

Predatory Marriages: A Growing Concern

By Deborah S. Ball and Malya Kurzweil Levin

Introduction

For many Americans today, older adulthood is a time of increased financial security. According to the Centers for Disease Control, people 65 and older have the lowest poverty rate of all demographics. There are a number of reasons for this phenomenon. Older adults can take advantage of government entitlements such as Medicare and Social Security to buoy their financial security. They may have saved money, often utilizing financial services like IRA or 401(k) accounts, through which funds may only be accessed penalty-free once the individual is a certain age. Additionally, many large expenses like raising children or paying off mortgages have been concluded, leaving older adults with increased disposable income.

This enviable financial situation, coupled with the isolation and loneliness that can sometimes accompany aging as family members and friends pass away and scatter, makes older adults increasingly vulnerable to financial abuse with an emotional component. One such gambit, the predatory or secret marriage, has been seen increasingly by attorneys and the courts in recent years. In this scheme, a man or woman enters into a relationship with an older adult for the purpose of gaining access to the victim's assets or estate. The victim may believe that the relationship is romantic, but the perpetrator, who is often significantly younger and commonly plays some type of caretaker role in the victim's life, is motivated solely by financial gain. Some cases may also involve a long-standing relationship that never resulted in marriage while both parties were in good health, but then a marriage is secretly and hastily obtained once one of the parties has become cognitively impaired. The perpetrator swiftly and secretly marries the victim in a courthouse ceremony, often taking advantage of a period when other family supports are away or unavailable. The victim may misguidedly believe he or she has found love and companionship, or alternatively, due to cognitive impairment, may not even realize the marriage has occurred.

Once the marriage has been performed, the perpetrator typically moves quickly, becoming a joint owner of bank accounts that had belonged to the victim and draining large sums of money; transferring real property; or arranging to inherit significant amounts from the victim's estate, either through a new will, changing the beneficiary designations, or even via elective share.

Case Study: Predatory Marriage: Jack's Story

Jack was a lifelong bachelor in his late 60s. A car accident in his youth had left him with a traumatic brain injury, which impaired his judgment and impulse control. He had always lived with his mother, and upon her death he inherited her sizable estate. One day, shortly after his mother's death, Jack was approached on the street outside his bank by Rae, a woman in her 30s, who said she'd seem

him around the neighborhood and would like to get to know him better. Jack, living alone for the first time in his life, was eager for companionship. Jack and Rae began



Deborah S. Ball



Malya K. Levin

spending time together, and Jack was happy to sponsor their lavish dinners. Just a few weeks after they had met, Rae brought Jack to City Hall, where they were married. They went directly from the ceremony to the bank, where Jack listed her as a joint owner on all of his accounts. Jack was thrilled, believing he had at last found the love of his life. Once they had married, though, Jack saw Rae much less. She claimed she couldn't move in with him because of her work schedule, but sometimes he didn't see her for weeks at a time. When she appeared, she often wanted things from the apartment, like the television or pieces of his mother's jewelry. Mysterious bills began to arrive at the house. Jack got a call from his bank inquiring about suspicious activity, a pattern of large withdrawals. Confused and agitated, Jack hung up on the bank. Concerned about the possibility of financial exploitation, the bank referred the case to Adult Protective Services.

A caseworker visited Jack. She found him alone in an unkempt apartment, his clothes hanging on him from all the weight he had lost. Though he was highly defensive, the caseworker gathered enough information to realize that a call to the District Attorney was appropriate. When the Elder Abuse Unit reviewed the case, the details sounded familiar. They had been investigating the same woman for perpetrating the same scheme with another man simultaneous to Jack's case. The District Attorney's Office ultimately entered into a plea agreement with Rae which included restitution and jail time. Jack was transferred to the Harry and Jeanette Weinberg Center for Elder Justice, an elder abuse shelter located within the Hebrew Home at Riverdale, where he was able to receive medical care, counseling to process the true nature of his relationship with Rae, therapeutic activities to engage him in a new community, and legal advocacy to stabilize his finances. An Article 81 guardianship proceeding was initiated, and Jack was found to lack capacity. A cousin who had known Jack since childhood was appointed. The guardianship court was also able to annul Jack and Rae's marriage, thus ensuring Rae would no longer be able to access Jack's finances or assets and, eventually, would not have any rights to his estate.

Predatory Marriage: Case Study Analysis

Unfortunately, Jack's story is atypical in two critical ways. First, the existence of multiple victims made it pos-

sible for the local District Attorney's office to successfully secure a guilty plea from the perpetrator and some justice for the victim. Often, this is not the case. For example, in *In re Application of Doar v. LS*, an Article 81 guardianship proceeding with a predatory marriage at its center, the court noted that, although the AIP's close friend had reported the suspicious relationship to the District Attorney's office, the investigation had ceased once the perpetrator, a woman nearly 40 years younger than the AIP who had served as his home attendant, had married the AIP.¹

Second, in Jack's case, an observant professional at his bank took the appropriate precautions and reported the institution's concerns to Adult Protective Services. Ultimately, this action allowed Jack to receive the assistance he needed. There is currently no mandated reporting for financial institutions in New York State. In many cases, privacy or liability concerns prevent financial institutions from making these sorts of reports to institutions like Adult Protective Services. This is true despite the federal interagency guidance issued in 2013 advising financial institutions to make these reports, and indicating that doing so is not a violation of the Gramm-Leach-Bliley Act.² Therefore, these predatory marriages are often only discovered when a victim's money is irreparably lost or even after the victim has died.

In one such case, *Campbell v. Thomas*,³ the court took notice of the fact that New York has no statute which specifically addresses a situation in which a person takes unfair advantage of an individual who clearly lacks the capacity to enter into a marriage.⁴ It call[ed] upon the Legislature to reexamine the relevant EPTL and the Domestic Relations Law...to consider whether it might be appropriate to make revisions that would prevent unscrupulous individuals from wielding the law as a tool to exploit the elderly and unjustly enrich themselves at the expense of such victims and their rightful heirs.⁵

NY Domestic Relations Law, Article 2, Section 7, provides that a marriage is void from the time its nullity is declared by a court of competent jurisdiction if either party thereto:

1. Is under the age of legal consent, which is 18 years, provided that such nonage shall not of itself constitute an absolute right to the annulment of such marriage, but such annulment shall be in the discretion of the court which shall take into consideration all the facts and circumstances surrounding such marriage;
2. Is incapable of consenting to a marriage for want of understanding;
3. Is incapable of entering into the married state from physical cause;
4. Consent to such marriage by reason of force, duress or fraud;
5. Has been incurably mentally ill for a period of five years or more.⁶

It is important to understand that there is a distinction between "void" marriages and "voidable" marriages. Under the Domestic Relations Law, a "void" marriage is one which is defined as incestuous (DRL § 5)⁷ or bigamous (DRL § 6).⁸ A void marriage is considered nonexistent from the beginning. However, a voidable marriage, as defined above, is still considered valid until the point in which a court has declared otherwise.⁹ This means that in order to eradicate the marriage, it must have been annulled during the lifetime of the spouses. This is especially problematic because if the marriage was made in secret, it would not likely become known until after the death of the incapacitated spouse. Unfortunately, EPTL § 5-1.2 recognizes the surviving spouse's right to the elective share of the decedent's estate where there has not been pre-death annulment.¹⁰ The court in *Campbell v. Thomas* noted that since the marriage was not declared a nullity until several years after the decedent's death, his surviving spouse "technically had a legal right to her elective share."¹¹ But since the Supreme Court is one of equity as well as law, it applied the principle that no one has a right to profit from fraudulent activity, and denied the living spouse's petition for an elective share.¹²

Recognizing the gravity of situations where one person is incapable of consenting to a marriage due to lack of capacity, the court in *Campbell v. Thomas* began its opinion with a discussion about elder abuse. Specifically, the court referred to financial exploitation of vulnerable elderly individuals.¹³ The court was conscious of the fact that financial exploitation of the elderly most often involves someone who, as in Jack's case, has a relationship with the victim. In that case, the decedent, Howard Nolan Thomas, had an ongoing relationship with Nidia Campbell that spanned over two decades. Based upon the circumstances evinced, the Court determined that Nidia Campbell had knowledge of the decedent's lack of capacity (even without a judicial determination) and, nonetheless, waited until his primary caregiver was out of town to marry Mr. Thomas. The family was not informed until after the marriage occurred, and thereafter she substantially altered Mr. Thomas's estate plan and present ownership of his assets by creating joint accounts and changing beneficiary designations. The court found that she was entitled to remain as beneficiary on the decedent's retirement account because that designation occurred prior to the marriage.

Citing the seminal case, *Riggs v. Palmer*,¹⁴ which holds that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to fund any claim upon his own iniquity, or to acquire property by his own crime," the court found "ample support" that Ms. Campbell was aware of the decedent's "lack of capacity to consent to the marriage, and took unfair advantage of his condition for her own pecuniary gain...."¹⁵ The court upheld the Supreme Court decision declaring that Nidia Campbell had no rights of a surviving spouse.¹⁶

Remedy is also available in the context of a guardianship proceeding. Mental Hygiene Law § 81.29(d) provides:

If the court determines that the person is incapacitated and appoints a guardian, the

court may modify, amend, or revoke any previously executed appointment, power, or delegation under section 5-1501, 5-1505, or 5-1506 of the general obligations law or section two thousand nine hundred sixty-five of the public health law, or section two thousand nine hundred eighty-one of the public health law notwithstanding section two thousand nine hundred ninety-two of the public health law, or any contract, conveyance, or disposition during lifetime or to take effect upon death, made by the incapacitated person prior to the appointment of the guardian if the court finds that the previously executed appointment, power, delegation, contract, conveyance, or disposition during lifetime or to take effect upon death, was made while the person was incapacitated or if the court determines that there has been a breach of fiduciary duty by the previously appointed agent. In such event, the court shall require that the agent account to the guardian. The court shall not, however, invalidate or revoke a will or a codicil of an incapacitated person during the lifetime of such person.¹⁷

In the case of *In Re Kaminester*, the court reviewed Domestic Relations Law § 7.2 and Mental Hygiene Law § 81.29(d).¹⁸ The court found that, where a guardian has been appointed, the court can make a determination that a marriage entered into by an incapacitated person, which is defined as contract, can be annulled or revoked.¹⁹ In this case (and the numerous related cases, both in the states of New York and Texas), Richard Kaminester was determined by clear and convincing evidence to require a guardian. Inalee Foldes secretly married Richard Kaminester following the appointment of a temporary guardian. Mr. Kaminester died two-and-half months later. One of the issues raised was to disqualify Ms. Foldes from asserting her right of election as a surviving spouse. The marriage was subsequently revoked and voided pursuant to Mental Hygiene Law § 81.29(d). In the decision, the court discussed the fact that under DRL § 7, a marriage becomes a nullity as of the date it was annulled.

As seen in the *Campbell v. Thomas* case, the court acknowledged that since there was no pre-death annulment, Ms. Campbell was considered a surviving spouse. Ultimately, however, the court would not allow her to benefit from her fraudulent activities. The court in *In Re Kaminester* pointed out that under Mental Hygiene Law § 81.29(d), if there has been a determination of incapacity, a guardian under Article 81 can revoke a marriage and that such revocation is “void ab initio.” As a result, there can be no legal interest claimed as a surviving spouse.²⁰ This is the action that was taken in Jack’s case to avoid further exploitation during his life, as well as potential estate administration issues.

A court-appointed guardian also retains certain types of authority even after the death of the incapacitated person. In the *In re Dandridge*, the court found it proper to annul the marriage between the incapacitated person and his wife. In this case, the court directed the temporary guardian to investigate the circumstances of the marriage between the alleged incapacitated person and his wife. The alleged incapacitated person, Aldo G., attended his brother’s funeral in Georgia during the pendency of the guardianship proceeding, and during that time, he and Ann G-D, who was Aldo G.’s long-time caregiver, were married. The lower court held that “Aldo G. was incapacitated, lacked the capacity to enter into a marriage, and, as a result, annulled the marriage.”²¹ Although Aldo G. died while the matter was being appealed, the Appellate Court reasoned that “a guardian’s powers and the guardianship court’s supervision may continue even after the incapacitated person’s death.”²²

Predatory Marriages: A Call to Action

Civil attorneys can play a critical role in identifying and intervening in cases of predatory marriages. Attorneys may see red flags such as: a new relationship that has progressed very quickly, particularly one in which:

- One spouse is significantly younger and/or had been in a paid caregiver role for the older spouse;
- The client seems confused about the nature of the relationship;
- The new spouse seems to be directing a significant change to the client’s finances or estate plan;
- Client’s family or longtime friends seem possibly unaware of the marriage.

In such cases, attorneys should, prior to executing any documents, meet with the client alone to assess the client’s capacity to execute whatever transaction has been requested, the client’s understanding of the rights conferred by marriage, and whether the client is being threatened or coerced. The attorney can then proceed with assisting the client based upon the knowledge gained from this interview. Additionally, attorneys should be aware of the court’s authority to annul a marriage in the context of a guardianship proceeding.

Predatory marriages are likely to become increasingly common and visible as life expectancy continues to rise. It is appropriate for attorneys to be aware of how to spot predatory marriages and how to investigate them effectively and efficiently.

Endnotes

1. *In re Application of Doar v. LS*, 2013 NY Slip Op. 50988. The facts of this case are significant because the victim, L.S. was still alive when the matter came to light. The IP testified in the guardianship proceeding and demonstrated confusion. He did refer to Vanessa T.S. as his wife, but the court found that he lacked capacity.
2. Interagency Guidance on Privacy Laws and Reporting Financial Abuse of Older Adults, 2013, at <https://www.fdic.gov/news/>

news/press/2013/interagency-guidance-on-privacy-laws-and-reporting-financial-abuse-of-older-adults.pdf?source=govdelivery.

3. *Campbell v. Thomas*, 72 A.D.3d 103; 897 N.Y.S.2d 460, 2010 N.Y. App. Div. LEXIS 2031, 2010 Slip Op. 2082.
4. *Campbell v. Thomas*, HN1.
5. *Campbell v. Thomas*, at 1.
6. DRL § 7.2.
7. DRL § 5.
8. DRL § 6.
9. *Campbell v. Thomas*, at 14,15.
10. EPTL § 5-1.2.
11. *Campbell v. Thomas*, at 24.
12. *Campbell v. Thomas*, citing N.Y. Const. art VI, § 7,[a]; *McCain v. Koch*, 70 NY2d 109, 116, 511 NE2d 62, 517 NYS2d 918 [1987], at 24.
13. *Campbell v. Thomas*, at 4.
14. *Riggs v. Palmer*, 115 NY 506, 511, 22 NE 188, 23 Abb N Cas 452 1889.
15. *Campbell v. Thomas*, at 28.
16. *Campbell v. Thomas*, at 36, citing *Kaminster v. Foldes*, 51 AD3d 528, 529, 859 NYS2d 412 [2008].
17. MHL § 81.26.
18. *In Re Kaminester*, 26 Misc. 3d 227, 888 N.Y.S.2d 385, 2009 N.Y. Misc. LEXIS 2916, 2009 N.Y. Slip Op. 29429.
19. In the related Supreme Court case, *Kaminster v. Foldes*, 51 A.D. 3d 528, 859 N.Y.S.2d 412, 2008 N.Y.App.Div. LEXIS 4315, 2008 NY Slip Op. 4557, the court found that revocations of a marriage contract it a remedy under MHL § 81.29(d) where it has been proven by clear and convincing evidence that the person executing the document (in this case, a marriage license) lacked the requisite mental capacity.
20. *In Re Kaminester*, at 16.
21. *In re Dandridge*, 120 A.D.3d, 1411, 993 N.Y.S.2d 125, 2014 N.Y.App. Div. LEXIS 6272; 2014 NY Slip Op 06311, at 5.
22. *In re Dandridge*, at 7-8. It should be noted that while the Court reviewed the issue of capacity based upon the underlying case, it nevertheless, remanded the matter for a hearing to determine capacity because the appellant, Ann G-D, did not receive proper notice and was therefore, deprived of the opportunity to be heard before the Court annulled the marriage, at 7-8.

The Law Offices of Deborah S. Ball is a practice concentrating on elder law issues, matters affecting the developmentally disabled, trust and estate planning options, including will preparation, and estate administration. As a former Assistant District Attorney, Ms. Ball investigated financial exploitation against the elderly community. Ms. Ball is a member of the New York State Bar Association Elder Law Section where she is a member of the executive committee. She is the Co-Chair of the Elder Abuse Committee and serves on the Guardianship Committee, the Mental Health Law Committee and the Committee on Special Needs Planning. She has served on the Committee on Representing Developmentally Disabled Persons for over twenty years; and is a member of the Trusts and Estates Section. She is a member of the Brooklyn Bar Association Elder Law Section. Additionally, Ms. Ball presently serves as a member of the board of the Brandeis Association of Jewish Lawyers. Ms. Ball is also a member of the Attorney's Council of the New York Chapter of Hadassah and served as the co-chair for the Working Mother's Committee of the Women's Bar Association.

Malya Kurzweil Levin, Esq. is the Staff Attorney for the Harry and Jeanette Weinberg Center for Elder Abuse Prevention, the nation's first emergency elder abuse shelter. In this role, she represents clients who are victims of acute abuse and speaks about the legal facets and ramifications of elder abuse to a variety of audiences. Malya received her JD cum laude from Brooklyn Law School in 2012. She has written for a variety of legal publications including the *NAELA Journal* and the *New York State Elder Law and Special Needs Journal*. She is a certified Reiki energy healer.

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