MONEY & FAMILY LAW

FOUNDING EDITORS:
BARRY S. CORBIN AND LORNE H. WOLFSON

PROVIDING NEWS AND INSIGHT TO PROFESSIONALS IN FAMILY LAW, ESTATE AND TAX PLANNING SINCE 1986

PENSION BENEFITS TRAP?

By Barry S. Corbin*

Ontario's *Pension Benefits Act*[1] ("*PBA*") governs entitlement to pension benefits upon the death of a member of former member of a pension plan. In particular, it governs entitlement to ongoing pension payments where a pension is "in pay" (that is, where the monthly pension payments have already commenced) at the time of that death, as well as entitlement to the "pre-retirement death benefit" ("PRDB"). This article will address an issue with the latter type of payment, which is described in section 48 of the statute. Under section 48 of the *PBA*, the rules regarding entitlement to the PRDB are as follows:

1. If at the time of death the member had a spouse (as that term is defined in the *PBA*), the spouse is entitled to the PRDB, provided that the member and that spouse were not living separate and apart at the time of the member's death. The spouse is entitled to select one of three options:
   (a) a lump sum payment equal to the commuted value of post-1986 accruals of the "lost" pension benefits;
   (b) a transfer of the amount described in paragraph 1(a) to a locked-in registered retirement savings arrangement (known as a LIRA); or
   (c) an immediate or deferred pension with a commuted value equal to the amount described in paragraph 1(a).
2. If there is no spouse having an entitlement under rule no. 1, entitlement to the PRDB goes to the person who is the object of a beneficiary designation made by the member (pursuant to the rules governing beneficiary designations in Part III of the *Succession Law Reform Act*[2]). In this case, only the form of PRDB described in paragraph 1(a) is available, unless the terms of the particular pension plan provide otherwise.
3. If no-one is entitled to the PRDB under either of rules 1 and 2, the form of PRDB described in paragraph 1(a) will go to the personal representative of the member's estate (although unlike other estate assets, that PRDB will not be subject to the claims of the member's creditors).

In this regard, subsection 48(3.2) of the *PBA* is noteworthy. It was added as part of the legislative amendments intended to undo the damage done by the Ontario Court of Appeal in its decision in *Carrigan v. Carrigan Estate*.[3] That subsection provides that a spouse from whom the deceased

November 2016 | ISSUE 31-11
PAGES 81-88

CONTENTS

* Corbin Estates Law. The author gratefully acknowledges the helpful comments on an earlier draft of this article provided by pension lawyer and pension dispute mediator, Ari Kaplan of Kaplan Law.

[1] R.S.O. 1990, c. P.8.

[2] R.S.O. 1990, c. s.26.

[3] *Carrigan v. Quinn; Carrigan v. Carrigan Estate* (2012), 112 O.R. (3d) 161, 2012 CarswellOnt 13522 (Ont. C.A.) (additional reasons 2012 ONCA 823 (Ont. C.A.), additional reasons 2013 ONCA 96 (Ont. C.A.), leave to appeal refused 2013 CarswellOnt 3406 (S.C.C.)). The Ontario Court of Appeal decision was perceived in many quarters to have been wrongly-decided. Nonetheless, the Supreme Court of Canada denied the application for leave to appeal (which leave application was supported by the Financial Services Commission of Ontario).

plan member was separated at the time of death, despite not being entitled to the PRDB payable under rule no. 1 above, may none the less be entitled to: (a) the PRDB under rule no. 2; or (b) in his or her capacity as personal representative of the deceased member, the PRDB under rule no. 3.

Insofar as a separated spouse's entitlement under rule no. 2 is concerned, it is likely that subsection 48(3.2) of the *PBA* was spawned by the somewhat unusual facts in the *Carrigan* decision. Despite having been separated from his wife sometime in 1996 and having commenced living with his new common law partner by 2000, Mr. Carrigan made a beneficiary designation in 2002 that named his wife and their two daughters to receive the death benefit under his pension plan. The legislators might have thought that in the absence of that later common law relationship, it would be important to declare, perhaps only for greater certainty, that a separated spouse ought not to be deprived of a PRDB as a result of a beneficiary designation that post-dated the separation.[4] This would be analogous to the entitlement of a testator's ex-spouse to inherit under the will. If the will pre-dates the divorce, the *Succession Law Reform Act* declares the entitlement to be revoked (unless the will contains a contrary intention). Since the statute is silent on the case where the will post-dates the divorce, the testator's ex-spouse can take the bequest under that will.

In our view, there is a problem with scope of subsection 48(3.2) of the *PBA*. It fails to make any distinction between a separated spouse's entitlement under a beneficiary designation that pre-dates the separation and his or her entitlement under a beneficiary designation that post-dates the separation. To illustrate, let us change the facts in *Carrigan*. Suppose that Mr. Carrigan had made the beneficiary designation in favour of his wife and daughters well before the couple separated. Had he died in, say, 1992, rule no. 1 would have given the full PRDB to his wife. That is, her spousal status would have prevented the application of rule no. 2. But suppose that Mr. Carrigan had died after the separation but before he had taken up with his common law partner (or at least before he and she had been living together for the requisite three-year period that would have qualified her as Mr. Carrigan's "spouse" under the *PBA*). Evidently, his spouse and two daughters would have taken the PRDB under the beneficiary designation in accordance with rule no. 2.

While we see no reason why, in that hypothetical scenario, his daughters shouldn't share in the PRDB as designated beneficiaries, it strikes us as inequitable that his wife would be entitled to share in the PRDB, despite the fact that the separation prevented her from taking under rule no. 1. (Even more bizarre, to our way of thinking, the same result would evidently obtain if Mr. Carrigan had divorced his wife prior to his death.) In our view, it would have been far more reasonable for subsection 48(3.2) of the *PBA* to have been limited in its application to beneficiary designations that post-dated the separation.

This is evidently a cautionary note for the estates solicitor whose client is a member of a pension plan and who has separated from his or her spouse (legal or common law). In addition to advising the client to review all beneficiary designations for life insurance, RRSPs, RRIFs, LIRAs and TFSAs, the estates solicitor should advise the client to ascertain whether there is a pre-separation pension beneficiary designation in favour of a separated spouse — or indeed, an ex-spouse — that ought to be changed to avoid an unintended windfall. (Some solicitors include in the client's will a beneficiary designation that is worded broadly enough to encompass pension benefits. In that case, since revocation of a will revokes any beneficiary designations contained in the will, making a new will for the client would eliminate any unintended pension benefit passing to the separated spouse or ex-spouse.)

[4] Subsection 48(3.3) of the *PBA* limits the scope of application of subsection 48(3.2) to cases where a member, former member or retired member dies on or after July 24, 2014, being the coming-into-force date of the 2014 Budget Bill that enacted this change.

PENSION DIVISION UPON THE BREAKDOWN OF THE SPOUSAL RELATIONSHIP — PART IV

By Douglas Rienzo*

(ix) Exceptions to the 50% rule

The first exception under the old regime to the 50% rule relates to court orders for support. Section 67.6(1) of the *Pension Benefits Act*[1] (the "PBA") indicates that section 67.6 (containing the transitional provisions) applies to an order under Part I of the *Family Law Act*[2] (the "FLA") made prior to 2012. Part I of the FLA governs equalization payments. However, we know that court orders can also be made in respect of support obligations, pursuant to Part III of the FLA. Therefore, the 50% rule under the old regime may not apply if the court order assigns a pension for support purposes.[3]

There have also been cases under the old rules where, seemingly based on the court's unfavourable view of the plan member's behaviour, the court found a way to transfer 100% of the member's pension benefits to the non-member spouse. These cases demonstrate that a court order which results in 100% of the member's pension going to his or her former spouse may not necessarily be in violation of the PBA. In *Nicholas*,[4] the plan member was in jail for the attempted murder of his former spouse. The court held that 50% of his pension would be assigned to the spouse for equalization, and the other 50% would

* Douglas Rienzo is a partner in Pensions & Benefits at Osler, Hoskin & Harcourt LLP in Toronto. He is also chair of the firm's Diversity Committee. He would like to acknowledge the assistance of Jon Marin, an associate lawyer in Osler's Pensions and Benefits Department.

This article was presented at the Osgoode Professional Development conference: "Pension and Benefit Entitlements Upon Marriage Breakdown: The Legal Guide", on January 28, 2016 and is being reprinted here with the permission of the author.

[1] R.S.O. 1990, c. P.8.
[2] R.S.O. 1990, c. F.3.
[3] The use of *assignment* in the support context is to be distinguished from *execution* of payments under a pension for support purposes.
[4] *Nicholas v. Nicholas* (1998), 37 R.F.L. (4th) 13, 1998 CarswellOnt 1828 (Ont. Gen. Div.).

be assigned (when and as paid) for support. In *Kennedy*,[5] the court took notice of the plan member's previous assaults of the non-member spouse, and also saw fit to order that 100% of the member's pension be payable to the non-member spouse, half for equalization and half for support. In *Gauthier*,[6] the court ordered that half of the member's pension would go to the non-member spouse in execution of a support obligation, with the remaining half assigned for equalization purposes. More recently, in *Belton*,[7] the court concluded that it is not prevented from ordering half of a member's pension to be paid to satisfy property claims under section 51 of the PBA[8] and the remaining half to be transferred to satisfy support obligations under section 65 of the PBA.

It could perhaps be argued that the "stacking" of equalization and support obligations may no longer be permitted under the new rules post-2011. Since sections 67.3 and 67.4 of the PBA, which permit pension splitting to occur, refer only to orders under Part I of the FLA, it is not clear how the parties would compel the administrator to implement the assignment of the other 50% of the pension pursuant to Part III of the FLA, for support. That being said, section 67.5 of the PBA, which restricts the manner in which administrators can be compelled to divide a pension, expressly refers only to orders under Part I of the FLA, thus (it might be argued) leaving the door open for orders under Part III of the FLA to assign the remaining portion of the pension not assigned under Part I:

> 67.5 (1) An order made under Part I (Family Property) of the *Family Law Act*, a family arbitration award or a domestic contract is not effective to the extent that it purports to require the administrator of a pension plan to divide the pension benefits, deferred pension or pension, as the case may be, of a member or former member of the plan otherwise than as provided under section 67.3 or 67.4.

Section 67.5 provides that court orders made after 2011 under Part I of the FLA cannot compel an administrator to divide a pension otherwise than pursuant to section 67.3 or 67.4 of the PBA. This could perhaps be interpreted to imply that an order under Part III of the FLA (for support) will be effective to permit the division of a pension otherwise than under those two sections. This argument is further supported by sections 67.3(11) and 67.4(7) of the PBA, which provide that the PBA provisions governing the division of pensions do not affect "any order for support enforceable in Ontario".

In addition, subsection 65(3) of the PBA (set out above), which permits the assignment of pensions, refers generally to "an order under the *Family Law Act*" and not to an order under Part I of that Act, which might imply that orders assigning a pension for support purposes under Part III of the FLA are permitted. If that interpretation were accepted, however, then such orders could assign 100% of a member's pension, since the rules in the PBA restricting assignments to 50% of the benefits earned during the spousal period apply only to orders under Part I of the FLA. While the PBA is therefore not entirely clear on the point, and perhaps contains unintended gaps, the overall scheme for pension division would seem to suggest that the drafters contemplated only assignments by court order if the order is made under Part I of the FLA, and not Part III. Until subsection 65(3) is amended to refer only to court orders made under Part I, however, then it will be open for non-member spouses to argue that a court order for support (under Part III of the FLA) can assign a pension with no limit on the amount being assigned.

(x) What pension plan administrators should do if it seems the 50% rule is violated

If plan administrators receive a court order or domestic contract governed by the old regime which violates the 50% rule set out in section 67.6(4) of the PBA, or which they suspect may do so, they must take extra care in dealing with it. It may be that one of the exceptions applies, and more than 50% can legally be paid to the non-member spouse. Or, it may be that the administrator can only implement the court order or domestic contract up to the 50% maximum (as noted above, an order or agreement which violates the 50% rule is not void; it is just not effective to cause more than 50% of the pension benefit to be payable to the non-member spouse). If the new rules apply, then subject to the discussion above regarding the possible assignment of part or all of the member's pension for support purposes, the administrator may only transfer 50% of the imputed value of the member's pension to the non-member spouse.

It is important to remember that under the old regime, in order to determine the maximum amount payable to the non-member spouse, the 50% rule must be applied only to the portion of the pension accrued during the period the parties were spouses, not to the member's entire pension (unless the parties were spouses during the entire time the member was accruing benefits under the plan). For court orders made after 2011, the 50% rule is based on the "imputed value" of the pension, which, essentially, is the value related to the period of the spousal relationship.

(xi) What is "double dipping"?

"Double dipping" is a term used by the courts to describe a situation in which, upon marriage breakdown, a member's pension is taken into account when calculating the equalization payment owing (*i.e.*, as a capital asset), and then taken into account again when the pension is in pay, for purposes of determining the member's obligation to provide spousal support (*i.e.*, as an income stream). The case law is still unclear in this regard — there are cases indicating that "double dipping" is inherently unfair. A Supreme Court case (*Boston*) indicated that double dipping is to be avoided, but did not rule out permitting it in certain circumstances.[9]

---

[5] *Kennedy v. Sinclair* (2001), 18 R.F.L. (5th) 91, 2001 CarswellOnt 1634 (Ont. S.C.J.), affirmed 2003 CarswellOnt 2507 (Ont. C.A.).

[6] *Gauthier v. Gauthier* (2003), 23 R.F.L. (6th) 94, 2003 CarswellOnt 8038 (Ont. S.C.J.).

[7] *Belton v. Belton* (2010), 2010 CarswellOnt 2506, [2010] W.D.F.L. 4180 (Ont. S.C.J.).

[8] Section 51 of the PBA was repealed effective January 1, 2012, in conjunction with the coming into force of the Bill 133 amendments. However, a functional equivalent to these provisions (including the 50% rule) was preserved under the transition provisions in Section 67.6 of the PBA.

[9] *Boston v. Boston*, [2001] 2 S.C.R. 413, 2001 CarswellOnt 2432 (S.C.C.).

Part V of this article will appear in the 31-12 issue of *Money & Family Law*, to be published in December 2016

CALCULATING EXECS' SPOUSAL SUPPORT CAN BE COMPLEX

By Farley J. Cohen and Antonina Wasowska*

Executives at large corporations (private and public) often have compensation packages that pose challenges for determining net family property (NFP) and calculating income for child and spousal support purposes under the Guidelines.[1]

This article illustrates some of the issues that counsel and their business valuators need to consider.

Ms. Ex is a senior VP at Commco, a major public Canadian communications company. Her compensation includes stock options, a bonus plan and forgivable loans to purchase Commco shares. What valuation and income determination challenges does this package present?

Ms. Ex held 200,000 Commco shares, which closed trading at $5 per share on the separation date and stock options to purchase 100,000 shares at $3 each. While at first glance the fair market value of Ms. Ex's shares appears to be $1 million and the options $200,000, the correct valuations are not so straightforward.

Ms. Ex is subject to Commco's insider trading blackout periods, which preclude her from trading the company's shares for five months each year. Similarly, given her senior position, it is difficult for her to execute trades without attracting attention from the market, thereby impacting the share price. Therefore, in calculating the value of her holdings, adjustments may be required to reflect these trading restrictions, as well as the attributes of her options.

While she had yet to exercise her stock options, they still need to be valued for NFP. Public company options are often valued using an option model such as Black-Scholes, which estimates value at a point in time based on the specific option attributes, market conditions and historical activity of the company's stock. The resulting value may also require an additional discount to reflect the risk that the options may not vest.

Lastly, certain shares that Ms. Ex purchased with forgivable loans had yet to vest and therefore could not be sold at the separation date. The value of these shares will need to be further discounted to account for the risk that the shares may not vest, and the volatility of the share price between the valuation date and the vesting date.

Ms. Ex's NFP should also reflect contingent disposition costs on her shares and options, based on the likely timing of disposition, giving consideration to overall property settlement, her history of share sales and retirement plans.

Shortly before the separation date, Ms. Ex was granted a two-year forgivable loan to purchase Commco shares. Under Canadian tax provisions, the full amount of the loan will be included in Ms. Ex's income for the year that it is forgiven. Accordingly, the tax owing at that time represents a contingent tax liability to be reflected in NFP at the separation date, discounted for future payment timing.

However, the loan will only be forgiven if Ms. Ex remains employed with Commco on the forgiveness date; otherwise, the loan must be repaid. Therefore, if it appears unlikely that Ms. Ex will be employed by Commco at the forgiveness date, then the loan amount owing (appropriately discounted), rather than tax owing on the income inclusion, should be reflected as a liability in NFP.

Ms. Ex's separation date fell between Commco's fiscal year end, and her bonus payout. Accordingly, a bonus receivable was included as an asset in NFP *and* her bonus was included in her Line 150 income upon receipt. This results in a "double-dip" situation whereby an asset equalized between Ms. Ex and her former spouse also forms part of income for support. Assets such as pensions, stock portfolio gains and other deferred compensation plans can likewise lead to double-dip situations.

In cases with double-dip it is now common for the valuator to calculate income under several scenarios for the court's consideration (with and without double-dip income, for example). Depending on the number of factors involved, and the interplay among the various scenarios, these calculations can become quite complex.

When dealing with executive-level spouses, it is important to understand the executive's compensation package — particularly the terms of any stock-based compensation and incentive plans. At minimum, counsel should request the employment contract, incentive plan agreements, statements showing balances of stock based compensation and pension plans at the valuation dates, and a breakdown of T4 employment income by source for all years under review. A business valuator can then work with counsel to identify and value compensation related assets and liabilities for inclusion in NFP, as well as calculate the spouse's income for support purposes. Executive life can be complicated.

* Farley J. Cohen MBA, FCPA, FCA•IFA, CIRP, FCBV, ASA is a founding principal with Cohen Hamilton Steger & Co. in Toronto, where he specializes in business valuation and damages quantification. Farley has appeared as an expert witness at numerous trials and court proceedings, and is a past chair of the Canadian Institute of Chartered Business Valuators. Antonina Wasowska CPA, CA, CBV, CFF is an associate with Cohen Hamilton Steger & Co. in Toronto, specializing in business valuation and damages quantification, with a focus on family law engagements.

This article originally appeared in the July 22, 2016 issue of *The Lawyers Weekly*.

[1] *Federal Child Support Guidelines*, SOR/97-175.

CAPACITY TO MARRY, CO-HABIT, SEPARATE, AND DIVORCE — PART I

By Kimberly A. Whaley*

1. INTRODUCTION

Current and evolving statistics confirm that our population is aging and doing so, rapidly. With age and longevity can often come an increase in the occurrence of medical issues affecting cognitive ability, related diseases and disorders, such as dementia in varying types and degrees, delirium, delusional disorders, Alzheimer's, and other conditions involving reduced functioning and capability.[1] There are a wide variety of disorders that affect

* Kimberly A. Whaley is the founder and principal of the Toronto boutique Trusts and Estates litigation firm, Whaley Estate Litigation.

This paper was presented at the Law Society of Upper Canada's "Family Law and the Elderly Client" conference (June 9, 2015).

[1] Kimberly Whaley, Michel Silberfeld, Heather McGee, and Helena Likwornik, *Capacity to*

capacity and increase an individual's susceptibility to being vulnerable, dependent and susceptible to influence. Factors affecting capacity can *inter alia*, 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.[2] These sorts of issues unfortunately invite opportunity for financial abuse, elder abuse, and exploitation.

Exploitation, financial abuse, and undue influence can occur in the context of marriage, co-habitation, separation, and even divorce. For example, 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, of providing consent to marry and to enter into a contract of marriage — perhaps because of illness or dependency.[3] Indeed, unscrupulous opportunists too often get away with preying upon in particular, older adults with diminished reasoning ability purely for financial gain. An appropriate moniker for this type of relationship is that of the "predatory marriage".[4] Given that marriage brings with it a wide range of property and financial entitlements, the descriptive, "predatory" does effectively capture the situation where one person marries another of limited capacity solely in the pursuit of these advantages.[5] Older adults may also be prone to abuse or pressure to co-habit for unscrupulous reasons. While co-habitation does not bring with it the same property rights and financial consequences of marriage, living with a predator can still have equally serious consequences.

Similarly, vulnerable older adults may be unduly pressured not to live with, or marry persons due to influence from children of prior unions who may disapprove of later life partnership. Adult children may see an opportunity to persuade a vulnerable parent to divorce, or cease living with a partner once becoming ill, vulnerable or decisionally incapable. What the older adult wants is often overlooked. The question of whether there is a presence of decisional capacity sufficient to make such decisions is paramount?

Determining whether an older adult has the requisite decisional capacity to marry, to co-habit, to separate and to divorce is explored in this paper as well as related issues such as predatory marriages, and the nature and extent of the role of the litigation guardian in such matters.

2. WHAT IS CAPACITY?

There is no single legal definition of "capacity". The *Substitute Decisions Act, 1992*[6] (the "SDA") which addresses various types of capacity, simply defines "capable" as "mentally capable", and provides that "capacity" has a corresponding meaning. What does this mean?

Equally puzzling is the fact that there is no general or consistent approach to apply in determining or establishing "capacity", "mental capacity" or "competency". Each particular task or decision undertaken has its own corresponding capacity characteristics and determining criteria.

In general, all persons are deemed capable of making decisions at law. That presumption stands unless and until the presumption of capacity is legally rebutted.[7]

Decisional capacity is determined upon factors of mixed law, medicine and fact by applying the evidence available to the applicable capacity consideration as at the relevant time.[8] Often reference is made to a capacity "test", notably however there is no "test" so to speak, rather there are different criteria to consider in determining decisional capacity.

Capacity is an area of enquiry where medicine and law collide, in that legal practitioners are often dealing with clients who have medical and cognitive challenges, and medical practitioners are asked to apply legal criteria in their clinical practices, or are asked to review evidence retrospectively to determine whether at the relevant time an individual had the requisite decisional capacity to complete a specific task.

The assessment of capacity is a less-than-perfect science, both from a legal and medical perspective. Capacity determinations are often complicated: in addition to professional and expert evidence, lay evidence is relevant to assessing decisional capacity. The standard of assessment varies and this too, can become an obstacle that is difficult to overcome in determining capacity as well as in resolving disputes over the quality and integrity of capacity findings. To add further to the complication, in contentious settings, capacity is frequently evaluated retrospectively, when a conflict arises relating to a long since past decision of a person, alive or deceased. The evidentiary weight given to such assessments varies. In some cases where medical records exist, a retrospective analysis over time can provide comprehensive and compelling evidence of decisional capacity.

Capacity is *decision*, *time* and *situation*-specific. This means that a person may be capable with respect to some decisions, at different times, and under different circumstances. A person is not globally "capable" or "incapable" and there is no specific standard to determine general capacity. Rather, capacity is determined on a case-by-case basis in relation to a particular or specific task/decision and at a moment in time.

(a) Capacity is Decision-Specific

Capacity is *decision*-specific in that, for example, as determined by legislation, the capacity to grant a power of attorney for property differs from the capacity to grant a power of attorney for personal care, which in turn differs from the capacity to manage one's property or personal care. Testamentary capacity, the capacity to enter into a contract, to give a gift, to marry, to separate or to divorce, all involve different considerations as determined at common law. As a result, an individual may be capable of making personal care decisions, but not capable of managing property, or capable of granting a power of attorney document, but, not capable of making a will. The possibilities are unlimited as each task or decision

Marry and the Estate Plan (Aurora, Ontario, Canada Law Book, 2010), at p. 70.

[2] *Ibid.,* at p. 1.

[3] *Ibid*.

[4] *Ibid*.

[5] *Ibid.* at 70.

[6] S.O. 1992, c. 30, as am.

[7] *Palahnuk v. Kowaleski*, 2006 CarswellOnt 8526, [2006] O.J. No. 5304, 154 A.C.W.S. (3d) 996 (Ont. S.C.J.); *Brillinger v. Brillinger-Cain*, [2007] O.J. No. 2451, 158 A.C.W.S. (3d) 482 (Ont. S.C.J.); *Knox v. Burton* (2004), 6 E.T.R. (3d) 285, 130 A.C.W.S. (3d) 216 (Ont. S.C.J.), affirmed 2005 CarswellOnt 877 (Ont. C.A.).

[8] *Starson v. Swayze*, [2003] 1 S.C.R. 722 (S.C.C.).

undertaken has its own specific factors to consider in its determination.

(b) Capacity is Time-Specific

Capacity is *time*-specific in that legal capacity can fluctuate over time. The legal standard builds in allowances for "good" and "bad" days where capacity can and does fluctuate depending on the cause. As an example, an otherwise capable person may lack capacity when under the influence of alcohol. Even in situations where an individual suffers from a non-reversible and/or progressive disorder, that person may not be permanently incapable, and may have decisional capacity at differing times. Much depends on the unique circumstances of the individual and the medical diagnosis. Courts have consistently accepted the principle that capacity to grant a power of attorney or to make a will can vary over time.[9]

The factor of time-specificity as it relates to determining capacity means that any expert assessment or examination of capacity must clearly state the time of the assessment. If an expert assessment is not contemporaneous with the giving of instructions, the making of the decision or the undertaking of the task, then it may have less probative value than the evidence of, for instance, a drafting solicitor who applies a legal analysis in determining requisite capacity commensurate with the time that instructions are received.[10]

(c) Capacity is Situation-Specific

Lastly, capacity is *situation*-specific in that under different circumstances, an individual may have differing capacity. For example, a situation of stress or difficulty may diminish a person's capacity. In certain cases, for example, a person at home may have capacity not displayed in a lawyer's or doctor's office.

Although each task has its own specific capacity analysis, it is fair to say that in general, capacity to make a decision is demonstrated by a person's ability to understand all the information that is relevant to the decision to be made, and then that person's ability to understand the possible implications of the decision in question.

The 2003 Supreme Court decision in *Starson v. Swayze*[11] is helpful in understanding and determining decisional capacity. Although this decision dealt solely with the issue of capacity to consent to treatment under the *Health Care Consent Act, 1996*,[12] (a statute which is not addressed in this paper) the decision is helpful in that there are similar themes in all capacity determinations.

Writing for the majority, per Major J: The presence of a mental disorder must not be equated with incapacity since the presumption of legal capacity can only be rebutted by clear evidence.[13]

Major J. emphasized that the ability to understand and process information is key to capacity. It requires the "cognitive ability to process, retain and understand the relevant information."[14] Then, a person must "be able to apply the relevant information to the circumstances, and be able to weigh the foreseeable risks and benefits of a decision or lack thereof." [15]

A capable person requires the "ability to appreciate the consequences of a decision", and not necessarily an "actual appreciation of those consequences".[16] A person should not be deemed incapable for failing to understand the relevant information and/or appreciate the implications of a decision, if that person possesses the ability to comprehend the information and consequences of a decision.

Major J. also made note that the subject matter of the capacity assessment need not agree with the assessor on all points, and that mental capacity is not equated with correctness or reasonableness.[17] A capable person is entitled to be unwise in decision-making. In the oft-cited decision of *Re Koch*,[18] Quinn J. wrote as follows:[19]

> It is mental capacity and not wisdom that is the subject of the *SDA* and the *HCCA*. The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected.

3. PROPERTY LAW/TESTAMENTARY CONSIDERATIONS

To truly appreciate the importance of capacity in the context of marriage, separation and divorce, it is necessary to understand what entitlements may be gained or lost.

Put in context, it is important to note that in Ontario, and in many other Canadian provinces, marriage automatically revokes a will/testamentary document pursuant to section 15 of the *Succession Law Reform Act*[20] (the "*SLRA*"), and the exceptions thereto as set out at section 16 of the *SLRA*. One of the applicable exceptions applies where there is a declaration in the will that it is made in contemplation of marriage. The 2010 Court of Appeal decision in British Columbia, *MacLean Estate v. Christiansen*[21] held that extrinsic evidence supported the term "spouse" as used in the will to mean the testator's legal spouse, with whom he was contemplating marriage. Ontario legislation would not likely provide for such a result, it requiring "a declaration in the will" (Section 16(a)).[22]

This revocation of a will upon marriage can raise serious consequential issues where a vulnerable adult marries, yet lacks the requisite capacity to make a will thereafter, or dies before a new will can be executed. Some provinces have recognized this issue and have recently enacted legislation to prevent revocation of wills upon marriage. Alberta's *Wills and Succession Act* came into force on February 1, 2012, and under that act marriage no longer revokes a will.[23] British Columbia followed suit and on March 31, 2014, the new *Wills, Estates and Succession Act* ("WESA") came into

[9] *Palahnuk v. Kowaleski, Brillinger v. Brillinger-Cain*, and *Knox v. Burton,* all *supra* note 7.
[10] *Palahnuk v. Kowaleski, supra* note 7, at para. 71.
[11] *Supra* note 9.
[12] S.O. 1996, c. 2, Sched. A, as am.
[13] *Starson v. Swayze, supra* note 8, at para. 77. This case was most recently applied in the Ontario Court of Appeal case of *Gajewski v. Wilkie*, 2014 ONCA 897 (Ont. C.A.), which deals with statutory guide for capacity to consent to treatment under the *Health Care Consent Act, 1996*.
[14] *Starson v. Swayze, supra* note 8, at para. 78.
[15] *Starson v. Swayze, supra* note 8, at para. 78.
[16] *Starson v. Swayze, supra* note 8, at paras. 80-81 (emphasis in original).
[17] *Starson v. Swayze, supra* note 8, at para. 79.
[18] 1997 CarswellOnt 824 (Ont. Gen. Div.), additional reasons 1997 CarswellOnt 2230 (Ont. Gen. Div.).
[19] *Re Koch*, *supra note 18*, at para. 89.
[20] R.S.O. 1990, c. S.26.
[21] 2010 BCCA 374 (B.C. C.A.).
[22] Section 16(a) of the *SLRA*.
[23] S.A. 2010, c. W-12.2.

force.[24] Under WESA, marriage no longer revokes a will.

In addition to the testamentary consequences of marriage, in all Canadian provinces, marriage comes with certain statutorily-mandated property rights as between spouses. Using Ontario legislation as an example, section 5 of Ontario's *Family Law Act*[25] (the "FLA"), provides that, on marriage breakdown or death, the spouse whose "net family property" is the lesser of the two net family property calculations, is entitled to an equalization payment of one-half the difference between them. 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" and to make application 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 and apply either to take pursuant to the intestate succession legislation under the SLRA, or to elect to receive an equalization payment under the FLA. While a claim for variation (in other words, a challenge) of one-half of the difference can be made, it is rarely achieved in the absence of fraud or other unconscionable circumstances.

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. 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.[26]

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 and intestate succession, to such an extent that spouses are given primacy over the heirs of a deceased person's estate. Ontario's *SLRA* also permits under section 58, a spouse to claim proper and adequate support as a dependant of a deceased, whether married, or living common law. Notably, the decision of Belleghem J. in *Blair v. Allair Estate*[27] saw a determination that two different women simultaneously were legally spouses of the deceased and as such, were not precluded from both obtaining an award of support from the estate.

4. CAPACITY TO MARRY

Marriage vows often include promises to be exclusive, to stay together until death, and to provide mutual support.[28] Yet, at the time of marriage, parties regularly as a matter of course fail to consider the significant property rights that arise out 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.[29]

Currently, in Canada, 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.[30] No party is required to understand *all* of the consequences of marriage. The reason for this is that cases dealing with claims to void or declare a marriage a nullity on the basis of incapacity often cite long standing classic English cases, such as *Durham v. Durham*,[31] which collectively espouse the following principle: "the contract of marriage is a very simple one, one which does not require a high degree of intelligence to comprehend."[32]

(a) Statutory and Common law Requirements

With a few exceptions, most provinces and territories in Canada have marriage legislation that contemplates the necessity of capacity.[33] These statutes prevent the relevant marriage officiate from issuing a license to, or solemnizing the marriage of an individual who is known to lack the requisite mental capacity to marry,[34] is incapable of giving valid consent,[35] or who has been certified as mentally disordered.

At a glance, in Manitoba, certain rigorous precautions exist, for instance, persons certified as mentally disordered cannot marry unless a psychiatrist certifies in writing that he/she is able to understand the nature of marriage and its duties and responsibilities.[36] In fact, should a person who issues a marriage license or solemnizes the marriage of someone who is known to be certified as mentally disordered, will be guilty of an offence and is liable on summary conviction to a fine.[37]

Section 7 of Ontario's *Marriage Act* prohibits persons from issuing a license to, or solemnizing the marriage of, any person where reasonable grounds exist to believe that person lacks requisite mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs *or for any other reason*.[38]

In British Columbia, it is an offence under the *Marriage Act*[39] to issue a license for a marriage, or to solemnize a marriage, where the authority in question knows or has reason to believe that either of the parties to the marriage is mentally disordered or impaired by drugs or alcohol.[40] This Act further provides that a caveat can be lodged with an issuer of marriage licenses against issuing a license to persons named in the caveat.[41] Once lodged, the caveat prevents the issuing of a marriage license until the issuer has

[24] S.B.C. 2009, c. 13.
[25] R.S.O. 1990, c. F.3.
[26] SLRA, O. Reg 54/95, s. 1.
[27] 2011 ONSC 498 (Ont. S.C.J.).
[28] Whaley *et al.*, note 2, at p. 50.
[29] *Ibid*., at p. 50.
[30] *Ibid.* at 50.
[31] *Durham v. Durham* (1885), 10 P.D. 80 (Eng. P.D.A.).
[32] *Durham v. Durham*, supra note 31, at p. 82.
[33] Exceptions being Newfoundland and Labrador, Nova Scotia, Yukon, and New Brunswick.
[34] Section 7 of the Ontario *Marriage Act*, R.S.O. 1990, c. M.3, provides: "No person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[35] *Marriage Act*, R.S.N.W.T. (Nu.) 1988, c. M-4 (Nunavut).
[36] *The Marriage Act*, C.C.S.M. c. M50, s. 20.
[37] *Ibid.*, s. 20(3).
[38] Section 7 of the Ontario *Marriage Act*, provides: "No person shall issue a license to or solemnize the marriage of any person who, based on what he or she knows or has reasonable grounds to believe, lacks mental capacity to marry by reason of being under the influence of intoxicating liquor or drugs or for any other reason."
[39] R.S.B.C. 1996, c. 282.
[40] *Ibid.*, s. 35.
[41] *Ibid*, s. 23.

inquired about the caveat and is satisfied the marriage ought not to be obstructed, or the caveat is withdrawn by the person who lodged it.[42] While at the time of writing there are no reported cases citing section 35 of the Act, I am aware from discussions with B.C. counsel that this provision does get used and is a good tool to delay or avoid questionable marriages in circumstances of incapacity. The caveat system, although useful, I am told is not fully implemented in that there is no centralized, searchable roster of caveats lodged in the province.

Where provincial legislation is silent on this issue of capacity and marriage, common law dictates that a marriage may be found to be void *ab initio* if one or both of the spouses did not have the requisite mental capacity to marry. Thus, whether by statute or at common law, every province requires that persons have legal capacity in order to consent to, and therefore enter into a valid contract of marriage.

Several common themes appear to emerge from a comprehensive review of historical cases on the issue of decisional and requisite capacity to marry.[43] These themes are summarized here:

1. That the so called "test" for determining the requisite capacity to marry is equivalent to that of the capacity to contract;[44]
2. That marriage has a distinct nature of rights and responsibilities;[45]
3. That the contract of marriage is a simple one;[46] and
4. That the standard for determining the requisite capacity to marry is the same as the standard for ascertaining capacity to manage property; or that it requires both the requisite capacity to manage the person and the property.[47]

From a historical perspective, it is apparent that there is no single and complete definition of the requisite capacity to contract marriage. Rather, on one end of the judicial spectrum, there exists a view that marriage is but a mere contract, and a simple one at that; and, on the other end of the spectrum, several courts have espoused the view that the requirement to marry is not so simple; rather, one must be capable of managing one's person and/or one's property in order to enter into a valid marriage. Current legal treatment is unsettled and would benefit from judicial clarity. In the interim, we explore other legal doctrines to remedy the legal treatment until judicial precedent catches up with the development of property rights as they currently exist.

Part II of this article will appear in the 31-12 issue of *Money & Family Law*, to be published in December 2016.

[42] *Supra* note 39, at s. 23(2).

[43] For a more in-depth discussion on the history of the capacity to marry, see Whaley *et al.*, *supra* note 1.

[44] See *Lacey v. Lacey*, 1983 CarswellBC 1614, [1983] B.C.J. No. 1016 (B.C. S.C.).

[45] See *Re Park Estate*, [1953] 2 All E.R. 1411 (Eng. C.A.).

[46] See *Lacey v. Lacey*, *supra* note 44; *Durham v. Durham*, *supra* note 31, at p. 82; *Re Park Estate*, *supra* note 45; and *Hunter v. Edney* (1885), 10 P.D. 93 (Eng. P.D.A.).

[47] *Browning v. Reane* (1812), [1803-13] All E.R. Rep. 265, 161 E.R. 1080 (Eng. Ecc.); *Spier v. Bengen; Spier Estate, Re*, [1947] W.N. 46 (Eng. P.D.A.).

One Corporate Plaza, 2075 Kennedy Road,
Scarborough, Ontario M1T 3V4
Tel: (416) 609-3800 from Toronto
1-800-387-5164 from elsewhere in Canada/U.S.
Internet: http://www.carswell.com
E-mail: www.carswell.com/email

Monday through Friday,
8:30 a.m. to 5:30 p.m. Eastern Time

Lorne H. Wolfson (lwolfson@torkinmanes.com) and Lindsay G. Mills (lmills@torkinmanes.com) practise law with the Toronto firm of Torkin Manes LLP. Barry S. Corbin (barry.corbin@corbinestateslaw.com) practises law with the Toronto firm of Corbin Estates Law Professional Corporation.

Letters to the editor are welcome. Correspondence should be sent to Torkin Manes LLP, 151 Yonge Street, Suite 1500, Toronto, Ontario M5C 2W7, FAX (416) 863-0305, or to Money & Family Law, c/o Editorial Department, at the above address.

We acknowledge the financial support of the Government of Canada, through the Publications Assistance Program, (PAP), toward our mailing costs.

Publications mail Agreement #40065782