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Predatory Marriages: Legal Capacity to Marry and the Estate Plan

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1. Introduction

The statistics confirm that our population is aging rapidly. With longevity 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.[i] 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.[ii]

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.[iii] Indeed, unscrupulous opportunists too often get away with preying upon those older adults with diminished reasoning ability purely for financial profit. An appropriate moniker for this type of relationship is that of the 'predatory marriage'.[iv] This is not a term that is in common use. However, given that marriage brings with it a wide range of entitlements, it does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.[v]

The problem here is that such marriages are not easily challenged. The current test for "capacity to marry" as developed in the case law is not a rigorous one. This means that capacity is likely found, even in the most obvious cases of exploitation, and, consequently, that predatory and exploitative marriages are more likely to withstand challenge.

While litigation arising from marriages involving the elderly is still relatively uncommon, we are seeing an increase in such cases as the number of elderly individuals reaches record highs. As this article is but a snapshot of the many critical issues arising from predatory relationships, those interested in learning more about this topic may wish to refer to *Capacity to Marry and the Estate Plan*, a Canada Law Book publication, co-authored by Kimberly Whaley, Dr. Michel Silberfeld, Heather McGee and Helena Likwornik.[vi]

2. Marriage and Property Law

To truly understand why it is that predatory marriages are so problematic, it is necessary to understand what the entitlements are that persons, once married, gain access to.

At the outset, it is important to note that in Ontario law and in many other provinces, marriage automatically revokes a will.

In addition, in many Canadian provinces, with marriage come certain statutorily-mandated property rights. Using Ontario law as an example, section 5 of Ontario's *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), provides that, on marriage breakdown or death, the spouse whose "net family property" is the lesser of the two net family 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 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: "any interest, present or future, vested or contingent, in real or personal property."

Such entitlements do not terminate on death. Rather, where one spouse dies leaving a will, marital status bestows upon the surviving spouse the right to 'elect' 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.[vii]

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.[viii] 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.[ix]

There are legitimate policy reasons underlying this statutorily-imposed wealth-sharing regime. Using the marital property provisions of the *FLA* as an example, section 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)..

Arguably, this policy rationale does not apply to the predatory marriage scenario, where one party is significantly older, holds the bulk of the property and finances in the relationship, there are no children, and the other party offers little in the way of contribution. Such a relationship is not, as the legislation presumes, founded on an equal contribution, whether financial or otherwise.

As is apparent, in some provinces, like Ontario, the marital legislation is extremely powerful in that it dramatically alters the legal and financial obligations of spouses and has very significant consequences on testate or intestate succession, to such an extent that spouses are given primacy over the heirs of a deceased person's estate.

The difficulty with predatory marriages is that despite the injustice they cause to the incapable spouse (and his legitimate heirs, if any), such unions are not easily challenged. The reason for this is that the current test for capacity to marry has, historically, been a fairly low threshold to cross and continues to be so and, unfortunately, the case law has not kept pace with the development of legislation that has been designed to promote and protect property rights.

3. Capacity to Marry, a Statutory and Common Law Requirement

With the exception of British Columbia,[x] Newfoundland and Labrador,[xi] Nova Scotia, Yukon, New Brunswick, most of the provinces and territories in Canada have marriage legislation which prohibits a person from issuing a licence to or solemnizing the marriage of a person who he or she knows, or has reasonable grounds to believe, lacks mental capacity to marry,[xii] is incapable of giving a valid consent,[xiii] or who has been certified as mentally disordered.

In Manitoba, for instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that they are able to understand the nature of marriage and its duties and responsibilities.[xiv] In fact, should a person who issues a marriage licence or solemnizes the marriage of someone whom he or she knows is certified as mentally disordered, they will be guilty of an offence and liable on summary conviction to a fine.[xv]

Section 7 Ontario's *Marriage Act* prohibits persons from issuing a licence to or solemnizing 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*.

In the other provinces, like British Columbia, the legislation is relatively silent on this issue and it is the common law that dictates that a marriage may be found to be void *ab initio* if one or both of the spouses did not have the requisite mental capacity to marry.

Thus, whether by statute or the common law, all of the provinces require that persons have legal capacity in order to enter into a valid marriage.

4. What is Capacity?

In law, one is presumed capable unless and until this presumption is rebutted. Legal capacity is decision, time and situation/context specific.[xvi] The law prescribes a different standard of capacity in different contexts. Contexts in which capacity is required include the following:

1. Giving instructions for and to execute a will or trust. In other words, "testamentary capacity";[xvii]
2. Making other testamentary dispositions;[xviii]

3. Contracting;[xix]
4. Managing property;[xx]
5. Managing personal care;[xxi]
6. Granting or revoking a Continuing Power of Attorney for Property;[xxii]
7. Granting or revoking a Power of Attorney for Personal Care;[xxiii]
8. Consenting to treatment decisions in accordance with the *Health Care Consent Act;*[xxiv]
9. Gifting or selling property;[xxv]
10. Instructing a lawyer; and
11. **Marrying.**

Thus, as can be seen, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which differs from the capacity to manage one's property or personal care.[xxvi] And, importantly, as the law currently stands, capacity to marry may exist despite incapacity in other legal matters.[xxvii]

The relevant time period is the time at which the decision in issue is made,[xxviii] although legal capacity can fluctuate over time.[xxix] Capacity is situation-specific in that the choices that a person makes in granting a power of attorney or making a will affect a court's determination of capacity.[xxx] For example, if a mother appoints her eldest child as a power of attorney, this choice will be viewed with less suspicion and concern for potential diminished capacity than if she appoints her recently-hired gardener.[xxxi]

Assessing capacity is an imperfect science which further complicates a possible determination.[xxxii] In addition to professional and expert evidence, lay evidence can also be determinative in some situations.[xxxiii] The standard of assessment varies and this too can become an obstacle that needs to be overcome in determining capacity.[xxxiv]

5. Capacity to Marry

The promises frequently encapsulated in marriage vows are that the spouses intend 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.[xxxv] Yet, at the time of marriage, parties often fail

to consider the other facets of the marital union; namely, the obligation to provide financial support, the enforced sharing of equity acquired during the marriage, and the impact it has on the disposition of one's estate.[xxxvi]

Currently, in Canadian law, in order to enter into a marriage that cannot be subsequently voided or declared a nullity, there must be a minimal understanding of the nature of the contract of marriage.[xxxvii] No party is required to understand all of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite classic English cases, such as *Durham v. Durham*,[xxxviii] which espouse the following principle: "the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend."[xxxix]

6. The Historical Development of Capacity to Marry

Several themes emerge from a review of the historical cases on the issue of capacity to measure. These themes are:

1. That the test for capacity to marry is equivalent to the test for capacity to contract;
2. That marriage has a distinct nature;
3. That the contract of marriage is a simple one; and
4. That the test for capacity to marry is the test for capacity to manage property.

(i) Marriage as a (civil) contract

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

> 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. 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. Were the parties then

> capable of understanding the nature of the contract they were entering into?[xli]

As is evident from *Lacey v. Lacey*, historically, the contract of marriage was considered to be "simple" one. This is evident in the case of *Durham v. Durham*, where Sir J. Hannen stated:

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

In the case of *In the Estate of Park, Deceased*,[xliii] Justice Singleton was faced with making a determination as to whether the deceased had capacity to marry. His articulation of the test for the validity of marriage was as follows:

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

Again commencing from the proposition the contract of marriage is a simple one, Birkett, L.J. contributed as follows:

> The contract of marriage in its essence is one of simplicity. There can be degrees of capacity apart from soundness of mind. It is understandable that an illiterate man, perfectly sound of mind, but not of high quality, might be able to understand the contract of marriage in its simplicity, but who, coming into a sudden accession of wealth, might be quite incapable of making anything in the nature of a complicated will, but degrees of unsoundness of mind cannot have much relevance to the question whether it is shown that a person was not mentally capable of understanding the contract into which he or she had entered.[xliv]

Karminski J. took the position that there is "a lesser degree of capacity ... required to consent to a marriage than in the making of a will."[xlv] In his view, the test for a valid marriage was 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;

> 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.[xlvi]

While the Court struggled with developing the appropriate test for capacity to marry, it concluded that the capacity to marry was essentially equivalent to the capacity to enter into any binding contract.

In the case of *Turner v. Meyers*,[xlvii] the Court agreed, stating:

> [T]hat a defect of incapacity invalidates the contract of marriage, as well as any other contract…that a marriage of an insane person could not be invalidated on that account, founded, I presume, on some notion that prevailed in the dark ages, of the mysterious nature of a contract of marriage, in which its spiritual nature almost entirely obliterated its civil character. In modern times, it has been considered, in its proper light, as a civil contract, as well as a religious vow, and, like all civil contracts, will be invalidated by want of consent of capable persons.[xlviii]

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

> "A fourth incapacity is, want of reason; without a competent share of which, as no others, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and, consequently, that his marriage was valid. A strange determination!
>
> since consent is absolutely requisite to matrimony; and neither idiots, nor lunatics, are capable of consenting to anything; and, therefore, the civil law judged much more sensibly, when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not be in a lucid interval, was absolutely void." [Mr. Justice Blackstone]
>
> Here, then, the law, and the good sense of the law, are clearly laid down; want of reason must, of course, invalidate a contract, and the most important contract of life, the very essence of which is consent. It is not material whether the want of consent arises from idiocy or lunacy, or from both combined, nor does it seem necessary, in this case, to enter into any disquisition of what is idiocy, and what is lunacy. Complete idiocy, total fatuity from the birth, rarely occurs; a much more common cause is mental weakness and imbecility, increased as a person grows up and advances in age from various supervening causes, so as to produce unsoundness of mind. Objects of this sort have occurred to the observation of most people. If the incapacity be such, arising from either

> or both causes, that the party is incapable of understanding the nature of the contract itself, and incapable from mental imbecility to take care of his or her own person and property, such an individual cannot dispose of her person and property by the matrimonial contract, any more than by any other contract. The exact line of separation between reason and incapacity may be difficult to be found and marked out in the abstract, though it may not be difficult, in most cases, to decide upon the result of the circumstances, and this appears to be a case of that description, the circumstances being such as to leave no doubt upon my mind.[l]

The holding in this case would later be reviewed and adopted by the Ontario courts.

(ii) The Distinct Nature of Marriage

There is another line of cases which suggest that marriage, as an institution, is a distinct and that capacity to marry requires an appreciation of the duties and responsibilities that attach to this particular union. Hence, in the case of *Durham, supra,* the question to be answered by the court was "whether or not the individual had capacity to understand the nature of the contract, *and* the duties and responsibilities which it creates?" [emphasis added].

The Court in the cases of *Jackson v. Jackson*,[li] as well as in *Forster v. Forster*[lii] utilised similar tests. The question, as posited by the Court in *Jackson v. Jackson* was: "whether the respondent was capable of understanding the nature of the contract he was entering into, free from the influence of morbid delusions on the subject."[liii]

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

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

As you may note, the Court went further stating that "there must also be a capacity to take care of his or her own person and property."

(iii) The Simplicity of the Marital Contract

As may be evident above, historically, the courts viewed marriage not only as a mere contract, but a simple one at that. Paraphrasing the Court in *In the Estate of Park, supra,* 'marriage is in its essence a simple contract which any person of either sex of normal intelligence should readily be able to comprehend.'[lvi] The Court in *Hunter v. Edney*[lvii] held the same view, stating that "no high intellectual standard is required in consenting to a marriage."[lviii]

(iv)That the test for capacity to marry is the test for capacity to manage property

That said, an alternate view of the capacity to marry that also arises from the jurisprudence is one that was alluded to above in the cases of *Browning v. Reane* and *Spier, supra*. The Court in *Browning v. Reane* stated that for a person to be capable of marriage, they must be capable of managing their person and property. Similarly, in *Spier, supra*, the Court stated that one must be capable of managing their property, in order to be capable of marrying.

Conclusion

As is evident, historically, there has been an absence of a single and complete definition of marriage and of capacity to marry. Rather, on one end of the judicial spectrum, there is the view that marriage is but a mere contract, and a simple one at that. On the other end of the spectrum, however, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person or one's property in order to enter into a valid marriage.

7. A Cross-Provincial Look at the Recent Case Law

Make no mistake, predatory marriages are on the rise. With the growth of an aging population, comes a simultaneous increase in such cases. There is a pattern that has emerged which makes these types of unions easy to spot. For instance, they are usually characterised by one spouse who is significantly advanced in age and, because a number of factors which range from the loneliness consequent to losing a long-term spouse, or illness or incapacity, they are in a vulnerable position, thus making them more susceptible to exploitation by another. These unions are frequently clandestine – alienation from friends and loved ones being a tell-tale sign that the relationship is not above board. Three fairly recent cases involving such fact scenarios are *Hart v. Cooper*,[lix] *Banton v. Banton*,[lx] *Barrett Estate v. Dexter*,[lxi] and *Feng v. Sung Estate*.[lxii]

Hart v. Cooper

The case of *Hart v. Cooper* involved a 76 year old man, Mr. Smiglicki, who married a woman 18 years his junior: Ms. Hart. The couple married by way of a civil marriage ceremony. As is generally the case, Mr. Smiglicki's marriage to Ms. Hart automatically revoked a will he had made six years prior, which named his three children as the beneficiaries of his Estate. Mr. Smiglicki had made this will after learning that he had a terminal illness and little more than a month to live. Mr. Smiglicki's children challenged the validity of his marriage to Ms. Hart on the ground that Mr. Smiglicki lacked the mental incapacity to contract a marriage. Allegations were also made of alienation by Ms. Hart of Mr. Smiglicki.

Referring to the cases of *Durham v. Durham*, *Hunter v. Edney* and *Cannon v. Smalley*, the British Columbia Supreme Court reiterated the classic test for capacity to marry, a test which relies on the concept of marriage as a 'simple contract':

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

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

> Where, as here, a marriage has, in form, been properly celebrated, the burden of proving a lack of mental capacity is bore by the party who challenges the validity. What is required is proof of a preponderance of evidence. The evidence must be of a sufficiently clear and definite character as to constitute more than a "mere" preponderance as is required in ordinary civil cases: *Reynolds v. Reynolds* (1966), 58 W.W.R. 87 at 90-91 (B.C.S.C.) quoting from *Kerr v. Kerr* (1952), 5 W.W.R. (N.S.) 385 (Man. C.A.).[lxiv]

The court in this case did not accept the medical evidence of Mr. Smiglicki's incapacity and concluded that the burden of proof borne by the three children had not been discharged. The court added that there was no evidence given to suggest that Ms. Hart ever profited financially from either her marriage to Mr. Smiglicki or to her previous husbands. Additionally, the court found that Ms. Hart's motivation in marrying Mr. Smiglicki was not otherwise relevant to the determination of his mental state at the time of the marriage ceremony. Accordingly, the marriage was upheld as valid, and the will previously executed remained revoked.

It is difficult to determine from the reasons in this case whether and to what extent the court considered the allegations of alienation and potentially predatory circumstances that the family asserted preceded the marriage.

Although the Court found that the burden of proof had not been satisfied, no significant analysis was made by the Court of the allegations of alienation by Ms. Hart and its impact on Mr. Smiglicki's decision to marry. Moreover, whether Mr. Smiglicki fully understood the financial consequences of marriage or the impact of marriage on his property rights were not matters considered by the court in reaching its conclusion. Consequently, the case makes no advancements in defining the '*duties and responsibilities'* that attach to the marriage contract or what must be understood by those entering into the contract of marriage.

Thus, in a consistent application of the historical case law, *Hart v. Cooper* confirms the age-old principle that the contract of marriage is a simple one. This is problematic in that this principle does not accord with the guidance given in *Browning v. Reane* and *Spier v. Spier* where the requirement for the capacity to marry required both capacity to manage one's person and one's property.

Banton v. Banton[lxv]

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

Yet, in 1994, at 88 years of age, Mr. Banton married Ms. Yassin at her apartment. Two days after the marriage, he and Ms. Yassin met with a solicitor who was instructed to prepare a Power of Attorney in favour of Muna Yassin, and a will, leaving all of Mr. Banton's property to Ms. Yassin. Identical planning documents were later prepared after an assessment of Mr. Banton's capacity to manage his property and to grant a Power of Attorney. However, in 1995, and shortly after the new identical documents were prepared, a further capacity assessment

was preformed, which found Mr. Banton incapable of managing property, but capable with respect to personal care. Mr. Banton died in 1996.

Mr. Bantons's children raised a number of issues before the Court, including the following: whether Mr. Banton had capacity to make wills in 1994, and 1995; whether the wills were procured by undue influence; and, whether Mr. Banton had capacity to enter into marriage with Ms. Yassin.

Justice Cullity found that Mr. Banton lacked testamentary capacity to make the Wills in 1994 and 1995, and that the Wills were obtained through the exertion of undue influence. In spite of these findings and the fact that the marriage to Ms. Yassin revoked all existing Wills, Cullity J. held that Mr. Banton did have the capacity to marry.

Justice Cullity reviewed the law on the validity of marriages, emphasizing the disparity in the 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 and capacity to marry according to the provisions of the *Substitute Decisions Act*.[lxvi]

Although Justice Cullity observed that Mr. Banton's marriage to Ms. Yassin was part of her "carefully planned and tenaciously implemented scheme to obtain control, and, ultimately, the ownership of [Mr. Banton's] property", he did not find duress or coercion under the circumstances. In his view, Mr. Banton had been a "willing victim" who had "consented to the marriage."[lxvii] Having found that Mr. Banton consented to the marriage, the Court found it unnecessary to deal with the questions of whether duress makes a marriage void or voidable, and, if the consequence is that the marriage is voidable, whether it can be set aside by anyone other than the parties.[lxviii] In reaching this conclusion, Cullity J. drew a significant distinction between the concepts of 'consent' and of 'capacity,' finding that a lack of consent neither presupposes nor entails an absence of mental capacity.[lxix]

Having clarified the distinction between 'consent' and 'capacity', Justice Cullity then embarked upon an analysis of the test for capacity to marry and whether Mr. Banton passed this 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.[lxx] In the Court's view, however,

the test is not one which is particularly rigorous. Consequently, in light of the fact that Mr. Banton had been married twice before his marriage to Ms. Yassin and despite his weakened mental condition, the Court found that Mr. Banton had sufficient memory and understanding to continue to appreciate the nature and the responsibilities of the relationship to satisfy what the court described as "the first requirement of the test of mental capacity to marry."

Justice Cullity then turned his attention to whether or not, in Ontario law, there was an "additional requirement" for mental capacity to marry:

> An additional requirement is, however, recognized in the English authorities that have been cited with approval in our courts. The decision to which its source is attributed is that of Sir John Nicholl in *Browning v. Reane* (1812), 161 E.R. 1080 (Eng. Ecc.) where it was stated:
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> > 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
>
> The principle that a lack of ability to manage oneself and one's property will negative capacity to marry was accepted and, possibly extended, by Willmer J. in *Spier v. Bengen*, [1947] W.N. 46 (Eng. P.D.A.) where it was stated:
>
> > There must be a capacity to understand the nature of the contract and the duties and responsibilities which it created, and ... there must also be a capacity to take care of his or her own person and property. at p. 46

In support of the additional requirement, Justice Cullity also cited *Halsbury* (4th edition, Volume 22, at para. 911) for "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 eccle-siastical 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 review of 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'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 is 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."

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, somewhat surprisingly, Justice Cullity held that Mr. Banton did have the capacity to marry Ms. Yassin and that such marriage was valid. Even more, 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, you will note that, earlier in his reasons, he 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*.

Barrett Estate v. Dexter.

In sharp contrast to the holding in *Banton*, in *Barrett v. Dexter* ("*Barrett*") the Alberta Court of Queen's Bench declared the marriage performed between Arlene Dexter-Barrett and Dwight

Wesley Barrett to be a nullity based upon a finding that Mr. Barrett lacked the legal capacity to enter into any form of marriage contract.

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

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

It was not long after this that Mr. Barrett's withdrawals from the bank began to increase in both frequency and amount. Ms. Dexter then made an appointment with the marriage commissioner, and her daughter and son-in-law were to attend as witnesses. The marriage was not performed as apparently the son-in-law had a change of heart about acting as a witness. Ms. Dexter then made another appointment with a different marriage commissioner. On this occasion, the limousine driver and additional taxi cab driver acted as witnesses. Mr. Barrett advised his grand-daughter of the marriage when she came to visit him on the day after the wedding. Mr. Barrett proceeded to draft a new Will, appointing his new wife as executor, and gifting to her the house and furniture as well as the residue of his estate. A capacity assessment was conducted shortly thereafter and Mr. Barrett's son brought an application to declare the marriage a nullity on the basis of lack of mental capacity to marry, or alternatively, that Mr. Barrett was unduly influenced by Ms. Dexter such that he was not acting of his own will and accord.

In reviewing the evidence, the Court noted that at the time of the marriage, Mr. Barrett told the marriage commissioner that he believed that the marriage was necessary in order for him to avoid placement in a nursing home. There was evidence of alienation by Ms. Dexter, including

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

Not only were all of the assessing doctors unanimous in their finding that Mr. Barrett lacked the capacity to marry, they also found that Mr. Barrett had significant deficiencies which prevented him from effectively considering the consequences of his marriage on his family and estate. On the issue of capacity to marry, one of the doctors, Dr. Malloy, significantly 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. Dr. Malloy testified that it is possible for an assessor or the court to set a high or low threshold for this measurement, but that in his opinion, "no matter where you set the threshold, Dwight [Mr. Barrett] failed."[lxxi]

In considering the evidence before it, the court cited a decision of the Alberta Court of Appeal of *Chertkow v. Feinstein (Chertkow)*[lxxii] which employed the test set out in *Durham v. Durham*:

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

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

Not only were all of the assessors credible, but their findings took place close in time to the marriage ceremony, one before and one after. Again, all of the experts were unanimous in their findings.

Although the Court did consider the evidence of the lay witnesses, relative to the medical evidence, the evidence given by the lay witnesses was weak. In fact, Ms. Dexter was the best

lay witness. However, because she had a personal interest in the outcome of the case her evidence could not be accepted.

In conclusion, the Court held that the plaintiff had proven, on a balance of probabilities, that Mr. Baxter lacked the requisite capacity to marry. Consequently, the marriage was declared null and void and the court found it unnecessary to decide the issue of undue influence. As the Plaintiff son had been entirely successful in the action, he was entitled to costs.

Feng v. Sung Estate

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

In making her determination, Justice Greer found that there was no question that the formalities of the marriage accorded with the provisions of Ontario's *Marriage Act*. In addition, the Court found that the marriage was not voidable, as neither party prior to Mr. Sung's death took steps to have it declared such.[lxxiv] That said, Justice Greer was satisfied on the evidence in this case that the marriage of Mr. Sung and Ms. Feng was void *ab initio*.

In the Court's view, the evidence showed that Ms. Feng used both duress and undue influence to force Mr. Sung, who was in a vulnerable position, to marry her. Although Mr. Sung was only 70 years of age, he was both infirm and vulnerable and, the Court noted, Ms. Feng would have been very aware of his frail mental and physical health as a result of her nursing background. The Court also found that Ms. Feng was aware of Mr. Sung's vulnerability on the basis that Mr. Sung had agreed to help financially support Ms. Feng's son. It was suspicious that Mr. Sung, who had always been very close to his family, never told his children and his

family about his marriage to Ms. Feng. Moreover, that Mr. Sung was under duress was evident from the fact that his health was frail and he feared that Ms. Feng would leave him if he did not marry her.

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

The Court also adopted the test for capacity to marry articulated by one of the medical experts, Dr. Malloy, in the case of *Barrett Estate*: "…a person must understand the nature of the marriage contract, the state of previous marriages, one's children and how they may be affected."[lxxv] On the basis that Mr. Sung married Ms. Feng because he had erroneously believed that he and Ms. Feng had executed a prenuptial agreement (she secretly cancelled it before it was executed), Justice Greer found that Mr. Sung did not understand the nature of the marriage contract and the fact that it required execution by both parties to make it legally effective.

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

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

A.B. v. C.D.

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

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

The Court noted that this characterization differs from the standard adopted in the English decisions of *Perry v. Perry*, [1963] 3 All E.R. 766 (Eng. P.D.A.) and *Brannan v. Brannan* (1972), [1973] 1 All E.R. 38 (Eng. Fam. Div.), which conclude that when a spouse suffers from delusions that govern a decision to leave the marriage, the delusional spouse does not have the requisite intent to leave the marriage. However, as noted by the Court, Professor Robertson's characterization of the requisite capacity is preferable as it respects the personal autonomy of the individual in making decisions about his or her life.[lxxix]

8. Conclusions on the Current Case Law

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) is anything but crystal clear. In referring to the cases of *Browning v. Reane* and *Re Spier*, cases which appear to suggest that capacity to manage one's person *and* one's property are a component of the test for capacity to marry, *Banton* and *Re Sung Estate* appear to be moving in the direction of developing an adequate test for capacity to marry—one which best reflects and accords with the real-life financial implications of death or marital breakdown on a marriage.

Yet, it would appear that our courts are still haunted by the old judicial adage that "the contract to marry is a very simple one." This, combined with reluctance on the part of our courts to "attribute inordinate weight to the proprietary aspects of marriage," has meant that the test for the capacity to marry is much less stringent than the one used to determine testamentary capacity or capacity to manage property.

The consequences of maintaining such a test are as puzzling as they are problematic. Essentially, this means that a person found incapable of making a will may revoke his or her will through the act of marriage. As well, in refusing to require that a finding of capacity to manage property forms a prerequisite to a finding of capacity to marry gives free reign to would-be (predatory) spouses to marry purely in the pursuit of a share in their incapable spouse's wealth, however vast or small it may be. After all, as stated, a multitude of proprietary rights flow from marriage.

Until our test for capacity to marry is refined, such that it adequately takes into consideration the financial implications of marriage, all those with diminished mental capacity will remain vulnerable to exploitation through marriage. This is likely to become an increasingly pressing problem as we face a future in which the proportion of the aged who are particularly prone to decline continue to diminish in mental capacity.

9. A Note on Costs in Capacity Proceedings

As it is true that, in order to dissolve a predatory marriage, a challenger must invoke the court system, any potential litigant needs to be cognisant of the possible cost consequences involved in commencing or engaging in capacity-related proceedings, particularly in light of recent cost cases being delivered by our courts.

The Historical Treatment of Costs

Historically, in estate litigation, costs were generally ordered to be paid out of the estate of the deceased person. The classic case upon which this principle was founded was that of *Mitchell v. Gard* (1863), 3 Sw. & Tr. 75 and the comments of Sir J.P. Wilde, particularly:

> The basis of all rule on this subject should rest upon the degree of blame to be imputed to the respective parties; and the question who shall bear the costs? will be answered with this other question, whose fault was it that they were incurred? If the fault lies at the door of the testator, his testamentary papers being surrounded with confusion or uncertainty in

> law or fact, it is just that the costs of ascertaining his will should be defrayed by his estate.
>
> But if the testator be not in fault, and those benefited by the will not to blame, to whom is the litigation to be attributed? In the litigation entertained by other Courts, this question is in general easily solved by the presumption that the losing party must indeed be in the wrong, and, if in the wrong, the cause of a needless contest. But other considerations arise in this Court. It is the function of this Court to investigate the execution of a will and the capacity of the maker, and having done so, to ascertain and declare what is the will of the testator. If fair circumstances of doubt or suspicion arise to obscure this question, a judicial enquiry is in a manner forced upon it. Those who are instrumental in bringing about and sub-serving this enquiry are not wholly in the wrong, even if they do not succeed. And so it comes that this Court has been in the practice on such occasions of deviating from the common rule in other Courts, and of relieving the losing party from costs, if chargeable with no other blame than that of having failed in a suit which was justified by good and sufficient grounds for doubt.

Cross-provincial Application of the "Modern Approach" to Costs in Estate Litigation

Recently, however, courts across Canada have demonstrated an increased willingness to treat costs awards in the same way that they are treated in civil litigation, with costs being awarded against unsuccessful parties at an increasing rate.

Ontario

In Ontario, the leading case cited as precedent for the application of the "loser pays" principle in estate litigation is the 2005 Court of Appeal decision of *McDougald Estate v. Gooderham*.[lxxx] Since this judgement was rendered, the lower courts have followed suit, as was the case of *Salter v. Salter Estate*[lxxxi] a case from which the following statement by Justice Brown is frequently quoted in cost decisions:

> From a year of acting as administrative judge for the Toronto Region Estates List I have concluded that the message and implications of the *McDougald Estate* case are not yet fully appreciated. A view persists that estates litigation stands separate and apart from the general civil litigation regime. It does not; estates litigation is a sub-set of civil litigation. Consequently, the general costs rules for civil litigation apply equally to estates litigation - the loser pays, subject to a court's consideration of all relevant factors under Rule 57, and subject to the limited exceptions described in *McDougald Estate*. *Parties cannot treat the assets of an estate as a kind of ATM bank machine from which withdrawals automatically flow to fund their litigation. The "loser pays" principle brings needed discipline to civil litigation by requiring parties to assess their personal exposure to costs before launching down the road of a lawsuit or a motion. There is no reason why such discipline should be absent from estate litigation. Quite the contrary. Given the charged*

> *emotional dynamics of most pieces of estates litigation, an even greater need exists to impose the discipline of the general costs principle of "loser pays" in order to inject some modicum of reasonableness into decisions about whether to litigate estate-related disputes*.[Emphasis added].

Manitoba

In the case of *Jumelle v. Soloway Estate*,[lxxxii] the Manitoba Court of Appeal was faced with an unsuccessful litigant, the wife of the deceased testator, who at trial had been awarded her costs out of the her late husband's estate. Although the Court of Appeal noted, with approval, the Manitoba Court of Queen's Bench's findings that the jurisprudence in recent years has demonstrated a movement away from the traditional approach to estate litigation, such that courts are no longer simply allowing a recovery of costs from an estate without regard to the degree of success of a party to the litigation,[lxxxiii] it did not agree with Justice McCawley's decision to award the wife her costs out of the estate and set the order aside. In the Court's view, "An estate should not be diminished in size because a party pursues a claim without merit. As in other litigation, a party who brings a claim against an estate with no substantial merit will have to pay the costs."[lxxxiv]

Alberta

McCullough Estate v. McCullough[lxxxv] involved an elderly, blind testatrix who left a substantial estate to her children and grandchildren. Two of the children of the testatrix disputed her will and initiated court proceedings which lasted six years. The trial judge found the will to be valid. The children who disputed the will requested that the estate pay for the costs of the litigation. The trial judge refused to allow costs to be paid out of the estate. One of the children who disputed the will appealed the trial decision, inclusive of the costs decision. The Alberta Court of Appeal dismissed the appeal with respect to costs on the following basis:

> Costs exist primarily for two reasons. First, to take some of the burden off victors, ensure that not all victories are pyrrhic, and so to encourage those who are right to persevere. And, second, to deter those who are wrong. The trial judge here found that Daniel was very wrong, and had little evidence on his side. In some obscure sense, a question of mental capacity may somehow be the "fault" of the testatrix, and so by some leap of logic, be visited on the estate. (But we hasten to add that there seems to have been no professional evidence to support a challenge to the testamentary capacity here.) Even if that is true of capacity, undue influence is different. In no sense is an unfounded allegation of that the "fault" of the testatrix. The law traditionally imposes stricter costs where allegations of misconduct fail, particularly when little evidence of weight is adduced to support them.[lxxxvi]

New Brunswick

An insightful case on the matter of costs is *St. Onge Estate v. Breau*,[lxxxvii] a case decided by the New Brunswick Court of Appeal. This case is interesting for its cross-provincial review of various appellate-level cases concerning costs in estate cases.

St. Onge Estate involved the estate of Ernest St. Onge, deceased (the "Deceased"). The appellant, a friend of the Deceased, had attempted to argue before the New Brunswick Court of Queen's Bench that the Deceased had gifted him the monies shared by them in his joint account, which was created pursuant to a power of attorney in the appellant's favour, while the deceased's health was declining. On appeal, the Court of Appeal agreed with the court below, that the deceased did not have the requisite mental capacity to form the intention to make a gift of the monies in the joint account (or his tools and personal items).

The Court of Appeal also upheld the trial judge's determination on costs, which was an award of party-and-party costs of $8,875 against the defendant/appellant. The defendant/appellant had attempted to argue that while the general rule is that costs follow the event is inapplicable in cases involving estate litigation. Rather, he contended that the general rule is that all parties, including the unsuccessful ones are *prima facie* entitled to reimbursement out of the estate, on a solicitor-client basis. In addition, the appellant insisted that only in exceptional circumstances is the unsuccessful party to be denied solicitor-client costs. The Court of appeal concluded that the trial judge did not err in exercising his discretion to award party-and-party costs against the appellant. The Court concluded that "there is no general rule that all litigants are entitled to full indemnification out of the estate or even a general rule that unsuccessful estate litigants are entitled to full or partial indemnification."[lxxxviii]

In reaching its conclusion, the Court commenced its analysis with the leading English authority on the matter of costs in estate cases: *Mitchell v. Gard* (1863), 164 E.R. 1280 (Eng. Prob. Ct.), a case which, the Court of Appeal opined, is cited "for the proposition that probate costs are at the discretion of the court and the general rule is that costs follow the event."[lxxxix] In the Court's view, in the exercise of that discretion, the court must be guided by the principles laid down in the case law including *Mitchell v. Gard* in which the following two exceptions were recognized:

> From these considerations, the Court deduces the two following rules for its future guidance: first, if the cause of the litigation takes its origin in the fault of the testator or those interested in the residue, the costs may properly be paid out of the estate; secondly, if there be sufficient and reasonable ground, looking to the knowledge and means of knowledge of the [...] capacity of the testator, or to put forward a charge of undue influence or fraud, the losing party may properly be relieved from the costs of his successful opponent. [at p. 1281]

From this, the Court of Appeal found that the English cases do not support a blanket rule that costs in estate cases should be borne by the estate, but rather that that costs follow the event, subject to the two exceptions identified therein, i.e. (i) the litigation is the fault of the testator and (ii) the capacity of the testator is in issue. However, as noted by the Court, from the paragraph quoted above, "we are not told whether the payment of costs means party-and-party costs or solicitor-client costs" and, as such, "[o]ne can reasonably assume that the choice is a matter of discretion to be exercised by the court on a case-by-case basis."[xc] The Court also opined that "if the second exception (e.g. capacity of testator) is applicable, the unsuccessful challenger is to be relieved of the obligation to pay costs so long as there are, for example, reasonable grounds for alleging testator incapacity," "[...] however, that the exception does not say that the losing party is entitled to full indemnification cost of the estate."[xci] In the Court's view, "[t]hat too is a matter that remains at the discretion of the court."[xcii]

The Court then referred to the cases decided by appellate courts of Ontario (i.e. *McDougald Estate v. Gooderham*), Manitoba (i.e. *Jumelle v. Soloway Estate*), and Alberta (i.e. *McCullough Estate v. McCullough*), along with appellate level cases from British Columbia and Prince Edward Island (*Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76, [1995] B.C.J. No. 170 (B.C. C.A.) and *Dagle v. Dagle* (1990), 81 Nfld. & P.E.I.R. 245, [1990] P.E.I.J. No. 54 (P.E.I. C.A.)), to come to the following conclusion:

> Over the last two decades, no less than five appellate courts have confirmed the understanding that, even in estate litigation, the general rule is that costs follow the event. Correlatively, only in exceptional circumstances will an unsuccessful litigant be entitled to full or partial indemnification out of the estate with respect to legal costs incurred in pursuing an action. Ironically, these two propositions of law are now labelled the "modern approach". In reality, the modern approach is simply a reversion to the original or traditional rule established pursuant to English precedents.[xciii]

As noted by the Court of Appeal, "The general rule that costs follow the event when it comes to estate litigation appears to be law in British Columbia. Unless one of the recognized exceptions

applies, the general rule will be applied: *Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76, [1995] B.C.J. No. 170 (B.C. C.A.) and see *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341, [1993] B.C.J. No. 1894 (B.C. Master)."[xciv] The Court of Appeal also took comfort in the decision of the Prince Edward Island Court of Appeal in *Dagle v. Dagle* (1990), 81 Nfld. & P.E.I.R. 245, [1990] P.E.I.J. No. 54 (P.E.I. C.A.) where the unsuccessful estate litigant was ordered to pay costs at trial and, on appeal, "it was found that the appellant was entitled to costs out of the estate based on one of the exceptions set out in *Mitchell v. Gard* [...]."[xcv]

At paragraph 69, the Court concluded its analysis on the law of costs in estate litigation, with the following:

> Following the lead of Alberta, British Columbia, Manitoba, Ontario and Prince Edward Island, we believe the general rule that "costs follow the event" should apply in estate litigation. Moreover, the general rule envisages costs on a party-and-party basis (partial indemnification). Of course, the general rule is subject to an exceptional category which mirrors and builds upon the policy reasons cited in the jurisprudence. In exceptional cases, the probate court may exercise its discretion to depart from the general rule and award costs to an unsuccessful litigant (partial or full). Of course, the exercise of discretion must be effected on a principled basis and, hence, in accordance with the case law discussed above. In the present case, the probate court judge did not give any reasons for rejecting the appellant's request for solicitor-client costs payable by the estate. Thus, it falls on this Court to decide the issue within the framework identified in these reasons.

Applied to the facts, the Court of Appeal found that this case did not fall within one of recognized exceptions where costs from the estate could be considered. It did involve the interpretation of a will or trust document and, consequently, one could attribute the litigation to the fault of the Deceased. The case did not involve the testamentary capacity of the Deceased and it was not a wills variation case. In the Court's view, litigation over ownership of funds in a joint bank account should not be treated as exceptional category, but, even if it was an exceptional category, the defendant/appellant should still not succeed on the costs issue since he did not have reasonable grounds for pursuing or defending the litigation, nor was litigation reasonably necessary for the proper administration of estate.

Some Noteworthy Ontario Cases

Teffer v. Schaefers[xcvi]

Teffer v. Schaefers was a case decided by Fragomeni J. of the Ontario Superior Court of Justice. The case centred around a woman diagnosed with Alzheimer's disease, Johanna Maria Schaefers and the respondent, Mr. Peter Verbeek, who was a lawyer who had been appointed as Ms. Schaefers attorney pursuant to powers of attorney for property and personal care. Justice Fragomeni found that Mr. Verbeek did not have Ms. Schaefers assessed before she signed the attorney documents and, consequently, the applicants were successful in setting aside power of attorney. The main issue before the Court on April 6, 2009 was the issue of costs. In its analysis, the Court commenced from the proposition that the Court has discretion to award costs pursuant to s. 131(1) of the *Courts of Justice Act*, R.S.O. 1990 c. C-43 and Rule 57.01(1) of the *Rules of Civil Procedure*. The Court referred to the case of *Andersen v. St. Jude Medical Inc*., 264 D.L.R. (4th) 557, where the Divisional Court outlined the following principles applicable to the Court's broad discretion to award costs:

1. The discretion of the court must be exercised in light of the specific facts and circumstances of the case in relation to the factors set out in Rule 57.01(1): Boucher, Moon and Coldmatic.

2. A consideration of experience, rates charged and hours spent (formerly a costs grid calculation) is appropriate, but is subject to the overriding principle of reasonableness as applied to the factual matrix of the particular case: Boucher. The quantum should reflect an amount the court considers to be fair and reasonable rather than any exact measure of the actual costs to the successful litigant: Zesta Engineering.

3. The reasonable expectation of the unsuccessful party is one of the factors to be considered in determining an amount that is fair and reasonable: Rule 57.01(1)(0.b).

4. The court should seek to avoid inconsistency with comparable awards in other cases. "Like cases, [if they can be found], should conclude with like substantive results": Murano at p. 249.

5. The court should seek to balance the indemnity principle with the fundamental objective of access to justice: Boucher.

6. A discretionary decision of a case-management judge in a class proceeding is entitled to a very high level of deference: Khan and Bre-X.

The Court referred to the Court of Appeal case of *Boucher v. Public Accountants Council (Ontario)*, 71 O.R. (3d) 291, for the principle that the expectation of the parties concerning the quantum of a costs award is a relevant factor in deciding what is fair and reasonable. The Court also referred to the decision of the Honourable Madam Justice Spies in *Ziskos v. Miksche*, 2007 CarswellOnt 7162 (Ont. S.C.J.), which among other things, articulates the principle that

"typically an important factor in assessing costs is to consider the result in the proceeding - who was the successful party." Justice Fragomeni also cited paragraph 56 of that decision which states as follows:

> [...] it can no longer be said in estate matters, and in this regard I would include matters under the SDA, that parties and their counsel can reasonably expect all of their costs to be paid for by the assets or in this case now from the estate of Johanna Miksche. The trend for some time now has been to examine the nature of the dispute and the conduct of the parties. Although in most cases it is also possible to consider which party is the "successful" party, that is not as significant a factor in these types of cases provided it can be said that the parties are properly motivated by the best interests of the person under a disability and are acting reasonably.

Justice Fragomeni did fix costs in the matter, awarding the applicants costs, a portion of which was to be paid for by the respondent, personally, and the balance from the estate. Costs were awarded on substantial indemnity basis as the court found that the respondent's refusal to acknowledge Ms. Schaefers' incapacity as well as his failure to diligently comply with two court orders and requests for information unduly and unnecessarily lengthened proceedings.

Chu v. Chang[xcvii]

The case of *Chu v. Chang* revolved around Mrs. Chang, a then 98 year old woman, and the way in which her children and one of her grandchildren were involved in her care. The matter first came before the Court in December 2008 when her daughter, Lily Chu, applied for an order appointing her as sole attorney for personal care and property. The Court appointed two joint guardians for personal care and property: Kin Kwok Chang (one of Mrs. Chang's sons) and Lily's son, Dr. Stephen Chu, who were later removed due to findings of kidnapping and an inability by family members to get along with respect to Mrs. Chang's property and personal care. The Court refused to appoint any of the remaining family members as guardians of property and, instead, appointed a trust company. Mrs. Chang's youngest daughter, Peggy Wu, was appointed the guardian for Mrs. Chang's personal care.

On March 26, 2010, the family was back before the Court to speak to the matter of costs. Justice Brown noted that while it was true that, at the end of the day, he had removed both individual co-guardians and replaced them, the Court found that Dr. Chu had initiated a second round of unnecessary litigation following the release of his November 20 endorsement and that he had been unsuccessful in so doing. Justice Brown opined that a guardian of the property or

the person has fiduciary duties of honesty and integrity that require him to approach the court with only the cleanest of hands.[xcviii] Justice Brown that Dr. Chu had breached his fiduciary duties to Mrs. Chang by:

1. Invoking the process of the court to make baseless allegations against others;[xcix]
2. misrepresenting the true state of affairs to the court; [c]
3. attempting to advance a position before the court in proceedings under the *Substitute Decisions Act*, which is not motivated solely by a concern, objectively-based, for the best interests of the incapable person but, instead, to initiate proceedings under the *Substitute Decisions Act*, including proceedings for directions, which reflect merely an effort by one side of a family to lever the court process to obtain some tactical advantage against another side: [ci]

Citing the cases of *Greenlight Capital Inc. v. Stronach* (2008), 91 O.R. (3d) 241 (Ont. Div. Ct.) and *Willmot v. Willmot* [2007 CarswellOnt 4199 (Ont. S.C.J.)], Justice Brown opined that "substantial indemnity costs may be awarded where a party has made serious allegations of misconduct against another which were unfounded and misused the court's process."[cii] As Dr. Chu's misconduct, and its effect in prompting the litigation, stood at the extreme end of the scale, Justice Brown concluded that this was an appropriate case to award substantial indemnity costs against Dr. Chu.

Smith Estate v. Rotstein[ciii]

Smith Estate v. Rotstein is a case decided by Justice Brown on July 30, 2010. The July 30 decision concerned the issue of costs, further to Justice Brown's reasons released on April 15, 2010, where he granted a motion for partial summary judgment of Lawrence Smith dismissing an Amended Notice of Objection of his sister, Nancy-Gay Rotstein, in respect of the 1987 Will and the first two codicils made by their mother, Ruth Dorothea Smith, who died in 2007. Justice Brown had also given directions for the process to determine the validity of a third and fourth codicil to the deceased mother's will.

Justice Brown clarified the law with respect to the principle on costs, as set out in the case of *McDougald Estate v. Gooderham*. As stated by his Honour at paragraph 10:

> It is crucial to note that the two exceptions to the "loser pays" principle in estate litigation are not class exceptions – i.e. the exceptions do not apply to *all* will challenge cases or *all* will interpretation cases. On the contrary, as revealed by the four cases pointed to by the Court of Appeal in *McDougald Estate* as examples of the application of the modern

> approach to costs, responsibility of the costs of will interpretation or will validity litigation may well be placed on the shoulders of the individual litigants [*MacDougald Estate* (2005), 255 D.L.R. (4th) 435 (Ont. C.A.) para. 85]. Only where the parties can demonstrate that *reasonable* grounds existed to question the execution of the will or the competency of the testator, or the presence of a *reasonable* dispute about the interpretation of a testamentary document, will the courts consider whether it is appropriate to award costs of the litigation from the estate, rather than apply the "loser pays" principle. The costs inquiry therefore will be specific to the facts and issues raised in each particular piece of estate litigation – no general class exceptions from the standard civil rules of costs exist for types of estate litigation.

In reviewing his findings of fact in his previous endorsement, Justice Brown concluded that an award should made against Ms. Rotstein personally as she "had failed to present any *reasonable* grounds upon which to question the validity of the 1987 Will and the first two codicils" and, therefore, "no basis existed to impose the responsibility for the costs of her will challenge on the estate."[civ] In terms of the appropriate scale of indemnity, Justice Brown found that Mr. Smith was entitled to full indemnity costs. Justice Brown based his decision on a number of factors. For instance, the Court found that "Ms. Rotstein had advanced bald allegations of testamentary invalidity, for which she offered no evidence in support, and which she persisted in pursuing at the hearing notwithstanding admissions made on her behalf by her husband against the position she took and the contrary evidence filed from independent witnesses."[cv] Ms. Rotstein was found to have made baseless allegations of misconduct against her brother and meritless claims of fraud, deceit, and dishonesty based on pure speculation, which, as noted by the Court, the case law has recognized warrant an elevated cost award. The Court found that Ms. Rotstein's attempt to challenge every will until she arrived at one which benefitted her equally with her brother demonstrated the "harassing nature of Ms. Rotstein's will challenge." In the Court's view, Ms. Rotstein had brought a will challenge which, on the facts of the family's history, ought never to have been brought.

In determining the "reasonableness" of the full indemnity cost award, the Court took into consideration the principles set out by the Court of Appeal in the case of *Davies v. Clarington* (2009), 100 O.R. (3d) (C.A.), par. 15, which, again, pointed to an "overriding principle of reasonableness."[cvi] Counsel for Ms. Rotstein had filed a detailed critique of the Bill of Costs submitted by opposing counsel. However, having failed to submit her own Bill of Costs, the Court put little weight on this critique and, in the absence of a Bill of Costs, the Court was required to infer that the fees incurred by Ms. Rotstein on a full indemnity basis approximated those incurred by Mr. Smith. Consequently, Justice Brown refused to accept her submission

that Mr. Smith had "overreached in respect of the time claimed."[cvii] Having taken into account the factors set out in Rule 57.01 of the *Rules of Civil Procedure*, the Court agreed with the following comments of Justice Gray in his decision in the case of *Cimmaster Inc. v. Piccione (c.o.b. Manufacturing Technologies Co*.), 2010 ONSC 846, par. 19:

> The principle of proportionality is important, and must be considered by any judge in fixing costs…However, in my view, the principle of proportionality should not normally result in reduced costs where the unsuccessful party has forced a long and expensive trial. It is cold comfort to the successful party, who has been forced to expend many thousands of dollars and many days and hours fighting a claim that is ultimately defeated, only to be told that it should obtain a reduced amount of costs based on some notional concept of proportionality. In my view…the concept of proportionality appropriately applies where a successful party has over-resourced a case having regard to what is at stake, but it should not result in a reduction of the costs otherwise payable in these circumstances.

Justice Brown concluded that a fair and reasonable award of full indemnity fees to be payable by Ms. Rotstein, personally, to Mr. Smith would be $707,173.00, an amount reduced from that claimed by Mr. Smith by just under $84,000.00. The disbursement costs were reduced as well, and an award of $30,407.29 was to be paid by Ms. Rotstein personally to Mr. Smith.

Zimmerman v. McMichael Estate[cviii]

This infamous case involved the founders of extensive Canadian art collection (the McMichael Collection), husband and wife, who donated to the province of Ontario in 1966. In 2001, the couple executed mirror wills that appointed the other as sole executor of their estate. The wills left the entire estate to the surviving spouse, but if there was no surviving spouse, the residue of the estate was to go to the McMichael Collection after five bequests of $50,000 were made. The husband died on November 2003 and that very night Mr. Zimmerman, a friend of the couple and a lawyer, took the widow, Mrs. McMichael, to his parents' house to console her and sign power of attorney documents appointing himself as her sole attorney. Mrs. McMichael was 81 years of age when her husband died. Although she continued to live in the matrimonial home for a short time, she was frail and required constant nursing assistance. She had no immediate family and her closest relative was Mrs. Fenwick, who lived in Montreal. By mid-January 2004, her health deteriorated to the point that she could no longer remain in her home and was moved to a seniors' residence, where she remained until her death in July of 2007.

In January and February 2004, Mr. Zimmerman had a trust deed prepared which contemplated that the trustee would settle a trust of Mrs. McMichael's property. Mrs. McMichael executed a deed creating the trust and authorized that all property be transferred to the trust except for $250,000 which was held back to satisfy the bequests in her will. The trust deed contained terms that differed from the will, including a provision that on Mrs. McMichael's death the property was to be retained for 21 years rather than immediately being distributed to the McMichael Collection. Upon Mrs. McMichael's death, her niece and her husband were granted a certificate of appointment of estate trustee with will.

The niece and her husband successfully brought an application for a declaration that the power of attorney and the trust were void and an order that required Mr. Zimmerman to account for his dealings with the trust property. Mr. Zimmerman was ordered to pass his accounts, but failed to do so and was removed as trustee on March 9, 2009. The niece and her husband made many objections to his accounts and Mr. Zimmerman failed to respond and made an application to pass his accounts for the property and the trust. During the hearing, the Court found that the accounts presented and sworn to by Mr. Zimmerman in his affidavit verifying the accounts were inadequate, incomplete and in many respects false. The accounts contained no statement of the compensation claimed by Mr. Zimmerman in connection with the discharge of his responsibilities under the Trusts. In fact, it was found that Mr. Zimmerman had pre-taken compensation to cover such things as expensive dinners not while, but after visiting Mrs. McMichael, new clothing, limousines, sailing trips to Bermuda, and trips to New York. It was also found that he had used Mrs. McMichael's BMW, charging any/all expenses to her trusts, and had taken her expensive art collection to adorn the walls of his own home. There was a dearth of evidence and/or explanation as to how such expenses could have been related to the discharge of Mr. Zimmerman's duties to Mrs. McMichael, as is required by the *SDA*. Although the trust deed impliedly permitted pre-taking, the court found that the authority to pre-take compensation did not relieve Mr. Zimmerman of the responsibility to ensure that the pre-taking was reasonable.

The Court found that Mr. Zimmerman's conduct fell well below the standards expected of a trustee and that he had breached some of the most basic obligations of a trustee, such as: he failed to properly account; he made improper and unauthorized payments and loans to himself, or for his benefit out of the Trusts; he mingled trust property with his own property and he used the two interchangeably for his own purposes; he paid himself compensation of almost

$450,000.00, without keeping proper records of his alleged pre-takings or the calculation thereof, and without the consent of the beneficiaries; and that he used other Trust assets such as the BMW and the McMichaels' art collection for his own personal benefit.

Although the court ordered that the hearing should continue in order to give Mr. Zimmerman a final chance to respond to the notices of objection concerning the disbursements he made out of trust property, the court concluded that he was not entitled to compensation for his services as an attorney or a trustee and was required to repay the amounts that he had pre-taken by way of compensation, in the total amount of $356,462.50 CDN and $85,400.00, US, together with prejudgment interest from the date of each taking. He was also required to repay the sum of $34,064.55 to Reynolds Accounting Services for the preparation of accounts, among other reimbursements. In addition, in a separate hearing on costs, the court found that, as Mr. Zimmerman had presented accounts that were "manifestly inaccurate, incomplete and false," and delayed and obstructed the beneficiaries in search for answers, he should pay all costs involved in getting to the truth. And, there was no reason why he should not personally pay costs that were incurred in bringing him to account. On the contrary, the court found it would be unfair and unreasonable for the estate or the beneficiaries to bear any part of those costs.

Conclusions on Costs

Since legal fees in estate litigation can be quite significant, these recent costs decisions must be considered when assessing the risk of costs. Particularly in dealing with emotionally fraught litigation, counsel must put their minds to these principles and must manage the expectations of their clients. After all, as is evident from the cases noted above, there is a strong message coming from our courts: if proceedings do not relate solely to the best interests of incapable persons, then all costs will be borne by the litigating parties, without contribution from the incapable person's assets. While this may be small comfort to those attempting to protect their loved ones from predators and may indeed place a chill on those unwilling to assume the risk of using the courts to undo marriages predicated on vulnerability and exploitation, it does underscore how problematic predatory marriages can be and further evinces a need for increased awareness of this systemic problem and thus increased vigilance by litigators, lawmakers and concerned citizens alike.

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.

Kimberly A. Whaley *August 10, 2010.*

[i] Kimberly Whaley *et. al*, *Capacity to Marry and the Estate Plan* (Aurora: Canada Law Book, 2010) at 70.

[ii] *Ibid*.

[iii] *Ibid*.

[iv] *Ibid*. at 1.

[v] *Ibid*. at 70.

[vi] *Ibid*.

[vii] *Ibid*.

[viii] *Ibid*.

[ix] *Ibid*.

[x] British Columbia *Marriage Act*, [RSBC 1996] CHAPTER 282.

[xi] *Marriage Act*, S.N.L. 2009, c. M-1.02.

[xii] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "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."

[xiii] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).

[xiv] *The Marriage Act*, C.C.S.M. c. M50, section 20.

[xv] *The Marriage Act*, C.C.S.M. c. M50, subsection 20(3).

[xvi] *Supra* note 1 at 46.

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

[xviii] The *Succession Law Reform Act*, R.S.O. 1990 c. s 26, as amended, defines a will as follows: "*will*" includes(a) a testament, (b) a codicil, (c) an appointment by will or by writing in the nature of a will in

exercise of a power, and (d) any other testamentary disposition. ("testament") R.S.O. 1990, c. S.26, s. 1 (1); 2005, c. 5, s. 66 (1, 2).

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

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

[xxi] *Supra,* note 18, s. 45.

[xxii] *Supra,* note 18, Section 8.

[xxiii] *Supra,* note 18, Section 47.

[xxiv] *Health Care Consent Act*, 1996, S.O. 1996, c.2, Schedule A, Section 41.

[xxv] *Archer v. St. John,* 2008 A.B.Q.B. 9; *Pecore v. Pecore* [2007] 1 S.C.R. 795; *Re Beaney (Deceased)* [1978] 1 WLR 770 at 774; *Re Morris (Deceased), Special trustees for Great Ormond Street Hospital for Children v Pauline Rushin* [2000] All ER(D) 598.

[xxvi] *Supra* note 1 at 45.

[xxvii] *Supra* note 1 at 45.

[xxviii] *Supra* note 1 at 46.

[xxix] *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.). The Ontario Court of Appeal held that a cognitively impaired person can fluctuate between being capable and incapable of granting a power of attorney.

[xxx] *Supra* note 1 at 48.

[xxxi] *Supra* note 1 at 48.

[xxxii] *Supra* note 1 at 48.

[xxxiii] *Supra* note 1 at 48.

[xxxiv] *Supra* note 1 at 48.

[xxxv] *Supra* note 1 at 50.

[xxxvi] *Supra* note 1 at 50.

[xxxvii] *Supra* note 1 at 50.

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

[xxxix] *Durham v. Durham* (1885), 10 P.D. 80 at 82.

[xl] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016,

[xli] *Lacey v. Lacey (Public Trustee of)* [1983] B.C.J. No. 1016, at para.31.

[xlii] *Durham* v. *Durham*, (1885), 10 P.D. 80 at p.82.

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

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

[xlv] *Estate of Park, ibid,* at 1425.

[xlvi] *Estate of Park,ibid,* at 1417.

[xlvii] *Turner* v. *Meyers* (1808), 1 Haig. Con. 414.

[xlviii] *Turner* v. *Meyers* (1808), 1 Haig. Con. 414 at paras. 415-417.

[xlix] *Browning* v. *Reane* (1812), 161 E. R. 1080, [1803-13] All E.R. Rep. 265 [hereinafter *Browning*].

[l] *Browning, ibid* at 1081 (E.R.).

[li] *Jackson* v. *Jackson* [1908] 1 P. 308.

[lii] [1923], 39 T.L.R. 658(39, The Times L. R., 658-659 [1923]).

[liii] *Jackson* v. *Jackson*, *supra* note xxx, at para. 308.

[liv] *Spier v. Benyen (*sub nom. *Spier Estate, Re*) [1947] W.N. 46 (Eng. P.D.A.); *Spier* v. *Spier* [1947] The Weekly Notes, at para. 46 per Willmer J.

[lv] *Ibid*. at 46.

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

[lvii] *Hunter* v. *Edney*, (1881) 10.P.D. 93.

[lviii] *Hunter* v. *Edney*, (1881) 10.P.D. 93 at 95-96.

[lix] *Hart v. Cooper,* 1994 CanLII 262 (BC S.C.).

[lx] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at 244.

[lxi] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII).

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

[lxiii] *Hart v. Cooper,* 1994 CanLII 262 at 9 (BC S.C.).

[lxiv] *Hart v. Cooper,* 1994 CanLII 262 (BC S.C.) at 9.

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

[lxvi] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at para.33.

[lxvii] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at para.136.

[lxviii] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at para.136.

[lxix] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at paras. 140-41.

[lxx] *Banton v Banton,* 1998 CarswellOnt 4688, 164 D.L.R. (4th) 176 at para.142.

[lxxi] *Barrett Estate v. Dexter*, 2000 ABQB 530 (CanLII) at pp.71-2.

[lxxii] *Chertkow v. Feinstein (Chertkow)*, [1929] 2 W.W.R. 257, 24 Alta. L.R. 188, [1929] 3 D.L.R. 339 (Alta. C.A.).

[lxxiii] *Durham* v. *Durham*, (1885), 10 P.D. 80 at 82.

[lxxiv] *Feng v. Sung Estate* at para. 51.

[lxxv] *Feng v. Sung Estate, supra* at para. 62.

[lxxvi] *Feng v. Sung Estate* [2004] O.J. No. 4496 (Ont. C.A.).

[lxxvii] *A.B. v. C.D.* (2009), BCCA 200 (CanLII).

[lxxviii] Robertson, Gerald B. *Mental Disability and the Law in Canada*, 2nd ed., (Toronto: Carswell, 1994) at pp.253-54.

[lxxix] *A.B. v. C.D.*, (2009), BCCA 200 (CanLII) at para.30.

[lxxx] (2005), 17 E.T.R. (3d) 36.

[lxxxi] 2009 CarswellOnt 3175 (Ont. S.C.J.).

[lxxxii] 1999 CarswellMan 467 (Man. C.A.).

[lxxxiii] *Ibid*. at par. 7.

[lxxxiv] *Ibid*. at par. 10.

[lxxxv] 1998 CarswellAlta 84 (Alta. C.A.).

[lxxxvi] *Ibid*. at par. 29.

[lxxxvii] 2009 CarswellNB 237 (N.B. C.A)..

[lxxxviii] *Ibid*. at par. 3.

[lxxxix] *Ibid*. at par. 55.

[xc] *Ibid*. at par. 56.

[xci] *Ibid*.

[xcii] *Ibid*. at par. 56.

[xciii] *Ibid*. at par. 55.

[xciv] *Ibid*. at par. 66.

[xcv] *Ibid*. at par. 67.

[xcvi] 2009 CarswellOnt 2283.

[xcvii] *Chu v. Chang*, 2010 CarswellOnt 246 (Ont. S.C.J.); additional reasons in, *Chu v. Chang*, 2010 CarswellOnt 1765 (Ont. S.C.J.).

[xcviii] *Chu v. Chang*, 2010 CarswellOnt 1765 at par. 10.

[xcix] *Ibid*. at par.11.

[c] *Ibid*. at par.12.

[ci] *Ibid*. at par.13.

[cii] *Ibid*. at par.14.

[ciii] (2010) 2010 ONSC 2117 (Ont. S C.J.).

[civ] *Ibid.* at par. 15.

[cv] *Ibid.* at par. 44.

[cvi] *Ibid*. at par. 52.

[cvii] *Ibid*. at par. 58.

[cviii] *Zimmerman v. Fenwick*, 2010 CarswellOnt 5179, 57 E.T.R. (3d) 241, 2010 ONSC 3855 (Ont. S.C.J.).