

THE CAPACITY TO MARRY AND DIVORCE

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INTRODUCTION

Marriage is a rite of passage that carries with it intense personal, familial and societal significance. Most people marry, and many marry more than once. It is a ritual that is familiar, comforting and celebratory. However, in addition to the emotional, familial and cultural importance of marriage, marriage also brings with it significant legal and property implications. The act of marriage not only alters an individual's personal life, but also his or her financial life.

The ramifications of marriage are that more serious in the scenario of predatory marriages, where unscrupulous individuals prey upon older adults with diminished reasoning ability for their own financial profit.¹ As the aging population increases, and so too, a populace with cognitive impairment, the prevalence of these marriages will only increase, as will the importance of understanding the relevance of capacity as it relates to marriage.

The issue of capacity to marry and divorce is one that is evolving in the law. While the traditional view of the requisite capacity to marry reflected an understanding that marriage is "simple" and that therefore one only needs a basic understanding of the requirements of marriage to have the requisite capacity to marry, the historic case law also suggests that capacity to manage one's personal care and perhaps one's property is required for one to have capacity to marry. Other suggestions have been made that the 'test', the requisite standards, or factors to determine capacity to marry must be more fulsome, and incorporate an appreciation of the effect that a marriage has on one's property and children. And more recently, calls have been made to make the standard for capacity to marry more stringent so as to protect those who are vulnerable.²

All of these points require careful consideration by lawyers dealing with such cases. First, a traditionally low threshold for capacity to marry means that a challenge to a marriage on the

¹ Kimberly Whaley, Michel Silberfeld, Heather McGee and Helena Likwornik, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70 [hereinafter Whaley et al.]

² As an example, please see "Predatory Marriages" by Professor Albert H. Oosterhoff presented at the Law Society of Upper Canada 14th Annual Estates and Trust. At page 40, Professor Oosterhoff writes: "I..suggest that the test for capacity to marry be amended by legislation to require proof of testamentary capacity and the absence of undue influence, the latter as measured by the law applied when a will is contested on that ground..." [hereinafter Oosterhoff]

basis of incapacity is difficult. Still, a solicitor dealing with a client in the family law context, or estate planning context, who is to marry, or has married, or wants to change his or her estate plan on the basis of the marriage, but has challenges respecting capacity, will want to be sure to address the issue of capacity either in the lawyer's office, or with the assistance of outside expertise. As society continues to age and live longer, this issue will continue to become even more pressing, and even more so to the lawyers who serve that aging population.

FACTORS TO CONSIDER IN ASSESSING THE CAPACITY TO MARRY AND THE CAPACITY TO DIVORCE

Capacity in general

At law, one is presumed capable unless and until this presumption is rebutted. Capacity is decision, time and situation/context-specific.³ One's capacity may fluctuate with any given decision or task in question and from time to time.

While the term "test" is often applied to issues of capacity, it may be more appropriate to use the term "standard" or factors to be applied in assessing, and even then, to understand that capacity is a fluid concept that is difficult to measure precisely. It is for this reason that often more than one capacity assessment is employed and a variety of evidence is considered to evaluate an individual's capacity. Still, it is a matter that requires serious attention, and for solicitors, it is one they must regularly turn their minds to.

Capacity to Marry and Divorce and Statute

There is no statutory test for the requisite capacity to marry or to divorce.

The *Marriage Act*, R.S.O. 1990, c.M.3, which is the statute governing marriage in Ontario, addresses mental capacity in marriage in section 7. That section provides that a marriage license is not to be issued, nor is a marriage to be officiated if one (or presumably both) person(s) lack(s) the mental capacity to marry.

Also please see, Whaley et al., *Ibid*, pages 117 to 120

³ Whaley et al., *supra* note 1 at 46.

Persons lacking mental capacity

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

While this provision proscribes marriage of persons lacking mental capacity, it does not address what that requisite capacity is.

The issue of capacity to marry and divorce is addressed in the common law.

The Property Implications of Marriage and Divorce

The complicating factor in the issue of capacity to marry and divorce is that marriage and divorce carry with them significant financial implications.

First, in Ontario marriage automatically revokes any previously executed Will.

Furthermore, on death, married spouses are entitled to a significant share of the deceased spouse's Estate. Section 5 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), provides that, death, the spouse whose "net family property" is the lesser of the two net family properties is entitled to an equalization payment of one-half the difference between them.

A spouse's "net family property" or NFP is the value of all of their property (except for certain excluded properties set out in subsection 4(2) of the *FLA*) that a spouse owns on the valuation date (which could be the date of divorce, or date of death of a spouse), after certain deductions are made, such as, for example, the spouse's debts and other liabilities and the value of property that the spouse already owned on the date of marriage after deducting the debts and other liabilities related to that property. Importantly, even if the matrimonial home was owned before/as at the date of marriage, its value is not deducted from a spouse's NFP, nor are any debts or liabilities related directly to the acquisition or significant improvement of the matrimonial home (calculated as of the date of the marriage). The definition of property in the *FLA* is fairly

vast, including “any interest, present or future, vested or contingent, in real or personal property.”⁴

Even if the deceased spouse leaves a Will, the surviving spouse may ‘elect’ to either take under the Will, or to receive an equalization payment, if applicable. Even if a spouse dies intestate, the surviving married spouse is entitled to elect to either take pursuant to the intestacy laws set out in the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 (the “SLRA”), or to receive an equalization payment pursuant to the *FLA*. While a claim for variation of one-half of the difference can be pled, it is rarely achieved in the absence of fraud or other unconscionable circumstances.⁵

Section 44 of Part II of the *SLRA* provides that where a person dies intestate in respect of property and is survived by a spouse and not survived by issue, the spouse is entitled to the property absolutely.⁶ Where a spouse dies intestate in respect of property having a net value of more than the “preferential share” and is survived by a spouse and issue, the spouse is entitled to the preferential share, absolutely. The preferential share is currently prescribed by regulation as \$200,000.00.⁷

The purpose of ensuring financial benefits to spouses is in recognition of the principles that spouses are expected to share in financial responsibilities equally, such that both are equally entitled to the property of the marriage.

There are legitimate policy reasons underlying this statutorily imposed wealth-sharing regime. Using the marital property provisions of the *FLA* as an example, subsection 5(7) of that Act sets out its underlying policy rationale as follows:

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

⁴ *Family Law Act*, R.S.O. 1990, c. F.3, ss. 4(1) [hereinafter *FLA*]

⁵ Whaley et al., *supra* note 1 at 33

⁶ *Ibid.* at 34 to 35

⁷ *Ibid.*

Marriage and the consequences of family and estate legislation are extremely powerful in that they dramatically alter the legal and financial obligations of spouses and have 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.

It is these factors that complicate the issue of the requisite capacity to marry and to divorce. While historically, marriage has been perceived as an individual right and decision to make, and one that Courts should be loath to interfere in, in reality, Courts have been required to address the serious financial ramifications of marriage and it is those implications that are reflected in the range of case law on the topic.

Potential for Abuse

While the above-noted financial implications that accompany marriage are in place to prioritize equal treatment of spouses and ensure that partners to a marriage are protected financially, there is the unfortunate consequence that those who have less than honourable intentions can also benefit. In these predatory marriages, an (often) older adult is financially exploited by someone who seeks to marry them and enjoy the benefits proffered by family and estate legislation.

Statistics confirm that our population is aging rapidly. With longevity alone, comes an increase in the occurrence of medical issues affecting cognition, as well as related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, cognitive disorders and other conditions involving reduced functioning and capability.⁸ There are a wide variety of disorders that affect capacity and increase an individual's susceptibility to being vulnerable and dependant. Other factors affecting capacity include, normal aging, disorders such as depression which are often untreated or undiagnosed, schizophrenia, bipolar disorder, psychotic disorders, delusions, debilitating illnesses, senility, drug and alcohol abuse, and addiction.⁹

⁸ Whaley et al., *supra* note 1 at 70

⁹ *Ibid.*

Civil marriages are solemnized with increasing frequency under circumstances where one party to the marriage is incapable of understanding, appreciating, and formulating a choice to marry—perhaps because they are afflicted with one of the ailments described above.¹⁰

Legal Treatment of Capacity to Marry and Divorce

As outlined below, the issue of the requisite capacity to marry and divorce at law is based on a historical assumption that marriage is simple, as well as a more modern priority on individual autonomy. These twin forces mean that the issue of capacity to marry often avoids the serious financial implications of marriage (and by extension, the potential for abuse).

Still, at the same time, more litigation is coming before the Courts that reflects the concerns of individuals (often, heirs) who are affected by marriages where capacity is in issue.

And often, because cases come to the Courts after the spouse whose capacity is in question has passed away, the Court must look retrospectively at the marriage (or divorce) and do so with the assistance of capacity assessments and medical data.

Since the requisite capacity to marry is a singular issue, often a person whose capacity is in question will not have had that aspect of capacity assessed, however, s/he will have had other aspects of capacity measured. Some of the cases outlined below show how assessments of different types of capacity, for instance: to instruct counsel; to manage property; to make personal care decisions, are applied by Courts to determine the spouse in question's capacity to marry. This all goes to suggest that the requisite capacity to marry is tied to these other standards or factors to consider in determining capacity.

CASE REVIEW OF RELEVANT LEGAL FACTORS AND THEIR APPLICATION

The Traditional View on Capacity to Marry: Marriage is a Simple Contract

The traditional English view on capacity to marry is that the threshold is low, on the basis that marriage is a straight-forward, uncomplicated matter. In the leading English case of *Durham*

¹⁰ *Ibid.*

*v. Durham*¹¹ the English court ruled that “the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend.”¹²

The Court proceeded to compare capacity to marry to capacity to enter into a contract. This analysis, the Court continues, would require the person in question to possess the:

- (a) Ability to understand the nature of the contract of marriage; and
- (b) Ability to understand the effect of the contract of marriage.¹³

In this traditional view, spouses are required to understand only the most basic components of marriage, such as the commitment of the spouses to be exclusive, that the relationship is to be terminated only upon death, and that the marriage is to be founded on mutual support and cohabitation. In general, to be found capable of marrying, according to historical common law, a person need not have the ability to understand the more serious financial implications that accompany marriage, such as revocation of previous wills, support obligations, and potential equalization.¹⁴

In another historic English case, *In the Estate of Park, Deceased*,¹⁵ Justice Singleton outlined that in order to be deemed capable of marrying, “a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attaching to marriage.” Again, commencing from the proposition that the contract of marriage is uncomplicated, Birkett, L.J., contributed to the judgment, underlining the “simplicity” of marriage”

The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question

¹¹ (1885), 10 P.D. 80 [hereinafter *Durham v. Durham*]

¹² *Ibid.* at p. 82

¹³ *Ibid.*

¹⁴ Whaley et. al, *supra* note 1 at 50

¹⁵ *Estate of Park, Park v. Park* [1954] p. 112, C.A.; affg. *Park v. Park*, [1953] All E.R. Reports [Vol. 2] at 1411 [hereinafter *Park*]

whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.¹⁶

In the same decision, Karminski J. outlined the test for a valid marriage 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.¹⁷

While the Court struggled with developing the appropriate “test”, so to speak, for capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract, and certainly at a lower threshold than testamentary capacity. Karminski J. stated clearly that there is “a lesser degree of capacity ... required to consent to a marriage than in the making of a will.”¹⁸

Historically, therefore, the Courts have viewed marriage as a contract, and a simple one at that.

Browning v. Reane and Spier v. Spier

While the above line of reasoning is supported in the historic case law, it is worth noting that there is also an alternative view that appears in older case law. While the general proposition is that marriage is simple and therefore capacity to marry is not a difficult requirement to meet, the decisions of *Browning v. Reane*¹⁹ and *Spier v. Spier*²⁰ posit that there are additional requirements of capacity in order for one to be capable of marriage.

¹⁶ *Ibid.* at 1425

¹⁷ *Ibid.* at 1417

¹⁸ *Ibid.* at 1425

¹⁹ (1812), 161 E.R. 1080 (Eng. Ecc.) [hereinafter *Browning v. Reane*].

In the 1812 decision of *Browning v. Reane*, the Court stated that for a person to be capable of marrying, he or she must be capable of managing his or her person and property. Similarly, in *Spier v. Spier*, a case decided in 1947, the Court stated that one must be capable of managing his or her property, in order to be capable of marrying.²¹

Modern Case Law on Capacity to Marry and Divorce

In recent cases before the Courts the tension between the traditional historical view of marriage as an easy-to-understand matter, and recognition of rights of autonomy, and the reality that marriage brings with it very serious implications for property and the Estate (not the least of which is the revocation of all previous Wills) is increasingly apparent.

Calvert (Litigation Guardian of) v. Calvert

In *Calvert (Litigation Guardian of) v. Calvert*²² Justice Benotto was asked to decide whether Mrs. Calvert who at the time suffered from Alzheimers disease had the capacity to divorce her husband.

Mr. Calvert argued that Mrs. Calvert lacked the capacity to divorce. There were other issues in dispute, including the role of the litigation guardian and the enforceability of a marriage contract.

In the analysis, Benotto J. compared the different standards of capacity to marry, separate and divorce:

[57] Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to *remain* separate and to be no longer married to one's spouse. It is the undoing of the contract of marriage.

[58] The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend: *Park, supra*, at p. 1427. If marriage is simple, divorce must be equally simple. The

²⁰ *Spier v. Benyen* (sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier v. Spier* [1947] The Weekly Notes. [hereinafter *Spier v. Spier*]

²¹ *Ibid.* at para. 46 per Willmer J.

²² 1997 CanLII 12096 (ON S.C.), aff'd 1998 CarswellOnt 494; 37 O.R. (3d) 221 (C.A.), 106 O.A.C. 299, 36 R.F.L. (4th) 169, leave to appeal to S.C.C. refused May 7, 1998. [hereinafter *Calvert*]

American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage: *Re Kutchins*, 136 A.3d 45 (Ill., 1985).

The Court equated the threshold for capacity to divorce with the threshold for capacity to marry. Justice Benotto continued, and pointed to a “simple” test for capacity to marry, consistent with the reasoning in *Durham v. Durham*,²³ and in *Park*,²⁴ both referred to above.

As for the specifics of the test, Justice Benotto favourably referred to the evidence of an expert physician, Dr. Molloy who outlined a case for the requisite test for capacity:

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

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

The Court still emphasized at paragraph 74, that “the threshold of understanding with respect to separation and divorce is low.”

The Court reviewed the evidence before it, which included information that Mrs. Calvert was clear and decisive in her intention to divorce Mr. Calvert and concluded that Mrs. Calvert had the requisite capacity to separate and divorce at the relevant time.²⁵

This case reinforces the historic view that the threshold for capacity to marry is low, and extends that threshold to capacity to divorce.

Banton v. Banton

In the 1998 Ontario case of *Banton v. Banton*²⁶ Cullity J. was asked to assess whether the Deceased, a then-88-year old man had had the requisite capacity to marry a then-31-year old

²³ *Supra* note 11

²⁴ *Supra* note 15

²⁵ *Calvert*, *supra* note 22 at para. 75

²⁶ 1998, 164 D.L.R. (4th) 176 at 244 [hereinafter *Banton*]

woman. Muna Yassin was a waitress in the retirement home in which George Banton resided. Around the same time that his wife died, Mr. Banton formed a relationship with Ms. Yassin. In 1994, despite the fact that Mr. Banton had been found incapable of managing property, he and Ms. Yassin started withdrawing significant sums of money, prompting Mr. Banton's children's concern. In that same time period, Mr. Banton and Ms. Yassin were married at Ms. Yassin's apartment without the knowledge of Mr. Banton's children. Two days after the marriage, the couple attended at a solicitors office and instructed the lawyer to prepare a Power of Attorney in favour of Ms. Yassin, and a will, leaving all of Mr. Banton's property to the wife.²⁷

Justice Cullity reviewed the law on the validity of marriages, emphasizing the differences in the tests for testamentary capacity, capacity to manage property, capacity to give a Power of Attorney for Property, capacity to give a Power of Attorney for Personal Care capacity to marry, and the provisions of the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30.²⁸

In Justice Cullity's view of the facts of the case, Mr. Banton had been a "willing victim" who had "consented to the marriage."²⁹

Justice Cullity took pains to distinguish between "consent" and "capacity", and then embarked upon an analysis of the test for capacity to marry and whether Mr. Banton would have met the test. The Court commenced its analysis with the "well-established" presumption that an individual will not have capacity to marry unless he or she is capable of understanding the nature of the relationship and the obligations and responsibilities it involves.³⁰ In the Court's view, the test is not one that is particularly rigorous. Justice Cullity considered the fact that Mr. Banton had been married twice before he married Ms. Yassin to find that, despite his weakened mental condition, 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."³¹

²⁸ *Ibid.* at para. 33

²⁹ *Ibid.* at para. 136

³⁰ *Ibid.* at para. 142

³¹ *Ibid.* at para. 144

Justice Cullity found no further requirement for capacity to marry in the Canadian case law before him. He did however find that the English cases of *Browning v. Reane* and *Spier v. Spier*, referred to above, provided for an “additional requirement” for mental capacity to marry:

[145]...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 the matrimonial contract, any more than by any other contract. at pp. 70-1

[146] The principle that a lack of the 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.

In support of the so-called “additional requirement”, Justice Cullity referred to *Halsbury* (4th edition, Volume 22, at para. 911) for “the test 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.

After reviewing these authorities, however, Justice Cullity found that the passages quoted were not entirely consistent. In his view, Sir John Nicholl's statement in *Browning v. Reane* appeared to require both incapacity to manage oneself as well as one's property; 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 incapacity to marry. Notably, Halsbury J's, statement was not precise on this particular question.

In the face of this inconsistency in the jurisprudence, Justice Cullity looked to the old cases and statutes and found that implicit in the authorities, dating at least from the early 19th century, emphasis was placed on the presence (or absence) of an ability to manage oneself *and* one's affairs, including one's property. It was only with the enactment of the *Substitute Decisions Act*, that the line between capacity of the person and capacity with respect to property has been drawn more sharply. In light of the foregoing, his Honour made explicit his preference for the original statement of the principle of capacity to marry in *Browning v. Reane*. In his view, while marriage does have an effect on property rights and obligations, "to treat the ability to manage property as essential to the relationship would [...] be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate."³²

Despite articulating what would, at the very least, be a dual test for capacity to marry (one which requires a capacity to manage one's self *and* one's property) and despite a persuasive medical assessment which found Mr. Banton incapable of managing his property, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid.

Somewhat surprisingly, however, Justice Cullity made this determination in spite of the fact that 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*." However, it is worth noting that, earlier in his reasons, Justice Cullity had stated that the case of *Browning v. Reane* is the source to which the "additional requirement" is attributed, which requirement goes beyond a capacity to understand "the nature of the relationship and the obligations and responsibilities it involves" and, as in both *Browning v. Reane* and *Re Spier*, extends to capacity to take care of one's own person and property.

³² *Ibid.* at para. 157

Barrett Estate v. Dexter

In *Barrett Estate v. Dexter*³³ the Court of Queen's Bench in Alberta was asked to determine whether the marriage between the then-deceased Dwight Barrett and Arleen Dexter was a nullity due to lack of capacity on the part of Mr. Barrett. The Court concluded that the marriage was a nullity based on its finding that at the time of the marriage, Mr. Barrett had “lacked the legal capacity to enter into any form of marriage contract.”³⁴

At the time of the marriage, Mr. Barrett was 93 years of age and Ms. Dexter was 54 years old. Ms. Dexter and Mr. Barrett came to know each other when Ms. Dexter was providing caregiving services to Mr. Barrett, and later resided with Mr. Barrett for reduced rent. Over that time period, Mr. Barrett gave Ms. Dexter money, signed a document authorizing her to reside in his home after he died at the expense of his estate, and went to a lawyer's office at Ms. Dexter's behest. Mr. Barrett and Ms. Dexter were married in a ceremony witnessed and attended only by their limousine driver and another taxi driver. Following the marriage, Mr. Barrett made a new Will leaving the bulk of his \$1 million dollar Estate to Ms. Dexter, with only nominal bequests to his children and grandchildren.

Prior to his death, Mr. Barrett underwent two separate capacity assessments, both of which concluded that Mr. Barrett's cognitive function and judgment were significantly impaired, and indeed the second assessment found that Mr. Barrett was “severely impaired.” Both assessing physicians concluded that Mr. Barrett could not make financial or personal decisions due to his cognitive impairment.

The Court relied on the evidence of Dr. Malloy, who was qualified as an expert in geriatric medicine and an expert in the trial. Dr. Malloy outlined the requirements for capacity to marry and reviewed the facts before the Court to determine whether Mr. Barrett had capacity to marry.

At paragraph 72, the Court referred to Dr. Malloy's explanation of capacity to marry:

On the issue of marriage, Dr. Malloy opined that a person must **understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected...**[emphasis added]

³³ 2000 ABQB 530 (CanLII) 268 AR 101 [hereinafter *Barrett Estate*]

³⁴ *Ibid.* at para. 1

Applying that test to the facts of the case, Dr. Malloy concluded that in the applicable time period, Mr. Barrett had been generally “incapable of marrying, signing or revoking a power of attorney or making a will.”³⁵ Specifically, with respect to the marriage in question, “...Dr. Malloy opined that Dwight would not understand the nature of the contract; his relationship with his intended spouse; his previous marriage history; or the impact of his marriage on legal matters.”³⁶

The Court concluded in light of the evidence and medical opinions and in particular the expert opinion of Dr. Malloy, that Mr. Barrett lacked the capacity to marry. Consequently the marriage was declared null and void. The Court declined to consider the issue of undue influence, having made its ruling on the basis of capacity.³⁷

In my view this is an instructive, well reasoned opinion and such factors should routinely be applied in the context of an assessment of the requisite capacity to marry.

Feng v. Sung Estate

The issue of capacity to marry was central in the 2003 Ontario case of *Feng v. Sung Estate*.³⁸ That case stemmed from a claim for support by Qi Li Feng under the *Succession Law Reform Act*, R.S.O. 1990, c.S26, as well as a preferential share of the Estate of Kam Yuen Sung. The Estate and Mr. Sung’s five children brought a Cross-Application seeking a declaration that the marriage of Mr. Sung and Ms. Feng was void *ab initio*, on the basis that Mr. Sung had lacked capacity to marry.

The deceased Mr. Sung had married Ms. Feng, his caregiver, a mere six weeks before he died. At the time of the marriage, Mr. Sung was very ill, suffering from lung cancer and Parkinson’s disease. He was also dealing with the devastating loss of his first wife. Although the marriage took place on August 23, 2001, none of Mr. Sung’s six children, to whom he was very close, knew of the marriage until September 4, 2001. In that time period, Mr. Sung was extremely ill and had to be admitted to the emergency department. He died from the lung cancer in October.

³⁵ *Ibid.* at para. 74

³⁶ *Ibid.* at para. 78

³⁷ *Ibid.* at paras. 90, 91

³⁸ 2003 CanLII 2420 (ON S.C.). [hereinafter *Feng v. Sung Estate*]

Mr. Sung's children argued that the marriage was a nullity in part because their father lacked capacity to marry. Ms. Feng on the other hand argued that Mr. Sung was capable of marriage as he appreciated the "duties and responsibilities..that are normally attached to marriage" relying on the historic line of cases including *Park v. Park* and *Durham v. Durham*.

In her decision, Greer J. carefully reviewed the chronology of events leading up to and following the marriage, noting Mr. Sung's vulnerability and Ms. Feng's determination to marry him as well as evidence that she had taken money from Mr. Sung. The evidence showed that Ms. Feng received \$30,000.00 from Mr. Sung directly and that she had withdrawn \$26,000.00 from his bank accounts, some days making as many as six withdrawals in a day.

In her analysis, Greer J. carefully reviewed the decision in *Banton*. Justice Greer highlighted the point made by Justice Cullity that **consent to marry does not equal capacity to marry**.³⁹ Justice Greer also noted Justice Cullity's reference to the principle in *Re Spier*, that in order to be capable of marrying, a person must also be capable of taking care of his person and property.⁴⁰ On the facts of the case before her, Justice Greer found that although Mr. Sung had been able to write his own cheques he had not been able to take care of his person.⁴¹

Justice Greer turned to the 'test' for capacity to marry set out by Dr. Malloy, in the decision of *Barrett Estate*, referred to above which required that in order to be capable of marrying, "a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."⁴² Applying the medical evidence and the evidence of Mr. Fung's children to the 'test' set out by Dr. Malloy in *Barrett Estate*, Justice Greer found that Mr. Sung had lacked capacity to marry and declared the marriage void *ab initio*.⁴³

Ms. Feng appealed the decision of Justice Greer to the Court of Appeal.⁴⁴ The Court of Appeal upheld Justice Greer's finding that Mr. Sung lacked capacity to marry, however, noted that the case was "a close one."⁴⁵

³⁹ *Ibid.* at para. 55; *Banton*, *supra* note 26 at p. 224

⁴⁰ *Ibid.* at paras. 55 and 56

⁴¹ *Ibid.* at para. 57

⁴² *Ibid.* at para. 59

⁴³ *Ibid.* at paras. 61, 62 and 66

⁴⁴ *Sung Estate*, Re. 2004 CarswellOnt 4512, 11 E.T.R. (3d) 169, 9 R.F.L. (6th) 229

⁴⁵ *Ibid.* at para. 8.

A.B. v. C.D.: Divorce

In *A.B. v. C.D.*⁴⁶, the British Columbia Court of Appeal was asked to review a decision of Justice Kelleher of the British Columbia Supreme Court in which a husband's application for an order that his wife undergo an independent psychiatric examination, was dismissed.

The parties had been married for 43 years. In 2007, the wife left the matrimonial home and shortly thereafter commenced divorce proceedings. The husband did not want the divorce and challenged the wife's capacity to separate and argued that she suffered from a delusional disorder that caused her to believe he had been unfaithful to her and had persecuted her. The husband sought a medical examination to address his belief that his wife suffered from a delusional disorder. The Supreme Court obtained an expert opinion from a forensic psychologist as to whether the choice to separate had been caused by a mental disorder. The expert found the wife's description of the relationship to be consistent with the husband's and did not find that her desire to separate was based on any "beliefs that she has about him."⁴⁷

It is also relevant and notable that the husband conceded during the proceedings that his wife had capacity to manage her affairs and instruct counsel.⁴⁸

In the decision, Kelleher J. referred to the characterization of the different standards of capacity and the standard of capacity to form the intention to leave a marriage as set out by Professor Gerald B. Robertson in his text, *Mental Disability and the Law in Canada*.⁴⁹ Professor Robertson's standard, focuses on the spouse's overall capacity to manage his or her own affairs. This standard, as stated at paragraph 21 of the Court of Appeal's decision is as follows:

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

⁴⁶ 2009 CarswellBC 1192, 2009 BCCA 200, [2009] B.C.W.L.D. 3694, [2009] B.C.W.L.D. 3919, [2009] W.D.F.L. 2728, 66 R.F.L. (6th) 237, [1009] 9 W.W.R. 82, 94 B.C.L.R. (4th) 38, 270 B.C.A.C. 238, 454 W.A.C. 238, leave to appeal to SCC refused in 2009 CarswellBC 2851 [hereinafter *A.B. v. C.D.*]

⁴⁷ *Ibid.* cited at para. 14

⁴⁸ *Ibid.* at para. 18

⁴⁹ 2nd ed., (Toronto: Carswell, 1994)

The Court of Appeal noted that this standard for capacity to divorce differs and was described as less onerous than that adopted in the English decisions of *Perry v. Perry*⁵⁰ and *Brannan v. Brannan*⁵¹ which found that a spouse was incapable when he or she suffered from delusions that lead to a decision to leave the marriage. The Court of Appeal noted preferred Professor Robertson's characterization of capacity to that found in those older English cases, as it prioritizes the personal autonomy of the individual in making decisions about his or her own life.⁵²

Wolfman-Stotland v. Stotland: Divorce

In *Wolfman-Stotland v. Stotland*⁵³ the British Columbia Court of Appeal was asked to consider the requisite capacity necessary to form the intention to live separate and apart. The appellant, Lillian Wolfman-Stotland at 93 years of age had sought a declaration from the British Columbia Supreme Court that there was no reasonable prospect of reconciliation with her 92-year old husband. Mr. Stotland had applied for a medical examination of Mrs. Stotland and Justice Smith of the Supreme Court had ordered that Mrs. Stotland be examined by a physician with respect to her capacity to instruct counsel, to manage her affairs, her capacity to form the intention to live separate and apart from her husband, and her capacity to "appreciate the nature and consequences of abandoning the marital relationship."⁵⁴

The assessing physician found that Mrs. Stotland "likely" had the capacity to instruct counsel in respect of the divorce, but did not have the capacity to manage her property, nor did she have the capacity "to form the intention to live separate and apart from her husband," however he did find that she had the capacity "to appreciate the financial nature and consequences of abandoning her marital relationship."⁵⁵

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

⁵⁰ [1963] 3 All E.R. 766 (Eng. P.D.A.)

⁵¹ (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.)

⁵² *A.B. v. C.D.*, *supra* note 46 at para.30.

⁵³ 2011 CarswellBC 803, 2011 BCCA 175, [2011] B.C.W.L.D. 3528, [2011] W.D.F.L. 2593, 16 B.C.L.R. (5th) 290, 333 D.L.R. (4th) 106, 97 R.F.L. (6th) 124, 303 B.C.A.C. 201, 512 W.A.C. 201 [hereinafter *Stotland*]

⁵⁴ *Ibid.* at para. 12

⁵⁵ *Ibid.* at para. 14

The Court of Appeal overturned the Chambers judge's finding, and concluded that the judge "erred in law in the formulation and application of the proper test of the capacity necessary to form the intention to live separate and apart."⁵⁶

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

In order to enter into a valid marriage, each party must be capable, at the date of the marriage, or understanding the nature of the contract of marriage and the duties and responsibilities which it creates...The test does not, or 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, indeterminable except by death or divorce, and involved mutual support and cohabitation, capacity is present. The reported cases indicate that the test is not a particularly demanding one...

The Court of Appeal concludes based on the authorities that capacity to separate is the same as the standard for the requisite capacity to marry, and that the "requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one's affairs."⁵⁷

It is worth noting in this case, however, that there was a finding that the appellant was capable of instructing counsel, and of appreciating the financial consequences of a divorce. In fact, therefore there was evidence that she understood and appreciated the ramifications of a separation and divorce, such that her capacity was *not* so low.

SMBC v. WMP and others

In *SMBC v. WMP and others*⁵⁸ the fairly new, Court of Protection of the High Court of England and Wales was asked to give directions in proceedings respecting the capacity to marry and capacity to manage property of a person referred to as "A". The case was prompted by police

⁵⁶ *Ibid.* at para. 21

⁵⁷ *Ibid.* at para. 27

⁵⁸ [2011] EWHC B13 (CoP)

seeking forced marriage protection orders for A and his two brothers based on concerns about A's capacity to marry and family pressure for A to undergo an arranged marriage abroad.

A argued that the Court of Protection was not the proper forum for him as he had not been properly found incapable. A relied on the fact that there was no conclusive finding that he was incapable, such that he could rely on the presumption of capacity.

Indeed the Court found that the capacity assessment (termed a "COP3") was incomplete and flawed, but noted that it did raise concerns of incapacity such that it warranted the attention of the Court of Protection. A further report was ordered, however, the second assessing psychiatrist was unable to provide a fulsome assessment as he required background information and additional tests which A refused to participate in. There were further complications: a social worker had met with and interviewed A without involving his lawyer, which was in breach of the legal requirements. The Court still allowed the social worker's evidence but gave it less weight.

One of the issues in question was whether as part of capacity proceedings, an individual's medical records can be obtained.

The Court had evidence that "A" lacked an understanding of marriage and divorce, as well as the proceedings in general. In light of the evidence of possible incapacity, the Court allowed the release of A's information as sought by the expert.

The Court used the proceedings as an opportunity to set out rules of guidance for capacity proceedings, including requirements that experts should seek information and set out questions before completing their reports, that social workers investigating capacity inform the party's lawyer of the intent to interview the party, medical assessors must provide clear reports, it is not a violation of human or common law rights for a medical expert to be provided with a party's medical records, and that psychometric testing is appropriate even if the person who may indeed be capable so objects.

While these proceedings are different from those in the cases noted above, in that they were prompted by protective legislation that allows the state to prevent marriage on the basis of incapacity, the principles are interesting in that they emphasize the importance of clear assessments and the need for access to information. While the decision underscores the importance of respecting an individual's rights, and the presumption of capacity, it also

emphasizes the need for experts to have access to full information in order to make proper assessments.

The (Canadian) cases cited above also highlight the need for clear information, so that full and proper assessments can be obtained. Many of the difficulties in the above-cited cases are caused by the inability to properly determine whether the party in question had capacity to marry or divorce at the requisite time. For capacity assessments to be meaningful, they must not only address the legal issues in full, they must also be informed by proper and complete background information on the person in question.

PRACTICAL CONSIDERATIONS VERSUS LEGAL LIMITATIONS IN RESOLVING LITIGATION DISPUTES

The Elusive “Test” (so to speak) for Capacity to Marry or Divorce

As may be evident, a review of the current Canadian case law demonstrates that the law with respect to capacity to marry and/or to live separate and apart and to divorce is somewhat difficult to state clearly. While the underpinnings of the issue suggest that the threshold is low, as marriage is “simple” and individuals ought to be free to marry and divorce, there is evidence even in historical cases (such as *Browning v. Reane*⁵⁹ and *Spier v. Spier*⁶⁰) that capacity to marry requires something more than the most basic understanding of marriage (or divorce). The cases of *Browning v. Reane*⁶¹ and *Spier v. Spier*⁶² appear to suggest that capacity to manage one’s person and one’s property are a component of the ‘test’ for determining the requisite capacity to marry.

The more recent Ontario cases of *Banton*⁶³ and *Feng v. Sung Estate*⁶⁴ appear to be moving (slowly) in the direction of developing a more fulsome test for capacity to marry which reflects and accords with the real-life financial implications of death of a spouse or divorce.

⁵⁹ *Supra* note 19

⁶⁰ *Supra* note 20

⁶¹ *Supra* note 19

⁶² *Supra* note 20

⁶³ *Supra* note 26

⁶⁴ *Supra* note 35

Interestingly, the British Columbia cases of *A.B. v. C.D.*⁶⁵ and *Stotland*,⁶⁶ above, appear too, to rely on the old judicial adage that “the contract to marry is a very simple one.” The justification referred to in these cases is that a priority must be placed on individual autonomy. These cases appear to diverge somewhat from the Ontario and Alberta cases cited above.

The ‘test’ employed in *Barrett Estate*⁶⁷ and referred to by Dr. Malloy was followed by Justice Greer in *Feng v. Sung Estate*⁶⁸ requiring the assessment of requisite capacity to marry to include consideration of whether the person in question understands the nature of the marriage contract, the state of previous marriages, one’s children and how they may be affected. This was upheld (albeit narrowly) by the Court of Appeal in Ontario.

Therefore, while there is the traditional emphasis on simplicity and a modern priority on autonomy, there is some evidence that Courts are employing somewhat more rigorous standards for capacity to marry and divorce.

The evolving state of the law concerning the requisite capacity to marry and divorce complicates matters for lawyers and for assessors requested to conduct assessments of capacity.

Challenging Marriage or Divorce for Lack of Capacity

As can be gathered from the within analysis, the ‘test’ for capacity to marry and/ or divorce is difficult to define. The standard itself is described as quite low. The difficulty is compounded by the fact that there is not a significant amount of judicial guidance on the issue which takes into account the development of property rights legislation vis a vis the earlier case law when no such property protection existed historically.

From a practical perspective, marriage and divorce can have serious implications for the assets and Estate of a person. In an Estates practice, and for that matter, a Family Law practice, the issue of the requisite capacity to marry is relevant since an individual who marries revokes all prior Wills and the spouse obtains significant property rights. This can often mean that children

⁶⁵ *Supra* note 46

⁶⁶ *Supra* note 53

⁶⁷ *Supra* note 33

⁶⁸ *Supra* note 35

may find themselves not inheriting from their parents in cases where they had otherwise expected they would do so, and arguably would have but for the exploitation.

Most often this issue arises after the potentially incapable spouse's death such that evidence is difficult to obtain.

And even if the person is still alive, there is often a practical difficulty in establishing and proving lack of capacity. Often there is alienation as a factor, resistance to assessments, and carefully crafted plans to exploit such that evidence of incapacity is difficult, if not impossible to obtain. In general, since the threshold for capacity to marry is historically described as, relatively low, it can be extremely difficult to challenge a marriage on the grounds of incapacity. The snapshot of the case law cited above demonstrates the difficulty, even with something of a trend toward a more stringent test. Even in the decision of *Feng v. Sung Estate*, in which case the spouse in question was extremely ill, confused, unwell, and died mere weeks after the marriage, the Court of Appeal noted that it was a "close case."

The current standard, or factors for determining the requisite "capacity to marry" as developed in the case law is clearly, not a rigorous one. It is confused. This means that capacity is often found, even in the most obvious cases of exploitation, and alienation for financial profit, and, consequently, that predatory and exploitative marriages are more likely to withstand challenge.

It is difficult to legally and successfully challenge a marriage, and very difficult for a third party to do so. If a party seeks to challenge a marriage (or divorce) he or she should strive to obtain and preserve strong evidence. Capacity assessments are helpful, but contemporaneous assessments of the person's cognitive and mental well-being are also of assistance and arguably, more persuasive, if not determinative. Evidence of lay persons, relatives and lawyers is also often determinative.

PRACTICE MANAGEMENT TIPS FOR AVOIDING LITIGATION OR SOLICITOR'S NEGLIGENCE CLAIMS IN A SOLICITOR'S PRACTICE

Marriage and Divorce and Property Implications

As a first point of concern from a solicitor's perspective, if a client has married, then the solicitor must ensure that the client understands that any Wills executed prior to the marriage are thereby revoked and if the person does not execute a further Will, s/he is deemed to die intestate. This can have serious property implications for that person's children or other individuals who might have expected to inherit, i.e. under a prior Will.

A solicitor should advise such a client of the importance of executing a new Will, but only if the client is capable of executing a Will.

The property implications of marriage and divorce including the application of the *FLA* and *SLRA* (as outlined above) should also be explained in full to the client.

Capacity in General

As issues of capacity can cause a variety of complications from a financial planning perspective and significant consequences many years after legal services have been rendered, a solicitor is well-advised to maintain careful notes when dealing with such clients, and to turn his/her mind to the issue of capacity and assure him/herself that the client has the requisite legal capacity required to complete the task undertaken. It is always the obligation of the drafting solicitor, to interview the client and observe and ascertain capacity concerns in respect of the task contemplated by the client. If the lawyer is confident that the client meets the test for capacity, he or she should clearly indicate this in his notes. Those notes should be thorough and carefully recorded and preserved. Where a lawyer is unable to determine the capacity as it relates to a particular task or decision and a lawyer suspects capacity could be compromised, the lawyer has an obligation to raise the concern with the client, make appropriate recommendations to address the concern including seeking an assessment (which may be refused) and to ask about medical conditions. Remember, 'Rights Advice' must be given in the context of such assessments. The lawyer will have to make careful notes of discussions and observations and advise the client of the risks associated with the decision or plan undertaken.

It is wise for lawyers to take their time in asking the client probing questions, to give the client a chance to answer carefully, to provide the client with as much information as possible about the legal proceedings. All questions and answers should be carefully recorded in sufficient detail. Lawyers should also consider seeking to corroborate the answers provided by the client, for example, relating to the extent of the client's assets and relationships.

Where Capacity is in Issue

If a solicitor is consulted by a client who seeks a divorce and the solicitor has concerns about that client's capacity to do so, the lawyer should take careful notes, ask fulsome probing questions and perhaps meet with the client on more than one, maybe several, occasions. If the concerns persist, the lawyer should discuss with the client the merits and risks associated with a capacity assessment.

Concerns relating to capacity to instruct counsel, and capacity to divorce may well warrant a professional assessment. The request for a capacity assessment should clearly set out the legal standards, as well as the background information on the client. If the findings are positive, the capacity assessment should form part of the lawyer's file. If the findings are negative, then the lawyer should consider whether to act in respect of effecting a divorce, but such report nevertheless should also form part of the lawyer's file.

If an Estate planning solicitor is faced with a client who seeks to marry and it is not clear that person has capacity to marry, it may be wise to assist that person with obtaining an assessment of his or her capacity to marry. This is a very rare scenario, however, as few people consult with their lawyers about a decision to marry alone, and may not consult with a lawyer at all to address the Estate plan. More likely, a solicitor encounters a client after that person has already married, and when that person seeks to change his or her Estate plan accordingly.

If a solicitor is faced with a client who has so married and the solicitor has concerns about that person's capacity to do so, and/or capacity to execute a Will or grant or revoke Powers of Attorney, that solicitor should be sure to meet alone with the client to attempt to determine what that person's instructions are, and to ascertain whether the person has capacity to give instructions and to execute a Will or grant or revoke Powers of Attorney. As noted above, a

solicitor should/must take careful, purposeful notes, and always protect his/her file so as to avoid problems in the future, or be prepared should such questions arise.

In cases where there is concern about a client's capacity, it is often wise to consider obtaining an expert report on capacity. As with all capacity assessments, however, it is important that the solicitor clearly specify what it is he/she requires an assessment of, and what the legal considerations are, and specifically what the legal 'test' or factors to be applied are. A capacity assessment that is not carefully conducted and written and that does not apply the evidence to the appropriate legal 'test' will be deemed deficient and unhelpful should a legal challenge arise in the future.

In the case of a client who has married and his/her capacity in that regard is in doubt, it is likely worthwhile to ask the assessor to evaluate the person's ability to understand the information relevant to the marriage and appreciate its consequences having regard to the earlier factors discussed herein.

However, in light of the continuing evolution of the law, it may also be wise to ask for a more detailed assessment, that is, to ask that the assessor consider whether the individual would meet the "Dr. Malloy" 'test' of whether, the person understands the responsibilities of the marriage, the state of previous marriages; and the effect of the marriage on his or her children. As this test was accepted by the Court in *Feng v. Sung*, and, therefore could arguably be persuasive in the future development of the case law.

For any assessment to be meaningful, it is important to explain to the assessor just what the responsibilities of the marriage are, including financial implications, and what the financial effect of the marriage will be on the person's children. In that case, background information should be provided to the assessor about the person's financial information, testamentary intentions and the implications on death of the marriage.

Since the Courts have also taken into consideration other types of capacity, such as capacity to manage property, to make personal care decisions, when looking at capacity to marry, it is also, in my view, relevant to ask the assessor to assess those tasks as well, again providing all the requisite background information and setting out the appropriate legal criteria.

Undue Influence

The issue of capacity (or lack of capacity) to marry or divorce is often connected to undue influence. In cases where a solicitor has concerns about a person's capacity to marry, there may also be considerations of undue influence that the solicitor should be attuned to. It is important in those cases for solicitors to ensure they are receiving instructions that are freely given and as much as possible to remove any potential source of undue influence by having more than one meeting with the client, meeting with the client alone, and making the client feel comfortable in the lawyer's office and out of earshot of others, consider making appropriate investigations.

If there are serious concerns about undue influence, then the solicitor on advising on the assessment process, and if one is undertaken, may also consider asking a capacity assessor to consider whether the person in question is "susceptible to undue influence." As with all requests for assessments, the lawyer should clearly set out the background information, and the assessment that is being sought.

CONCLUSION

The issue of the requisite capacity to marry and divorce is one that will surely continue to be considered and developed by the Courts. It is one that, in light of the rapidly aging population, will only become more relevant and pressing.

As the population continues to rapidly age, capacity and specifically capacity to marry and divorce are becoming increasingly relevant. The property and succession implications of marriage mean that it affects more than just the two spouses involved. The issue of predatory marriages is one that has prompted calls for reform, either to the test for capacity itself⁶⁹ or to the legislative regime⁷⁰ that attaches significant property rights to marriage, and consequently divorce.

⁶⁹ Oosterhoff, *supra* note 2 and Whaley et al., *supra* note 1, pages 117 to 120

⁷⁰ Whaley et al., *supra* note 1 pages 117 to 120

The jurisprudence in my view, demonstrates that the standard for capacity to marry and divorce is in flux, and continues to evolve. It is an area of law, surely bound to develop continuously as more litigation reaches our Courts.

From a practitioner's perspective, capacity is an issue that should always be in consideration. The issues of capacity – to marry, to manage property, to divorce, to instruct counsel, and others – are all interconnected and need to be carefully considered by solicitors.⁷¹

SUMMARY OF CAPACITY TESTS

The following is a synopsis which attempts to summarize the various standards, factors, and or 'test' so to speak for capacity evaluation:

TASK	SOURCE	DEFINITION OF CAPACITY
Manage property	<i>SDA, s. 6</i>	(a) Ability to understand the information that is relevant in making a decision in the management of one's property; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.
Make personal care decisions	<i>SDA, s. 45</i>	(a) Ability to understand the information that is relevant to making a decision relating to his or her own health care, nutrition, shelter, clothing, hygiene or safety; <u>and</u> (b) Ability to appreciate the reasonably foreseeable consequences of a decision or lack of decision.
Grant and revoke a POA for Property	<i>SDA, s. 8</i>	(a) Knowledge of what kind of property he or she has and its approximate value; (b) Awareness of obligations owed to his or her dependants; (c) Knowledge that the attorney will be able to do on the person's behalf anything in respect of property that the person could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney; (d) Knowledge that the attorney must account for his or her dealings with the person's property; (e) Knowledge that he or she may, if capable, revoke the continuing power of attorney;

⁷¹ Attached please find a summary chart of capacity standards, including capacity to marry, separate and divorce

TASK	SOURCE	DEFINITION OF CAPACITY
		(f) Appreciation that unless the attorney manages the property prudently its value may decline; <u>and</u> (g) Appreciation of the possibility that the attorney could misuse the authority given to him or her.
Grant and revoke a POA for Personal Care	SDA, s. 47	(a) Ability to understand whether the proposed attorney has a genuine concern for the person's welfare; <u>and</u> (b) Appreciation that the person may need to have the proposed attorney make decisions for the person.
Contract	Common law	(a) Ability to understand the nature of the contract; <u>and</u> (b) Ability to understand the contract's specific effect in the specific circumstances.
Gift	Common law	(a) Ability to understand the nature of the gift; <u>and</u> (b) Ability to understand the specific effect of the gift in the circumstances. <i>In the case of significant gifts (i.e. relative to the estate of the donor), then the test for testamentary capacity arguably applies. Intention is a factor in determining the gift.</i>
Make a will	Common law	(a) Ability to understand the nature and effect of making a will; (b) Ability to understand the extent of the property in question; <u>and</u> (c) Ability to understand the claims of persons who would normally expect to benefit under a will of the testator.
Revoke a will	Common law	(Same as above – to Make a will)
Make a codicil	Common law	(Same as above – to Make a will)
Make a testamentary designation	Common law	(Same as above – to Make a will)
Create a trust	Common law	(a) Ability to understand the nature of the trust; <u>and</u> (b) Ability to understand the trust's specific effect in the specific circumstances. <i>In cases of a testamentary trust, the test for testamentary capacity applies.</i>
Capacity to marry	Common law	Ability to appreciate the nature and effect of the marriage contract, including the responsibilities of the relationship, the state of previous marriages, and the effect on one's children.

TASK	SOURCE	DEFINITION OF CAPACITY
		Also possibly required: capacity to manage property and the person Dr. Malloy stated that for a person to be capable of marriage, he or she must understand the nature of the marriage contract, the state of previous marriages, as well as his or her children and how they may be affected.
Capacity to separate	Common law	Ability to appreciate the nature and consequences of abandoning the marital relationship.
Capacity to divorce	Common law	Ability to appreciate the nature and consequences of a divorce.

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.

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