Marrying into Financial Abuse: A Solution To Protect the Elderly in California

ASHLEY E. RATHBUN*

* J.D. Candidate 2010, University of San Diego School of Law; B.A. 2005, University of California, Davis. Special thanks to Professor Kris B. Panikowski, who guided me throughout the process, and Ellen McKissock, Esq., who brought the problem of financial elder abuse to my attention and provided me with countless insights. Thanks also to Professors Gail A. Greene and Miranda O. McGowan, as well as Mary Obidinski, David M. Dreyman, and Karen M. Harkins Slocomb, for their many hours of editing, supporting, and advising me; and to the *San Diego Law Review* staff for their detailed edits. Most of all, thanks to my family because I never could have gotten this far without their love and patience.

I. INTRODUCTION

On September 13, 2001, the once powerful and prominent former California judge and lawmaker Ralph Dills married his stepdaughter, Wendi Lewellen, who was thirty-four years his junior.[1] To gain Dills's affection, Wendi reportedly impersonated her mother, Dills's wife of nearly thirty years, by dressing up in her clothing and wearing her perfume.[2] Dills sought comfort and companionship in Wendi after her mother had passed away; Wendi sought financial support from Dills.[3]

Wendi and her previous husband had run into financial trouble and had filed for bankruptcy; a few years later, they filed for divorce.[4] Wendi lived with Dills while finalizing her divorce and married him only five weeks after it was finalized.[5] Wendi subsequently started spending large sums of Dills's money without his consent, leaving Dills with the impression that he was destitute.[6] Dills's stepsons, Wendi's brothers, finally learned of the marriage after four months.[7] When one of Wendi's brothers asked Dills why Wendi was spending so much of Dills's money, Dills explained, "'I think she's my wife.'"[8] Dills did not

1. Elizabeth Fernandez, *From Stepdaughter to Caretaker to Wife: Late Lawmaker's Sons Say Their Sister Took Advantage of Ailing Father*, S.F. CHRON., Aug. 18, 2002, at A1, *available at* http://articles.sfgate.com/2002-08-18/news/17557809_1_elder-abuse-prevention-ralph-dills-rocklin. Wendi was fifty-seven years old at the time; Dills was a frail ninety-one. *Id.*

2. *Id.* Dills had formally adopted Wendi's two brothers but had not formally adopted Wendi. *Id.* Dills married their mother in 1970, when Wendi was in her midtwenties. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* ("[Wendi] looted [Dills's] money to the point where a befuddled Dills believed he was going broke despite receiving nearly $13,700 in monthly pensions and Social Security.").

7. *Id.*

8. *Id.*

understand the relationship he held with his stepdaughter-turned-wife.[9] Wendi's brothers accused her of marrying Dills both to "save hundreds of thousands of dollars on estate taxes" and to reduce her financial instability.[10] Advocates against elder abuse recognized that the circumstances surrounding the marriage indicated that Dills was likely the victim of elder abuse.[11]

Legal battles over Dills's competence ensued between Wendi and her siblings.[12] Her brothers attempted to annul the marriage, claiming Wendy married Dills when he suffered from dementia and lacked competence to marry.[13] A psychologist confirmed the brothers' suspicions when she examined Dills one month before he died.[14] She determined that Dills suffered from Alzheimer's-type dementia and "'was of "unsound mind" to marry.'"[15] Due to the progression of the

---

9. *Id.*

10. *Id.*

11. *Id.* Wendi also neglected him, allowing her dogs to use his bathroom as their own to the point where it was so full of dog feces that he could not use it. *Id.* Dills found himself a victim of both neglect and financial elder abuse. *See id.* California finds financial elder—or dependent adult—abuse when a person or entity:

> (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both[;]
> (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both[; or]
> (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 1575 of the Civil Code.

CAL. WELF. & INST. CODE § 15610.30(a) (West 2001 & Supp. 2009).

12. Fernandez, *supra* note 1. Wendi challenged the appointment of one of her brothers as Dills's temporary conservator, "telling the court that she was Dills' wife . . . and asked that [the brother] be removed as temporary conservator." *Id.* Conservatorships consist of a fiduciary and legal relationship, wherein a conservator is appointed to assist a "person who is unable to manage his or her financial resources or properly provide for his or her personal needs, such as, food, clothing, and shelter." Bruce S. Ross, *Conservatorship Litigation and Lawyer Liability: A Guide Through the Maze*, 31 STETSON L. REV. 757, 758 (2002) (describing the process of establishing a conservatorship, the powers and duties of a conservator, and the four types of conservatorships in California); *see* Lawrence Friedman & Mark Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 273 (1988).

13. Fernandez, *supra* note 1.

14. *Id.*

15. *Id.* As of 2007, one study estimated that over two-thirds—69.9%—of persons diagnosed with dementia suffer from Alzheimer's disease. B.L. Plassman et al.,

dementia, the psychologist determined that Wendi clearly knew of Dills's degenerating mental condition when she married him and that "'undue influence was exerted in terms of Mr. Dills marrying.'"[16] Wendi clearly took advantage of Dills's declining mental state for her financial advantage.[17]

This high profile case illustrates a growing problem:[18] elderly individuals—persons "65 years of age or older"[19]—can enter into marriages without the capacity to understand the nature of marriage or the potential repercussions of marrying.[20] The ease with which an elderly person can enter into marriage presents an opportunity for unscrupulous individuals to marry elders of questionable capacity.[21]

Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study, 29 NEUROEPIDEMIOLOGY 125, 128 (2007). For a broad discussion of the characteristics of reversible, as well as irreversible, dementia, see Lois M. Brandriet & Brian L. Thorn, *Determining Capacity: Is Your Older Client Competent?*, 14 UTAH B.J. 21, 22 (2001).

16. Fernandez, *supra* note 1. "Undue influence" is defined as "[t]he improper use of power or trust in a way that deprives a person of free will and substitutes another's objective." BLACK'S LAW DICTIONARY 1666 (9th ed. 2009).

17. *See* Fernandez, *supra* note 1.

18. *Id.* ("[This case] stands as an alarming illustration of the predicament that can befall the elderly, no matter how prominent or well-off."); *see also* E-mail from Ellen McKissock, Esq., Hopkins & Carley, to author (Aug. 26, 2008, 04:29 PDT) (on file with author) (indicating that eight out of twenty-four attorneys, who met in a small group in northern California, felt that at least one of their clients had fallen victim to a marriage solely for their assets). This Comment proposes a solution for California, but the problem extends far beyond California. *See, e.g.*, *In re* Hua Wang, 864 N.Y.S.2d 710, 716 (Sur. Ct. 2008) (recognizing that without legislative change, New York's current laws "seemingly invite a plethora of surreptitious[] 'deathbed marriages'"); *infra* Part V.A–B (discussing both Texas's proposal to solve the problem in that state and a scholar's suggestion for preventing incentives for deathbed marriages on a national level).

19. CAL. WELF. & INST. CODE § 15610.27 (West 2001). This Comment adopts this definition of "elder."

20. This problem logically extends to any individual who lacks capacity, not just an elder. However, most offenses of abuse, neglect, and financial exploitation are especially dangerous to the elderly population. *See* Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOY. L.A. L. REV. 589, 632 (2003). Elders are generally isolated from family and friends, and become dependent on caretakers or strangers. *See id.* at 634. An assumption arises that elderly individuals have large estates from years of accumulating wealth. *See id.* For these reasons, elders likely fall prey more easily than other individuals to neglect and physical and financial abuse. *See id.*

21. *See* Ellen McKissock, *A New Use for Confidential Marriage: Elder Abuse*, CAL. TR. & EST. Q., Spring 2008, at 19, 19 ("The level of capacity for entering into a marriage is so minimal that a lonely elder under the undue influence of another can easily enter into matrimony without question from a clerk."); *infra* Part III (explaining the extremely low requirements for satisfying marital capacity). See generally Terry L. Turnipseed, *How Do I Love Thee, Let Me Count the Days: Deathbed Marriages in America*, 96 KY. L.J. 275 (2008), for a discussion of "deathbed marriages," in which an

Once in the relationship, it may prove difficult to dissolve the marriage prior to the elder's death.[22] Marriages "may be exploitative and provide a means of psychological, sexual, financial or social abuse."[23] A new spouse can gain control over the elder through the ability to access the elder's financial information[24] and the power to make healthcare

individual marries an elder or someone else who is about to die in order to financially gain. This Comment addresses the capacity to marry, property consequences of marriage, and the distinction between void and voidable marriages, just as Turnipseed does in his article. *See id.* Turnipseed, however, ultimately "proposes a theoretical framework for a model act giving heirs and beneficiaries standing to sue in order to negate the property consequences that flow from marriage, depending on the level of mental capacity at the time of the marriage." *Id.* at 277. This Comment differs in that it raises the issues of property consequences of marriage and the impact of void versus voidable marriages only as they apply to California law. Also, this Comment proposes a premarriage solution rather than one that comes into effect only after the elder dies. *See infra* Part V.B–C (discussing Turnipseed's proposal and the need for a predeath solution to the problem of financially exploitative marriages).

For an international review of the problem, see generally Carmelle Peisah et al., *Abuse by Marriage: The Exploitation of Mentally Ill Older People*, 23 INT'L J. GERIATRIC PSYCHIATRY 883 (2008), which examines relevant cases from the United Kingdom, Australia, and Canada. The marital capacity test proposed in this Comment was created prior to accessing the international article, but both propose a very similar test, suggesting that healthcare professionals administer a capacity examination prior to marriage. *See id.* at 887; *infra* Part VI. However, this Comment mandates a capacity test, *infra* Part VI, whereas the Australian article raises the issue merely "to promote medical and community awareness of the vulnerability of older people with mental disorder to abuse by marriage while highlighting the rights of older people to equity and autonomy in personal relationships," Peisah et al., *supra*, at 887.

22. First, an elder may continue to lack the capacity to recognize the relationship the elder has with the "spouse" throughout the "marriage." *See In re* Marriage of Sawyer, No. A104303, 2004 WL 1834670, at *8 (Cal. Ct. App. Aug. 17, 2004) ("Sawyer's mental functioning prior to and after the date of the marriage . . . showed severe impairment in Sawyer's ability to make decisions, to problem solve and to understand the functional consequences of decisions and established that Sawyer was vulnerable to coercion and abuse."). Second, the elder may have trouble accessing the court. *See* James S. Richardson, Sr., *Aging and Its Impact on Court Systems*, FED. LAW., July 2008, at 3. Lastly, it logically follows that a marriage can take place close enough in time to an elder's death that the elder dies before the issue is raised in court. *See* Kristine S. Knaplund, *The Right of Privacy and America's Aging Population*, 86 DENV. U. L. REV. 439, 453 (2009).

23. Peisah et al., *supra* note 21, at 883.

24. *See, e.g.*, Charles Pratt, *Banks' Effectiveness at Reporting Financial Abuse of Elders: An Assessment and Recommendations for Improvements in California*, 40 CAL. W. L. REV. 195, 195 (2003). Prior to the enactment of section 15630.1 of the California Welfare and Institutions Code, effective January 1, 2007, situations such as the following true story "depict[ed] a common form of elder abuse":

> A San Diego woman, referred to here as "B.," in her late seventies, was suffering early Alzheimer's disease when a man in his mid-sixties, "T.,"

decisions on the elder's behalf—unless the elder specifies another individual in a durable power of attorney for healthcare.[25] The new spouse then stands to inherit from the elder's death.[26]

This Comment argues that California should require proof of an elder's marital capacity from an attending physician or mental health professional to ensure protection of elders whose mental capacity has declined to a point where they can no longer understand what marriage entails. Part II explores the problem of financial elder abuse and examines how it pertains to marriage in California. Part III explains the levels of capacity required to enter into marriage, create testamentary documents,[27] and enter into binding contracts, and the reasons for these

---

> introduced himself after he overheard that she was selling her condominium. B. suffered a stroke during her first "date" with T. and was hospitalized. When B. was released from the hospital, T. showed up unexpectedly and spirited her off to Las Vegas where he married her. Immediately upon return from the "honeymoon," T. gained power of attorney in a meeting that B. cannot recall. T. presented the power of attorney to B.'s bank, and then proceeded to join her accounts. He used the net proceeds from the condo sale to purchase an expensive motor home and car, to transfer money out of the country, to cash B.'s social security checks, and to stash some of the money in a hidden bank account. B.'s bank account showed frequent ATM withdrawals of the maximum amount—from casinos. During much of this time B. and T. were not living together; T. spent some of the money on a "girlfriend." A marriage dissolution proceeding forced the return of a portion of the money, but much of it was lost.

Id. (citing Telephone Interview with B. and her daughter (Jan. 13, 2003)). Section 15630.1 requires financial institutions to report suspected elder financial abuse. CAL. WELF. & INST. CODE § 15630.1 (West Supp. 2010). Reports of financial elder abuse by financial institutions have increased since the passage of section 15630.1. James P. Bessolo, *Mandatory Reporting Requirements for Financial Elder Abuse*, L.A. LAW., Oct. 2007, at 23, 27. In order to report, financial institutions look for warning signs such as the following: changes in frequency or increasing amounts of account withdrawals; different people accessing the elder's accounts; the elder's change in attitude towards banking; and the elder's reliance on another person. *Id.* at 26–27. For additional warning signs and information on reporting requirements, see generally *id.*

Although financial institutions must now report suspected financial elder abuse, logically some abuse will go unreported, leaving open a window for devastating harm to unreported victims of elder abuse. *See id.* at 27. "By the time the abuse is discovered, the abuser often will have dissipated the victim's assets and elderly victims are often unable to financially recover from their losses, which can lead to increased reliance on public welfare programs, greater physical problems, and a higher mortality rate." *Id.* at 24.

25. Joanna Lyn Grama, *The "New" Newlyweds: Marriage Among the Elderly, Suggestions to the Elder Law Practioner*, 7 ELDER L.J. 379, 396, 399–402 (1999).

26. *Id.* at 384, 396; *see infra* Part IV.A.

27. "Testamentary" documents are documents "of or relating to a will." BLACK'S LAW DICTIONARY 1612 (9th ed. 2009). In order to create a will, a person must meet a requisite testamentary capacity, defined as "the ability to recognize the natural objects of one's bounty, the nature and extent of one's estate, and the fact that one is making a plan to dispose of the estate after death." *Id.* at 235.

capacity requirements. Part IV discusses procedural and statutory safeguards from the law of trusts and estates. These safeguards are aimed at protecting testamentary intent, but unfortunately, they may inadvertently encourage financially exploitative marriages. Part V details the statutory requirements for family members to challenge the validity of an elder's marriage. It also describes the inadequacies of proposals that suggest that courts allow for postdeath litigation to determine the elder's capacity on the elder's wedding day. Part VI describes the elements of this Comment's proposed marital capacity test and finds that the test is constitutionally permissive.

II. ASSESSING THE PROBLEM OF FINANCIAL ELDER ABUSE IN MARRIAGES

Society questions marriage between elders and markedly younger persons.[28] Such disapproval is undoubtedly the product of suspicions into the motives behind the marriage. A new spouse who gains access to the elder's financial accounts can exploit the elder.[29] Financial exploitation occurs when a person improperly uses an elder's funds in a manner that is unethical, is unauthorized, or does not keep the elder in mind.[30] Financial abuse generally occurs as a systematic pattern over months and years.[31] California attorneys in the field of trust and estate litigation recognize that their elderly clients often fall victim to

28. *See, e.g.*, *Fame and Infamy Surround Anna Nicole Smith*, ABC NEWS, Nov. 17, 2005, http://abcnews.go.com/Primetime/story?id=1320909 ("[I]t was [Anna Nicole Smith's] marriage to Texas oil tycoon J. Howard Marshall that some say made her infamous. When word got out that the love of Smith's life was 63 years her senior, many dismissed her as a gold digger."); GREEDY (Imagine Entertainment 1994) (portraying a family who worries that their rich uncle's new nurse, who is young and attractive, is "going to get everything [because t]hat's the way these old guys are").

29. *See supra* text accompanying notes 6, 10; *supra* note 24.

30. Kathleen Schoen, *Colorado Bar Association Builds Collaborations To Stop Financial Abuse of the Elderly*, COLO. LAW., Sept. 2005, at 107. Financial exploitation is not limited to a new spouse acquiring assets but also includes adult children and spouses of adult children who "care" for the vulnerable elder and gain access to everything the elder owns. *See* Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails To Build an Effective Foundation*, 52 HASTINGS L.J. 537, 543 (2001) ("90% of known perpetrators of elder abuse are family members—two-thirds of them adult children or spouses of adult children."). This Comment, however, only focuses on a solution for preventing financial elder abuse that stems from a new marriage.

31. Schoen, *supra* note 30, at 108.

financially abusive marriages, suggesting that the current legislation is unable to protect elders from financial abuse.[32] These attorneys relay that the elder's new spouse is frequently someone who interacted with the elder, such as a care provider or gardener, who could notice the elder's declining mental capacity.[33]

Financial abuse can occur during contrived marriages, as in Dills's case,[34] or when a spouse dies intestate[35] or without modifying existing testamentary instruments after marriage, falling prey to the omitted spouse statutes.[36] In California, if a person dies without a valid testamentary instrument, the spouse stands to inherit anywhere from one-third to the entire share of the decedent's separate property[37] and

32. *See* Knaplund, *supra* note 22, at 446; E-mail from Ellen McKissock to author, *supra* note 18. Knaplund acknowledges that elders, like individuals of all ages, need intimacy and companionship. Knaplund, *supra* note 22, at 439–40. Caregivers in assisted living facilities, nursing homes, and in-home care situations throughout the United States can take advantage of the elder through those needs. *Id.* at 442. The California Legislature passed a protective statute that "rais[es] a presumption of undue influence in cases where a caregiver is named in a will or other donative instrument." *Id.* at 446. As Knaplund notes, California's protective statute "exempt[s] spouses, relatives, and domestic partners of transferors, thus leaving an opening exploited by unscrupulous caregivers." *Id.* (footnote omitted). For a further discussion of California's protective statute, see *infra* Part IV.B.

33. *See* E-mail from Ellen McKissock to author, *supra* note 18.

34. *See supra* text accompanying notes 6–11.

35. A person can die without a valid testamentary document—intestate—for several reasons, including but not limited to the following: a deliberate choice not to make a will or trust due to hassle or expense, a revocation of an otherwise valid testamentary document due to its loss or destruction, or the person's death or incapacitation prior to the creation of a testamentary document. ELIAS CLARK ET AL., CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS, AND ESTATE AND GIFT TAXATION 50 (5th ed. 2007). Disappointed heirs often fight over a decedent family member's estate, raising typical postmortem challenges in probate court, generally claiming either (1) that the probate court should not admit the decedent's will because the testator lacked capacity, was under undue influence at the time of the signing, or did not meet all of the necessary will formalities; or (2) that the court should strike a particular provision of the will as void as contrary to public policy—"a court [may] negate[] will provisions that are wasteful or destructive in a way that harms surviving persons." Judith G. McMullen, *Keeping Peace in the Family While You Are Resting in Peace: Making Sense of and Preventing Will Contests*, 8 MARQ. ELDER'S ADVISOR 61, 61–71 (2006).

36. *See infra* Part IV.A.

37. CAL. PROB. CODE § 6401(c) (West 2009). The surviving spouse will receive one-third of the decedent's separate property if the decedent is survived by more than one child, one child and issue—lineal descendents or offspring—of one or more deceased children, or issue of two or more deceased children. *Id.*; *see also* BLACK'S LAW DICTIONARY 908 (9th ed. 2009) (defining "issue"). The surviving spouse will receive one-half of the decedent's separate property if the decedent is survived by one child or issue of one deceased child or by a parent or issue of the parent if none of the decedent's issue are then living. § 6401(c). Lastly, if the decedent spouse is not

potentially all of the couple's community property and quasi-community property.[38] Therefore, a person who marries an elder, or anyone near death, stands to inherit substantial assets.[39] The possibility for a surviving spouse to inherit substantial assets presents an incentive to commit elder abuse.[40]

A. The Prevalence of Financial Elder Abuse

As the elderly population increases due to the aging of the baby boomer generation,[41] financially exploitative marriage scams are likely to increase. According to statistics, "[i]n 2030, when all of the baby boomers will be 65 and older, nearly one in five U.S. residents is expected to be 65 and older. This age group is projected to increase to 88.5 million in 2050, more than doubling the number in 2008 (38.7 million)."[42] According to California's Department of Aging, "the elderly population [of California] is expected to grow more than twice as fast as the total population . . . . The elderly age group will have an overall increase of 112 percent during the period from 1990 to 2020."[43]

---

survived by any of the above mentioned individuals, then the surviving spouse inherits the entire share of separate property. *Id.*

38. Quasi-community property includes all personal property and all California real property that either spouse or domestic partner owned while domiciled outside of California that would have been characterized as community property if the spouse had been domiciled in California when the property was acquired. *See* CAL. PROB. CODE § 66 (West 2009).

39. *See infra* Part IV.A. *See generally* Turnipseed, *supra* note 21 (recommending a solution to the problem of financially driven deathbed marriages, which would prevent a spouse from inheriting under either elective share or community property states).

40. *See* Steven Pietroforte, *Legal Principles of Confidential Marriages and the Potential for Abuse*, 18 GLENDALE L. REV. 63, 65 (1999) (noting that California's confidential marriage and intestate statutes present an opportunity "for persons to fraudulently obtain the estate of the sick and dying"); Turnipseed, *supra* note 21, at 300 ("The current incentives are off kilter. A greedy potential spouse has every incentive to find a minister or officer of the law willing to marry them off to a wealthy sick person and no legal incentives not to try it.").

41. The baby boomer generation consists of individuals who were born between 1946 and 1964. Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 79 (2008).

42. Press Release, Robert Bernstein & Tom Edwards, U.S. Census Bureau, An Older and More Diverse Nation by Midcentury (Aug. 14, 2008), *available at* http://www.census.gov/Press-Release/www/releases/archives/population/012496.html.

43. California Department of Aging, Statistics/Demographics—Facts About California's Elderly, http://www.aging.ca.gov/stats/fact_about_elderly.asp (last visited Mar. 28, 2010). The U.S. Census Bureau in 2000 reported that nearly 3.6 million persons

Of California's elderly population, nearly 14% fall victim to some type of elder abuse each year.[44] Forty percent of these elderly victims suffer from financial abuse.[45]

Dependency and capacity issues leave the elderly population vulnerable and "more subject to risks of abuse, neglect, and abandonment," including financial abuse, than other members of the population.[46] Fewer family members live near their elderly relatives than in previous decades, increasing the likelihood of elders' falling victim to exploitative marriages and financial elder abuse.[47] Neglect by loved ones can lead an elder of questionable capacity to seek companionship.[48] Therefore, when no relatives live nearby, an elder can easily become a victim of abuse by unscrupulous individuals.[49]

---

aged sixty-five and older live in California, accounting for almost 11% of California's population. U.S. CENSUS BUREAU, DP-1: PROFILE OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000: GEOGRAPHIC AREA: CALIFORNIA (2008), *available at* http://factfinder.census.gov/ (select "California" in the "state" information box and click on "go"; on the "Fact Sheet" page, click on the "2000" tab).

44. RICHARD RYDER & CHERI JASINSKI, ELDER FINANCIAL ABUSE TASK TEAM REPORT TO THE CALIFORNIA COMMISSION ON AGING 3 (2005).

45. *Id.* In other words, almost 6% of elders in California fall victim to financial elder abuse. Other types of elder abuse include physical abuse, psychological or mental abuse, neglect, abandonment, abduction, and isolation. NAT'L CTR. ON ELDER ABUSE, TYPES OF ELDER ABUSE IN DOMESTIC SETTINGS 1–2 (1999), http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/basics/fact1.pdf.

46. *See* CAL. WELF. & INST. CODE § 15600 (West 2001). Section 15610.07 defines "'[a]buse of an elder or a dependent adult'" as "[p]hysical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering." *Id.* § 15610.07. *See generally* Lara Queen Plaisance, Comment, *Will You Still . . . When I'm Sixty-Four: Adult Children's Legal Obligations to Aging Parents*, 21 J. AM. ACAD. MATRIMONIAL L. 245, 246 (2008) (advocating a required duty of care for adult children to look after an incapacitated parent).

47. *See* ELDER ABUSE: INTERNATIONAL AND CROSS-CULTURAL PERSPECTIVES 3–4 (Jordan I. Kosberg & Juanita L. Garcia eds., 1995). Isolation and neglect of elderly individuals is due to an increase in the mobility of family members who move away from the elderly relative for employment and educational opportunities. *Id.* Economic changes that encourage—or perhaps even require—female family members to work outside of the home also increase the neglect of elders. *Id.* at 3.

48. *See* Knaplund, *supra* note 22, at 439–41, 455. The elderly, like all humans, need intimacy and physical contact and such needs may actually increase as a person grows older. *Id.* at 439–40. Knaplund asserts that "elderly people who lack family to care for them at home face two tough choices. They can either stay in their homes and retain a great deal of freedom over their personal affairs, or they can go to a facility, where they may find their freedom severely restricted." *Id.* at 441. If elders choose to stay in their homes, "[t]he result in some cases is that the elderly are being taken advantage of by unscrupulous caregivers, even in states that have legislation attempting to protect them." *Id.* at 442.

49. *See supra* note 47. *See generally* Knaplund, *supra* note 22 (comparing the protection that an elder, who lacks a supportive family, receives when the elder lives in

Financial elder abuse is especially troubling because it can avoid detection for long periods of time.[50] For example, a relationship that leads to marriage can superficially appear to be a casual friendship or the product of a person's simply taking an interest in the care of an elder. Third parties may not notice the influence a person has over the elder or the steps taken to lure the elder into marriage. Therefore, states must find a balance between protecting elders from financially exploitive marriages and allowing them to exercise their fundamental right to enter into marriage.[51]

B. California Marriage Statutes

The State of California regulates marital relationships by requiring that both parties have capacity to marry and that the parties obtain a marriage license and certificate.[52] A couple must marry within ninety days of obtaining a marriage license.[53] The marriage license becomes a marriage certificate when the person solemnizing the marriage registers the license with the county clerk.[54]

---

either a nursing or assisted living facility versus the abuse that an elder faces when the elder remains in the elder's house).

50. Thomas L. Hafemeister, *Financial Abuse of the Elderly in Domestic Settings*, *in* ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA 382, 403 (Richard J. Bonnie & Robert B. Wallace eds., 2003). A familial relationship between the elder and the abuser may eliminate suspicions of financial abuse because a third party may presume that the elder victim voluntarily provided or consented to the perpetrator's obtaining the elder's assets. *Id.* at 404. Additionally, an abuser can hide signs of financial abuse, unlike in the case of physical abuse. *Id.*

51. The fundamental right to enter into marriage is "a right of marital and familial privacy . . . [the right is not absolute, it] places some substantive limits on the regulatory power of government" over marriage. Zablocki v. Redhail, 434 U.S. 374, 397 (1978) (Powell, J., concurring); *see infra* Part VI.B. *See generally* Stephen L. Grose, *A Constitutional Analysis of Pennsylvania's Restrictions Upon Marriage*, 83 DICK. L. REV. 71 (1978) (analyzing to what extent the state can infringe upon the personal freedom to marry); Joseph A. Pull, *Questioning the Fundamental Right To Marry*, 90 MARQ. L. REV. 21 (2006) (discussing the origins of, contradictions within, and reasons for the fundamental right to marriage).

52. CAL. FAM. CODE §§ 300, 500.5 (West 2004 & Supp. 2009); *see also* Estate of DePasse, 118 Cal. Rptr. 2d 143, 148 (Ct. App. 2002) (discussing the legislature's role in regulating marriage).

53. CAL. FAM. CODE §§ 356, 504 (West 2004). It is the duty of the person solemnizing the marriage to return the certificate to the county recorder's office within ten days of performing the ceremony. CAL. FAM. CODE §§ 357(c), 506(c) (West 2004 & Supp. 2009).

54. §§ 300, 500.5.

In California, couples can marry either by public marriage,[55] common in all states, or through confidential marriage, which is specific to California.[56] California has recognized confidential marriage since 1878.[57] At the time the legislature codified confidential marriage, society considered it sinful for couples to live together before marriage.[58] Despite society's negative views on premarital cohabitation, many couples living in rural parts of California chose to live in sin because they simply could not reach a courthouse or member of the clergy without great difficulty in order to formalize their union.[59] Confidential marriages encouraged men and women, who were already living together, to enter into a legally recognized marriage without the couple's suffering the public embarrassment of having the actual marriage date publicized.[60] The couple's neighbors and family members, or any other person interested in the date of marriage, could not obtain the actual date of the marriage because the record was sealed by the church.[61] Thus,

---

55. *See id.* §§ 300–310.

56. *Id.* §§ 500–511. Michigan also offers a "secret" marriage option in order "to protect a child born out of the indiscretions of its parents." Baum v. Baum, 173 N.W.2d 744, 746 (Mich. Ct. App. 1969); MICH. COMP. LAWS ANN. § 551.201 (West 2005). Under the Michigan statute, couples can request a predated marriage certificate, which keeps the actual marriage date hidden from disclosure. *See Baum*, 173 N.W.2d at 746.

57. *See* Act of Feb. 6, 1878, ch. 51, 1877–1878 Cal. Stat. 75, 75–76 (current version at CAL. FAM. CODE § 500 (West 2004)). The text of the original statute reads as follows:

> When unmarried persons, not minors, have been living together as man and wife, they may, without a license, be married by any clergyman. A certificate of such marriage must, by the clergyman, be made and delivered to the parties, and recorded upon the records of the church of which the clergyman is a representative. No other record need be made.

Id.; *see also* People v. McIntire, 1 P.2d 443, 444 (Cal. 1931) (discussing the requirements of the statute).

58. *See* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 157–58 (2008). Lind explains that society accepted the common law marriage ceremony in the nineteenth and twentieth centuries because the frontier lifestyle of early America made it difficult for couples to marry publicly. *Id.* Social reasons, such as protecting the woman's reputation and legitimizing children, encouraged marriage. *See id.*

59. *See* Jill Wolfson, *The Great Wedding War: Just Say 'I Do,'* MIAMI HERALD, Sept. 23, 1983, at E3, *available at* 1983 WLNR 247205. Frontier living, sparse transportation, and a limited number of clergymen made wedding ceremonies difficult if not impossible. *Id.* Confidential marriages provided couples with the opportunity to legitimize their relationship when an opportunity to marry before the clergyman presented itself. *Id.*

60. McKissock, *supra* note 21, at 19; Pietroforte, *supra* note 40, at 63 (citing Encinas v. Lowthian Freight Lines, Inc., 158 P.2d 575, 579 (Cal. Dist. Ct. App. 1945)).

61. *See Encinas*, 158 P.2d at 579. Today couples must record confidential marriages with the county clerk, but the record remains sealed from public inspection. CAL. FAM. CODE § 511 (West 2004 & Supp. 2009).

confidential marriages furthered the public policy goal of encouraging marriages and helped to legitimize children born out of wedlock.[62]

1. Distinctions Between Confidential and Public Marriages

A few rules distinguish the public and confidential marriage statutes.[63] First, public marriages require the signature of at least one witness, whereas confidential marriages do not require any witnesses.[64] Second, to engage in a confidential marriage, a couple must first live together as husband and wife, although the statute does not specify the required length of time a couple must live together before marrying.[65] Third, it is more difficult to confirm the existence of a confidential marriage because the public cannot view confidential marriage records.[66] A family member or concerned friend can access a public marriage license

62. *See Encinas*, 158 P.2d at 579; McKissock, *supra* note 21, at 19. Unwed parenthood and premarital cohabitation no longer carry the same stigma they did when the state first recognized the confidential marriage statute. *See* David D. Meyer, *Parenthood in a Time of Transition: Tensions Between Legal, Biological, and Social Conceptions of Parenthood*, 54 AM. J. COMP. L. SUPPLEMENT 125, 132 (2006); *see also* Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington's Community Property Marriage Statutes to Cohabitational Relationships*, 20 SEATTLE U. L. REV. 543, 555 (1997) ("Once the social mores against cohabitation were challenged and society did not come to an end, the traditional reasons for placing cohabitation on a level well below marriage may have lost relevance.").

63. One distinction, which is no longer legally applicable today, is that a couple marrying under the public statute had to appear at the county clerk's office and file a statement declaring their marital status—single or divorced—prior to the wedding. *See Family Law, Confidential Marriage Certificates, Cohabitation Contracts, Interlocutory Judgment in Marriage Dissolution*: *Hearing Before the Assemb. Comm. on Judiciary*, 1979–1980 Leg. Reg. Sess. 1 (Cal. 1979) [hereinafter *Hearing*] (statement of Robert D. Zumwalt, County Clerk, San Diego County). As early as 1981, the confidential marriage statute allowed an exception to the appearance requirement for parties unable to appear due to incarceration in prison or confinement to a healthcare facility. Act of Sept. 26, 1981, ch. 872, §§ 1–2, 1981 Cal. Stat. 3335, 3335–36. The legislature extended this exemption to public marriages effective January 1, 2008. *See* CAL. FAM. CODE § 426 (West 2004 & Supp. 2009); *infra* text accompanying notes 73–77.

64. *Compare* CAL. FAM. CODE § 422(b) (West 2004 & Supp. 2009) (requiring that one or more witnesses sign a public marriage certificate), *with id.* § 500 (West 2004) (requiring only that the couple live together prior to marrying).

65. § 500. Case law indicates that a relationship of "occasional illicit intercourse," People v. McIntire, 1 P.2d 443, 444 (Cal. 1931), or of man and mistress will not suffice to constitute a couple's living together as husband and wife, *see* Sharon v. Sharon, 22 P. 26, 35 (Cal. 1889).

66. *See* CAL. FAM. CODE §§ 506, 511 (West 2004 & Supp. 2009).

by mailing a request to the county clerk's office.[67] In contrast, the county clerk may release a copy of a confidential marriage certificate only to parties of the marriage or to third parties who obtain a court order establishing "good cause."[68]

Although distinctions exist between confidential and public marriages, an unfortunate similarity exists between them: an insincere courter can take advantage of an elder under either. After the death of either of the spouses, a third party cannot challenge the marriage based on an elder's lack of capacity.[69] If a family member does not know the elder is married until after the elder dies, then the family cannot challenge the marriage.[70] Therefore, the confidential marriage option exacerbates the problem of financial elder abuse carried out by marriage.[71] Despite the potential for abuse of the confidential marriage statute, the statute continues to exist because some individuals wish to keep their marriage certificates private to maintain some semblance of privacy in their personal lives.[72] Ironically, the same secrecy of marital records that

---

67. *See, e.g.*, El Dorado County Recorder-Clerk, Marriage FAQs, http://www.co.el-dorado.ca.us/countyclerk/faq_marriage.html (last visited Mar. 28, 2010). In El Dorado County, for example, it takes two to three days after the county receives the request for *anyone* to receive a certified copy of a public marriage. *Id.* A confidential marriage certificate may also be mailed but it requires a signed affidavit by the couple named on the certificate and it takes three to four weeks for the couple to receive a certified copy. *Id.*

68. CAL. FAM. CODE §§ 509, 511 (West 2004 & Supp. 2009). *See, e.g.*, David L. Butler, County of San Diego, Assessor/Recorder/County Clerk, http://arcc.co.san-diego.ca.us/services/marriage_certificates.aspx ("If you had a confidential marriage license, only the married parties named on the certificate may request a copy and they will be required to show identification.") (last visited Mar. 28, 2010). There is no established definition of "good cause." *See, e.g.*, Zorrero v. Unemployment Ins. Appeals Bd., 120 Cal. Rptr. 855, 858 (Ct. App. 1975) ("[I]ts definition varies with the context in which it is used. Very broadly, it means a legally sufficient ground or reason for a certain action.").

69. *See* CAL. FAM. CODE §§ 2210–2211 (West 2004); *infra* Part V.

70. *See* §§ 2210–2211; McKissock, *supra* note 21, at 20 ("In the case of a confidential marriage, family members may never be aware that an incompetent elder has married until after his or her death and a surviving spouse suddenly appears."); Pietroforte, *supra* note 40, at 65.

71. *See supra* notes 66–68, 70 and accompanying text.

72. Often celebrity couples try to keep their marriages private. In 1991, Janet Jackson and her songwriter-boyfriend married in a secret wedding at their San Diego home. *Jackson's Secret Marriage Ends*, BBC NEWS, June 1, 2000, http://news.bbc.co.uk/1/hi/entertainment/772596.stm ("[Janet Jackson] had kept it private 'in an effort to have a normal family life.'"). Gary Coleman also engaged in a secret wedding. *Gary Coleman Reveals Secret Marriage*, FOX NEWS, Feb. 12, 2008, http://www.foxnews.com/story/0,2933,330509,00.html?sPage=fnc/entertainment/celebcouples ("[Mrs. Coleman] said they kept their wedding secret because she wanted to keep being seen as her own person."). Other couples may also wish to keep their marriages away from public inspection for personal security reasons. *See* Memorandum of Points and Authorities in

allows the occurrence of elder abuse also warrants the continued existence of the statute.

2. Abuse of the Marriage Statutes

Under both marriage statutes, parties to the marriage must appear *together* before the county clerk.[73] However, exceptions are made for a party[74] who is physically unable to appear due to hospitalization, incarceration, or any other reason a county clerk deems satisfactory.[75] When the presence requirement of a party is excused, the person solemnizing the marriage must submit an affidavit to the county clerk, signed under penalty of perjury, stating the reasons the party could not appear in person.[76] Either a notary public or a court must authenticate the signature of the person who is unable to appear prior to the issuance of a marriage certificate.[77]

Opposition to Co-Trustees Motion for Summary Judgment at 5, *In re* Tollefsen, No. PRO116118 (Cal. Super. Ct. 2008). Judges, policemen, and individuals worried about a jealous ex-spouse or a stalker may all choose to have a confidential marriage to protect their loved ones. *Id.* (citing County of Marin, Application for License and Certificate of Confidential Marriage, *available at* http://www.co.marin.ca.us/depts/CC/Main/clerk/Forms/m_app_conf.pdf (last visited Mar. 28, 2010) ("A confidential marriage license is not a public record. You may want a confidential marriage license if you are a celebrity, work in law enforcement or have another confidentiality issue.")). Online accessibility to documents that form the public record makes it easier for wrongdoers to access a future victim's personal information. *See generally* Kristen M. Blankley, Note, *Are Public Records Too Public? Why Personally Identifying Information Should Be Removed from Both Online and Print Versions of Court Documents*, 65 OHIO ST. L.J. 413, 418 (2004) ("The advent of the Internet has greatly increased the incident rate of [identity theft]. Because the personally identifying information in court documents is rarely removed before a document is posted online, courts have created a substantial risk of identity theft for those whose records are exposed to the public." (footnotes omitted)); Kristen M. Driskell, Note, *Identity Confidentiality for Women Fleeing Domestic Violence*, 20 HASTINGS WOMEN'S L.J. 129, 131 (2009) ("[A]dvancing internet technologies and the release of personal information by government agencies, courts, and corporations make it easier than ever for an abuser to find and continue to abuse his victim.").

73. CAL. FAM. CODE §§ 359, 501 (West 2004 & Supp. 2010).

74. Technically, neither party has to appear. *See infra* note 75.

75. CAL. FAM. CODE §§ 426(d), 502(d) (West 2004 & Supp. 2009). As of the writing of this Comment, there are no cases that assist in determining what the county clerk might deem satisfactory.

76. *Id.* §§ 426(a)–(b), 502(a)–(b).

77. *Id.* §§ 426(c), 502(c).

Abuse can occur despite the appearance requirement.[78] For example, Linda Lowney, an estate planning attorney in her fifties, and Thor Tollefsen, her eighty-six-year-old client, appeared together in person before the county clerk in order to marry confidentially.[79] The couple chose to marry under the confidential marriage statute because "Lowney did not want anyone to know about the marriage, especially her 16-year-old daughter."[80] Both parties signed the confidential marriage license and the deputy clerk married the couple.[81] As with many elders, the groom was lonely; he lived by himself and his only surviving relatives lived in Norway.[82] Even after signing the marriage license, the couple continued to live in separate houses.[83] Within a year of the marriage, Tollefsen asked Lowney for a divorce; his relatives learned of his marriage, as well as his unhappiness with it, at approximately the same time.[84] Tollefsen died before his family could help him with the divorce proceedings, leaving him still "married" to Lowney when he died.[85] Six days after Tollefsen's death, Lowney filed for a spousal property petition in order to claim half of Tollefsen's separate property assets—approximately one million dollars.[86] Fortunately, Lowney's efforts proved unsuccessful.[87] The couple's lack of premarital cohabitation violated the confidential marriage statute, therefore, invalidating the marriage.[88]

Although the surviving spouse's attempt to claim a share of the decedent's separate property proved unsuccessful, the case illustrates the ineffectiveness of appearing before the county clerk as a deterrent for financially abusive marriages. Abuse occurs anytime an elder who lacks capacity to understand the obligations and potential risks of marriage is convinced to get married—either through a public or confidential license. Confidential marriages remain particularly abusive because family members and concerned third parties, who might otherwise help

78. McKissock, *supra* note 21, at 19.
79. Plaintiff's Memorandum of Points & Authorities in Support of Summary Judgment at 1, *In re* Tollefsen, No. PRO116118 (Cal. Super. Ct. Mar. 11, 2008) [hereinafter Pl.'s Mem. of P. & A.]; McKissock, *supra* note 21, at 20.
80. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
81. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
82. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
83. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
84. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
85. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
86. Pl.'s Mem. of P. & A., *supra* note 79, at 1; *see* McKissock, *supra* note 21, at 20.
87. E-mail from Ellen McKissock to author, *supra* note 18.
88. *Id.*

to protect their elder loved one, have difficulty obtaining information regarding the marriage.[89]

Furthermore, some individuals with statutory authority to solemnize marriages do not have the training or experience necessary to determine the capacity of a marital applicant.[90] The county clerk may appoint deputy commissioners to solemnize marriages.[91] A friend or relative may serve as a deputy commissioner for a wedding provided the friend or relative attends a fifteen- to twenty-minute instruction on how to perform the service.[92] A person trying to abuse the marriage system could easily use a friend, serving as a deputy commissioner of civil marriage, to solemnize the marriage. In the case of a friend or relative solemnizing the marriage, the personal relationship between the person seeking to financially exploit the elder and the deputy commissioner indicates that the deputy commissioner likely could not fairly or honestly judge capacity. This is because the deputy commissioner either lacks the training for such a determination or has a potential personal bias or motive. Therefore, it is possible that marriages can occur despite one of the parties' lacking capacity.

III. DETERMINING CAPACITY

Under Anglo-American law, a person must meet a specified level of understanding—"soundness of mind"—to enter into legal agreements or relations.[93] On a basic scale, marital capacity requires the least amount of capacity, followed by testamentary capacity, and lastly, capacity to

89. *See* McKissock, *supra* note 21, at 20; Pietroforte, *supra* note 40, at 65; *supra* notes 66–68 and accompanying text.

90. The list of persons able to solemnize a marriage is available at CAL. FAM. CODE § 400 (West 2004 & Supp. 2010). The list includes, but is not limited to, judges, a commissioner of civil marriages, and an "authorized person of any religious denomination." *Id.*

91. CAL. FAM. CODE § 401 (West 2004).

92. *See, e.g.*, El Dorado County, Deputy Commissioner of Marriage Program, http://www.co.el-dorado.ca.us/countyclerk/deputy.html (last visited Mar. 28, 2010); County of Alameda, Volunteer Deputy Marriage Commissioner Program, http://www.acgov.org/auditor/clerk/commissioners.htm (last visited Mar. 28, 2010) (requiring only that applicants are over the age of eighteen, able to read and write English, and have a personal commitment to the county and serving others). For a list of counties that allow friends or family members to serve as deputy commissioners, see Sheri & Bob Stritof, *Deputy for a Day Program in California: A Member of Your Family or a Friend Can Perform Your Marriage Ceremony*, ABOUT.COM: MARRIAGE, http://marriage.about.com/od/california/qt/deputyforaday.htm (last visited Mar. 28, 2010).

93. *See* BLACK'S LAW DICTIONARY 235–36 (9th ed. 2009) (defining "capacity").

enter into contracts.[94] The level of understanding required depends on the complexity of the act or task at hand.[95] In California, a person has marital capacity and is, therefore, able to consent to marriage if that person is capable of understanding the nature of marriage and the obligations it creates.[96] In keeping with the fundamental right to marry, the low level of capacity required allows the majority of individuals to marry.[97] For example, a person under a conservatorship[98] is generally without contractual power but may validly create a will or marry in California.[99] Another textbook example is that courts may find a marriage valid even if the court deems the decedent's will, signed the day after the marriage, invalid due to the decedent's lack of capacity.[100] The problem rests not with the low level capacity required to marry, but rather in the fact that the statutory requirement of consent is not effectively enforced.[101]

---

94. JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 145–46 (7th ed. 2005); *see* Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAELA J. 303, 304–05 (2006); Turnipseed, *supra* note 21, at 286.

95. Frolik & Radford, *supra* note 94, at 304. Some advocate a standard one-size-fits-all capacity requirement for all transactions, but imposing different standards of capacity based on the transaction is necessary because different tasks have different levels of consequences. Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321, 326 (2003). Beyond marital, testamentary, and contractual capacity, a person must also have enough capacity when deciding whether to forego medical treatment. *Id.* at 326–27. The patient must have enough capacity to be "aware of his physical condition and the likely result of the decision to forego medical treatment." *Id.* at 326. Along the lines of healthcare decisionmaking, appointing an agent under a durable power of attorney requires contractual capacity because the appointed agent is given immediate, life-impacting decisionmaking capability. Frolik & Radford, *supra* note 94, at 313.

96. Dunphy v. Dunphy, 119 P. 512, 512 (Cal. 1911) ("The true test in actions to annul a marriage on account of insanity at the time of the marriage . . . is whether the party was capable of understanding the obligations assumed by marriage." (citation omitted) (internal quotation marks omitted)). Marriage is often referred to as a "special kind of contract" that warrants certain rights under state law and creates obligations between the parties involved. GAIL KOFF, LOVE AND THE LAW 74 (1989).

97. *See* Knaplund, *supra* note 22, at 447 ("Today, given the fundamental right to marry, states have proceeded cautiously in restricting the rights of incompetent people to marry . . . ."); *infra* Part VI.B.

98. *See* Friedman & Savage, *supra* note 12, at 273; Ross, *supra* note 12, at 758.

99. *See* CAL. PROB. CODE §§ 1900–1901 (West 2002 & Supp. 2009); McKissock, *supra* note 21, at 19; *see also* DUKEMINIER ET AL., *supra* note 94, at 145–46.

100. Hoffman v. Kohns, 385 So. 2d 1064, 1068–69 (Fla. Dist. Ct. App. 1980).

101. *See* McKissock, *supra* note 21, at 19 ("The county clerk is not required to verify any statements on the confidential marriage license, which statements are quite often not even made under penalty of perjury.").

A. Marital Capacity Requirements

In California, both parties must have capacity in order to marry.[102] A diagnosis of a physical or mental disorder does not equate to a lack of marital capacity and, therefore, does not automatically prevent an individual from getting married.[103] A judge will only determine that an individual lacks marital capacity if the individual has a deficit in one or more mental functions that "significantly impairs the person's ability to understand and appreciate the consequences" of marriage.[104] The court finds deficient mental functioning when an individual lacks the ability to reason logically, concentrate, recall information, understand when communicating with others, or maintain organized thoughts.[105]

In addition to requiring that marriage applicants have a requisite mental capacity to marry, social and ethical standards require that both parties reach a statutorily imposed age before marrying.[106] The minimum age requirement, however, has changed over time and throughout jurisdictions. Under common law the courts considered individuals capable of consenting to marriage based simply on the age of sexual maturity.[107] Therefore, a female could validly marry at the age of twelve and a male could enter into marriage upon reaching the age of fourteen.[108] Likewise, California sets the age requirement for entering into a marital relationship at eighteen[109] but allows exceptions for minors to marry who obtain consent from each underage person's parent or who receive court approval.[110] Allowing minors to marry is particularly applicable for the case of unwed minor parents because the state maintains an interest in protecting the legitimacy of any children born of

102. *See* CAL. FAM. CODE § 300 (West 2004 & Supp. 2009). A denial of a marriage license occurs when "either of the applicants lacks the capacity to enter into a valid marriage or is, at the time of making the application for the license, under the influence of an intoxicating liquor or narcotic drug." *Id.* § 352 (West 2004).
103. *See* CAL. PROB. CODE § 810 (West 2002).
104. *Id.* § 811(b).
105. For a complete list of what constitutes deficient mental functions, see *id.* § 811(a).
106. LIND, *supra* note 58, at 187.
107. *Id.* at 191.
108. *Id.* Persons under those ages could still marry, but marriages between minors under the age of seven were considered void, as if they had never happened. *Id.*
109. CAL. FAM. CODE § 301 (West 2004).
110. *Id.* §§ 302–303 (West 2004 & Supp. 2009).

the marriage.[111] States seemingly impose arbitrary marital capacity standards by assuming that a person meets a certain level of capacity once an individual meets physical maturity[112] or a minimum age.[113]

A person's chronological age, after all, does not necessarily reflect that person's "mental age" or ability to comprehend the nature of the marital act.[114] As a person ages, it becomes "more likely that he or she may suffer from diminished capacity."[115] Studies reveal that although less than 1% of persons under the age of sixty-five suffer from dementia, the percentage of individuals exhibiting symptoms of dementia significantly increases after age sixty-five.[116] In fact, approximately 45% of eighty-five-year-olds suffer from dementia.[117] Federal and state governments recognize the vulnerability of elders and, therefore, pass laws aimed at caring for, and protecting, elders.[118] For example, the California Legislature passed legislation aimed at protecting elders from abuse, neglect, and abandonment.[119] The state, therefore, should acknowledge that elders may lack capacity to marry just as minors lack capacity and should adopt legislation that protects elders entering into marriage.

B. Reasons for Capacity Requirements

Capacity requirements allow states to simultaneously balance individual autonomy[120] with protection of incapacitated persons.[121]

---

111. *See* Encinas v. Lowthian Freight Lines, Inc., 158 P.2d 575, 579 (Cal. Dist. Ct. App. 1945). Similarly, Michigan provides a statutory exception to the age requirement for marital capacity. *See supra* note 56.

112. An individual reaches physical maturity when that person has the ability to consummate the marriage or become pregnant.

113. When the states recognized twenty-one as the age of majority, the age of determining testamentary capacity was set at the same age. Frolik & Radford, *supra* note 94, at 306. Today, eighteen years of age is widely recognized as the age of majority and most states, therefore, recognize it as the minimum age for testamentary capacity. *Id.* Statutorily reducing the age of majority by three years—and consequently the age of capacity to devise property—suggests the arbitrariness in the age requirement. *See id.*

114. *Id.*

115. *Id.*

116. Brandriet & Thorn, *supra* note 15, at 22; Sherrill Y. Tanibata, *Mind over Matters: The Question of an Elder's Legal Capacity Nearly Always Involves Issues of Fraud and Undue Influence*, L.A. LAW., Oct. 2007, at 28, 30.

117. *See* sources cited *supra* note 116.

118. *See* Friedman & Savage, *supra* note 12, at 273 ("Federal and state laws against age discrimination, pension and social security law, and many other fields of law touch directly or indirectly on the problems of those who are middle-aged or older.").

119. CAL. WELF. & INST. CODE § 15600 (West 2001).

120. Individual autonomy includes, but is not limited to, a person's freedom to contract, marry, and bequeath one's estate.

Requiring that an individual meet a minimal level of capacity to enter into marriage indicates that society highly values the individual's decision to marry and that the state endorses marriage.[122] In order to preserve the legitimacy of the institution of marriage, the state must ensure that individuals knowingly and willingly enter into marriage.[123] Similar to an elder unduly influenced to sign a testamentary document, an elder who lacks the full understanding of marital consequences cannot rationally enter into a marriage because the choice to marry is essentially taken out of the elder's hands.[124] Therefore, if California continues to avoid addressing the problem of individuals' conning elders into financially exploitative marriages, then California is arguably complicit in devaluing the institution of marriage.

Additionally, mental capacity requirements "may protect a senile or incompetent [individual] from exploitation by cunning persons."[125] The law of trusts and estates acknowledges that "[i]f the incompetent could make wills, then many institutionalized people would be subject to imposition by the unscrupulous."[126] States maintain an interest in preventing incompetent persons from entering into binding contracts or making irrevocable lifetime gifts that could leave an incompetent

121. *See e.g.*, Brandriet & Thorn, *supra* note 15, at 21 (noting that society highly values independent decisionmaking by those with the capacity to make sound decisions); Rebecca Dresser, *Research Involving Persons with Mental Disabilities: A Review of Policy Issues and Proposals*, *in* 2 NAT'L BIOETHICS ADVISORY COMM'N, RESEARCH INVOLVING PERSONS WITH MENTAL DISORDERS THAT MAY AFFECT DECISIONMAKING CAPACITY: COMMISSIONED PAPERS 5, 9 (1999), *available at* http://bioethics.georgetown.edu/nbac/capacity/volumeii.pdf ("A judgment that a capable person is incapable of exercising autonomy is disrespectful, demeaning, and stigmatizing to that individual. Conversely, a judgment that an incapable person is capable leaves that individual unprotected and vulnerable to exploitation by others."); Knauer, *supra* note 95, at 327–28 (discussing the need to balance individual autonomy, states' interests, and care for those with diminished capacity).

122. *See* Knauer, *supra* note 95, at 328–29; *supra* notes 94, 96–99 and accompanying text.

123. This idea applies similarly to the law of trusts and estates because "the public acceptance of law rests upon a belief that legal institutions, including inheritance, are legitimate, and legitimacy cannot exist unless decisions are reasoned." DUKEMINIER ET AL., *supra* note 94, at 147. A testamentary instrument procured by undue influence does not represent the testator's true intent. *See id.* at 148. Therefore, society cannot accept such an "irrational" representation of the testator's intent. *Id.* The will cannot be probated, meaning it cannot be brought before the court for establishing its validity. *See id.*; *supra* note 35.

124. *See supra* note 123.

125. DUKEMINIER ET AL., *supra* note 94, at 148.

126. *Id.*

individual—as well as that individual's dependents—impoverished and, therefore, dependent on the state.[127] Protecting incompetent elders from unscrupulous individuals extends beyond protecting them from financial insecurity; states also have an interest in protecting elders from abandonment, neglect, and physical abuse.[128] In other words, states maintain an interest in protecting vulnerable elders, but California fails to protect them from exploitative marriages.[129]

IV. INHERITANCE RIGHTS AND MARRIAGE

States generally uphold testamentary freedom.[130] States will, however, override a testamentary instrument, or provisions therein, if (1) the provisions of the testamentary instrument violate public policy,[131] (2) heirs or potential beneficiaries successfully challenge the validity of the testamentary instrument,[132] or (3) such overriding is necessary in order to prevent unscrupulous individuals, who attempt to procure a share of the decedent's estate, from profiting from their wrongdoing.[133] Additionally, the California Legislature created statutes that override

127. *See id.* at 145 (citing RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003)). Therefore, capacity requirements for making a gift, financial investment, or contract all require contractual capacity, the highest level of capacity on the capacity hierarchy. *See supra* note 94 and accompanying text. The required capacity to create a will is lower because the testator will no longer be alive and in need of the money devised by the testamentary instrument. DUKEMINIER ET AL., *supra* note 94, at 145–46.

128. CAL. WELF. & INST. § 15600 (West 2001).

129. *See supra* note 32.

130. *See* Frolik & Radford, *supra* note 94, at 305; McMullen, *supra* note 35, at 78. States encourage testamentary freedom for individuals to choose to whom and in what amounts they want their property distributed at death; a testator's legal authority to devise property at death encourages the testator to accumulate wealth during life. Frolik & Radford, *supra* note 94, at 305. The ability to devise one's property also encourages family members to care for and to support their aging parents; family members who want to inherit will likely pay more attention to the testator in an effort to remain in favor. *Id.*

131. McMullen, *supra* note 35, at 64–66.

132. *Id.* at 66–71. Challenges as to the validity of a testamentary instrument include whether the instrument met all of the formal requirements of a will, whether the testator lacked testamentary capacity during the signing of the instrument, and whether the testator was unduly influenced to sign the document. *Id.*

133. *See, e.g.*, CAL. PROB. CODE § 250 (West 2002 & Supp. 2009) (prohibiting inheritance of individuals "who feloniously and intentionally kill[ed] the decedent"); *id.* § 259 (West 2002) (deeming persons held liable for committing elder abuse as predeceasing the decedent so that such persons may not inherit damages awarded to the decedent's estate in the elder abuse action); *id.* § 21350 (West Supp. 2009) (requiring extra precautions for deathtime transfers to certain individuals who are the most likely to unduly influence the testator). However, these statutes only protect the testator's property interests after the testator dies.

testamentary intent in order to protect the decedent's surviving spouse from unintentional disinheritance.[134] This Part explains how the statutes designed to protect the decedent's family may actually encourage individuals to sidestep legislative measures intended to protect the decedent.

A. Probate Statutes Designed To Protect the Decedent's Family

The institution of marriage serves to foster a partnership between spouses with regard to property.[135] States, therefore, regulate the distribution of property during a marriage and upon the death of one of the spouses or divorce.[136] Based on the presumption of married couples as partners, it logically follows that a new spouse, added to the elder's bank account, may withdraw from the elder's account and use the elder's money for personal benefit—to the detriment of the elder.[137] Then upon the elder spouse's death, the surviving spouse may inherit from the decedent elder through a devise in the elder's testamentary instruments, through an omitted spouse statute,[138] or by intestate succession.[139] A new spouse's ability to inherit property upon the elder's death justifies using similar procedural safeguards as those found in the law of trusts and estates.[140]

In California, a community property state,[141] a surviving spouse stands to inherit from the decedent spouse, even if the decedent executed a will

134. *Id.* § 21610 (ensuring a surviving spouse receives a share of the decedent's estate if the spouse is inadvertently omitted from the testator's will); *see In re* Estate of Katleman, 16 Cal. Rptr. 2d 468, 477 (Ct. App. 1993) (upholding spouse's right to receive an omitted spouse share despite the decedent's intent to disinherit her).

135. *See generally* Laura A. Rosenbury, *Two Ways To End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (discussing the partnership theory of marriage, including the effects of death and divorce on property).

136. *Id.*

137. *See, e.g.*, Pratt, *supra* note 24, at 195; *supra* text accompanying notes 6–11.

138. § 21610.

139. *Id.* § 6401 (West 2009). *See supra* notes 35–38 and accompanying text.

140. *See infra* Parts IV.B, V. Examining an elder's capacity to enter into marriage merely would provide the same procedural safeguards as those preventing the inheritance of property by fraud and undue influence. *See infra* Part IV.B.

141. CAL. FAM. CODE § 760 (West 2004). The other community property states include the following: Arizona, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Turnipseed, *supra* note 21, at 277 n.16. A surviving spouse stands to inherit from a decedent spouse regardless of whether the death occurs in a state that follows an elective share regime or a state that follows a community property regime. *Id.*

that does not name the surviving spouse as a beneficiary.[142] Under the California Probate Code's omitted spouse statute, a surviving spouse who is not provided for by the deceased spouse's will may receive the decedent's share of both community property and quasi-community property.[143] The omitted spouse is also entitled to a share of the decedent's separate property equivalent in value to the amount the spouse otherwise would have received had the decedent died intestate.[144] Thus, the surviving spouse may inherit even if the decedent spouse dies with a valid will if that will was executed prior to the marriage and does not reference the new spouse.[145]

This rule of automatic inheritance for a new surviving spouse is not without exceptions, however.[146] A surviving spouse will not inherit under California's omitted spouse statute if the decedent's testamentary instruments clearly indicate the decedent's intent not to provide for the surviving spouse, if evidence suggests that the decedent made other arrangements to provide for the surviving spouse,[147] or if the surviving spouse signed a premarital or antenuptial agreement or otherwise acknowledged an agreement not to partake in the decedent's estate.[148] None of these exceptions to the omitted spouse statute would prevent an individual from inheriting from an elder who lacks marital capacity. An individual who lacks marital capacity lacks the higher levels of testamentary and contractual capacity and, therefore, cannot validly execute testamentary instruments to disinherit the surviving spouse or enter into premarital or antenuptial agreements.[149]

Both the foregoing omitted spouse statute and the community property regime protect the surviving spouse from disinheritance. Public policy dictates that both the surviving spouse and certain surviving children[150]

---

at 277–79. Elective share states allow a surviving spouse to circumvent the distribution in an otherwise valid will by choosing to inherit a statutorily defined elective share instead of from the will. *Id.* at 278.

142. *See* § 21610.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* § 21611.

147. Such evidence can include proof of lifetime gifts or outside transfers.

148. § 21611.

149. *See supra* text accompanying notes 93–100.

150. If the decedent left out a living child, either because the child was born or adopted after the execution of the testamentary instrument or because the decedent never learned of the child's birth or mistakenly thought the child to be dead, the child shall receive a share as if the decedent died without executing the testamentary document. *See* CAL. PROB. CODE §§ 21620–21622 (West Supp. 2009) (articulating instances in which an omitted child can inherit and providing exceptions to the foregoing general rule).

be protected against an "oversight, accident, mistake, or unexpected change of condition," which causes omission from a will.[151] However, nothing in the omitted spouse statute or other California statutes protects an elder or the elder's family from the "unexpected change of condition" of an elder's being manipulated into marrying. To the contrary, in protecting the surviving spouse, the omitted spouse statute and the intestacy statute seemingly provide incentive for an individual to prey on the loneliness and diminished capacity of an elder.[152] These statutes allow the surviving spouse to benefit, by way of inheritance, from the elder spouse's death contrary to public policy goals of protecting the elder and the elder's family.[153] Furthermore, these statutes prevent the effectuation of the decedent's testamentary intent because the elder testator's choices of to whom and in what amounts the elder wants to distribute personal property at death are disrupted by an automatic share going to the surviving spouse.[154]

B. California Protects Elders' Deathtime Property Transfers

Courts closely scrutinize donative intent when a testator chooses to bequeath the entire estate, or large amounts of it, to someone outside of the testator's immediate family.[155] Reasonably, such transfers appear suspicious and hint of possible fraud, undue influence, or financial exploitation.[156] To protect testators from these evils, the California Legislature enacted section 21350 of the California Probate Code,[157]

151. *In re* Estate of Katleman, 16 Cal. Rptr. 2d 468, 477 (Ct. App. 1993).
152. *See supra* notes 40, 46–49 and accompanying text.
153. *See supra* notes 37–40, 127 and accompanying text.
154. *See supra* notes 141–49 and accompanying text.
155. CLARK ET AL., *supra* note 35, at 198. Courts scrutinize transfers to persons outside of the testator's family because courts favor inheritance as a system of reciprocity. *See* DUKEMINIER ET AL., *supra* note 94, at 146–47 (explaining that inheritance is an "economic incentive" for family members to care for their aging relatives).
156. *See* Graham v. Lenzi, 43 Cal. Rptr. 2d 407, 411 (Ct. App. 1995) ("In enacting sections 21350 and 21351, the Legislature was aware that certain individuals are uniquely positioned to procure gifts from elderly persons through fraud, menace, duress or undue influence.").
157. *See* CAL. PROB. CODE § 21350 (West Supp. 2009); Suzanne E. Luna, *Financial Crimes Against the Elderly:* Bernard v. Foley, PROB. & PROP., Jan.–Feb. 2008, at 35, 37. The California Legislature passed section 21350 in response to an infamous scandal that involved an attorney who frequented a retirement community, well-known for its wealthy residents, where he then drafted testamentary documents for the residents. *Id.*

which prohibits donative transfers by will or revocable trust—with a few exceptions[158]—to the following individuals: the drafter of the testamentary instrument; any employees, relatives, or business partners of the drafter; and individuals who have a fiduciary relationship with the transferor.[159] After the Trusts and Estates Section of the State Bar of California[160] had notified the legislature of a "rise in the number of unscrupulous in-home caregivers and agencies,"[161] the legislature added care custodians of the transferor to the list of individuals prohibited from receiving donative transfers.[162]

A transferor may avoid the prohibitory effects of section 21350 if an independent attorney reviews the intended transfer with the transferor and determines that donative intent exists.[163] The attorney must find the transferor's decision is free from "fraud, menace, duress, or undue influence."[164] The independent attorney must sign a certificate of

---

Through these documents the attorney bequeathed millions of dollars to himself and the partners at his firm. *Id.*

158. *See* CAL. PROB. CODE § 21351 (West Supp. 2009). This prohibitive statute allows for the following exceptions: the transferor obtains a court order approving the transfer; a court determines after clear and convincing evidence that the transfer was not a product of fraud, menace, undue influence, or duress; the transfer is to a blood relation by at least five familial degrees; or the transferor was not only a nonresident of California but also signed the instrument outside of California. *Id.* The evidence that the transfer was not a product of fraud, menace, undue influence, or duress must include more than the testimony of the disqualified person. *Id.* Transfers of less than $3000 will not trigger the prohibitive effects of the statute. *Id.* § 21351(h).

159. *See id.* § 21350.

160. Established in 1976 as the Estate Planning, Trust & Probate Section, membership in the section "includes more than 5,000 attorneys" and covers fields of "Estate Planning, Income and Transfer Taxes, Trust and Estate Administration, Litigation, Incapacity (including Conservatorship, Guardianship, and Elder Law), and Ethics." The State Bar of California: Trusts and Estates Section, http://www.calbar.ca.gov/state/calbar/calbar_generic.jsp?cid=10705&id=7066 (last visited Mar. 28, 2010).

161. Luna, *supra* note 157, at 37.

162. *See* § 21350. This addition, although well-meaning, created confusion and concern as to who qualifies as a care custodian. Luna, *supra* note 157, at 38. California defines "care custodian" as "an administrator or an employee of . . . public or private facilities or agencies, or persons providing care or services for elders or dependent adults." CAL. WELF. & INST. CODE § 15610.17 (West 2001 & Supp. 2010). Longtime friends and other nonprofessionals who provide healthcare services on an informal basis to the elder or dependant adult also fall under the care custodian category of section 21350. *See* Bernard v. Foley, 139 P.3d 1196, 1206 (Cal. 2006). A further discussion of the interpretation of the statute by the California courts is beyond the scope of this Comment, but the legislation itself reveals the potential financial exploitation facing elders in California from "unscrupulous" in-home caregivers. *See* Knaplund, *supra* note 22, at 446; *see also supra* note 32 and text accompanying notes 32–33.

163. § 21351(b).

164. *Id.*

independent review and deliver it to the transferor in order to validate the transfer.[165]

Despite the safeguard of prohibiting deathtime transfers to certain individuals, a beneficiary can simply bypass the statutory protection by marrying or cohabitating with the transferor.[166] An individual may use fraud or undue influence to entrap a lonely, incapacitated elder into marriage.[167] Once married, the new spouse gains access to the elder's money both during the elder's lifetime and by inheritance at the elder's death.[168]

The "marriage" of Thor Tollefsen to his estate planning attorney, Linda Lowney, highlights the ineffectiveness of section 21350 as a safeguard against undue influence and fraud.[169] Tollefsen told his family that he had agreed to marry Lowney because "'that's what she wanted.'"[170] Lowney befriended the lonely elder and, during his lifetime, he gave her gifts amounting to nearly $350,000.[171] Upon Tollefsen's death, Lowney waited only six days to file a petition for her right in Tollefsen's separate property.[172] It seems highly probable that Lowney attempted to marry Tollefsen for the sole purpose of bypassing section 21350, which would otherwise have barred her from inheriting anything he might have devised to her in a will that she drafted.

A gaping loophole clearly exists in the protective measure established by section 21350.[173] Under current law, an attorney or a caretaker can con an incapacitated, elderly individual into marriage. Once married, the individual procures inheritance rights that the statute would have otherwise prohibited the individual from receiving.

---

165. *Id.*

166. *See id.* § 21351(a) (exempting spouses, cohabitants, and registered domestic partners from the list of individuals prohibited from receiving deathtime property transfers from the decedent). For the purposes of this exemption, "cohabitant" is defined as "two unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship," whose relationship includes some of the following list of nonexhaustive factors: "(1) sexual relations between the parties while sharing the same living quarters, (2) sharing of income or expenses, (3) joint use or ownership of property, (4) whether the parties hold themselves out as husband and wife, (5) the continuity of the relationship, and (6) the length of the relationship." CAL. PENAL CODE § 13700 (West 2009).

167. *See supra* notes 1–3, 16–17 and accompanying text.

168. *See supra* Part IV.A.

169. *See supra* notes 79–87 and accompanying text.

170. Pl.'s Mem. of P. & A., *supra* note 79, at 6.

171. *Id.* at 5.

172. *Id.* at 1.

173. *See supra* notes 32, 166 and accompanying text.

V. THE INADEQUACIES OF OTHER APPROACHES TO THE PROBLEM

As with other states, California attempts to promote a decedent's testamentary intent.[174] California disturbs testamentary intent by prohibiting certain deathtime transfers[175] and by ensuring that a decedent's surviving spouse is not unintentionally disinherited.[176] However, the legislature essentially undermines these statutory prohibitions by failing to protect incapacitated elders from entering financially exploitative marriages and allowing wrongdoers to benefit from either the omitted spouse statute or the intestacy statute.[177] An elder who lacks marital capacity does not understand the nature and consequences of marriage, lacks testamentary intent, and, therefore, cannot understand that the surviving spouse will inherit from the elder's estate.[178] Families or other concerned parties who want to prevent a surviving spouse from inheriting must seek a declaration that the marriage is either void or voidable, depending on the basis for the challenge and when it is raised.[179]

On the one hand, if a court declares a marriage void, then the marriage is considered to have never existed.[180] Only incestuous, bigamous, and nonlicensed marriages fit into the category of void marriages.[181] No statute of limitations exists to bar the declaration of a void marriage.[182]

---

174. *See supra* note 130 and accompanying text.

175. *See supra* note 133 and accompanying text. Public policy favors the implementation and enforcement of prohibitory statutes—such as the ones in California—that discourage potential heirs or beneficiaries from abusing or unduly influencing testators. *See generally* Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975 (2007) (discussing a national movement towards disinheriting heirs and beneficiaries who engage in misconduct or harm against the decedent, such as adultery, murder, abandonment, and abuse). In order to protect elders but also ensure their testamentary intent when determining shares of inheritance, probate judges must consider factors such as the misconduct of an heir or beneficiary, protection of the vulnerable elderly population, and other public policy concerns such as family privacy and judicial efficiency. *See id.* at 990–91.

176. *See supra* Part IV.A.

177. *See supra* Part IV.A.

178. *See supra* text accompanying notes 94, 149, 154.

179. *See infra* notes 180–88 and accompanying text.

180. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 3.1, at 126–27 (2d. ed. 1988); Mark Strasser, *Harvesting the Fruits of* Gardiner*: On Marriage, Public Policy, and Fundamental Interests*, 71 GEO. WASH. L. REV. 179, 210 n.226 (2003) ("'A major difference between a void marriage and a voidable marriage is that the latter is treated as valid and binding until its nullity is ascertained and declared by a competent court, whereas the former does not require such a judgment.'" (quoting Flaxman v. Flaxman, 273 A.2d 567, 569 (N.J. 1971))); Turnipseed, *supra* note 21, at 280.

181. CAL. FAM. CODE §§ 2200–2201 (West 2004); Estate of DePasse, 118 Cal. Rptr. 2d 143, 151 (Ct. App. 2002) (declining to validate a "marriage" that occurred without a

On the other hand, if a court declares a marriage voidable, then the court finds that the marriage did exist but was invalid; the law treats the parties to the voidable marriage as unmarried, including for purposes of inheritance.[183] A court may declare a marriage voidable if the couple married as a result of force or fraud by one of the parties or if one of the parties lacked marital capacity.[184] Time limitations apply for when a party may bring a suit to challenge a marriage as voidable.[185] In order for the court to declare a marriage voidable based on one spouse's lack of capacity, "a relative or conservator of the party of unsound mind" must challenge the marriage "before the death of either party."[186] This time limitation minimizes the family's ability to prevent the surviving spouse from inheriting because if a family does not challenge the validity of the elder's marriage until after the elder dies,[187] then the family must prove that the marriage was void from its inception in order to prevent the surviving party from inheriting.[188]

The void versus voidable distinction is particularly troubling in the context of confidential marriage because the lack of publicly recorded marriage certificates makes it easier for an individual to hide the

---

license). The ability to void a marriage exists "in order to terminate relationships clearly violating public policy." CLARK, *supra* note 180, at 127 (1988).

182. *See* §§ 2200–2201.

183. *See id.* § 2212; CLARK, *supra* note 180, at 127. Voidable marriages remain valid until someone challenges the marriage. Strasser, *supra* note 180, at 210. If no one ever challenges the marriage as voidable, then it remains valid. *Id.* Essentially, voidable marriages imply that "as long as a couple is satisfied with their marriage, the jurisdictions are too and will continue to recognize its validity." *Id.* at 211.

184. *See* CAL. FAM. CODE § 2210 (West 2004). The statute also lists the following as grounds for voidable marriage: incurability of a physical incapacity, being under the age to legally give consent, and certain instances of bigamy—wherein the challenging party did not know of the spouse's prior marriage or thought the former spouse was deceased. *Id.* A marriage cannot be declared voidable if the couple freely cohabitated with each other after recognizing the impediment to the marriage. *Id.*

185. *See id.* § 2211. A party to the marriage, who is not of legal age to marry, must raise a challenge to the validity of the marriage "within four years after arriving at the age of consent"; if a "parent, guardian, conservator, or other person having charge" of a minor brings a challenge, the challenge must be brought prior to the minor's reaching the age of majority. *Id.* § 2211(a). A four-year statute of limitations also applies for marriages "consented" to on the basis of fraud or force. *Id.* § 2211(d)–(e).

186. *Id.* § 2211(c).

187. Presumably the family does not challenge the marriage until after the elder dies because the family does not discover the marriage until the surviving spouse files a spousal petition.

188. *See* McKissock, *supra* note 21, at 20.

marriage from the elder's family.[189] This reduces the likelihood that family members will know of the marriage in time to challenge it before the elder's death. It follows that family members may not question the occurrence of a marriage. If a person moves in with the elder, the family may assume the elder's new "housemate" is merely a caretaker. Unfortunately, even if an elder's family learns of a marriage only after the elder dies, the family cannot challenge the marriage based on incapacity because once the elder dies, a family member can only seek to declare a marriage void and not voidable.[190]

In the event of an unsuccessful challenge to a marriage, under either the void or voidable statute, then the marriage remains valid and a surviving spouse remains able to claim a share in intestacy or pursuant to the omitted spouse statute.[191] Also, unless the elder's family can successfully challenge the marriage, the family cannot bring a cause of action for financial elder abuse against the surviving spouse.[192] The surviving spouse, therefore, benefits financially from the decedent without any repercussions for wrongdoing[193]—an unjust result that scholars, politicians, and this Comment seek to rectify.[194]

A. Texas's Approach: Declaring a Marriage Void Postdeath

In 2007, Texas, a community property state like California,[195] adopted a statute aimed at providing a remedy for family members who discover, after the death of an incapacitated elder family member, that an individual manipulated the elder into entering a marriage.[196] Texas found that caretakers were convincing elders, dependent on their care, to enter into marriages with them in order to inherit from the elder's death.[197] Prior to this legislation, Texas permitted a marriage to be

189. *See supra* notes 66–68 and accompanying text.
190. *See* CAL. FAM. CODE §§ 2200–2201, 2210 (West 2004).
191. *See supra* Part IV.A.
192. McKissock, *supra* note 21, at 20 ("Without invalidating the marriage, no cause of action for financial elder abuse exists because a spouse has a right to support, and proving that he or she has retained property for a 'wrongful use' is likely impossible." (emphasis omitted)).
193. *See id.* at 22; Turnipseed, *supra* note 21, at 300.
194. *See infra* Parts V.A–B, VI.
195. TEX. FAM. CODE ANN. § 3.002 (Vernon 2006).
196. *See* TEX. PROB. CODE ANN. § 47A (Vernon 2009); TEX. HOUSE RESEARCH ORG., H.B. 391 BILL ANALYSIS (2007), *available at* http://www.hro.house.state.tx.us/PDF/ba80R/HB0391.PDF.
197. TEX. HOUSE RESEARCH ORG., *supra* note 196, at 3.

declared voidable only until the death of one of the spouses,[198] like in California.[199] The Texas Legislature recognized a family member's difficulty in challenging a marriage before the death of the elder and therefore expanded the statute to allow for postdeath challenges of a marriage's validity.[200] The Texas statute allows postdeath challenges only if the decedent died while married, the marriage commenced less than three years prior to the decedent's death, and an interested person[201] filed the challenge with the court within one year of the decedent's death.[202] However, an interested person can continue a suit pending at the death of one of the spouses even if the marriage occurred more than three years prior to the decedent's death.[203]

In determining the validity of the marriage after the death of one of the spouses, Texas courts must examine whether the decedent had the mental capacity to consent to the marriage "on the date the marriage occurred."[204] The decedent must have understood the nature of the marriage ceremony.[205] A successful challenge eliminates the surviving spouse status and prevents the surviving party from inheriting the surviving spouse's share of the community property upon the decedent's death.[206] This proposal suffers from a few inadequacies, but perhaps its greatest flaw is that it allows the state to declare a marriage void after an elder dies and can no longer testify as to, or be tested for, capacity.[207]

198. GLENN M. KARISCH, 2007 LEGISLATIVE UPDATE: SUMMARY OF CHANGES AFFECTING PROBATE, GUARDIANSHIP AND TRUST LAW 16 (2007), http://www.texasprobate.com/07leg/2007update.pdf.

199. *See* CAL. FAM. CODE § 2211 (West 2004).

200. *See* KARISCH, *supra* note 198, at 16.

201. "'Interested persons' or 'persons interested' means heirs, devisees, spouses, creditors or any others having a property right in, or claim against, the estate being administered; and anyone interested in the welfare of an incapacitated person, including a minor." TEX. PROB. CODE ANN. § 3(r) (Vernon 2003 & Supp. 2009).

202. *Id.* § 47A (Vernon Supp. 2009).

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. *See* Turnipseed, *supra* note 21, at 294 (noting that the Constitution may not allow proposals to challenge the validity of marriages postdeath).

B. An Academic's Approach: Requiring Testamentary Capacity for Inheritance Rights

To solve the problem of elders' marrying despite lacking capacity, academics and politicians continue to toss out several potential solutions. Those solutions include the following: first, allowing postdeath challenges to the validity of the marriage as in Texas;[208] second, raising the level of capacity required to that of testamentary capacity;[209] lastly, providing interested persons with standing to litigate the postdeath property consequences of an elder's marriage.[210] States may choose not to enforce either of the first two proposals because both proposals may be constitutionally impermissible.[211] This Comment instead focuses on the inadequacies of the third academic proposal, articulated by Terry L. Turnipseed, an assistant professor of law at Syracuse University College of Law.[212] Turnipseed's proposal limits postdeath challenges involving one or more parties of questionable capacity to the property consequences of marriage.[213]

Turnipseed bases his proposal on the notion that if a person lacks testamentary capacity, then that person also lacks capacity to devise property through marriage.[214] Under the proposal, if an interested party can prove the decedent lacked testamentary capacity on the decedent's wedding day, then either a prior will of the decedent takes effect—if that prior will was executed when the testator had testamentary capacity—or the testator is deemed to have died intestate.[215] In either case, Turnipseed's proposal treats the decedent as unmarried, preventing the surviving spouse from inheriting.[216] Accordingly, this approach offers a disincentive for an individual to marry a wealthy, incapacitated elder

208. Knaplund, *supra* note 22, at 452–53; *supra* Part V.A.

209. *See* Posting of Bridget Crawford to Feminist Law Professors Blog, http://feministlawprofs.law.sc.edu/?p=2353 (Sept. 26, 2007, 08:07 EDT).

210. Turnipseed, *supra* note 21, at 298–99. Turnipseed's proposal applies to all deathbed marriages, not just when an elder marries. *Id.*

211. *Id.* at 294. The first proposal does not prohibit marriages but rather "retroactively revoke[s] the legitimacy of the marriage itself." *Id.* The second proposal limits who can marry by demanding that an elder exhibit a higher level of capacity than marital capacity. *See id.*

212. *See id.* at 275.

213. *Id.* at 298–99. The academic proposal limits the challenge to the property consequences of marriage mainly to ensure compliance with the fundamental right to marry. *Id.* at 297–99. For a discussion of how the legislation proposed by this Comment also upholds the fundamental right to marry, see *infra* Part VI.B.

214. Turnipseed, *supra* note 21, at 298–99.

215. *Id.*; *see also* Frolik & Radford, *supra* note 94, at 316.

216. Turnipseed, *supra* note 21, at 298.

because it prohibits the surviving spouse from inheriting from the decedent's estate in the event the court determines that, on the wedding day, the decedent lacked testamentary capacity.[217] Although a novel idea, this academic proposal, like the Texas statute, does not go far enough to fix the problem.

C. The Inadequacies of Both Approaches

Although both Texas's and Turnipseed's approaches may reduce the incentive for individuals to marry elderly persons for their money, neither solution is the most effective approach.[218] First, as with will contests, a postdeath challenge to a marriage raises proof problems because it occurs when the decedent cannot testify and thus is unable to provide evidence of capacity.[219] Arguably, proof problems are even more difficult with postdeath marriage challenges because witnesses are often limited and persons experienced in determining capacity, such as an estate planning attorney or a physician,[220] are generally not present at marriage ceremonies.[221]

Secondly, both approaches may induce frivolous litigation by failing to effectively discourage challenges by greedy or upset family members.[222] Surviving family members, especially children of a prior marriage, may use litigation in an attempt to challenge a decedent spouse's marital

217. *Id.* at 298–99.
218. *See supra* Part V.A–B.
219. *See* CLARK ET AL., *supra* note 35, at 205 (noting that regardless of the type of will contest, challenging either general incapacity or a single insane delusion that led to the creation of the challenged will, the testator is "by definition dead and unable to defend himself"); Frolik & Radford, *supra* note 94, at 309 ("The evidence offered in [will contests] is by its very nature circumstantial . . . ."); Knaplund, *supra* note 22, at 452 (recognizing that states may not want to allow challenges to longstanding marriages after a spouse dies because the decedent cannot "testify, consent, or object to the proceedings"); Tanibata, *supra* note 116, at 30–32 (recommending that attorneys document a testator's capacity in case litigation arises and the testator is either dead or alive but incapacitated).
220. *See infra* note 256 and accompanying text.
221. Proof problems can be especially problematic for confidential marriages because no witnesses are required, limiting the amount of testimony regarding the elder's capacity. *See supra* note 64 and accompanying text.
222. *See, e.g.*, TEX. HOUSE RESEARCH ORG., *supra* note 196, at 6 (documenting opponent's argument that House bill 193 would lead to a "flood of litigation").

capacity and prevent an innocent surviving spouse from inheriting.[223] Thus, the Texas and Turnipseed approaches might have the unintended effect of inducing postdeath litigation that burdens the court system by allowing challenges to either perfectly valid marriages or the property consequences of such marriages.

Moreover, although the postdeath solutions may discourage persons from marrying an elder or persons near death, neither approach prevents marriages from occurring in the first place. Under both "solutions," the elder remains married, and therefore unprotected, during the elder's lifetime. While the elder is still alive, a spouse may deplete the elder's assets[224] and emotionally abuse or even neglect the elder—much like Wendi Lewellen did with Ralph Dills[225] and Linda Downey did with Thor Tollefsen.[226] Instead, testing an elder's capacity to marry prior to marriage, as this Comment suggests, has the benefit of safeguarding elders from entering into harmful marriages and suffering financially and emotionally. Thus, rather than judging capacity postdeath, the elder's capacity to marry should be judged premarriage.

By potentially allowing frivolous postdeath challenges by greedy heirs[227] and failing to protect the elder during the elder's lifetime,[228] both Texas's statute and Turnipseed's academic proposal seemingly take the interest of the heirs into consideration above the protection of the elder. Therefore, despite taking positive strides to discourage individuals from

---

223. *See In re* Estate of Gregorson, 116 P. 60, 61–62 (Cal. 1911) (recognizing that allowing persons to void marriages after the death of one of the spouses can help to prevent exploitative marriages but, on the other hand, may lead to "many cases in which a great hardship might be worked on innocent persons if the validity of a marriage which had been treated by the parties as binding could, after the death of one of them or in a collateral proceeding, be questioned by a third party asserting that the purported husband or wife had been of unsound mind at the time of undertaking the marriage"); McMullen, *supra* note 35, at 61, 79–82 (noting that family members often come to expect inheritance and challenge testamentary instruments if the testator disinherits an expecting heir or beneficiary); Turnipseed, *supra* note 21, at 299 (noting that protections are needed to prevent such harassment). Opponents to the Texas legislation suggested that family members, often children of a prior marriage who disliked the decedent's new spouse, may seek to declare even legitimate marriages as invalid. TEX. HOUSE RESEARCH ORG., *supra* note 196, at 6.

224. *In re* Estate of Williams, No. A092090, 2001 WL 1575522, at *7 (Cal. Ct. App. Dec. 11, 2001) ("[T]hrough various means appellant became the exclusive caregiver for decedent and controlled access to his person and money at the time the will was executed. Throughout their relationship, appellant transferred decedent's money to herself. *The marriage expedited her efforts*." (emphasis added)); *see also supra* note 24.

225. *See supra* text accompanying notes 1–11.

226. *See supra* text accompanying notes 82–83, 170–72.

227. *See supra* notes 222–23 and accompanying text.

228. *See supra* text accompanying notes 224–26.

marrying people who are near death, both approaches fail to fully protect elders from unwittingly falling into exploitative marriages.[229]

VI. ADOPTING A MARITAL CAPACITY TEST TO PREVENT FINANCIAL ELDER ABUSE

Protecting an incapacitated elder from entering into a financially exploitative marriage is better than first recognizing a marriage only to determine, after messy postdeath litigation, that the elder lacked capacity.[230] In the case of postdeath litigation for marriages, just as in challenges involving the validity of testamentary documents, the decedent is no longer alive to verify either the decedent's wishes or capacity.[231] Most reputable estate planning attorneys, therefore, try to ensure that each of their clients meets the required level of testamentary capacity by observing and questioning each client, as well as possibly requesting that a client obtain a medical or psychiatric evaluation for further proof.[232] Also, to ensure a testator's capacity to execute a testamentary document, an independent certificate of review[233] is required whenever a testator seeks to bequeath property to a nonrelated caretaker or drafting attorney.[234] Unfortunately, no similar procedural safeguard exists for ensuring one's capacity to enter into marriage, even though testamentary documents and marriage both require a minimum level of capacity and both confer property rights.[235]

The procedural protection of an independent certificate of review in the law of trusts and estates can easily be adopted to determine and document an individual's marital capacity.[236] Such a mandatory marital capacity test is the best and most effective safeguard for ensuring an elder meets the required level of marital capacity. In the event of postdeath challenges to the marriage, the test can serve to prove an

229. *See supra* notes 218–26 and accompanying text. The Texas statute, in particular, does not allow postdeath challenges to the marriage based on undue influence. *See* McKissock, supra note 21, at 22.
230. *See supra* Part V.C.
231. *See supra* note 219 and accompanying text.
232. CLARK ET AL., *supra* note 35, at 207; Tanibata, *supra* note 116, at 31–32 (advocating additional documentation for clients with questionable capacity).
233. *See supra* notes 163–65 and accompanying text.
234. *See supra* notes 155–62 and accompanying text.
235. *See supra* Part III.
236. *See infra* Part VI.A.

elder's marital capacity and can rebut any presumption of undue influence over an elder, in the same way that an independent certificate of review provides clear and convincing evidence of a testator's testamentary capacity and freedom from undue influence.[237] By providing clear and convincing evidence of an elder's marital capacity and freedom from undue influence, the capacity test should effectively reduce litigation from third parties who dislike or disapprove of the marriage.[238] The test will also close the loophole to section 21350 of the California Probate Code because it prevents Tollefsen-Lowney situations when a person, who is presumptively prohibited from receiving certain testamentary transfers under section 21350, simply marries the elder to circumvent the prohibition.[239] By testing an elder's marital capacity before marriage, the state will protect the elder during the elder's lifetime and will better effectuate the elder's intent regarding the disposition of property at death.

A. Suggested Marital Capacity Test

The details of the marital capacity test should be developed by a collaboration of experts, including physicians, estate planning attorneys, and mental health professionals such as psychiatrists, neuropsychologists, and clinical psychologists.[240] These individuals have experience dealing with capacity issues and can use their expertise to develop a test that determines whether an elder maintains the statutorily required mental functioning to understand the nature and consequences of marriage.[241]

The test must include several basic elements. First, the marital capacity test should maintain California's current definition of "elder": a "person residing in [California], 65 years of age or older."[242] Second, because public policy favors marriage,[243] the state must maintain the

237. *See* Knaplund, *supra* note 22, at 446–47 (discussing section 21350 and courts' reluctance to determine that an elder lacks marital capacity); *supra* text accompanying notes 163–65.

238. *See supra* notes 222–23 and accompanying text.

239. *See supra* note 166 and accompanying text.

240. *See* Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 71, 72 (2004) (explaining the roles of experts in testing testamentary capacity for will contests); Peisah et al., *supra* note 21, at 887.

241. *See supra* note 240.

242. CAL. WELF. & INST. CODE § 15610.27 (West 2001).

243. States and the federal government grant certain legal benefits to married couples, which include the following: the opportunity to file joint tax returns, the creation of a confidential relationship between spouses under which spouses do not have to testify against one another, Social Security, and inheritance rights of the surviving

level currently required for marital capacity,[244] rather than increasing the required level of capacity to that of testamentary capacity or contractual capacity.[245]

Third, the exam must concentrate on whether the individual meets the necessary capacity to understand marriage and cannot automatically exclude elders who have a mental health disease.[246] A quick, noninvasive, and affordable test that is commonly used to examine mental function is the mini mental state examination (MMSE).[247] The MMSE takes less than ten minutes to conduct and involves a series of questions relating to, among other things, memory, comprehension, and attention.[248] When conducted without any other screening procedures, the MMSE may prove too brief of a test to provide an accurate evaluation of capacity.[249] Therefore, it is important that qualified persons administer the test, such as "[h]ealth care professionals with expertise in the geriatric, psychiatric or neuropsychological field."[250]

Additional considerations for the test include asking questions that test not only for capacity but also for possible undue influence over the elder,[251] administering the test privately with only the elder in the

---

spouse. *See* Thomas B. Stoddard, *Why Gay People Should Seek the Right To Marry*, OUT/LOOK, Fall 1989, *reprinted in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY 234, 235 (Robert T. Francoeur ed., 3d ed. 1991).

244. Marital capacity currently requires a basic understanding of the nature and consequences of marriage. *Supra* notes 102–04.

245. *See supra* Part III.A. Requiring an elder to satisfy testamentary or contractual capacity is most likely impermissible under the Constitution because such a requirement would impose additional burdens on the right to marry by preventing a larger number of elders from marrying than is necessary to protect them. *See supra* note 211; *infra* Part VI.B.

246. *See* Marson et al., *supra* note 240, at 83 (observing that having a mental health disease such as Alzheimer's does not automatically mean that the testator lacked capacity to create a will). For a review of how the law currently accounts for the effects of mental health diseases on capacity, see *supra* notes 103–05.

247. 18 AM. JUR. 3D *Proof of Facts* § 185 (1992).

248. *See id.*; *see also* Lenore Kurlowicz & Meredith Wallace, *The Mini Mental State Examination (MMSE)*, TRY THIS: BEST PRAC. NURSING CARE TO OLDER ADULTS, (Hartford Inst. for Geriatric Nursing, New York, N.Y.), Jan. 1999, at 1, *available at http://www.isu.edu/nursing/opd/geriatric/MMSE.pdf.* The mini mental examination also concentrates on reading and writing. *Id.*

249. Brandriet & Thorn, *supra* note 15, at 24.

250. *Id.* (revealing that the MMSE is not a conclusive test, necessitating the use of neuropsychologists or other trained specialists to test for dementia); Peisah et al., *supra* note 21, at 887; *infra* Part VI.A.1.

251. *See infra* Part VI.A.2.

room,[252] and administering the test within a reasonable amount of time before the marriage solemnization.[253]

1. Who Can Administer the Test?

A qualified mental health professional[254] or the elder's attending physician should administer the marital capacity test.[255] Mental health professionals routinely deal with capacity issues, and courts rely on their expert testimony for postdeath determinations of testamentary capacity.[256] Elders often visit with the same attending physician on a reoccurring basis for medical checkups, increasing the likelihood of detecting the elder's declining capacity.[257]

In order to prevent fraudulent capacity tests, the statute should prohibit certain attending physicians and mental health professionals from determining an elder's capacity to marry. The list of individuals prohibited from taking under a will includes drafters of the document, relatives and business associates of the drafters, and caretakers.[258] Similarly, mental health professionals or attending physicians who are relatives, friends, or employees of either of the potential spouses should not perform the capacity test. These individuals may have ulterior motives that would cause them to falsely declare that the elder either lacks or possesses marital capacity. For example, an administrator who is also a relative of the elder's potential spouse may keep that individual's financial interests primarily in mind and incorrectly claim the elder possesses marital capacity. Alternatively, an administrator who is related to the elder may falsely claim the elder lacks capacity because

---

252. *See* Brandriet & Thorn, *supra* note 15, at 23–24; *infra* Part VI.A.2.
253. *See infra* Part VI.A.3.
254. *See supra* note 250 and accompanying text.
255. *See infra* note 257 and accompanying text.
256. Marson et al., *supra* note 240, at 72. The author wrote:

> Legal cases involving issues of TC [testamentary capacity] and undue influence very frequently involve mental health professionals (MHPs) . . . . The roles of these MHPs can vary widely, from consulting with attorneys about clients with questionable capacity, to clinically evaluating testators for TC prior to will execution, to conducting post-mortem retrospective evaluations of TC and the validity of a previously executed will . . . .

Id.

257. In the law of trusts and estates, an attending physician's testimony that the testator had testamentary capacity upon signing the instrument constitutes persuasive evidence for the proponent of the will. CLARK ET AL., *supra* note 35, at 207. "A doctor has the best opportunity to observe the testator's 'organic condition' and to speak with experience and authority about the testator's capabilities." *Id.*

258. CAL. PROB. CODE § 21350 (West Supp. 2009). Section 21351 contains some statutory exceptions; for a list of exceptions, see *supra* note 158.

the administrator does not like the potential spouse or is skeptical of the potential spouse's motive to marry the elder. Due to the potential for abuse, the statute should prohibit mental health professionals or attending physicians who are related to either of the marital parties from determining the elder's capacity.

2. Testing for Undue Influence

The statute should also require that only the elder and the administrator are present in the room during the marital capacity test. By performing the test outside the presence of the potential spouse, as well as family and friends of either party, the administrator can minimize outside influence on the elder.[259] When no one else is present during the test, the elder may provide more forthright answers to questions regarding whether the potential spouse is exerting undue influence over the elder.[260] To determine whether undue influence is present, the administrator should ask questions that reveal whether the elder has a general loss of independent thought or a forced dependency on the potential spouse.[261] In addition to asking questions that assess "the [elder]'s understanding of the proposed marriage to the proposed spouse, and the responsibilities and duties of marriage to that person,"[262] some

259. *See, e.g.*, Julia L. Birkel et al., *Litigating Financial Elder Abuse Claims*, L.A. LAW., Oct. 2007, at 19, 20 ("[T]o properly investigate a financial elder abuse claim, it is important to meet the elder separately from other family members to ascertain whether the elder truly consents to the intervivos transfer, modifications to testamentary documents, or other affairs affecting the estate."); Brandriet & Thorn, *supra* note 15, at 23.

260. *See* Brandriet & Thorn, *supra* note 15, at 23–24.

261. *See* Trent J. Thornley, Note, *The Caring Influence: Beyond Autonomy as the Foundation of Undue Influence*, 71 IND. L.J. 513, 518 (1995). Under the law of trusts and estates, a challenger to a will must show undue influence by proving some of the following factors: (1) the suspected influencer had opportunity to influence the testator, which is proven by factors such as dependency of and access to the testator, for example, living with the testator; (2) the suspected influencer had motive to influence, which is proven by providing evidence that the suspected influencer had something to gain by the undue influence; and (3) the testator was susceptible to influence, which requires examining whether or not the testator had a weak mind. *Id.* at 517–19. The administrator of the proposed marital capacity test can ask the elder questions that may reveal opportunity, motive, or susceptibility. *See id.* at 518.

262. Peisah et al., *supra* note 21, at 887. Sample questions for an assessor to ask relating to the elder's understanding of marital relationships include the following: "'What is your understanding of what marriage is?'"; "'Why are you marrying X?'"; and "'What is your understanding of your responsibilities to your spouse and what are your spouse's responsibilities to you when you get married?'" *Id.*

sample questions to check for undue influence include asking whether the potential spouse secludes the elder from family and friends, whether the elder feels dependent upon the potential spouse, and about the nature of the couple's relationship.

3. Timeframe for Administering the Test

To ensure accurate results, the marital capacity test should be administered reasonably close in time to the solemnization. In the law of trusts and estates, a court generally gives an assessment of testamentary capacity more weight the closer in time the assessment occurs before or after the execution of an estate planning document.[263] But under current law, a couple has ninety days from the date they obtain a marriage license before the couple must solemnize the marriage and return the marital certificate to the county clerk.[264] To account for the fact that capacity assessments conducted closer in time to solemnization better account for capacity, the county clerk should not transfer the marriage license into a marriage certificate under this proposal until receiving both the marriage license, signed and filled out by the parties, and a signed certificate from a mental health professional or attending physician confirming that the elder spouse has capacity to marry.

Critics of this Comment's proposal may argue that requiring a test, which is an additional step to marriage, imposes a virtual waiting period for an elder to marry. However, other states already impose mandatory waiting requirements between applying for and obtaining a marriage license.[265] Under those statutes, a competent elder can theoretically obtain a marriage license and die prior to obtaining a certificate of marital capacity, thus failing to meet the statutory requirements. Although unfortunate, it is possible that an elder may die prior to obtaining a capacity test, just as it is possible that an elder may die prior to the legal completion of a marriage in states that currently impose mandatory waiting periods.

States with mandatory waiting periods allow for a waiver of the waiting period in emergencies.[266] Likewise, the California Legislature

---

263. *See* Marson et al., *supra* note 240, at 84.

264. *See supra* text accompanying notes 52–54.

265. Wisconsin mandates a five-day waiting period. WIS. STAT. § 765.08 (2009). Minnesota also requires five days between application and license. MINN. STAT. § 517.08, subdiv. 1b(a) (2006). Texas requires three days between the issuance of the marriage license and the marriage ceremony. TEX. FAM. CODE ANN. § 2.204 (Vernon 2006).

266. Minnesota waives the waiting period when extraordinary circumstances exist. § 517.08, subdiv. 1b(a). Wisconsin allows the county clerk to exercise discretion in waiving

might consider allowing probate judges, who often review elder law issues,[267] to waive the proposed requirement of a marital capacity test. Probate judges routinely determine testamentary capacity in postdeath litigation of testamentary documents[268] or in judicial review of a conservatee's capacity to marry.[269] Judicial review by probate judges could easily be extended—beyond checking for marital capacity of conserved elders—to determine marital capacity for any elder who intends to marry. The judge should review the elder's mental functioning and also review the facts leading to the marriage to ensure the marriage is not procured by undue influence.[270] This exemption affords more freedom to couples seeking legitimate marriages but still ensures that the elder possesses the capacity necessary to enter into a marital contract.

4. Potential Costs of a Marital Capacity Test

Requiring an elder to obtain a certificate of review of marital capacity will cost money, mainly the cost of visiting the mental health professional or assisting physician.[271] If a person is unable to afford the services of

---

the five-day waiting period provided that the applicant pays an additional amount of money up to $10. § 765.08. Texas excuses members of the military and waives the waiting period upon judicial approval by the family law court. § 2.204.

267. *See* Birkel et al., *supra* note 259, at 19 (noting that claims brought under CAL. WELF. & INST. CODE § 15610.30 (West 2001 & Supp. 2009) "do not necessarily get tried in Probate Court, where judges are more familiar with elder law").

268. In the case of reviewing testamentary capacity, the individual is deceased and the judge must rely on factual evidence of the testator's behavior and the potential influence of persons or factors, as well as testimony presented by attending physicians, attorneys, friends, neighbors, business associates, attesting witnesses, and perhaps even psychiatrist experts. *See* CLARK ET AL., *supra* note 35, at 206–08.

269. *See, e.g.*, *In re* Marriage of Sawyer, No. A104303, 2004 WL 1834670, at *1 (Cal. Ct. App. Aug. 17, 2004). After physicians determined Charles Sawyer lacked the mental functioning to resist fraud and undue influence or to carry out some day-to-day tasks, he was appointed a general conservator. *Id.* The conservator tried to stop Sawyer from marrying his long-term-friend-turned-paid-caretaker by seeking a judicial proceeding to determine if Sawyer maintained the capacity to enter into the marriage. *Id.* at *3. The couple married before the judicial determination occurred. *See id.* The new spouse tried to prohibit the conservator from seeing Sawyer and even filed a petition to remove the conservator. *Id.* at *3–4. The conservator filed for an annulment proceeding, and the court determined Sawyer did in fact lack capacity to marry. *Id.* at *8.

270. *See supra* text accompanying notes 103–05; *supra* Part VI.A.2.

271. *Compare* Robert D. Goodman, *In Sickness or in Health: The Right To Marry and the Case of HIV Antibody Testing*, 38 DEPAUL L. REV. 87, 106 (1988) (reasoning that if premarital HIV testing were imposed, some couples would decide not to marry because the roughly $200 to $300 cost would be prohibitive), *with* J.D.

the administrator, then the legislature may consider providing a certified mental health professional to perform the test at no charge to the indigent individual.[272] Providing services to those who cannot afford them will impose costs on the state.[273] However, the potential costs imposed, either on elders themselves or the state, are justified from a public policy perspective because examining elders will reduce the incidence of financial elder abuse without infringing the right to marry.[274]

Alternatively, the California Legislature can choose to completely exempt individuals who suffer undue hardship from having to pay for an examination. When the California Legislature imposed statutory prohibitions regarding to whom a testator could transfer property, it maintained an exemption for transfers of $3000 or less.[275] The California Legislature could provide a similar exemption to those who it deems cannot pay for a capacity examination. Presumably, if an elder cannot financially afford the test, it is unlikely that an individual is taking advantage of the elder's weakened capacity for financial gain. If the state provides alternatives for those who cannot afford the exam, then all elderly individuals, who have a minimum level of capacity, will have equal access to marriage.

5. Widespread Adoption of the Marital Capacity Test

Opponents might argue that until other states adopt the suggested marital capacity test, individuals will simply marry elders in another state, thus undermining the California Legislature's efforts. However, California serves as a legal trendsetter.[276] If California creates and

---

Lounsbery, *Athletic Commission*, CAL. REG. L. REP., Spring/Summer 1994, at 38, 38 (projecting a reduction in the cost of the "Mini-Mental Status Exam" because of additional trained administers of the exam).

272. *See, e.g.*, *Legislation & Regulations*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 373, 373 (describing how, in cases of involuntarily committed persons with mental illnesses who are deemed dangerous, the Department of Mental Health must pay for the mental health exam of any indigents who request one).

273. *See, e.g.*, Monica Land, *State Officials Question Mandatory STD Testing*, MISS. LINK, June 19, 2008, at 1, *available at* 2008 WLNR 13651108 (discussing that the requirement for couples to obtain a premarital syphilis screening has cost the State of Mississippi nearly three million dollars over the past ten years).

274. *See infra* Part VI.B; *see, e.g.*, Goodman, *supra* note 271, at 107 ("[In the case of premarital HIV testing, [i]t appears unlikely that the imposition of a $200 or $300 cost would in and of itself constitute substantial interference with a non-indigent's right to marry.").

275. CAL. PROB. CODE § 21351(h) (West Supp. 2009).

276. *E.g.*, Kathryn E. Litchman, Mentorship Article, *Punishing the Protectors: The Illinois Domestic Violence Act Remedy for Victims of Domestic Violence Against Police*

adopts the proposed marital capacity test, then other states might also choose to adopt it because the benefits of the test warrant its adoption on a nationwide scale. Even if other states do not create legislation that requires some sort of marital capacity test, the benefits of the test, and society's view of marriage, necessitate its implementation in California.

B. Protecting Versus Restricting Marriage

The proposed statute may raise questions regarding its effect on an elder's ability to enter into marriage, but the capacity test is not intended to discourage individuals from entering into marriage or to prohibit the state's formal recognition of a couple's love.[277] The proposed marital capacity test aims only to prohibit elders from marrying when they lack marital capacity, and the test can achieve that goal by enforcing the current statutory prerequisite to marriage—that each spouse enters into marriage with sufficient mental capacity to understand the nature and duties of the marital contract.[278] Although the marital capacity test may deter marriages involving elders who actually have marital capacity,[279] the benefits of protecting elders who lack marital capacity far outweigh the potential that some elders may *choose* not to marry due to the additional requirement of obtaining a certificate of marital capacity.

The constitutionality of the marital capacity test must be examined because of the potential deterring effects on marriage. After all, states favor marriages, legally recognizing marriages "regardless of whether the spouses love, respect, or even see each other on a regular basis."[280]

Misconduct, 38 LOY. U. CHI. L.J. 765, 801 (2007) (noting that California has a reputation as a legal trendsetter and that California jurisprudence is often later followed by other jurisdictions).

277. *See In re* Marriage Cases, 183 P.3d 384, 427 (Cal. 2008) ("[T]he right to marry does obligate the state to take affirmative action to grant official, public recognition to the couple's relationship as a family, as well as to protect the core elements of the family relationship from at least some types of improper interference by others." (footnote omitted) (citations omitted)).

278. *See* Dunphy v. Dunphy, 119 P. 512, 513 (Cal. 1911); *supra* Part III.A.

279. *See, e.g.*, Goodman, *supra* note 271, at 106–07 (explaining the deterring effects on marriage of mandatory HIV testing).

280. Paula L. Ettelbrick, *Since When Is Marriage a Path to Liberation?*, OUT/LOOK, Fall 1989, *reprinted in* TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL ISSUES IN HUMAN SEXUALITY, *supra* note 243, at 239, 242. "Sham marriages," in which people engage to ensure legal immigration status, are one example of a type of marriage into which couples enter for a benefit other than love. *See* BLACK'S LAW DICTIONARY 1062 (9th ed. 2009) ("[A sham marriage is a] purported marriage in which all the formal

The government's support of marriage is legally required because, in 1967, the United States Supreme Court described marriage as a "fundamental right," meaning that marriage is a basic human right that requires judicial protection.[281] California, therefore, upholds the fundamental right to marry and is actually even more protective of the right than the federal government.[282]

Regardless of the fundamental right to marry, each state may impose prerequisites to marriage,[283] such as age requirements[284] and licensing requirements.[285] States may even prohibit marriages.[286] If the legislature

---

requirements are met or seemingly met, but in which the parties go through the ceremony with no intent of living together as husband and wife."). In addition to marriages for immigration status, loveless marriages may also occur for political advantage, financial benefits, shielding homosexuality—a so-called lavender marriage—and other reasons that do not pertain to love, such as marrying for the sake of children. *See, e.g.*, John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461, 490 n.140 (2008) (citing EDWARD B. TYLOR, ANTHROPOLOGY 247 (Leslie A. White ed., Univ. Mich. Press 1960) (1881)) (noting that prior to the modern nation states, and to some extent today, marriage served to transfer property rights and played an important role in solidifying alliances between families, tribes, and clans).

281. Loving v. Virginia, 388 U.S. 1, 12 (1967) (finding Virginia's antimiscegenation statute unconstitutional based on racial discrimination and because "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men"); *see also* Zablocki v. Redhail, 434 U.S. 374, 378, 388 (1978) (holding a Wisconsin statute unconstitutional because it indefinitely prohibited some individuals from marrying even though the individuals had the legal capacity to marry).

282. *Compare In re Marriage Cases*, 183 P.3d at 419 (conveying the fundamental right to marriage even though the California Constitution "does not contain any explicit reference" to such a right), *with* Note, *Assessing the Viability of a Substantive Due Process Right to In Vitro Fertilization*, 118 HARV. L. REV. 2792, 2806–07 (2005) (noting that in *Zablocki*, the United States Supreme Court deviated from strict scrutiny and instead "used language that implied an intermediate level of review" (citing *Zablocki*, 434 U.S. at 388)).

283. *Zablocki*, 434 U.S. at 386 ("[R]easonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed."). The Court distinguished *Zablocki* from *Califano v. Jobst*, 434 U.S. 47 (1977), a case it had decided a year earlier, which upheld a provision of the Federal Social Security Act that effectively cut off benefits to disabled individuals who chose to remarry. *Zablocki*, 434 U.S. at 386–87.

284. *See supra* Part III.A.

285. California requires both marriage licenses and certificates in order for a valid marriage to exist. CAL. FAM. CODE §§ 300, 500.5 (West 2004 & Supp. 2009). The marriage license serves as an indicator that "[no] impediments to [the] marriage exist" and that the couple has met the required level of capacity. LIND, *supra* note 58, at 187.

286. *See e.g.*, *In re Marriage Cases*, 183 P.3d at 407–08, 434 n.52; *id.* 463–64 (Baxter, J., concurring and dissenting); *In re* Estate of Gregorson, 116 P. 60, 61 (Cal. 1911) ("[T]he legislature has full control of the subject of marriage, and may fix the conditions under which the marital status may be created or ended, as well as the effect of an attempted creation of that status . . . ."). Likewise, the United States Supreme

imposes a prerequisite to marriage that "*significantly* interfere[s] with decisions to enter into the marital relationship,"[287] then under California law the proposed prerequisite must pass strict scrutiny.[288] A restriction on marriage passes strict scrutiny if the state can show "a *compelling* state interest . . . [that] is *necessary* to serve that compelling state interest."[289]

Protecting elders and society from the repercussions of elder abuse and protecting the sanctity of marriage are *compelling* state interests that justify requiring that elders pass a marital capacity test prior to marrying.[290] First, the California Legislature already recognizes a state interest in protecting its elders,[291] who make up "a disadvantaged class requiring

---

Court explicitly explained that states can prohibit marriages if there is incest, bigamy, an underage spouse, or inability to pass a venereal disease exam. *Zablocki*, 434 U.S. at 392 (Stewart, J., concurring). Scholars find inherent contradictions in calling marriage a fundamental right but then allowing the state to deny some marriages. *See*, *e.g.*, Pull, *supra* note 51, at 22; Cass R. Sunstein, *The Right To Marry*, 26 CARDOZO L. REV. 2081, 2081 (2005). If an unlimited right existed, a person could marry someone of the same sex, a relative, or even "their dog, their aunt, June 29, a rose petal, or a sunny day." *Id.*

287. *Zablocki*, 434 U.S. at 386 (emphasis added).

288. Strict scrutiny applies when a law prohibits or interferes with a fundamental right—right to marriage, privacy, interstate travel, et cetera—or discriminates against a minority group—"gender, race, and religion—a constitutionally suspect basis upon which to impose differential treatment." *In re Marriage Cases*, 183 P.3d at 401; ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 793–94 (3d. ed. 2006).

289. *In re Marriage Cases*, 183 P.3d at 401; *see also* People v. Sweeney, 95 Cal. Rptr. 3d 557, 563 (Ct. App. 2009) (quoting People v. Goslar, 82 Cal. Rptr. 2d 558, 562 (Ct. App. 1999)). Some cases state the second part of the strict scrutiny test as whether the ordinance or statute is "narrowly tailored to promote [the] compelling governmental interest." Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997). Either the Equal Protection Clause or the Due Process Clauses can form the basis for the strict scrutiny test; in this instance, the validity of a marital capacity test can be challenged under either clause because the test "denies a right to some, while allowing it to others." CHEMERINSKY, *supra* note 288, at 793–94. Arguably, this Comment's proposal does not need to address strict scrutiny but rather the lower rational basis scrutiny because mandating a marital capacity test "'does not make marriage practically impossible for a particular class of persons'"; instead, it upholds the marital capacity prerequisite to marriage. Oritz v. L.A. Police Relief Ass'n, Inc., 120 Cal. Rptr. 2d 670, 684 (Ct. App. 2002) (quoting Parks v. City of Warner Robins, Ga., 43 F.3d 609, 614–15 (11th Cir. 1995)); *see also supra* note 287.

290. *See Nunez*, 114 F.3d at 946 ("The City has a compelling interest in protecting the entire community from crime."); *In re Marriage Cases*, 183 P.3d at 401–02 (reviewing whether it is necessary to retain the traditional definition of marriage to uphold the sanctity of marriage).

291. *See supra* notes 46, 119, 133 and accompanying text.

special protection."[292] Second, the state legislature also recognizes the need to protect *family members*—not wrongdoers—from disinheritance.[293] Lastly, the state appoints conservators to protect elders when they can no longer care for themselves, thus further evincing the government's interest in protecting its elderly citizens.[294]

These protective measures have been imposed to safeguard the compelling state interest of protecting elders from abuse and to protect society from the repercussions of such abuse. An elder who marries without capacity may affect the elder's life, the lives of the elder's family members, and society as a whole; the elder may face financial abuse, the family may lose inheritance, and society may have to account for the impoverishment or dependency of either the elder or a member of the elder's family as a result of the loss of the elder's financial resources.[295] By testing an individual for marital capacity, the mental health professional or attending physician may discover that the elder lacks more than marital capacity but actually requires the appointment of a conservator. Thus, an elder is further protected from abuse by others because if the elder is truly incompetent, the elder may receive a court-appointed conservator to manage the elder's affairs.[296]

Also, society suffers from a social perspective when the state allows marriages that result from undue influence or a lack of capacity; the significance of marriage is devalued when an elder enters into marriage while lacking the capacity to properly consent to it.[297] States already restrict marriage by imposing capacity requirements in order to ensure that only those individuals capable of consenting actually marry.[298] For example, the United States Supreme Court held that minors lack the

---

292. Respondents' Brief at 35, Lowney v. Bergsaker, 2009 WL 3470401 (Cal. Ct. App. Oct. 28, 2009) (No. A123071); *see supra* note 46 and accompanying text.

293. *See supra* Part IV.A.

294. *See supra* notes 12, 269.

295. For example, a lonely elderly gentleman lost his house and life savings after giving several loans to a much younger female neighbor. *See* Charles Duhigg, *When Shielding Money Clashes with Elders' Free Will*, N.Y. TIMES, Dec. 24, 2007, at A1. This story highlights how easily an individual can con a lonely or incapacitated elder into giving gifts to the elder's detriment. *Id.* This particular elder lost almost all of his assets, which at one time included his house worth $650,000 and bank accounts worth $500,000. *Id.* He was left with less than $6000 and as of 2007 lived in a tiny spare bedroom off his step-daughter's house. *Id.*

296. *See* Ross, *supra* note 12, at 759. A relative of the proposed conservatee or "'interested' state or local entities" may file a petition for appointment of a conservator out of concern for the elder. *See id.* (citing CAL. PROB. CODE § 1820(a) (West 2002)).

297. *See supra* Part III.B.

298. *See supra* Part III.A.

capacity necessary to enter into some contracts and to marry.[299] A compelling state interest exists to protect minors.[300] The goal of the minimum age requirement for capacity reflects similar goals to the marital capacity test proposed in this Comment: protecting elders and ensuring that individuals are capable of consenting to marriage.[301]

The marital capacity test is narrowly tailored and necessary to meet the state's compelling interests of protecting elders from financial abuse and ensuring marital capacity. First, allowing an elder to marry without capacity will "alter the legal framework of the institution of marriage" because allowing an incapacitated elder to marry means that the elder does not meet the statutory prerequisites of marriage.[302] Second, the solutions offered by the Texas statute and Turnipseed's proposal do not solve the problem; both suggestions only apply after the elder has already died and, therefore, cannot remedy any financial abuse or other elder abuse that occurs during the marriage.[303] The proposed marital capacity test, however, protects an elder during the elder's lifetime and protects the elder's intent in regard to property distribution upon the

299. Zablocki v. Redhail, 434 U.S. 374, 392 (1978) (Stewart, J., concurring) ("[A] State may legitimately say that no one can marry . . . who is not at least 14 years old . . . ."); Carey v. Population Serv. Int'l, 431 U.S. 678, 714 (1976) (Stevens, J., concurring) ("The State's important interest in the welfare of its young citizens justifies a number of protective measures . . . premised on the fact that young persons frequently make unwise choices with harmful consequences . . . ." (citation omitted)); *see also* Moe v. Dinkins, 669 F.2d 67, 68 (2d Cir. 1982) ("In light of New York's important interest in promoting the welfare of children by preventing unstable marriages among those lacking the capacity to act in their own best interests we agree . . . that the New York statutory scheme passes constitutional muster." (citation omitted)).

300. *See, e.g.*, Nunez v. City of San Diego, 114 F.3d 935, 946 (9th Cir. 1997) (applying strict scrutiny in determining whether an ordinance infringed on minors' fundamental rights of free movement and travel). In *Nunez*, the Ninth Circuit examined how minors differ from adults but determined that "[a]lthough the state may have a compelling interest in regulating minors differently than adults, we do not believe that [a] lesser degree of scrutiny [than the strict scrutiny applied in reviewing infringements for adults' fundamental rights] is appropriate to review burdens on minors' fundamental rights." *Id.*

301. *See id.*

302. *In re* Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) (finding the opposite result for same-sex marriages "because same-sex couples who choose to marry will be subject to the same obligations and duties that currently are imposed on married opposite-sex couples").

303. *See supra* Part V. Unfortunately, however, none of the proposals can prevent a person from abusing or taking advantage of an elder notwithstanding marriage. *See, e.g.*, *supra* note 295.

elder's death. Lastly, the proposal provides exceptions so as only to restrict the fundamental right to marry as is necessary.[304]

VII. CONCLUSION

As the elderly population increases, it is likely that financial elder abuse will continue to grow.[305] California provides some layers of protection but currently does not sufficiently protect elders.[306] These laws do little to prevent individuals from trapping elders in marriages for their financial assets.[307] California must focus on preventing its elderly population from entering into financially exploitative marriages. The best remedy to thwarting individuals from taking advantage of elders is to ensure each elder has the requisite marital capacity before an elder can marry.

The California Legislature should require a marital capacity test for elders entering into marriage. Confidential marriages allow an individual to hide a financially exploitative marriage from the elder's family more easily than a public marriage.[308] The legislature must, at a very minimum, adopt the proposal for confidential marriages. However, if the legislature chooses to apply this Comment's proposal only to confidential marriages, then it will merely put a dent in the problem of financially exploitative marriages to elders. The same potential for elder abuse occurs for elders who enter into confidential marriages as those who enter into public marriages.[309] Therefore, adopting the marital capacity test for all types of California marriage is the optimal solution.

A marital capacity test is constitutionally permissive and is the best solution for preventing elder abuse resulting from financially exploitative marriages.[310] The proposed test is simple, easily enforceable, and effective. The benefits of the test—ensuring that elders have the capacity to consent to marriage—outweigh any minimal drawbacks. It

304. *See supra* Part VI.A.3–4; *see, e.g.*, *Nunez*, 114 F.3d at 949 (citing Waters v. Barry, 711 F. Supp. 1125, 1135 (D.D.C. 1989)) (concluding that a juvenile curfew ordinance was not constitutional because the ordinance lacked exceptions).

305. *See supra* notes 41–45 and accompanying text.

306. *See supra* Part IV.

307. *See supra* Part IV.

308. *See supra* Part II.B.1.

309. A family member, whether out of curiosity or suspecting wrongdoing, can contact the court to find out whether an elder has entered into a marriage—so even if a family member could not get the exact date of a confidential marriage, the family member could still challenge the marriage and have the court order the record of marriage unsealed. Therefore, confidential marriages are not so much more dangerous than public marriages. *See supra* Part II.B.1.

310. *See supra* Part VI.B.

may be impossible to prevent all of the Senator Dills-type situations of gross elder abuse, but preventing the exploitation of elders who lack capacity is a step in the right direction.