

## **Late-in-Life Marriages: Love, Heartbreak, and Family Law Matters**

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### **Hypothetical Fact Situation**<sup>2</sup>

Axle and Daisy Rose married in 2004. Both were in their sixties and they each one adult child (the "Children") from their previous marriages. Axle was bound by a court order to pay ongoing spousal support to his former wife. The divorce left Axle bitter and Daisy and Axle entered into a marriage contract prior to their 2004 nuptials. They each obtained independent legal advice. The contract stipulated that they would remain separate as to property and included a waiver of any claims to spousal support. After the wedding, each of Axle and Daisy executed a new Will that reflected the intent of the contract, so that the residue of each spouse's estate was to go to that spouse's own Child.

After a number of happy years together, Axle and Daisy visited their local bank's investment advisor as Axle had recently inherited a large sum of money. Unaware of any marriage contract, the investment manager recommended some lucrative GICs as joint investments, advising them that this would help avoid probate taxes due to the survivorship rights arising from the joint title. Axle and Daisy understood little of either the world of finance or law and followed the investment manager's advice, unaware of the conflict with their intention to keep their property separate. Joint bank accounts were also opened. A year or so later, one of their children alerted Axle and Daisy that the joint investment and joint bank accounts were inconsistent with their intentions as set out in the marriage contract. Upon inquiry, Axle and Daisy were advised by the bank investment advisor that they could not collapse the GICs prior to maturity, nor could they transfer them to Axle's name alone. Axle and Daisy retained a lawyer for advice. The lawyer, aware of the marriage contract's provisions regarding their intent to remain separate as to property, advised them to complete mutual Wills (the "Wills") in order to 'offset' the effect of the joint investments. The lawyer explained that, by 'pooling' their

assets, this would prevent only one side of the family from benefiting as a result of the survivorship provisions of the GICs and joint bank accounts, if one of them predeceased the other.

Under each Will, the testator left to the surviving spouse a life interest in the estate, with the residue of the estate to go to the Children equally following the death of the surviving spouse. However, the Wills did not contain express wording as to the irrevocability of the Wills.

In 2008, Axle and Daisy both began to show signs of memory loss and confusion. They had each granted a Power of Attorney for Property to Daisy's daughter, Cherry. Unfortunately, Cherry had a secret gambling habit and began withdrawing large amounts of money from their bank accounts. Axle's son, Pilot, suspected "something was up" when Cherry also started selling off household items. Cherry claimed the money and items were 'gifts' from her mother and step-father.

Unfortunately, accusations by Pilot against Cherry resulted in vicious family disputes in which Axle and Daisy became embroiled and, in late 2008, Axle and Daisy separated. In 2009, Daisy was diagnosed with severe Alzheimer's, deemed incapable to manage her affairs, and admitted to a long-term care facility. Axle continued to reside in the family home, although under the care of a young nursing assistant, Trixie. In 2010, Axle changed his Will to exclude both Daisy and Cherry, leaving his estate in equal portions to Trixie and Pilot. Daisy's Will remained unchanged.

### General Comments on Late-in-life Marriages

Due in part to medical advances and better nutrition, life expectancy in Canada has advanced to 80.4 years, whereas in 1991 it was 77.8 years.<sup>3</sup> By the year 2050, an estimated 2 billion people around the world will be older than 60 years of age.<sup>4</sup> In Canada, this has resulted in a 12% increase in persons over the age of 65 between the years 2001 and 2006.<sup>5</sup> Late-in-life marriages, as between couples who marry when they are over the age of 60, are a growing trend in Canadian society.<sup>6</sup> This raises unique concerns of which late-in-life couples ought to be specifically aware, such as:

- ongoing support obligations from previous marriages;
- the capacity to marry and testamentary capacity;
- predatory marriages by often younger partners or care-givers;
- debilitating illness and personal care needs;
- adult children feuding over potential legacies from the parents' estate; and
- misuse of Powers of Attorney by family members.<sup>7</sup>

Axle and Daisy's rapid decline in mental capacity are, sadly, not unusual for older couples and make them vulnerable to predatory behaviour. It is helpful to review some of the issues presented in the above fact scenario in order to address some issues which are emerging in both family, estate and elder care law.

#### Previous Marriages and Prior Obligations

Axle has obligations, pursuant to a court order, to provide spousal support for his former wife. Section 34(4) of the Ontario *Family Law Act* (the "*FLA*") provides that a support order "binds the estate of the person having the support obligation unless the order provides otherwise" and acts as a first charge on the estate.<sup>8</sup> A similar provision exists in the Alberta *Family Law Act*.<sup>9</sup> Often the estate will fulfill and release its obligation by payment of a lump sum amount, with consent of the surviving spouse.

However, in *Schwartz Estate v. Schwartz*, the court held that a spousal support order made under the *Divorce Act* ("*DA*") did not bind the payor's estate *unless specifically so provided in the order*, even where the order provides for support for an 'indefinite period'.<sup>10</sup> Therefore, the wording of the court order, and the Act under which the support was obtained, will be determinative of Axle's estate's obligations to continue paying support to the former wife.

However, the court order may limit how Axle may dispose of his assets during his lifetime. Non-dissipation orders may be attached to Axle's assets. Additionally, there could be court-ordered charges on Axle's property. Daisy should be aware of any court orders, separation agreements or other documents that may bind Axle's assets even if they intend to remain separate as to property as such provisions may affect Axle's

ability to financially contribute to their standard of living as a couple. Furthermore, if Axle's estate is bound by a previous support order, executing mutual Wills could result in Daisy's assets, should she predecease Axle, being partially or wholly dispersed to Axle's former wife instead of to the Children.

Additionally, the courts have held that spousal support obligations can be deducted from pension income, and in certain cases, even where pensions had been equalized; i.e. the 'double dipping' issue. In *Boston v. Boston*, the Supreme Court held that it was "generally unfair to allow the payee spouse to reap the benefit of the pension both as an asset and then again as a source of income".<sup>11</sup> However, Major J. also noted that some cases warranted such double recovery.

"Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal."<sup>12</sup>

Therefore, where a former spouse is in need, an individual in a second marriage with prior support obligations may be obligated to maintain the support for the previous dependent spouse after the payor retires. The second wife, here Daisy, should be aware of this as this may affect what Axle can contribute to the household expenses during the marriage, even when Axle is living solely off his pension income.

In *Meiklejohn v. Meiklejohn*, the Ontario Court of Appeal allowed for double recovery by continuing spousal support payment obligations out of a husband's pension payments due in part to the need of the first wife and the fact that the pension was not fully equalized.<sup>13</sup> Although the support award was reduced, the court ordered that the payment obligation would be indexed annually to the cost of living as the pension was itself fully indexed.<sup>14</sup>

It is interesting to note, however, that a payor of spousal support is not necessarily required to encroach on his capital from *property excluded from net family property calculations*, as defined under section 4(2) of the *FLA*.<sup>15</sup> In *Shepley v. Shepley*, the court held that a payor husband was not required to draw upon the capital of an

inheritance, excluded under the *FLA* from his net family property calculation, to meet spousal support obligations.<sup>16</sup> The husband was living on a modest pension but had a significant inheritance from his parents. Although the former wife was in financial need, the court found it did not have jurisdiction to order the husband to deplete the inheritance for her support. Neither was he required to preserve the asset's capital:

"To conclude that Mrs. Shepley is entitled to an order for support that would require her retired former spouse to continue to deplete his inherited assets, I would have to interpret the *Divorce Act* to mean that property itself can be shared as a means of providing support. As I have already said, I do not believe that there exists any jurisdiction under the *Divorce Act* to justify that interpretation...

**It would be unjust, and, indeed, unconstitutional to share as "support" that which the law has exempted from sharing as property.** In other facts and circumstances, where, say, exempt property is intact and generating income — for example, rental property or a family business — the result may well be different.

In all the circumstances, **I find that Mr. Shepley had no obligation in law to preserve his exempt property, or to maximize his future income, to ensure an ongoing spousal support obligation.**<sup>17</sup> (Emphasis added)

Therefore, Axle's inheritance should be exempt from his obligations to pay spousal support to his former wife.

Finally, as Axle has been married before, the marriage contract between Axle and Daisy ought to ensure that any spousal support obligations that exist to his first wife are acknowledged and accounted for. Daisy will also wish to have the contract affirm that she does not bear any support obligations to the first wife and cannot be held liable for Axle's obligations.

### Intentions to Remain Separate as to Property

When couples marry late-in-life, a primary concern centres around the protection of each spouse's estate. It is therefore not usual, as in the case of Axle and Daisy, for an older couple embarking on a second marriage to enter into a marriage contract in which the spouses agree they will remain separate as to property. This provision allows for each spouse to deal with their assets, and after their death, their estate, subject to any charge that binds the estate, as they deem fit. This is often the case where the elderly spouses are financially independent of each other and prefer to bequeath their

individual estates to their children or grandchildren, particularly where there are children from a previous marriage.

Indeed, this is also true of waivers of spousal support claims in marriage contracts. Spousal support obligations can deplete the value of an elderly parent's estate. Where both spouses are financially independent, it is advisable to include spousal support waivers in marriage contracts. It must be borne in mind, however, that a spouse may challenge the contract under both the *FLA* and the *DA*. Marriage contract provisions pertaining to spousal support may be set aside where the support provision under the contract is found to be unconscionable, or if the support recipient is receiving public support (ex. welfare), or where the payor has defaulted in payment.<sup>18</sup> The *Divorce Act* contains a similar provision.<sup>19</sup>

Where elderly spouses have failed to protect their estates through a Will, "adult children who have no right of inheritance ... will find themselves sharing the remainder of a parent's estate equally with a new step-parent, after that step-parent takes the first \$200,000 of net value of the estate" as their preferential share under section 46 of the *Succession Law Reform Act* (the "*SLRA*").<sup>20</sup>

Marriage contracts are a vital part of a spouse's estate planning, as Ontario law allows a surviving spouse to elect for Net Family Property ("NFP") equalization under section 5 of the *FLA* instead of the provisions made in the deceased spouse's Will.<sup>21</sup> Marriage contracts are legally permissible under both the *DA* and the Ontario *FLA*. The *FLA* expressly allows marriage contracts to replace *FLA* provisions on the equalization of property.<sup>22</sup> Many contracts contain provisions wherein each spouse waives their rights to any interests or claims in the other's estate. However, it is not sufficient to say that parties will be "separate as to property" under Ontario law.<sup>23</sup> To meet the requirement, it is common to include a provision that states that property will be divided according to ownership only, where ownership is defined to mean whoever holds title to that asset.<sup>24</sup> Marriage contracts often also include provisions which release all claims to constructive trusts in the other's property.

This was the intent of the marriage contract as between Axle and Daisy. They wanted to maintain separate property such that they could bequeath their estates to their

respective Children. This would not prevent them from making a gift to the other in a Will, but would preclude the other from taking from the deceased's estate anything other than that provided for in the deceased spouse's Will.

Assuming the validity of the marriage contract, all should have turned out well for the Roses. However, the purchase of the joint GICs and joint bank accounts clearly went against the intent and spirit of the marriage contract. The bank's investment advisor was not made aware of the provisions of the marriage contract, and Axle and Daisy were too naive regarding such affairs to be alert to the problems the joint investments would create. Lawyers should advise clients that merging assets after the execution of a marriage contract which provides for separate property ownership can result in complex legal and financial issues down the road.

The problems centre around the non-severability of the GICs. Because the title to the GICs was registered in Axle and Daisy's names as jointly with right of survivorship, on the first of Axle and Daisy to die, the surviving spouse would receive the entirety of the joint asset, free and clear of any obligations to the deceased's estate. In the Rose's case, the GIC investments were funded by Axle's inheritance after his marriage to Daisy. Section 4(2) of the *FLA* excludes such inheritances, and any substituted traceable property, from a spouse's NFP calculation, which would have meant that Axle would not have been required to divide this asset with Daisy.<sup>25</sup> Additionally, the marriage contract would have protected Axle's inheritance from devolving to Daisy. The joint GICs, however, now give Daisy an interest in this asset, contrary to the intentions of the parties. This, in itself, creates another problem for the parties. The survivorship rights in the joint GICs and bank accounts would mean that the surviving spouse's child would inherit the full amount of the joint assets to the exclusion of the deceased spouse's child; also completely contrary to the parties' intentions.

The situation was compounded when the couple retained the lawyer for advice. The lawyer advised that, as the GICs could not be severed, mutual Wills should be drafted in order to 'offset' the joint investments. The idea was, that by pooling their assets and then leaving their estates to each other with the residue to be divided equally between the Children, the couple would prevent a scenario wherein one child would inherit more

than the other. Note, however, that the joint bank accounts could be dissolved during Axle and Daisy's lifetime and this issue could have been easily rectified.

However, the lawyer's advice about the mutual Wills was problematic. The very creation of the 'mutual' Wills only served to further undermine the intention of the parties to remain separate as to property. Additionally, as Axle's net worth, inclusive of the inheritance, was likely more than Daisy's prior to the merging of their assets, this would result in an unintended windfall inheritance for Daisy and, ultimately, Cherry (Daisy's daughter) when Daisy passes away. Finally, as discussed below, the Wills were not properly drafted and executed as mutual Wills as they lacked an express irrevocability clause, which created further problems for the Roses in terms of enforceability (see discussion below).

An alternate solution to the 'mutual Wills' could have involved amending or redrafting the marriage contract to effectively deal with the joint GICs. However, a better solution would be to execute a Deed of Trust in which Daisy acknowledges that she holds her interests in the GICs in trust for Axle. Daisy would retain her legal title in the GICs as a joint owner, but beneficial title in her half of the investments would vest to Axle by the Deed of Trust. This would allow Axle to retain the value of his asset and prevent unintended legacies out of his estate.

It is also interesting to note that case law has supported the principle of a resulting trust where one party has acquired joint title in another's joint account. In *Robertson v. Hayton*, the court commented:

"When a person transfers his own money into his own name jointly, with that of another person, there is *prima facie* a resulting trust for the transferor. This is a presumption of law, which is rebuttable by oral or written evidence or other circumstances tending to show that there was in fact, an intention of giving beneficially to the transferee..."<sup>26</sup>

Therefore, there was already a presumption of a resulting trust in favour of Axle in the GICs. A Deed of Trust would help to further clarify for the parties the proper ownership of the assets.

## The Adult Child as POA and Family Feuds

Granting a Power of Attorney for Property is a serious affair and the decision as to who should be appointed as the attorney should be vetted carefully. Tragically, parents who make 'emotional' decisions as to whom to name as attorney can lead to disastrous results. It is not uncommon for parents to name an adult child as his or her attorney, as it is often assumed that the child will know the living standard and preferences of the parents and will have the parents' best interests at heart. This is not always the case, however, and can result in deep divisions within the family unit as well as expensive litigation to force a passing of accounts where the adult child attorney has misused the parents' assets, usually for their own gain.

In *Campbell v. Evert*, the court ordered the removal of an adult son as his mother's attorney for property and ordered a passing of accounts as the son had used his mother's assets to, *inter alia*, buy himself a motorcycle and loan money out to friends.<sup>27</sup> The son's sense of entitlement to help himself to his mother's account was noted by the court by, for example, the son's testimony as to why he used his mother's account to pay for his gas to go to his cottage:

"Because she's got my time at home. I mean normally I would be living at the cottage. She was very fortunate to have my time. There's not too many sons that would do that."<sup>28</sup>

The situation in *Campbell* resulted in such a bitter family feud that the court declined to name the sister as the replacement attorney for property due to ill will between the siblings.<sup>29</sup>

In *Penny v. Bolen*, an 85 year-old mother had granted Powers of Attorney over her property to three of her five children who subsequently made large expenditures with her money, transferred funds, made withdrawals and refused to account for their spending.<sup>30</sup> The mother became concerned about what was happening to her assets and revoked the Powers of Attorney, naming her brother instead. The children arranged for a capacity assessment at which the mother was deemed incapable of managing her property. The mother then arranged for a *second* assessment which came to the

opposite conclusion. The mother once again arranged to execute a new Will and new Powers of Attorney including a new Continuing Power of Attorney for Property.

However, the mother's frustrations with the children did not end there. The children then applied for an order requiring their mother to submit for a *further* capacity assessment. The court denied the children's request, upheld the second capacity assessment finding the mother capable and ordered a passing of accounts. The court preferred the second assessment as it was corroborated with other witness testimony.<sup>31</sup> The *Penny* case demonstrates the difficulties that can be visited upon a parent where their adult children attorneys for property have "dipped their hands into the cookie jar" or fail to respect the wishes of the parent and where a parent can no longer trust a child to act in their best interests.

A shocking, but not uncommon, case is found in *Robertson v. Hayton, supra*.<sup>32</sup> The case bears some resemblance to that of Axle and Daisy. In *Robertson*, a daughter had been granted Power of Attorney by her parents. The daughter then transferred sums of \$6,000 and \$79,500 from the parents' joint accounts into her own account. The daughter later claimed they were gifts. The court held that the daughter had failed to meet the strict test to prove the intention of a gift and noted that, as the parents were mentally incapable at the time of the transfers, the father was incapable of forming the intention to make a gift and that the daughter was required, under section 14 of the *Ontario Evidence Act*, to corroborate her evidence that the father wanted her to have the money.<sup>33</sup> The court held the daughter had failed to corroborate her evidence, removed her as attorney for property and required her to account for the money.

Cherry will be held to a similar standard. It will be unlikely that Cherry can meet the test of an intention to make a gift, which requires: an intention to donate, acceptance of the gift and a sufficient act of delivery. If Axle and Daisy had been found incapable at the time of the transfers, they would have been incapable to form the intent to gift the money. If, however, they were capable at the time, Cherry would still have to corroborate her evidence that they intended such a gift as they are both incapable *now*.

Cherry will have to account, as attorney for property, for the money transfers and the removal and sale of the household items. Her position as attorney for property will have

to be revoked. Given the acrimonious feelings between Cherry and Pilot, it would be advisable to have the Public Guardian and Trustee act as guardian of property for Axle and Daisy, rather than name Pilot.

Although not all adult children are as unscrupulous as Cherry and other examples found in the case law, elderly parents must bear in mind the risks inherent with passing such power and control into the hands of adult children. Despite a parent's love of, and trust in, their child, the appointment of a child as the attorney for property must be vetted carefully, and serious and objective reflection on a child's past spending habits, debt obligations, and previous judgment decisions is advisable. Parents must also be aware of the unpleasant truth that, even where an adult child acts under a Power of Attorney in the best interest of the parents and carefully manages the assets, other family members may 'judge from the sidelines' and create tensions and jealousies in the family dynamic.

A final point of interest on guardians for parents of late-in-life marriages is worth noting. The standard as to the capacity to marry is relatively low. In the seminal case of *Banton v. Banton*, the court held that an elderly person could be incapable of making a Will (testamentary incapacity) but still capable of consenting to marriage.<sup>34</sup> Even where an elderly person is incapable as to managing property, they can still consent to marriage.<sup>35</sup> An adult child guardian may wish to protect the interests of a parent who marries late-in-life by executing a marriage contract on the parent's behalf. However, one must take careful note that, pursuant, to section 55(3) of the *FLA*, a domestic contract entered into by a guardian on behalf of an incapable person *must be approved by the court in advance* in order to be enforceable. In the case of *Parker v. Atkinson*, a guardian daughter entered into a domestic contract on behalf of her incapable father but failed to obtain the court's approval of the contract.<sup>36</sup> When her father died, the Public Guardian and Trustee, acting on behalf of the now incapable step-mother, took the position that the domestic contract was invalid due to the daughter's failure to have the contract approved. The daughter then applied to have the contract approved *nunc pro tunc*, but the court found it was too late and dismissed the motion.

"The legislature's express use of the word "prior" in s. 55(3) of the *Family Law Act* was used purposefully, particularly when it is considered in contrast to the wording of section 55(2). To approve this marriage contract now, in my view, would be contrary to the plain meaning of the legislation."<sup>37</sup>

Therefore, care must be taken by any guardian seeking to protect an elderly parent's assets through a domestic contract that *prior approval of the court* is obtained or run the risk that the contract will be invalid.

Counsel advising on these issues should be familiar with these provisions in order to ensure that the assets are properly protected and to prevent heartbreak and family feuds down the road.

### The Separation

Typically, a separation with no reasonable prospect of reconciliation would result in an equalization of the former spouses' net family properties, pursuant to section 5 of the *FLA* and could invoke applications for spousal and/or child support under Part III of the *FLA*.<sup>38</sup> However, a valid marriage contract or separation agreement allows parties to contract out of most support obligations and property equalization.

Axle and Daisy's marriage contract waived claims to spousal support and provided that the parties were to remain separate as to property. Although some assets were held in joint accounts, all other individually held assets would be divided according to ownership, pursuant to the contract.

Separation would not terminate the joint ownership in the GICs, nor would separation revoke the Wills. Therefore, after separation, the Wills would still be in effect and Daisy and Axle would retain their beneficiary interests in the other's Will.

However, any subsequent divorce would revoke the Wills. Section 17(2) of the *SLRA* provides:

"17. (2) Except when a contrary intention appears by the will, where, after the testator makes a will, his or her marriage is terminated by a judgment absolute of divorce or is declared a nullity,

- (a) a devise or bequest of a beneficial interest in property to his or her former spouse;
- (b) an appointment of his or her former spouse as executor or trustee; and
- (c) the conferring of a general or special power of appointment on his or her former spouse,

are revoked and the will shall be construed as if the former spouse had predeceased the testator."<sup>39</sup>

There has been some confusion as to what is meant by the term 'property' under this provision and whether the term is distinct from 'residue'. This issue, and the issue of revocation of a Will after divorce, was addressed in the case of *Re Billard*.<sup>40</sup> The case involved a couple who had divorced, but prior to which divorce the husband had executed a Will in which he devised "10% of the residue of my estate" to his former wife for her use, absolutely.<sup>41</sup> When the husband subsequently died, the executor applied for directions as to the gift to the former wife under the Will. The court held that the devise to the wife was a nullity, pursuant to s. 17(2) of the *SLRA*, due to the fact that the divorce was granted after the execution of the Will.<sup>42</sup> The court further held that, although the Will was made after the separation and the husband had not changed the Will after the divorce was granted, did not constitute a "contrary intention" as under s. 17(2), which intention must be clearly indicated *by the Will itself*.<sup>43</sup> Failure to provide a clear intention in the Will document, such as, for example, a provision which reads "notwithstanding any issuance of a certificate of divorce, I devise...", resulted in the nullity of the devise. It is interesting to note that in *Re Billard*, the court found that section 17(2) of the *SLRA* applied to the 'residue' of an estate and did not distinguish between residue and property.

In the recent case of *Re Roth Estate*, the Ontario court reasserted that divorce revokes a Will and that 'property' under s. 17(2) of the *SLRA* included the property of deceased, both real and personal, and *included spousal support payments* as bequests.<sup>44</sup> In *Re Roth*, a couple separated and the husband executed a Will which provided for spousal support for the wife's lifetime. The couple then entered a separation agreement, which provided for the same but also provided that, should the husband predecease the wife, the resultant income tax consequences may constitute a material change in circumstances under the agreement. The couple later divorced and the husband died.

The husband's estate applied to reduce spousal support under the separation agreement to reflect the income tax consequences of the husband's death on the spousal support payments as a material change in circumstances. The estate also argued that only the separation agreement was in effect as the Will was revoked upon

the divorce. The wife, however, argued that the Will was not revoked as the spousal support payments were not 'property' as under the *SLRA* provision and therefore s. 17(2) did not apply. Further, the wife argued that wording in the Will itself created a 'contrary intention' as required for exemption from s. 17(2).

The court rejected the wife's arguments, and held that the spousal support payments were bequests, and property, under s. 17(2) of the *SLRA* and that the provision therefore applied with the result that the spousal support provisions of the Will were revoked upon the couple's divorce.<sup>45</sup> The court also found no contrary intention in the wording of the Will.<sup>46</sup>

Therefore, Axle and Daisy's Wills remained in effect after the separation, until such time that they are revoked by either remarriage, divorce or any other act of revocation. It is advisable to alert clients to the fact that Wills are revoked upon divorce, but not separation. Separation agreements should contain provisions in which parties are to reflect the terms of the agreement in their respective Wills, and be worded with the clear intention that the Wills would survive the issuance of a divorce certificate.

### Mutual Wills, Enforceability, and Challenging Wills

Were Axle and Daisy's Wills *mutual Wills* under the law? The short answer is in the negative. However, the issue remains somewhat unsettled in the case law and can turn on the facts.

Mutual Wills are a common law doctrine which is described as follows:

"Where two persons make an arrangement as to the disposal of their property and execute mutual wills in pursuance thereof, **the one who predeceases the other without having departed from the arrangement has performed his part of the bargain and dies with the implied promise of the survivor that it shall hold good.** Usually the parties give each other a life interest with remainders over to the same person but they may give each other an absolute interest with a substitutional gift in the event of the other's prior death...

**Once one of the parties dies, the arrangement becomes irrevocable**, at least if the survivor accepts the benefits conferred on him by the other's will. Until the first death, either may withdraw from the arrangement; and any material alteration by one party of his will without the agreement of the other party will prevent it from being binding...."<sup>47</sup> (Emphasis added)

In *Edell v. Sitzer*, the court held that for the mutual Wills doctrine to apply, and hence to enforce the mutual Wills, "the agreement must satisfy the requirements for a binding contract and not be "just some loose understanding or sense of moral obligation"" and there must be included a clear "agreement not to revoke the Wills" (Emphasis added).<sup>48</sup>

Mutual Wills are enforced by imposing a constructive trust on the breaching party's property:

"Where the requirements for the application of the doctrine are satisfied, the survivor will not be permitted to defeat the agreement by revoking his or her will after the death of the other. This result is achieved by the imposition of a constructive trust on the survivor's estate for the benefit of those who were intended to benefit under the agreement."<sup>49</sup>

In *Edell*, a husband and wife made Wills in which they gave each other life interests, with the residue of their estates to be divided equally between the two children. After the wife died, the husband changed his Will in which he left his property to his son, excluding his daughter with whom he had a difficult relationship. The daughter sought to invoke the doctrine of mutual Wills in order to have her father's property held in trust for her. The court rejected her claim and found that, without the required non-revocation clause, the Wills were not 'mutual Wills' and the husband's new Will was upheld, excluding the daughter.<sup>50</sup>

The *Edell* case was followed recently in *Cassin v Cassin*.<sup>51</sup> In *Cassin*, a husband and wife each made Wills in which they left their estates to each other and, in the event that one should pre-decease the other, the estates would be divided equally among their three children. One of the adult children had been estranged for many years and did not attend his father's funeral. His mother was so upset by his failure to attend that she changed her Will so that her estate was to be divided with one third each to the other two children, relegating the estranged son to share the final third with the grandchildren. The estranged son claimed the original Wills were mutual Wills and that his mother's new Will, reducing his legacy from one third to one ninth, was a breach of the mutual Wills doctrine. The court rejected his claim, applied the *Edell* requirements in establishing mutual Wills, and found that the estranged son had failed to prove that there had been any agreement as between the testators not to revoke their Wills; hence they were only 'similar', not mutual, Wills.<sup>52</sup> The *Edell* decision stands for a clear,

unambiguous non-revocation statement in the Wills in order to warrant the remedy of a constructive trust.

Mutual Wills can be revoked *during the lifetimes* of the parties by: a clear joint consent between the parties to revoke the mutual Wills; unilateral revocation of one of the mutual Wills with notice to the other party; by marriage; and by clear conduct by the parties that is inconsistent with the agreement not to revoke the Wills.<sup>53</sup> Remarriage revoked mutual Wills in *Brynelson Estate v. Verdeck*.<sup>54</sup> And where a wife *was aware* that her husband had changed his Will, thereby revoking his mutual Will, the court held that she was barred from later enforcing the mutual Will.<sup>55</sup>

Therefore, in order for mutual Wills to be established, and enforced by way of a constructive trust, clear language in the Will as to the intention to create mutual Wills and as to the agreement between the parties *not to revoke the Wills* is essential in drafting mutual Wills. A nice example of clear drafting of such Wills appears in a recent Alberta case of *Powell v. Glover*.<sup>56</sup> The court in that case found the wording of the mutual Wills to be clear and unambiguous, as follows:

"Whereas my wife and I have, each with the other covenant and agreed to execute Wills of an even date in consideration of our agreement that each of us has an equitable interest in the estate of the other; and that accordingly, our respective Wills shall not hereafter be revoked or altered either during our joint lives or by the survivor of us after the death of one of us. Now relying on such an agreement, I give, devise and bequeath all my property of every nature and kind and wheresoever situate, including any property over which I may have a general power of appointment, to my said trustee upon the following trusts,..."<sup>57</sup>

In *Powell*, the court held that, while the surviving wife could use the assets during her lifetime for her needs, she could not dispose of the assets in order to defeat the trust.<sup>58</sup> However, *Powell* distinguished itself from the Ontario case of *Re Ohorondnyk*, in which the court held that the surviving wife was free to dispose of the property, as the mutual Wills in that case had provided that each spouse was to take the other's estate absolutely.<sup>59</sup> In *Powell*, the court held that the wording of the Wills in that case created an *equitable interest* in the other's estate (see above quote); hence the restraint in disposition of the estate in that case.<sup>60</sup>

It would appear, therefore, that Axle and Daisy, in failing to include a non-revocation clause in their mutual Wills, had effectively created 'similar' Wills, not mutual Wills enforceable by constructive trust. However, the recent Ontario decision in *Hall v. McLaughlin Estate* has revisited the requirement for clear statements of non-revocability as set out in *Edell, supra*, where the intention of the parties to make such an agreement could be clearly established by corroborated evidence.<sup>61</sup>

The *Hall* case is similar to the facts at hand. In *Hall*, the court was asked to determine whether or not mutual Wills had been created by a husband and wife, both now deceased. The Wills provided that the survivor would leave their estate to the adult children of both marriages, but failed to include a non-revocation clause. This had been the second marriage for both spouses, each with children from their previous marriages. Prior to her death, the wife had suffered from Alzheimer's. After the wife lost testamentary capacity due to dementia, the husband changed his Will, leaving the entirety of his estate to his family, excluding the wife's daughters. The wife then died and her estate went to the husband, according to her Will. After the death of the husband, the wife's daughters claimed that their mother and step-father had intended to make mutual Wills and that the husband was bound by his former, mutual Will. The husband's family claimed the Wills were only identical and not mutual, and that the new Will was valid.

The court recognized that the Wills failed to include a non-revocation clause, but allowed for evidence from the children as to the parents' relationship and intentions. The court accepted evidence that the husband and wife had intended to benefit the children equally, and that the husband had likely only changed his Will in order to protect the wife's estate or provide for an *inter vivos* gift to the daughters after their mother, then incapable, passed away.<sup>62</sup> The court held the original Wills had been mutual Wills, despite the lack of a clearly stated non-revocability agreement:

"Was there an agreement not to revoke the 1992 wills and not to make new ones? There is no behaviour on Emily's part to suggest any different agreement. **On Johnnie's part, apart from drawing new wills, his behaviour is equally consistent while Emily had testamentary capacity. However, even his two subsequent wills refer to Emily's 1992 will, suggesting he felt bound to protect Emily's estate for her children. These subsequent wills corroborate the existence of an agreement.** Johnnie was not prohibited from making a new will; he was,

however unable to execute a new will that did not adhere to the agreed upon scheme."<sup>63</sup>  
(Emphasis added)

Of further significance, the court held that the mutual Wills became enforceable upon the *testamentary incapacity of the wife due to her dementia*, calling her incapacity a 'legal death' which precluded any further changes to the Wills as the wife could no longer consent to any revocation or understand any such notice. A constructive trust was imposed on one half of the husband's estate.

"Emily's progressive dementia is significant legally. Once she lost testamentary capacity, she would not have been able to change her will. Nor would she have been able to consent to Johnnie changing his will. **It was as if Emily's dementia constituted a legal death, for testamentary purposes. I conclude that she would have probably been unaware of Johnnie making new wills and would, in any event, have lacked the capacity to consent to these changes or to revise her own will.**

**Once Emily irretrievably lost her testamentary capacity, she had performed her part of the bargain with Johnnie, as reflected in their 1992 wills.** Her consideration for the agreement was that Johnnie would inherit her estate. Within the year of her death, he did so. **Upon her incapacity, she could no longer withdraw from the agreement.** She could not have made a new will, benefiting her children.<sup>64</sup> (Emphasis added)

The *Hall* case is applicable to the situation of Axle and Daisy. Although the case law has clearly held that non-revocability needs to be clearly established in mutual Wills, the *Hall* decision now allows for corroborated evidence that parties intended to create mutual Wills. Corroboration of a party's evidence is required in an action by or against heirs of a deceased person or an action by or against an incapable person.<sup>65</sup> The testimony of the lawyer who drafted the Wills may suffice to corroborate Cherry or Pilot's evidence that Daisy and Axle intended to create mutual, binding, Wills. If the court accepts the evidence that Axle and Daisy's lawyer specifically advised them to create mutual Wills and that that was their intent, the Wills could become enforceable under the mutual Wills doctrine. The result would be that, subject to legal revocation, Axle's new Will would be invalid and a constructive trust could be imposed on one half of Axle's estate.

It is also noteworthy that Daisy was mentally incapable at the time that Axle executed a new Will. As in *Hall*, losing testamentary capacity *triggered Daisy's reliance on the agreement*. Axle became bound by the mutual Wills at the instance that Daisy could no longer consent to any revocation. Therefore, *if the Wills are found by the court to be*

*mutual as they were in Hall*, Axle's new Will, leaving his estate to Trixie and Pilot, is invalid and the mutual Wills are enforceable.

As the case law suggests, mutual Wills can be problematic. This is especially true in situations where the parties have separated, as it remains unclear as to whether the mutual Wills truly continue to reflect the testators' respective intentions. Where mutual Wills are used, extreme caution should be used in the wording of the provisions, with clear statements as to non-revocability and the intentions of the parties. Parties should be advised of the effect of testamentary incapacity on mutual Wills and that thought should be given to the possibility of a future separation. Separated couples who wish to revoke mutual Wills are required to give the other party notice.

Failure to properly draft Wills and codicils can result in expensive litigation for the estate and potential beneficiaries. It was once common for costs in estate litigation to be taken from the estate, even for an unsuccessful party, barring frivolous litigation. However, the 'modern' approach to costs awards is quite different. The seminal case on the modern principles of costs awards in estate litigation is found in the 2005 Ontario Court of Appeal case, *McDougald Estate v. Gooderham*.<sup>66</sup>

"Gone are the days when the costs of all parties are so routinely ordered payable out of the estate that people perceive there is nothing to be lost in pursuing estate litigation....

The modern approach to fixing costs in estate litigation is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations set out above applies, to follow the costs rules that apply in civil litigation."<sup>67</sup>

In 2009, in *Salter v. Salter Estate*, the court made an interesting and relevant comment on costs in a contentious estate matter:

"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.... **Parties cannot treat the assets of an estate as a kind of ATM bank machine** from which withdrawals automatically flow to fund their litigation....**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."<sup>68</sup> (Emphasis added)

Therefore, families that are left to challenge poorly drafted Wills may be faced with prohibitive legal expenses, resulting in bequests that were never the intentions of the deceased testators. Such litigation can often tear families apart. If Cherry were to

challenge the validity of Axle's new Will, she may not be able to count on the estate to cover her costs and may find such litigation too expensive. This may also be true for Pilot, who may wish to challenge the devises and legacies to Trixie under Axle's new Will.

### Predatory Marriages and Capacity Issues

The relationship between Axle and his much younger caregiver, Trixie, is not uncommon among the elderly and, as people generally live longer, can be expected to occur more often. However, there are vulnerabilities associated with late-in-life relationships and the opportunity for abuse is ever-present, especially where the elder partner is reliant on the other for personal health care.

"Many who require others to care for them become highly susceptible to undue influence. Because of their state of need, they idealize and fail to criticize. This alone may account for the inclination to favour the latest caregivers, or the providers of terminal care. Memory impairment exaggerates this inclination. Undue influence is not just a function of the perpetrator's force but is also a product of the mentally weakened position of the old and impaired."<sup>69</sup>

The elderly can become highly susceptible to undue influence, coercion, lapses in judgment and memory. Axle's increasing confusion and memory loss, combined with his dependency on Trixie, makes him highly vulnerable to Trixie's influence. In some cases, an opportunistic caregiver convinces the elderly victim to marry them and becomes the guardian of their property.

The seminal case of *Banton, supra* illustrates the dangers of falling prey to what is referred to as "predatory marriages".<sup>70</sup> In that case, an 88 year-old widower testator was terminally ill and living in a nursing home. At the time, his Will provided that his estate be shared among his adult children. While at the nursing home, he began a relationship with a 31 year-old waitress working at the nursing home restaurant. The waitress's influence on the testator grew rapidly and soon the couple began withdrawing money from the testator's account. The testator's children became alarmed and transferred his assets into a trust fund after an assessment found the testator to be incapable as to property. Two days later, the testator and the waitress secretly married and then attended at a lawyer's office to change his Will in her favour, excluding the children, and

to appoint the waitress/wife as attorney for property. When the testator died, the children challenged both the testator's testamentary capacity and capacity to marry.

The landmark decision in *Banton* held that the testator did not have testamentary capacity to form the new Will in favour of the new wife, but *did have the requisite capacity to marry*.<sup>71</sup> While the standard for testamentary capacity is high, the standard for capacity to marry is relatively low. Therefore, it may be difficult to void a marriage even where the circumstances are suspicious, as in *Banton*. The new Will was declared invalid due to lack of testamentary capacity and undue influence by the new wife. However, as the marriage *was valid*, it revoked the previous Will in favour of the children, resulting in the testator dying intestate.<sup>72</sup> The court held that a capacity to marry and testamentary capacity were different types of capacity.

"A finding of a lack of testamentary capacity does not necessarily determine whether an individual has the mental capacity to marry; nor is testamentary capacity at the time of marriage required before the marriage will revoke a will..."<sup>73</sup>

The court also held that a person, while incapable as to property, could still marry, while incapacity as to *both* property *and* personal care may render a person incapable to marry:

"While I believe that it may well be the case that a person who is incapable both with respect to personal care and with respect to property may be incapable of contracting marriage, I do not believe that incapacity of the latter kind should, by itself, have this effect. Marriage does, of course, have an effect on property rights and obligations, but to treat the ability to manage property as essential to the relationship would, I believe, be to attribute inordinate weight to the proprietary aspects of marriage and would be unfortunate. Elderly married couples whose property is administered for them under a continuing power of attorney, or by a statutory guardian, may continue to live comfortably together. They may have capacity to make wills and give powers of attorney. I see no reason why this state of affairs should be confined to those who married before incapacity to manage property supervened."<sup>74</sup>

However, in *Re Sung Estate*, the court held that a marriage between a recently widowed, grieving terminally ill 70 year-old man and his much younger caregiver was void *ab initio* where the court found the man did not have the capacity to marry, was unduly influenced into marriage under duress and threats.<sup>75</sup> The couple had married secretly without executing a prenuptial agreement which the man was led to believe was in force. The man was highly dependent on the caregiver for his physical and

medical care and she had threatened to abandon him if he did not marry her. She also immediately made large withdrawals from his accounts.

"...Feng pressured Sung into marrying her by telling him that she would abandon him and not take care of him. Given Sung's frail health and the fact that he was dying, Sung did not have either the physical or mental strength to resist this and tell his children what Feng was doing. Further, Feng's rapacious behaviour and utter greed, caused her to literally drain Sung's bank account without both before his death and shortly thereafter.

I am satisfied on the evidence before me that the marriage of Sung and Feng was void *ab initio*. **Each case turns on its facts, when it comes to marriages of the infirm, the elderly and the vulnerable.** Sung, although only 70 years of age, was both infirm and vulnerable and Feng knew this."<sup>76</sup> (Emphasis added)

In *Barrett Estate v. Dexter*, the Alberta court annulled a marriage between a 93 year-old man and his unscrupulous 54 year-old housekeeper, finding that the man's lack of capacity with respect to both property *and* personal care were enough to void the marriage.<sup>77</sup>

Pilot should be alert to his father's relationship with Trixie and consider a capacity assessment of his father. If Pilot can be named a guardian for his father due to incapacity, he may at least be able to ensure a marriage contract is executed on behalf of his father, subject to the court's approval under section 55 of the *FLA*, if he cannot actually prevent a marriage between Axle and Trixie and be able to better protect Axle's assets.

It is interesting to note that the Ontario *Substitute Decisions Act*, at sections 24(2), 46(3) and 57(2), expressly prohibit the naming of health caregivers as Powers of Attorneys for property or personal care unless the attorney appointed is a spouse, partner or relative.<sup>78</sup> Saskatchewan has a similar provision prohibiting the naming of health caregivers as attorneys where they receive remuneration.<sup>79</sup> However, other provinces do not have such provisions in their legislations, leaving open the possibility that unscrupulous caregivers can convince a vulnerable person in their charge to grant such powers.<sup>80</sup>

### Dependant Relief and Other Issues

The *SLRA* provides that a court may award support payments out of an estate to a surviving spouse in financial need, where the deceased has failed to make appropriate

provisions for the spouse.<sup>81</sup> This support provision of the *SLRA* overrides any provision in a marriage contract to the contrary.<sup>82</sup> Therefore, there is a question as to the enforceability of such provisions in marriage contracts, such as that between Axle and Daisy. Therefore, although many contracts provide that the waiver of all rights to support claims *include* any claims or rights under the *SLRA*, it is possible that such provisions can be attacked or set aside.<sup>83</sup>

If Axle's new Will is upheld, and Axle predeceases Daisy, Daisy may have a claim for spousal support notwithstanding the waiver in the marriage contract if she can establish need. It is important to note that applications for net family property equalization can also be brought within six years of separation, under the *FLA*, by either the former spouse *or their estate*.<sup>84</sup>

As Axle and Daisy approach their winter years, health care decisions will likely become necessary. Issues such as quality of life and end of life care decisions, for example by way of 'do not resuscitate' ("DNR") orders, become prominent. An appointed substitute decision maker, such as a POA for personal care, if granted the express authority, can make decisions as to consent for or against medical treatment.<sup>85</sup>

A power of attorney for personal care is a serious responsibility that carries with it a great deal of trust that the person will act in accordance with the incapable person's wishes and best interests. In *Sly v. Curran*, a man named his wife from his second marriage as his attorney for personal care prior to being admitted to a nursing home.<sup>86</sup> The wife acted in accordance with her authority under the Power of Attorney and the evidence showed she was caring and attentive to him. However, the adult children from a previous marriage disagreed with her decisions and brought an application under sections 66 and 68 of the *Substitute Decisions Act* to restrain her actions. The court dismissed the application, stating that a person is free to choose their own attorney for personal care and upholding her authority to make decisions on her husband's behalf. The court then ordered the family to attend mandatory mediation to address the family conflict.

<sup>86</sup>As attorney, she has the authority to make decisions regarding Alfred's residential, medical, nutritional and safety issues. If it can be shown that she is not acting in accordance with the statutory principles governing decision-making, then the court will intervene. However, on the

evidence led, there is no basis to order directions for the relief sought and the application is dismissed."<sup>87</sup>

Care for elderly parents can be a contentious issue amongst family members. Appointing attorneys for personal care can be a delicate decision for parents of multiple of children. It is often advisable to have frank family discussions in which the parents inform all of the children of their preferences in terms of care decisions before granting a Power of Attorney for personal care in order to prevent unnecessary conflict and ill will among siblings in the future. This is particularly true where end of life decisions, as well as organ and tissue donation decisions, are involved. Difficult as such decisions can be, it would have behoved Axle and Daisy to have prepared Powers of Attorney for personal care, contingent on their becoming incapable, while they were still able to express their wishes and preferences.

### Conclusions

As late-in-life marriages become more common in Canadian society, the issues surrounding such relationships warrant special consideration. Not only are marital issues at play, but the vulnerabilities and challenges of elder care as well as the complexities of estate matters are also intertwined. Commitments and obligations from previous marriages further complicate the situation. Competent legal advice is required to ensure that financial and legal decisions are avoided where they might conflict with the parties' intentions. Mutual Wills should be drafted carefully and be reviewed upon any separation of the parties. Adult children must be alerted to the possibility of predatory relationships with their aging parents and to the means available to protect their parents' estates from unscrupulous persons. The more open the discussions within the family as to the wishes of the parents, the clearer the drafting of Wills and domestic contracts, the less opportunity there will be for bitter family conflict down the road.

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<sup>2</sup> The fact scenario in this paper depicts fictional characters.

<sup>3</sup> Kimberly Whaley *et al.*, *Capacity to Marry and the Estate Plan* (Canada Law Book, 2010) at p. 6.

<sup>4</sup> *Ibid.* at p. 5.

<sup>5</sup> *Ibid.* at p. 7.

<sup>6</sup> [Patty Randall, "Late-in-life marriages likely to increase from aging population", \*The Calgary Herald\*, online \(accessed May, 2010\).](#)

<sup>7</sup> It should be noted that this list is not exhaustive, nor are these issues entirely exclusive to late-in-life marriages.

<sup>8</sup> [Family Law Act, R.S.O. 1990, c. F.3 at s. 34\(4\) \(the "FLA"\).](#)

<sup>9</sup> See the Alberta [Family Law Act, S.A. 2003, c. F-4.5 at s. 80\(1\).](#)

<sup>10</sup> *Schwartz Estate v. Schwartz* (1998), 36 R.F.L. (4th) 110, 21 E.T.R. (2d) 9, [1998] O.J. No. 378 at para. 27 (O.C.J. (Gen. Div.)).

<sup>11</sup> *Boston v. Boston*, 2001 SCC 43, [2001] W.D.F.L. 459, 201 D.L.R. (4th) 1, 17 R.F.L. (5th) 4, [2001] 2 S.C.R. 413 at para. 63.

<sup>12</sup> *Ibid.* at para. 65.

<sup>13</sup> *Meiklejohn v. Meiklejohn* (2001), 19 R.F.L. (5th) 167, 150 O.A.C. 149, C.E.B. & P.G.R. 8395 (note), [2001] O.T.C. 323 (Ont. C.A.).

<sup>14</sup> *Ibid.* at para. 24.

<sup>15</sup> *FLA*, *supra* note 8 at s. 4(2).

<sup>16</sup> *Shepley v. Shepley*, [2006] W.D.F.L. 1140, [2006] W.D.F.L. 1260, 24 R.F.L. (6th) 422 (Ont. S.C.J.).

<sup>17</sup> *Ibid.* at paras. 69, 72 and 73.

<sup>18</sup> *FLA*, *supra* note 8 at s. 33(4).

<sup>19</sup> [Divorce Act, 1985 c. 3 \(2<sup>nd</sup> Supp.\) at S. 15.2\(4\).](#)

<sup>20</sup> Kimberly Whaley *et al.*, *supra* note 3 at p. 64 and see [Succession Law Reform Act, R.S.O. 1990, c. S.26 at s. 46 \["SLRA"\]](#).

<sup>21</sup> Karon C. Bales, *Living Happily Ever After: Marriage Contracts in Ontario*, Toronto, 2010 (London, England: International Bar Association, 15<sup>th</sup> Annual International Wealth Transfer Practice Conference, 2010) at p. 8 ("Karon C. Bales") and see *FLA*, *supra* note 8 at ss. 5(1) and 6(1).

<sup>22</sup> Karon C. Bales, *supra* note 21 at p. 8 and see *FLA*, *supra* note 8 at s. 52(1).

<sup>23</sup> James MacDonald and Ann Wilton, eds., *The 2009 Annotated Ontario Family Law Act* (Toronto: Thomson Carswell, 2009) at S. 52§3.1.

<sup>24</sup> Karon C. Bales, *supra* note 21 at p. 13.

<sup>25</sup> *FLA*, *supra* note 8 at s. 4(2).

<sup>26</sup> *Robertson v. Hayton* (2003), 2003 CarswellOnt 4457, 4 E.T.R. (3d) 115 at para. 32 (Ont. S.C.J.).

<sup>27</sup> *Campbell v. Evert* (2009), 2009 CarswellOnt 1533, 48 E.T.R. (3d) 304 (Ont. S.C.J.).

<sup>28</sup> *Ibid.* at para. 24.

<sup>29</sup> *Ibid.* at para. 40.

<sup>30</sup> *Penny v. Bolen* (2008), 2008 CarswellOnt 5644 (Ont. S.C.J.).

<sup>31</sup> *Ibid.* at paras. 27 - 31.

<sup>32</sup> *Robertson v. Hayton*, *supra* note 26.

<sup>33</sup> *Ibid.* at paras. 34, 36 and 44. See also [Ontario Evidence Act, R.S.O. 1990, c. E.23 at s. 14.](#)

<sup>34</sup> *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, 66 O.T.C. 161 (O.C.J. (Gen. Div.)).

<sup>35</sup> *Ibid.* at para. 125.

<sup>36</sup> *Parker v. Atkinson* (1993), 48 R.F.L. (3d) 193, 104 D.L.R. (4th) 279 (Ont. U.F.C.).

<sup>37</sup> *Ibid.* at para. 25.

<sup>38</sup> *FLA*, *supra* note 8 at s. 5 and Part III.

<sup>39</sup> *Succession Law Reform Act*, *supra* note 20 at s. 17(2).

<sup>40</sup> *Re Billard* (1986), 50 R.F.L. (2d) 99, 22 E.T.R. 150 (Ont. S.C. (H.C.J.)).

<sup>41</sup> *Ibid.* at para. 3.

<sup>42</sup> *Ibid.* at para. 6.

<sup>43</sup> *Ibid.* at paras. 4 – 6.

<sup>44</sup> *Re Roth Estate*, [2009] W.D.F.L. 5384, [2009] W.D.F.L. 5386, 51 E.T.R. (3d) 290, 74 R.F.L. (6th) 300 at para. 16 (Ont. S.C.J.).

<sup>45</sup> *Ibid.* at paras. 16 – 18.

<sup>46</sup> *Ibid.* at para. 19 - 20.

<sup>47</sup> *Snell's Equity*, 13<sup>th</sup> ed., Sweet and Maxwell, London, (date unknown) at pp.219-20.

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<sup>48</sup> *Edell v. Sitzer* (2001), 55 O.R. (3d) 198, 40 E.T.R. (2d) 10 at para. 58 (Ont. S.C.J.), **aff'd** (2004), 187 O.A.C. 189, 9 E.T.R. (3d) 1 (Ont. C.A.).

<sup>49</sup> *Ibid.* at para. 57.

<sup>50</sup> *Ibid.* at para. 72.

<sup>51</sup> *Cassin v. Cassin* (2007), 2007 CarswellOnt 1033, 30 E.T.R. (3d) 289 (Ont. S.C.J.).

<sup>52</sup> *Ibid.* at para. 37.

<sup>53</sup> See *University of Manitoba v. Sanderson Estate* (1998), 155 D.L.R. (4th) 40, 20 E.T.R. (2d) 148, 102 B.C.A.C. 186, 166 W.A.C. 186, [1998] 7 W.W.R. 83, 47 B.C.L.R. (3d) 25 at paras. 24, 30- 31, and 49. (B.C.C.A.).

<sup>54</sup> *Brynelsen Estate v. Verdeck*, 2002 BCCA 187, 44 E.T.R. (2d) 26, 165 B.C.A.C. 279, 270 W.A.C. 279, [2002] B.C.W.L.D. 486 (B.C.C.A.).

<sup>55</sup> *Knysh v. Knysh Estate* (1994), 1994 CarswellMan 289, 94 Man. R. (2d) 266 (Man. C.Q.B.).

<sup>56</sup> *Powell v. Glover* (2008), 2008 ABQB 532, 42 E.T.R. (3d) 298, 95 Alta. L.R. (4th) 235 (Alta. C.Q.B.).

<sup>57</sup> *Ibid.* at para. 2.

<sup>58</sup> *Ibid.* at paras. 18 and 26.

<sup>59</sup> *Re Ohorodnyk* (1979), 4 E.T.R. 233, 24 O.R. (2d) 228, 97 D.L.R. (3d) 502, [1979] 2 A.C.W.S. 40 at paras. 9 and 44 (Ont. S.C. (H.C.J.)), **aff'd** (1980), 102 D.L.R. (3d) 576, 6 E.T.R. 215, 26 O.R. (2d) 704 (Ont. C.A.).

<sup>60</sup> *Powell*, *supra* note 56 at para. 13.

<sup>61</sup> *Hall v. McLaughlin Estate* (2006), 25 E.T.R. (3d) 198, 149 A.C.W.S. (3d) 1173 (Ont. S.C.J.).

<sup>62</sup> *Ibid.* at paras. 89 - 90.

<sup>63</sup> *Ibid.* at para. 93.

<sup>64</sup> *Ibid.* at paras. 49 and 92.

<sup>65</sup> *Ontario Evidence Act*, *supra* note 33 at ss. 13 and 14.

<sup>66</sup> *McDougald Estate v. Gooderham* (2005), 17 E.T.R. (3d) 36, 199 O.A.C. 203, 255 D.L.R. (4th) 435 (O.C.A.).

<sup>67</sup> *Ibid.* at paras. 85 and 80.

<sup>68</sup> *Salter v. Salter Estate*, [2009] W.D.F.L. 3762 at para. 6 (Ont. S.C.J.).

<sup>69</sup> *Kimberly Whaley et al*, *supra* note 3 at p. 3.

<sup>70</sup> *Banton v. Banton*, *supra* note 34.

<sup>71</sup> *Ibid.* at paras. 55, 106 – 108 and 127.

<sup>72</sup> *Ibid.* at para. 127.

<sup>73</sup> *Ibid.* at para. 110.

<sup>74</sup> *Ibid.* at para. 125.

<sup>75</sup> *Re Sung Estate* (2003), 37 R.F.L. (5th) 441, 1 E.T.R. (3d) 296 (Ont. S.C.J.), **aff'd** (2004), 11 E.T.R. (3d) 169, 9 R.F.L. (6<sup>th</sup>) 229 (Ont. C.A.).

<sup>76</sup> *Ibid.* at paras. 50 and 53.

<sup>77</sup> *Barrett Estate v. Dexter* (2000), 34 E.T.R. (2d) 1, 286 A.R. 101, 2000 ABQB 530 (Alta. C.Q.B.).

<sup>78</sup> [Substitute Decisions Act, S.O. 1992, c. 30 at ss. 24\(2\), 46\(3\), and 57\(2\).](#)

<sup>79</sup> [The Powers of Attorney Act, S.S. 2002, c. P-20.3 at s. 6\(1\)\(b\).](#)

<sup>80</sup> See for example the Alberta [Powers of Attorney Act, R.S.A. 2000, c. P-20](#), the British Columbia [Power of Attorney Act, R.S.B.C. 1996, c. 370](#), and the Manitoba [Powers of Attorney Act, C.C.S.M. c. P97](#).

<sup>81</sup> *SLRA*, *supra* note 20 at s. 63(1).

<sup>82</sup> *Ibid.* at s. 63(4).

<sup>83</sup> Karon C. Bales, *supra* note 21 at p.24.

<sup>84</sup> *FLA*, *supra* note 8 at s. 7.

<sup>85</sup> [Health Care Consent Act, S.O. 1996, c. 2 Sched. A at s. 20.](#)

<sup>86</sup> *Sly v. Curran* (2008), 2008 CarswellOnt 4301 (Ont. S.C.J.).

<sup>87</sup> *Ibid.* at para. 16.