

Trevor Todd and Judith Milliken QC

Mental Capacity *and* Marriage



Most of us have heard of the infamous case of playboy playmate Anna Nicole Smith who laid claim to the estate of her 90-year-old husband.

This odd couple met at a topless bar where Smith earned her living. He was 89 and she was 26. Their marriage lasted just over one year before the husband died, leaving an estate of \$475 million. He died in 1995 and the litigation is still before the courts.

From time to time, newspapers report similar situations involving a lonely, enfeebled old man who marries a much younger waitress or careworker. Increased longevity will undoubtedly give rise to yet more disputes about the validity of such marriages.

Some courts have made apparently contradictory findings that a deceased senior, who is not mentally capable of executing a Will, is still mentally capable of marrying, thereby revoking his or her existing Will. *Banton vs. Banton* 164 D.L.R. (4th) 176 is just such a case.

This was an Ontario decision involving an 86-year-old man who formed a friendship with a 31-year-

old waitress from the restaurant of his retirement home. She persuaded him to secretly marry and to prepare two Wills in her favour. At the time of the marriage and the execution of the Wills, the court found that the deceased suffered from terminal cancer, serious hearing problems, restrictions of physical mobility, incontinence, and depression. They found he was cognitively impaired and enfeebled.

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The court concluded that Mr. Banton did not have testamentary capacity when he signed his Wills in this woman's favour and that it was her undue influence that procured the Wills. Nevertheless the court found that he had sufficient mental capacity to enter into his marriage and thus the marriage was valid.

The court ruled that although the test for testamentary capacity is quite stringent, the test for capacity to marry is not. Capacity to marry requires only

that the person understand the nature of the relationship and its responsibilities. In this case, the testator had some experience in that he had been married twice before. The court concluded that he had sufficient capacity to enter into the marriage and was not coerced into doing so.

In fact cases as far back as *Durham v. Durham* (1885) 1 T.L.R.338 have ruled that it does not require a high degree of intelligence to comprehend the significance of entering into a marriage.

Hart v. Cooper 2 E.T.R. (2d) 168 (B.C.S.C.) is a good example of the extent of evidence required to set aside a questionable marriage. In this case the deceased drew a Will in 1988 naming his three children as his beneficiaries. In 1990 he was widowed and in 1991 he married the younger plaintiff. He was her sixth husband.

The deceased did not tell his children of his plans to marry and the marriage was witnessed by acquaintances of the plaintiff wife. Indeed he disappeared from hospital and married two days before his scheduled examination by a psychiatrist to determine his mental capacity. Following the marriage, the plaintiff effectively isolated the husband, refusing to allow his children or doctor to contact

him. This ultimately led to police intervention. When they spoke to the husband, he told them that he had been kidnapped and that he wanted to return to the hospital. He died in hospital within one month of the suspect marriage.

After the death of the husband, the plaintiff wife sought a declaration that 1988 Will had been revoked as a result of their marriage. The deceased's children challenged the validity of the marriage.

The family doctor testified that in his opinion, the plaintiff was manipulating the deceased to derive a benefit from his estate. He further stated that the deceased's mental state was impaired to such a degree that he was incapable of comprehending the importance of any issues before him and would not have had the mental capacity to comprehend the contract of marriage.

Justice Lowry did not accept this uncontroverted medical evidence and found that the children had not proven

lack of mental capacity. He was not satisfied that the husband could not understand the simple nature of the contract of marriage and as a result he ruled the marriage valid. Thus, the prior Will was revoked by operation of law pursuant to the terms of the *Wills Act*.

This case illustrates the lengths to which the courts may go to uphold what appears to be a questionable marriage by a vulnerable older person.

Evidence Required to Set a Marriage Aside

The Alberta decision of *Barrett Estate v. Dexter*³⁴ E.T.R. (2d)1 is another good example of the extent of evidence required to set a marriage aside, based on lack of mental capacity. A 93-year-old man married his 54-year-old housekeeper and he died a short time later. His estate brought an action to have the marriage declared a nullity.

Three medical specialists had examined the deceased shortly before and after the date of the marriage. All

three testified that he suffered advanced dementia. Their evidence was near unanimous that the deceased was "quite significantly deteriorated in cognitive function and certainly not aware of legal and financial matters and that his judgment is impaired along with his other cognitive and intellectual factors."

The court cited the reasoning of their appellate court in *Chertkow vs. Feinstein* (1929) 24 Alta.L.R.188, holding "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." The court here ruled that the plaintiff impugning the validity of the marriage had met the burden of proof required and satisfied the court the marriage ought to be ruled invalid.

Similarly the Ontario Court of Appeal upheld the trial decision in *Re Sung Estate* 11 E.T.R. (3d) 169. Once more this case involved an enfeebled and depressed elderly man who secretly

married his younger housekeeper. When the deceased's five children learned of the marriage, the wife assured them that their father had protected their position financially with a prenuptial agreement. In fact a prenuptial agreement was prepared but never signed.

The medical evidence indicated that at the time of the marriage, the groom required full-time assistance from a caregiver, suffered from Parkinson's disease, and needed a respirator to breathe and a wheelchair for transport. Further he was rapidly succumbing to lung cancer and was taking massive amounts of medication. The family doctor testified that the deceased was unable to think clearly and logically at the time of the marriage.

The trial judge found that the deceased lacked sufficient capacity to enter into a form of marriage. The Court of Appeal upheld this decision in what they described, notably, as a close case.

Conclusion

The act of marriage gives rise to significant legal ramifications in both matrimonial law and estate/inheritance law. Indeed many people do not even know that marriage automatically revokes a Will. Whatever the historical basis may have been in holding that marriage is a simple contract not requiring a high degree of mental capacity, that ought not to be the case in modern times.

Today many seniors may marry for the second or third time. Modern matrimonial law includes many presumptions of entitlement to share in family assets and spousal maintenance law can be complicated. Needless to say, marriages in blended family situations may create a great amount of uncertainty with respect to the various claims of the children. Unfortunately disputes often arise involving the distribution of wealth following the death of one of the spouses.

Savvy seniors will wish to enter into prenuptial agreements that will require independent legal advice to be enforceable. Surely a significant mental

capacity is required to understand the legal consequences.

The common law courts have traditionally ruled it should not be too difficult to enter into marriage. Marriage, however, automatically entails important consequences to the testator's financial affairs and estate planning. For example the very act of marrying automatically revokes the spouses' previous Wills and gives any surviving spouse significant rights under our modern legislation.

Surely it is paradoxical that a person who is not mentally capable of executing a Will may nevertheless be mentally capable of marrying and thus effectively revoke his or her existing Will and estate plan. It seems inappropriate that our *Wills Act* should prescribe an automatic Will revocation in the event of marriage, even when a spouse does not have the mental capacity to execute a new Will. Surely if there is to be a statutory revocation of a Will upon marriage, it should be limited to those cases where a spouse has full testamentary capacity at the time of that marriage. ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 31 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

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