consideration. In the usual predatory marriage situation, the predator spouse induces the older adult to marry by perpetrating a false representation that the marriage will be a "real" marriage (which the predator spouse knows is false, a trick, a misrepresentation). The older adult relies on the representation, marries the predator spouse, and suffers damage as a result (either through money given to the predator spouse, or through the various rights that a spouse takes under legislation, which deprives the older adult of significant property rights. A case could be fashioned so 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.[348]

[346] See *Becker v. Petkus* (1980), 117 D.L.R. (3d) 257, [1980] 2 SCR 834 (SCC); *Garland v. Consumers' Gas Co.* (2004), 237 D.L.R. (4th) 385 (S.C.C.).
[347] *Campbell*, supra at p.119.
[348] *Bruno v. Hyrniak* 2014 SCC 8 at para. 21

Canadian jurisprudence includes many decisions analyzing civil fraud/tort of deceit in the context of marriage in "immigration fraud" cases where one spouse falsely represents that he/she is entering into a "true" marriage when in fact the marriage was entered into simply to attain Canadian residency.[349] The Courts have been reluctant to set aside this type of marriage as a fraud.

In *Ianstis v. Papatheodorou,*[350] 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.[351] This case has been cited with approval many times and continues to be considered as the leading case.[352] The Courts' reluctance to find that civil fraud will vitiate consent to a marriage appears to have prevented opening the floodgates to more litigation.[353] Alleging fraud when 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 grounds of fraud, it remains that this may simply promote increased and expensive litigation. [emphasis added]"[354]

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[349] 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.)
[350] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[351] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.) at pp. 248 and 249
[352] 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.).
[353] *Ianstis v. Papatheodorou* [1971] 1 O.R. 245 (C.A.)
[354] *Grewal v. Kaur* 2009 CanLII 66913 (ONSC) at paras. 23-24

The Court's message is, effectively, "*caveat emptor*" – the spouses ought to have conducted their due diligence before marriage.[355] Predatory marriages are easily distinguishable from immigration fraud cases if for no other reason than that a person under disability may and likely is not, for many obvious reasons, in a position to conduct any due diligence.

Although it may be difficult for an older spouse to have a marriage set aside on the grounds of civil fraud/tort of deceit, the victim however may be able to seek and receive damages for the fraud perpetrated. The case of *Raju v. Kumar* [356], 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."

The Court limited damages to those incurred for the wedding (cost of the reception, photos and ring), supporting the groom's immigration to Canada (including his application, immigration appeal and landing fee) and the cost of her pre- and post-marriage long distance calls.[357]

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[355] *A.A.S. v. R.S.S.,* 1986 CanLII 822 (BC CA) at para. 25.
[356] *Raju v. Kumar* 2006 BCSC 439
[357] *Raju v. Kumar* 2006 BCSC 439 at para. 72. See also the ase of *RKS v. RK* 2014 BCSC 1626, where the Court dismissed a claim alleging the tort of deceit. A wife alleged that she was induced into marrying her husband on false representations that he was heterosexual, while in fact he was not. The wife also sought an annulment of the marriage citing non-consummation. The Court dismissed the claim and refused to grant an annulment as there was no evidence that the groom or groom's family made any false representations to either the bride or her family with an intent to deceive the plaintiff into marrying him. Prior to the wedding the plaintiff and her family had asked many questions about the defendant's background, his education, his financial situation and the kind of woman he was looking to marry. The Court found that the wife's claim for damages for the tort of deceit had to fail as it found that the husband never made any representations, prior to the wedding, about his sexual orientation. Furthermore the wife

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

Ex Turpi Causa Non Oritur Actio

The legal principle, *ex turpi causa*, acts as a defence to bar a plaintiff's claim when the plaintiff seeks to profit from acts that are "anti-social"[358] or "illegal, wrongful or of culpable immorality"[359] in both contract and tort. In other words, a court will not assist a wrongdoer to recover profits from the wrongdoing. Arguably, a Court should not assist a predatory spouse to recover the benefits from a marriage that was obtained through the predator's devious, unscrupulous and anti-social means. The unscrupulous predator 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.

Non Est Factum

Non est factum is the plea that a deed or other formal document is declared void for want of intention and has been used to set aside contracts when a party signs a document with a fundamental misunderstanding about the nature or effect of the document.[360]

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could not prove with medical or other evidence that the marriage was not consummated. The husband testified that it had been consummated. The Court denied the wife's claim for an annulment and granted a divorce instead.

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

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

[360] *Marvco Colour Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [192] 2 SCR 774.

Non est factum is a defence developed in common law and not the court of equity. However, it could be applicable to a predatory marriage situation when the predator attempts to enforce some right arising from the marriage and the victim entered the marriage with a fundamental misunderstanding about the nature or effect of executing the marriage document.

Lack of Independent Legal Advice

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

Courts have consistently held that "*marriage is something more than a contract*".[361] Thus, 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 unclear whether such arguments extend to parties other than those to the marriage. If the victim dies, such 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 is then declared to be void *ab initio,* since these unions can be challenged by other interested parties.[362]

2021 – Pringle v. Pringle – (Ontario)[363]

In the case of *Pringle*, the Applicant wife was applying for an order determining the validity of a marriage contract between the parties. While not a predatory marriage case, the

[361] 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.).
[362] *Ross-Scott v. Potvin* 2014 BCSC 435 at para. 73
[363] 2021 ONSC 3677 [*Pringle*].

decision in *Pringle* demonstrates how a court can use its discretion to set aside a marriage contract where there is a lack of independent legal advice.

The parties cohabited as unmarried spouses between 1995 and 1999. When they separated, they negotiated a separation agreement. During these negotiations, Ms. Pringle learned that married spouses are entitled to more expansive rights on separation than unmarried spouses.[364] In 2005, the parties reconciled and were married on June 30, 2006. The parties separated for the final time on June 16, 2018.

In *Pringle*, the Court considered the principles applicable to setting aside a marriage contract and the importance of financial disclosure and independent legal advice. Relying on the decision in *LeVan v. LeVan*, 2008 ONCA 388 at para. 35 which held "the party must know what assets and liabilities exist at the date of the contract and must understand the general legislative scheme in order to know what he or she is giving up in the proposed agreement."[365]

In *Pringle*, it was held that "because of a lack of independent legal advice, neither party had a clear understanding of their rights and obligations under the *Family Law Act* with or without a marriage contract."[366] The Court therefore, concluded that it should exercise its discretion to set aside the marriage contract dated June 27, 2006.

CONCLUDING COMMENTS

In the absence of clear legislation defining a societally relevant definition of the requisite decisional capacity to marry, the common law remains unclear and insufficient. In Canada, *Banton* and *Re Sung Estate* cite *Browning v. Reane* and *Re Spier*, which both suggest that the requisite capacity to manage one's person *and/or* one's property, or both are an essential component for determining the requisite capacity to marry. These cases and other very recent cases including Hunt, and U.K. decisions appear to be moving in the direction of developing an appropriate consideration of factors for ascertaining the

[364] *Pringle*, at paras. 2-4.
[365] *Ibid*, at para. 19.
[366] *Pringle*, *supra*, at para. 87.

capacity to marry—ones which best reflect and accord with the real-life financial implications of death or marital breakdown on a marriage in today's ageing society.

Still, our courts continue to be haunted by the old judicial adage that "the contract to marry is a very simple one." We see this as obvious in *Ross-Scott v. Potvin* and more recently in *Devore-Thompson v Poulain*.

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

The consequences of Canada's ongoing deference to the common law factors are as puzzling as they are problematic from a social and a public policy perspective. The repeal of legislation revoking a Will on marriage does not put an end to these predatory unions. In refusing to require that a finding of capacity to manage property forms a prerequisite to a finding of capacity to marry gives free reign to would-be (predatory) spouses to marry purely in the pursuit of a share in their incapable spouse's wealth, however vast or small it may be.

Until our factors to determine the requisite capacity to marry are defined or refined, so that they adequately take into consideration the financial implications of marriage, all those with diminished decisional capacity will remain vulnerable to exploitation through marriage. Their would-be heirs will lose their expected gifts and face uncertain costly litigation. This is likely to become an ever increasing and pressing problem as an unprecedented proportion of our society becomes, with age, prone to cognitive decline. It is hoped that we will see some of the suggested equitable approaches gaining some traction in the near future.

Where should the law go from here? While many jurisdictions have abolished the "revocation–upon–marriage" provisions in their succession or probate statutes, this is

merely one small step towards the development of a more cohesive approach to preventing financial abuse through predatory marriages.

There are many further developments that could potentially assist in the remedy of the wrongs done by these unions including, to mention but a few: creative legislative reform which could prevent these marriages from taking place; by introducing legislated caveats to prevent the issuance of a marriage license and the solemnization of marriage in cases where capacity is lacking; and by training and insisting marriage commissioners are more accountable. These marriages perpetrated under false, fraudulent, and deceitful pretences rob our elderly of their dignity and their intended heirs, of the gifts intended for their loved ones.

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.

Whaley Estate Litigation Partners *November 2023*

APPENDIX "A"

CAPACITY TO MARRY IN CANADA: CROSS-PROVINCIAL EXAMINATION OF MARRIAGE LEGISLATION

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
ALBERTA	*Marriage Act*, RSA 2000, c M-5	Section 27 (1) – states that marriages cannot be issued where there is **reason to believe one of the parties is mentally incompetent** by way of a guardianship/trusteeship order or certificate of incapacity under the Adult Guardianship and Trusteeship Act or equivalent legislation of another jurisdiction, is a committee under The Mentally Incapacitated Persons Act, RSA 1970 c232, or equivalent legislation of another jurisdiction. However, section 27 (2) holds that a marriage licence may be issued with proof the trustee or guardian has been given 30 days' notice and that no trustee or guardian has served an originating notice concerning the issuance of the marriage licence. Section 27 (4) States that punishment for issuing a licence in contravention of this is a fine of not more than $1000 and in default of payment to imprisonment for a term not exceeding 30 days.	Despite addressing capacity issues, the *Marriage Act*, Alberta provides no definition of "capacity" or "capacity to enter into a marriage" At common law, 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.
BRITISH COLUMBIA	*Marriage Act*, RSBC 1996, c 282	Section 23 states that **a caveat can be lodged with the issuer of marriage licences against issuing a licence** for the person's named in the caveat. Once lodged, **the caveat prevents the issuing of**	No definition of "capacity" or "capacity to enter into a marriage"

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
		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 Section 35 states that it is a **criminal offence** to issue a license for a marriage, or to solemnize a marriage, when 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, and is liable on conviction to a penalty of not more than $500.	
MANITOBA	*The Marriage Act*, CCSM c M50	Section **20** states that persons declared mentally disordered cannot be issued a marriage licence until a **psychiatrist certifies in writing** that they have the capacity to understand the nature of the contract of marriage and the duties and responsibilities which it creates. A person who contravenes this will be guilty of an offence and liable on summary conviction to a fine of not more than $500. Section 30 states that a declaration that a valid marriage was not affected or entered into shall only be made after a trial relying on witness examination or depositions read into evidence.	No definition of "capacity" or "capacity to enter into a marriage"
NEW BRUNSWICK	*Marriage Act*, RSNB 2011, c188	Caveats against issuance of marriage licence	No definition of "capacity" or "capacity to enter into a marriage"

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
		19(1) Any person on payment of a fee prescribed by regulation may lodge with any issuer a caveat against the issuing of a licence for the marriage of any person named in the caveat, and if a caveat is lodged with the issuer and is duly signed by or on behalf of the person who lodges the caveat and states that person's place of residence and the ground of objection on which that person's caveat is founded, no marriage licence shall be issued by the issuer until either the issuer has examined into the matter of the caveat and is satisfied that it ought not to obstruct the issuing of the licence or the caveat is withdrawn by the person who lodged it. **19**(2) The issuer may in case of doubt refer the matter of the caveat to the Registrar for his or her advice. Section 27 concerning validation holds that nothing in the section has the effect of confirming or rendering valid a marriage between parties who were not legally competent to enter into the marriage contract by reason of consanguinity, affinity or otherwise.	
NEWFOUNDLAND & LABRADOR	*Marriage Act*, SNL 2009, c M-1.02	Newfoundland is silent on the capacity to marry. Section 18, however, holds that a marriage licence will not be issued to anyone under 16, under the influence of drugs and alcohol, or in respect of the issuer's own marriage	No definition of "capacity" or "capacity to enter into a marriage"

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
NORTHWEST TERRITORIES	*Marriage Act*, SNWT 2017, c2	Per section 19, the issuer of a marriage in NWT shall meet with each of the parties separately to ensure they understand the contents of the licence and its significance. Section 43 holds that an issuer shall not issue a marriage where they know or have reason to believe either of the party to the intended marriage is ineligible or incapable of freely consenting or under the influence of drugs or alcohol. Section 45 makes it a summary offence to issue or solemnize a marriage contrary to the *Act*.	No definition of "capacity" or "capacity to enter into a marriage"
NOVA SCOTIA	*Marriage Act*, RSNS 1989, c 436	Nova Scotia's *Marriage Act* is silent on the issue of capacity to marry. Section 46 holds that the determination a valid marriage was not effected or entered into shall only be rendered after a trial.	No definition of "capacity" or "capacity to enter into a marriage" Common law: 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
NUNAVUT	*Marriage Act*, RSNWT (Nu) 1988, c M-4	**Section 18** holds that no one shall perform a marriage ceremony and no person shall go through with a form of marriage with any other person in Nunavut where they know or have reason to believe that either of the contracting parties are incapable of giving a valid consent.	No definition of "capacity" or "capacity to enter into a marriage"
ONTARIO	*Marriage Act*, RSO 1990, c M3	Ontario's *Marriage Act*, at **section 7** holds that no person shall issue a licence or solemnize the	No definition of "capacity" or "capacity to enter into a marriage"

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
		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.	
PRINCE EDWARD ISLAND	*Marriage Act*, RSPEI 1974, c M-5	PEI at section 23 of its *Marriage Act* makes it a summary offence to issue a licence or solemnize a marriage where the issuer knows or has reason to believe that either of the parties to the intended marriage is mentally incompetent.	No definition of "capacity" or "capacity to enter into a marriage"
QUEBEC	*Civil Code of Quebec*, CQLR c CCQ-1991	Like the caveat provisions of British Columbia and New Brunswick, Quebec's Civil Code at section 372 allows any interested person to **oppose the solemnization of a marriage between persons incapable of contracting it**. A minor may oppose a marriage alone. They may also act alone as defendant.	
SASKATCHEWAN	*The Marriage Act*, SSA 1995, c M-4.1	Section **32.1** of Saskatchewan's *Marriage Act*, allows a number of interested parties to bring an action to declare that a valid marriage was not effected or entered into because of a lack of consent. Any of the following parties can bring an action: (a) a party to the marriage; (b) a family member of one of the parties to the marriage; (c) any other person who has a close personal connection to one of the parties to the marriage; (d) the public	No definition of "capacity" or "capacity to enter into a marriage"

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Definition of "capacity to marry"?
		guardian and trustee if the public guardian and trustee is acting pursuant to The Public Guardian and Trustee Act as a personal guardian, property guardian or administrator for one of the parties to the marriage. A declaration that a valid marriage was not effected or entered into shall only be made after a trial including evidence taken orally in open court or of witnesses examined de bene esse, where, according to the practice of the court, depositions of that nature may be read in evidence.	
YUKON	*Marriage Act*, RSY 2002, c.146	Yukon's *Marriage Act* is silent on capacity, capacity to marry, or mental competency. Section 45 addresses the nullity of a marriage and holds that pursuant to s 45 (5), before a trial to determine the nullity of a marriage, **a Judge may order a physical examination of either of the parties by a medical practitioner or nurse practitioner appointed for the purpose by the Judge**.	No definition of "capacity" or "capacity to enter into a marriage"

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APPENDIX "B"

REVOCATION OF WILL LEGISLATION: CROSS-PROVINCIAL EXAMINATION

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Does Marriage Revoke a Will?
ALBERTA	*Wills and Succession Act, RSA 2010, c. W-12.2*	Marriage does not revoke a will in Alberta, provided that the marriage took place on or after February 1, 2012. **23** (2) No will or part of a will, regardless of when it was made, is revoked by (a) a marriage of the testator that occurs on or after February 1, 2012	No
BRITISH COLUMBIA	*Wills and Succession Act*, SBC 2009, c. 13 ("*WESA*")	Marriage does not revoke a will in British Columbia, however, under *WESA*, a person becomes a common law spouse after living together for two years in a "marriage-like relationship": *WESA*, s. 2 (1) **55** (1)A will other than an electronic will or a part of a will other than an electronic will is revoked only in one or more of the following circumstances: (a)by another will made by the will-maker in accordance with this Act; (b)by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37 [how to make a valid will]; (c)by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it; (d)by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that	No

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Does Marriage Revoke a Will?
		(i)the consequence of the act of the will-maker or the other person is apparent on the face of the will, and (ii)the act was done with the intent of the will-maker to revoke the will in whole or in part. (2)A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.	
MANITOBA	*The Wills Act*, CCSM c. W150, s. 17	Revocation by marriage **17** - A will is revoked by the marriage of the testator except where (a) there is a declaration in the will that it is made in contemplation of the marriage; or (a.1) there is a declaration in the will that it is made in contemplation of the testator's common-law relationship with the person the testator subsequently marries; or (b) the will is made in exercise of a power of appointment of real or personal property which would not, in default of the appointment, pass to the heir, executor, or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate; or (c) the will fulfills obligations of the testator to a former spouse or common-law partner under a separation agreement or court order.	Yes
NEW BRUNSWICK	*Wills Act*, RSNB 1973, c. W-9,	Effect of subsequent marriage on will **15.1**(1)In this section “Court” means The Court of King’s Bench of New Brunswick and includes a judge of that Court. **15.1**(2)A person who has made a will and who subsequently marries and dies shall be deemed to have died intestate if the person dies	Yes

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Does Marriage Revoke a Will?
		(a) while married, or (b) while any issue of a marriage of the testator subsequent to the will is still alive.	
NEWFOUNDLAND & LABRADOR	*Wills Act*, RSNL 1990, c. W-10, s. 9	Revocation by marriage **9**. A person's will shall be revoked by his or her marriage except where (a) there is a declaration in the will that it is made in contemplation of that marriage; or (b) the will is made in exercise of a power of appointment, when the property appointed by it would not, in default of the appointment, pass to his or her executor or administrator, or to the person entitled as his or her next-of-kin, under the Intestate Succession Act.	Yes
NORTHWEST TERRITORIES	*Wills Act*, RSNWT 1988, c.W-5, s.11(3)	*Wills Act*, RSNWT 1988, c.W-5, s.11(3) - Revocation by marriage **11** (3) Subject to an order made under subsection (4), a will is revoked by marriage of the testator after it is made, except where (a) it is declared in the will that it is made in contemplation of that marriage; or (b) the will is made in exercise of a power of appointment and the real or personal property appointed by that means would not, in default of the appointment, pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate.	Yes
NOVA SCOTIA	*Wills Act*, RSNS 1989, c. 505, s. 17	17 Every will is revoked by the marriage of the testator except where (a) it is declared in the will that the same is made in contemplation of such marriage;	Yes

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Does Marriage Revoke a Will?
		(b) the wife or husband of the testator elects to take under the will by an instrument in writing signed by such wife or husband and filed, within one year after the testator's death, in the court of probate in which probate of such will is taken or sought to be taken; or (c) the will is made in exercise of a power of appointment, when the real or personal property thereby appointed would not in default of such appointment pass to the heir, executor or administrator or the person entitled as next of kin.	
NUNAVUT	*Consolidation of Wills Act*, RSNWT 1988, c. W-5, s.11	11. Revocation by marriage (3) Subject to an order made under subsection (4), a will is revoked by marriage of the testator after it is made, except where (a) it is declared in the will that it is made in contemplation of that marriage; or (b) the will is made in exercise of a power of appointment and the real or personal property appointed by that means would not, in default of the appointment, pass to the heir, executor or administrator of the testator or to the persons entitled to the estate of the testator if the testator died intestate. Evidence will made in contemplation of marriage (4) A court of competent jurisdiction may order that a will was not revoked by the marriage of the testator if it is satisfied on clear and convincing evidence that the testator made the will in contemplation of the marriage.	Yes
ONTARIO	Bill 245, *Accelerating Access to Justice Act*, 2021	Bill 245 repeals ss. 15 (a) and 16 of the *SLRA*, as a result, marriage of the testator no longer revokes a will in Ontario. Previously, ss. 15 (a) and 16 of the held that a will is revoked by a subsequent marriage of the testator.	No

PROVINCE	LEGISLATION	IMPORTANT/RELEVANT SECTIONS	Does Marriage Revoke a Will?
	Succession Law Reform Act, RSO 1990, c. S.26 ("*SLRA*")		
PRINCE EDWARD ISLAND	*Probate Act*, RSPEI 1988, c P-21, s. 68	**68**. Marriage revokes a will (1) Every will made by a man or woman is revoked by his or her marriage. Application of section (2) This section does not apply to a will (a) made in contemplation of a marriage of the testator which marriage actually takes place within one month after the making of the will; (b) made in exercise of a power of appointment, when the real or personal estate thereby appointed would not, in default of the appointment, pass to his or her heir, executor or administrator, or the person entitled as his or her next of kin, under Part IV.	Yes
QUEBEC	*Civil Code of Quebec*, CQLR c CCQ-1991		No
SASKATCHEWAN	Bill 175 *The Wills Act*, SSA 1996, c. W-14.1, 16 (a)	Bill 175, An Act to amend *The Marriage Act*, 1995 and to make consequential amendments to *The Wills Act*, 1996. As a result, marriage no longer revokes a will in Saskatchewan. **16** (a) of the *Wills Act*, SSA has been repealed Pursuant to 16 (b) – a will is revoked by the execution of a new will or by its destruction.	No
YUKON	*Amend the Wills Act*, 2020 *Wills Act*, RSY 2002, c.230, s.10(2)(a)	Bill No. 12 – *Amend the Wills Act*, 2020 - came into force on May 1, 2021 - repealed the automatic revocation of a will by marriage pursuant to *Wills Act*, RSY, 2002, c.230, s.10(2)(a)	No

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