

Ashley Rathbun's article, "Marrying into Financial Abuse: A Solution to Protect the Elderly in California," is an important resource in an estate planner's library. Estate planners will or may have experience with one of their elder clients marrying a much younger spouse (say 30 years difference), with the younger spouse's motive often tied to financial gain. The author concludes that this motive is often financial, and that the younger spouse uses different forms of undue influence to get the older spouse to the marriage throne. She (HE?) notes, as planners know, that "marrages may be exploitative and provide a means of psychological, sexual, financial or social abuse," citing an excellent article by Carmelle Peisah, "Abuse by Marriage,: The Exploitation of Mentally Ill Older People," 23 Int' J. Geriatric Psychiatry 883 (2008).

The long battle that a family may face in overcoming the testamentary provisions left for a younger spouse are highlighted by the case of Ralph Dills, a California Judge who married his stepdaughter, 34 years his younger. As the author points out, "[a]buse occurs anytime an elder who lacks capacity to understand the obligations and potential risks of marriage is convinced to get married."

The author explores the strategies for the elder spouse's family (children, for example from a former spouse) to unwind this abuse when it happens. Two macro strategies are available: to attempt to unwind the marriage during the elder spouse's life, based on lack of marital capacity, or attempt to unwind post death, on a theory related to undue influence or lack of testamentary capacity.

The author initially discusses the difficult standards to meet for the family to unwind a marriage based on lack of marriage capacity. To show capacity in most states is typically a very low bar:

"[M]arital capacity requires the least amount of capacity, followed by testamentary capacity, and lastly, capacity to enter into contracts."

In California, a person must have the capacity "of understanding the nature of marriage and the obligations it creates."

A challenge to marital capacity is one prong of a two prong attack. Note that even if a court finds that a person had marital capacity, the person may still lack testamentary capacity (a different standard). The two prong challenge, first to marital capacity, and then to testamentary capacity, is a useful technique. In the marriage capacity proceeding, evidence may be obtained that turns out useful in the latter proceeding to invalidate a Will or Trust.

Further, practitioners should note that in addition to lacking testamentary capacity invalidating a Will or Trust, some states prevent one from profiting from wrongdoing (for example, murdering one's spouse or even, in California, engaging in elder abuse. Cal. Prob.Code section 21350).

If these challenges to capacity, marriage and testamentary, prove ineffective, the author lobbies for states to enact further protections. In this regard, the author points to more advanced legislation enacted in other states directed at elder abuse, such as Texas. In Texas, a family can challenge a marriage post mortem for reasons relating to capacity if the marriage commenced less than three years prior to death, and an interested person files a challenge within one year after death.

The article concludes by discussing new legislative standards that should be considered by states in determining the validity of marriages in these potentially undue influence situations involving elders. As our population ages, more states will consider and adopt legislation in this area. That legislation will take on different forms, and for the practitioner, rather than focusing on the “model” form offered by the author, it is important to monitor that practitioner’s state legislation to determine if this area is being addressed.