

The (Not So) Simple Contract:
Mental Capacity & The Act of Marriage

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The purpose of this paper is three-fold. First, it will outline the current common law legal test that an individual must meet to be considered mentally capable of marriage. Second, it will examine the historical origins of this test, and why it may be ill suited to the modern understanding of marriage. Finally, alternate formulations of the test will be examined, in light of their likely impact and the evolving jurisprudence in the area.

The Current Legal Test

Adults, as a rule, are always presumed to be mentally capable.¹ There is no all-encompassing legal test for when an adult becomes “mentally incapable” in Canada. Each action, or category of actions, that can be undertaken by an adult has a specific test for mental capacity.² These various tests of capacity are intended to respect the dignity and autonomy of the adult, while also serving a protective purpose for that adult.³

The legal test for when an adult has the requisite decisional capacity to enter into a contract of marriage⁴ in Canada is found in the common law, not in statute. This test has remained relatively static in recent history.⁵ In their book *Capacity to Marry and The Estate Plan*, K. Whaley et al. summarize four principles informing the test for marital capacity, as distilled from the jurisprudence:⁶

- (i) Capacity to marry is more than a mere appreciation of taking part in a marriage ceremony, or a mere understanding of the words invoked;⁷
- (ii) Capacity to marry requires an understanding of the nature of the marriage contract;
- (iii) To understand the nature of the marriage contract is to understand the duties and responsibilities that marriage creates;

¹ *Ross-Scott v. Potvin*, 2014 BCSC 435 at para 37 (“*Ross-Scott v. Potvin*”)

² The notion of a “test” itself is problematic here; see Kimberly Whaley & Heather Hogan, “Legal Capacity to Marry, Co-Habit, Separate and Divorce, and Predatory Marriages”, a paper presented at the 2015 Canadian Elder Law Conference, November 12-13, 2015, at 2.1.3.

³ British Columbia Law Institute, Report on Common-Law Tests of Capacity, September 2013 at 11-24.

⁴ The term “marital capacity” will be used interchangeably in this paper, as a convenient shorthand.

⁵ *Barrett Estate v. Dexter*, 2000 ABQB 530 at para 51

⁶ Kimberly Whaley, Michel Silberfeld, Heather McGee and Helena Likwornik, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at p 92-93 (“*Capacity to Marry*”)

⁷ *Hart v. Cooper*, [1994] BCWLD 460 (SC) at para 30 (“*Hart v. Cooper*”)

- (iv) The contract of marriage is in essence a simple one, which does not require a high degree of intelligence to comprehend.⁸

As many jurists have suggested⁹, proving a lack of marital capacity is difficult. It is exceedingly rare that marriages will be deemed void from the outset (or, *ab initio*) and retroactively set aside by the court.¹⁰

The plaintiff attacking the marriage must demonstrate that the individual in question lacked the capacity to enter into the marriage at the time of the ceremony. Further, courts in British Columbia have held that this evidence must:¹¹

“...be of a *sufficiently clear and definite* character, as to constitute more than a “mere” preponderance, as is required in ordinary civil cases”

This high evidentiary bar is compounded by the fact that marriage capacity is often only assessed retrospectively, on decisions that were made years prior.¹² There are no notice requirements that must be met before entering into a marriage.

Such assessments can also be especially difficult where medical records are sparse, or the individual at issue has fluctuating capacity (e.g., temporary delusions). These difficulties are often further exacerbated by a strong desire upon the part of the incapacitated individual to retain their independence, and a corresponding inability to recognize their own cognitive deficits.¹³

Interaction With Other Tests of Capacity

Historically, the various tests for capacity have been organized into a “hierarchy”, which was premised on the idea that certain decisions require a “higher” degree of mental capacity than others.¹⁴ The capacity to marry is generally ranked near the bottom of this

⁸ *Wolfman-Stotland v. Stotland*, 2011 BCCA 175 at para 26 (“*Wolfman*”), leave to appeal ref’d [2011] S.C.C.A. No. 242, citing *Calvert (Litigation Guardian of) v. Calvert* (1997) 32 OR (3d) 281 (Ont Ct J) at para 55 (“*Calvert*”), aff’d (1998), 37 OR (3d) 221 (CA)

⁹ Dorota Miler, “Elder Exploitation Through Predatory Marriage”, (2013) 28 Can. J. Fam. L at 31; Albert H. Oosterhoff, “Consequences of a January/December Marriage: A Cautionary Tale” (1998-1999) 18 ETPJ 261 at 273-274

¹⁰ with a few notable recent exceptions; see, e.g., *Feng v Sung Estate*, [2003] O.T.C. 355 (S.C.J) and *Barrett Estate v Dexter*, 2000 ABQB 530

¹¹ *Hart v. Cooper*, [1994] B.C.J No. 159 (S.C) at para 30

¹² Kimberly Whaley & Heather Hogan, “Legal Capacity to Marry, Co-Habit, Separate and Divorce, and Predatory Marriages”, a paper presented at the 2015 Canadian Elder Law Conference, November 12-13, 2015, at 2.1.3

¹³ A hallmark of Alzheimer’s, especially, is a lack of insight into one’s own conditions; see *Barrett Estate v. Dexter*, 2000 ABQB 530 at para 73

¹⁴ see *Calvert*, *supra* at para 54-55, and, more recently, *Wolfman*, *supra* at para 26

hierarchy, and has been described as requiring “the lowest level of understanding” to effect.¹⁵

In *AB. v. CD*, the British Columbia Court of Appeal drew an equivalence between the standards for the capacity to intend to live separate and apart and marital capacity. At paras. 27-28, the Court held:¹⁶

It is significant that the parties agree with the chambers judge's adoption of Professor Robertson's characterization of the capacity to form the intention to live separate and apart as being the equivalent to the capacity to marry. They also agree with his view that both forms of capacity engage a lower standard than the capacity required to manage one's own affairs and instruct counsel. Thus, the capacity to form the intention to live separate and apart is subsumed within the capacity or competency of an individual to manage their own affairs and instruct counsel.

I agree with Professor Robertson's characterization of the different standards of capacity.

The most recent case addressing marital capacity at the British Columbia Court of Appeal, *Wolfman-Stotland v. Stotland*, has endorsed this same hierarchy.¹⁷

However, some Canadian commentators have contended the “hierarchy” approach fundamentally misunderstands the nature of decisional capacity.¹⁸ A line of jurisprudence in Ontario, the most recent of which is the Superior Court of Justice decision of *Covello v. Sturino*¹⁹, has also held that no hierarchy exists at all; each of the various types of decisional capacity simply call for different criteria to be applied.²⁰ Certain English cases have also rejected this “sliding scale” of capacity.²¹

In the Ontario Court of Justice decision of *Banton v. Banton*,²² Cullity J. attempted to delineate the relationship between several of the tests of capacity. In *Banton*, the

¹⁵ see, e.g., *Wolfman*, *supra* at para 27; *Park v. Park*, [1953] 2 All ER 404 (Prob. Div.) at 97; see also Ashley E. Rathburn, “Marrying Into Financial Abuse: A Solution to Protect the Elderly in California” (2010) 47 San Diego L. Rev. 227 at pp 243-244, which summarizes the American view that “marital capacity requires the least amount of capacity, followed by testamentary capacity, and lastly, capacity to enter into contracts”.

¹⁶ *AB. v. CD*, 2009 BCCA 200 at paras 27-28

¹⁷ *Wolfman*, *supra* at para 27

¹⁸ See Kimberly A. Whaley et al., “The Myth of A Hierarchy of Decisional Capacity: A Medico-Legal Perspective”, (2016) 45:4, Adv. Q. 395 at p 401 (“*The Myth of A Hierarchy of Capacity*”)

¹⁹ *Covello v. Sturino*, 2007 CarswellOnt 3726 (Ont. S.C.J.) [*Covello*], citing *Godellie v. Ontario (Public Trustee)* (1990), 39 E.T.R. 40, 21 A.C.W.S. (3d) 1251 (Ont. Dist. Ct.).

²⁰ *Covello*, *supra* at para. 21

²¹ see *Park v. Park*, [1953] 2 All ER 1411 (CA) at 1411 “if a man’s mental condition is such that he is not capable of making a simple will...most people would consider that he is not in a fit condition to enter into a contract of marriage”, and, from Birkett J. in the same judgment, at 1425: “degrees of unsoundness of mind cannot have much relevance to the question of [marital capacity]”

²² *Banton v. Banton*, [1998] O.J. No. 3528, 66 O.T.C. 161 (Ont. Ct. J) (“*Banton*”)

marriage between a young caregiver and an elderly man with Alzheimer's was challenged on the basis that, prior to the marriage, the man had been deemed incapable of managing his affairs (i.e., his legal and proprietary interests). The man had also been found to lack testamentary capacity at the time of the marriage. No expert evidence was presented on the issue of his marital capacity.

Cullity J. began his analysis by identifying that a lack of testamentary capacity at the relevant time does not necessarily determine whether an individual had the mental capacity to marry.²³ In other words, one may still be capable of marriage even if they are incapable of making a will.

Cullity J. then considered whether someone who was incapable of managing his or her property would also necessarily be incapable of marriage. He found that this was not true; though marriage had a clear effect on property rights and obligations, those factors were not "essential to the relationship".²⁴ Thus, an individual that is unable to manage their affairs may still be capable of consenting to a marriage.

The judgment did not explicitly state that a person who is incapable with respect to their personal care would also be incapable of marriage, but this was heavily implied, and subsequent decisions confirmed this.²⁵

The message from recent Canadian jurisprudence in this area is that marriage is a straightforward exercise. There are likely many reasons for this (some of which will be examined later in this paper), but a large part of the explanation appears to lie in the historical cases from which the modern test is drawn.

The (Dubious) Origins of The Legal Test For Capacity To Marry

As outlined previously, an oft-repeated legal maxim in cases that deal with the capacity to marry is that marriage contract is "a very simple" one, which does not require a high degree of intelligence to comprehend". This maxim has informed much of the subsequent jurisprudence in this area, and continues to be cited to this day.²⁶

The description of marriage as being "simple" and "not requiring a high degree of intelligence to understand" seems to have originated in *Durham v. Durham*, a UK Probate Division case from 1885.²⁷ In that case, Sir J. Hannen wrote:²⁸

²³ *Banton, supra* at para 110

²⁴ *Banton, supra* at para 110

²⁵ This remains the subject of conflicting case law in British Columbia, however; see *Ross-Scott v. Potvin, supra* at para 199

²⁶ *Davison v. Sweeney*, 2005 BCSC 757 at para 27; *Feng v Sung Estate*, [2003] O.T.C. 355 (S.C.J) at para 46; *Wolfman, supra* at para 26

²⁷ Though, this idea was prevalent in the jurisprudence at the time- see, e.g., *Hunter v. Edney*, (1881) 10 P.D. 93 at pp 95-96: "no high intellectual standard is required in consenting to a marriage"

...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.

Sir J. Hannen went on to discuss the nature of a marriage as it was understood at the time, seemingly to justify its simplicity:

It is an engagement between a man and a woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promise of the marriage ceremony by words have reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman.

[*Emphasis added.*]

Sir J. Hannen recognized that more than the words are required, that the mind of the party must be capable of understanding the language used, and must not be affected by delusions or insanity:

...a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into.

[*Emphasis added*]

In *Durham*, the Earl of Durham sought to have his marriage declared null. He argued that his wife, the Countess of Durham, had become “hopelessly insane”. He argued further that his wife was also insane on the day of their wedding. His evidence was that she was a person of low intellectual power. He argued that her coldness and reticence after their engagement was “so unnatural in the circumstances that it is evidence of a deranged intellect”. The evidence adduced to prove his case was that she avoided walking near him, she shrank from him, and she walked on the grass borders of the paths near their estate to keep away from him.

The Earl argued that she suffered delusions, as she repeatedly stated “there is something dreadful and awful I ought to tell you”, but that there was nothing in her life that could be considered dreadful or awful. He submitted that the fact that she did not love him was evidence of her insanity.

Sir J. Hannen found that the wife was shy and unhappy at the time of the marriage, not insane. He denied the application to have the marriage voided due to mental incapacity of the wife.

When Sir J. Hannen described that the marriage contract did not require a high degree of intelligence to comprehend, it seems likely he was countering the contention that the wife had always been an “imbecile” and of “low intellectual powers”.

²⁸ *Durham v Durham* (1885), 10 P.D. 80 at p.82 (“*Durham*”)

It is from these unusual factual circumstances that our existing law of marriage capacity has been drawn. Despite these idiosyncratic origins, however, the *Durham* principle has been imported without modification into British Columbia, and continues to be reaffirmed.²⁹

This statement from *Durham* also appears to have had a seminal effect on the scholarship surrounding the legal test for capacity to marry in Canada, and on the conception of marriage that underpins it. In Professor Robertson's text, *Mental Disability and the Law in Canada*, 2d ed. (Toronto: Carswell, 1994), at pp. 253-254, the following passage (which is quoted with some regularity in the case law³⁰) conveys an idea of marriage as a decidedly simple undertaking:

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

[*Emphasis added*]

In *Lacey v. Lacey (Public Trustee of)*, [1983] B.C.J. No. 1016 (S.C.), Wong L.J.S.C. (as he then was) rationalized the low threshold for capacity to marry as follows, at para 31:

Thus at law, the essence of a marriage contract is an engagement between a man and a woman to live together and to love one another as husband and wife to the exclusion of all others. It is a simple contract which does not require high intelligence to comprehend. It does not involve consideration of a large variety of circumstances required in other acts involving others, such as in the making of a Will..

²⁹ See *Wolfman*, *supra* at para 24; see also *Davison v. Sweeney*, 2005 BCSC 757 at para 25; *Chertkow v. Feinstein*, *supra* at p 214

³⁰ *AB v. CD*, *supra* at para 24; *Wolfman*, *supra* at para 24; *Fuhr (Litigation Guardian of) v. Tingey*, 2013 BCSC 711 at para 32

Wong L.J.S.C. refers to the “essence” of marriage as being a contract to live together and love one another, to the exclusion of others. Whereas that may be the “essence” of marriage for some, such a description does not apply to all marriages. What of the property rights that flow from marriage? What of those who choose to live apart? And those who are not exclusive?

Marriage In The Modern Context

In common-law nations, the institution of marriage has historically been informed by religious considerations.³¹ Often, the strictures of such faiths required life-long unions, and this may have discouraged the formation of a test for marriage capacity that would more readily lead to the dissolution of those unions.³²

Such urges are further bolstered by the perception of strong public policy reasons for preserving marriages; as flagged in *Kerr v. Kerr*, a decision of the Manitoba Court of Appeal, “the interest of the public in upholding marriages is recognized in law by the rule that everything, including capacity of the parties, is presumed in favor of marriages”.³³ Other jurisdictions discouraged the dissolution of marriages to an even greater degree; until passage of the *The Matrimonial Causes Act* in 1857, every divorce in England required an Act of Parliament to be legally effective.³⁴

Further, until relatively recently, marriage itself has not been premised on the notion of equality, in which both partners were possessed of the same autonomy, but on more archaic gender roles. Traditionally, the common law held that marriage would cause a wife to lose her entitlement to most of the benefits of property ownership³⁵; in law, a husband and wife were united as one legal entity, and that entity was the husband.

These ideas are evident in the court’s description of what a “marriage” is, in *Durham*:³⁶

It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman.

³¹ See, e.g., *Turner v. Meyers* (1808), 161 ER 600 at 601 (Consist. Ct)

³² e.g., *Milson v. Hough*, [1951] 3 DLR 725 (HCJ) at 726, where Gale J. stated in a marital capacity case that “marriage is a sacred state, not lightly to be cast aside....”

³³ *Kerr v. Kerr*, [1952] 4 DLR 578 at 588 (Man. CA)

³⁴ see Lawrence Stone, “*Road to Divorce, England 1530-1987*” (Oxford, Oxford University Press, 1990)

³⁵ *Capacity to Marry*, *supra* at p 27

³⁶ *Durham*, *supra* at p 82

Contrasted with the egalitarian ideals of contemporary society, such statements seem archaic, and hopelessly out of touch with modern notions of self-sufficiency. They may also represent an undue focus on the “personal status” consequences of a marriage, or the roles that it entails, or its property consequences.

The Legal And Financial Consequences of A Modern Marriage

The act of marriage is often described in the jurisprudence as a “marriage contract” between two individuals.³⁷ A contract is, at its simplest, an agreement between parties which gives rise to obligations that may be enforced in the courts.³⁸ These obligations can be manifold, and may be of far-reaching significance to the parties and their families.

Indeed, courts have (perhaps hyperbolically) referred to the marriage contract as “the most important contract of life”.³⁹ The relationship this contract creates is also, in many cases, a permanent one. This was flagged by the Supreme Court of Canada in *Nova Scotia (Attorney General) v. Walsh*, where the Court discussed the nature of marriage.⁴⁰

Marriage is an institution in which couples agree to participate by the expression of a formal and public choice. The contractual nature of marriage distinguishes married couples from common law couples who have not expressed their wish to be bound by the obligations of marriage...the fact that some unmarried couples have relationships similar to married couples does not undermine the central distinguishing feature of the institution of marriage: *permanent contractual commitment*. Marriage is of a solemn and permanent nature...

[Emphasis added]

The content of this contract then becomes crucial to the issue of whether one can meaningfully consent to it. As the Alberta Court of Appeal in *Chertkow v. Feinstein*, one of the most cited cases in Canada on the topic, states:⁴¹

What must be established is set out in *Durham v. Durham*...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".

³⁷ *Ross-Scott v. Potvin*, *supra* at para 40

³⁸ *Westshore Terminals Limited Partnership v. Leo Ocean, S.A.*, 2014 FC 136 at para 41

³⁹ *Browning v. Reane* (1812), 161 ER 1080 at 1081 (Consist. Ct.); *Capon v. McLay*, [1965] 2 O.R. 83, 49 D.L.R. (2d) 675 (C.A) at para 16

⁴⁰ *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 para 200

⁴¹ *Chertkow v. Feinstein*, *supra* at p 214

This raises fundamental questions - what exactly is the nature of the marriage contract, and what duties and responsibilities does it entail? Inescapably, these seem to include a financial or proprietary element, as emphasized by the Supreme Court in *Nova Scotia (Attorney General) v. Walsh*.⁴²

It is by choice that married couples are subject to the obligations of marriage. When couples undertake such a life project, they commit to respect the consequences and obligations flowing from their choice. The choice to be subject to such obligations and to undertake a life-long commitment underlies and legitimates the system of benefits and obligations attached to marriage generally, and, in particular, *those relating to matrimonial assets*.

The financial perquisites that may accrue from marriage are numerous.⁴³ In many Canadian jurisdictions, marriage can confer, among other things:

- pension and survivorship benefits
- significant tax planning advantages
- the right to equalization payments under family law legislation, and
- the new spouse may automatically become the primary beneficiary of their spouse's estate under provincial intestacy laws.

Marriage also has the effect of automatically revoking all previous wills in many jurisdictions, though such legislation has been reconsidered of late.⁴⁴ When this revocation is combined with the preferential assumptions spouses enjoy under most intestacy schemes, the inheritance benefits to a new spouse may be considerable if no new will replaces the old.⁴⁵

In addition to the automatic changes that may be brought about by legislation, new marriages often involve a reorganization of one's estate plan, and the creation of new

⁴² This passage, from *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83 at para 200, was cited in the marital capacity case of *Ross-Scott v. Potvin*, *supra* at para 41. However, the court in *Ross-Scott v. Potvin* later stated that an incapacity to manage one's financial affairs would not "necessarily impact" a person's ability to consent to marriage, at para 200:

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...*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.

⁴³ For an overview of the property consequences of marriage in various jurisdictions of the United States, see Terry L. Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America" (2008) 96:275 Kentucky Law Journal, at 277

⁴⁴ See, e.g., section 15 of the *Succession Law Reform Act*, R.S.O. 1990. In British Columbia, however, s. 14(1) of the *Wills Act*, R.S.B.C. 1996 c. 489, which revoked prior wills upon marriage, was recently repealed by the *Wills, Estates and Succession Act*, S.B.C. 2009 c. 13 ("WESA").

⁴⁵ See, for example, *Devore-Thompson v. Poulain*, 2017 BCSC 1289 at para 40; *Banton*, *supra* note 10 at p 223; *Hart v. Cooper* (1994), 2 ETR (2d) 168 (BCSC) at para 29

testamentary dispositions. These changes often have far-reaching effects for previous beneficiaries, and the testator themselves.

Especially in relation to an elderly or mentally infirm testator, there is a heightened concern that such testamentary changes could be the result of coercion, or undue influence, on the part of the new spouse. This issue is further compounded by Canada's aging population, and the fact that many individuals will now be married more than once during their lifetimes.⁴⁶

It is undeniable that the institution of marriage has been radically altered in the past century, as society continues to redefine its effects and cultural significance. Perhaps, then, the legal test for marital capacity, and what, exactly, needs to be "understood" by participants to a valid marriage, may need to adapt with it.

Alternative Formulations & The Future of The Test

The wide-ranging effects of marriage have been increasingly cited in the jurisprudence on marital capacity, and much recent case law in this area has identified a need to "rethink" the test for capacity to marry.⁴⁷ Such pleas are often based on the argument that the current test makes it too easy for opportunistic individuals to obtain control of the estate of the elderly, or mentally infirm.⁴⁸

There have been several solutions proposed to ameliorate these concerns in recent years, some of which have received significant support from commentators in the field.⁴⁹ The most prominent of these are:

- (a) setting a different threshold for the capacity to marry;
- (b) changing the nature of the test for marital capacity to an examination of specific factors;
- (c) revising certain pieces of provincial legislation that relate to the distribution of an individual's estate.

A description, and some potential implications, of each solution will be outlined below.

A Test That Considers The Financial Impact of Marriage

⁴⁶ *Capacity to Marry, supra*, at p 3.

⁴⁷ e.g., *Feng v Sung Estate*, [2003] O.T.C. 355 (S.C.J) at para 58; see British Columbia Law Institute, Report on Common-Law Tests of Capacity, September 2013 at p 177, footnote 747 for a complete list

⁴⁸ See Albert H. Oosterhoff, "*Barrett Estate v. Dexter*" (2001) ETPJ 115 at p 121; for a list of equitable remedies or tort claims that may be applied in these scenarios, see Kimberly Whaley & Heather Hogan, "Legal Capacity to Marry, Co-Habit, Separate and Divorce, and Predatory Marriages", a paper presented at the 2015 Canadian Elder Law Conference, November 12-13, 2015, at 2.1.9, 2.1.12-18

⁴⁹ Dorota Miler, "Elder Exploitation Through Predatory Marriage", (2013) 28 Can. J. Fam. L at 11, 28 ("*Elder Exploitation*"); see also Albert H. Oosterhoff, "*Barrett Estate v. Dexter*" (2001) ETPJ 115 at p 121

A common proposal is that the test should be altered to require that the parties to the marriage appreciate the financial consequences of marriage.⁵⁰ Practically, then, the test would likely echo, or incorporate, the criteria used to determine whether one is capable of managing their “property” (i.e., their legal and financial affairs).⁵¹ This would dovetail with the growing judicial appreciation of the impact that marriage has on one’s financial and property rights.⁵²

As outlined previously, however, the capacity needed to manage one’s property has traditionally been placed higher on a “capacity hierarchy” than that required to marry. Changing the test in this manner would significantly alter that hierarchy (though, as flagged earlier, the notion of a capacity hierarchy may itself be wrongheaded).⁵³ Further, calls for such changes are often paired with the suggestion that a capacity test be mandatory prior to some, or all, marriages.

Leaving aside the practical and legal issues surrounding mandatory capacity examinations at the time of marriage,⁵⁴ updating the test to include the criteria for the capacity to manage property may be deemed a more-than-incremental change to the common law. Such a change may require legislative action to effect.⁵⁵ It could also restrict access to marriage. While this could thwart potential exploitative marriages, it could have negative consequences for others. For example, it could unduly prevent some people from legalizing their relationships.⁵⁶ Love, and/or marriage, should not be out of reach simply because one cannot manage their finances.

However, judicial support for the idea that meaningful marital capacity should entail an understanding of the impact of marriage on one’s property does exist, though largely in

⁵⁰ Albert H. Oosterhoff, “Consequences of a January/December Marriage: A Cautionary Tale” (1998-1999) 18 ETPJ 261 at 272-273; Whaley, *Capacity to Marry*, *supra* at 39-42;

⁵¹ British Columbia Law Institute, Report on Common-Law Tests of Capacity, September 2013 at p 179

⁵² *The Myth of A Hierarchy for Capacity*, *supra* at 413

⁵³ *The Myth of A Hierarchy of Capacity*, *supra* at 415 - “it does not logically follow that simply because one may have capacity with respect to certain decisions and not to others, that those decisions fall along a linear hierarchy”

⁵⁴ For a discussion of the constitutional issues engaged by state-ordered capacity examinations, see *Temoin v. Martin*, 2012 BCCA 250 at paras 57-60. It is also unclear who would bear the responsibility of effecting such an assessment in relation to a marriage - unlike the creation of a will, a lawyer is not currently required for a marriage ceremony to be valid. See *Elder Exploitation*, *supra*, at p 36, or, for the proposal that the marriage officiant be responsible, see Wendy L. Griesdorf, “Crazy In Love: Caregiver Marriages In the Context of Estate Disputes”, 25:315 ETPJ at 327.

⁵⁵ Per *R. v. Salituro*, [1991] 3 SCR 654 at p 670:

“Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared. Nonetheless...for any changes to the law which may have complex ramifications, however necessary or desirable such changes may be, they should be left to the legislature. The judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of our society.”

⁵⁶ *Elder Exploitation*, *supra* at p 35

other jurisdictions. In the English decision of *Browning v. Reane*, the court outlined the following test for the capacity to marry, at para 70:⁵⁷

If the capacity be such ... that the party is incapable of understanding the nature of the contract itself, and incapable, from mental imbecility, to take care of his or her own person and property, such an individual cannot dispose of his or her person *and property* by the matrimonial contract, any more than by any other contract.

[*Emphasis added*]

This formulation of the test (requiring incapacity of both person and property) implies that the marriage contract is more complex than the “simple contract” described in *Durham*, and necessarily involves proprietary interests. However, in *Banton*, the only Canadian decision to consider *Browning*, the Ontario Court of Justice found that the ability to consider property rights and obligations was not an essential component of the test for marital capacity:⁵⁸

“to treat the ability to manage property as essential to the [*marriage*] relationship would...be to attribute inordinate weight to the proprietary aspects of marriage”

There is, as yet, no decision in British Columbia where proprietary interests were considered or discussed as an element of the test when marital capacity was at issue.⁵⁹

A Formal List Of Factors For The Test

While several cases have made preliminary attempts to add specific elements to the test for capacity to marry,⁶⁰ no Canadian decision has yet outlined a comprehensive list of factors to determine if an individual adequately appreciates the effect of marriage.

While it is often said that marital capacity “requires an understanding of the nature of the marriage contract”, courts in British Columbia have previously rejected the notion that a wide variety of circumstances should be considered to determine if a marriage contract was consented to.⁶¹ However, in the most recent decision on marital capacity in British

⁵⁷ *Browning v. Reane*, (1812), 161 E.R. 1080, [1803-13] All E.R. Rep. 265 (Eng. Ecc.) (“*Browning*”)

⁵⁸ *Banton*, *supra* at para 110

⁵⁹ British Columbia Law Institute, Report on Common-Law Tests of Capacity, September 2013 at p 181

⁶⁰ see *Barrett Estate*, at para 89, and *Feng v. Sung Estate* (2003), 1 ETR (3d) 296 (SCJ), *aff'd* (2004), 11 ETR (3d) 169 (CA) at para 61

⁶¹ This rejection of the other consequences of marriage as irrelevant to the test occurred in *Lacey v. Lacey (Public Trustee of)*, [1983] B.C.J. No. 1016 (S.C.), where Wong L.J.S.C. stated at para 31:

[*Marital consent*] 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 contemplation of children.

Columbia, *Devore-Thompson v. Poulain*, Griffin J. outlined such a list when she found the individual at issue to have lacked the necessary capacity:⁶²

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.*

[*Emphasis added*]

Griffin J. in *Devore-Thompson* also found it relevant that the incapacitated individual:⁶³

“did not understand...*what it meant to live together with another person, nor could she understand the concept of a lifetime bond*”.

[*Emphasis added*]

This, of course, begs the question of what factors are appropriate for the list. While a precise description of what a marriage entails for its participants is difficult, and may vary between marriages, courts have already developed a method for legally assessing it. This method assesses whether a “marriage-like relationship” exists between individuals, by using certain objective indicators that such a relationship exists.⁶⁴

Many of these factors might be used to determine whether an individual truly understands the nature of a marriage. That is, a court might ask whether the party could truly consent to changes such as:

- cohabitation;
- shared finances;
- shared property;
- an exclusive sexual relationship; and
- mutual beneficiary designations.

A list-based approach would also have the benefit of drawing from a deep well of existing case law on “marriage-like” relationships. Further, by virtue of its wide adoption and relatively frequent updates, this body of law is arguably more responsive to the current social consensus of what a marriage entails.

⁶² *Devore-Thompson v. Poulain*, 2017 BCSC 1289 at para 347 (“*Devore-Thompson*”).

⁶³ *Devore-Thompson*, *supra* at note 345

⁶⁴ See, e.g., *Re Richardson Estate*, 2014 BCSC 2162

Changes To The Surrounding Legislation

As mentioned, one of the primary motivations commonly cited by advocates for change in this area of the law is the protection of incapacitated individuals from unscrupulous would-be spouses that covet their estates. Instead of recalibrating the common law test to address these concerns, however, some jurists have proposed a re-drafting, or outright elimination, of:

- the statutory rules that trigger the automatic revocation of all previous wills upon marriage, or
- the rules that grant a spouse the preferential share of an estate upon intestacy.⁶⁵

The likely impact of each of these proposed changes will be examined, in turn.

a) Rules That Revoke All Previous Wills Upon Marriage

A complete elimination of the rules that automatically revoke wills upon marriage without an alternative in place could lead to undesirable consequences. Without such rules, it is easy to imagine a situation where a prior will, with a prior spouse as the primary beneficiary, remained effective long after it was unlikely that testator wished to benefit that spouse.

However, such provisions are also somewhat draconian in effect, given that an entire, carefully crafted estate succession plan under a document can be rendered null by a testator's unexpected marriage.⁶⁶ Also, since the capacity to marry is currently set at a "lower" threshold than testamentary capacity, these rules mean that an individual that may not have the capacity to revoke their own will directly may still do so indirectly, by the act of marriage.⁶⁷

With *WESA*, however, British Columbia has created an alternative legal framework in an attempt to address these concerns. The statute eliminates the automatic wills-revocation rule found in its predecessor legislation. In its place, it establishes a rule where, at the time an individual ceases to be a spouse of the will-maker, any gift, executorship, trusteeship, or powers of appointment that the will confers upon a former spouse will be treated as if that spouse had pre-deceased the will-maker.⁶⁸

⁶⁵ See Albert H. Oosterhoff, "*Barrett Estate v. Dexter*" (2001) ETPJ 115 at p 121

⁶⁶ Wendy L. Griesdorf, "Crazy In Love: Caregiver Marriages In the Context of Estate Disputes", 25:315 ETPJ at 326

⁶⁷ This disparity is identified as a "fundamental flaw" in *Capacity to Marry*, *supra* at p 93

⁶⁸ *WESA*, *supra* at ss 56(2); a nearly identical provision is found at section 25 of Alberta's recent *Wills and Succession Act*, SA 2010, c W-12.2

This solution satisfies all three concerns; first, a new marriage does not revoke a will-maker's will in its entirety when that will-maker may lack the legal capacity to understand the effect of that action. Second, it preserves the overall estate plan of that individual. Third, former spouses do not continue to have inheritance rights under old wills they may still be identified as beneficiaries in (though, the rule is subject to any "contrary intention" appearing in the will, so those that wish to benefit a former spouse may still do so).⁶⁹

It is to be hoped other jurisdictions take note of this alternative, and, if possible, apply it to their own statutory succession frameworks.

b) Rules That Grant A Spouse A Preferential Share of The Deceased's Estate

A spouse's preferential share upon intestacy is less open to attack or modification; such rules are rooted in assumptions about intergenerational wealth transfer and spousal entitlements that transcend the debate around marital capacity.⁷⁰ While eliminating this presumptive entitlement of spouses may go a long way in discouraging the unscrupulous from marrying the vulnerable for a share of their estate,⁷¹ this would also necessarily defund many innocent spouses whose partners died intestate.

A "middle ground" between elimination and preservation that has been proposed in other jurisdictions⁷² is the creation of a time period between when the marriage occurs and when a spouse becomes entitled to their preferential share. However, such a rule would only address the issue of exploitative "deathbed marriages" and, depending on the time horizons involved, may ultimately be over-inclusive.

Conclusion

The traditional view of the capacity needed to marry in Canada is that a marriage only requires a basic level of comprehension from its participants. However, the understanding of marriage that underpins this test may no longer reflect contemporary social attitudes and concerns, especially in light of the wealth of proprietary rights that flow from marriage.

⁶⁹ *WESA*, *supra* at ss 56(1)

⁷⁰ See, e.g., the policy rationales outlined in the *Family Law Act*, R.S.O. 1990, c. F.3, at ss. 5(7); these same broad concerns would also likely stifle any significant changes to the property regime that governs spousal entitlements upon divorce.

⁷¹ Section 21 of *WESA*, *supra* already strikes a balance in this area, arguably to discourage exploitative marriages; a spouse who had children with the deceased is entitled to \$300,000, but this share decreases to \$150,000 if there are no children common to the deceased and the surviving spouse. However, in either case, after the spouse's preferential share is deducted, the remainder of the estate is split 50-50 between the spouse and the children.

⁷² Terry L. Turnipseed, "How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America" (2008) 96:275 *Kentucky Law Journal*, at 295

Many have suggested that the standard for marital capacity be made more rigorous, to protect those with impaired mental capacity. The test may need to incorporate an appreciation of the effect that a marriage has on one's property, or on the other effects marriage can entail for an individual. Statutory changes have also been proposed to minimize the impact of exploitative marriages.

All of these points require careful consideration by lawyers dealing with such cases, as the jurisprudence on marital capacity continues to evolve, and new opportunities may exist to further the law in this area. Such issues are likely to only escalate in importance as Canadians live longer, have fewer children, and become more prone to cognitive decline.